



**FORM 5C**

Rule 5.02(2)

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMERCIAL COURT  
COMMERCIAL LIST – LYONS J**

Case: S ECI 2022 02457

Filed on: 22/11/2022 10:35 AM

S ECI 2022 02457

BETWEEN

**Vasco Trustees Limited (ACN 138 715 009) as responsible entity for the Heritage Lodge Scheme (ARSN 089 099 249)**

Plaintiff

and

**Australian and Pacific Investment Corporation Pty Ltd (ACN 005 445 107) in its own capacity and in its capacity as representative of the members of the Heritage Lodge Scheme (ARSN 089 099 249) & Ors (according to the attached schedule of parties)**

Defendants

**AMENDED ORIGINATING MOTION BETWEEN PARTIES**

Date of Document: 9 September 2022

Solicitors Code: CR108844

Filed on behalf of: The plaintiff

Telephone: 07 3239 2900

Prepared by:

Ref: Selina Nutley :210234

**McMahon Clarke**

Email: selina.nutley@mcmahonclarke.com

Level 2, 696 Bourke Street

MELBOURNE VIC 3000

**TO THE DEFENDANTS**

**TAKE NOTICE** that this proceeding by originating motion has been brought against you by the plaintiff for the relief or remedy set out below.

**ALSO TAKE NOTICE** that the plaintiff cannot continue with the proceeding except by order of the Court. You will be given notice by summons of any application for the order and until the summons is served you are not required to take any step in the proceeding.

**IF YOU INTEND TO DEFEND** the proceeding you must attend before the Court at the time and place named in the summons served with this originating motion.

.....  
**Registrar**

**TAKE NOTICE** that the plaintiff will apply to the Court on a date to be fixed for the following relief or orders:

1. ~~Judicial advice under r 54.02 of the *Supreme Court (General Civil Procedure) Rules 2015* in respect of whether the plaintiff is justified in defending Supreme Court of Victoria proceeding no. S ECI 2021 03202, having regard to:~~
  - a. ~~the definition of “Opening Date” in the Hotel Management Agreement dated 28 June 2002 (“HMA”);~~
  - b. ~~the definition of “Term” in the HMA; and~~
  - c. ~~the exercise of options to extend the “Term” under clauses 2.4(a) and 2.4(b) of the HMA.~~

**RELIEF OR REMEDY SOUGHT**

1A. The Court declares as to the Hotel Management Agreement dated 28 June 2002 (HMA) that:

a. the “Opening Date” at paragraph 1 of the HMA means:

i. 16 April 2002;

ii. 28 June 2002;

iii. 8 May 2006; or

iv. such other date for which a party contends; and

b. the “Term” at paragraph 1 of the HMA means that, subject to earlier termination in accordance with the terms of the HMA or at common law, and the valid exercise of any options under clause 2.4 of the HMA, the HMA’s expiration date is:

i. 16 April 2022;

ii. 28 June 2022;

iii. 8 May 2026; or

iv. such other date for which a party contends.

1B. The Court declares that:

a. by entering into the room management agreement for lot 112 with APIC on or about 5 February 2020, and room management agreements with other members of the Scheme in similar form (collectively, **Evergreen RMAs**), the Responsible Entity was acting in accordance with its powers under the Scheme Constitution, and

b. the Evergreen RMAs are valid.

1C. An order that the plaintiff is entitled to draw the costs of and incidental to this Amended Originating Motion from the assets of the Heritage Lodge Scheme, including its legal costs on a solicitor and own client basis.

1D. An order that each defendant to this Originating Motion bear its own costs of this proceeding.

2. Such further or other orders (including guidance and direction) as the Court thinks fit.

1. Place of trial – Melbourne
2. This amended originating motion was filed by McMahon Clarke of Level 2, 696 Bourke Street, Melbourne VIC 3000, solicitors for the defendant.
3. The address of the plaintiff is: Level 4, 99 William Street, Melbourne VIC 3000
4. The address for service of the plaintiff is c/- McMahon Clarke of Level 2, 696 Bourke Street, Melbourne VIC 3000
5. The email address of the plaintiff is selina.nutley@mcmahonclarke.com
6. The address of the first defendant is 2 Palm Grove, Balwyn VIC 3103.

The address of the second defendant is c/- HWL Ebsworth Lawyers, Level 8, 447 Collins Street, Melbourne VIC 3000

The address of the third defendant is c/- HWL Ebsworth Lawyers, Level 8, 447 Collins Street, Melbourne VIC 3000

**SCHEDULE**

**Vasco Trustees Limited (ACN 138 715 009) as responsible entity for the Heritage Lodge Scheme**

Plaintiff

and

**Australian and Pacific Investment Corporation Pty Ltd (ACN 005 445 107) in its own capacity and in its own capacity and as representative of the members of the Heritage Lodge Scheme (ARSN 089 099 249)**

First defendant

and

**Austpac Properties Pty Ltd (ACN 140 675 216)**

Second defendant

and

**Yarra Valley Lodge Pty Ltd (ACN 159 460 303)**

Third defendant