CR 2018/12 - Income tax: Westpac Banking Corporation - Westpac Capital Notes 5

Class Ruling

Income tax: Westpac Banking Corporation – Westpac Capital Notes 5

Contents Para

Summary – what this ruling is about

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

Relevant provisions

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

- subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936)
- section 26BB of the 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 70B of the ITAA 1936
- Division 1A of former Part IIIAA of the ITAA 1936
- section 177EA of the ITAA 1936

- section 6-5 of the *Income Tax Assessment Act 1997* (ITAA 1997)
- section 8-1 of the ITAA 1997
- Division 67 of the ITAA 1997
- section 67-25 of the ITAA 1997
- section 104-10 of the ITAA 1997
- section 104-25 of the ITAA 1997
- section 109-10 of the ITAA 1997
- section 110-25 of the ITAA 1997
- section 110-55 of the ITAA 1997
- section 130-60 of the ITAA 1997
- section 204-30 of the ITAA 1997
- Subdivision 207-D of the ITAA 1997
- section 207-20 of the ITAA 1997
- section 207-145 of the ITAA 1997
- section 974-75 of the ITAA 1997
- section 974-115 of the ITAA 1997
- section 974-120 of the ITAA 1997.

Class of entities

3. The class of entities to which this Ruling applies is subscribers of Westpac Capital Notes 5 (WCN5) issued by Westpac Banking Corporation (Westpac) who:

- are Australian residents within the meaning of subsection 6(1) of the ITAA 1936
- hold their WCN5 on capital account, and
- are not subject to the taxation of financial arrangements rules in Division 230 of the ITAA 1997 in relation to gains and losses on their WCN5.

  (**Note:** Division 230 of the ITAA 1997 will generally not apply to individuals, unless they have made an election for it to apply to them.)

In this Ruling, a person belonging to this class of entities is referred to as a Holder.

4. The class of entities to which this Ruling applies does not extend to Holders of WCN5 who acquired their WCN5 otherwise than by initial application under the Westpac Capital Notes 5 Prospectus and Westpac CPS Reinvestment Offer Information dated and lodged with the Australian Securities and Investments Commission on 13 February 2018 (Prospectus).

Qualifications

5. 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 61 of this Ruling.

6. 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.

7. This Ruling does not consider how the gross-up and tax offset rules in Division 207 of the ITAA 1997 apply to partnership or trustee Holders, or to indirect distributions to partners in a partnership or beneficiaries or trustees of a trust.

8. This Ruling does not consider the tax implications of Conversion of the WCN5 on the occurrence of a Capital Trigger Event, Non-Viability Trigger Event, Acquisition Event or Conversion where the Holder does not wish to receive Ordinary Shares or is an Ineligible Holder.

Date of effect

9. This Ruling applies from the income year ended 30 June 2018 to 30 June 2029. The Ruling continues to apply after 30 June 2029 to all entities within the specified class who entered into the specified scheme during the term of the Ruling. 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

10. The following description of the scheme is based on the following information provided by the applicant:

- application for a Class Ruling dated 5 February 2018

- the Prospectus, and
- Westpac Capital Notes 5 Terms (Terms) in Appendix B of the Prospectus.

Note: certain information has been provided on a commercial-in-confidence basis and will not be disclosed or released under Freedom of Information legislation.

11. In this Ruling, unless otherwise defined, capitalised terms take their meaning as specified in the Prospectus and Terms.

12. Westpac is an Australian resident company listed on the Australian Securities Exchange (ASX).

13. Westpac is an authorised deposit-taking institution (ADI) for the purposes of the *Banking Act 1959* (Cth) and is subject to regulatory requirements as administered by the Australian Prudential Regulation Authority (APRA), including maintenance of minimum levels of Tier 1 capital.

14. In the Prospectus, Westpac announced its intention to raise approximately AUD 1.45 billion of Additional Tier 1 Capital through the offer of the WCN5.

15. The WCN5 were confirmed by APRA to meet the criteria of Additional Tier 1 Capital for the purposes of the Prudential Standard APS 111 implemented under the Basel III capital reforms (commencing from 1 January 2013).

16. The WCN5 offer was announced to the market on 5 February 2018.

17. The WCN5 were issued to Holders on 13 March 2018 (Issue Date).

18. The WCN5 are listed on the ASX and are available for investment by different types of investors with different tax profiles.

19. The funds raised from the issue of WCN5 will be used by Westpac in its Australian operations to replace funding previously provided by the Westpac CPS issue and for general corporate purposes.

Features of the WCN5

20. The WCN5 are Australian dollar denominated fully paid, non-cumulative, convertible, transferable, redeemable, subordinated, perpetual, unsecured notes issued by Westpac, acting through its head office.

21. The issue price of each WCN5 is $100 (Face Value).

Distribution calculation and payment conditions

22. Subject to the conditions outlined at paragraph 24 of this Ruling, each WCN5 entitles the Holder to receive on the relevant

Distribution Payment Date, interest on the Face Value of the WCN5 (Distribution), calculated using the following formula:

$$\text{Distribution} = \frac{\text{Face Value x Distribution Rate x N}}{365}$$

where:

Distribution Rate (expressed as a percentage per annum) is calculated using the following formula:

Distribution Rate = (Bank Bill Rate + Margin) x (1 – Tax Rate)

where:

Bank Bill Rate (expressed as a percentage per annum) means, for each Distribution Period, the average rate for bills of a term of 90 days which average rate is displayed on Thomson Reuters page BBSW (Bank Bill Swap Rate) (or any page that replaces that page) at such time at which such rate customarily appears on that page on, in the case of the first Distribution Period, the Issue Date, and in the case of any other Distribution Period, the first Business Day of that Distribution Period, or if there is a manifest error in the calculation of that average rate or that average rate is not displayed by such time that is 15 minutes after the then prevailing time at which such rate customarily appears on that page on that date, the rate specified in good faith by Westpac at or around that time on that date having regard, to the extent possible, to:

- the rates otherwise bid and offered for bills of a term of 90 days or for funds of that tenor displayed on Thomson Reuters page BBSW (or any page which replaces that page) at or around that time on that date, and
- if bid and offer rates for bills of a term of 90 days are not otherwise available, the rates otherwise bid and offered for funds of that tenor at or around that time on that date,

Margin means the rate (expressed as a percentage per annum) determined under the Bookbuild, being 3.20% per annum

Tax Rate (expressed as a decimal) means the Australian corporate tax rate applicable to the franking account of Westpac at the relevant Distribution Payment Date, and

N means, in respect of a Distribution Period, the number of days in that Distribution Period.

23. Distributions payable in respect of the WCN5 are expected to be fully franked. However, if any Distribution is not fully franked or only partially franked (other than because of an act by, or circumstances affecting the particular Holder), the Distribution will be grossed-up to the extent that the franking percentage of the Distribution is less than 100%.

24. Each Distribution is subject to:

- Westpac's absolute discretion
- the payment of the Distribution not resulting in a breach of Westpac's capital requirements (on a Level 1 basis) or of the Westpac Group's capital requirements (on a Level 2 basis) under the current Prudential Standards at the time of the payment
- the payment of the Distribution not resulting in Westpac becoming, or being likely to become, insolvent for the purposes of the *Corporations Act 2001* (Cth), and
- APRA not otherwise objecting to the payment of the Distribution.

25. Distributions on the WCN5 are payable:

- quarterly in arrear on 22 March, 22 June, 22 September and 22 December of each year, commencing on 22 June 2018 until that WCN5 has been Converted at its full Face Value (or terminated following a failure to Convert) or Redeemed, in each case in accordance with the Terms, and
- on the Conversion Date (other than a Capital Trigger Event Conversion Date or Non-Viability Trigger Event Conversion Date), Redemption Date or Transfer Date (as the case may be) on which such WCN5 is Converted, Redeemed or Transferred

(each a Distribution Payment Date).

26. A Distribution is only payable to those persons registered as a Holder of the WCN5 on the Record Date for that Distribution. The Record Date for the first Distribution is 14 June 2018.

27. Distributions are only payable in cash and are non-cumulative. If any Distribution is not paid, Westpac has no liability to pay the Distribution to the Holder and the Holder will have no claim, including in a Winding Up, or right to apply for Winding Up in respect of the non-payment. Non-payment of a Distribution does not constitute an event of default.

28. If a Distribution has not been paid to Holders in full on the relevant Distribution Payment Date, Westpac must not determine or pay any dividends on the Ordinary Shares or undertake any discretionary Buy Back or Capital Reduction unless the amount of the unpaid Distribution is paid in full within 20 Business Days of that Distribution Payment Date or:

- all WCN5 have been Converted (or terminated following a failure to Convert) or Redeemed, or

- on a subsequent Distribution Payment Date, a Distribution for the subsequent Distribution Period is paid in full, or
- a Special Resolution of the Holders has been passed approving such action

and APRA does not otherwise object to the actions listed in (a), (b) or (c) as applicable. The dividend and capital restrictions do not apply in certain circumstances.

Scheduled Conversion

29. Each WCN5 will convert into Ordinary Shares on the date that is the earlier of:

- 22 September 2027, and
- the first Distribution Payment Date after that date

on which the Scheduled Conversion Conditions are satisfied (each a Scheduled Conversion Date).

30. The Scheduled Conversion Conditions for each Scheduled Conversion Date are:

- the volume weighted average price (VWAP) on the 25th Business Day on which trading in Ordinary Shares took place immediately preceding (but not including) the Scheduled Conversion Date is greater than 56.12% of the Issue Date VWAP (First Scheduled Conversion Condition), and
- the VWAP during the period of 20 Business Days on which trading in Ordinary Shares took place immediately preceding (but not including) the Scheduled Conversion Date is greater than 50.51% of the Issue Date VWAP (the Second Scheduled Conversion Condition).

31. Holders do not have a right to request Conversion of their WCN5 at any time.

Automatic Conversion

32. Automatic Conversion happens upon the occurrence of:

- a Capital Trigger Event
- a Non-Viability Trigger Event, or
- an Acquisition Event, subject to the satisfaction of the modified Second Scheduled Conversion Condition.

Capital Trigger Event

33. A Capital Trigger Event occurs when:

- Westpac determines, or
- APRA notifies Westpac in writing that it believes

that either or both the Westpac Level 1 Common Equity Tier 1 Capital Ratio or Westpac Level 2 Common Equity Tier 1 Capital Ratio (as defined by APRA in its Prudential Standards) is equal to or less than 5.125%.

34. If a Capital Trigger Event occurs, Westpac must notify APRA and convert such number of WCN5 (or, if it so determines, such percentage of the Face Value of each WCN5) as is sufficient following conversion or write-down of other Tier 1 Capital securities of Westpac (Relevant Securities), to return either or both of the Westpac Level 1 Common Equity Tier 1 Capital Ratio or the Westpac Level 2 Common Equity Tier 1 Capital Ratio, as the case may be, to above 5.125%.

Non-Viability Trigger Event

35. A Non-Viability Trigger Event occurs when APRA notifies Westpac in writing that it believes:

- Conversion of all or some WCN5, or conversion or write down of capital instruments of the Westpac Group, is necessary because, without it, Westpac would become non-viable, or
- a public sector injection of capital, or equivalent support, is necessary because, without it, Westpac would become non-viable.

36. If a Non-Viability Trigger Event occurs pursuant to paragraph (a) above, Westpac must convert such number of WCN5, (or, if it so determines, such percentage of the Face Value of each WCN5), as is equal (following conversion or write-down of other Relevant Securities whose terms require them to be converted or written down before Conversion of WCN5) to the aggregate face value of capital instruments which APRA has notified Westpac must be converted or written down (or, if APRA has not so notified Westpac, such number of WCN5 or, if Westpac so determines, such percentage of the Face Value of WCN5, as is necessary to satisfy APRA that Westpac will no longer be non-viable).

37. If a Non-Viability Trigger Event occurs due to an APRA determination that a public sector injection of capital or equivalent support is required, Westpac must convert all of the WCN 5.

38. The Scheduled Conversion Conditions do not apply to Conversion as a result of a Capital Trigger Event or Non-Viability Trigger Event.

Automatic Conversion upon the occurrence of a Capital Trigger Event or a Non-Viability Trigger Event

39. If a Capital Trigger Event or Non-Viability Trigger Event has occurred and all or some WCN5 (or a percentage of the Face Value of each WCN5) are required to be Converted, then:

- Conversion of the relevant WCN5 or percentage of the Face Value of each WCN5 will be taken to have occurred immediately on the Capital Trigger Event Conversion Date or Non-Viability Trigger Event Conversion Date
- the entry of the corresponding WCN5 in each relevant Holder’s holding in the WCN5 Register will constitute an entitlement of that Holder to the relevant number of Ordinary Shares (and, if applicable, also to any remaining balance of WCN5 or WCN5 with a Face Value equal to the aggregate of the remaining percentage of the Face Value of each WCN5), and Westpac will recognise the Holder as having been issued the relevant Ordinary Shares for all purposes, in each case without the need for any further act or step by Westpac, the Holder or any other person (and Westpac will, as soon as possible thereafter and without delay on the part of Westpac, take any appropriate procedural steps to record such Conversion, including updating the WCN5 Register and the Westpac Ordinary Share register), and
- upon Conversion a Holder has no further right or claim in respect of the WCN5 Converted, except in relation to the relevant number of Ordinary Shares and the Holder’s entitlement, if any, to WCN5 representing the unconverted outstanding Face Value.

No further rights if Conversion cannot occur upon the occurrence of a Capital Trigger Event or a Non-Viability Trigger Event

40. If, for any reason, Conversion of any WCN5 (or a percentage of the Face Value of any WCN5) required to be Converted upon the occurrence of a Capital Trigger Event or Non-Viability Trigger Event fails to take effect or does not occur for any other reason and the Ordinary Shares are not issued for any reason in respect of such Conversion by 5.00pm on the fifth Business Day after the Capital Trigger Event Conversion Date or Non-Viability Trigger Event Conversion Date, then such WCN5 (or percentage of the Face Value of WCN5) will not be Converted in respect of such Capital Trigger Event Conversion Date or Non-Viability Trigger Event Conversion Date and will not be Converted, Redeemed or Transferred on any subsequent date and the relevant Holders’ rights (including to payment of Distributions and Face Value and any other payments) in

relation to such WCN5 or percentage of the Face Value of the WCN5 are immediately and irrevocably terminated and such termination will be taken to have occurred immediately upon the Capital Trigger Event Conversion Date or Non-Viability Trigger Event Conversion Date, as the case may be.

Acquisition Event

41. If an Acquisition Event occurs then Westpac must Convert all WCN5 provided the modified Second Scheduled Conversion Condition is satisfied. The modified Second Scheduled Conversion Condition applies to a Conversion following an Acquisition Event as though the proposed Acquisition Event Conversion Date were a Scheduled Conversion Date for the purposes of Scheduled Conversion (except that in the case of an Acquisition Event, the Second Scheduled Conversion Condition will apply as if it referred to 20.20% of the Issue Date VWAP).

42. Conversion pursuant to an Acquisition Event will occur:

- in the case of an Acquisition Event that is a takeover bid, on a date no later than the Business Day prior to the then announced closing date of the relevant takeover bid, or
- in the case of an Acquisition Event that is a court approved scheme, on a date no later than the record date for participation in the relevant scheme of arrangement.

Conversion where the Holder does not wish to receive Ordinary Shares or is an Ineligible Holder

43. If a Holder's WCN5 are required to be Converted and the Holder has notified Westpac that it does not wish to receive Ordinary Shares as a result of the Conversion, or the Holder is an Ineligible Holder, then, on the Conversion Date, all of the Holder's rights in relation to each such WCN5 being Converted are immediately and irrevocably terminated and Westpac will issue the Conversion Number of Ordinary Shares to the Sale Agent for no additional consideration to hold on trust for sale for the benefit of the relevant Holder. At the first opportunity to sell the Ordinary Shares, the Sale Agent will arrange for their sale at market value and pay the proceeds, less selling costs, brokerage, stamp duty and other taxes and charges, to the relevant Holder.

Optional Conversion

44. Westpac may at its option elect to Convert:

- all or some WCN5 on 22 September 2025, provided that on the second Business Day before the date on which an Optional Conversion Notice is sent by Westpac, the VWAP on that date is greater than 56.12% of the Issue Date VWAP, or

- all (but not some) of the WCN5 on an Optional Conversion Date following the occurrence of a Tax Event or Regulatory Event, provided that on the second Business Day before the date on which an Optional Conversion Notice is sent by Westpac, the VWAP on that date is greater than 22.20% of the Issue Date VWAP.

45. If the modified Second Scheduled Conversion Condition is not satisfied on the proposed Optional Conversion Date:

- the WCN5 will not Convert, and
- Westpac will notify Holders as soon as practicable after the proposed Optional Conversion Date that Conversion did not occur.

46. Optional Conversion may occur even if Westpac, in its absolute discretion, does not pay a Distribution for the final Distribution Period.

47. Holders do not have a right to request Conversion of their WCN5 at any time.

General Terms for Conversion

48. Upon Conversion, Westpac will allot and issue a number (Conversion Number) of Ordinary Shares for each WCN5 held by the Holder. The Conversion Number is calculated according to the following formula, and subject always to the Conversion Number being no greater than the Maximum Conversion Number:

$$\text{Conversion Number for each WCN5} = \frac{\text{Face Value}}{0.99 \times \text{VWAP}}$$

where:

VWAP (expressed in dollars and cents) means the VWAP during the VWAP Period

Maximum Conversion Number means a number calculated according to the following formula:

$$\text{Maximum Conversion Number} = \frac{\text{Face Value}}{\text{Relevant Percentage} \times \text{Issue Date VWAP}}$$

49. The Relevant Percentage will be 0.5 if Conversion occurs on a Scheduled Conversion Date or the Optional Conversion Date on 22 September 2025, and 0.2 if Conversion occurs at any other time.

50. The effective 1% discount on Conversion of the WCN5 to Ordinary Shares is customary practice in the market for equity of this kind and is designed to compensate investors for transaction costs (that is, brokerage) which may be incurred on the disposal of the Ordinary Shares they receive on Conversion of the WCN5.

Optional Redemption

51. Westpac may at its option, Redeem all or some of WCN5 on 22 September 2025 or all (but not some) of the WCN5 on a Redemption Date following the occurrence of a Tax Event or Regulatory Event for their Face Value.

52. Westpac may only Redeem if:

- before or concurrently with the Redemption, Westpac replaces WCN5 with a capital instrument which is of the same or better quality than WCN5 and the replacement of WCN5 is done under conditions that are sustainable for the income capacity of Westpac, or APRA confirms that Westpac does not have to replace WCN5, and
- APRA has given its prior written approval to the Redemption.

53. Redemption may occur even if Westpac, in its absolute discretion, does not pay a Distribution for the final Distribution Period.

54. Holders do not have a right to request Redemption of their WCN5 at any time.

Optional Transfer

55. Westpac may elect that Transfer occur in relation to all or some of WCN5 on 22 September 2025, or all (but not some) of the WCN5 on a Transfer Date following the occurrence of a Tax Event or a Regulatory Event.

56. A Transfer means the transfer of WCN5 by Holders to a Nominated Party, being one or more third parties selected by Westpac in its absolute discretion, which cannot include a member of the Westpac Group or a related entity.

57. Westpac may only elect to Transfer WCN5 if Westpac has given a Transfer Notice at least 21 Business Days before the proposed Transfer Date to ASX and the Holders.

58. If Westpac elects to Transfer by issuing a Transfer Notice:

- each Holder is taken irrevocably to offer to sell the relevant number of their WCN5 to the Nominated Party on the Transfer Date for a cash amount per WCN5 equal to the Face Value (and to have appointed Westpac as its agent and attorney to execute documents and do all things necessary in connection with that offer and any resulting sale)

- subject to payment by the Nominated Party of the Face Value to Holders, all right, title and interest in the relevant number of WCN5 will be Transferred from the Holders to the Nominated Party on the Transfer Date, and
- if the Nominated Party does not pay the Face Value to the relevant Holders on the Transfer Date, the relevant number of WCN5 will not be Transferred to the Nominated Party.

59. Transfer may occur even if Westpac, in its absolute discretion, does not pay a Distribution for the final Distribution Period.

60. Holders do not have a right to request Transfer of their WCN5 at any time.

Other matters

61. This Ruling is made on the basis that:

(a) during the term of the scheme, Westpac is a resident of Australia under the income tax laws of Australia

(b) the majority of Holders of the WCN5 are expected to be residents of Australia for Australian tax purposes, although some Holders may be non-residents

(c) the WCN5 are equity interests in Westpac for the purposes of Division 974 of the ITAA 1997 and constitute non-share equity interests as defined in subsection 995-1(1) of the ITAA 1997

(d) the Ordinary Shares obtained by a Holder on Conversion of the WCN5 will be equity interests under Division 974 of the ITAA 1997

(e) Distributions paid in respect of the WCN5 are frankable distributions under section 202-40 of the ITAA 1997 and are not unfrankable under section 202-45 of the ITAA 1997

(f) Westpac will frank Distributions in respect of the WCN5 at the same franking percentage as the Westpac tax consolidated group benchmark for the franking period in which the payments are made

(g) Westpac will not differentially frank Distributions to different Holders in respect of the WCN5 according to the tax status of Holders or on any other basis

(h) the dividend payout ratios and Westpac's policies in relation to the franking of its distributions on ordinary share capital, other preference share capital, and non-share equity interests of Westpac (to the extent such dividends/distributions are frankable) are not expected to change as a result of the issue of the WCN5

(i) Distributions and any gross-up amounts payable in respect of the WCN5 will not be debited to Westpac's share capital account (within the meaning of section 975-300 of the ITAA 1997) or non-share capital account (within the meaning of section 164-10 of the ITAA 1997)

(j) Distributions on the WCN5 will not be sourced, directly or indirectly, from Westpac's share capital or non-share capital account

(k) the share capital of Westpac will not become tainted (within the meaning of Division 197 of the ITAA 1997) by the issue of the WCN5 or Ordinary Shares on Conversion

(l) Westpac expects to continue with its policy of fully franking all frankable distributions (to the extent that franking credits are available in its franking account)

(m) immediately before payment of a Distribution on the WCN5, Westpac will have sufficient available frankable profits (worked out under section 215-20 of the ITAA 1997) to pay the Distribution

(n) on Conversion or Redemption of the WCN5, Westpac will debit the Face Value of the WCN5 to a non-share capital account

(o) Holders, and their 'associates', will not have taken any positions (within the meaning of former section 160APHJ of the ITAA 1936) in relation to the WCN5 apart from the holding of the WCN5 themselves that would cause a Holder not to be a 'qualified person' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936

(p) Holders, and their 'associates', will not make any related payments (within the meaning of former section 160APHN of the ITAA 1936) in relation to Distributions payable on the WCN5

(q) Holders will not dispose of their WCN5 before a period of at least 90 days (excluding the date of acquisition and disposal) beginning the day after the acquisition of the WCN5

(r) there are no material amendments made to the Terms as provided for under clause 13 of the Terms

(s) the accounts of the Westpac group are prepared in accordance with applicable accounting standards, and

(t) all parties to the scheme are dealing with each other at arm's length.

Ruling

Acquisition time of WCN5

62. Pursuant to Item 2 of the table in section 109-10 of the ITAA 1997, a Holder acquired their WCN5 on 13 March 2018, being the date the WCN5 was issued to them.

Cost base and reduced cost base of WCN5

63. The first element of the cost base and reduced cost base of each WCN5 is $100, being the money paid by the Holder to acquire the WCN5 (subsections 110-25(2) and 110-55(2) of the ITAA 1997).

Inclusion of Distributions and franking credits in assessable income

64. Distributions are non-share dividends as per section 974-120 of the ITAA 1997 and must be included in the Holder's assessable income (subparagraph 44(1)(a)(ii) of the ITAA 1936).

65. Holders will need to include an amount equal to the franking credits attached to the Distribution in their assessable income pursuant to subsection 207-20(1) of the ITAA 1997.

Entitlement to a tax offset

66. Holders will be entitled to a tax offset equal to the franking credit received on Distributions (subsection 207-20(2) of the ITAA 1997) unless the Distribution is exempt income or non-assessable non-exempt income in the hands of the Holder.

Exempt income or non-assessable non-exempt income

67. To the extent that the Distribution (or a part of it) is either exempt income or non-assessable non-exempt income in the hands of the relevant Holder (and none of the exceptions in Subdivision 207-E of the ITAA 1997 apply), the amount of any franking credit on the Distribution that is exempt income or non-assessable non-exempt income is not included in the assessable income of the Holder, and the Holder is not entitled to a tax offset under Division 207 of the ITAA 1997 (Subdivision 207-D of the ITAA 1997).

Franking credits subject to the refundable tax offset rules

68. Holders who are entitled to a tax offset under subsection 207-20(2) of the ITAA 1997, in respect of the franking credits received in relation to the WCN5, will be subject to the refundable tax offset rules in Division 67 of the ITAA 1997, unless they are specifically excluded under section 67-25 of the ITAA 1997.

Imputation benefit streaming

69. The Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997 to deny the whole, or any part, of the imputation benefits received by a Holder in relation to Distributions paid in respect of the WCN5.

Section 177EA of the ITAA 1936

70. 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 by a Holder in relation to Distributions paid in respect of the WCN5.

Gross-up and tax offset denied in certain circumstances

71. Section 207-145 of the ITAA 1997 will not apply to the whole, or any part, of the Distributions that will be paid to Holders. Hence, section 207-145 of the ITAA 1997 will not adjust the gross-up of the Holders' assessable income to exclude the franking credit, nor will it deny the tax offset to which the Holders would have otherwise been entitled.

Each WCN5 will not be a traditional security

72. Section 26BB of the ITAA 1936 will not apply to include any amount in the assessable income of Holders upon disposal of WCN5.

73. Section 70B of the ITAA 1936 will not apply to allow a deduction to Holders upon the disposal of their WCN5.

The WCN5 are convertible interests

74. Each WCN5 is considered a convertible interest per item 4 of the table in subsection 974-75(1) of the ITAA 1997.

Conversion of the WCN5 – ordinary income

75. As WCN5 are held by Holders on capital account, no amount will be included in the assessable income of a Holder on the Conversion of a WCN5 under section 6-5 of the ITAA 1997.

76. Similarly, a Holder will not incur a deductible loss under section 8-1 of the ITAA 1997 as a consequence of a Conversion.

Conversion of the WCN5 – not a dividend

77. Other than in respect of a Distribution paid on the Conversion Date, Conversion of the WCN5 into Ordinary Shares will not result in the Holder being taken to have received a 'dividend' (as defined in subsection 6(1) of the ITAA 1936) nor a 'non-share dividend' (as defined in subsection 995-1(1) of the ITAA 1997 having the meaning within section 974-120 of the ITAA 1997).

78. Therefore, the issue of Ordinary Shares on Conversion will not be included in the assessable income of a Holder under subparagraph 44(1)(a)(ii) of the ITAA 1936.

Conversion of the WCN5 – CGT implications

79. CGT event C2 (section 104-25 of the ITAA 1997) will happen on the Conversion of the WCN5 for Ordinary Shares.

80. Any capital gain or capital loss made by a Holder from CGT event C2 happening on Conversion of the WCN5 will be disregarded (subsection 130-60(3) of the ITAA 1997).

Cost base and reduced cost base of Ordinary Shares acquired on Conversion

81. On Conversion, Subdivision 130-C of the ITAA 1997 will apply such that the first element of the cost base and reduced cost base of each Ordinary Share acquired from the Conversion of WCN5 is a pro-rata portion of the cost base of the WCN5 at the time of Conversion (item 2 of the table in subsection 130-60(1) of the ITAA 1997).

Acquisition time of Ordinary Shares acquired on Conversion

82. Pursuant to subsection 130-60(2) of the ITAA 1997, Ordinary Shares acquired on Conversion of the WCN5 will be taken to have been acquired when the Conversion happens on the relevant Conversion Date.

Redemption or Transfer of the WCN5 – ordinary income

83. As the WCN5 are held by Holders on capital account, no amount will be included in the assessable income of a Holder on the Redemption or Transfer of a WCN5 under section 6-5 of the ITAA 1997.

84. Similarly, a Holder will not incur a deductible loss on the Redemption or Transfer of a WCN5 under section 8-1 of the ITAA 1997.

Redemption of the WCN5 – CGT implications

85. CGT event C2 (section 104-25 of the ITAA 1997) will happen on the Redemption of the WCN5, where Redemption is constituted by the Redemption of all or some of the WCN5 for their Face Value.

86. As the capital proceeds received by Holders will not be more than the cost base of the WCN5, Holders should not make a capital gain as a result of the Redemption of their WCN5.

87. If the Face Value of the WCN5 has been reduced because there has been a Capital Trigger Event or a Non-Viability Trigger Event, Holders will make a capital loss on the Redemption of their WCN5.

Transfer of the WCN5 – CGT implications

88. CGT event A1 (section 104-10 of the ITAA 1997) will happen on the Transfer of the WCN5. The Transfer of the WCN5 will be for the Face Value of the WCN5.

89. As the capital proceeds received by Holders will not be more than the cost base of the WCN5, Holders should not make a capital gain as a result of the Transfer of their WCN5.

90. If the Face Value of the WCN5 has been reduced because there has been a Capital Trigger Event or a Non-Viability Trigger Event, Holders will make a capital loss on the Transfer of their WCN5.

Application of sections 45, 45A and 45B of the ITAA 1936

91. Section 45 of the ITAA 1936 will not apply to treat the Ordinary Shares issued on Conversion as an unfrankable dividend paid by Westpac.

92. The Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies to treat the whole, or part of, a capital benefit that arises on Conversion or Redemption of their WCN5 as an unfrankable dividend in the hands of the Holders.

93. The Commissioner will not make a determination under paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to treat the whole, or part of, a capital benefit that arises on Conversion or Redemption of the WCN5 as an unfranked dividend in the hands of the Holders.

Commissioner of Taxation
14 March 2018

Appendix 1 – Explanation

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 WCN5

94. An equity interest that is issued by a company is acquired when the contract is entered into, or if there is no contract, when the equity interest is issued (item 2 of the table in section 109-10 of the ITAA 1997).

95. Accordingly, a Holder acquired their WCN5 on the Issue Date, being the date the WCN5 was issued.

Cost base and reduced cost base of WCN5

96. 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 the CGT asset (paragraph 110-25(2)(a) of the ITAA 1997 and subsection 110-55(2) of the ITAA 1997).

97. The issue price of each WCN5 is $100. Therefore, the first element of the cost base and reduced cost base of each WCN5 is $100.

Inclusion of Distributions and franking credits in assessable income

98. Paragraph 44(1)(a) of the ITAA 1936 provides that the assessable income of a resident shareholder in a company includes all dividends and non-share dividends paid to the shareholders by the company. Paragraphs 43B(1)(a) and 43B(1)(b) of the ITAA 1936 effectively provides that paragraph 44(1)(a) of the ITAA 1936 applies to non-share equity interests and equity holders in the same way as it applies to shares and shareholders.

99. Each WCN5 is a 'non-share equity interest' and each Holder is an 'equity holder' as defined in subsection 995-1(1) of the ITAA 1997.

100. Distributions paid in respect of the WCN5 are non-share dividends per sections 974-115 and 974-120 of the ITAA 1997. Accordingly, Holders must include in their assessable income Distributions paid in respect of the WCN5 under subparagraph 44(1)(a)(ii) of the ITAA 1936.

101. Distributions paid in respect of the WCN5 are expected to be franked. Pursuant to subsection 207-20(1) of the ITAA 1997, Holders will need to include an amount equal to the franking credits attached to the Distribution in their assessable income.

Entitlement to a tax offset

102. The Ruling section provides a detailed explanation of the Commissioner's decision. Therefore, no further explanation is warranted.

Exempt income or non-assessable non-exempt income

103. The Ruling section provides a detailed explanation of the Commissioner's decision. Therefore, no further explanation is warranted.

Franking credits subject to the refundable tax offset rules

104. Holders who are entitled to a tax offset under subsection 207-20(2) of the ITAA 1997, in respect of the franking credits received in relation to the WCN5, will be subject to the refundable tax offset rules in Division 67 of the ITAA 1997, unless they are specifically excluded under section 67-25 of the ITAA 1997. The refundable tax offset rules ensure that certain taxpayers are entitled to a refund once their total tax offsets have been utilised to reduce any income tax liability to nil.

105. Entities excluded under section 67-25 of the ITAA 1997 include corporate tax entities (such as companies, corporate limited partnerships, corporate unit trusts and public trading trusts), unless they satisfy the requisite conditions as set out in subsections 67-25(1C) or 67-25(1D) of the ITAA 1997.

Imputation benefit streaming

106. Subdivision 204-D of the ITAA 1997 enables the Commissioner to make a determination where distributions with attached imputation benefits are streamed to a member of a corporate tax entity in preference to another member.

107. Section 204-30 of the ITAA 1997 prescribes the circumstances that are required to exist before the Commissioner may make such a determination. Section 204-30 of the ITAA 1997 applies where an entity 'streams' the payment of distributions in such a way that:

(a) an 'imputation benefit' is, or apart from section 204-30 of the ITAA 1997 would be, received by a member of the entity as a result of the distribution or distributions (paragraph 204-30(1)(a) of the ITAA 1997), and

(b) the member (favoured member) would derive a greater benefit from franking credits than another member of the entity (paragraph 204-30(1)(b) of the ITAA 1997), and

(c) 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) of the ITAA 1997).

108. If all the conditions in section 204-30 of the ITAA 1997 are satisfied, the Commissioner may make one or more of the following determinations listed under subsection 204-30(3) of the ITAA 1997:

(a) that a specified franking debit arises in the franking account of the entity, for a specified distribution or other benefit to a disadvantaged member,

(b) that a specified exempting debit arises in the exempting account of the entity, for a specified distribution or other benefit to a disadvantaged member,

(c) that no imputation benefit is to arise in respect of a distribution that is made to a favoured member and specified in the determination.

109. The meaning of the word ‘streams’ is not defined for the purposes of Subdivision 204-D of the ITAA 1997. However, the Commissioner understands it to refer to a company ‘selectively directing the flow of franked distributions to those members who can most benefit from the imputation credits’ (paragraph 3.28 of the Explanatory Memorandum to the New Business Tax System (Imputation) Bill 2002).

110. Based on the information provided, the Commissioner has concluded that the requisite element of streaming does not exist in relation to the franked Distributions to be paid by Westpac to Holders. Accordingly, the Commissioner will not make a determination under paragraph 204-30(3)(c) of the ITAA 1997 to deny the whole, or any part, of the imputation benefits received by a Holder in relation to Distributions paid in respect of the WCN5.

Section 177EA of the ITAA 1936

111. 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. In these circumstances, 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 distribution entity’s franking account, or
- denying the imputation benefit on the distribution that flowed directly or indirectly to the relevant taxpayer.

112. Pursuant to subsection 177EA(3) of the ITAA 1936, the provision 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, and

(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, and

(c) the distribution was, or is expected to be, a franked distribution or a distribution franked with an exempting credit, and

(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.

113. Subsection 177EA(12) of the ITAA 1936 extends the operation of section 177EA of the ITAA 1936 to non-share equity interests. Subsection 177EA(12) of the ITAA 1936 provides that section 177EA of the ITAA 1936:

(a) applies to a non-share equity interest in the same way as it applies to a membership interest

(b) applies to an equity holder in the same way as it applies to a member, and

(c) applies to a non-share dividend in the same way as it applies to a distribution.

114. The Commissioner considers that the conditions in paragraphs 177EA(3)(a) to 177EA(3)(d) of the ITAA 1936 are satisfied because:

(a) the issue of the WCN5 constitutes a scheme for the disposition of a membership interest (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 interests or an interest in membership interests’ includes a scheme that involves issuing membership interests. Paragraph 177EA(12)(a) of the ITAA 1936 applies to treat non-share equity interests in the same way as 'membership interests' under section 177EA of the ITAA 1936. The WCN5 are non-share equity interests. Therefore, the WCN5 will be treated as 'membership interests' issued by Westpac for the purposes of paragraph 177EA(3)(a) of the ITAA 1936

(b) frankable distributions are expected to be payable to the Holders in respect of the membership interest (paragraph 177EA(3)(b) of the ITAA 1936). The Commissioner accepts that Distributions payable on the WCN5 will be frankable distributions under section 202-40 of the ITAA 1997

(c) franked distributions are expected to be paid to the Holders (paragraph 177EA(3)(c) of the ITAA 1936). It is expected that Westpac will continue its policy of fully franking all frankable distributions made by it, and

(d) it is reasonable to expect that an imputation benefit will be received by the Holders (that is, the relevant taxpayers), given that Westpac expects to frank the Distributions on the WCN5 (paragraph 177EA(3)(d) of the ITAA 1936).

115. Accordingly, the issue is whether, having regard to the relevant circumstances of the scheme, it would be concluded that a person, or one of the persons, who entered into or carried out the scheme, did so for a purpose (whether or not the dominant purpose but not including an incidental purpose) of enabling the relevant taxpayer (Holders) to obtain an imputation benefit (paragraph 177EA(3)(e) of the ITAA 1936).

116. 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 relation to a particular scheme.

117. Having regard to all the relevant circumstances of the scheme and the qualifications set out in this Ruling, the Commissioner has concluded that the purpose of enabling the Holders to obtain imputation benefits is not more than incidental to Westpac's purpose of raising Tier 1 Capital to meet its regulatory capital requirements.

118. Accordingly, 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 by a Holder in relation to Distributions.

Gross-up and tax offset denied in certain circumstances

119. Subdivision 207-F of the ITAA 1997 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.

120. 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 a franked distribution is made to an entity in one or more of the following circumstances:

(a) the entity is not a 'qualified person' in relation to the distribution for the purposes of Division 1A of former Part IIIAA of the ITAA 1936

(b) the Commissioner has made a determination under paragraph 177EA(5)(b) of the ITAA 1936 that no imputation benefit is to arise in respect of the distribution for the entity (paragraph 207-145(1)(b) of the ITAA 1997)

(c) the Commissioner has made a determination under paragraph 204-30(3)(c) of the ITAA 1997 that no imputation benefit is to arise in respect of the distribution for the entity, and

(d) the distribution is made as part of a dividend stripping operation.

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

122. By virtue of 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.

123. The holding period rule applies where neither the holder nor an associate of the holder has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend (or non-share dividend), and requires the shares (or non-share equity interests) to have been continuously held at risk throughout the primary qualification period (former paragraph 160 APHO(1)(a) of the ITAA 1936).

124. The related payments rule applies where the holder or an associate of the holder has made, is under an obligation to make, or is likely to make, a related payment in respect of the dividend (or non-share dividend), and requires the shares (or non-share equity interests) to have been continuously held at risk throughout the secondary qualification period (former paragraph 160APHO(1)(b) and former section 160APHN of the ITAA 1936).

125. A Holder will be a 'qualified person' in relation to a Distribution received, provided that:

(a) the Holder held their WCN5 at risk for a period of at least 90 days (excluding the day of acquisition and the day of disposal, and any days on which the Holder has materially diminished risks of loss or opportunities for gain in respect of the shares or interest), in the period beginning on the day after the day on which the Holder acquired the WCN5 and ending on the 90th day after the day on which the WCN5 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

(b) neither the Holder, nor an associate of the Holder, has made, is under an obligation to make, or is likely to make a related payment in relation to Distributions on their WCN5 (former paragraph 160APHO(1)(a) of the ITAA 1936 and former section 160APHN of the ITAA 1936).

126. If either, or both, of the above two considerations are not met, the Holder will not be a 'qualified person' for the purposes of Division 1A of former Part IIIAA of the ITAA 1936.

127. In determining whether a shareholder is a 'qualified person' in relation to dividends paid on their shares, all 'positions' in respect of the shares are taken into account in identifying a 'net position' to ensure that there is no material diminution in the risks of loss or opportunities for gain.

128. Having regard to the relevant circumstances and the qualifications set out in this Ruling, the Commissioner is of the view that Holders will not take any position that will result in periods of materially diminished risks of loss or opportunities for gain in respect of the WCN5. Therefore, paragraph 207-145(1)(a) of the ITAA 1997 does not apply.

129. The Commissioner 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 Distributions paid to Holders.

130. The Prospectus and Terms provide no indication that the offering of the WCN5 and the associated payment of franked Distributions to Holders in any way constitutes a dividend stripping arrangement.

131. Hence, section 207-145 of the ITAA 1997 will not adjust the gross-up of the Holders' assessable income to exclude the franking credit, nor will it deny the tax offset to which the Holders would have otherwise been entitled.

Each WCN5 will not be a traditional security

132. A traditional security is defined in subsection 26BB(1) of the ITAA 1936 as a 'security' held by the taxpayer that was acquired after 10 May 1989 that is not trading stock of the taxpayer and either does not have an eligible return, or has an eligible return that satisfies the conditions listed in subparagraph 26BB(1)(b)(ii) of the ITAA 1936.

133. The term 'security' is defined under subsection 159GP(1) of the ITAA 1936 as:

(a) stock, a bond, debenture, certificate of entitlement, bill of exchange, promissory note or other security

(b) a deposit with a bank or other financial institution

(c) a secured or unsecured loan, or

(d) any other contract, whether or not in writing, under which a person is liable to pay an amount or amounts, whether or not the liability is secured.

134. Each of the WCN5 is not stock, a bond, debenture, certificate of entitlement, bill of exchange or a promissory note.

135. The term 'or other security' in paragraph (a) of the definition above only encompasses instruments that evidence an obligation on the part of the issue to pay an amount to the holder, whether during the term of the instrument or at its maturity. These are typically recognised as debt instruments (paragraph 29 of Taxation Ruling TR 96/14 *Income tax: traditional securities*).

136. Paragraphs (b) and (c) of the definition above do not apply to the WCN5 because the WCN5 is neither a deposit with a bank or other financial institution, nor a secured or unsecured loan.

137. Only those contracts that have debt like obligations will usually fall under paragraph (d) of the definition of security (TR 96/14).

138. For the purposes of subsection 159GP(1) of the ITAA 1936, the terms of the WCN5 do not contain features that exhibit debt like obligations, as:

(a) they are perpetual, and Holders do not have a right to require Redemption or Conversion

(b) Distributions under WCN5 are subject to various conditions. They are discretionary and non-cumulative

(c) on Conversion, Westpac will allot and issue Ordinary Shares to Holders based on a formula set out in the Terms of the WCN5. Westpac will not be required to make a payment or be liable to pay any amount on Conversion

(d) while early Redemption is possible, it is at the option of Westpac, and will only occur upon the happening of certain events

(e) Westpac is not liable to pay any amount under the WCN5 in the event of a wind-up, and

(f) under either the Capital Trigger Event or the Non-Viability Event, Westpac will not be obligated to pay any amount, as the WCN5 will Convert into Ordinary Shares, or will be terminated.

139. Accordingly, the WCN5 is not a 'security' within the meaning of subsection 159GP(1) of the ITAA 1936, and cannot be a traditional security under section 26BB of the ITAA 1936.

140. Therefore, section 26BB of the ITAA 1936 will not apply to include any gain upon disposal or Redemption of the WCN5 in the assessable income of the Holder. Likewise section 70B of the ITAA 1936 will not apply to allow a deduction to Holders upon disposal and Redemption of their WCN5.

The WCN5 are convertible interests

141. Paragraph (b) of item 4 of the table in subsection 974-75(1) of the ITAA 1997 provides that an interest is an equity interest if it is an interest issued by the company that is an interest that will, or may, convert into an equity interest in the company.

142. As WCN5 will give Holders Ordinary Shares (which are equity interests) upon its Conversion at the Relevant Conversion Date, it satisfies this definition and hence are convertible interests.

Conversion of the WCN5 – ordinary income

143. Section 6-5 of the ITAA 1997 provides that assessable income includes income according to ordinary concepts, known as ordinary income.

144. Subsection 6-10(2) of the ITAA 1997 also includes in assessable income, other amounts that are not ordinary income but are included in assessable income by other provisions of the income tax legislation – these are known as statutory income. Statutory income includes capital gains (sections 10-5 and 102-5 of the ITAA 1997).

145. Holders acquired a CGT asset when they acquired a WCN5 pursuant to item 2 of the table in section 109-10 of the ITAA 1997, and will hold the WCN5 on capital account. Therefore, any capital gain from Conversion of WCN5 would generally be included within the assessable income of the Holder as statutory income under section 6-10 of the ITAA 1997 and not under section 6-5 of the ITAA 1997. However, as ruled on in paragraph 80, any capital gain arising from CGT event C2 on Conversion of WCN5 will be disregarded under subsection 130-60(3) of the ITAA 1997.

146. Similarly, a Holder will not incur a deductible loss under section 8-1 of the ITAA 1997 as a consequence of a Conversion of WCN5.

Conversion of the WCN5 – not a dividend

147. The issue of Ordinary Shares to Holders on Conversion is a distribution of property to holders of a 'non-share equity interest' and therefore constitutes a 'non-share distribution' as defined in subsection 995-1(1) of the ITAA 1997 and having the meaning pursuant to subparagraph 974-115(b)(ii) of the ITAA 1997. A 'non-share distribution' is a 'non-share dividend' as also defined in subsection 995-1(1) of the ITAA 1997 to have the meaning under subsection 974-120(1) of the ITAA 1997, except to the extent that the company debits the distribution against the company's non-share capital or share capital account.

148. Subparagraph 44(1)(a)(ii) of the ITAA 1936 requires the assessable income of a resident shareholder to include all non-share dividends paid to the shareholder.

149. On Conversion, Westpac will debit the Face Value of the WCN5 to its non-share capital account. Accordingly, the issue of Ordinary Shares on Conversion is not a non-share dividend and will not be included in assessable income under subparagraph 44(1)(a)(ii) of the ITAA 1936.

Conversion of the WCN5 – CGT implications

150. The Ruling section provides a detailed explanation of the Commissioner's decision. Therefore, no further explanation is warranted.

Cost base and reduced cost base of Ordinary Shares acquired on Conversion

151. The Ruling section provides a detailed explanation of the Commissioner's decision. Therefore, no further explanation is warranted.

Acquisition time of Ordinary Shares acquired on Conversion

152. The Ruling section provides a detailed explanation of the Commissioner's decision. Therefore, no further explanation is warranted.

Redemption or Transfer of the WCN5 – ordinary income

153. The Ruling section provides a detailed explanation of the Commissioner's decision. Therefore, no further explanation is warranted.

Redemption of the WCN5 – CGT implications

154. The Ruling section provides a detailed explanation of the Commissioner's decision. Therefore, no further explanation is warranted.

Transfer of the WCN5 – CGT implications

155. The Ruling section provides a detailed explanation of the Commissioner's decision. Therefore, no further explanation is warranted.

Application of sections 45, 45A and 45B of the ITAA 1936

Section 45 of the ITAA 1936

156. 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%.

157. 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 the value of Ordinary Shares on Conversion as an unfrankable dividend in the hands of the Holders.

Section 45A of the ITAA 1936

158. Section 45A of the ITAA 1936 applies in circumstances where a company streams the provision of capital benefits 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 (the disadvantaged shareholders) have received or will receive dividends.

159. Where the Commissioner makes a written determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies in relation to the whole or part of the capital benefits, the capital benefits will be treated as unfranked dividends paid out of the company's profits.

160. The provision of Ordinary Shares on Conversion will constitute a provision of a capital benefit as per paragraph 45A(3)(a) of the ITAA 1936.

161. In the absence of any other factors that would contribute to an alternative conclusion, the issue of Ordinary Shares on Conversion will not be considered to be streaming the provision of capital benefits.

162. By virtue of paragraph 45A(3)(b) and subsection 45A(3A) of the ITAA 1936, the Redemption of WCN5 for their Face Value will constitute a provision of capital benefits as it will constitute a non-share capital return. The amount however, is limited to the Face Value of the WCN5. Accordingly, it cannot be said that Holders would derive a greater benefit from capital benefits than other Westpac shareholders.

163. Therefore, the Commissioner will not make a determination under subsection 45A(2) of the ITAA 1936 that section 45C of the ITAA 1936 applies in relation to the whole, or a part, of the capital benefits provided to Holders when the Ordinary Shares are issued to the Holders on Conversion or Redemption.

Section 45B of the ITAA 1936

164. Subsection 45B(1) of the ITAA 1936 applies where certain capital benefits are provided to shareholders in substitution for dividends and the conditions in subsection 45B(2) of the ITAA 1936 are satisfied.

165. Where the requirements of subsection 45B(2) of the ITAA 1936 are satisfied, paragraph 45B(3)(b) of the ITAA 1936 empowers the Commissioner to make a determination that section 45C of the ITAA 1936 applies such that the capital benefit is taken to be an unfranked dividend.

166. The issue of Ordinary Shares to Holders on Conversion will constitute a scheme under which the Holders are provided with a capital benefit (paragraph 45B(5)(a) of the ITAA 1936). Similarly, Redemption will also constitute a scheme under which the Holders are provided with a capital benefit (paragraph 45B(5)(b) of the ITAA 1936 by virtue of subsection 45B(7) of the ITAA 1936).

167. 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, entered into the scheme or carried out the scheme or any part of the scheme 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 are provided in subsection 45B(8) of the ITAA 1936.

168. Having regard to the relevant circumstances of the scheme, it cannot be concluded that Westpac, the Holders or any person entered into or carried out any part of the scheme, did so for more than an incidental purpose of enabling Holders to obtain a tax benefit.

169. Accordingly, the Commissioner will not make a determination under paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies in relation to the whole, or a part, of the capital benefits provided to Holders when Ordinary Shares are issued to the Holders on Conversion or Redemption.

Appendix 2 – Detailed contents list

170. The following is a detailed contents list for this Ruling:

References

Previous draft:

Not previously issued as a draft

Related Rulings/Determinations:

TR 2006/10

Legislative references:

- ITAA 1936
- ITAA 1936 6(1)
- ITAA 1936 26BB
- ITAA 1936 26BB(1)
- ITAA 1936 26BB(1)(b)(ii)
- ITAA 1936 43B(1)(a)
- ITAA 1936 43B(1)(b)
- ITAA 1936 44(1)
- ITAA 1936 44(1)(a)
- ITAA 1936 44(1)(a)(ii)
- ITAA 1936 45
- ITAA 1936 45A
- ITAA 1936 45A(2)
- ITAA 1936 45A(3)(a)
- ITAA 1936 45A(3)(b)
- ITAA 1936 45A(3A)
- ITAA 1936 45B
- ITAA 1936 45B(1)
- ITAA 1936 45B(2)
- ITAA 1936 45B(2)(c)
- ITAA 1936 45B(3)(b)
- ITAA 1936 45B(5)(a)
- ITAA 1936 45B(5)(b)
- ITAA 1936 45B(7)
- ITAA 1936 45B(8)
- ITAA 1936 45C
- ITAA 1936 70B
- ITAA 1936 159GP(1)
- ITAA 1936 Pt IIIAA Div 1A
- ITAA 1936 160AOA
- ITAA 1936 160APHJ
- ITAA 1936 160APHJ(2)
- ITAA 1936 160APHM
- ITAA 1936 160APHN
- ITAA 1936 160APHO
- ITAA 1936 160APHO(1)(a)
- ITAA 1936 160APHO(1)(b)
- 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(3)(e)
- ITAA 1936 177EA(5)
- ITAA 1936 177EA(5)(b)
- ITAA 1936 177EA(12)
- ITAA 1936 177EA(12)(a)
- ITAA 1936 177EA(14)(a)
- ITAA 1936 177EA(17)
- ITAA 1997
- ITAA 1997 6-5
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- ITAA 1997 6-10(2)
- ITAA 1997 8-1
- ITAA 1997 10-5
- ITAA 1997 Div 67
- ITAA 1997 67-25
- ITAA 1997 67-25(1C)
- ITAA 1997 67-25(1D)
- ITAA 1997 102-5
- ITAA 1997 104-10
- ITAA 1997 104-25
- ITAA 1997 109-10
- ITAA 1997 110-25
- ITAA 1997 110-25(2)
- ITAA 1997 110-25(2)(a)
- ITAA 1997 110-55
- ITAA 1997 110-55(2)
- ITAA 1997 Subdiv 130-C
- ITAA 1997 130-60
- ITAA 1997 130-60(1)
- ITAA 1997 130-60(2)
- ITAA 1997 130-60(3)
- ITAA 1997 Div 197
- 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)
- ITAA 1997 204-30(3)(c)
- ITAA 1997 Div 207
- ITAA 1997 Subdiv 207-D
- ITAA 1997 Subdiv 207-F
- ITAA 1997 207-20
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ATOlaw topic:	Income tax ~~ Assessable income ~~ Dividend income ~~ Dividend income Income tax ~~ Assessable income ~~ Other types of income ~~ Traditional securities Income tax ~~ Capital gains tax ~~ CGT assets ~~ General Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT event A1 – disposal of a CGT asset Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT events C1 to C3 – end of a CGT asset Income tax ~~ Capital management ~~ Anti avoidance rules ~~ Section 45A Income tax ~~ Capital management ~~ Anti avoidance rules ~~ Section 45B Income tax ~~ Capital management ~~ Anti avoidance rules ~~ Section 45C Income tax ~~ Capital management ~~ Anti avoidance rules ~~ Section 177EA Offsets / rebates / credits / benefits ~~ Other offsets / rebates / benefits ~~ Franking tax offset Offsets / rebates / credits / benefits ~~ Other offsets / rebates / benefits ~~ Dividend streaming and demerger benefits