

# ***CR 2009/19 - Income tax: Westpac Banking Corporation: Westpac Stapled Preferred Securities II***

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## Class Ruling

### Income tax: Westpac Banking Corporation: Westpac Stapled Preferred Securities II

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#### **ⓘ This publication provides you with the following level of protection:**

This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, the Commissioner must apply the law to you in the way set out in the ruling (unless the Commissioner is satisfied that the ruling is incorrect and disadvantages you, in which case the law may be applied to you in a way that is more favourable for you – provided the Commissioner is not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid tax, penalty or interest in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

## What this Ruling is about

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1. This Ruling sets out the Commissioner's opinion on the way in which the relevant provision(s) identified below apply to the defined class of entities, who take part in the scheme to which this Ruling relates.

#### **Relevant provision(s)**

2. The relevant provisions dealt with in this Ruling are:

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936);
- subsection 44(1) of the ITAA 1936;
- section 45 of the ITAA 1936;
- section 45A of the ITAA 1936;
- section 45B of the ITAA 1936;
- section 45C of the ITAA 1936;
- section 177EA of the ITAA 1936;
- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997);
- Division 67 of the ITAA 1997;

- Division 104 of the ITAA 1997;
- section 109-5 of the ITAA 1997;
- subsection 110-25(2) of the ITAA 1997;
- subsection 110-55(2) of the ITAA 1997;
- Subdivision 130-A of the ITAA 1997;
- section 204-30 of the ITAA 1997;
- section 207-20 of the ITAA 1997; and
- section 207-145 of the ITAA 1997.

All subsequent legislative references are to the ITAA 1997 unless otherwise indicated.

## **Class of entities**

3. The class of entities to which this Ruling applies are the Australian resident individuals, companies and complying superannuation entities who acquired Westpac Stapled Preferred Securities II (Westpac SPS II) offered by Westpac Banking Corporation (Westpac) from the Initial Purchaser (IP), and who hold the Westpac SPS II on capital account.

4. The class of entities to which this Ruling applies are referred to as 'Holders'.

5. The class of entities to which this Ruling applies does not include investors who acquire the Westpac SPS II other than by way of submitting the Application Form attached to the Westpac Stapled Preferred Securities II Prospectus dated 2 March 2009 (the Prospectus) for the offer of the Westpac SPS II (that is, this Ruling only applies to investors who have acquired the Westpac SPS II from the IP under the Prospectus).

## **Qualifications**

6. The class of entities defined in this Ruling may rely on its contents provided the scheme actually carried out is carried out in accordance with the scheme described in paragraphs 10 to 37 of this Ruling.

7. If the scheme actually carried out is materially different from the scheme that is described in this Ruling, then:

- this Ruling has no binding effect on the Commissioner because the scheme entered into is not the scheme on which the Commissioner has ruled; and
- this Ruling may be withdrawn or modified.

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## **Date of effect**

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9. This Ruling applies from 31 March 2009 to 30 June 2015. The Ruling continues to apply after 30 June 2015 to all entities within the specified class who entered into the specified scheme (as described in paragraphs 10 to 37 of the Ruling) under the Prospectus. However, this Ruling will not apply to taxpayers to the extent that it conflicts with the terms of a settlement of a dispute agreed to before the date of issue of this Ruling (see paragraphs 75 and 76 of Taxation Ruling TR 2006/10).

## **Scheme**

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10. The following description of the scheme that is the subject of this Ruling is based on the following documents provided by Allens Arthur Robinson (the Applicant). These documents, or the relevant parts of them, as the case may be, form part of and are to be read in conjunction with this description.

11. The relevant documents, or parts of documents, to be read in conjunction with this description are:

- the application for a Class Ruling dated 7 November 2008 lodged by the Applicant on behalf of Westpac;
- the Prospectus (replacing the original Westpac Stapled Preferred Securities II Prospectus dated 20 February 2009);
- the Note Deed Poll dated 20 February 2009;
- the Note Terms as contained in the Prospectus;
- the Subscription Agreement dated 20 February 2009;
- the Preference Share Terms as contained in the Prospectus;

- correspondence dated 17 October 2008 to 31 March 2009, from the Applicant providing further particulars; and
- Media Release dated 9 December 2008 in relation to the completion of \$2.5 billion share placement by Westpac.

**Note:** certain information which relates to the affairs of Westpac that is not in the public domain has been taken into account in determining the Commissioner's opinion set out in this Ruling (including the application of certain anti-avoidance provisions). This information has been provided on a commercial-in-confidence basis and will not be disclosed or released under the Freedom of Information legislation.

12. In this Ruling, unless otherwise defined, capitalised terms take their meaning as per the Prospectus.

13. Westpac is an authorised deposit-taking institution and is required to comply with the capital requirements of the Australian Prudential Regulation Authority (APRA), which includes the maintenance of mandatory levels of Tier 1 Capital.

14. The Westpac SPS II have been approved by APRA as Non-innovative Residual Tier 1 Capital and will assist Westpac in meeting its Tier 1 Capital requirement.

15. The Holders have acquired the Westpac SPS II from the IP. A Westpac SPS II is an instrument consisting of a bundle of rights which have the features of a Note and a Preference Share. The Holders have acquired Westpac SPS II from the IP for a price of \$100 each on 31 March 2009. Pursuant to the terms of the Offer in the Prospectus, the Holders have acquired Westpac SPS II subject to the Note Deed Poll, the Note Terms and the Preference Share Terms. In doing so, the Holders will be taken to be bound by, and subject to the terms of the offer made by the IP to assign the Note to Westpac on the occurrence of a defined Assignment Event. When an Assignment Event occurs, the Westpac SPS II will be Unstapled (that is, the Notes will be detached and transferred to Westpac) without any further action being required by the Holder. Each Note and Preference Share comprising a Westpac SPS II will be listed on the Australian Securities Exchange (ASX) as a stapled security before the Note is detached. Upon becoming Unstapled, the Westpac SPS II consisting solely of Preference Shares will remain listed on the ASX subject to their continuing compliance with ASX Listing Rule requirements, except where the Unstapling event is in respect of mandatory Conversion, early Conversion or Redemption.

## **Main features of the Westpac SPS II**

### ***Distributions in respect of the Westpac SPS II***

16. Interest and Dividends payable in respect of the Westpac SPS II are expected to be fully franked. To the extent that the Interest or Dividend is not franked to 100% under Part 3-6, the Holders will generally receive a Gross-Up Amount, in addition to the Interest or Dividend payable.

17. Broadly, Interest and Dividends are scheduled to be paid quarterly in arrears on the Interest Payment Dates or Dividend Payment Dates as applicable and on any Redemption Date or Conversion Date. They are non-cumulative.
18. Interest and Dividends and Gross-Up Amounts (including any Optional Dividend) will not be paid to Holders on an Interest Payment Date (or a Dividend Payment Date) if the relevant conditions in the terms of the Westpac SPS II are not satisfied.
19. If the Interest or Dividend is not paid in full because the relevant conditions in the terms of the Westpac SPS II are not satisfied, Holders have no claim in respect of the unpaid portion of that Interest or Dividend, notwithstanding the ability for an Optional Dividend to be paid. However, if the unpaid amount is unpaid Interest, an Assignment Event may occur.
20. No interest accrues on any unpaid Interest, Dividend or Gross-Up Amount, and the Holders will have no claim or entitlement in respect of interest on any unpaid Interest, Dividend or Gross-Up Amount.
21. Following the occurrence of an Assignment Event and consequential Unstapling of the Notes and Preference Shares and the assignment of the Notes to Westpac (the Assignee), Westpac may choose to pay an Optional Dividend (subject to APRA approval) equal to the aggregate amount of any unpaid Interest or Dividends and any Gross-Up Amounts (as applicable) which were scheduled to be paid in the 12 months before the date of the Optional Dividend.
22. Subject to certain exceptions, non-payment of Interest or a Dividend will restrict Westpac from paying certain distributions in respect of other specific instruments issued by Westpac. The Holders will not have a right to require redemption of the Notes for cash prior to the winding up of Westpac.
23. Dividends on the Preference Shares will become payable after an Assignment Event (other than mandatory Conversion, early Conversion or Redemption) has occurred as each Westpac SPS II will then consist solely of a Preference Share.

***An Assignment Event – the Westpac SPS II is Unstapled***

24. Immediately after an Assignment Event, the following will occur in relation to all Westpac SPS II to which the Assignment Event applies:
- (a) Westpac will accept the Holders' offer to assign the relevant Note to it;
  - (b) the relevant Note will become Unstapled from the Preference Share to which it is Stapled;
  - (c) the Note and the Holders' right, title and interest in the Note are assigned to Westpac on that date; and

- (d) all amounts payable in respect of the Note after the occurrence of an Assignment Event will be payable to Westpac.

25. An Assignment Event is defined in the Note Terms. Broadly, an Assignment Event in respect of a Westpac SPS II means the earliest of any of the following dates or events to occur after the issue of Preference Shares comprising part of the Westpac SPS II:

- (a) the date Westpac selects in its absolute discretion as the Assignment Event Date by announcement to the ASX in which announcement such date is specified;
- (b) the appointment by APRA of a statutory manager to Westpac pursuant to subsection 13A(1) of the *Banking Act 1959*;
- (c) the Conversion Date on which Preference Shares comprising the relevant Westpac SPS II Convert, immediately prior to the Conversion taking effect;
- (d) the Redemption Date on which Preference Shares comprising the relevant Westpac SPS II are Redeemed, immediately prior to the Redemption taking effect;
- (e) the 21st Business Day after an Interest Payment Date, where Westpac has not paid in full Interest and Gross-Up Amount on the Notes within 20 Business Days of that Interest Payment Date; or
- (f) the occurrence of an Event of Default.

### ***Mandatory Conversion***

26. On the Mandatory Conversion Date, Westpac must, unless the Westpac SPS II are otherwise Redeemed or Transferred on that date, Convert all Preference Shares on issue at that date into Westpac Ordinary Shares. The variation of the status of, and the rights attaching to, a Preference Share and any allotment of additional Westpac Ordinary Shares, is together termed 'Conversion' in the Preference Share Terms.

27. Each Holder may also be allotted an additional number of fully paid Westpac Ordinary Shares for each Preference Share Converted. The number of additional Westpac Ordinary Shares is calculated using a formula which incorporates a Conversion Discount of 1%.

28. The Mandatory Conversion Date will be the earlier of 30 September 2014 and the first Dividend Payment Date thereafter, in either case, where both of the Conversion Conditions are satisfied. If the Conversion Conditions are not satisfied (and if the Westpac SPS II are not otherwise Redeemed or Transferred on that date), then Conversion will occur on the next Dividend Payment Date on which the Conversion Conditions are satisfied. The Holders have no right to seek or initiate Conversion or Redemption of the Westpac SPS II.

***Early Conversion or Redemption***

29. Westpac may serve an Early Conversion/Redemption Notice in respect of some or all of the Westpac SPS II, following the occurrence of a Tax Event or Regulatory Event, or, in respect of all (but not some) Westpac SPS II, if an Acquisition Event occurs.

30. Westpac may Convert the Preference Shares into Westpac Ordinary Shares subject to the satisfaction of the Conversion Conditions, or may Redeem the Preference Shares on the relevant Redemption Date.

31. In broad terms, if an Acquisition Event occurs and Westpac has not issued an Early Conversion/Redemption Notice within 10 Business Days after the Acquisition Event, Westpac must, provided the Conversion Conditions are satisfied, Convert all the Preference Shares on issue into Westpac Ordinary Shares.

***Transfer***

32. Westpac may issue a Transfer Notice to the Holders specifying that all Westpac SPS II (or, following the occurrence of an Assignment Event where Preference Shares remain outstanding, the Preference Shares) will be acquired by a party nominated by Westpac on the Mandatory Conversion Date for cash for the amount of the Face Value per Westpac SPS II (\$100). This Transfer Notice must be issued no less than 30 Business Days, and no more than 50 Business Days, prior to a Relevant Date for mandatory Conversion.

33. Following the occurrence of a Tax Event, Regulatory Event or Acquisition Event, Westpac may elect to issue an Early Transfer Notice no later than 30 Business Days prior to the potential Conversion Date or Redemption Date relevant to that event, which specifies that all Westpac SPS II (or following the occurrence of an Assignment Event where the Preference Shares remain outstanding, all Preference Shares then outstanding) will be acquired by a Nominated Party. If an Early Transfer Notice is issued by Westpac, the same provisions will apply as if a Transfer Notice had been issued in respect of a potential Mandatory Conversion Date.

***The offer***

34. The offer to apply to subscribe for the Westpac SPS II was limited to:

- Eligible St. George Hybrid Holders – that is, registered holders of St. George SPS, St. George CPS and St. George CPS II on or after 20 February 2009 who are shown on the register to have an address in Australia;
- Eligible Former SAINTS Holders – that is, former holders of SAINTS who were shown on the register on 1 December 2008, just prior to the acquisition of the SAINTS by Westpac, to have an address in Australia;

- Eligible Securityholders – that is, registered holders of Westpac ordinary shares, Westpac SPS and/or Westpac TPS (being 2006 Trust Preferred Securities) on the record date (13 February 2009) who are shown on the register to have an address in Australia;
- Broker Firm Applicants – that is, Australian resident retail clients of a Syndicate Broker, including clients who are Eligible St. George Hybrid Holders and Eligible Former SAINTS Holders, who apply for a broker firm Allocation from a Syndicate Broker; and
- Institutional Investors, including Institutional Investors who hold St. George SPS, St. George CPS and St. George CPS II and/or who formerly held SAINTS, which are invited by the Joint Lead Managers.

35. There was no general public offer of the Westpac SPS II. However, Westpac reserved the right to accept applications from persons other than Eligible St. George Hybrid Holders, Eligible Former SAINTS Holders, Eligible Securityholders, Broker Firm Applicants and Institutional Investors at its discretion.

36. Westpac had not taken any action to register or qualify Westpac SPS II, or otherwise permit a public offer of Westpac SPS II, in any jurisdiction outside Australia where such an offer is made under the laws in that jurisdiction.

## Other

37. This Ruling is made on the basis that:
- (a) the documents listed in paragraph 11 of this Ruling provide a complete and accurate description of the scheme;
  - (b) the scheme is implemented according to the terms of the documents listed in paragraph 11 of this Ruling;
  - (c) during the term of the scheme, Westpac will be a resident of Australia under the income tax laws of Australia and of no other jurisdiction;
  - (d) each Westpac SPS II is an 'equity interest' in Westpac under Division 974;
  - (e) Westpac Ordinary Shares are 'equity interests' under Division 974;
  - (f) Interest and any Gross-Up Amounts payable in respect of the Westpac SPS II and Dividends and any Gross-Up Amounts payable in respect of the Westpac SPS II following any Assignment Event (other than mandatory Conversion, early Conversion or Redemption), will not be debited to Westpac's share capital account, or its non-share capital account;

- (g) no Interest amounts (nor any Gross-Up Amounts) and no Dividends (nor any Gross-Up Amounts) will be sourced, directly or indirectly, from Westpac's share capital account;
- (h) Westpac expects to have sufficient 'available frankable profits', as defined in section 215-20, immediately before the payment of any Interest or any Gross-Up Amount or Dividend or any Gross-Up Amount in respect of the Westpac SPS II;
- (i) there will be no different treatment afforded to potential investors according to their status as residents or non-residents in the issue of the Westpac SPS II, or any other relevant characteristics of potential investors, for example their tax profile, other than as described under the heading 'The offer' in paragraphs 34 to 36 of this Ruling;
- (j) Westpac will not differentially frank distributions to different Holders in respect of the Westpac SPS II according to the tax status of the Holders or on any other basis;
- (k) Westpac will not differentially frank distributions on any other frankable interest in Westpac according to the tax status of the Holders of those instruments or on any other basis;
- (l) Westpac intends to continue with its policy of franking (to the extent that franking credits are available in its franking account) all frankable distributions. This includes Interest and Dividends payable in respect of the Westpac SPS II;
- (m) the Westpac SPS II rank equally amongst themselves in all respects;
- (n) Westpac will not substitute for itself any member of the Westpac Group or any branch of Westpac in respect of the Westpac SPS II;
- (o) Westpac will be the Assignee should an Assignment Event (as defined in the Note Terms) occur;
- (p) a Capital Disqualification Event (as defined in the Note Terms) will not occur;
- (q) Interest, Dividends and any Gross-Up Amounts payable in respect of the Westpac SPS II are frankable distributions pursuant to section 202-40 and are not unfrankable under section 202-45;
- (r) where Westpac franks a frankable distribution payable in respect of the Westpac SPS II in accordance with section 202-5, the distribution will be a franked distribution;

- (s) the relevant Holder and their associates will not have any positions (within the meaning of former section 160APHJ of the ITAA 1936) in relation to the Westpac SPS II apart from holding the Westpac SPS II themselves;
- (t) the relevant Holder or their associates will not make any related payments (within the meaning of former section 160APHN of the ITAA 1936) in relation to Interest and Dividends payable in respect of the Westpac SPS II;
- (u) the relevant Holder will not dispose of their Westpac SPS II before a period of at least 90 days (excluding the day of acquisition and the day of disposal) beginning the day after the acquisition of the Westpac SPS II; and
- (v) any additional Westpac Ordinary Shares issued by Westpac on Conversion of the Preference Shares, which form part of the Westpac SPS II, to Westpac Ordinary Shares will not involve an amount being credited to the Holders as shareholders and no amount will be paid from profits.

## Ruling

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### **Acquisition time of the Westpac SPS II**

38. Each Holder will acquire the Westpac SPS II on the date of entering into the contract to acquire the Westpac SPS II from the IP (section 109-5).

### **Cost base and reduced cost base**

39. The first element of the cost base and reduced cost base for each Westpac SPS II will be \$100, being the amount to be paid by the Holders to acquire each Westpac SPS II from the IP (subsections 110-25(2) and 110-55(2)).

### **Inclusion of Interest and Dividends in assessable income**

40. Interest and Dividends payable in respect of each Westpac SPS II are non-share dividends and dividends respectively. Holders must include in their assessable income all non-share dividends and dividends received in respect of the Westpac SPS II (paragraph 44(1)(a) of the ITAA 1936). The Holders must also include in their assessable income an amount equal to the franking credits attached to the non-share dividends and dividends respectively (subsection 207-20(1) of the ITAA 1997).

**Entitlement to a tax offset**

41. Holders will be entitled to a tax offset equal to the franking credit received on the non-share dividends and dividends paid in respect of the Westpac SPS II (subsection 207-20(2)).

**Franking credit subject to the refundable tax offset rules**

42. Holders who are entitled to a tax offset under subsection 207-20(2), in respect of the franking credits received in relation to the Westpac SPS II, will be subject to the refundable tax offset rules in Division 67, unless specifically excluded under section 67-25.

**Imputation integrity provisions**

43. The Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefits received in relation to the non-share dividends and dividends received by the Holders in respect of the Westpac SPS II.

44. The Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 to deny the whole, or any part, of the imputation benefits received in relation to the non-share dividends and dividends received by the Holders in respect of the Westpac SPS II.

**Gross-up and tax offset denied in certain circumstances**

45. Section 207-145 will not apply to the whole, or any part, of the non-share dividends or dividends received by the Holders. Accordingly, section 207-145 will not adjust the gross-up of the Holders' assessable income to exclude the franking credits, nor will it deny the tax offset to which the Holders would have otherwise been entitled.

**Disposal of a Westpac SPS II – Capital Gains Tax (CGT) consequences**

46. On a disposal of a Westpac SPS II each Holder will realise:
- a capital gain under subsection 104-10(4) to the extent that the capital proceeds from the disposal exceed the cost base of the Westpac SPS II; and
  - a capital loss under subsection 104-10(4) to the extent that the capital proceeds from the disposal are less than the reduced cost base of the Westpac SPS II.

## **Assignment Event – CGT implications**

47. CGT event H2, in section 104-155, will happen when an Assignment Event occurs. However, no Holder will make a capital gain or capital loss, as there are no capital proceeds because of the event, and no incidental costs are incurred in respect of the event. No other CGT event will happen when an Assignment Event occurs.

## **Conversion of a Westpac SPS II, involving the allotment of any additional Westpac Ordinary Shares – CGT implications**

48. No CGT event in Division 104 will happen to the Holders because of the Conversion of a Westpac SPS II involving the allotment of additional Westpac Ordinary Shares to the Holders.

## **Allotment of additional Westpac Ordinary Shares – assessable income**

49. The value of any additional Westpac Ordinary Shares received by the Holders on Conversion of the Westpac SPS II will not be a 'dividend' as defined in subsection 6(1) of the ITAA 1936, and the value of any additional Westpac Ordinary Shares will not be included in the Holders' assessable income under subsection 44(1) of the ITAA 1936. In addition, the value of the additional Westpac Ordinary Shares will not be assessable to the Holders as ordinary income under subsection 6-5(1) of the ITAA 1997.

## **Section 45**

50. Section 45 of the ITAA 1936 will not apply to treat any additional Westpac Ordinary Shares issued on Conversion of the Westpac SPS II as an unfranked dividend paid by Westpac.

## **Section 45A**

51. The Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the capital benefit arising on Conversion of the Westpac SPS II. Accordingly, the whole or part of the capital benefit arising on Conversion of the Westpac SPS II will not be treated as an unfranked dividend in the hands of the Holders.

## **Section 45B**

52. The Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the capital benefit arising on Conversion of the Westpac SPS II. Accordingly, the whole or part of the capital benefit arising on Conversion of the Westpac SPS II will not be treated as an unfranked dividend in the hands of the Holders.

**Cost base of the Westpac Ordinary Shares**

53. Subdivision 130-A will apply to apportion the first element of the cost base and reduced cost base of each Westpac SPS II over the Converted Westpac SPS II (that becomes a Westpac Ordinary Share) and any additional Westpac Ordinary Shares issued by Westpac.

**Date of acquisition of the Westpac Ordinary Shares**

54. The Westpac Ordinary Shares will be taken to have been acquired by the Holders when the Holders acquired the Westpac SPS II (section 109-5). The date of acquisition of the Westpac Ordinary Shares that arise from a Conversion of the Westpac SPS II does not change as a result of the Conversion.

55. Any additional Westpac Ordinary Shares that are allotted to the Holders as part of the Conversion of the Westpac SPS II will be taken to have been acquired by the Holders at the time the Westpac SPS II were originally acquired by the Holders (item 1 in the table in subsection 130-20(3)).

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**Commissioner of Taxation**22 April 2009

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## Appendix 1 – Explanation

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**❶** *This Appendix is provided as information to help you understand how the Commissioner's view has been reached. It does not form part of the binding public ruling.*

### **Acquisition time of the Westpac SPS II**

56. Where an entity disposes of a CGT asset to you (except where you compulsorily acquire it), you acquire the CGT asset at the time when the disposal contract is entered into or, if no contract is entered into, when the entity stops being the asset's owner (item 1 of the table in subsection 109-5(2)).

57. Each Westpac SPS II is a single CGT asset, arising from a single contract between Westpac and the Holder. By acquiring the Westpac SPS II from the IP on the terms offered by Westpac in the Prospectus for the issue of the Westpac SPS II, each Holder will agree to be bound by the Constitution of Westpac, the Note Deed Poll, the Note Terms, the Preference Share Terms and the terms and conditions of the Offer as set out in the Prospectus.

58. Each Westpac SPS II will be acquired by the Holders from the IP on 31 March 2009.

59. Each Westpac SPS II will be a single CGT asset consisting of a bundle of rights. The Assignment Event will not result in the acquisition of any new CGT asset. Rather each Westpac SPS II will take on the features of a simple Preference Share. Accordingly, each Preference Share will not be a new CGT asset acquired by the Holders upon the assignment of the Note, and the acquisition date of the Preference Share will be the acquisition date of the Westpac SPS II, being 31 March 2009.

### **Cost base and reduced cost base**

60. The first element of the cost base and reduced cost base of a CGT asset includes the money paid, or required to be paid, in respect of acquiring that CGT asset (paragraph 110-25(2)(a) and subsection 110-55(2)).

61. The Holders will acquire each Westpac SPS II from the IP for \$100. Accordingly, the first element of the cost base and reduced cost base of each Westpac SPS II will be \$100.

62. The occurrence of an Assignment Event will not modify the cost base and reduced cost base of each Westpac SPS II. Accordingly, the first element of the cost base and reduced cost base of each Westpac SPS II will be \$100.

**Inclusion of Interest and Dividends in assessable income**

63. Paragraph 44(1)(a) of the ITAA 1936 includes in the assessable income of a resident shareholder in a company all dividends and non-share dividends that are paid to the shareholder by the company.

64. Interest and Dividends payable in respect of the Westpac SPS II are non-share dividends and dividends respectively. Accordingly, the Holders will include in their assessable income Interest and Dividends payable in respect of the Westpac SPS II under paragraph 44(1)(a) of the ITAA 1936.

65. Furthermore, as this Ruling is made on the basis that:

- the non-share dividends and dividends payable in respect of the Westpac SPS II are frankable distributions pursuant to section 202-40 and are not unfrankable under section 202-45; and
- where Westpac franks a frankable distribution payable in respect of the Westpac SPS II in accordance with section 202-5, the distribution will be a franked distribution,

it therefore follows that the franking credits to be attached respectively to the non-share dividends and dividends must also be included in the Holders' assessable income under subsection 207-20(1).

**Entitlement to a tax offset**

66. In accordance with subsection 207-20(2), the Holders will be entitled to receive a tax offset equal to the value of the franking credit which will be included in their assessable income in respect of the non-share dividends and dividends they receive.

**Franking credit subject to the refundable tax offset rules**

67. Holders who are entitled to a tax offset under subsection 207-20(2), in respect of the franking credit received, will also be subject to the refundable tax offset rules in Division 67, unless specifically excluded under section 67-25. Certain trustees and corporate tax entities are not subject to the refundable tax offset rules because of subsections 67-25(1A) to (1D).

68. The refundable tax offset rules ensure that certain taxpayers are entitled to a refund once their available tax offsets have been utilised to reduce any income tax liability to nil.

## **Imputation integrity provisions**

### ***Streaming of imputation benefits***

69. Subdivision 204-D broadly enables the Commissioner to make a determination where distributions with attached imputation benefits are streamed to members of a corporate tax entity.

70. Section 204-30 prescribes the circumstances that are required to exist before the Commissioner may make such a determination. Section 204-30 applies where an entity 'streams' the payment of distributions in such a way that:

- an 'imputation benefit' is, or apart from section 204-30 would be, received by a member of the entity as a result of the distribution or distributions (paragraph 204-30(1)(a));
- the member (favoured member) would derive a greater benefit from franking credits than another member of the entity (paragraph 204-30(1)(b)); and
- the other member (disadvantaged member) of the entity will receive lesser imputation benefits, or will not receive any imputation benefits, whether or not the other member receives other benefits (paragraph 204-30(1)(c)).

71. The existence of these conditions enables the Commissioner, under paragraph 204-30(3)(c), to make a determination that no imputation benefit is to arise in respect of the distributions made to those favoured members.

72. 'Streaming' is not defined for the purposes of Subdivision 204-D. However, it is understood to refer to a company selectively directing the flow of franked distributions to those members who can most benefit from the imputation credits (refer to paragraph 3.28 of the Explanatory Memorandum to the New Business Tax System (Imputation) Bill 2002).

73. Westpac have indicated in the Prospectus that the Interest payable and Dividend payable in respect of the Westpac SPS II to the Holders are expected to be fully franked. Although the Westpac SPS II rank ahead of Ordinary Shares in respect of the payment of Interest/Dividends, Westpac have advised that they have paid, and will continue to pay, fully franked dividends (to the extent of available franking credits in their franking account) to all of its shareholders and equity holders, including holders of Ordinary Shares. There will be no change in Westpac's dividend franking policy or dividend payout ratios on its share capital as a result of the issue of the Westpac SPS II.

74. As such, there is no evidence that the requisite element of streaming exists in relation to the franked distributions to be paid by Westpac to the Holders. Accordingly, based on the information provided, the Commissioner will not make a determination under paragraph 204-30(3)(c) to deny imputation benefits to Holders.

**General anti-avoidance rule – imputation**

75. Section 177EA of the ITAA 1936 is a general anti-avoidance provision that applies where one of the purposes (other than an incidental purpose) of the scheme is to obtain an imputation benefit. Where these circumstances arise, subsection 177EA(5) of the ITAA 1936 enables the Commissioner to make a determination with the effect of either:

- imposing franking debits or exempting debits on the distributing entity's franking account generally; or
- denying the imputation benefit on the distribution that flowed directly or indirectly to the relevant taxpayer.

76. Pursuant to subsection 177EA(3) of the ITAA 1936, and in conjunction with subsection 177EA(12) of the ITAA 1936 (which extends the application of section 177EA of the ITAA 1936 to non-share equity interests, equity holders and non-share dividends), section 177EA applies if the following conditions are satisfied:

- (a) there is a scheme for a disposition of membership interests, or an interest in membership interests, in a corporate tax entity;
- (b) either:
  - (i) a frankable distribution has been paid, or is payable or expected to be payable, to a person in respect of the membership interests; or
  - (ii) a frankable distribution has flowed indirectly, or flows indirectly or is expected to flow indirectly, to a person in respect of the interest in membership interests, as the case may be;
- (c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit;
- (d) except for this section, the person (the relevant taxpayer) would receive, or could reasonably be expected to receive, imputation benefits as a result of the distribution; and
- (e) having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit.

77. Membership interests include both equity interests and non-share equity interests.

78. It is considered that the conditions in paragraphs 177EA(3)(a) to (d) of the ITAA 1936 are satisfied because:

- (a) the issue of Westpac SPS II constitutes a scheme for the disposition of membership interests (paragraph 177EA(3)(a) of the ITAA 1936). Pursuant to paragraph 177EA(14)(a) of the ITAA 1936, a 'scheme for a disposition of membership interest or an interest in membership interest' includes a scheme that involves the issuing of the membership interests. The issuance of Westpac SPS II on the terms set out in the Prospectus is a scheme that involves the issuing of membership interests because the Holders of the Westpac SPS II are equity holders of Westpac;
- (b) frankable distributions are expected to be paid to the Holders of the Westpac SPS II (paragraph 177EA(3)(b) of the ITAA 1936). This Ruling is made on the basis that the distributions payable in respect of the Westpac SPS II will be frankable distributions under section 202-40 of the ITAA 1997 and not be unfrankable distributions under section 202-45 of the ITAA 1997;
- (c) franked distributions are expected to be paid to the Holders of the Westpac SPS II (paragraph 177EA(3)(c) of the ITAA 1936). It is expected that the franked distribution payable in respect of the Westpac SPS II will be made on a quarterly basis. Furthermore, Westpac has advised that it will continue its policy of fully franking all frankable distributions made by it, to the extent of the franking credits available in its franking account; and
- (d) it is reasonable to expect that an imputation benefit will be received by the relevant taxpayers as a result of distributions made to the Holders given that Westpac expects to frank the distributions on the Westpac SPS II (paragraph 177EA(3)(d) of ITAA 1936).

79. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme, it would be concluded that it was entered into or carried out for the purpose (which is not merely an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit under the scheme.

80. Circumstances which are relevant in determining whether any person has the requisite purpose include, but are not limited to, the factors listed in subsection 177EA(17) of the ITAA 1936. The relevant circumstances listed encompass a range of circumstances which, taken individually or collectively, could indicate the requisite purpose. Due to the diverse nature of these circumstances, some may or may not be present at any one time in any one scheme.

81. The issue of the Westpac SPS II is a capital raising transaction which Westpac advised will be undertaken to assist it to comply with the capital requirements of APRA. There is nothing in the terms of the Westpac SPS II which would suggest that it will be entered into for the purpose (which is not merely an incidental purpose) of enabling the relevant taxpayer to obtain an imputation benefit under the scheme.

82. Based on the information provided, and having regard to the factors listed in subsection 177EA(17) of the ITAA 1936, the qualifications set out in this Ruling and the relevant circumstances of the scheme, it would not be reasonable to conclude that in entering into the scheme, Westpac and/or the Holders of the Westpac SPS II will demonstrate the objective purpose of securing imputation benefits for the Holders of the Westpac SPS II. To the extent that any imputation benefits will be secured, those benefits are considered to be incidental to the more significant objective purposes of the raising of Tier 1 Capital by Westpac to meet its capital adequacy requirements.

83. Accordingly, the Commissioner will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 that would deny the imputation benefits to the Holders of the Westpac SPS II.

#### ***Gross-up and tax offset denied in certain circumstances***

84. Subdivision 207-F creates the appropriate adjustment to cancel the effect of the gross-up and tax offset rules where the entity concerned has manipulated the imputation system in a manner that is not permitted under the income tax law.

85. Section 207-145 of the ITAA 1997 provides the circumstances that must exist before this adjustment can occur. Pursuant to subsection 207-145(1) of the ITAA 1997 a 'manipulation of the imputation system' may occur where:

- the entity is not a 'qualified person' in relation to the distribution (paragraph 207-145(1)(a) of the ITAA 1997);
- the Commissioner has made a determination under paragraph 177EA(5)(b) of the ITAA 1936 that no imputation benefit is to arise in relation to the dividend (paragraph 207-145(1)(b) of the ITAA 1997);
- the Commissioner has made a determination under paragraph 204-30(3)(c) of the ITAA 1997 that no imputation benefit is to arise in relation to the distribution (paragraph 207-145(1)(c) of the ITAA 1997); or
- the dividend is made as part of a dividend stripping operation (paragraph 207-145(1)(d) of the ITAA 1997).

86. A person is a 'qualified person' for the purposes of former Division 1A of Part IIIAA of the ITAA 1936 if, generally speaking, they satisfy the holding period rule and the related payments rule (see former section 160APHO of the ITAA 1936).

87. By virtue of the former section 160AOA of the ITAA 1936, the holding period rule and the related payments rule apply to non-share equity interests, equity holders and non-share dividends in the same way as they apply to shares, shareholders and dividends respectively.

88. The holding period rule applies where no related payment has, or will be made, in respect of the non-share dividend or dividend, and requires the non-share equity interest or share to have been continuously held at risk throughout the primary qualification period (former paragraph 160APHO(1)(a) of the ITAA 1936).

89. The related payments rule applies where the taxpayer or an associate has made or will make a related payment in respect of the non-share dividend or dividend and requires the non-share equity interest or share to have been continuously held at risk throughout the secondary qualification period (former subsection 160APHO(1) of the ITAA 1936 and former section 160APHN of the ITAA 1936).

90. The Holders are 'qualified persons', as:

- the Holders in receipt of non-share dividends and dividends in respect of the Westpac SPS II will have held their Westpac SPS II at risk for a period of at least 90 days (excluding the day of acquisition and the day of disposal), in the period beginning on the day after the day on which the Holders acquired the Westpac SPS II and ending on the 90th day after the day on which the Westpac SPS II became ex dividend (former subsections 160APHO(2) and 160APHO(3) of the ITAA 1936 and former sections 160APHM and 160APHJ of the ITAA 1936); and
- neither the Holders, nor associates of the Holders, will be under an obligation to make, or are likely to make a related payment in relation to the non-share dividends or dividends (former paragraph 160APHO(1)(a) of the ITAA 1936 and former section 160APHN of the ITAA 1936).

91. However, if either or both of the above 2 considerations are not met the Holders will not be a 'qualified person' for the purposes of former Division 1A of Part IIIAA of the ITAA 1936. Subdivision 207-F of the ITAA 1997 will create the appropriate adjustment to cancel the effect of the gross-up and tax offset rules for the Holders.

92. The Commissioner has confirmed that he will not make a determination under paragraph 177EA(5)(b) of the ITAA 1936 or paragraph 204-30(3)(c) of the ITAA 1997 to deny the imputation benefits attached to non-share dividends or dividends paid to the Holders in respect of the Westpac SPS II.

93. A distribution will be taken to be made as part of a dividend stripping operation, pursuant to section 207-155, where the distribution arose out of, or was made in the course of, a scheme or substantially similar arrangement that was in the nature of dividend stripping.

94. The Prospectus provides no indication that the offering of Westpac SPS II and the associated payment of franked distributions to the Holders in any way constitute a dividend stripping arrangement. As such, the dividend stripping provision will have no application to the Holders.

95. Therefore, section 207-145 will not apply to deny imputation benefits to Holders as none of the circumstances outlined in paragraph 85 of this Ruling are present.

#### **Characterisation of Westpac SPS II for CGT purposes**

96. Each Westpac SPS II will be a single CGT asset, arising from a single contract, the terms of which are to be found in the Note Deed Poll, the Note Terms, the Preference Share Terms and the terms and conditions of the Offer as set out in the Prospectus.

#### **Disposal of a Westpac SPS II – CGT consequences**

97. CGT event A1 happens if you dispose of a CGT asset (subsection 104-10(1)). Under subsection 104-10(2), you dispose of a CGT asset if a change of ownership occurs from you to another entity, whether because of some act or event or by operation of law.

98. CGT event A1 will happen if a Westpac SPS II is disposed of on market, or pursuant to a Transfer Notice, as there will be a change of ownership of the Westpac SPS II.

99. A capital gain will be made under subsection 104-10(4) on the disposal of the Westpac SPS II if the capital proceeds from the disposal are more than the cost base of the Westpac SPS II. A capital loss will be made under subsection 104-10(4) on the disposal of the Westpac SPS II if the capital proceeds from the disposal are less than the reduced cost base of the Westpac SPS II.

#### **Assignment Event – CGT implications**

100. Each Westpac SPS II will be a single CGT asset, arising from a single contract between Westpac and the Holder. The assignment of the Note on the occurrence of an Assignment Event will not affect the continued existence of this CGT asset, although each Westpac SPS II will then take on the features of a simple Preference Share.

101. Subsection 104-155(1) provides that CGT event H2 happens if an act, transaction or event occurs in relation to a CGT asset that you own and the act, transaction or event does not result in an adjustment being made to the asset's cost base or reduced cost base.

102. CGT event H2 will happen when an Assignment Event occurs. This is an act, transaction or event in relation to the Westpac SPS II that does not result in an adjustment being made to the cost base or reduced cost base of the Westpac SPS II.

103. A capital gain is made if the capital proceeds from CGT event H2 are more than the incidental costs incurred in relation to the event. A capital loss is made if the capital proceeds are less than the incidental costs (subsection 104-155(3)).

104. Subsection 116-20(2) provides that the capital proceeds from CGT event H2 happening is the money or other consideration received, or entitled to be received, because of the act, transaction or event.

105. Holders will make no capital gain or capital loss from the happening of CGT event H2 as there are no capital proceeds because of the event and no incidental costs are incurred by the Holders that relate to the event. No other CGT event will happen when an Assignment Event occurs.

## **Conversion of a Westpac SPS II, involving the allotment of any additional Westpac Ordinary Shares – CGT implications**

106. Pursuant to the terms of the Westpac SPS II, upon a Conversion, the Westpac SPS II will Convert into Westpac Ordinary Shares through a variation of the rights attaching to each Westpac SPS II. Holders of the Westpac SPS II may also receive an allotment of additional Westpac Ordinary Shares.

107. The Westpac SPS II will Convert into Westpac Ordinary Shares on 30 September 2014, subject to the satisfaction of the Conversion Conditions. If the Conversion Conditions are not satisfied on that date, the Mandatory Conversion Date moves to the next Dividend Payment Date on which the conditions are satisfied.

108. The Westpac SPS II may Convert into Westpac Ordinary Shares before the Mandatory Conversion Date at Westpac's discretion where certain defined events have occurred.

109. CGT events A1, C2, G1 or H2 will not happen to the Holders on the Conversion of the Westpac SPS II involving the allotment of additional Westpac Ordinary Shares to the Holders.

110. The Conversion of the Westpac SPS II does not constitute a disposal of an asset or part of an asset as required for CGT event A1 to happen.

111. Each Westpac SPS II will be comprised of a bundle of rights. However, those rights will not be separate pieces of property capable of being divided out and held separately (refer to Taxation Ruling TR 94/30).

112. Under section 104-25, CGT event C2 happens if, among other things, the ownership of an intangible CGT asset (each Westpac SPS II) ends:

- by being redeemed or cancelled (paragraph 104-25(1)(a)); or
- if each Westpac SPS II is a convertible interest – by being converted (paragraph 104-25(1)(f)).

113. The mere variation of rights attaching to each Westpac SPS II will not be a 'redemption' or 'cancellation' of the Westpac SPS II for the purposes of paragraph 104-25(1)(a), and will not involve the conversion of the Westpac SPS II for the purposes of paragraph 104-25(1)(f).

114. Furthermore, the relinquishment by the Holders of some of the rights attaching to each Westpac SPS II will not be a CGT event that happens to part of the CGT asset comprised by each Westpac SPS II under section 112-30 (see paragraph 40 of TR 94/30).

115. Under section 104-135, CGT event G1 happens if a company makes a payment (which can include giving property) to an entity in respect of a share they own in the company (each Westpac SPS II), and some or all of the payment is not a dividend. The variation of rights attaching to each Westpac SPS II, so that they become Westpac Ordinary Shares, will not amount to Westpac making a payment. Therefore, CGT event G1 will not happen.

116. Although CGT events A1, C2 or G1 do not happen as a result of the variation of the rights attaching to each Westpac SPS II, the receipt of money or other consideration in respect of such a variation may attract the operation of CGT event H2 (see paragraphs 10 and 46 to 48 of TR 94/30).

117. Subsection 104-155(1) provides that CGT event H2 happens if an act, transaction or event occurs in relation to a CGT asset that you own and the act, transaction or event does not result in an adjustment being made to the asset's cost base or reduced cost base.

118. The Conversion of each Westpac SPS II to a Westpac Ordinary Share involving the allotment of additional Westpac Ordinary Shares will result in an adjustment to the cost base and reduced cost base of the Westpac SPS II under Subdivision 130-A (refer to paragraphs 142 to 144 of this Ruling).

119. Accordingly, the act, transaction or event that occurs in relation to each Westpac SPS II will result in an adjustment to the cost base or reduced cost base of each Westpac SPS II. Therefore, CGT event H2 will not happen because of the Conversion of the Westpac SPS II involving the allotment of additional Westpac Ordinary Shares.

120. No other CGT event in Division 104 will happen because of the Conversion of the Westpac SPS II involving the allotment of additional Westpac Ordinary Shares.

**Allotment of additional Westpac Ordinary Shares – assessable income**

121. Subsection 6(1) of the ITAA 1936 defines a 'dividend' to include any distribution made by a company to any of its shareholders, whether in money or other property, and any amount credited by a company to any of its shareholders as shareholders.

122. Although any additional Westpac Ordinary Shares issued on Conversion of each Westpac SPS II (which, after an Assignment Event takes on the features of a simple Preference Share) will constitute 'property' in the hands of the Holders, the allotment is not a disposition of property in the ordinary meaning of that expression (refer *Ord Forrest Pty Ltd v. Federal Commissioner of Taxation* (1974) 130 CLR 124; 74 ATC 4034; (1974) 4 ATR 230). As there is no disposition, there cannot be a distribution of property by Westpac.

123. Furthermore, no amount is credited to the Holders, nor is an amount paid out of profits.

124. Accordingly, the allotment of additional Westpac Ordinary Shares does not constitute a 'dividend' within the meaning of subsection 6(1) of the ITAA 1936.

125. The issue of any additional Westpac Ordinary Shares on Conversion of each Westpac SPS II will be an issue of shares for which consideration is not payable and results in a re-expression of the Holders' interest in the share capital of Westpac. Accordingly, the value of any additional Westpac Ordinary Shares issued on the conversion of each Westpac SPS II to Ordinary Shares would not be assessable as ordinary income under subsection 6-5(1) (*Commissioner of Taxation v. McNeil* (2007) 229 CLR 656; 2007 ATC 4223; (2007) 64 ATR 431).

**Sections 45, 45A and 45B**

126. Sections 45, 45A and 45B of the ITAA 1936 are anti-avoidance provisions which, if they apply, either deem the value of shares or other capital benefits received by a shareholder to be an unfranked dividend paid by the company out of profits of that company, to the shareholder or allow the Commissioner to make a determination to that effect.

**Section 45**

127. Section 45 of the ITAA 1936 applies where a company streams the provision of shares and the payment of minimally franked dividends to its shareholders in such a way that the shares are received by some shareholders and minimally franked dividends are received by other shareholders. Minimally franked dividends are dividends which are franked to less than 10%.

128. Westpac has for some time fully franked the dividends it has paid and expects to continue paying fully franked dividends to all its shareholders. Based on the information provided and having regard to the circumstances of the scheme, section 45 of the ITAA 1936 will not apply to treat any allotment of additional Westpac Ordinary Shares as an unfranked dividend in the hands of the Holders.

### **Section 45A**

129. Section 45A of the ITAA 1936 applies in circumstances where capital benefits are streamed to certain shareholders who derive a greater benefit from the receipt of capital (the advantaged shareholders) and it is reasonable to assume that the other shareholders have received or will receive dividends (the disadvantaged shareholders).

130. The 'provision of capital benefit' is defined in subsection 45A(3) of the ITAA 1936 to include the provision by a company of shares in the company to its shareholder and anything that is done in relation to a share that has the effect of increasing the value of a share (which may or may not be the same share) held by the shareholder.

131. The allotment of any additional Westpac Ordinary Shares to Holders and any increase in the value of each Westpac SPS II, which has the features of a simple Preference Share immediately before Conversion, on a Conversion of the Westpac SPS II are 'provision of capital benefits' pursuant to paragraphs 45A(3)(a) and (c) of the ITAA 1936.

132. The allotment of any additional Westpac Ordinary Shares is in effect a restatement of the Holders' interest in the capital of Westpac. Without more, it will not constitute the streaming of capital benefits.

133. Any increase in the value of the Westpac SPS II on a Conversion of the Westpac SPS II will not on its own constitute the streaming of capital benefits.

134. Accordingly, it cannot be said that Holders derive a greater benefit from the capital benefits arising from the Conversion of the Westpac SPS II than other Westpac shareholders. Therefore, the allotment of any additional Westpac Ordinary Shares or any increase in the value of the Westpac SPS II on Conversion of the Westpac SPS II would not trigger the application of section 45A of the ITAA 1936.

135. Therefore, the Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies to deem the whole or part of the capital benefit arising from a Conversion of the Westpac SPS II as an unfranked dividend in the hands of the Holders.

## Section 45B

136. Section 45B of the ITAA 1936 applies where certain capital benefits are provided to shareholders in substitution for dividends.

137. The phrase 'provided with a capital benefit' is defined in subsection 45B(5) of the ITAA 1936. Relevantly, it includes the provision of ownership interests in a company to a person and anything that is done in relation to an ownership interest that has the effect of increasing the value of an ownership interest (which may or may not be the same interest) held by the person.

138. The allotment of any additional Westpac Ordinary Shares to Holders and any increase in the value of each Westpac SPS II, which immediately before Conversion has the features of a simple Preference Share, on a Conversion of the Westpac SPS II are therefore capital benefits provided by Westpac to the Holders.

139. For the provision to apply, among other things, paragraph 45B(2)(c) of the ITAA 1936 requires that, having regard to the relevant circumstances of the scheme, it would be concluded that the person, or one of the persons, who entered into or carried out the scheme or any part of the scheme did so for a purpose, other than an incidental purpose, of enabling a taxpayer to obtain a tax benefit. A non-exhaustive list of relevant circumstances of the scheme is provided in subsection 45B(8) of the ITAA 1936.

140. Having regard to the relevant circumstances surrounding the issue of the Westpac SPS II, it cannot be concluded that Westpac, the Holders or any other person who will enter into or carry out the issue of the Westpac SPS II will do so for the purpose of enabling the Holders to obtain a tax benefit. The terms of the arrangement do not disclose that the additional Westpac Ordinary Shares which may be allotted and any increase in the value of the Westpac SPS II on Conversion of the Westpac SPS II will be provided in substitution for any dividend payment in respect of the Westpac SPS II. Further, the allotment of any additional Westpac Ordinary Shares cannot be said to be attributable to the profits of the company.

141. Accordingly, the Commissioner will not make a determination under subsection 45B(3) of the ITAA 1936 that section 45C of the ITAA 1936 applies to deem the whole or part of the capital benefit arising from a Conversion of the Westpac SPS II as unfranked dividends in the hands of the Holders.

## Cost base of the Westpac Ordinary Shares

142. Subdivision 130-A provides special rules relating to the time of acquisition and the cost base of bonus equities for CGT purposes.

143. Subdivision 130-A will apply to apportion the first element of the cost base and reduced cost base of each Westpac SPS II over the Converted Westpac SPS II (that becomes a Westpac Ordinary Share) and any additional Westpac Ordinary Shares issued by Westpac.

144. As the value of any additional Westpac Ordinary Shares is not a dividend nor taken to be a dividend, the first element of the cost base and reduced cost base of each Westpac SPS II will be apportioned in a reasonable way over both the Westpac Ordinary Share and any additional Westpac Ordinary Shares issued to the Holders by Westpac (item 1 of the table in subsection 130-20(3)).

#### **Date of acquisition of the Westpac Ordinary Shares**

145. The Westpac Ordinary Shares will be taken to have been acquired by the Holders when each Holder acquired the Westpac SPS II, being 31 March 2009 (section 109-5).

146. Any additional Westpac Ordinary Shares that are allotted to the Holders as part of the Conversion of the Westpac SPS II are taken to have been acquired by the Holders at the time the Westpac SPS II are originally acquired by the Holders, being 31 March 2009 (item 1 in the table in subsection 130-20(3)).

**Appendix 2 – Detailed contents list**

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## References

*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 94/30; TR 2006/10

*Subject references:*

- acquisition dates
- capital gains tax
- CGT cost base
- dividend imputation
- franking rebates
- preference shares

*Legislative references:*

- ITAA 1936 6(1)
- ITAA 1936 44(1)
- ITAA 1936 44(1)(a)
- ITAA 1936 45
- ITAA 1936 45A
- ITAA 1936 45A(2)
- ITAA 1936 45A(3)
- ITAA 1936 45A(3)(a)
- ITAA 1936 45A(3)(c)
- ITAA 1936 45B
- ITAA 1936 45B(2)(c)
- ITAA 1936 45B(3)
- ITAA 1936 45B(5)
- ITAA 1936 45B(8)
- ITAA 1936 45C
- ITAA 1936 Pt IIIIA Div 1A
- ITAA 1936 160AOA
- ITAA 1936 160APHJ
- ITAA 1936 160APHM
- ITAA 1936 160APHN
- ITAA 1936 160APHO
- ITAA 1936 160APHO(1)
- ITAA 1936 160APHO(1)(a)
- ITAA 1936 160APHO(2)
- ITAA 1936 160APHO(3)
- ITAA 1936 177EA
- ITAA 1936 177EA(3)
- ITAA 1936 177EA(3)(a)
- ITAA 1936 177EA(3)(b)
- ITAA 1936 177EA(3)(c)
- ITAA 1936 177EA(3)(d)
- ITAA 1936 177EA(5)
- ITAA 1936 177EA(5)(b)
- ITAA 1936 177EA(12)
- ITAA 1936 177EA(14)(a)
- ITAA 1936 177EA(17)
- ITAA 1997 6-5(1)
- ITAA 1997 Div 67
- ITAA 1997 67-25
- ITAA 1997 67-25(1A)
- ITAA 1997 67-25(1B)
- ITAA 1997 67-25(1C)
- ITAA 1997 67-25(1D)
- ITAA 1997 Div 104
- ITAA 1997 104-10(1)
- ITAA 1997 104-10(2)
- ITAA 1997 104-10(4)
- ITAA 1997 104-25
- ITAA 1997 104-25(1)(a)
- ITAA 1997 104-25(1)(f)
- ITAA 1997 104-135
- ITAA 1997 104-155
- ITAA 1997 104-155(1)
- ITAA 1997 104-155(3)
- ITAA 1997 109-5
- ITAA 1997 109-5(2)
- ITAA 1997 110-25(2)
- ITAA 1997 110-25(2)(a)
- ITAA 1997 110-55(2)
- ITAA 1997 112-30
- ITAA 1997 116-20(2)
- ITAA 1997 Subdiv 130-A
- ITAA 1997 130-20(3)
- ITAA 1997 Pt 3-6
- ITAA 1997 202-5
- ITAA 1997 202-40
- ITAA 1997 202-45
- ITAA 1997 Subdiv 204-D
- ITAA 1997 204-30
- ITAA 1997 204-30(1)(a)
- ITAA 1997 204-30(1)(b)
- ITAA 1997 204-30(1)(c)
- ITAA 1997 204-30(3)(c)
- ITAA 1997 207-20
- ITAA 1997 207-20(1)
- ITAA 1997 207-20(2)
- ITAA 1997 Subdiv 207-F
- ITAA 1997 207-145
- ITAA 1997 207-145(1)
- ITAA 1997 207-145(1)(a)
- ITAA 1997 207-145(1)(b)
- ITAA 1997 207-145(1)(c)
- ITAA 1997 207-145(1)(d)
- ITAA 1997 207-155
- ITAA 1997 215-20
- ITAA 1997 Div 974
- TAA 1953
- Banking Act 1959 13A(1)
- Copyright Act 1968

*Case references:*

- Ord Forrest Pty Ltd v. Federal Commissioner of Taxation (1974) 130 CLR 124; 74 ATC 4034; (1974) 4 ATR 230
- Commissioner of Taxation v. McNeil (2007) 229 CLR 656; 2007 ATC 4223; (2007) 64 ATR 431

*Other references:*

- Explanatory Memorandum to the New Business Tax System (Imputation) Bill 2002
- 

## ATO references

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ATOLaw topic: Income Tax ~ Assessable income ~ dividend, interest and royalty income  
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