

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

No. 2073 of 2002
F 5476

BETWEEN:

ANSETT AUSTRALIA LIMITED (Subject to a Deed of Company
Arrangement)
(ACN 004 209 410)

Plaintiff

-and-

WESTPAC BANKING CORPORATION (ABN 33 007 457 141)

Defendant

AMENDED STATEMENT OF CLAIM

Date of document:	<u>October</u> September -2002
Filed on behalf of:	The Plaintiff
Prepared by:	Solicitors Code: 00054
Arnold Bloch Leibler	DX: 455 Melbourne
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- 1 The plaintiff ("**Ansett**") is and was at all relevant times a company incorporated according to law.
- 2 The defendant ("**Westpac**") is and was at all relevant times a company incorporated according to law.
- 3 From about August 1991, and at all relevant times, Ansett conducted a frequent flyer reward program called Global Rewards ("**the GR Program**").

PARTICULARS

The GR Program was governed by Global Rewards Terms and Conditions. A copy of those Terms and Conditions is in the possession of Ansett's solicitors and may be inspected by prior appointment.

- 4 On or about 9 April 2001 Ansett and Westpac entered into a Participation Agreement ("**the Participation Agreement**").

PARTICULARS

The Participation Agreement is in writing and is dated 9 April 2001. A copy of it is in the possession of Ansett's solicitors and may be inspected by prior appointment.

- 5 The Recitals of the Participation Agreement provide:

- "A. *Ansett conducts a frequent flyer reward program called Global Rewards under which those people who join Global Rewards accrue points based on their consumption of goods and services supplied by Ansett, the Participant [Westpac] and other participants in Global Rewards and can then exchange those Points for specified goods and services.*
- B. *The parties have developed a Global Rewards Westpac Visa Card.*
- C. *The Participant [Westpac] wishes to participate in Global Rewards in respect of the use by a Member of the Global Rewards Westpac Visa Card in accordance with the terms and conditions set out in this Agreement."*

- 6 There were terms of the Participation Agreement as follows:

- "Ansett Calendar Month" means the 28 or 35 day billing periods implemented by Ansett (clause 1.1);
- "Bonus Points" means Points earned by a Cardholder pursuant to the Global Rewards Westpac Visa Card Bonus Partner Program,

when using a Global Rewards Westpac Visa Card to purchase goods or services from a Bonus Partner, in addition to Points credited pursuant to Clause 6 (clause 1.1);

- “Cardholder” means a person who has a Global Rewards Westpac Visa Card (clause 1.1);
- “Commencement Date” means 1 January 2001 (clause 1.1);
- “Global Rewards Program Terms and Conditions” means the terms and conditions which govern a Member’s membership in Global Rewards (clause 1.1);
- “Global Rewards Westpac Visa Card” means the Visa credit card issued by the Participant (Westpac) which is branded with the names and logos of the Participant and Ansett (clause 1.1);
- “Global Rewards Westpac Visa Card Bonus Partner Program” means the program operated by the Participant (Westpac) pursuant to which Members are credited Bonus Points in relation to Qualifying Purchases from Bonus Partners (clause 1.1);
- “GR” means Global Rewards, a frequent flyer reward program conducted by Ansett (clause 1.1);
- “Member” means a natural person who is a member of GR but does not include an executor, administrator or legal representative or assignee of such person (clause 1.1);
- “Points” means GR points accrued by Members based on their consumption of goods and services supplied by Ansett, the Participant (Westpac) and other participants in GR (clause 1.1);
- “Qualifying Purchase 1” means the acceptance by the Participant (Westpac) of a Member’s application for a Global Rewards Westpac

Visa Card (regardless of whether that Member applies for membership of GR at the same time as making the application for a Global Rewards Westpac Visa Card or otherwise) and subsequent issue of a Global Rewards Westpac Visa Card to a Member (clause 1.1);

- "Qualifying Purchase 2" means the total amount charged to a Global Rewards Westpac Visa Card credit card account issued by the Participant (Westpac) and billed on their monthly statement of account provided to the Member by the Participant, excluding fees, interest charges, card fees, cash advances, government charges and payments, and transactions that are excluded from the accrual of Points by the Global Rewards Program Terms and Conditions, and after deduction of credit returns and adjustments (including disputed transaction) (clause 1.1);
- "Rewards" means the specified goods and services for which Points accrued by Members can be exchanged in GR (clause 1.1);
- The Participant (Westpac) will participate in GR under the Terms and Conditions set out in the Participation Agreement (clause 2(a));
- The term of the agreement is from the Commencement Date until it is terminated in accordance with Clause 19 (clause 3(a));
- The Participant (Westpac) will be responsible for the Global Rewards Westpac Visa Card's function (clause 5(a)).

7 Clause 6 of the Participation Agreement provides inter alia:

"6. Point Accrual

- (a) For every Qualifying Purchase 1 by a Member, Ansett will credit the Member with 1000 Points.*

- (b) *Unless otherwise agreed, for every Qualifying Purchase 2 by a Member, Ansett will credit the Member with one Point for every dollar charged.*
- (c) *The Participant will pay Ansett for every Point credited to a Member:*
 - (i) *from the Commencement Date until 30 September 2001, at a rate of \$0.0085 per Point;*
 - (ii) *from 1 October 2001 until 31 December 2003, at a rate of \$0.01 per Point; and*
 - (iii) *thereafter, at a rate per Point to be agreed by the parties from time to time.*
- (d) *The Participant is only required to pay Ansett for Points actually credited to a Member's GR account.*
- (e) *...*
- (f) *The obligations of Ansett to credit Points to a Member and for the Participant to pay for those Points will be subject to the Member complying with the Global Rewards Program Terms and Conditions."*

8 Clause 9 of the Participation Agreement provides inter alia:

"9. Global Rewards Westpac Visa Card Bonus Partner Program

- (a) *The Participant must obtain Ansett's consent in writing to the appointment of any Bonus Partner (such consent to be at the sole discretion of Ansett).*
- (b) *....*
- (c) *....*
- (d) *....*
- (e) *For every Qualifying Purchase by a Member from a Bonus Partner:*
 - (i) *Ansett will credit the Member with one Bonus Point for every dollar charged; and*
 - (ii) *the Participant will pay Ansett for each Bonus Point credited to a Member:*
 - (A) *In respect of the Bonus Partners listed in Schedule 3, at a rate of \$0.01 per Bonus Point;*

(B) *in respect of the Bonus Partners listed in Schedule 4, at a rate of \$0.015 per Bonus Point; and*

(C) *in respect of all other Bonus Partners, at a rate per Bonus Point to be agreed, such rate to be no less than \$0.015 per Point. . .*

”

9 Clause 10 of the Participation Agreement provides:

“10. Invoicing

Ansett will invoice the Participant at the end of each Ansett Calendar Month. Payment must be made by the Participant no later than 30 days after the date of the invoice in such manner as Ansett may notify the Participant from time to time.”

10 In the Ansett Calendar Month of August 2001, pursuant to and in accordance with the terms of clauses 6(a), 6(b) and 9 (e) (i) of the Participation Agreement, Ansett credited Members of the GR Program with Points and Bonus Points for Qualifying Purchases made by those Members (“**the August Credited Points**”).

PARTICULARS

Particulars of the August Credited Points are set out in Schedule A hereto.

11 Pursuant to clause 6(c)(i) of the Participation Agreement, Westpac was and is obliged to pay Ansett for every such Point credited to a Member pursuant to clauses 6(a) and 6(b) of the Participation Agreement at the rate of \$0.0085 per Point.

12 Further, pursuant to clause 9(e)(ii) of the Participation Agreement, Westpac was and is obliged to pay Ansett for each such Bonus Point

credited to a Member pursuant to clause 9(e)(i) of the Participation Agreement at the rate specified in sub-clauses 9 (e)(ii) (A), (B) and (C).

- 13 In the premises, Westpac is indebted to Ansett in the sum of \$9,164,100.45 in respect of the August Credited Points.

PARTICULARS

Particulars of this indebtedness are set out in Schedule A hereto.

- 14 Further, in the Ansett Calendar Month of September 2001, pursuant to and in accordance with the terms of clauses 6(a), 6(b) and 9(e)(i) of the Participation Agreement, Ansett credited Members of the GR Program with Points and Bonus Points for Qualifying Purchases made by those Members ("**the September Credited Points**").

PARTICULARS

Particulars of the September Credited Points are set out in Schedule B hereto.

- 15 Pursuant to clause 6(c)(i) of the Participation Agreement, Westpac was and is obliged to pay Ansett for each and every such Point credited to a Member pursuant to clauses 6(a) and 6(b) of the Participation Agreement at the rate of \$0.0085 per Point.
- 16 Further, pursuant to clause 9(e)(ii) of the Participation Agreement, Westpac was and is obliged to pay Ansett for each such Bonus Point credited to a Member pursuant to clause 9(e)(i) of the Participation Agreement at the rates specified in sub-clauses 9(e)(ii) (A), (B) and (C).

- 17 In the premises, Westpac is further indebted to Ansett in the sum of \$7,290,695.78 in respect of the September Credited Points.

PARTICULARS

Particulars of this further indebtedness are set out in Schedule B hereto.

- 18 On 30 August 2001 Ansett issued an invoice to Westpac for \$9,164,100.45 in respect of the August Credited Points ("the August invoice").

PARTICULARS

A copy of the August Invoice is in the possession of Ansett's solicitors and may be inspected by prior appointment.

- 19 On 11 September 2002 Ansett issued an invoice to Westpac for \$7,290,695.78 in respect of the September Credited Points ("the September Invoice").

PARTICULARS

A copy of the September Invoice is in the possession of Ansett's solicitors and may be inspected by prior appointment.

- 1920 In breach of the Participation Agreement Westpac has failed and/or refused to pay:

- (a) the monies owing by it to Ansett in respect of the August Credited Points (\$9,164,100.45);
- (b) the monies owing by it to Ansett in respect of the September Credited Points (\$7,290,695.78); or

(c) the August Invoice; or

(d) the September Invoice.

2021 By reason of the said breaches of the Participation Agreement Ansett
has suffered and continues to suffer loss and damage.

PARTICULARS

(a) Loss of \$16,454,796.23

(b) Loss of use of money.

AND THE PLAINTIFF CLAIMS:

A. \$16,454,796.23

B. Further or alternatively, damages.

C. Interest.

D. Costs.

E. Such further or other order as to the Court seems appropriate.

Dated: October~~September~~ 2002.

SP Whelan

MC Garner

.....
Arnold Bloch Leibler
Solicitors for the Plaintiff