

**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 (Defendant by Counterclaim)

-and-

WESTPAC BANKING CORPORATION
(ABN 33 007 457 141) Defendant (Plaintiff by Counterclaim)

REPLY AND DEFENCE TO COUNTERCLAIM

Date of document:	13 November, 2002
Filed on behalf of:	The Plaintiff
Prepared by:	Solicitors Code: 00054
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To the defence and counterclaim of the defendant ("**Westpac**") dated 25 October 2002, the plaintiff ("**Ansett**") says by way of reply and defence to counterclaim as follows:

NOTE:

- A. Terms defined in the amended statement of claim dated October 2002 bear the same meanings when used in this reply and defence to counterclaim.
- B. Terms defined in Westpac's defence and counterclaim dated 25 October 2002 bear the same meanings when used in this reply and defence to counterclaim.

REPLY

- 1 It denies paragraph 4(a) and refers to and repeats paragraph 18 below.
- 2 It denies paragraph 4(b) and refers to and repeats paragraph 18 below.
- 3 As to paragraph 11, it refers to and repeats paragraphs 1 and 2 above and paragraphs 12 –24 below, and otherwise joins issue.
- 4 As to paragraph 12, it refers to and repeats paragraphs 1 and 2 above and paragraphs 12-24 below, and otherwise joins issue.
- 5 As to paragraph 13, it refers to and repeats paragraphs 1 and 2 above and paragraphs 12-24 below, and otherwise joins issue.
- 6 As to paragraph 15, it refers to and repeats paragraphs 1 and 2 above and paragraphs 12-24 below, and otherwise joins issue.
- 7 As to paragraph 16, it refers to and repeats paragraphs 1 and 2 above and paragraphs 12-24 below, and otherwise joins issue.
- 8 As to paragraph 17, it refers to and repeats paragraphs 1 and 2 above and paragraphs 12-24 below, and otherwise joins issue.
- 9 As to paragraph 20(b), it refers to and repeats paragraphs 1 and 2 above and paragraphs 12-24 below.
- 10 It denies paragraph 20(c).
- 11 As to paragraph 21, it refers to and repeats paragraphs 1 and 2 above and paragraphs 12-24 below, and otherwise joins issue.
- 12 It admits paragraph 22.

13 As to paragraph 23, it says that on or about 17 September 2001 the GR Program was suspended by Ansett (as it was entitled to do in accordance with clause 1.3 of the Global Rewards Terms and Conditions referred to in paragraph 18(a) below) and that from that date Ansett ceased to operate the GR Program, but otherwise denies that paragraph.

14 It denies paragraph 24.

15 It denies paragraph 25.

16 In further answer to paragraph 25 it says that if (which is denied):

(a) Ansett breached the Participation Agreement as alleged in paragraph 24 of the defence and counterclaim;

(b) Westpac has suffered loss and damage as alleged in paragraph 25 of the defence and counterclaim,

then by virtue of clause 12.2(c) of the Participation Agreement, Ansett is not liable to Westpac for that loss and damage and Westpac has released and waived any claims against Ansett regarding that loss and damage.

17 It denies paragraph 26 and refers to and repeats paragraph 16 above.

18 It denies paragraph 27 and in further answer to that paragraph says:

(a) There were express terms of the Global Rewards Terms and Conditions (which at all relevant times governed the GR Program) that:

(i) The Global Rewards Terms and Conditions may be changed or varied at any time without notice by Ansett in its absolute discretion (clause 1.2);

(ii) Ansett may in its absolute discretion suspend or terminate Global Rewards at any time (clause 1.3);

- (iii) Neither Points nor Rewards have any cash value and neither is convertible to cash (clause 1.10);
- (iv) Ansett may at its absolute discretion suspend, cancel or terminate a membership or cancel all or any of a Member's accumulated Points at any time (clause 2.13);
- (v) Membership is terminated on the death or personal bankruptcy of a Member and all Points accumulated by the Member prior to the termination are immediately cancelled. Points accumulated prior to termination are not transferable and do not form part of the Member's estate (clause 2.15);
- (vi) All Points awarded and all Reward Certificates not exchanged for Rewards are cancelled upon a person ceasing to be a Member for any reason (clause 2.16);
- (vii) Points are not transferable and may not be pooled with Points earned by another Member (clause 3.3);
- (viii) To claim a Reward a Member must have accumulated the required number of Points in that Member's account (clause 4.2);
- (ix) Members may redeem Points for Rewards at any time while the Points are valid, subject to availability and applicable conditions (clause 4.3);
- (x) All Rewards are subject to availability and suppliers' restrictions (clause 4.4(a));
- (xi) Ansett may withdraw, replace or substitute Rewards at any time without notice. Ansett may at any time without notice alter the number of Points required to obtain a particular Reward, withdraw a Reward supplied or impose additional restrictions on a Reward or conditions for obtaining it (clause 4.5).

- (b) Westpac knew and understood the said terms of the Global Rewards Terms and Conditions at the time it entered into the Participation Agreement.
- (c) Accordingly, Westpac knew and understood at the time it entered into the Participation Agreement that Ansett in its absolute discretion at any time could inter alia:
- (i) change or vary the terms of the GR Program;
 - (ii) suspend or terminate the GR Program;
 - (iii) suspend, cancel or terminate a membership or cancel all or any of a Member's accumulated Points;
 - (iv) withdraw, replace or substitute rewards or impose additional restrictions on a Reward or conditions for obtaining it.
- (d) Further, Westpac by and upon its entry into the Participation Agreement subjected itself to the Global Rewards Terms and Conditions.

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Ansett relies upon inter alia clauses 2(a) and 17 of the Participation Agreement.

- (e) In the premises, Westpac, at the time it entered into the Participation Agreement, assumed the risk that Ansett may, in its absolute discretion:
- (i) change or vary the terms of the GR Program;
 - (ii) suspend or terminate the GR Program;
 - (iii) suspend, cancel or terminate a membership or cancel all or any of a Member's accumulated Points;
 - (iv) withdraw, replace or substitute rewards or impose additional restrictions on a Reward or conditions for obtaining it.

- (f) Further or alternatively, Westpac derived a material benefit from or in respect of the crediting of Members of the GR Program with Points and Bonus Points for Qualifying Purchases made by those Members, namely, the anterior use by those Members of the Global Rewards Westpac Visa Card in respect of those Qualifying Purchases.

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Westpac's material benefits included:

- (i) interest earned on or in respect of Qualifying Purchases; and
- (ii) credit, service or bank fees or charges in respect of Members' Global Rewards Westpac Visa Cards and/or the use by Members of their Global Rewards Westpac Visa Cards.

Further particulars will be provided following discovery.

19 As to paragraph 28:

- (a) It says that, in accordance with and as a result of the exercise by Ansett of its rights and entitlements under the Terms and Conditions of the GR Program alleged in sub-paragraph 18(a) above, members who obtained Points in the GR Program by use of a Global Rewards Westpac Visa Card and who had not redeemed those Points prior to the suspension of the GR Program on or about 17 September 2001 no longer enjoy an ability to redeem those Points for Rewards under the GR Program.
- (b) It further says that, in accordance with and as a result of the exercise by Ansett of its rights and entitlements under the Terms and Conditions of the GR Program alleged in sub-paragraph 18(a) above, Ansett has not provided and will not provide any Rewards and redemption of the Points referred to in sub-paragraph 19 (a) above.
- (c) It otherwise denies paragraph 28.

(d) It further says that:

- (i) members who obtained Points in the GR Program by use of a Global Rewards Westpac Visa Card, and who did not redeem those Points prior to the suspension of the GR Program on or about 17 September 2001, derived a material benefit from the crediting of those Points, namely, the opportunity to redeem those Points for Rewards up until the suspension of the GR Program;
- (ii) the crediting of those Points to Members did confer a material benefit on Westpac, namely, the anterior use by those Members of the Global Rewards Westpac Visa Card in respect of the Qualifying Purchases which gave rise to the crediting of those Points.

PARTICULARS

Westpac's material benefit included:

- (A) interest earned on or in respect of the said Qualifying Purchases;
- (B) credit, service or bank fees or charges in respect of Members' Global Rewards Westpac Visa Cards and/or the use by Members of their Global Rewards Westpac Visa Cards; alternatively such credit, service or bank fees or charges attributable to the said Qualifying Purchases.

Further particulars will be provided following discovery.

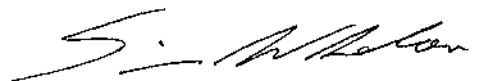
- 20 It denies paragraph 29 and further refers to and repeats paragraphs 18 and 19 above.
- 21 In further answer to paragraph 29 it says that if (which is denied) Ansett would, but for the matters set out in this paragraph, be liable to make restitution to Westpac of all Relevant Amounts as alleged in paragraph 29 of the defence and counterclaim or to repay all Relevant Amounts as alleged in paragraph 31 of the defence and counterclaim, then by virtue of clause 12.2(c) of the Participation Agreement Ansett is not liable to Westpac to make such restitution or payment as alleged.
- 22 It denies paragraph 30 and refers to and repeats paragraphs 20 and 21 above.
- 23 It denies paragraph 31 and refers to and repeats paragraphs 20 and 21 above.
- 24 It denies paragraph 32 and refers to and repeats paragraph 23 above.
- 25 Save for the admissions made therein, it otherwise joins issues with Westpac's defence.

DEFENCE TO COUNTERCLAIM


- 26 As to paragraph 33:
- (a) It refers to and repeats paragraphs 1, 2, 12, 13, 14, 15, 16, 18, 19, 20, 21 and 23 above.

(b) Save for the admissions made or referred to therein, it denies that paragraph.

DATED: 13 November 2002.



S.P. WHELAN



M.C. GARNER



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Arnold Bloch Leibler
Solicitors for the Plaintiff/Defendant by Counterclaim