

## Section 36B(4) Submissions



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Applicant:	Endeavour Group Limited
Application:	Application for Liquor Store Licence
Proposed Store:	BWS – Beer Wine Spirits Baldivis North

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# 1 Introduction and background to the Application

## 1.1 Introduction

- (a) The Applicant has made an application (**Application**) to the Licensing Authority for the conditional grant of a liquor store licence for premises be located at a new convenience shopping centre (**Centre**) at the corner of Baldivis Road and Fifty Road, Baldivis, Western Australia (**Proposed Store**).
- (b) To support the Application the Applicant has lodged:
  - (i) a Public Interest Assessment (**PIA**), which addresses the public interest requirement under section 38(2) of the Liquor Control Act 1988 (**Act**); and
  - (ii) material and evidence to support the PIA and Application (**Applicant's Evidence**).
- (c) Under sections 36B(2) and (4) of the Act the Licensing Authority must not grant the Application unless it is satisfied that local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality in which the Proposed Store will be situated.
- (d) This document addresses the section 36B(4) requirement. The Applicant relies upon the PIA and Applicant's Evidence to inform and support its submissions in this document.

## 1.2 About the Application

- (a) Full details of the nature of the Application and the services and facilities to be provided by the Proposed Store are detailed in the PIA.
- (b) In short, the Proposed Store is a drive-through liquor store that is designed to provide retail packaged liquor services to the local community.
- (c) The store will offer a total trading area of 349m<sup>2</sup>, inclusive of a walk-in coolroom, and a two lane drive through. Approximately 1,671 products will be offered, around 638 of which will be exclusive to the Applicant.<sup>1</sup>
- (d) Currently there is no drive through packaged liquor outlet in the Locality.

# 2 Section 36B(4)

## 2.1 The legislative provision

- (a) Section 36B(4) states as follows:

*“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 to be, situated.”* (emphasis added).
- (b) “Local packaged liquor requirements” is defined as:

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<sup>1</sup> Statement of Anthony Smith clause 5.9

*“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”* (section 36B(1))(emphasis added).

- (c) “Packaged liquor premises” is defined as:

*“means premises to which a licence referred to in subsection (2) relates”.* (section 36B(1)).

- (d) Subsection (2) states:

*“This section applies to an application for the grant or removal of any of the following licences –*

- (a) a hotel licence without restriction;*
- (b) a tavern licence;*
- (c) a liquor store licence;*
- (d) a special facility of a prescribed type.*

- (e) In short, the provision establishes a prohibition on the Licensing Authority to grant a specified application if it is satisfied the “requirements for consumers of packaged liquor in the locality” cannot be reasonably met by the existing outlets.

- (f) Conversely, if the Licensing Authority is satisfied that the relevant requirements cannot be reasonably met, then the application can proceed to be determined in accordance with the Act.

## **2.2 Background and purpose**

- (a) Section 36B(4) came into effect on 2 November 2019.<sup>2</sup>
- (b) From the extrinsic materials lodged to introduce section 36B(4), the purpose of the provision emerges as being to “prevent the further proliferation of small and medium packaged liquor outlets across the state” in order to “minimise the adverse impact and packaged liquor outlets can have on the community”.<sup>3</sup>

## **2.3 Proper approach to statutory interpretation**

- (a) The WA Court of Appeal recently summarised the principles of statutory interpretation as follows:<sup>4</sup>

*“The principles of statutory construction are well known and do not require detailed exposition. Statutory construction requires attention to the text, context and purpose of the Act. While the task of construction begins and ends with the statutory text, throughout the process the text is construed in its context. Statutory construction, like any process of construction of an*

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<sup>2</sup> Liquor Control Amendment Act 2018 section 18

<sup>3</sup> Liquor Control Amendment Bill Explanatory Memorandum; Second Reading Speech by the Minister for Racing and Gaming to the Legislative Assembly

<sup>4</sup> *Mohammadi v Bethune* [2018] WASCA 98, [31]-[33] quoting *SZTAL v Minister for Immigration* (2017) 262 CLR 362, [14]

instrument, has regard to context. As Kiefel CJ, Nettle and Gordon JJ recently explained in SZTAL:

*The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of the word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.*

**The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute.**

*The objective discernment of the statutory purpose is integral to contextual construction. **The statutory purpose may be discerned from an express statement of purpose in the statute**, inference from its text and structure and, where appropriate, reference to extrinsic materials. The purpose must be discerned from what the legislation says, as distinct from any assumptions about the desired or desirable reach or operation of relevant provisions.” (Footnotes omitted, emphasis added).*

- (b) These principles direct attention to the text of the provision, as well as the context and purpose of the provision, as matters which guide the process of statutory interpretation. It is notable that the Court of Appeal expressly warns about the danger of making assumptions about the desired or desirable reach or operation of relevant provisions.
- (c) It is also noted that while extrinsic materials may be used to assist in ascertaining the meaning of a provision, these should only be relied upon when the meaning is ambiguous or obscure. Section 19(1) of the *Interpretation Act 1984* (WA) provides as follows:

*“Subject to subsection (3), in the interpretation of a provision of a written law, if any material not forming part of the written law is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material –*

- (a) *to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law; or*
- (b) *to determine the meaning of the provision when –*
  - (i) **the provision is ambiguous or obscure; or**
  - (ii) *the ordinary meaning conveyed by the text of the provision, taking into account its context in the written law and the purpose or object*

*underlying the written law leads to a result that is manifestly absurd or is unreasonable.” (emphasis added).*

- (d) In the WA Supreme Court of Appeal decision of *Woolworths v Director of Liquor Licensing (Bicton Decision)* a key principle set down by the Court of Appeal was that the Licensing Authority is bound to take the Act’s primary and secondary objects into account when exercising functions under the Act.<sup>5</sup> In particular, the Court held that the criterion of the “public interest” under section 38(2) of the Act was “confined” by the objects of the statute including section 5(1)(c), as set out below.<sup>6</sup>

*“It is not uncommon for statutes to provide that a decision-maker shall or may take certain action if ‘satisfied’ of the existence of specified matters. See Buck v Bavone [1976] HCA 24; (1976) 135 CLR 110, 118 (Gibbs J). The expression ‘in the public interest’, when used in a statute, imports a discretionary value judgement. See O’Sullivan v Farrer [1989] HCA 61; (1989) 168 CLR 210, 216 (Mason CJ, Brennan, Dawson and Gaudron JJ). **If the statute provides no positive indication of the considerations by reference to which a decision is to be made, a general discretion by reference to the criterion of ‘the public interest’ will ordinary be confined only by the scope and purposes of the statute.** See O’Sullivan (216).” (emphasis added)*

- (e) The Court further held that, in determining whether it was satisfied that the grant of a liquor licence application was ‘in the public interest’, the Licensing Authority was bound to consider those matters relevant to the objects of the Act in section 5(2).<sup>7</sup> There are considerations in section 38(4) which the Licensing Authority may also take into account in determining whether granting an application is in the public interest.

- (f) The primary objects of the Act are set out in section 5(1) as follows:

*“The primary objects of this Act are –*

- (a) to regulate the sale, supply and consumption of liquor, and*
- (b) to minimise harm or ill-health caused to people, or any group of people, due to the use of liquor; and*
- (c) cater to the requirements of consumers for liquor and related services, with regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.”*

- (g) The secondary objects of the Act are set out in section 5(2) as follows:

*“In carrying out its functions under this Act, the licensing authority shall have regard to the primary objects of this Act and also to the following secondary objects –*

- (a) to facilitate the use and development of licensed facilities, including their use and development for the performance of live original music, reflecting*

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<sup>5</sup> (2013) 45 WAR 446

<sup>6</sup> Bicton Decision per Buss J at [48]

<sup>7</sup> Bicton Decision per Buss J at [49]

*the diversity of the requirements of consumers in the State; and to regulate the sale, supply and consumption of liquor, and*

*[(b), (c) deleted]*

*(d) to provide adequate controls over, and over the persons directly or indirectly involved in, the sale, disposal and consumption of liquor; and*

*(e) to provide a flexible system, with as little formality or technicality as may be practicable, for the administration of this Act; and*

*(f) to encourage responsible attitudes and practices towards the promotion, sale, supply, service and consumption of liquor that are consistent with the interests of the community.”*

(h) Other Supreme Court decisions following the Bicton Decision make it clear that considerations relevant to the public interest in section 38 are not defined “solely” by section 5.<sup>8</sup> Rather, that the objects inform the assessment of the public interest.

(i) It follows from the above that the same principles apply to the assessment to be carried out for the purposes of section 36B(4). That is, the objects of the Act are mandatory relevant considerations which inform the assessment.

## **2.4 Construction and meaning of section 36B(4)**

(a) Section 36B(4) provides that it is for the Licensing Authority to be “satisfied” about the specified state of affairs (being 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”). Therefore, it is a matter for the subjective assessment of the Licensing Authority as to whether that particular state of affairs exists. However, such subjective assessment must be made on the basis of a proper understanding of the law.

(b) The Act does not prescribe any factors or give any guidance as to what must be taken into account for the purposes of section 36B(4).

(c) As noted above, the phrase “local packaged liquor requirements” is defined to mean “the requirements of consumers for packaged liquor in the locality in which the proposed licensed premises are, or are to be, situated”. The key question of construction which arises in respect of this phrase concerns the meaning of “requirements”.

(d) The proper meaning and construction of section 36B(4) is currently the subject of a Supreme Court appeal by Liquorland (Australia) Pty Ltd against the decision by the Liquor Commission of WA to refuse its application for a liquor store licence for the proposed Liquorland Karrinyup liquor store. The appeal has been heard, but at the date of this document, the decision has not been handed down.

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<sup>8</sup> See, for example, *Commissioner of Police v Australian Leisure and Hospitality Group Pty Ltd* [2019] WASC 114, [48]

- (e) The primary basis upon which Liquorland’s application was refused was because Liquorland failed to overcome section 36B(4). In making the decision the Liquor Commission considered the meaning and application of section 36B(4). It formed the view that the meaning of section 36B(4) should be construed narrowly, and that the phrase “local packaged liquor requirements” meant a requirement for packaged liquor alone, as distinct from matters such as contemporary shopping habits.<sup>9</sup> It stated that:<sup>10</sup>

*“... the correct interpretation of section 36B(4) must consider that “requirements for packaged liquor as a physical item/product, as distinct from “requirements” as ordinarily understood for the purposes of section 5(1)(c)”.*

- (f) The Applicant considers this approach is incorrect, and that matters of convenience, one stop shopping and shopping preferences are relevant for the purposes of “requirement” in the context of section 36B(4). This is based on the following reasoning:

- (i) The usual approach to statutory interpretation is that where the same phrase appears more than once in the same Act, it should be given the same meaning wherever it appears. The phrase “requirement of consumers” appears in two other places in the Act, namely in sections 5(1)(c) and 5(2)(a), which are set out above. Consideration of the meaning of the phrase in the context of section 5(1)(c) and the public interest test under section 38(2) was given by the WA Appeal Court in the Bicton Decision.
- (ii) In particular, the Court held that the phrase “requirements of consumers” in section 5(1)(c) is broad enough to require consideration of consumer preference for one-stop shopping.<sup>11</sup> It expressly stated that in evaluating consumer requirements, it is a notorious fact that *“in contemporary Australian life, one-stop shopping and large suburban shopping centres is of great importance, especially to working people”*<sup>12</sup>.
- (iii) The fact that “requirement of consumers” in section 5(1)(c) has been held to encompass a consumer preference for one-stop shopping suggests that the phrase “requirements of consumers” in section 36B(4) should be interpreted in the same way, by reference to the same object.
- (iv) The Court also determined that the factual considerations to be taken into account when considering the requirements of consumers can be wide.<sup>13</sup> These principles, together with Buss J’s other findings in the

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<sup>9</sup> LC 01/202 Liquorland Karrinyup paragraphs 115 to 119

<sup>10</sup> LC 01/202 Liquorland Karrinyup paragraphs 115

<sup>11</sup> Bicton Decision per Buss J at [78]-[79]

<sup>12</sup> Bicton Decision per Buss J at [78]-[79]

<sup>13</sup> Bicton Decision per Buss J at [80] to [89]; refer also Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police [2017] WASC 88 per Banks-Smith J at [98]-[101]

Bicton Decision were observed in a recent Liquor Commission decision:<sup>14</sup>

*“The requirement of consumers necessitates a consideration of a wide range of matters including the nature and character of services sought by consumers, matters of taste, convenience, shopping habits and shopping preferences to name but a few ...”*

LC 14/2018

- (v) While the phrase “requirements of consumers” in section 5(1)(c) is in a broader context compared to section 36B(4) this does not mean the meaning of the phrase should, or ought to be, different. This is because by construction, section 36B has a more limited focus and sets a different threshold (i.e. section 36B(4) is limited to “requirements of consumers for packaged liquor in the locality”. That is, it has a different operational effect to other sections of the Act, such as the public interest test in section 38(2).
- (vi) Section 38(2) requires an assessment of the public interest in light of all of the objects in section 5 including an assessment about the “requirements of consumers for packaged liquor in the locality”. In contrast, section 36B(4) has a more limited focus in that it:
  - (A) directs attention to the requirement for “packaged liquor in the locality” rather than “liquor and related services”; and
  - (B) requires an assessment of whether the requirement “cannot reasonably” be met by existing outlets in the locality.
- (vii) Furthermore, as noted above, the objects of the Act must inform the assessment to be carried out under section 36B(4). Therefore, section 36B(4) must be read consistently with section 5 so far as is possible so that section 36B(4) is not rendered meaningless.
- (viii) Based on the above it can be concluded that the meaning of the phrase “requirements of consumers” in section 36B(4) includes the requirements of consumers which may be associated with being a consumer of packaged liquor, not just a requirement for packaged liquor itself.
- (ix) Next the meaning of phrase “cannot reasonably” in section 36B(4) must be considered. Where the criteria includes a test of “reasonableness” the legal standard is an objective one. That is, what is reasonable in the circumstances.
- (x) In *Charlie Carter Pty Limited v Streeter and Male Pty Ltd* (1991) 4 WAR 1, Malcolm CJ considered the meaning of “reasonable” in the phrase “reasonable requirements for the public for liquor and related services

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<sup>14</sup> LC 14/2018

or accommodation in that area” contained in section 38(1) of the (now repealed) Liquor Control Act 1970.<sup>15</sup> His Honour observed as follows:

*“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.”*

- (xi) The *Concise Oxford Dictionary* (Seventh Edition, 1982) gives the following meaning for the word “reasonable”:

*“In accordance with reason, not absurd; within the limits of reason, not greatly less or more than might be expected; inexpensive, not extortionate; **tolerable, fair**”.* (emphasis added).

- (xii) In short, the standard of the identified consumer requirements that must be met, is that which is objectively “tolerable” or “fair” in the circumstances. There is no requirement for the identified requirements to be perfectly met by the existing liquor outlets.
- (xiii) Nor does the provision quantify the extent to which the “requirements” must be met. Therefore it may be the case that while a number of requirements in the identified “suite” of requirements are satisfied by the existing outlets, that one or two requirements are not, and that this is sufficient in the circumstances to satisfy the Licensing Authority that local packaged liquor requirements cannot be reasonably met by the existing outlets.
- (xiv) The term “locality” limits the application of section 36B(4). First, “local packaged liquor requirements” are limited to “the requirements of consumers of packaged liquor in the locality in which the proposed licensed premises are, or are to be, situated”. Second, the extent to which these requirements are met are measured against what is provided by the existing packaged liquor premises in the locality.
- (xv) “Locality” is not a defined term in the Act or in the *Interpretation Act 1984 (WA)*.
- (xvi) As well as appearing in section 36B(4) the term is used in section 38(4)(b) of the Act, pursuant to which an assessment of the impact on the amenity of the “locality” in which the proposed licensed premises are to be situated is required as part of the public interest assessment.
- (xvii) In the Liquor Commission decision relating to the Dan Murphy’s Joondalup liquor store licence application the Liquor Commission determined the relevant locality should be the geographical area from which the proposed liquor store might be expected to draw custom.<sup>16</sup>

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<sup>15</sup> (1991) 4 WAR 1, 9-10

<sup>16</sup> LC 12/2013 dated 28 March 2013

A large format liquor store may well be found to have a larger “locality”.<sup>17</sup>

(xviii) The Director of Liquor Licensing has published guidance on how to determine “locality” in the Public Interest Assessment policy, in the “Specification of Locality” section under Attachment 2.

(xix) The guidance in Attachment 2 includes that:

*“In general, ‘locality’ will be defined as the area surrounding the licensed premises or proposed licensed premises, which is most likely to be impacted by an application if granted.*

*However, depending on the nature of the application the licensing authority may determine the locality for a specific application, particularly where the potential impact on a particular sub-community or ‘at risk’ group is such that reference to this sub-community should also be made, notwithstanding that this group may be situated outside of the locality of the proposed premises.”*

### **3 Addressing section 36B(4)**

#### **3.1 Role and function of the Licensing Authority**

- (a) In the hearing and determination of an application or matter under the Act, the Licensing Authority must apply itself to the real issues to be decided and evaluate the evidence before it, including by inference.<sup>18</sup> Its fact finding task also extends to the making of findings and the drawing of conclusions, wholly or partly, from notorious facts.<sup>19</sup>
- (b) The Licensing Authority is not bound by the rules of evidence.<sup>20</sup> In the Bicton Decision Buss J found this *“enables [the Licensing Authority] to make findings of fact on the basis of any probative material before it”*.<sup>21</sup>

#### **3.2 Relevant factors**

- (a) The Applicant has set out above what it considers to be the proper approach that must be taken in relation to the meaning and application of section 36B(4). Based on this it submits that the relevant factors to be taken into account in assessing section 36B(4) for the purposes of the Application include:
  - (i) the locality of the proposed liquor store;
  - (ii) the requirements of consumers for packaged liquor in the locality; and
  - (iii) the extent to which existing packaged liquor premises in the locality meet the requirements of these consumers.

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<sup>17</sup> LC 12/2013 dated 28 March 2013; *Woolworths Ltd v The Commissioner of Police* [2013] WASC 413 at [105]

<sup>18</sup> Bicton Decision per Buss J at [70]

<sup>19</sup> Bicton Decision per Buss J at [70]

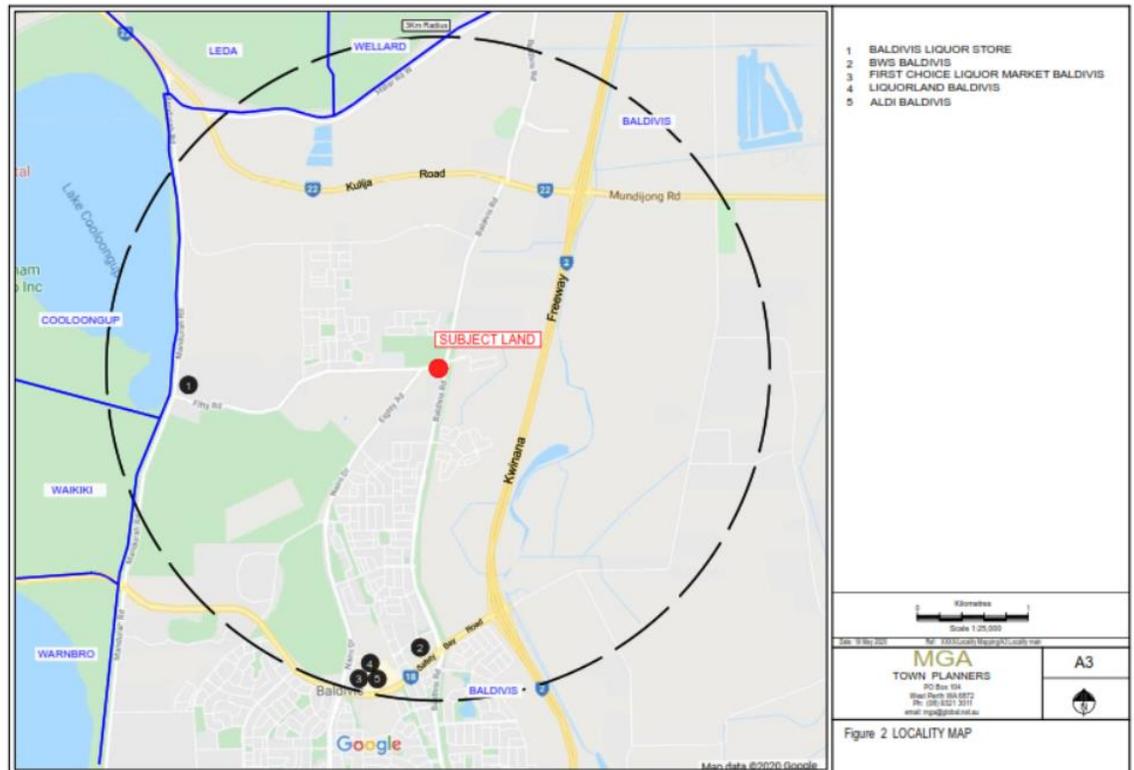
<sup>20</sup> Bicton Decision per Buss J at [58]

<sup>21</sup> Bicton Decision per Buss J at [59]

- (b) Once it is determined the extent to which existing packaged liquor premises in the locality meet the requirements of consumers, the question that arises is: is this reasonable in the circumstances?

### 3.3 Locality of the Proposed Store

- (a) The Applicant has determined the locality of the Application to be the area within a 3km radius of the Proposed Store, in accordance with the Director’s policy guideline (**Locality**).<sup>22</sup>
- (b) The geographic area contained within the Locality is depicted in the map below (being the area outlined in black). The site of the Proposed Store (and Centre) is at the red dot labelled “Subject Land”.



- (c) Details of the Locality are provided at clause 6 of the PIA. It is an established, fast growing, urban area in the southern metropolitan region of Perth.
- (d) As noted in the PIA, it is estimated that the population of the Locality in 2020 is 11,454 people.<sup>23</sup> This is expected to increase to 24,795 persons by 2031, with the majority of new residents being within close proximity to the site of the Proposed Store.<sup>24</sup>

<sup>22</sup> Attachment 2, “Specification of Locality” in the Director of Liquor Licensing’s Public Interest Assessment policy

<sup>23</sup> MGA Town Planning Report clause 4.7

<sup>24</sup> MGA Town Planning Report clause 4.8

### 3.4 The requirements of consumers for packaged liquor in the locality

- (a) To ascertain the requirements of consumers of packaged liquor in the Locality, the Applicant undertook a market survey (**Market Survey**). It has long been accepted that a market survey can provide evidence of the subjective requirements of the public.<sup>25</sup> In addition to this, evidence from its key personnel and relevant research was taken into consideration.
- (b) Research objectives of the Market Survey are set out below. As can be seen, these predominantly revolved around understanding and ascertaining the requirements of consumers in the locality:<sup>26</sup>



- (c) Relevant results from the Resident Survey include:
- (i) After the First Choice Liquor Market liquor store, BWS is the next liquor brand/store of choice for respondents.<sup>27</sup>
- (ii) Currently 14% of respondents purchase their liquor “always” or “often” from a drive through liquor store, with a further 25% purchasing “occasionally”.<sup>28</sup>
- (iii) 72% of respondents agree that the Proposed Store will make purchasing takeaway liquor more convenient in the Baldivis area, with the majority of these (61%) “completely” agreeing.<sup>29</sup>

<sup>25</sup> *Hay Properties Pty Ltd & Anor v Roshel Pty Ltd* Fct Sct Library 9804965 1998

<sup>26</sup> Market Survey slide 8

<sup>27</sup> Market Survey slides 46 and 47

<sup>28</sup> Market Survey slide 45

<sup>29</sup> Market Survey slide 31

- (iv) The top five appealing features of the Proposed Store for respondents are:<sup>30</sup>
  - (A) drive through service;
  - (B) being easier to get to and more conveniently located than other existing liquor stores;
  - (C) the convenience of having a BWS store near to where the respondent lived;
  - (D) BWS competitive pricing and weekly specials;
  - (E) a walk-in browse area if browsing is desired.
- (v) “Convenience” is overwhelmingly the key reason given by respondents as to why they would purchase liquor from the Proposed Store if it were to open (92%) of respondents, with the specific reasons including “close to home / its local”, “added convenience / easy (general)”; “drive through is convenient”; “easy parking / access” and “good location”.<sup>31</sup>
- (d) Full results of the Resident Survey are included in the Market Survey lodged in support of the Application.
- (e) A critical finding is that a significant proportion of residents already purchase their packaged liquor from a drive through outlet, with 14% stating they do so “always” or “often”. However, there currently is no existing drive through liquor outlet in the Locality. This means a proportion of residents are travelling outside the Locality to access drive through services and facilities. This in itself demonstrates that there is a consumer requirement for such services and facilities in the Locality. This is not, and cannot be, provided by the existing retail packaged liquor outlets as none of them have drive through services or facilities.
- (f) Further, it can be concluded that residents of the Locality have a range of packaged liquor requirements, with the key ones being:
  - (i) There is a requirement for the BWS brand.
  - (ii) There is a requirement for convenience, which includes convenient location, convenient access and convenient parking.
- (g) It is also observed that:
  - (i) 66% of respondents to the Resident Survey support the Proposed Store;<sup>32</sup> and
  - (ii) 70% of respondents are likely to use the Proposed Store if it were to open,<sup>33</sup> which in itself infers a requirement for the Proposed Store.
- (h) To supplement the Market Survey, consideration was given to general research completed by the Applicant to identify the requirements of Australian consumers

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<sup>30</sup> Market Survey slide 29

<sup>31</sup> Market Survey slide 22

<sup>32</sup> Market Survey slide 16

<sup>33</sup> Market Survey slide 19

for packaged liquor. Karen Sheppard, Head of Customer Insights for the Applicant states as follows:

*“EGL ... carries out regular, extensive market research to obtain insights into consumer purchasing patterns, motivations and trends in retail packaged liquor. This research also obtains information on the profile of liquor consumers; the different types of consumer segments that exist; what consumer expectations and preferences are within each consumer segment; and how consumers rate the features of different liquor brands. It is essential for EGL’s strategic planning and to ensure the products and services it offers are relevant to consumer needs and requirements.”<sup>34</sup>*

(i) The Applicant’s experience and research in other areas of Australia of the requirements of consumers throughout Australia is relevant and informative to the issue under section 36B(4) in this Application given:

- (i) The Proposed Store and BWS business model is consistent throughout Australia.<sup>35</sup>
- (ii) The Proposed Store is located in an established urban area, not a remote community with unique characteristics.<sup>36</sup>
- (iii) There is nothing to suggest the population of the Locality is any different to any other urban area in the Perth Metropolitan Area.

(j) As identified in the PIA, research by the Applicant evidences that there are different consumer segments for packaged liquor and that these segments have distinct and different shopping preferences.<sup>37</sup>

(k) Karen Sheppard reports some of the relevant findings of the Applicant’s research:<sup>38</sup>

*“Key findings ... include:*

- (a) there are different consumer segments for packaged liquor.*
- (b) these segments have distinct preferences as to the manner and frequency in which they purchase packaged liquor;*
- (c) a number of factors determine each consumer segment as to where they will purchase their packaged liquor; and*
- (d) there is a need for a variety of packaged liquor outlets as different retailers are chosen to suit different drinking occasions.”*

(l) Other findings include:

- (i) Around 78% of all packaged liquor consumers in Australia visited a BWS liquor store to purchase their packaged liquor over the last 12 months.<sup>39</sup>

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<sup>34</sup> Statement of Karen Sheppard clause 3.1

<sup>35</sup> Consideration of the popularity of the business model is a relevant consideration for the purposes of consumer requirement under section 5(1)(c): Bicton Decision per Buss J at [81] and [86]

<sup>36</sup> PIA clause 6.1

<sup>37</sup> PIA clause 9.1(b)

<sup>38</sup> Statement of Karen Sheppard clause 4.2

- (ii) A distinct proportion of packaged liquor consumers seek out BWS drive through stores.<sup>40</sup>
- (iii) Out of all types of BWS stores, BWS drive through outlets are preferred by young and new families over other store formats.<sup>41</sup>
- (m) The above confirms the results of the Market Survey. That is, that the BWS brand and business model is sought out, and successful throughout Australia; with a number of consumers of packaged liquor requiring drive through service and convenience.

**3.5 The extent to which the requirements of consumers for packaged liquor in the locality are being met by existing outlets**

- (a) Currently there are five liquor licences within the Locality that sell packaged liquor to the general public.<sup>42</sup>
- (b) Details of the nature of each store and its geographic location are provided in the PIA and the evidence and material supporting the Application.<sup>43</sup>
- (c) Set out below is a summary of each store and the extent to which it meets the key requirements on consumers in the Locality, as identified by the Applicant and set out above. The Chase Bar & Bistro has not been included as this venue operates under a tavern licence and does not offer retail packaged liquor
  - (i) Baldivis Liquor Store:

Factor	Comment
Nature of store?	Medium sized, browse style store. It is a stand-alone store not associated with any other retail services or facilities, except a service station.
Provides drive through service?	No.
Convenient parking?	Yes. On-site parking provided.
Convenient location?	No. Located on the western perimeter of the Locality, isolated from the main residential area of North Baldivis.

- (ii) First Choice Liquor Market:

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<sup>39</sup> Statement of Karen Sheppard clause 5.2  
<sup>40</sup> Statement of Karen Sheppard clause 5.2  
<sup>41</sup> Statement of Karen Sheppard clause 5.5(a)  
<sup>42</sup> PIA clause 8.1  
<sup>43</sup> PIA clause 8; MGA Report; Statement of Anthony Smith

Factor	Comment
Nature of store?	Large format, browse style, “destination” store. It is located in the Baldivis town centre within close proximity to a range of other retail services and facilities.
Provides drive through service?	No.
Convenient parking?	Yes. On-site parking provided.
Convenient location?	No. Being located in the heart of the Baldivis town centre means consumers have to contend with traffic and congestion.

(iii) BWS – Beer Wine Spirits Baldivis

Factor	Comment
Nature of store?	Medium sized, browse style store. It is located in the Baldivis Central Homemaker centre near the Baldivis town centre, within close proximity to a range of other retail services and facilities.
Provides drive through service?	No.
Convenient parking?	Yes. On-site parking provided.
Convenient location?	No. There are limited access points to the centre, and it is a busy centre which means consumers have to contend with traffic and congestion. Also the immediately adjacent Hungry Jack’s fast food outlet with a drive-through offer, makes vehicle congestion and parking at peak times extremely difficult and unattractive.

(iv) Liquorland Baldivis:

Factor	Comment
Nature of store?	Medium sized, browse style store. It is located in the Stockland Shopping centre in the Baldivis town centre, within close proximity to a range of other retail services and facilities.
Provides drive through service?	No.
Convenient parking?	No. Parking is in the centre car park which customers have to compete with and is a considerable distance from the store.
Convenient location?	No. Being located in the heart of the Baldivis town centre means consumers have to contend with traffic and congestion.

(v) Aldi Baldivis:

Factor	Comment
Nature of store?	Very small liquor store forming part of the Aldi supermarket. It is located in the Stockland Shopping centre in the Baldivis town centre, within close proximity to a range of other retail services and facilities.
Provides drive through service?	No.
Convenient parking?	No. Parking is in the centre car park which customers have to compete with and is a considerable distance from the store.
Convenient location?	No. Being located in the heart of the Baldivis town centre means consumers have to contend with traffic and congestion.

- (d) There is also a tavern located in the Locality, being the Chase Bar and Bistro. While the licence category permits the sale of packaged liquor the premises does not have a dedicated retail packaged liquor section. The Applicant has confirmed no packaged liquor sales are made from the premises.<sup>44</sup> Details of the tavern are set out below:

Factor	Comment
Nature of premises?	Tavern that is focussed on on-premises service of liquor, food and entertainment. No packaged liquor sales are made from the premises.  The tavern is located with the Baldivis town centre, within close proximity to a range of other retail services and facilities.
Provides drive through service?	No.
Convenient parking?	No.  Limited street parking is available in front of the tavern.
Convenient location?	No.  Being located in the heart of the Baldivis town centre means consumers have to contend with traffic and congestion.

### 3.6 Are the requirements of consumers for packaged liquor in the locality being reasonably met by the existing outlets

- (a) As indicated above, the critical point is the Proposed Store will be a drive through liquor store; none of the existing outlets offer drive through services and facilities; and these services and facilities are required by consumers in the Locality. Quite simply, the requirement is not being met, to any extent.
- (b) Other requirements of convenience in terms of convenient location, easy parking, easy access, etc. are only being met to a limited degree by the other outlets. This is particularly true for the outlets that are located in or near to the Baldivis town centre, which is near the southern perimeter of the Locality, and a significant distance from North Baldivis.
- (c) As indicated above, convenience is overwhelmingly a key requirement of consumers of packaged liquor in the Locality, and this is not being satisfactorily met. Comments from respondents to the Market Survey confirming this include the following:<sup>45</sup>

<sup>44</sup> Statement of Anthony Smith clause 12 and Annexure 2

<sup>45</sup> Market Survey slide 23

- (i) *“As I have young children at home I find the convenience of a drive through extremely appealing as it would mean not having to get kids in and out of the car”.*
  - (ii) *“Close to me. Convenience. Easier parking access than the current store on Safety Bay Road”.*
  - (iii) *“Super close to where I live, convenient location and adds options for liquor stores on this side of Baldivis without having to go to Stocklands if you want a different store than Bottlemart.”*
- (d) It is not reasonable to expect that residents in the Locality, and in particular, North Baldivis do not have access to packaged liquor services and facilities within close proximity to where they live.
- (e) The above is reinforced by the fact that a significant proportion of respondents to the Market Survey (72%) agree that the Proposed Store will make purchasing takeaway liquor more convenient in the Baldivis area.<sup>46</sup>

### **3.7 Submissions and conclusion**

- (a) The Applicant’s Evidence and the material and information supporting the Application establishes the following:
- (i) Packaged liquor consumers in the Locality have a specific requirement for drive through retail packaged liquor services in the Locality.
  - (ii) The requirement is not currently satisfied by the existing retail packaged liquor outlets in the Locality.
  - (iii) The Proposed Store will cater to the requirement, and other requirements of consumers of packaged liquor in the Locality.
  - (iv) Consumers of packaged liquor require, and expect, a range and variety of liquor stores to be available to them.
  - (v) On the evidence and material before it, it is not open to the Licensing Authority to be satisfied that local packaged liquor requirements can reasonably be met by the existing packaged liquor premises in the Locality.
- (b) Based on the above the Applicant submits the Application should not be precluded from being granted pursuant to section 36B(4).



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Solicitors for the Applicant

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<sup>46</sup> Market Survey slide 31