

## **DECISION OF DIRECTOR OF LIQUOR LICENSING**

**APPLICANT:** ENDEAVOUR GROUP LIMITED

**OTHER PARTIES:** COMMISSIONER OF POLICE (INTERVENOR)  
CHIEF HEALTH OFFICER (INTERVENOR)

**PREMISES:** BWS - BEER WINE SPIRITS KELMSCOTT

**PREMISES ADDRESS:** KELMSCOTT PLAZA SHOPPING CENTRE, T 1-3, 2889  
ALBANY HIGHWAY, KELMSCOTT

**APPLICATION ID:** A483230860

**MATTER:** APPLICATION FOR CONDITIONAL GRANT OF A LIQUOR  
STORE LICENCE

**DECISION OF:** PETER MINCHIN  
DIRECTOR LIQUOR CONTROL AND ARBITRATION

**DATE OF REASONS:** 15 JULY 2020

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### **Introduction**

- 1 On 14 May 2020, I issued a notice pursuant to s 18AA of the *Liquor Control Act 1988* (the Act) advising the parties that after consideration of the evidence and submissions, I had determined that the applicant had failed to discharge its onus under s 36B(4) of the Act and therefore the application was refused.
- 2 Pursuant to s 18AA(3), the applicant has requested written reasons for the decision. These are those reasons.

### **Background**

- 3 Endeavour Group Ltd (the applicant) lodged an application for the conditional grant of a liquor store licence for premises to be located at the Kelmscott Plaza Shopping Centre (the Centre), 2889 Albany Highway, Kelmscott and to be known as BWS – Beer Wine Spirits Kelmscott.
- 4 The application was advertised for public comment in accordance with instructions issued by the Director of Liquor Licensing. The Chief Health Officer and the Commissioner of Police both intervened in the application. A letter of opposition to the application was lodged by Mr Ian Newman.
- 5 The application was determined on the written submissions of the parties, as permitted under ss 13 and 16 of the Act. In addition, these written reasons have been prepared and should be read in the context of a high-volume liquor jurisdiction which is to act as speedily and with as little formality and technicality as is practicable.<sup>1</sup>

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<sup>1</sup> S 16(7) of the Act.

**Brief overview of the application**

- 6 According to the applicant's Public Interest Assessment (PIA), the proposed liquor store will be a modern, browse style store that will operate under the applicant's BWS brand. The proposed liquor store will be located adjacent to the existing Woolworths supermarket at the Centre.
- 7 It was submitted that the proposed liquor store will comprise a trading area of 184m<sup>2</sup> and is designed to provide convenience packaged liquor services and facilities, and in particular, provide the ultimate in one-stop, one-trolley shopping convenience for customers who want to purchase some packaged liquor at the same time as they do their shopping at the Centre.
- 8 The applicant submitted that the key features of the proposed liquor store include the following:
- a large, diverse and quality product range of approximately 1,671 products comprised of approximately:
    - a) 221 beer products and 116 cider products;
    - b) 823 wine products;
    - c) 285 bottled spirits products and 146 "Ready-to Drink" products; and
    - d) 80 sundry items (such as snacks, accessories etc)
  - Free on-site parking with easy access to/from the car park;
  - trolleys from the supermarket being available to customers to carry their purchases;
  - competitive product prices, with weekly specials and discounts available on bulk purchases;
  - modern, well laid out premises with wide aisles;
  - a walk-in cool room; and
  - numerous refrigerated display cabinets offering a large range of already chilled products.

**Section 36B(4) of the Act**

- 9 Section 36B(4) of the Act states:

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

- 10 "Local packaged liquor requirements" is defined in s 36B(1) to mean *the requirements of consumers for packaged liquor in the locality in which the proposed licensed premises are, or are to be, situated*. By virtue of s 36B(2), subsection (4) applies to an application for:
- (a) a hotel licence without restrictions;

- (b) a tavern licence;
- (c) a liquor store licence;
- (d) a special facility licence of a prescribed type.

- 11 Section 36B was inserted into the Act by s 18 of the *Liquor Control Amendment Act 2018* (WA). The related Explanatory Memorandum for the Bill relevantly provides:

*As a strategy to minimise the adverse impact that packaged liquor outlets can have on the community, the Bill inserts new section 36B to enable the licensing authority to manage the number of packaged liquor outlets where sufficient outlets already exist within a locality. This will be complemented by additional amendments relating to large packaged liquor outlets being established in close proximity to an existing large packaged liquor outlet. (emphasis added.)*

- 12 In the Second Reading Speech, the Minister for Racing and Gaming said:<sup>2</sup>

*... to prevent the further proliferation of small and medium packaged liquor outlets across the state, the act will be amended so that the licensing authority must not grant an application unless it is satisfied that existing premises in the locality cannot reasonably meet the requirements for packaged liquor.*

- 13 It is apparent, from the plain language in s 36B, that:

- the section applies to the grant of a liquor store licence;
- section 36B(4) imposes on the licensing authority a mandatory consideration by the use of the words “*must not*”. Consequently, unless the condition set out in s 36B(4) is met, the application must be refused;
- the condition within s 36B(4) is that the licensing authority must be satisfied that the “*local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in*” the relevant locality; and
- the evidential and persuasive onus falls upon the applicant for the grant of the licence to satisfy the licensing authority.

- 14 In order to be satisfied of such a condition, it is necessary for an applicant to adduce relevant probative evidence upon which the licensing authority can make findings of fact as to:

- what the local packaged liquor requirements are; and
- what packaged liquor services are currently provided by the existing packaged liquor premises in the locality.

- 15 Once the licensing authority has made findings as to those matters, the licensing authority is then required to make a value judgment as to whether the local packaged liquor

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<sup>2</sup> See Western Australian *Parliamentary Debates* (Hansard), Legislative Assembly, 20 February 2018 p324-325

requirements can reasonably be met by the existing packaged liquor premises in the locality.

### **The test under s 36B(4)**

- 16 Section 38 of the Act was repealed in 2007 and new provisions were inserted. The new provisions introduced the public interest test<sup>3</sup> and provided that an applicant who makes an application to which the section applies must satisfy the licensing authority that the grant of the application is in the public interest. The public interest test replaced what was colloquially referred to as the “needs test” contained in the repealed provisions of section 38. The old “needs test” included a restraint on the granting of liquor store licences.<sup>4</sup>
- 17 It was envisaged that the introduction of the public interest test in the 2007 amendments to s 38 of the Act would provide a mechanism to control the proliferation of packaged liquor outlets and outlet density<sup>5</sup>, however this did not eventuate. Consequently, the introduction of s 36B into the Act was Parliament’s response to decisions of the licensing authority and the Supreme Court relating to the grant of new packaged liquor licences. The Government has sought to create a direct restraint on the grant of new liquor licences authoring the sale of packaged liquor and to achieve this policy objective, s 36B was inserted into the Act.
- 18 The applicant submitted that by construction, the old “needs test” is entirely different to the test under s 36B(4). In particular, the factors to be taken into consideration for the purposes of the “requirements of the public” under the “needs test” were specifically prescribed<sup>6</sup>, whereas s 36B(4) does not contain any similar guidance.
- 19 I accept that submission.
- 20 The applicant further submitted that in the course of considering the meaning and application of the “needs test” the courts examined the concept of “requirement”, and through this historic line of cases and legal precedents, it is apparent that the concept can include a range of factors such as:
- contemporary standards in retailing which focussed on convenience, one-stop shopping, easy access by motor vehicle, product choice and preference;
  - convenience to the public and public taste and preference as to the manner of shopping;
  - the establishment of a convenient service to a significant section of the public may, be sufficient to establish “reasonable” requirements; and
  - evidence that the grant of the proposed licence would provide a convenient service to a significant section of the public may, be sufficient to establish a reasonable requirement.

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<sup>3</sup> See s 38(2)

<sup>4</sup> Section 38(2b) of the repealed provisions.

<sup>5</sup> refer *Parliamentary Debates, WA Parliament, vol 409, p 6342*

<sup>6</sup> See for example s 38(2) of the repealed provisions

- 21 The applicant then submitted that the above factors are relevant to the matters which may be considered for the purposes of s 36B(4).
- 22 I take no issue with the applicant's analysis of the historical line of cases and how the courts have interpreted the word "requirement" in the repealed provisions of s 38, however I do not agree with the submission that matters of convenience, one-stop shopping and shopping preferences are matters for consideration under s 36B(4). In my view, matters of convenience, one-stop shopping, and shopping preferences fall within the scope of s 38(2) and whether the grant of the application is in the public interest; whereas section 36B(4) is directed towards the requirement of consumers for packaged liquor itself and whether existing packaged liquor outlets in the locality can reasonably meet that requirement.
- 23 When assessing whether the grant of an application is in the public interest, the factual matters which the licensing authority is bound to take into account are those relevant to the objects of the Act, as set out in s 5.
- 24 One of the primary objects of the Act is to cater to the requirements of consumers for liquor and related services having regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State.<sup>7</sup> In considering whether the grant of an application is in the public interest, the Supreme Court has held that one-stop shopping, shopper preferences and convenience are relevant matters under object 5(1)(c).<sup>8</sup>
- 25 However, in my view, the word "requirement" in s 36B(4) should have a narrower interpretation that what has been applied to the word "requirement" in object 5(1)(c). I arrive at this conclusion for the following reasons.
- 26 First, the plain text in s 36B when considered in the context of the Act as a whole supports the narrow construction, particularly when compared to the text in object 5(1)(c). As I have noted, the Supreme Court has held that for the purposes of object 5(1)(c), and therefore the public interest test under s 38(2), one-stop shopping, convenience and shopping habits etc are relevant considerations, however, the definition of "local packaged liquor requirements" in s 36B is expressed differently to s 5(1)(c) in an important respect. The definition of "local packaged liquor requirements" in s 36B only refers to the "requirement of consumers for packaged liquor" unlike the broader requirement for "liquor and related services, having regard to the proper development of the liquor industry, the tourism industry and other hospitality industries in the State in s 5(1)(c).
- 27 As noted by Bank-Smith J in ***Australian Leisure and Hospitality Group Pty Ltd v Commissioner of Police*** [2017] WASC 88, s 5(1)(c) requires regard be directed to the proper development of the relevant industries in considering the issue of catering to the requirement of consumers, and catering for consumer requirements is not to be considered in isolation. Adopting a narrow construction on s 36B gives some effect to the

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<sup>7</sup> Object 5(1)(c)

<sup>8</sup> *Woolworths Ltd v Director of Liquor Licensing* [2013] WASCA 227

deliberate difference in the drafting provisions. This also reinforces the notion that the tests under s 36B(4) and s 38(2) are two separate and distinct tests. If the test under s 36B(4) and s 38(2) were essentially the same test, s 36B(4) would be rendered meaningless and would not achieve its statutory purpose.

28 Secondly, such an approach is consistent with the clear policy objective of the provision, which is to prevent the proliferation of packaged liquor outlets, including small and medium size outlets, and enable the licensing authority to manage the number of packaged liquor outlets where sufficient outlets already exist within a locality.<sup>9</sup>

29 In **SZTAL v Minister for Immigration and Boarder Protection** it was stated:<sup>10</sup>

*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.....Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.*

30 The Court of Appeal in **Mohammadi v Bethune**<sup>11</sup>, having referenced **SZTAL**, observed that:

*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.*

31 In order to achieve this statutory purpose, a narrow construction of the word “requirements” is necessary, otherwise, adopting a broader construction would allow applicants to mould their application to cater to the subjectiveness of convenience and shopping habits and thereby undermine the restriction in s 36B(4), when the intention of the proposed premises is to merely sell packaged liquor which is readily available within the locality.

32 Thirdly, the adoption of a narrow construction is supported by the approach of Anderson J in **Liquorland (Australia) Pty Ltd v Austie Nominees Pty Ltd**<sup>12</sup> (Austie) and King CJ in **Lincoln Bottle Shop Pty Ltd v Hamden Hotel Pty Ltd (No 2)**<sup>13</sup> (Lincoln Bottle Shop).

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<sup>9</sup> See the Explanatory Memorandum and Second Reading Speech referenced at [11] and [12]

<sup>10</sup> [2017] HCA 34

<sup>11</sup> **Mohammadi v Bethune** [2018] WASCA 98

<sup>12</sup> (1999) 20 WAR 405

<sup>13</sup> (1981) 28 SASR 458

- 33 In **Austie**, Anderson J considered the meaning of the phrase “*requirements of the public for liquor and related services*” which was couched in the same terms in both s 38(1) and s 38(2b) of the repealed provisions of s 38. Section 38(2b) was inserted into the then Act to create a specific restraint on the grant of new liquor store licences. Anderson J held that in order to give effect to parliament’s intent, a narrower interpretation of the phrase “*requirements of the public for liquor and related services*” should be adopted for the purposes s 38(2b) than for the same words in s 38(1). In section 38(2b) “*requirements of the public for liquor and related services*” meant the requirements of the public for liquor itself, whereas the same phrase in s 38(1) was concerned with the requirement of the public as to matters of taste, convenience, shopping habits, shopper preferences and the like.
- 34 King CJ in **Lincoln Bottle Shop** took the same approach to similar provisions in the South Australian legislation.
- 35 Consequently, in my view, in order to give intent to the obvious legislative policy of restricting the grant of certain licences in order to prevent the proliferation of packaged liquor outlets in the community, s 36B(4) relates to the requirements of consumers for packaged liquor itself, but does not include questions of convenience, one-stop shopping and shopper preferences which are linked to object 5(1)(c) and form part of the public interest considerations under s 38(2).
- 36 In making a value judgement as to whether the local packaged liquor requirements cannot reasonably be met by existing packaged liquor premises in the locality, consideration of issues such as the existing packaged liquor services in the locality, distribution of premises in the locality and ease of access to the existing premises are relevant factors. This is not an exhaustive list as ultimately the value judgment will be guided by the facts and circumstances of each case and the evidence presented by the applicant when discharging its onus under s 36B(4).

#### **The applicant’s evidence and submissions in respect of s 36B(4)**

- 37 The applicant lodged a market survey of residents of the locality. It was submitted that the key research objectives of the market survey was to understand the specific requirements of consumers in the locality for retail packaged liquor; determine the extent to which those requirements are met by existing outlets; and identify the extent to which the proposed liquor store would meet those requirements. According to the applicant, the principal findings of the market survey included the following:
- over half of the respondents (54%) are likely to purchase liquor from the proposed store, and the main reason for doing so was convenience, which included being able to do combined grocery and liquor purchases/one stop shopping;
  - respondents who are more regular purchasers of liquor (purchase liquor monthly or more often) and those who visit the shopping centre at least several times a week are significantly more likely to purchase liquor from the proposed store;

- “Access to competitive pricing”, “being able to do grocery shopping at the same time/doing it all in one trip” and “being in a safe environment to shop” were the top three attributes of the proposed store that appealed to respondents;
- the most important features of a liquor store sought by respondents were:
  - a safe environment;
  - a well organised store that is easy to browse and find what you want;
  - on-site parking;
  - a broad range of brands, products and styles to choose from; and
  - access to competitive pricing and weekly specials.
- 54% of respondents stated that a liquor store being located where you can do your supermarket shopping was an important feature, with 36% stating the ability to do grocery shopping and liquor shopping at the same time using the same trolley was important;
- almost all of the respondents (91%) shopped at the Woolworths supermarket at the Centre;
- Woolworths was the main, or most preferred household shopping retailer of respondents;
- 71% of respondents visited the shopping centre about once a week or more. Of these, 94% visited the Centre for the purpose of doing their grocery or household shopping;
- around 22% of respondents regularly purchase their packaged liquor when they do their grocery shopping;
- over the last 12 months, Dan Murphy’s Kelmscott was the place where the most number of respondents (88%) had purchased their packaged liquor, with 69% of respondents stating the Dan Murphy’s Kelmscott store was where they purchased most of their packaged liquor;
- while most respondents considered the existing retail packaged liquor outlets in the locality catered for their overall needs, respondents who lived within 1km of the proposed store were significantly less satisfied with the outlets for all relevant factors, particularly for meeting their requirements in terms of on-site parking and providing a well-lit, modern stylish outlet. A large proportion of these respondents (41%) stated the existing outlets did not meet their requirements in terms of being able to do their grocery shopping and liquor shopping using the same trolley, and 27% considered the existing outlets did not meet their requirements in terms of being located where they could do their supermarket shopping; and
- over half respondents (54%) said they would find it more convenient to be able to buy takeaway liquor while doing their regular shopping if their grocery store had a takeaway liquor section within the store.

38 In respect of the extent to which the requirements of consumers for packaged liquor in the locality are being met by existing outlets, the applicant stated that there are currently six packaged liquor outlets in the locality and provided the following summary of those outlets:



- all stores apart from Dan Murphy's Kelmscott are designed to service their immediate, local market and neighbourhood;
- the only existing outlet that provides the opportunity for combined grocery and liquor purchases is the Liquorland North Armadale store, however this store is located in a small neighbourhood centre designed to service residents in the southern section of the locality and access to the store from other parts of the locality are difficult given the physical barrier of the Kelmscott industrial area, road configuration and limited access due to the railway line;
- compared to existing outlets, the proposed liquor store will be located in the highest order shopping centre in the locality, and the only centre that contains a full-scale supermarket;
- despite being the highest order centre in the locality, the Kelmscott Town Centre/District Activity Centre does not provide the amenity of a packaged liquor outlet associated with a major supermarket;
- the shopping centre is located adjoining the only vehicle crossing east over the railway line within the Kelmscott Town Centre. Therefore, the proposed store will provide an improved range, level of attraction and comparison-shopping opportunity in an accessible location for residents of the locality west of the railway line in Champion Lakes, Camillo and Kelmscott (being where the bulk of the locality's population reside);
- there is only one existing liquor store in the Kelmscott Town Centre, being Dan Murphy's. This is a free-standing store located approximately 670 metres north of the proposed store on the opposite side of Albany Highway. It is not associated with a supermarket or shopping centre; and
- in relation to the Dan Murphy's store, the nature, style and target market of the store is significantly different to that of the proposed store. Dan Murphy's is a "destination" outlet that has a regional level of attraction that extends beyond the locality.

39 The applicant submitted that the ability to combine grocery and retail packaged liquor shopping using the same trolley is a key requirement of a large proportion of the consumers for packaged liquor in the locality and 36% of respondents to the market survey indicated that the existing range of packaged liquor outlets in the locality did not meet their requirement in this regard.

40 While acknowledging that the market survey indicated that a number of key requirements of packaged liquor consumers in the locality were largely met by the existing outlets in the locality, it was submitted by the applicant that these results are most likely skewed given 69% of respondents currently purchase their packaged liquor from the Dan Murphy's Kelmscott store which is a large format store that offers a comprehensive and extensive range of packaged liquor services and facilities, however, it is not associated with a supermarket and does not offer the opportunity to combine grocery and packaged liquor shopping and access to the store from the centre is inconvenient and hazardous.

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**Determination**

- 41 The applicant seeks to establish a convenience style BWS liquor outlet in the Kelmscott Plaza Shopping Centre. The proposed liquor store will be located adjacent to a Woolworths supermarket. The application is essentially predicated on providing a one-stop shopping service for liquor and groceries at the Centre.
- 42 Pursuant to s 36B(4) of the Act, the onus falls upon an applicant to satisfy the licensing authority that the local packaged liquor requirements cannot reasonably be met by the existing packaged liquor outlets in the locality. To give any meaning to Parliament's intent, the "requirement" for packaged liquor in s 36B(4) relates to packaged liquor itself, and matters such as one-stop shopping, convenience and shopper preferences are matters for consideration under the public interest test contained in s 38(2) (and subsequently linked to object 5(1)(c) of the Act). The test under s 36B(4) is an additional, and separate, requirement to the test under s 38(2).
- 43 As stated earlier in these reasons, in order to be satisfied of the test under s 36B(4), the following factors are relevant:
- what are the local packaged liquor requirements; and
  - what packaged liquor services are currently provided by the existing packaged liquor premises in the locality.
- 44 Having determined those matters, it is then necessary to make a value judgement as to whether the local packaged liquor requirements can reasonably be met by the existing packaged liquor premises in the locality.

*What are the local packaged liquor requirements?*

- 45 The applicant undertook a market survey and submitted that one of the research objectives of the survey was to understand the specific requirements of consumers in the locality for retail packaged liquor.
- 46 The results of the survey, on which the applicant relies upon to identify the local packaged liquor requirements are briefly summarised at [37] to [40] above. However, in my view, the applicant's survey data reflects the subjective views of the respondents on matters such as convenience, shopper preferences and consumer habits, which relate to the test under s 38(2) of the Act and whether the grant of the application is in the public interest. There is nothing in the survey evidence which specifically identifies the types of packaged liquor (i.e. table wine, craft beer, spirits etc) that consumers in the locality are purchasing or may require.
- 47 In my view, the applicant has failed to properly identify what the local packaged liquor requirements are in the locality in which the premises are to be located.

*What packaged liquor services are currently provided by the existing packaged liquor premises in the locality?*

- 48 The applicant identified the existing packaged liquor outlets in the locality<sup>14</sup> and provided a brief description of each premises, however, little information was provided on the liquor offering at each of these premises. A focus of the information provided on the existing premises was whether these premises were co-located with a supermarket.
- 49 However, reasonably detailed information was provided in respect of the Dan Murphy's Kelmscott store, which is approximately 670 metres from the applicant's proposed premises. It was stated that Dan Murphy's is Australia's premium retail liquor brand, and it offers the very best in range, service and price and caters to all types of liquor consumers. According to the applicant, Dan Murphy's offers significantly greater varieties of products across the whole range, with approximately 4,000 to 4,500 products available in store and over 10,000 products available on-line.<sup>15</sup>
- 50 The applicant submitted that all the existing packaged liquor outlets in the locality, apart from Dan Murphy's Kelmscott, which is a destination outlet, are designed to service their immediate, local market and neighbourhood.

*Has the applicant discharged its onus under s 36B(4)?*

- 51 The vast majority of respondents (91%) to the applicant's survey indicate that the existing packaged liquor outlets in the locality cater for their overall needs. In addition, a significant proportion of respondents (89%) indicate that an existing packaged liquor outlet is conveniently located to where they live.
- 52 The applicant states in its evidence that Dan Murphy's Kelmscott is a large format store that offers a comprehensive and extensive range of packaged liquor services and facilities. Not surprisingly, Dan Murphy's Kelmscott was the place where the greatest number of respondents (88%) had purchased their packaged liquor, with 69% of respondents stating that the Dan Murphy's Kelmscott store was where they purchased most of their packaged liquor.
- 53 Although the applicant does state that access to the Dan Murphy's store from the Centre is inconvenient and hazardous for persons pushing a trolley, there is little evidence to enable a finding as to the degree of inconvenience or level of hazard that may be generally experienced. Anthony Smith states that<sup>16</sup>:

*"The Dan Murphy's store is not convenient to those people who want to purchase packaged liquor at the same time as they do their shopping at the Centre, being the target market of the proposed store. It is too far, and too dangerous, to wheel a trolley from the Centre to the Dan Murphy's and would require a separate car and shopping trip. Driving from the Centre to*

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<sup>14</sup> MGA Town Planners report at 9.0

<sup>15</sup> Statement of Shane Tremble, General Manager – Corporate Service for Endeavour Drinks

<sup>16</sup> Statement of Anthony Smith, Business Development Manager, Endeavour Drinks Group

*the Dan Murphy's is not without its difficulties given the route requires traversing Albany Highway, an extremely busy road. The Dan Murphy's store is also located on the other side of Albany Highway."*

- 54 However, in my view, the survey data does not support a conclusion that general access to the Dan Murphy's store is, to any significant degree, inconvenient or hazardous. Although it might require a separate trip from the Centre and possibly a degree of inconvenience, consumers in the locality do not express any concerns in this regard. Understandably, the Dan Murphy's store is the most popular outlet in the locality and overall, a significant majority of respondents to the survey indicate that the existing packaged liquor outlets are conveniently located to where they live. The Dan Murphy's store is only 670 metres from the applicant's proposed premises.
- 55 The policy impetus for the introduction of s36B into the Act was to create a restraint on the proliferation of packaged liquor outlets in the community, with the evidentiary and persuasive onus falling upon the applicant. Although some members of the community might find it convenient to purchase packaged liquor from the applicant's proposed outlet when doing their grocery shopping, nonetheless, consumers are more than satisfied with the packaged liquor offering from the existing packaged liquor outlets in the locality.
- 56 The onus falls upon an applicant to satisfy the licensing authority that the local packaged liquor requirements cannot reasonably be met by the existing packaged liquor outlets in the locality. The "requirement" for packaged liquor in s 36B(4) relates to packaged liquor itself, and matters such as one-stop shopping, convenience and shopper preferences are matters for consideration under the public interest test contained in s 38(2) (and subsequently linked to object 5(1)(c) of the Act). The test under s 36B(4) is an additional, and separate, requirement to the test under s 38(2).
- 57 The word "reasonably" invokes a low threshold. In **Charlie Carter Pty Ltd v Streeter and Male Pty Ltd**<sup>17</sup>, 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"*
- 58 There was nothing in the applicant's evidence to suggest that consumers in the locality cannot readily and easily access packaged liquor. Further, there was little in the applicant's evidence to indicate that consumers of packaged liquor in the locality experience any great difficulty or inconvenience in obtaining packaged liquor.
- 59 Consequently, when I considered the totality of the applicant's evidence, I was of the view that the applicant failed to satisfy me that the existing packaged liquor outlets in the locality could not reasonably meet the local packaged liquor requirements. Some of the key factors that led me to this conclusion were:

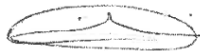
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<sup>17</sup> (1991) 4 WAR 1

- the applicant failed to properly identify what are the local packaged liquor requirements;
- 91% of respondents to the applicant's survey indicated that the existing packaged liquor outlets in the locality cater for their overall needs;
- 89% of respondents to the applicant's survey indicated that an existing packaged liquor outlet is conveniently located to where they live;
- Dan Murphy's Kelmscott, according to the applicant, offers the very best in range, service and price and caters to all types of liquor consumers;
- Dan Murphy's Kelmscott was the place where the greatest number of respondents (88%) had purchased their packaged liquor, with 69% of respondents stating that the Dan Murphy's Kelmscott store was where they purchased most of their packaged liquor; and
- according to the applicant, the existing packaged liquor outlets are designed to service their immediate local market and neighbourhood; and
- the application is merely predicated on providing one-stop shopping convenience.

### *Conclusion*

- 60 The condition within s 36B(4) is mandatory, with the evidential and persuasive onus falling on the applicant. Having found that the applicant failed to discharge its onus under s 36B(4), the application must be refused.
- 61 Consequently, it was not necessary for me to consider whether the applicant had demonstrated that the grant of the application was in the public interest, in accordance with s 38(2). Therefore, I make no findings on this matter.
- 62 Parties to this matter dissatisfied with the outcome may seek a review of the Decision under s 25 of the Act. The application for review must be lodged with the Liquor Commission within one month after the date upon which the parties receive notice of this Decision.
- 63 This matter has been determined by me under delegation pursuant to s 15 of the Act.



Peter Minchin

DELEGATE OF THE DIRECTOR OF LIQUOR LICENSING



Department of  
**Local Government, Sport  
and Cultural Industries**

Your Ref: SMN:DM:190405

Our Ref: A483230860

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Cullen MacLeod Lawyers  
BWS - Beer Wine Spirits Kelmscott  
PO Box 935  
NEDLANDS WA 6909

Dear Sir/Madam

**APPLICATION FOR THE CONDITIONAL GRANT OF A LIQUOR STORE LICENCE:  
ENDEAVOUR GROUP LIMITED**

I refer to the application lodged by Endeavour Group Limited on 6 December 2019.

Please find enclosed a copy of the reasons of the decision in respect of the above premises.

Yours faithfully

Seema Saxena  
RESEARCH AND REGULATORY OFFICER  
LIQUOR CONTROL AND ARBITRATION BRANCH

15 July 2020

cc: Liquor Enforcement Unit  
cc: Chief Health Officer  
cc: Ian Newman

[Enc]