

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

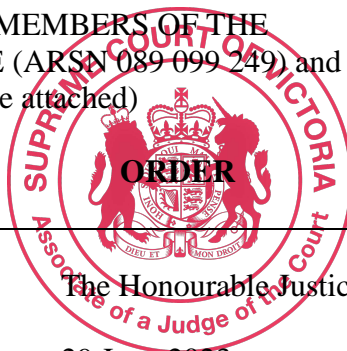
S ECI 2022 02457

BETWEEN:

VASCO TRUSTEES LIMITED (ACN 138 715 009) (as responsible entity for the Heritage Lodge Scheme) 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) and others (according to the schedule attached) Defendants



JUDGE: The Honourable Justice Lyons

DATE MADE: 29 June 2023

ORIGINATING PROCESS: Originating Motion filed on 30 June 2022

HOW OBTAINED: After the directions hearing on 2 June 2023

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

Mr M J Galvin one of His Majesty's Counsel with
Mr J Schulz of Counsel for the First Defendant

No appearance for the Second and Third
Defendants

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

THE COURT ORDERS THAT:

1. By **4:00pm** on **3 July 2023**, Vasco shall serve on each of the Members:

- (a) a copy of the Order of the Honourable Justice Lyons made 21 November 2022 (**‘November Order’**);
 - (b) a copy of the Order of the Honourable Justice Lyons made 22 December 2022;
 - (c) a copy of the Order of the Honourable Justice Lyons made 1 March 2023;
 - (d) a copy of this Order;
 - (e) a copy of the amended originating motion;
 - (f) a copy of the defendants’ amended points of issue; and
 - (g) the notice set out in Schedule A to this Order.
2. Vasco shall serve each of the Members by sending the materials set out in paragraph 1 hereof to the email address recorded in Vasco’s books for each Member.
 3. Notwithstanding paragraph 4 of the November Order, any Member that wishes to be heard at the trial of this proceeding shall by no later than **4:00pm on 11 August 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.
 4. The costs of the affidavits of:
 - (a) Selina Kate Nutley affirmed 31 May 2023; and
 - (b) Aleksandar Kuraica affirmed 2 June 2023,are not costs of this proceeding.
 5. Costs otherwise reserved.
 6. Liberty to apply.

DATE AUTHENTICATED:

29 JUNE 2023



THE HONOURABLE JUSTICE LYONS

SCHEDULE OF PARTIES

S ECI 2022 02457

BETWEEN:

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 CAPACITY AS REPRESENTATIVE
OF THE MEMBERS OF THE HERITAGE LODGE SCHEME
(ARSN 089 099 249)

First Defendant

AUSTPAC PROPERTIES PTY LTD (ACN 140 675 216)

Second Defendant

YARRA VALLEY LODGE PTY LTD (ACN 159 460 303)

Third Defendant

DATED: 29 JUNE 2023



SCHEDULE A

IMPORTANT NOTICE TO MEMBERS 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 of the Scheme acquired freehold interests in rooms and entitlements with respect to a hotel and golf course located at Chirnside Park, Victoria. The site comprises hotel facilities, a golf course, a club house and a "management lot".

The hotel has been subject to a hotel management agreement between the responsible entity of the Scheme, the operator of the hotel and the owner of the management lot. Each hotel room is the subject of a room management agreement between the room owner, the responsible entity and the hotel manager.

Vasco Trustees Limited (**Vasco**) is the current responsible entity of the Scheme. Australian and Pacific Investment Corporation Pty Ltd (**APIC**) is a room owner and member of the Scheme.

The proceedings raise issues about the commencement, expiry and termination of the hotel management agreement and the room management agreements under the Scheme.

Hotel management agreement

Disputes have arisen about the commencement, extensions and termination of the hotel management agreement.



According to its terms, the hotel management agreement commenced on the “Opening Date” and was to terminate on the tenth anniversary of that date, subject to the exercise of two further options of 5 years each. The “Opening Date” is defined in the hotel management agreement as the date upon which the last of a series of events relating to the establishment of the hotel, golf course and club house occurred. The disagreement is about when the last of those events occurred.

In its reports for the 2020 and 2021 financial years, Vasco stated that the hotel management agreement would expire on 16 April 2022. Following a review of the Scheme's records and interrogation of the criteria of "Opening Date" in the hotel management agreement, Vasco now contends the hotel management agreement to expire later than it previously understood. Vasco's position is that:

- (a) the Opening Date within the meaning of the hotel management agreement was 8 May 2006;
- (b) both options to extend the hotel management agreement for 5 years were validly exercised by the responsible entity; and
- (c) the hotel management agreement has not terminated and will not expire until 8 May 2026.

APIC's position is that:

- (a) the Opening Date was either 16 April 2002 (having regard to the expiry date notified in Vasco's 2020 and 2021 financial reports) or, at the latest, 28 June 2002;
- (b) the first option to extend the hotel management agreement was validly exercised, but the second was not because either the hotel management agreement had already been terminated (on 6 January 2015) or the requisite notices were not given;
- (c) the termination of the hotel management agreement on 6 January 2015 occurred pursuant to a termination notice served on Golden Heritage Golf Pty Ltd after it entered into a contract, as vendor, in 2014 to sell the management lot;
- (d) alternatively, if it was not validly terminated on 6 January 2015 and if both options to extend it were validly exercised, the hotel management agreement expired no later than 28 June 2022.

Room management agreements

There is a further issue about the validity of new room management agreements, which have been referred to as “Evergreen Agreements”. In 2015, the responsible entity at the time required members to enter into these new room management agreements in substitution for the previous room management agreements. Not every room management agreement was replaced by a new “Evergreen Agreement”.

Under the original form of room management agreement, the responsible entity was granted a licence to occupy the room for a term of 10 years from the “Commencement



Date”, which was capable of extension, at the responsible entity’s election, for a further two periods of 5 years each. Under the new (Evergreen) room management agreements, the responsible entity is entitled to occupy the rooms until either the Scheme is wound up or termination of the agreements by the responsible entity. There is a dispute as to whether the Scheme constitution permitted this change. Vasco’s position is that the 2015 change was valid. APIC’s position is that it was invalid.

If the new room management agreements, or the relevant provisions stipulating the new term of the responsible entity’s licence, are not valid, then it may be that the room management agreements which they replaced were not validly terminated and remain on foot.

The dispute about the Opening Date within the meaning of the hotel management agreement is relevant to when the first room management agreements will expire. This is because the “Commencement Date” within the meaning of the first room management agreements is the same day as the Opening Date within the meaning of the hotel management agreement.

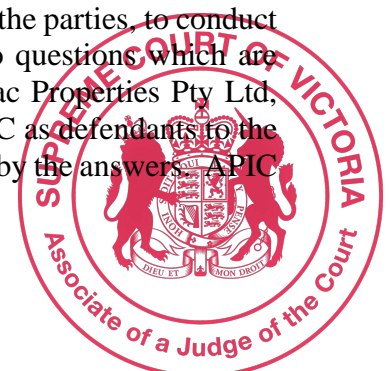
Proceedings

The above issues arise in three separate legal proceedings in the Supreme Court of Victoria:

- (a) The *first* proceeding (S ECI 2022 02457) was commenced by Yarra Valley Heritage Estate Pty Ltd (**YVHE**), Austpac Properties Pty Ltd and Yarra Valley Lodge Pty Ltd (as plaintiffs) against Vasco (**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.
- (b) The *second* proceeding (S ECI 2022 02457) was commenced as an application by Vasco for directions (judicial advice) from the Court regarding its involvement in the YVHE Proceeding (**Vasco Proceeding**).
- (c) The *third* proceeding (S ECI 2022 02906) was commenced by APIC against Vasco (**APIC Proceeding**). APIC is asking the Court to make orders declaring that the change to the new Evergreen room management agreements in 2015 was invalid on the grounds that it was not permitted by the Scheme Constitution. In this proceeding, APIC also asserts that it has validly terminated the room management agreements affecting its two rooms (rooms 112 and 131) pursuant to termination notices dated 29 June 2022 removing these rooms from the pool of rooms available for use in connection with the Scheme and entitling it to possession of them.

Determination of issues

This notice is issued in the Vasco Proceeding. In order to avoid inconsistent outcomes and to minimise costs, the Court has decided, with the consent of the parties, to conduct a hearing in the Vasco Proceeding to determine the answers to questions which are common or relevant to all three proceedings and to join Austpac Properties Pty Ltd, Yarra Valley Lodge Pty Ltd (the current hotel operator) and APIC as defendants to the proceeding so that they may be heard on the questions and bound by the answers. APIC



will participate in the proceeding on its own behalf and, subject to the matters set out below, as representative of all other members of the Scheme.

In summary, the questions to be determined by the Court in the Vasco Proceeding are:

1. What is the “Opening Date” for the purposes of the hotel management agreement? Was it 8 May 2006 (as Vasco contends), 16 April 2002 (as suggested in Vasco’s 2020 and 2021 financial reports) or 28 June 2002 (as APIC contends), or some other date?
2. Was the hotel management agreement validly terminated on 6 January 2015?
3. Was the second option to extend the hotel management agreement validly exercised?
4. If it has not been validly terminated and if the second option to extend it was validly exercised, has the hotel management agreement expired? If so, when did it expire? If not, when will it expire?
5. Insofar as they permit the responsible entity to continue to occupy members’ rooms until either the Scheme is wound up or terminated by the responsible entity, were the “Evergreen Agreements” (being the “new” room management agreements described on page 2 above) valid?

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

- A. No. Members have a *right* to participate in the Vasco proceedings but are *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 6 of the order of the Supreme Court made 2 June 2023 enclosed with this notice sets out the steps members must take if they do not wish APIC to act as their representative in the Vasco Proceeding. This includes filing and serve the following documents by **1 August 2023**:
- (a) 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; and
 - (b) 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 may be joined as a defendant to the proceedings and, if joined, you will be responsible for obtaining your own legal advice, and paying your own costs, in respect of your participation in the Vasco Proceeding.



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

A. Yes. All members, 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.

Members 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 APIC by emailing David Grant and/or Alex Kuraica at Alex.Kuraica@cbp.com.au, 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 David Grant and/or Alex Kuraica by email at Alex.Kuraica@cbp.com.au or by telephone on 03 8624 2144;
- (b) contact Lyn Ridley at Vasco by email at lr Ridley@vascofm.com or by telephone on 03 8352 7120;
- (c) 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 2 June 2023.

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

