

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

S ECI 2022 02457

IN THE MATTER of an application by Vasco Trustees Limited (ACN 138 715 009) (as responsible entity for the Heritage Lodge Scheme) for judicial advice pursuant to Rule 54.02 of the *Supreme Court (General Civil Procedure) Rules 2015*

BETWEEN:

VASCO TRUSTEES LIMITED (ACN 138 715 009) (as responsible entity for the Heritage Lodge Scheme) Plaintiff

- and -

No defendant



JUDGE: The Honourable Justice Lyons

DATE MADE: 21 November 2022

ORIGINATING PROCESS: Originating Motion filed on 30 June 2022

HOW OBTAINED: Following the mention on 9 September 2022 including by exchange of correspondence between the Court and the legal practitioners for the parties

ATTENDANCE: Mr M. N. C. Harvey one of His Majesty's Counsel with Mr G. Lubofsky of Counsel for the Plaintiff

Mr I. D. Martindale one of His Majesty's Counsel with Ms V. Bell of Counsel for Yarra Valley Heritage Estate Pty Ltd

Mr D. C. Harrison of Counsel for Australian and Pacific Investment Corporation Pty Ltd

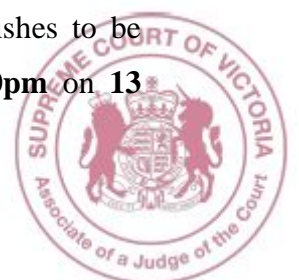
OTHER MATTERS: A. This Order is signed by the Judge of the Court making the Order pursuant to Rule 60.02(1)(b) of the *Supreme Court (General Civil Procedure) Rules 2015* ('Rules').

THE COURT ORDERS THAT:

1. Pursuant to rule 4.06 of the Rules, the plaintiff ('**Vasco**') is permitted to continue this proceeding by originating motion in Form 5C.
2. The title of this proceeding is amended by:
 - (a) Deleting the words 'IN THE MATTER of an application by Vasco Trustees Limited (ACN 138 715 009) for judicial advice pursuant to r 54.02 of the *Supreme Court (General Civil Procedure) Rules 2015*'; and
 - (b) Deleting the words 'no defendant' and inserting 'AUSTRALIAN AND PACIFIC INVESTMENT CORPORATION PTY LTD (ACN 005 445 107) IN ITS OWN CAPACITY AND IN ITS CAPACITY AS REPRESENTATIVE FOR THE MEMBERS OF THE HERITAGE LODGE SCHEME (ARSN 089 099 249) & Ors (according to the attached schedule of parties) Defendants'.
3. Pursuant to rule 9.06(b) of the Rules, the following parties are joined as defendants:
 - (a) Australian and Pacific Investment Corporation Pty Ltd (ACN 005 445 107) ('**APIC**') in its own capacity and in its capacity as the representative of the members of the Heritage Lodge Scheme (ARSN 089 099 249);
 - (b) Austpac Properties Pty Ltd (ACN 140 675 216);
 - (c) Yarra Valley Lodge Pty Ltd (ACN 159 460 303)('defendants').
4. Pursuant to rule 16.01(2) of the Rules, APIC is appointed as representative for the members of the Heritage Lodge Scheme (ARSN 089 099 249) ('**Members**') in respect of the matters the subject of this proceeding.
5. The following affidavits shall be removed from the Court file:
 - (a) Affidavit of Lyn Ridley sworn 28 June 2022; and
 - (b) Affidavit of Siobhan Luck affirmed 14 July 2022.
6. By **4:00pm** on **23 November 2022**, Vasco file and serve:
 - (a) an amended originating motion substantially in the form contained in Schedule A hereto; and



- (b) its affidavit(s) in support of the amended originating motion.
7. By **4:00pm** on **29 November 2022**, the defendants shall serve on Vasco any request for discovery of categories of documents, not including documents in Vasco's affidavit(s) in support of the amended originating motion.
8. By **4:00pm** on **7 December 2022**, Vasco shall provide discovery in response to such requests, subject to proper objection.
9. By **4:00pm** on **14 December 2022**, the defendants shall file and serve:
- (a) points of issue in respect of the matters set out in Vasco's amended originating motion; and
- (b) any affidavits on which they wish to rely.
10. By **4:00pm** on **19 December 2022**, Vasco shall file and serve on the defendants any requests for discovery of categories of documents, not including documents in the defendants' affidavits on which they wish to rely.
11. By **4:00pm** on **21 December 2022**, Vasco shall serve on each of the Members:
- (a) a copy of this Order;
- (b) a copy of the amended originating motion;
- (c) a copy of the defendants' points of issue; and
- (d) the notice set out in Schedule B to this Order.
12. Vasco shall serve each of the Members by sending the materials set out in paragraph 11 to the email address recorded in Vasco's books for each Member.
13. By **4:00pm** on **25 January 2023**, the defendants shall provide discovery in response to such requests, subject to proper objection.
14. By **4:00pm** on **7 February 2023**, Vasco shall file and serve any evidence in reply.
15. Notwithstanding paragraph 4 of this Order, any Member that wishes to be heard at the trial of this proceeding shall by no later than **4:00pm** on **13 February 2023**:



- (a) file and serve an affidavit setting out the reasons why that Member should be joined as a party to the proceeding, and its attitude in relation to the relief sought in the proceeding, and
 - (b) make an application for joinder to be listed on a date prior to the trial in this proceeding.
16. The amended originating motion be listed for determination on the first available date after 3 March 2023 on an estimate of 1 day.
 17. By **4:00pm** on **20 February 2023**, Vasco shall file and serve any written submissions.
 18. By **4:00pm** on **27 February 2023**, the defendants shall file and serve any written submissions in response.
 19. By **4:00pm** on **3 March 2023**, Vasco shall file and serve any written submissions in reply.
 20. Costs reserved.
 21. Liberty to apply.

DATE AUTHENTICATED: 22 NOVEMBER 2022



THE HONOURABLE JUSTICE LYONS

SCHEDULE A



FORM 5C

Rule 5.02(2)

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

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



SCHEDULE B



**IMPORTANT NOTICE TO OWNERS IN THE HERITAGE LODGE
SCHEME ARSN 089 099 249**

**IN THE MATTER OF 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) & Ors**

Defendants

THIS NOTICE IS SENT BY ORDER OF THE SUPREME COURT OF VICTORIA

IT IS IMPORTANT YOU READ THIS NOTICE CAREFULLY BECAUSE IT
MAY AFFECT YOUR LEGAL RIGHTS.

Q. WHY AM I RECEIVING THIS NOTICE?

- A. You are receiving this notice because you are a member of the Heritage Lodge Scheme ARSN 089 099 249 (**Scheme**). Legal proceedings have been commenced in the Supreme Court of Victoria which relate to the Scheme.

The Court has authorised the issue of this notice to make members aware of the nature of the proceedings and each member's right to participate in those proceedings.

Q. WHAT ARE THE PROCEEDINGS ABOUT?

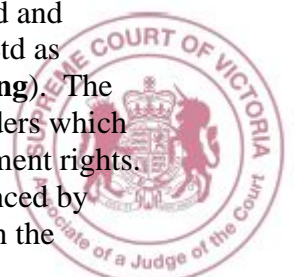
- A. Members will be aware a key document governing the rights and obligations of various stakeholders in the Scheme is the Hotel Management Agreement (**HMA**).

The term of the HMA and the original version of the room management agreements (**RMAs**) entered into by members is calculated with reference to the meaning of the definition "Opening Date" under the HMA. The HMA does not nominate a specific date, but says the Opening Date is the latest date on which a series of conditions relating to the Scheme and the hotel were fulfilled.

There is uncertainty about what the Opening Date is.

Three separate legal proceedings have been filed with the Supreme Court of Victoria which concern the Scheme and the definition of Opening Date.

The *first* proceeding (S ECI 2022 02457) has been commenced by Yarra Valley Heritage Estate Pty Ltd (**YVHE**), Austpac Properties Pty Ltd and Yarra Valley Lodge Pty Ltd (as plaintiffs) against Vasco Trustees Ltd as Responsible Entity of the Scheme (as defendant) (**YVHE Proceeding**). The plaintiffs in the YVHE Proceeding are asking the Court to make orders which will allow YVHE to buy the management lot and the hotel management rights. The *second* proceeding (S ECI 2022 02457) was originally commenced by Vasco seeking direction from the Court regarding its involvement in the



YVHE Proceeding (**Vasco Proceeding**). This notice is issued in the Vasco Proceeding.

The *third* proceeding (S ECI 2022 02906) has been commenced by Australian Pacific and Investment Corporation Pty Ltd (**APIC**) against Vasco (**APIC Proceeding**). APIC is asking the Court to make orders declaring that the RMAs it has signed over its two rooms in the Scheme have been terminated and, therefore, APIC is entitled to take possession of its rooms.

Because the meaning of the term Opening Date needs to be determined in the APIC Proceeding and may affect the outcome of the YVHE Proceeding, the Court has ordered its meaning be determined in the Vasco Proceeding and bind all owners and the parties to the HMA. It has ordered the following parties be joined as defendants to the Vasco Proceedings:

1. The other parties to the HMA, being Austpac and Yarra Valley Lodge Pty Ltd (the current hotel operator) and
2. APIC, in its personal capacity, and as a representative in respect of the subject matter of the Vasco Proceeding for all members of the Scheme.

The court has ordered the above approach to help to minimise costs and avoid the same issue being determined in all three proceedings.

Vasco's current position in the Vasco Proceeding is the Opening Date was, at the latest, 8 May 2006, and that this means the term of the HMA will expire on 8 May 2026. APIC's current position is that the HMA expired no later than 16 April 2022.

Q. Do I need to do anything in response to this notice?

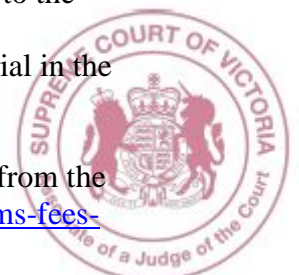
- A. No. Each member has a *right* to participate in the Vasco proceedings but is *not required* to participate if they are happy for APIC to be their representative. The purpose of this notice is to alert members to the existence of the Vasco Proceeding and the order made by the Court appointing APIC as representative for all the members.

Q. What do I need to do if I don't want APIC to act as my representative?

- A. Paragraph 15 of the order of the Supreme Court enclosed with this notice sets out the steps members must take, if they do not wish APIC to act as their representative. This includes filing and serve the following documents by 20 January 2023:

- (a)
- (b) An affidavit setting out the reasons why that member should be joined as a party to the Vasco Proceeding and its attitude in relation to the relief sought in the Vasco Proceeding.
- (c) An application for joinder to be listed on a date prior to the trial in the Vasco Proceeding.

You can obtain a blank copy of a notice of appearance and affidavit from the Supreme Court's website: <https://www.supremecourt.vic.gov.au/forms-fees-and-services/forms-templates-and-guidelines>



If you choose to file a notice of appearance, this means you will be joined as a defendant to the proceedings, and you will be responsible for obtaining your own legal advice, and paying your own costs in respect of your participation in the Vasco Proceedings.

Q. Will I be bound by the Court's decision in the Vasco Proceeding even if I choose not to participate?

A. Yes. All owners, even if they choose not to participate, will be bound by the Court's decision.

Q. Do I have to pay any money as a result of the proceedings?

A. If you are happy for APIC to act as your representative, you do not have to pay any money. If you do not wish APIC to act as your representative and, instead, choose to participate in the Vasco Proceeding yourself, you will be responsible for payment of your own legal costs, unless the Court orders otherwise.

Owners may indirectly contribute to the legal costs associated with all three proceedings through payment of the Scheme's legal costs from Scheme assets.

Q. Where can I obtain copies of relevant documents?

A. Copies of relevant documents may be obtained from Vasco by emailing Lyn Ridley at lr Ridley@vascofm.com, or by inspecting them at the Commercial Court Registry of the Supreme Court of Victoria at ground floor, 450 Little Bourke Street, Melbourne VIC 3000.

Q. Who should I contact if I have questions?

A. If you have any questions you can:
(a) contact Lyn Ridley at Vasco by email at lr Ridley@vascofm.com or by telephone on 03 8352 7120.
(b) seek independent legal advice.

The Supreme Court should **not** be contacted for legal advice.

This notice was approved by the Supreme Court and published pursuant to Orders made on 9 September 2022.

You should not delay in making any decision to participate in the Vasco Proceeding, or seek further advice.

