

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMERCIAL & EQUITY DIVISION  
COMMERCIAL LIST**

**No. 2073 of 2002  
F. 5476**

**BETWEEN:**

**ANSETT AUSTRALIA LTD (SUBJECT TO DEED OF COMPANY  
ARRANGEMENT) (ACN 004 209 410)**

**Plaintiff (Defendant to Counterclaim)**

**and**

**WESTPAC BANKING CORPORATION (ABN 33 007 457 141)**

**Defendant (Plaintiff by Counterclaim)**

**DEFENCE AND COUNTERCLAIM**

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**Date of Document:** 25 October 2002  
**Filed on behalf of:** The Defendant (Plaintiff by Counterclaim)

**Prepared by:**  
**ALLENS ARTHUR ROBINSON**  
**Lawyers**  
**530 Collins Street**  
**MELBOURNE VIC 3000**

**Solicitors' Code: 21455**  
**DX:** 30999 Melbourne Stock Exchange  
**Tel:** 9614 1011  
**Fax:** 9614 4661  
**Ref:** ASMM:MTSM (Mr M Schoenberg)

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**DEFENCE**

To the Amended Statement of Claim dated October 2002, the Defendant says as follows (with terms defined in the Amended Statement of Claim having the same respective meanings when used herein unless otherwise defined herein).

1. It admits paragraph 1.
2. It admits paragraph 2.
3. It admits paragraph 3.

4. It admits paragraph 4 and says further:
- (a) it was an implied term of the Participation Agreement that Ansett would not cease to operate the GR Program while the Participation Agreement remained on foot;
  - (b) alternatively, it was an implied term of the Participation Agreement that Ansett would not cease to operate the GR Program while the Participation Agreement remained on foot unless Ansett had given six months' prior notice to Westpac that it intended to cease to operate the GR Program.

### PARTICULARS

The term alleged in sub-paragraph (a) of this paragraph was to be implied from the following:

- (a) the fact that the Participation Agreement related to, assumed and depended upon the continuing existence and operation of the GR Program;
- (b) the fact that, if Ansett ceased to operate the GR Program, it would be impossible for Westpac to continue to provide to its Member customers, in respect of the use by them of the Global Rewards Westpac Visa Card, the ability to earn Points in the GR Program;
- (c) the fact that, if Ansett ceased to operate the GR Program, Member customers would be unable to redeem Points in the GR Program, accrued by them through use of the Global Rewards Westpac Visa Card, for Rewards under the Program;
- (d) the fact that the Global Rewards Westpac Visa Card was issued to customers of Westpac on the basis that, through use of it, Member customers would earn Points in the GR Program and be able to redeem such Points for Rewards under the GR Program;
- (e) the fact that the Global Rewards Westpac Visa Card was branded with the names and logos of both Ansett and Westpac;
- (f) the fact that the basis on which Westpac entered into the Participation Agreement was that Ansett would continue to operate the GR Program while the Participation Agreement remained on foot;

- (g) the fact that Ansett at all relevant times knew each of the facts set out in sub-paragraphs (a) to (f) (inclusive) above;
- (h) all of the contractual arrangements relating to the GR Program existing between Ansett and Westpac; between Westpac and its Member customers who had a Global Rewards Westpac Visa Card; and between such persons and Ansett;
- (i) all of the circumstances relating to the GR Program and the Participation Agreement.

The alternative term alleged in sub-paragraph (b) of this paragraph 4 was to be implied from:

- (i) the matters set out in sub-paragraphs (a) to (e) (inclusive), (h) and (i) above in these particulars;
- (ii) the fact that clause 19.1(a) of the Participation Agreement provided, "Ansett may terminate this Agreement by giving six months' prior written notice to [Westpac] at any time that it intends to cease to operate GR";
- (iii) the fact that no other term of the Participation Agreement authorised Ansett to terminate the Participation Agreement as a consequence of it ceasing or intending to cease to operate the GR Program;
- (iv) the fact that the basis on which Westpac entered into the Participation Agreement was that, subject to clause 19.1(a) of the Participation Agreement, Ansett would continue to operate the GR Program while the Participation Agreement remained on foot;
- (v) the fact that Ansett at all relevant times knew each of the facts set out in sub-paragraphs (i) to (iv) (inclusive) above.

5. Subject to the production of the Participation Agreement at the trial of this proceeding and reference to its full terms and effect, it admits paragraph 5.
6. Subject to the production of the Participation Agreement at the trial of this proceeding and reference to its full terms and effect, it admits paragraph 6.
7. Subject to the production of the Participation Agreement at the trial of this proceeding and reference to its full terms and effect, it admits paragraph 7.

8. Subject to the production of the Participation Agreement at the trial of this proceeding and reference to its full terms and effect, it admits paragraph 8.
9. Subject to the production of the Participation Agreement at the trial of this proceeding and reference to its full terms and effect, it admits paragraph 9.
10. It does not admit paragraph 10.
11. It refers to paragraph 4 above, and paragraphs 22 to 32 below, and otherwise denies paragraph 11.
12. It refers to paragraph 4 above, and paragraphs 22 to 32 below, and otherwise denies paragraph 12.
13. It refers to paragraph 4 above, and paragraphs 22 to 32 below, and otherwise denies paragraph 13.
14. It does not admit paragraph 14.
15. It refers to paragraph 4 above, and paragraphs 22 to 32 below, and otherwise denies paragraph 15.
16. It refers to paragraph 4 above, and paragraphs 22 to 32 below, and otherwise denies paragraph 16.
17. It refers to paragraph 4 above, and paragraphs 22 to 32 below, and otherwise denies paragraph 17.
18. Save that it admits that Ansett issued to it an invoice for \$9,164,100.45 dated 30 August 2001, which invoice it received on 3 September 2001 ("the August Invoice"), it does not admit paragraph 18.
19. It does not admit paragraph 19.

20. As to paragraph 20:
- (a) it admits that it has not paid to Ansett the August Invoice or the September Invoice (Ansett's issuing of which is not admitted) or monies in respect of the August Credited Points or the September Credited Points;
  - (b) it refers to paragraph 4 above and paragraphs 22 to 32 below;
  - (c) it says that it is not and never has been under any obligation to pay to Ansett any of the invoices or monies referred to in sub-paragraph (a) of this paragraph;
  - (d) it otherwise denies paragraph 20.
21. It refers to paragraph 4 above, and paragraphs 22 to 32 below, and otherwise denies paragraph 21.
22. Further, as at 17 September 2002:
- (a) the Participation Agreement remained on foot;
  - (b) Ansett had not given to Westpac six months', or any, notice that it intended to cease to operate the GR Program.
23. On or about 17 September 2002 Ansett ceased to operate the GR Program.
24. In the premises, Ansett's action in ceasing to operate the GR Program was wrongful and in breach of the term of the Participation Agreement alleged in sub-paragraph 4(a) hereof, alternatively the term of the Participation Agreement alleged in sub-paragraph 4(b) hereof.

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25. By reason of Ansett's breach of the Participation Agreement as alleged in paragraph 24 hereof, Westpac has suffered loss and damage.

### PARTICULARS

- (1) Loss of business and loss of customers as a result of the impossibility of Westpac continuing to provide to its Member customers, in respect of the use by them of the Global Rewards Westpac Visa Card, the ability to earn Points in the GR Program and as a result of the inability of such customers to redeem Points in the GR Program, accrued by them through use of the Global Rewards Westpac Visa Card, for Rewards under the Program.
- (2) Costs of establishing participation in another rewards program in place of participation in the GR Program through the Global Rewards Westpac Visa Card.

Further particulars will be provided prior to trial.

26. If, which is denied, Westpac is liable to Ansett in any amount in this proceeding, Westpac will set off against any such liability, to the extent that it is able, the amount for which Ansett is liable to it as alleged in paragraph 25 hereof.
27. Further or alternatively to paragraphs 22 to 26 hereof (inclusive), at the time of entering into the Participation Agreement, Westpac and Ansett both knew, assumed and understood, and it was the fact that:
- (a) Points in the GR Program had no material value to Members except the value derived from the right and ability of Members to redeem the Points for Rewards under the GR Program;
  - (b) Westpac agreed to enter into the Participation Agreement, and to make payment to Ansett for Points, on the basis and in the expectation that Members who obtained Points in the GR Program by use of a Global Rewards Westpac Visa Card would have and continue to have the right and the ability to redeem those Points for Rewards under the GR Program;

- (c) there was a substantial benefit to Westpac in its Member customers having and continuing to have the right and the ability to redeem for Rewards under the GR Program, Points obtained by use of a Global Rewards Westpac Visa Card;
  - (d) there was no material benefit to Westpac in its Member customers having Points in the GR Program if the Points did not carry and continue to carry with them the right and the ability to redeem the Points for Rewards;
  - (e) Ansett agreed to enter into the Participation Agreement, and to claim and receive payment from Westpac for Points, on the basis and in the expectation that Ansett would provide and continue to provide at its own cost Rewards to Members who sought to redeem for Rewards under the GR Program, Points obtained by use of a Global Rewards Westpac Visa Card.
28. Because Ansett ceased to operate the GR Program on or about 17 September 2001, as from that date:
- (a) Members who obtained Points in the GR Program by use of a Global Rewards Westpac Visa Card, and have not redeemed such Points, do not have the right or ability to redeem any such Points for Rewards under the GR Program;
  - (b) such unredeemed and unredeemable Points do not have any material value to Members;
  - (c) the crediting of such Points to Westpac's Member customers did not and does not confer any material benefit on Westpac;
  - (d) Ansett has not provided and will not provide any Rewards in redemption of such Points, and will not be obliged to incur any cost in redeeming such Points.

29. In the circumstances:

- (a) there was a failure of consideration in relation to all amounts ("Relevant Amounts") paid or payable by Westpac to Ansett under the Participation Agreement in respect of Points (including but not limited to August Credited Points and September Credited Points) which were credited by Ansett to Westpac's Member customers but not redeemed by Members for Rewards before Ansett ceased to operate the GR Program;
- (b) in so far as Westpac has paid or is required to pay Relevant Amounts to Ansett, it has derived and would derive no material benefit in doing so;
- (c) if Ansett were to retain or receive Relevant Amounts it would derive a windfall because Ansett has not provided and will not provide any Rewards in redemption of the Points to which such Relevant Amounts relate, and will not be obliged to incur any cost in redeeming such Points;
- (d) it is unconscionable for Ansett to claim or receive or retain Relevant Amounts;
- (e) payment of Relevant Amounts unjustly enriches Ansett at the expense of Westpac, and Ansett is obliged to make restitution to Westpac of all Relevant Amounts.

#### PARTICULARS

Westpac will give particulars of the unredeemed Points, and of the Relevant Amounts, following discovery.

30. If, which is denied, Westpac is liable to Ansett in any amount in this proceeding, Westpac will set off against any such liability, to the extent that it is able, the amount of restitution which Ansett must make to Westpac as alleged in paragraph 29 hereof.



31. Further and alternatively, by virtue of the matters alleged in paragraphs 27, 28 and 29(a)-(d) (inclusive) hereof, Relevant Amounts constitute moneys had and received by Ansett to the use of Westpac, to which Ansett has no title, and Ansett is obliged to pay to Westpac all Relevant Amounts.
32. If, which is denied, Westpac is liable to Ansett in any amount in this proceeding, Westpac will set off against any such liability, to the extent that it is able, the amount of Ansett's liability to Westpac as alleged in paragraph 31 hereof.

### COUNTERCLAIM

33. Westpac refers to and repeats paragraphs 4, 22 to 25 (inclusive), 27 to 29 (inclusive) and 31 hereof, and the particulars subjoined to those paragraphs, and refers to and repeats by way of positive assertion the admissions in paragraphs 1 to 9 (inclusive) hereof.

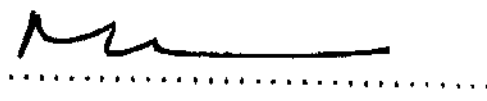
### AND WESTPAC CLAIMS:

- A. Damages.
- B. Further or alternatively, an order that Ansett make restitution to Westpac of all Relevant Amounts.
- C. Further or alternatively, an order that Ansett pay to Westpac all Relevant Amounts.
- D. Interest.
- E. Costs.

DATED: 25 October 2002

CHARLES SCERRI

D. J. BATT



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Allens Arthur Robinson  
Solicitors for the Defendant (Plaintiff by Counterclaim)