

Liquor Commission of Western Australia
(Liquor Control Act 1988)

Applicant: Ms Bakhita Emilliana Sino (*self-represented*)

Respondent: Director of Liquor Licensing
(*represented by Mr Michael Olds of the State Solicitor's Office*)

Commission: Ms Pamela Hass (Presiding Member)
Ms Elanor Rowe (Member)
Ms Shelley Davies (Member)

Matter: Application pursuant to section 25 of the *Liquor Control Act 1988* for review of the decision of the Director of Liquor Licensing to suspend the Applicant's liquor licence pursuant to section 92 of the *Liquor Control Act 1988*.

Premises: Mama Bakhita
Unit 3/7 Bessemer Way, Wangara, WA 6065

Date of Hearing: 20 January 2023

Date of Determination: 24 February 2023

Determination: The decision of the Director of Liquor Licensing is varied.

Authorities referred to in Determination:

- *Commissioner of Police v Bloo Moons Pty Ltd* (LC 05/2010)
- *Hancock v Executive Director of Public Health* [2008] WASC 224
- *Interpretation Act 1984*.
- *Kioa v West* (1985) 159 CLR 550
- *Liquor Control Act 1988 (WA)*.
- *Morris v Hall* [2022] WASC
- *Re Minister for Immigration and Multicultural Affairs Ex parte Lam* (2003) 214 CLR 1

Background

1. This is an application (“**Application**”) brought under section 25 of the *Liquor Control Act 1988* (“**the Act**”) for a review of the decision (“**Decision**”) of the Director of Liquor Licensing (“**Director**”) dated 14 September 2022 to suspend the Applicant’s Wholesaler liquor licence number 616216800921 (“**Licence**”) pursuant to section 92 of the Act.
2. By letter dated 8 September 2022, the Applicant was afforded seven days to show cause why the operation of the Licence should not be suspended pursuant to section 92 of Act (“**Show Cause Notice**”). The catalyst for the Show Cause Notice was an inspection of the Premises by Mr Royce Bond, a Premises Inspector in the employ of the Director, who had received information indicating that the Applicant had ceased to occupy or carry on business at Unit 3/7 Bessemer Way, Wangara (“**Premises**”).
3. On 14 September 2022, having been satisfied on the information before him that the Applicant had ceased to occupy or carry on business at the Premises, the Licence was suspended pursuant to section 92 of the Act. The Applicant was notified of the suspension by letter on the same date.
4. On 20 September 2022, the Applicant lodged an Application for review of the Decision.

Statutory Framework

Section 25

5. On a review under section 25 of the Act, the Commission may:
 - (a) affirm, vary or quash the decision subject to the review; and
 - (b) make a decision in relation to any application or matter that should, in the opinion of the Commission, have been made in the first instance; and
 - (c) give directions:
 - as to any question of law, reviewed; or
 - to the Director, to which effect shall be given; and
 - (d) make any incidental or ancillary order.
6. In conducting a review under section 25, the Commission is not constrained by a finding of error on the part of the Director but is to undertake a full review of the material before the Director and make its own decision on the basis of those materials.¹
7. The Commission is not bound by the rules of evidence or any practices or procedures applicable to courts of record and is to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal forms.²

¹ *Hancock v Executive Director of Public Health* [2008] WASC 224 at [54]; *Commissioner of Police v Bloo Moons Pty Ltd* (LC 05/2010) at [7].

² Act, sections 16(7)(a)-(b)

8. In conducting a review, section 25(2c) of the Act provides that the Commission may have regard only to the material that was before the Director when making the Decision.

Section 92

9. Section 92 of the Act empowers the Director to suspend a licence, relevantly as follows:

“92 Suspension because business has ceased etc.

The Director may, after (where practicable) giving the holder a reasonable opportunity to make submissions or to be heard, suspend the operation of a licence if -

- (a) it appears to the Director that the licensee has ceased to carry on business at the licensed premises; or*
 - (b) where the licensee is a body corporate, an event described in section 102(1)(a) or (b) had occurred.”*
10. This review concerns the suspension of the operation of the Licence on the basis of paragraph (a). Paragraph (b) is not applicable.
 11. Section 92 empowers the Director to suspend the operation of a licence where it appears to the Director that the licensee has ceased to carry on business at the licensed premises. There are three matters to note concerning section 92.
 12. *First*, it is open to view the words “*after (where practicable) giving the holder of a licence a reasonable opportunity to make submissions to be heard*” as a precondition to the exercise of the power to suspend the operation of the licence. Another view is that those words are a statutory requirement to afford procedural fairness to a licensee prior to a decision being made that affects a licensee’s rights or interests.³
 13. *Second*, the threshold for the Director’s state of mind to exercise the discretion to cancel a licence, that it “*appears*” the licensee has ceased to carry on business at the licensed premises, is low. It may be analogous to a “*reasonable suspicion*”.
 14. *Third*, while it is open to view section 92 as discretionary (indeed, generally speaking it is),⁴ it is equally open to view the presence of the word “*may*” as supplying the power to suspend the operation of a licence if it appears to the Director that the licensee has ceased to carry on business at the licensed premises.⁵ The latter view appears in keeping with the objects and purpose of the Act.⁶

³ “*where applicable*” appears to acknowledge that procedural fairness is focussed on what is practical, and that procedural fairness may differ in each case. See *Kioa v West* (1985) 159 CLR 550, 585 (Mason J). *Re Minister for Immigration and Multicultural Affairs Ex parte Lam* (2003) 214 CLR 1, 13-14 [37] (Glesson CJ).

⁴ *Interpretation Act 1984* section 56.

⁵ As recently discussed in *Morris v Hall* [2022] WASC [41]-[44].

⁶ *Interpretation Act 1984* section 3(1).

The Intervener's Submissions

15. The Intervener made the following written submissions:
- (a) On 7 September 2022, Mr Bond, an officer of the Director, received information from the Australian Taxation Office advising that the Applicant's tenancy agreement at the Premises had been terminated by the landlord.⁷
 - (b) On 8 September 2022, following receipt of the information above, Mr Bond requested the Applicant show cause, within seven days, as to why the Licence should not be suspended. As indicated in the Show Cause Notice, the Applicant was requested to show cause after information he received indicated the Applicant had ceased to occupy or carry on business at the Premises.⁸
 - (c) On 9 September 2022, in response to an email from the Applicant, Mr Bond requested the Applicant confirm whether she still has a lease over the Premises.⁹
 - (d) On 14 September 2022, having afforded the Applicant a reasonable opportunity to show cause (which was taken up), the information before the Director (summarised above) satisfied him that the Applicant had ceased to occupy or carry on business at the Premises.¹⁰

The Applicant's Submissions

16. The Applicant made written submissions which indicated that the lease for the Premises had been terminated.¹¹ The written submissions did not confirm that an alternative premises had been secured, nor were clear details provided in relation to the Applicant's intentions with respect to sourcing alternative premises.
17. At the hearing on 20 January 2023, the Applicant, Ms Sino, made further submissions including that:
- (a) Ms Sino did not realise that the Licence had been *suspended*, rather she had made the Application for review because she believed that the Licence had been *cancelled*.
 - (b) The business operating under the Licence, that is, Mama Bakhita, is no longer occupying or carrying on business at the Premises.
 - (c) Ms Sino is currently seeking alternative premises from which to operate the business under the Licence and wishes to resume her business operations once a new premises has been found.

⁷ Index – Document 1, 'Email from the Australian Taxation Office dated 7 September 2022 advising the licensee's tenancy agreement has been terminated and excise licence cancelled', page 41.

⁸ Index – Document 2, 'Letter to Bakhita Sino dated 8 September 2022 – Show Cause notice' page 41.

⁹ Index – Document 3, 'Email exchange between DLGSC and Bakhita Sino dated between 8 and 9 September 2022 regarding show cause letter', pages 42-43.

¹⁰ Index – Document 5, 'Decision – Suspension of Licence – Mama Bakhita dated 14 September 2022', pages 47-49.

¹¹ Index – Document G, 'Email from Bakhita Sino dated 12 December 2022 enclosing information in support of application for review' page 35.

Determination

18. It was clear, during the course of the hearing, that the Applicant was operating under a misapprehension as to the nature and effect of the Decision, particularly with respect to the difference between the suspension of a licence and the cancellation of a licence.
19. The Applicant's Licence is currently suspended, however, a suspension must at some point come to an end, either by virtue of the Director cancelling the suspension in accordance with section 92A of the Act, or by cancelling the licence itself by virtue of section 93 of the Act.
20. As such, it is worth noting here the content of section 93 which states.

“(1) Where the operation of a licence or a permit relating to a licence is suspended, or is deemed to have been suspended, and the Director after (where practicable) giving the holder a reasonable opportunity to make submissions or to be heard, is satisfied —

(a) that the licensee does not intend to resume the business carried on in the premises, or on the site of the premises, for which the licence was granted; and

(b) that the relevant period has elapsed from the day on which the licence or permit was suspended, or deemed to have been suspended,

the Director may, by notice in writing, specify that the licence is cancelled at the expiry of such period as may be specified in that notice unless it is again in force for all purposes before the expiry of that period, and effect shall be given to the notice.

(1a) In subsection (1)(b) —

relevant period means 28 days or any greater period prescribed.

(2) The Director may, on application, extend the period specified in a notice made under subsection (1).”

21. With this in mind, the Commission has determined to vary the decision of the Director to provide the Applicant with certainty around the timeframe for which she must secure alternative premises before the Director makes a further determination in respect of the long-term future of the Licence.
22. The Director's decision of 14 September 2022 is varied as follows:

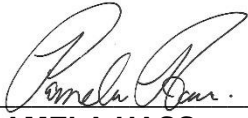
Pursuant to section 92 of the Liquor Control Act 1988, the Wholesaler Licence is suspended with effect from 14 September 2022.

*The Licensee is granted 3 months from the date of the Commission's determination, being 24 February 2023, within which timeframe the Licensee may apply to the Director of Liquor Licensing (**Director**) to transfer and remove the licence to an alternative premises.*

The Commission notes that during this period or until a successful application is made and granted during this period, the licence will remain in suspension.

The Commission also notes that any application for transfer and removal will be subject to the Director's approval.

This decision is not intended to alter the Director's powers to cancel the licence for any other reason.



**PAMELA HASS
PRESIDING MEMBER**



**ELANOR ROWE
MEMBER**



**SHELLEY DAVIES
MEMBER**