

6. Section 36B(4) of the Liquor Control Act 1988¹

Section 36B(4) of the Act:

“4) The licensing authority must not grant an application to which this section applies unless satisfied that local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the Locality in which the proposed licensed premises are, or are to be, situated.”²

6.1 The DLGSC website states:

“Concern regarding the impact of the proliferation of large packaged liquor outlets on the community has resulted in new legislative provisions that allow regulations to be prescribed setting out criteria that apply to applications for large packaged liquor outlets.”³

6.2 Further, Section 36B stipulates the following:

1. *An application will not be heard or determined by the licensing authority for the grant or removal of a licence if:
 - a. *the retail section of the proposed premises exceeds 400m²; and*
 - b. *an existing packaged liquor outlet with a retail section that exceeds 400m² is located within 5 kilometres (metropolitan) or 12 kilometres (regional) of the proposed premises (distances are calculated using the shortest route by road).**
2. *an application will not be heard or determined by the licensing authority to alter or redefine a licensed premises if:
 - a. *the alteration or redefinition would result in the retail section of the premises increasing to more than 400m²; and*
 - b. *an existing packaged liquor outlet with a retail section that exceeds 400m² is located within 5 kilometres (metropolitan) or 12 kilometres (regional) (distances are calculated using the shortest route by road).⁴**

6.3 Section 36B(1) defines local packaged liquor requirements as follows:

“local packaged liquor requirements, in relation to an application to which this section applies, means the requirements of consumers for packaged liquor in the Locality in which the proposed licensed premises are, or are to be, situated.”

6.4 The publicly available information on the DLGSC website, with respect to the Directors

¹ Attachment 10 – Section 36B

²http://www7.austlii.edu.au/cgi-bin/viewdoc/au/legis/wa/consol_act/lca1988197/s36b.html

³<https://www.dlgsc.wa.gov.au/department/news/news-article/2019/11/01/new-provisions-relating-to-packaged-liquor-outlets>

⁴<https://www.dlgsc.wa.gov.au/racing-gaming-and-liquor/liquor/liquor-licensing/license-types-and-trading-hours/package-liquor-sales-policy>

Policy on Public Interest Assessments, states that:

*"In this regard, applications for the grant of a new packaged liquor outlet must include evidence and submissions demonstrating that existing packaged liquor outlets in the Locality of the proposed packaged liquor premises cannot reasonably satisfy the local packaged liquor requirements of the public."*⁵

6.5 Further, while Section 36B(1) outlines a range of definitions that relate to Section 36B, there are no definitions applied to terms within Section 36B(4) such as:

- *Proliferation,*
- *Reasonable, or*
- *Consumer requirement.*

6.6 Accordingly, the Applicant submits the following with respect to some of the terms recently adopted by decision-makers at the licensing authority.

6.7 In the context of determining whether local packaged liquor requirements are being reasonably met, as per Section 36B(4) of the Act (WA), the concept of "*substantial difficulty or substantial inconvenience*" to the relevant public has been judicially considered. For instance, the precedent case in **Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd (1999) 20 WAR 405** explains that requirements are not reasonably met if they "*cannot be provided without occasioning substantial difficulty or substantial inconvenience*"⁶. The Court clarified that the term refers to an obstacle that is considerably more difficult than a "*mere inconvenience or difficulty.*"

6.8 The **Liquorland Karrinyup [2021] WASC 366**⁷ case is a relevant legal decision that examines the intricacies of Section 36B(4) of the Act. It specifically focuses on how to determine whether existing packaged liquor stores can reasonably cater to local packaged liquor requirements. In this case, the Court held that the licensing authority must be satisfied that existing packaged liquor premises cannot reasonably meet the local packaged liquor requirements in the locality in which the proposed licensed premises is to be situated.

6.9 Further in **WASC 366 (the Liquorland Karrinyup decision)**, Judge Archer found that:

"The purpose of legislation must be derived from the statutory text and not from any assumption about the desired or desirable reach or operation of the relevant provisions. The intended reach of a legislative provision is to be discerned from the words of the provision and not by making an a priori assumption about its purpose.

⁵<https://www.dlgsc.wa.gov.au/department/publications/publication/public-interest-assessment-policy>

⁶https://www.dlgsc.wa.gov.au/docs/default-source/racing-gaming-and-liquor/liquor/liquor-commission/liquor-decisions/l30_01_510-decision-c-mart-cockburn---section-25-review-final.pdf?sfvrsn=4efc88bb_3

⁷https://www.dlgsc.wa.gov.au/docs/default-source/racing-gaming-and-liquor/liquor/liquor-commission/liquor-decisions/liquorland-australia-pty-ltd-v-direcotr-of-liquor-licensing-2021-wasc366.pdf?sfvrsn=37e4353a_0

A section in a statute which specifically states the purposes or objects of the statute is relevant to the proper construction of the statute. It is necessary to consider the method by which Parliament has implemented the specified purposes or objects. The purposes or objects must be read and understood in the context of the statute as a whole.”⁸

6.10 Her Honour, in that decision, goes further to state:

“The task of statutory construction in this case involves, among other things, construing the phrase ‘requirements of consumers’ in s 36B of the Act. This phrase also appears in s 5(1)(c).

There is ordinarily a presumption that the same word will bear the same meaning wherever it appears throughout an Act.”⁹

6.11 In the decision, Judge Archer also emphasised the importance of consistent interpretation of phrases within a statute, noting that the phrase *‘requirements of consumers’* in Section 36B should be interpreted similarly to how it appears in Section 5(1)(c), thereby ensuring a coherent and consistent application of the statute across sections and contexts.

6.12 Significantly, Judge Archer determined that *“‘requirements of consumers for packaged liquor’ in the definition of ‘local packaged liquor requirements’ in section 36B(1) of the Act is not limited to the physical item or product of packaged liquor, and that other matters also include matters of convenience, product range, and other matters”¹⁰*. This expansive interpretation highlights the importance of evaluating whether existing premises can satisfy the reasonable requirements of the public based on a wide range of factors.

6.13 In the WA Supreme Court decision regarding **Woolworths Ltd v Director of Liquor Licensing [2013] WASCA 227**, Justice Bess stated that:

“It is a notorious fact that in contemporary Australian life, one-stop shopping in large suburban shopping centres is of great importance, especially to working people, and this social fact is reflected in the development of district and regional shopping centres.”¹¹

6.14 The Court, in the aforementioned Woolworths Ltd case, also recognised the importance of considering the public interest when determining applications for liquor licences. The Court stated that the public interest encompasses a wide range of considerations, including the requirement to minimise harm or ill health caused by the consumption of liquor, the requirement to ensure that the harm or ill health does not result from the

⁸ Point 21 of [2021] WASC 366

⁹ Point 22 of [2021] WASC 366

¹⁰ Point 108 of [2021] WASC 366

¹¹ <https://jade.io/article/303164>

sale or supply of liquor, and the requirement to ensure that the sale and supply of liquor contribute to, and does not detract from, the amenity of the locality.

- 6.15 The Supreme Court further underscored that the primary Objects of the Act is to regulate the sale, supply, and consumption of liquor to minimise undue harm or ill health due to the consumption of alcohol. Additionally, the Court observed that one of the secondary Objects of the Act is to promote the responsible development of the liquor industry and other related services within the State.
- 6.16 The case of **Executive Director of Health v Lily Creek International Pty Ltd & Ors [2000] WACA 258**¹² emphasises the importance of balancing the Objects of the Act, such as minimising undue alcohol-related harm and catering to consumer requirements. Moon and Mary is committed to providing a diverse range of quality products while taking self-imposed measures to reduce the risk of alcohol-related harm.
- 6.17 Moon and Mary is dedicated to considering both the positive and negative impacts on the locality, ensuring that their application aligns with the public interest. The Applicant has taken proactive steps to address potential concerns related to undue harm or ill health, disturbance, or inconvenience to the locality in their submissions. This demonstrates their commitment to the responsible sale and supply of packaged liquor.

Proliferation

- 6.18 Proliferation' is generally defined as:
- *“to grow or increase or cause to grow or increase rapidly”*¹³
 - *“the sudden increase in number or amount of something; a large number of a particular thing”*¹⁴
 - *“the fact of something increasing a lot and suddenly in number or amount”*¹⁵
- 6.19 In addressing the proliferation of packaged liquor outlets within the locality of Fremantle, it is imperative to consider the legal framework and judicial interpretations provided by Section 36B(4) of the Act. The Supreme Court decision in **Liquorland (Australia) Pty Ltd v Commissioner of Licensing [2021] WASC 366**¹⁶ provides critical insights and clarifications on key terms and considerations under this section.
- 6.20 Justice Archer in WASC 366 emphasised the importance of understanding *“local packaged liquor requirements,”* stating that it refers to *“the needs of consumers in the*

¹²https://www.dlgsc.wa.gov.au/docs/default-source/racing-gaming-and-liquor/liquor/liquor-commission/supreme-court-precedents/executive-director-of-public-health-v-lily-creek-international-pty-ltd-2000-wasca-258.pdf?sfvrsn=cff4f164_3

¹³<https://www.collinsdictionary.com/dictionary/english/proliferate#:~:text=proliferate%20in%20British%20English&text=1.,Collins%20English%20Dictionary>.

¹⁴https://www.oxfordlearnersdictionaries.com/definition/american_english/proliferation

¹⁵<https://dictionary.cambridge.org/dictionary/english/proliferation>

¹⁶https://www.dlgsc.wa.gov.au/docs/default-source/racing-gaming-and-liquor/liquor/liquor-commission/liquor-decisions/liquorland-australia-pty-ltd-v-director-of-liquor-licensing-2021-wasc366.pdf?sfvrsn=37e4353a_0

locality under consideration for packaged liquor." This definition is crucial as it evaluates whether the local liquor outlets sufficiently cater to the consumer's requirements.

6.21 With an understanding of the aforementioned submissions and based on the Applicant's experience and the objective evidence provided with this application, Miss Chow's Fremantle Pty Ltd submits that the conditional approval of the Tavern Unrestricted licence will cater to consumers' reasonable requirements, enhance the diverse amenities in the Fremantle locality and will not result in the proliferation of packaged liquor outlets.

Reasonable

6.22 While the Licensing Authority has not provided a strict definition of "*reasonable*," the Applicant, inspired by the interpretations from the Oxford Dictionary and the **Charlie Carter Pty Ltd v Streeter and Male Pty Ltd** case, is committed to demonstrating that the application meets the criteria implied by the term.

6.23 In a recent decision relating to application **A122893507**¹⁷, the decision maker introduced two distinct approaches to interpreting the word '*reasonable*'. At point 32, the decision maker referred to the Oxford Dictionary, stating the following:

"The word "reasonably" does not invoke a particularly high threshold. In Charlie Carter Pty Ltd v Streeter and Male Pty Ltd, Malcolm CJ noted that:

The word 'reasonable' imports a degree of objectivity in that the word reasonable means ...sensible, ...not irrational, absurd or ridiculous, not going beyond the limit assigned by reason, not extravagant or excessive, moderate: Shorter Oxford Dictionary at 1667."

6.24 According to the above definition, it does not invoke a particularly high threshold and implies a degree of objectivity, as in reasonable and not excessive.

6.25 Various sources define '*reasonable*' as:

- *"based on or using good judgement and therefore fair and practical"*¹⁸.
- *"fair, practical, and sensible"*¹⁹
- *"showing reason or sound judgement"*²⁰

6.26 In the context of Section 36(B)(4) and consumer requirements, Miss Chow's Fremantle Pty Ltd has diligently interpreted the term "*reasonably met*" by assessing a myriad of factors. These extend beyond the mere availability of physical liquor products,

¹⁷https://www.dlgsc.wa.gov.au/docs/default-source/racing-gaming-and-liquor/hangawee-outlet-northbridge436b61a50976489388d21bccd7d2d900.pdf?sfvrsn=83a7222e_4

¹⁸<https://dictionary.cambridge.org/dictionary/english/reasonable>

¹⁹https://www.oxfordlearnersdictionaries.com/definition/american_english/reasonable#:~:text=%2F%CB%88riz%C9%99n%C9%99bl%2F,beforehand%20that%20this%20would%20happen.

²⁰<https://www.collinsdictionary.com/dictionary/english/reasonable#:~:text=adjective-.1.,prescribed%20by%20reason%3B%20not%20excessive>

incorporating aspects such as location, convenience, accessibility, one-stop shopping, competition and the range, volume, and variety of liquor products.

- 6.27 The term “*cannot reasonably be met*” was scrutinised by Justice Archer, who highlighted that it should be interpreted as requirements that “*cannot be met to a reasonable extent or degree by the existing facilities.*” This interpretation ensures a balanced and objective assessment of the current market conditions and consumer requirements in Fremantle.
- 6.28 The Applicant has assessed the current liquor retail landscape in Fremantle by adopting a consumer-centric approach. This assessment reveals notable gaps in catering to consumer requirements, particularly in terms of craft premium spirits produced on the premises using local ingredients. The focus isn't just on the physical availability of alcohol but on elevating the overall consumer experience.

Consumer Requirements

- 6.29 Drawing inspiration from the **Australian Leisure and Hospitality Group Pty Limited v Commissioner of Police & Ors [2017] WASC 88** case, the Applicant recognises that consumer requirements surpass mere product availability. Through extensive market research, consumer surveys, and demographic analysis, the Applicant has curated their offerings to reflect the consumer requirements of the Fremantle locality. Miss Chow’s Fremantle Pty Ltd’s, as part of the Miss Chow’s Group, application for Moon and Mary is not only aligned with current consumer demand but is also designed with the versatility to adapt to impending consumer requirements, emphasising a broader and forward-thinking approach to delivering a diverse and quality amenity.
- 6.30 Australian Leisure and Hospitality Group Pty Limited v Commissioner of Police & Ors [2017] WASC 88²¹:
- "I consider Section 5(1)(c) requires regard be directed to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State in considering the issue of catering for consumer requirements. Catering for consumer requirements is not considered in isolation. The potential and opportunity for proper development of the industry (including change) is not to be ignored. Assuming there is appropriate probity evidence, the words invite a broader ambit of matters to be considered as part of assessing the diversity of consumer requirements and how they are to be catered for".*
- 6.31 Acknowledging the pivotal role of '*changing demographics of a community and the introduction of a different offering in terms of consumer choice and diversity*²²'. This

²¹https://www.dlgsc.wa.gov.au/docs/default-source/racing-gaming-and-liquor/liquor/liquor-commission/liquor-decisions/lc26-2018---peninsula-tavern---commission-decisione1cab950a970656ab79cff000037f661.pdf?sfvrsn=1368609b_3

²²https://www.dlgsc.wa.gov.au/docs/default-source/racing-gaming-and-liquor/liquor/liquor-commission/liquor-decisions/lc26-2018---peninsula-tavern---commission-decisione1cab950a970656ab79cff000037f661.pdf?sfvrsn=1368609b_3

commitment ensures the ability to cater to evolving consumer needs, preferences, and expectations, providing high-quality products and services that align with the diverse and ever-changing requirements of consumers.

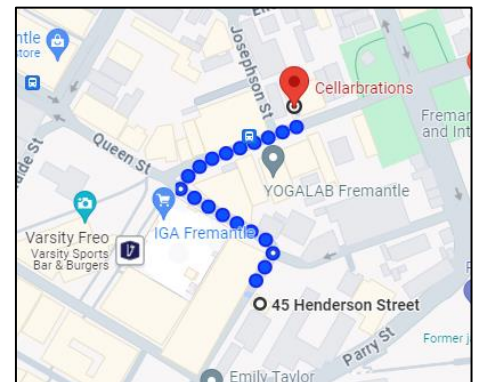
6.32 The Applicant has considered 'the positive and negative social, economic, and health impacts on the community'²³, thereby maintaining a balanced and responsible approach to liquor licensing. As substantiated by Judge Archer in WASC366:

"The Public Interest condition looks to, among other things, the risk that granting the application may have negative consequences, such as harm or ill-health, the reduction of amenities in the locality, and offence to those who live or work there. It also looks to any effect the granting of the licence may have in relation to tourism or community or cultural matters. Determining the public interest is a discretionary value judgment (to be made having regard to the objects of the Act)"²⁴

Packaged Liquor Outlets within the Defined Locality

6.33 Cellarbrations – 183m

- 1/152 High St, Fremantle, WA 6160
- Opening hours:
 - Monday: 9:30 AM - 7:00 PM
 - Tuesday: 9:30 AM - 7:00 PM
 - Wednesday: 9:30 AM - 7:00 PM
 - Thursday: 9:30 AM - 8:00 PM
 - Friday: 9:30 AM - 8:00 PM
 - Saturday: 9:30 AM - 8:00 PM
 - Sunday: 12:00 PM - 6:00 PM
- Cellarbrations is one of Australia's independent liquor retailers and is a part of the Metcash Group.
- This cellar stocks a range of Australian and imported wines, spirits, champagnes, and beer.
- The premises has an amount of shared street parking on High Street, a thoroughfare for Fremantle coming off Leach Highway.

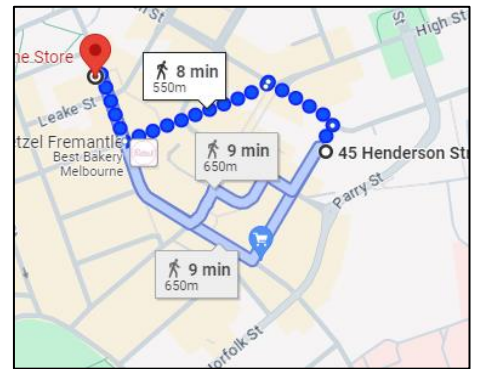


²³[https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_41184.pdf/\\$FILE/Liquor%20Control%20Act%201988%20-%20%5B08-g0-00%5D.pdf?OpenElement](https://www.legislation.wa.gov.au/legislation/prod/filestore.nsf/FileURL/mrdoc_41184.pdf/$FILE/Liquor%20Control%20Act%201988%20-%20%5B08-g0-00%5D.pdf?OpenElement)

²⁴https://www.dlgsc.wa.gov.au/docs/default-source/racing-gaming-and-liquor/liquor/liquor-commission/liquor-decisions/liquorland-australia-pty-ltd-v-director-of-liquor-licensing-2021-wasc366.pdf?sfvrsn=37e4353a_3

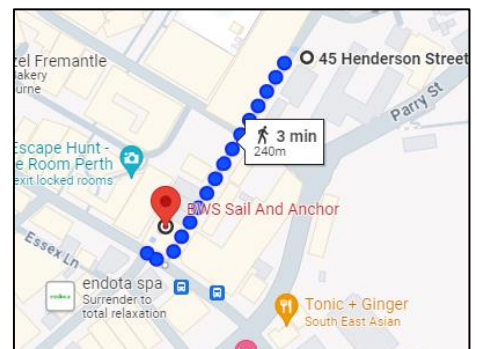
6.34 Wise Child Wine Store – 412m

- 21a Market St, Fremantle, WA 6160
- Opening Hours:
 - Monday: 11:00 AM - 6:00 PM
 - Tuesday: 11:00 AM - 6:00 PM
 - Wednesday: 11:00 AM - 7:00 PM
 - Thursday: 11:00 AM - 7:00 PM
 - Friday: 10:00 AM - 7:00 PM
 - Saturday: 11:00 AM - 7:00 PM
 - Sunday: 12:00 PM - 6:00 PM
- Wise Child Wine Store has a selection of minimal intervention Australian wines, craft beers, and select spirits²⁵.
- The store has online sales and Australia-wide shipping.
- Located on a main road in Fremantle, parking is limited to parking lots and side street parking.



6.35 BWS Sail And Anchor – 607m

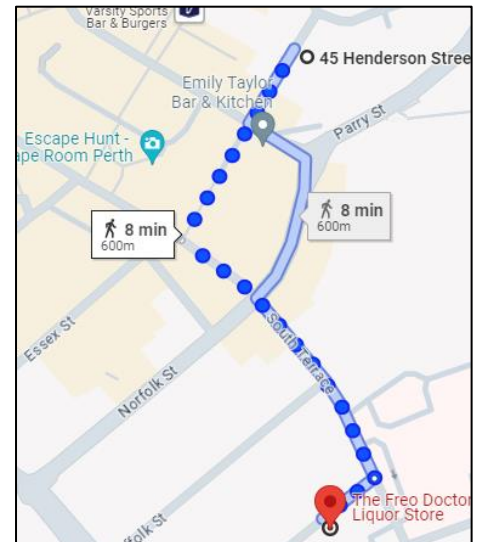
- 64 South Terrace, Fremantle, WA 6160
- Opening Hours:
 - Monday: 10:00 AM - 9:00 PM
 - Tuesday: 10:00 AM - 9:00 PM
 - Wednesday: 10:00 AM - 9:00 PM
 - Thursday: 10:00 AM - 9:00 PM
 - Friday: 10:00 AM - 10:00 PM
 - Saturday: 10:00 AM - 10:00 PM
 - Sunday: 10:00 PM - 9:00 PM
- BWS is part of a national chain in Australia owned by the Endeavour Group.
- BWS has a selection of beer, wine, spirits, ciders, and RTDs (ready-to-drink) beverages.
- The premises is on the main busy strip in Fremantle with limited access to parking apart from side streets and parking lots.



²⁵ <https://visitfremantle.com.au/wise-child-wine-store-0>

6.36 The Freo Doctor Liquor Store – 467mm

- 27 Arundel St, Fremantle, WA 6160
- Opening Hours:
 - Monday: 10:00 AM - 8:00 PM
 - Tuesday: 10:00 AM - 8:00 PM
 - Wednesday: 10:00 AM - 8:00 PM
 - Thursday: 10:00 AM - 8:00 PM
 - Friday: 10:00 AM - 8:00 PM
 - Saturday: 10:00 AM - 8:00 PM
 - Sunday: 11:00 PM - 7:00 PM
- The Freo Doctor Liquor Store is the oldest bottle shop in Fremantle. It was known as Oceania Trading Exchange for many years, an iconic Freo business built by the Sgro family in 1928.
- Independently owned and operated since 2006, the Freo Doctor has a selection of local and international wine, beer, cider and spirits and a friendly, fun and knowledgeable crew²⁶.
- Additionally, the premises is adjacent to street parking on Arundel street.



- 6.37 Acknowledging the pivotal role of *'changing demographics of a community and the introduction of a different offering in terms of consumer choice and diversity'*²⁷. The Applicant's commitment ensures the ability to cater to evolving consumer requirements and preferences, ensuring the provision of high-quality products and services that align with the diverse and changing requirements of consumers.

Catering to Consumer Requirements

- 6.38 Miss Chow's Fremantle Pty Ltd, drawing from its substantial experience in the hospitality and liquor sector, provides deep insights into meeting consumer requirements. Craft spirits and cocktails are carefully chosen to satisfy consumers' diverse preferences.

6.39 **Customer Service Excellence:**

- Comprehensive customer service training is a cornerstone of the Applicant's strategy, aimed at offering an unparalleled dining and service experience.

²⁶ <https://thefreodoctor.com/>

²⁷ https://www.dlgsc.wa.gov.au/docs/default-source/racing-gaming-and-liquor/liquor/liquor-commission/liquor-decisions/lc26-2018---peninsula-tavern---commission-decisione1cab950a970656ab79cff000037f661.pdf?sfvrsn=1368609b_3


- Staff are meticulously trained in assisting with inquiries, expertly matching food with wines or beers, and providing detailed product information, including tasting notes.
- Please refer to Miss Chow's Google Reviews below for context on customer

Jigyasa
9 reviews · 8 photos

★★★★★ 6 months ago

Dine in | Dinner | A\$100–120

Scenic views, great ambience and very quick service. Our food came within minutes of ordering. We ate the signature dumplings, fried chicken, Kung pow chicken, guava cocktail and affogato fir dessert. All done to perfection and hot to our liking. The Fried Chicken was crunchy, spicy and tender from the inside. The dumplings were gourmet and delicious. Kung pow was mouth watering and even had okra in it's veggies. Thankfully a restaurant that is meeting our spice quotient! 😊



service.

Jessica Megan

4 reviews

★★★★★ a month ago

Dine in | Dinner | A\$80–100

As always Miss Chows never disappoints. We chowed down the Miss Chows signature dumplings. My favourite was the pork and chive, yummy! Oh and for starters the duck springs rolls, you cannot go past that. Customer service was fantastic, there wasn't a single thing I could say I didn't enjoy. I'd even go so far to say I love the bathrooms. Gorgeous decor! Oh we also got a spectacular sunset over the river.

Food: 5/5 | Service: 5/5 | Atmosphere: 5/5

Recommended dishes

Assorted Dumplings, Edamame

Behnam Borna

3 reviews

★★★★★ 2 months ago

Dine in | Dinner | A\$200+

Miss Chow's restaurant is an absolute gem! From the moment we walked in, we were greeted with warmth and hospitality. The vibrant and inviting ambiance set the stage for an unforgettable dining experience.

The menu is a culinary delight, offering a diverse selection of dishes that cater to every palate. Each dish was a masterpiece – beautifully presented and bursting with flavor. The attention to detail and top-notch quality of the food truly made our dining experience exceptional.

What sets Miss Chow's apart is not just the outstanding cuisine, but also the impeccable service. The staff went above and beyond to ensure that every aspect of our dining experience was perfect. Their knowledge of the menu, genuine friendliness, and attentiveness made us feel like valued guests.

But it doesn't end there – the family-friendly atmosphere at Miss Chow's made it the perfect place for a memorable evening. The kids were entertained and the whole family felt welcome and at ease.

I've dined at many restaurants, but Miss Chow's has undoubtedly left a lasting impression. It's clear that the owner and the team have a true passion for providing top-quality food and service.

I cannot wait to return to Miss Chow's – it's an experience I look forward to repeating.

Sean and the team have created such a delightful dining destination. I wholeheartedly recommend Miss Chow's to anyone seeking a remarkable dining experience.

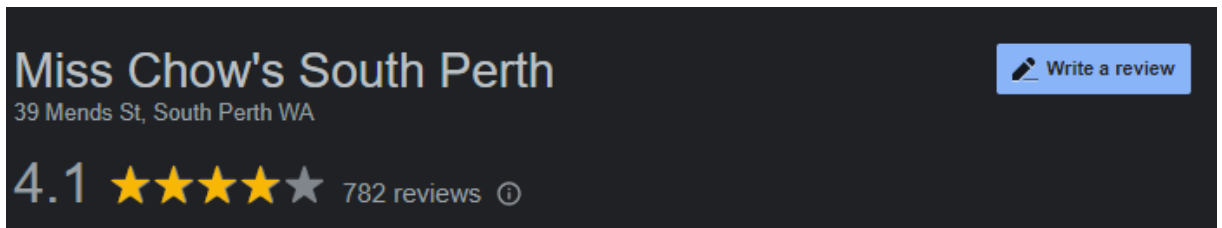
Food: 5/5 | Service: 5/5 | Atmosphere: 5/5

Recommended dishes

Kingfish Ceviche

- Miss Chow's South Perth has an overwhelmingly positive feedback mechanism

with a score of 4.1 stars after 782 reviews relating to food, service and atmosphere.



6.40 **Safety Assurance:**

- Moon and Mary's design incorporates Crime Prevention Through Environmental Design (CPTED) principles, ensuring a safe, welcoming environment that is well-lit at all times.
- CCTV systems will be installed throughout the venue, adhering to the Director's Policy on *Safety and Security for licensed establishments*²⁸.

6.41 **Targeted Approach:**

- The Applicant has invested in gathering locality-specific data and obtaining objective evidence for this submission, evidenced by the Consumer Surveys, demonstrating a targeted approach to understanding and catering to the requirements of consumers.

²⁸<https://www.dlgsc.wa.gov.au/department/publications/publication/safety-and-security-at-licensed-premises-policy>