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Please reply to: Sydney office

19 October 2021

PRIVATE AND CONFIDENTIAL

Amy Brown
CEO Investment NSW
Level 9, 52 Martin Place
SYDNEY NSW 2000

By email: amy.brown

Dear Ms Brown

JENNIFER WEST

We act for Jennifer West in relation to her employment with the NSW Government.

The NSW Government's recent treatment of Ms West, which has seen her lose both her current role and the role offered to her and accepted by her, gives rise to a number of causes of action against it, including under the Australian Consumer Law, in equity and at common law.

Our client was a loyal and highly successful public servant throughout her employment and has been integral in rolling out the Global NSW network, enabling the return of international students and promoting trade and investment into NSW globally. Our client is particularly aggrieved by the NSW Government's actions, noting that not only has Ms West lost the new role of Senior Trade & Investment Commissioner – Americas (a position of which had already been offered to her and which she had accepted), but Ms West has also now lost her current role as Deputy Secretary, Trade and International.

We set out below, in non-exhaustive terms, particulars of Ms West's mistreatment, as well as details regarding the nature of the claims available to Ms West.

PART A: FACTUAL BACKGROUND

1 Employment

1.1 On 12 October 2020, Ms West commenced employment in the role of Deputy Secretary, Trade & Investment in NSW Treasury.

- 1.2 In early 2021, Ms West was selected to participate in the Band 3 Executive Leadership Program. This is a coveted program for high performers aimed at developing future Secretaries in the NSW Government.
- 1.3 In March 2021, the NSW Premier combined a number of government departments, including Trade & Investment, Destination NSW, the Office of the Chief Scientist, R&D NSW, the 24-Hour Commissioner role under the banner of Investment NSW with you as CEO. Investment NSW is an Agency under the Department of Premier and Cabinet (“DPC”).
- 1.4 At the time of this amalgamation, Ms West was the only Senior Executive member of NSW Treasury who moved across into the Investment NSW Leadership team. Upon moving into Investment NSW, Ms West continued in her role as the Deputy Secretary of Trade and International and was confirmed as a permanent part of Investment NSW's Leadership team in May 2021.
- 1.5 In her role as Deputy Secretary, Trade and International, Ms West has been highly successful, and has worked federally and internationally to improve trade and investment for both the NSW Government and on behalf of the people of NSW, including, but not limited to, the following:
 - (a) increasing NSW Government's presence globally, including by:
 - (i) creating global hubs around the world to promote NSW trade around the world;
 - (ii) securing funding for the “Global NSW” rollout (a NSW initiative to support NSW industry, innovation, trade and development internationally);
 - (iii) building the NSW Government's profile internationally through strong stakeholder management/networks by:
 - (A) liaising with key European Ambassadors, including facilitating a trip for 14 European Ambassadors to the Hunter Valley;
 - (B) attending fortnightly meetings with the Japanese Consul General and heads of Japan External Trade Organisation;
 - (C) liaising with the Deputy High Commissioner for Singapore in Canberra;
 - (D) working in her capacity as NSW Government's representative for the European Business Council, member of Study NSW Board and Governor of the American Chamber of Commerce (“AmCham”) to raise NSW's profile globally;
 - (E) working in her capacity as the NSW Government's representative on the Senior Trade and Investment Group at a federal level with Austrade;

- (F) leading the focus on trade and international student returns with the Indian Consul General and Australia India Business Council;
 - (G) representing the NSW Government at major events and speaking events including the Premiers Export Award Finals, the Indian High Commission and events for the opening of the International Student Hub;
 - (H) speaking on panels and at global events for the British Chamber of Commerce during the COVID-19 pandemic;
- (b) improving NSW's Trade outcomes, including by:
- (i) developing NSW's first ever Trade Statement with the goal of doubling exports by 2030;
 - (ii) implementing NSW's trade strategy, including the "Going Global" program which last year took 150 exporters globally and delivered approximately \$90M in export revenue for the state of NSW. This year, the program is taking 200 exporters and 120 services and tech exporters global;
 - (iii) leading Federal Government engagement with Austrade and the Department of Agriculture to support exporters in light of Chinese trade bans;
- (c) facilitating the return of international students, including by:
- (i) engaging the international education sector, NSW Police and NSW Health to create a plan for the return of students;
 - (ii) meeting with the Federal Government, including the Department of Foreign Affairs and Trade, Department of Infrastructure, Department of Home Affairs and Austrade to facilitate the return of international students;
 - (iii) ensuring an integrated support program for students onshore, including helping obtain \$20M in crisis accommodation for students and helping to launch the first ever international student hub in Sydney with services for international students;
- (d) developing a clear strategy regarding population/skills and migration, including by:
- (i) liaising with Federal Government and achieving:
 - (A) 50% of all Significant Investor Visas;
 - (B) 40% of Global Talent Visas;
 - (C) +30% grown in the Business Innovation Visas; and

- (ii) leading a 5-year strategy regarding population, skills and migration working across areas of NSW Government and Federal Government as well as key industry bodies.

2 Senior Trade & Investment Commissioner – Americas opportunity

- 2.1 On 11 May 2021, Ms West spoke to you about applying for the role of Senior Trade & Investment Commissioner – Americas (“**STIC Role**”). You indicated that you would be delighted if Ms West applied for this role.
- 2.2 On 12 May 2021, Ms West applied for the STIC Role by way of cover letter attaching her resume. You subsequently advised Ms West that she would be taken off any STIC recruitment panels to ensure the interview process remained objective. Ms West was also required to undergo psychological testing and provide referees for the STIC Role.
- 2.3 On 19 July 2021, you texted Ms West advising her that Jim Betts, the new Secretary for the DPC, would be on her interview panel rather than Tim Reardon, Secretary, Department of Premier and Cabinet (who had announced he would be leaving the public service).
- 2.4 On 21 July 2021 between 1:00-1:30pm, Ms West attended an interview for the STIC Role with you, Mr Betts, Warwick Smith, Independent Panel Member and Marianne Broadbent, Global Recruiter.
- 2.5 On 12 August 2021, you called Ms West to officially let her know that she had been successful in obtaining the STIC Role.
- 2.6 You subsequently texted Ms West the words “Here’s one to frame!” with a copy of a briefing note signed by the then NSW Premier, Gladys Berejiklian, regarding Ms West’s appointment to the STIC Role.
- 2.7 On 13 August 2021, Ms West emailed you confirming receipt of the NSW Premier’s note, and requesting an increase to her proposed remuneration to account for living costs in New York as well as approval to obtain tax advice from Deloitte.
- 2.8 On 14 August 2021, you replied to the above email accepting Ms West’s proposed package and approving her utilisation of Deloitte for tax advice.
- 2.9 On 26 August 2021, Ms West sent multiple text messages to Kristy Manton, HR Director for Investment NSW, requesting a further update regarding the contract for the STIC Role.
- 2.10 On 31 August 2021, Ms West sent another text message to Ms Manton to follow up on the status of her contract for the STIC Role.
- 2.11 On 1 September 2021, Ms West received her police check for the purposes of the STIC Role.
- 2.12 On 6 September 2021, Ms West was informed by Ms Manton via text message that the contract for the STIC Role was almost ready.

- 2.13 On 15 September 2021, Ms West sent another follow-up text message to Ms Manton regarding the contract for the STIC Role. In response, Ms Manton advised Ms West that the contract was delayed as the “Big 4” accounting firms were unable to provide US tax advice.
- 2.14 On 16 September 2021, Ms West followed up with Chris Carr, Legal Counsel for Investment NSW, and Ms Manton after finding out about the issue of the tax advice. Ms West sought to understand why the issue of tax advice would delay the contract being issued to her. Ms West also escalated the issue to Lisa Braid, COO, requesting that she follow-up on finalising the contract for the STIC Role.
- 2.15 Also on 16 September 2021, Ms West received a text message from Ms Manton apologising for the delay. Mr Carr subsequently sent an email to Ms West explaining the reasons for the delay in the contract being that they were awaiting tax advice. In response, Ms West requested adding a clause to the contract saying “awaiting tax advice” to move it along.
- 2.16 At 7am on 17 September 2021, Ms West met with you for a walk. During this walk, you advised Ms West that the then NSW Deputy Premier, John Barilaro, had formally lodged a submission to Cabinet which would, if approved, affect Investment NSW's delegations in regards to the appointment of Senior Trade & Commissioner roles, including the appointment of Ms West to the STIC Role. In effect, Mr Barilaro was seeking to revoke an offer of employment (which had been accepted) to a loyal public servant vetted and approved via an official process and replace the position with a person appointed at his discretion. Ms West was also informed by you that in light of Ms West's prior appointment to the STIC Role, you had already taken the salary for Ms West's existing role as Deputy Secretary, Trade and International to fund two other roles in Investment NSW.
- 2.17 Later on 17 September 2021, Ms West spoke with Mr Carr and Alexandra Engle, your Chief of Staff, to see if there was any way to finalise the contract for the STIC Role ahead of the Cabinet decision.
- 2.18 On 18 September 2021, you emailed Ms West confirming that the contract would need to await the outcome of the Cabinet decision
- 2.19 On 27 September 2021, NSW Cabinet approved Mr Barilaro's submission, the effect of which was that he had the power to appoint a person to the STIC Role at his discretion despite the fact that a loyal public servant had already been appointed to the role. Later that day, you informed Ms West that she was the “*most severely impacted*” by Cabinet's decision. Ms West later asked you whether she still had her existing job as Deputy Secretary, Trade and International to which you responded in words to the effect of, “*I honestly don't know*”.
- 2.20 Ms West was scheduled to have a one-on-one meeting with you on 1 October 2021 during which you were going to discuss the impact of the Cabinet decision. However, on 29 September 2021, without explanation, you cancelled this meeting and did not engage in any follow-up communication with Ms West until late on the Thursday night.

- 2.21
- 2.22 On 1 October 2021, you and Ms Barilaro launched the NSW Trade Statement, which as set out above, Ms West had been leading on behalf of NSW Government since its beginning. Ms West subsequently emailed you indicating that she was disappointed not to have been involved in the launch given her involvement in the project.
- 2.23 Later on 1 October 2021, Ms Berejiklian announced her resignation as NSW Premier in light of an investigation into her conduct commenced by the Independent Commission Against Corruption. Ms Berejiklian's final day in office was 5 October 2021.
- 2.24 On 6 October 2021, Mr Barilaro announced his resignation as Deputy Premier.
- 2.25
- 2.26 On 11 October 2021, Ms West emailed Mr Coutts-Trotter, the new Secretary for Department of Premier and Cabinet, seeking to discuss her work situation when she returned to work on 13 October 2021. To date, Ms West has not received a response to this email.
- 2.27
- 2.28 During the day of 13 October 2021, Ms West became aware that there had been a Standing Order 52 tabled in the Upper House of Parliament requesting all the documentation in regards to the Senior Trade & Investment Commissioner appointments, which relevantly, will include the information in relation to Ms West's appointment the STIC Role.
- 2.29 On 14 October 2021, Ms West met with you at 5:15pm. During this meeting you informed Ms West that:
- (a) she would not be getting the STIC Role;
 - (b) the STIC Role would be a "present" for someone else;
 - (c) Ms West's role as Deputy Secretary, Trade and International was to be abolished and Ms West would receive 38 weeks' redundancy pay;
 - (d) Ms West could consider the timing of the redundancy and revert.
- 2.30 On 15 October 2021, due to continued feelings of stress in relation to her employment situation, particularly in light of Ms West's colleagues pressing her for information about what has occurred, Ms West attended her doctor who issued her with a certificate that she was unfit for work.
- 2.31 Since 18 October 2021, Ms West has been on personal leave.

PART B: DETRIMENTAL RELIANCE**3 Detrimental Reliance**

3.1 Since learning of her appointment to the STIC Role, Ms West has taken a number of steps to affect her move to New York by acting to her detriment, including:

- (a) meeting with real estate agents and attending to maintenance around her home in preparing it for rent in the amount of approximately \$5,000;
- (b) meeting with relocation companies;
- (c)
- (d) meeting with her tax accountant, phoning superannuation and insurance companies and getting her finances/personal affects together; and
- (e) reaching out to real estate brokers in regards to rental accommodation in New York.

4 Loss and damage

4.1 Not only has Ms West suffered the above detriment, Ms West has also suffered loss and damage that includes:

- (a)
- (b)
- (c)
- (d)
- (e)

4.2

4.3

PART C: LEGAL POSITION

5 Breach of Contract

- 5.1 As a result of the conduct set out at paragraph 2 above, there existed a contract between Ms West and the NSW Government in relation to the STIC Role (“**STIC Role Contract**”). Relevantly:
- (a) the NSW Government offered the STIC Role to Ms West;
 - (b) Ms West accepted the NSW Government’s offer;
 - (c) the NSW Government and Ms West reached agreement in relation to, *inter alia*, remuneration; and
 - (d) Ms West acted to her detriment (as set out at paragraph 3 above).
- 5.2 The NSW Government breached the STIC Role Contract by withdrawing its offer notwithstanding the fact that: Ms West had accepted the offer; the parties had reached agreement; and Ms West had acted to her detriment.
- 5.3 As a result of this breach, the NSW Government is liable to compensate Ms West for the damage suffered, including the loss set out in paragraph 4 above in addition to the loss of reasonable notice.

6 Contravention of the Australian Consumer Law

- 6.1 Section 18 of the *Australian Consumer Law* (which appears as schedule 2 to the *Competition and Consumer Act 2010* (Cth) (“**CC Act**”)) makes it unlawful for a person to engage in misleading or deceptive conduct in trade or commerce.
- 6.2 Further, pursuant to section 31 of the *Australian Consumer Law*, a person must not, in relation to employment that is offered by the person or by another person, engage in conduct that is liable to mislead persons seeking the employment as to:
- (a) the availability, nature, terms or conditions of the employment; or
 - (b) any other matter relating to the employment.

Application of the Australian Consumer Law to the conduct of the NSW Government

- 6.3 The CC Act will bind the NSW Government to the extent that it is “carrying on a business” (see section 2B of the CC Act).
- 6.4 The NSW Government was both carrying on a business and engaging in trade and commerce when, through Ms West, it engaged in the conduct set out at paragraph 1.5 above for its own benefit as well as on behalf of the people of NSW.
- 6.5 We also note that negotiations between an existing employee and their employer regarding a variation to their contract and negotiations between a new employee and their new employer have been considered in “*trade or commerce*” (see *Barto v GPR Management Services Pty Ltd* [1991] FCA 659; *Stoelwinder v Southern Health Care Network* [2000] FCA 444).

Representations

- 6.6 It is apparent that the NSW Government clearly represented to Ms West that she would be commencing the STIC Role forthwith.
- 6.7 It is clear that these representations were misleading or deceptive in circumstances where the then Deputy Premier subsequently intervened in Ms West's appointment.
- 6.8 In the premises, Ms West relied on these representations to her detriment as set out in paragraphs 3.1 to 4.3 above.
- 6.1 In the alternative, the NSW Government has misled our client about the nature of the availability, nature, terms or conditions of employment offered, and our client has suffered a detriment.
- 6.2 Based on the above, Ms West has a strong claim for damages against the NSW Government for its contraventions of sections 18 and/or 31 of the Australian Consumer Law.

7 Estoppel

- 7.1 Further or in the alternative, the NSW Government is estopped from withdrawing Ms West's appointment to the STIC Role based on conventional estoppel, or in the alternative, equitable estoppel.
- 7.2 A conventional estoppel arises by reason of the following:
- (a) Ms West and employees of the NSW Government, including you, adopted an assumption that Ms West would be commencing the STIC Role forthwith;
 - (b) both parties have conducted their relationship on the basis of that mutual assumption; and
 - (c) a departure from this assumption will occasion detriment to Ms West.
- 7.3 Alternatively, a promissory estoppel arises in that:
- (a) Ms West adopted an assumption that she would be commencing the STIC Role forthwith;
 - (b) by reason of the representations made to Ms West on behalf of the NSW Government, including representations from the former NSW Premier, you, Mr Carr and Ms Manton, the NSW Government has induced or acquiesced in Ms West's adoption of that assumption;
 - (c) Ms West acted in reliance on this assumption;
 - (d) the NSW Government knew or intended Ms West to so act; and
 - (e) it will occasion detriment to Ms West if this assumption is not fulfilled.
- 7.4 By reason of the above, the NSW Government will be held to the terms of offer to Ms West of the STIC Role.

8 Political interference and Protected Disclosure

- 8.1 The effect of Mr Barilaro's motion is that the Deputy Premier has revoked an offer of employment to a loyal public servant vetted and approved via an official process in order to replace Ms West with a person appointed at his discretion. This is conduct that has the potential to bring the integrity of the Deputy Premier into disrepute and impair confidence in public administration.
- 8.2 Further, this is conduct that amounts to "Disclosable Conduct" under the *Public Interest Disclosure Act 2013* (NSW) ("**PID Act**") and this letter amounts to a public interest disclosure. As such, Ms West is entitled to the protections against reprisals as set out in the PID Act.

PART D: NEXT STEPS

9 Next steps

9.1

9.2

- 9.3 Should the matter not be capable of being amicably resolved, our client reserves all of her rights to take all legal steps and initiate proceedings without further notice.

Yours faithfully

HARMERS WORKPLACE LAWYERS

Michael Harmer

Greg Robertson

Lauren Brouwer-French