

CR 2021/65 - Westpac Banking Corporation - Westpac Capital Notes 8



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Class Ruling

Westpac Banking Corporation – Westpac Capital Notes 8

❶ Relying on this Ruling

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

If this Ruling applies to you, and you correctly rely on it, we will apply the law to you in the way set out in this Ruling. That is, you will not pay any more tax or penalties or interest in respect of the matters covered by this Ruling.

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What this Ruling is about

1. This Ruling sets out the income tax consequences for entities who subscribed for and acquired Westpac Capital Notes 8 (WCN8) issued by Westpac Banking Corporation (Westpac).
2. The scheme is set out in paragraphs 46 to 83 of this Ruling.
3. In this Ruling, unless otherwise defined, capitalised terms have the meaning specified in the Glossary contained in Appendix A of the Prospectus for the issue of WCN8 dated 25 August 2021 (the Prospectus) or the Terms of Westpac Capital Notes 8 (the Terms), which are contained in Appendix B of the Prospectus.
4. All legislative references in this Ruling are to the *Income Tax Assessment Act 1997*, unless otherwise indicated.

Who this Ruling applies to

5. This Ruling applies to you if you are an investor (also referred to as a Holder) who:
 - acquired your WCN8 by initial application under the Prospectus
 - is a resident of Australia within the meaning of subsection 6(1) of the *Income Tax Assessment Act 1936* (ITAA 1936) during the period in which you hold your WCN8

- holds your WCN8 on capital account, and
- is not subject to the taxation of financial arrangements rules in Division 230 in relation to gains and losses on your WCN8.

What this Ruling does not consider

6. This Ruling does not consider:

- the tax implications in relation to a non-resident who holds their WCN8 through a permanent establishment (as defined in subsection 6(1) of the ITAA 1936) in Australia
- the tax implications of Conversion of WCN8 on the occurrence of a Capital Trigger Event, Non-Viability Trigger Event or Acquisition Event
- how the taxation law applies to a Nominated Party who acquires their WCN8 under the Transfer facility
- the tax implications for Westpac Capital Notes 4 (WCN4) holders of transferring their WCN4 under a Reinvestment Offer or of receiving distributions (including the pro rata distributions) on WCN4, or
- how the gross-up and tax offset rules in Division 207 apply to a partnership or trustee investors (other than a partnership or trustee that is a corporate tax entity, or a trustee of a trust that is a complying superannuation entity) or to indirect distributions to partners in a partnership or beneficiaries or trustees of a trust.

When this Ruling applies

7. This Ruling applies from 1 July 2021 to 30 June 2032.

Ruling**Consequences of acquiring Westpac Capital Notes 8*****Acquisition date***

8. You acquired your WCN8 on 15 September 2021 under table item 2 of section 109-10.

Cost base and reduced cost base of each Westpac Capital Note 8

9. The first element of the cost base and reduced cost base of each WCN8 is A\$100, being the money you paid to acquire your WCN8 (subsections 110-25(2) and 110-55(2)).

Consequences of holding Westpac Capital Notes 8***Distributions on Westpac Capital Notes 8 and entitlement to tax offset for franking credits***

10. A Distribution on a WCN8 is a non-share dividend under section 974-120 and is included in your assessable income (subparagraph 44(1)(a)(ii) of the ITAA 1936).

11. In the income year in which the Distribution is made (section 207-20), you also:
- include the amount of the franking credit attached to a Distribution in your assessable income, and
 - are entitled to a tax offset equal to the franking credit.
12. To the extent that a Distribution (or a part of it) is either exempt income or non-assessable non-exempt income in your hands (and none of the exceptions in Subdivision 207-E apply), the amount of any franking credit on the Distribution that is exempt income or non-assessable non-exempt income is not included in your assessable income and you are not entitled to a tax offset under Division 207 (Subdivision 207-D).
13. The franking credit tax offset that you are entitled to under Division 207 is subject to the refundable tax offset rules in Division 67, provided you are not excluded by the operation of section 67-25. Entities excluded by section 67-25 include corporate tax entities (such as companies, corporate limited partnerships and public trading trusts), unless they satisfy the requisite conditions in subsections 67-25(1C) or (1D).

Determination under paragraph 177EA(5)(b) of the ITAA 1936

14. 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 you receive in relation to a Distribution.

Determination under paragraph 204-30(3)(c)

15. The Commissioner will not make a determination under paragraph 204-30(3)(c) to deny the whole, or any part, of the imputation benefits you receive in relation to a Distribution.

Gross-up and tax offset cancelled in certain circumstances

16. Paragraph 207-145(1)(a) will not apply to cancel the effect of the gross-up and tax offset in respect of a franked Distribution if you are a qualified person in respect of that Distribution.
17. You will be a qualified person in relation to a Distribution if, during the primary qualification period, you held your WCN8 for a continuous period of at least 90 days during which you did not have 'materially diminished risks or loss of opportunities for gain' (as defined in former section 160APHM of the ITAA 1936) in respect of your WCN8.
18. The Transfer facility and Conversion mechanism of WCN8 will not affect your risks of loss or opportunities for gain in respect of your WCN8. This is because neither the Transfer facility nor the Conversion mechanism constitutes a separate position (former sections 160APHM and 160APHJ of the ITAA 1936).
19. Paragraphs 207-145(1)(b) to (db) will not apply to cancel the effect of the gross-up and tax offset rules in respect of a franked Distribution.
20. In respect of paragraphs 207-145(1)(b) and (c), refer to paragraphs 14 and 15 of this Ruling.
21. In respect of paragraph 207-145(1)(d), there is no evidence that the Distributions will be made as part of a dividend stripping operation.
22. In respect of paragraph 207-145(1)(da), the distribution washing provision does not apply (refer to subparagraph 83(u) of this Ruling).

23. In respect of paragraph 207-145(1)(db), the WCN8 are equity interests which form part of Westpac's Additional Tier 1 Capital (refer to subsection 207-158(2) and subparagraph 83(d) of this Ruling).

Consequences of disposing of Westpac Capital Notes 8

Westpac Capital Notes 8 not traditional securities

24. A WCN8 is not a traditional security as defined in subsection 26BB(1) of the ITAA 1936.
25. Section 26BB of the ITAA 1936 will not apply to include any gain on the disposal or Redemption of a WCN8 in your assessable income.
26. Section 70B of the ITAA 1936 will not apply to allow any loss on the disposal or Redemption of a WCN8 as a deduction to you.

Conversion of Westpac Capital Notes 8 for Ordinary Shares

27. Each WCN8 is a convertible interest.
28. CGT event C2 happens on Conversion (section 104-25).
29. A capital gain or capital loss you make from CGT event C2 happening on Conversion will be disregarded (subsection 130-60(3)).
30. Ordinary Shares acquired on Conversion will be taken to have been acquired when the Conversion happens on the relevant Conversion Date (subsection 130-60(2)).
31. The first element of the cost base and reduced cost base of Ordinary Shares acquired on Conversion will be equal to the cost base and reduced cost base of the relevant WCN8 at the time of Conversion (table item 2 of subsection 130-60(1)).
32. As you hold your WCN8 on capital account, no amount will be included in your assessable income on the Conversion of a WCN8 under section 6-5.
33. In addition, you will not incur a deductible loss under section 8-1 as a consequence of the Conversion.
34. On the Conversion of WCN8 for Ordinary Shares in Westpac, you will not be taken to have received a dividend or a non-share dividend.

Redemption of Westpac Capital Notes 8

35. CGT event C2 will happen on the Redemption of the WCN8, where Redemption is constituted by the Redemption of all or some of the WCN8 for their Face Value (section 104-25).
36. The capital proceeds received by Holders on Redemption of the WCN8 on a Redemption Date will be replaced with the market value of the WCN8 on the Redemption Date, worked out as if the Redemption had not occurred and was never proposed to occur, if the capital proceeds are more or less than the market value of the WCN8 (subparagraph 116-30(2)(b)(ii)). Accordingly, where the market value of the WCN8 at the time of Redemption is more or less than the cost base, you will make a capital gain or capital loss.
37. As you hold your WCN8 on capital account, no amount will be included in your assessable income on the Redemption under section 6-5.

38. In addition, you will not incur a deductible loss under section 8-1 as a consequence of the Redemption.

Transfer of Westpac Capital Notes 8

39. CGT event A1 happens on the Transfer of WCN8. The Transfer of WCN8 to the Nominated Party will be for the Face Value of WCN8 (section 104-10).

40. As the capital proceeds you receive will not be more than the cost base of WCN8, you will not make a capital gain as a result of the Transfer.

41. As you hold your WCN8 on capital account, no amount will be included in your assessable income on the Transfer under section 6-5.

42. In addition, you will not incur a deductible loss under section 8-1 as a consequence of the Transfer.

Other integrity provisions

Section 45 of the ITAA 1936

43. Section 45 of the ITAA 1936 will not apply to treat the value of Ordinary Shares issued to you on Conversion as an unfrankable dividend.

Section 45A of the ITAA 1936

44. 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 a part of the capital benefit provided to you on Conversion or Redemption as an unfranked dividend.

Section 45B of the ITAA 1936

45. 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 a part of the capital benefit provided to you on Conversion or Redemption as an unfranked dividend.

Scheme

46. The following description of the scheme is based on information provided by the applicant. If the scheme is not carried out as described, this Ruling cannot be relied upon.

Background

47. Westpac is an Australian-resident company for income tax purposes and is listed on the Australian Securities Exchange (ASX).

48. Westpac is an authorised deposit-taking institution for the purposes of the *Banking Act 1959* (Banking Act) and is subject to regulatory compliance requirements by the Australian Prudential Regulation Authority (APRA), including maintenance of mandatory levels of Tier 1 Capital.

49. Under the Prospectus, Westpac announced its intention to raise approximately \$1.45 billion of Additional Tier 1 capital through the offer of WCN8, with the ability to raise more or less (the Offer).

50. The classes of Applicants who could apply for WCN8 and the corresponding process for lodging Applications were set out in the Prospectus. The classes of Applicants were:

- Eligible Securityholders – registered holders of Ordinary Shares, Westpac Capital Notes 2, Westpac Capital Notes 5, Westpac Capital Notes 6 and/or Westpac Capital Notes 7 who are shown on the Register at 7.00pm Sydney time on 10 August 2021 as having an address in Australia.
- Eligible Westpac Capital Notes 4 Holders – registered holders of Westpac Capital Notes 4 who are shown on the Register at 7.00pm Sydney time on 10 August 2021 as having an address in Australia. Under the Reinvestment Offer, Eligible Westpac Capital Notes 4 Holders could apply to reinvest all or some of their Westpac Capital Notes 4 in WCN8 via the transfer of Participating Westpac Capital Notes 4 to the Westpac Capital Notes 4 Nominated Party for A\$100 per Participating Westpac Capital Note 4 and the automatic reinvestment of the transfer proceeds in WCN8.
- Broker Firm Applicant – a retail Australian-resident client of a Syndicate Broker invited to participate through the Broker Firm Offer.
- Institutional Investor – an investor who was invited by Westpac Institutional Bank to bid for WCN8 in the Bookbuild.

51. WCN8 were issued on 15 September 2021 (Issue Date).

52. WCN8 are listed on the ASX and trade under the code WBCPK.

53. WCN8 were issued by Westpac in Australia. WCN8 were not issued at or through an offshore permanent establishment or subsidiary of Westpac.

54. The Offer was made as part of Westpac's ongoing capital management strategy to satisfy regulatory capital requirements prescribed by APRA. The proceeds from the issue of WCN8 (the Transaction) will be used by Westpac in its Australian operations for the general corporate purposes of Westpac.

Main features of Westpac Capital Notes 8

55. WCN8 are fully-paid, non-cumulative, convertible, transferable, redeemable, subordinated, perpetual unsecured notes issued by Westpac in Australia.

56. A Holder of WCN8 does not have voting rights at a general meeting of Westpac shareholders before Conversion.

Issue Price

57. The Issue Price and Initial Face Value of each WCN8 is A\$100. WCN8 were fully paid on the Issue Date.

Distributions

58. Westpac will pay cash, quarterly, floating rate Distributions in respect of each WCN8 on a Distribution Payment Date (each a Distribution Payment Date) in accordance with the Terms.

59. The Distribution payable is calculated on the Face Value of each WCN8 using a Distribution Rate which is equal to the 3 month BBSW Rate plus a Margin adjusted by $(1 - \text{the Tax Rate})$ and based on the number of days in the Distribution Period divided by 365. The Margin was determined under the Bookbuild.

60. The Distributions are expected to be fully franked. If the Distribution is not fully franked, then the Distribution will be adjusted to reflect the applicable franking rate.

61. The payment of a Distribution is subject to the absolute discretion of Westpac and certain payment conditions (such conditions related to, for example, Westpac's capital or solvency requirements).

62. Distributions are non-cumulative and if all or any part of a Distribution is not paid, Holders have no claim or entitlement in respect of such non-payment and such non-payment does not constitute an event of default.

63. Subject to certain exceptions, if a Distribution is not paid in full on the relevant Distribution Payment Date, Westpac will be restricted from determining or paying Dividends on its Ordinary Shares or undertaking any discretionary Buy Back or Capital Reduction, unless the amount of the unpaid Distribution has been paid in full within 20 Business Days of that Distribution Payment Date or certain other requirements are satisfied.

Conversion

64. Conversion of WCN8 involves the following:

- each Holder is allotted and issued the Conversion Number of Ordinary Shares for each WCN8 held on the Conversion Date, and
- each Holder's rights (including to payment of Distributions, other than the Distribution, if any, payable on a Conversion Date that is not a Capital Trigger Event Conversion Date or a Non-Viability Trigger Event Conversion Date) in relation to each WCN8 that is being Converted are immediately and irrevocably terminated for an amount equal to the Face Value and Westpac applies the Face Value by way of payment for the subscription of the Conversion Number of Ordinary Shares to be allotted and issued on Conversion.

65. Each Ordinary Share allotted upon Conversion ranks equally with and has the same rights as all other fully paid Ordinary Shares.

Scheduled Conversion

66. Westpac must convert all (but not some) WCN8 into Ordinary Shares on the date on which the Scheduled Conversion Conditions are satisfied (each a Scheduled Conversion Date) that is the earlier of:

- 21 June 2032, or
- the first Distribution Payment Date after 21 June 2032.

67. If the Scheduled Conversion Conditions are not satisfied on the Scheduled Conversion Date, Westpac will not proceed with the Conversion on that date. The Conversion will be postponed until the first Distribution Payment Date after the Scheduled Conversion Date on which the Scheduled Conversion Conditions are satisfied.

Automatic Conversion

68. Automatic Conversion will occur on a Capital Trigger Event, a Non-Viability Trigger Event or an Acquisition Event.

69. A Capital Trigger Event or Non-Viability Trigger Event is triggered by certain circumstances affecting the capital adequacy or viability of Westpac and an Acquisition Event is triggered by events such as takeover bids and schemes of arrangement relating to Ordinary Shares in Westpac.

70. If a Capital Trigger Event occurs, Westpac must Convert such number of WCN8 or amount of WCN8 as is sufficient to return Westpac's relevant Common Equity Tier 1 Capital Ratio to the required percentage.

71. If a Non-Viability Trigger Event occurs, Westpac must Convert the number or amount of WCN8 necessary to satisfy APRA that Westpac will no longer be non-viable (and may in certain circumstances be required to Convert all WCN8).

72. On Conversion following a Non-Viability Trigger Event or a Capital Trigger Event, Holders will receive a variable number of Ordinary Shares up to the Maximum Conversion Number. However, if Conversion does not occur within five Business Days, then the rights of Holders will be terminated and they will lose all of the value of their investment and will not receive any compensation or unpaid Distributions.

73. If an Acquisition Event occurs, Westpac must Convert all (but not some) WCN8 (subject to applicable conversion conditions).

Optional Conversion

74. Subject to the Terms, Westpac may at its option Convert:

- all or some WCN8 on 21 September 2029, 21 December 2029, 21 March 2030 or 21 June 2030, or
- all (but not some) WCN8 on an Optional Conversion Date following the occurrence of a Tax Event or a Regulatory Event.

75. A Holder does not have the right to request Conversion at any time.

Optional Redemption

76. Subject to the Terms, Westpac may at its option Redeem:

- all or some WCN8 on 21 September 2029, 21 December 2029, 21 March 2030 or 21 June 2030, or
- all (but not some) WCN8 on a Redemption Date following the occurrence of a Tax Event or a Regulatory Event.

77. Westpac may only Redeem WCN8 where APRA has given prior written approval.

78. WCN8 are Redeemed by payment on the Redemption Date of an amount equal to the Face Value to the Holder.

79. A Holder does not have the right to request Redemption at any time.

Optional Transfer

80. Subject to the Terms, Westpac may elect to Transfer to a Nominated Party:
- all or some WCN8 on 21 September 2029, 21 December 2029, 21 March 2030 or 21 June 2030, or
 - all (but not some) WCN8 on a Transfer Date following the occurrence of a Tax Event or a Regulatory Event.
81. Each Holder on the Transfer Date is taken irrevocably to offer to sell the relevant number of WCN8 to the Nominated Party on the Transfer Date for a cash amount per each WCN8 equal to the Face Value.
82. A Holder does not have the right to request Transfer at any time.

Other matters

83. This Ruling is made on the basis that:
- (a) During the term of the scheme, Westpac is a resident of Australia under the income taxation laws of Australia and of no other jurisdiction.
 - (b) The majority of the Holders who acquire WCN8 under the Offer are expected to be residents of Australia for tax purposes, although some may be non-residents.
 - (c) WCN8 are equity interests in Westpac under Division 974 and are non-share equity interests as defined in subsection 995-1(1).
 - (d) WCN8 form part of Westpac's Additional Tier 1 Capital for the purposes of the prudential standards determined by APRA and in force under section 11AF of the *Banking Act 1959*.
 - (e) The Distributions are frankable distributions under section 202-40.
 - (f) In accordance with Division 203, Westpac will frank Distributions in respect of WCN8 at the same franking percentage as the Westpac benchmark for the franking period in which the frankable distribution is made.
 - (g) Distributions on WCN8 are not sourced, directly or indirectly, from Westpac's share capital account or its non-share capital account.
 - (h) Distributions paid on WCN8 will not be debited to Westpac's share capital account or its non-share capital account.
 - (i) Immediately before the payment of a Distribution on WCN8, Westpac will have available frankable profits (worked out under section 215-20) at least equal to the Distribution.
 - (j) Westpac expects to continue with its policy of franking all frankable distributions (to the extent that franking credits are available in its franking account).
 - (k) Westpac will not differentially frank Distributions to different Holders according to their tax status or on any other basis.
 - (l) The dividend payout ratios and Westpac's policies in relation to the franking of its distributions on ordinary share capital and other preference share capital of Westpac (to the extent such dividends/distributions are frankable) are not expected to change as a result of the issue of WCN8.

- (m) The share capital account of Westpac will not become tainted (within the meaning of Division 197) by the issue of WCN8 or the allotment of Ordinary Shares on Conversion of WCN8.
- (n) On Conversion or Redemption of WCN8, Westpac will debit the Face Value of WCN8 to its non-share capital account.
- (o) Ordinary Shares issued to the Holders on Conversion of WCN8 will be equity interests under Division 974.
- (p) The accounts of the Westpac group will be prepared in accordance with the applicable accounting standards.
- (q) All parties to the scheme will deal with each other at arm's length.
- (r) You will not take any 'positions' (as defined in former section 160APHJ of the ITAA 1936) at any time in relation to your WCN8 apart from holding your WCN8.
- (s) You (or an associate) will not make, be under an obligation to make or be likely to make, a 'related payment' (as defined under former section 160APHN of the ITAA 1936) in relation to a Distribution.
- (t) You will hold your WCN8 for a continuous period of at least 90 days (excluding the day of acquisition and disposal (if relevant)) during the 'primary qualification period' (as defined in former section 160APHD of the ITAA 1936) in relation to a Distribution.
- (u) You (or your connected entities) will not engage in distribution washing (as outlined in section 207-157) in relation to a Distribution (unless entitled to the exception under subsection 207-157(4)).

Appendix – Explanation

❶ *This Explanation 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.*

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Determination under paragraph 177EA(5)(b) of the ITAA 1936

84. 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 a particular scheme is to enable a taxpayer to obtain an imputation benefit.

85. The conditions in paragraphs 177EA(3)(a) to (d) of the ITAA 1936 are satisfied, therefore the relevant circumstances of the scheme must be considered to establish whether any person who entered into or carried out the scheme, or any part of the scheme, did so for a more than incidental purpose of enabling a Holder to obtain an imputation benefit (paragraph 177EA(3)(e) of the ITAA 1936).

86. The Commissioner considers that the relevant circumstances of the scheme do not, on balance, lead to a conclusion that the purpose of enabling Holders to obtain imputation benefits is more than incidental to Westpac's primary purpose of raising Additional Tier 1 capital for regulatory capital requirements and otherwise to maintain the diversity of its sources and types of funding.

Determination under paragraph 204-30(3)(c)

87. Subsection 204-30(1) empowers the Commissioner to make a determination under paragraph 204-30(3)(c) if an entity streams distributions in a certain way.

88. Based on the scheme, there is no evidence of streaming. Distributions will be received by all Holders by reason of their proportionate holding of WCN8 and not by reference to their tax profiles or individual tax positions. There is nothing in the Terms that allows Westpac to treat Holders differently in respect of their entitlement to a franked Distribution.

Gross-up and tax offset cancelled in certain circumstances

89. If you are not a qualified person in relation to a Distribution, you:

- do not include the franking credit attached to the dividend in your assessable income (paragraph 207-145(1)(e)), and
- are not entitled to a tax offset equal to the amount of the franking credit attached to the dividend (paragraph 207-145(1)(f)).

90. As this Ruling is made on the basis that you have not made a related payment in respect of a Distribution, the relevant qualification period is the 'primary qualification period' (as defined in former section 160APHD of the ITAA 1936). The primary qualification period begins on the day after you acquire your WCN8 and ends on the 90th day after the day WCN8 becomes ex-distribution.

91. You need to have held WCN8 'at risk' for a continuous period of 90 days (excluding the days of acquisition and disposal, if relevant) during the primary qualification period. Any days you had materially diminished risks of loss or opportunities for gain in respect of your holding are also excluded (former subsection 160APHO(3) of the ITAA 1936).

92. Under former subsection 160APHM(2) of the ITAA 1936, you are taken to have materially diminished the risks of loss and opportunities for gain on a particular day with respect to your WCN8 if your net position on that day does not retain 30% or more of the risks and opportunities associated with holding WCN8.

93. Embedded options such as the Transfer and Conversion mechanisms do not represent separate positions in relation to WCN8 (see also Taxation Determination TD 2007/29 *Income tax: holding period rule: is an embedded share option a position in relation to the share if it is exercisable by or against a party other than the issuer of the share?*). Under the Transfer mechanism, you will only be taken to have made an offer to sell WCN8 if Westpac issues a Transfer Notice. As Westpac is the only party entitled to make an election to exercise the Transfer option, it is not a separate position that you have taken in relation to your WCN8. Similarly, under the Conversion mechanism you do not have the right to elect Conversion of your WCN8 and neither does Westpac have an obligation to Convert.

94. Therefore, the Transfer and Conversion mechanisms will not of themselves affect your risks of loss or opportunities for gain in respect of your WCN8.

95. However, if you do enter into any risk management strategies in respect of your WCN8 that have the effect of reducing your risks of loss and opportunities for gain below 30% (for example, by the use of limited recourse loans, options or other derivatives), then you will not be considered a qualified person in respect of a Distribution.

Ordinary Shares received on Conversion not a dividend or a non-share dividend

96. You are not a shareholder of Westpac in respect of your WCN8 holding. Accordingly, you will not receive a 'dividend' as defined in subsection 6(1) of the ITAA 1936.

97. The application of the Face Value to subscribe for Ordinary Shares on Conversion of WCN8 is a crediting of that amount to you and, therefore, a non-share distribution under section 974-115.

98. All non-share distributions are non-share dividends unless they are debited against the distributing company's non-share capital account or its share capital account (section 974-120).

99. The allocation and issue of Ordinary Shares to you on Conversion of WCN8 will not be a non-share dividend as defined in section 974-120, as the Face Value of WCN8 will be debited against Westpac's non-share capital account.

Market value of Westpac Capital Notes 8 on Redemption

100. The capital proceeds received by Holders on Redemption will be replaced with the market value of the WCN8 on the date of Redemption, worked out as if the Redemption had not occurred and was never proposed to occur, if the capital proceeds are more or less than the market value (subparagraph 116-30(2)(b)(ii)).

101. If Westpac elects to Redeem WCN8 on a Redemption Date before the Scheduled Conversion Date, the market value of WCN8 which are Redeemed will need to be determined in accordance with Practical Compliance Guideline PCG 2021/1 *Application of market value substitution rules when there is a buy-back or redemption of hybrid securities – methodologies for determining market value for investors holding their securities on capital account*.

Section 45 of the ITAA 1936

102. 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 but not all shareholders, and
- some or all of the shareholders who do not receive the shares receive or will receive minimally franked dividends.

103. Westpac's distribution/dividend payout ratios in relation to its Ordinary Shares and other equity interests are not expected to change as a result of issuing WCN8. Further, Westpac has a history of fully franking its frankable distributions, which is also not expected to change.

104. Under the Terms, Westpac is unable to issue Ordinary Shares to all or some Holders in satisfaction of their Distribution entitlement under WCN8. The issue of Ordinary Share on Conversion merely reflects a change in the type of equity interests held by Holders in Westpac.

105. 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 issued to you on Conversion as an unfrankable dividend.

Section 45A of the ITAA 1936

106. Section 45A of the ITAA 1936 applies where a company streams capital benefits and the payment of dividends to shareholders who would derive a greater benefit from receiving the capital benefits (the advantaged shareholders), and it is reasonable to assume that other shareholders (the disadvantaged shareholders) have received, or will receive, dividends.

107. Both the issue of Ordinary Shares on Conversion and the Redemption of WCN8 will constitute the provision of a capital benefit to Holders (paragraph 45A(3)(a) of the ITAA 1936 for a Conversion, and paragraph 45A(3)(b) of the ITAA 1936 as affected by subsection 45A(3A) of the ITAA 1936 for a Redemption).

108. However, the issue of Ordinary Shares on Conversion and the Redemption of WCN8 will not constitute the streaming of capital benefits because under a Conversion or Redemption, Westpac will not selectively direct the flow of capital benefits to Holders who could most benefit from the receipt of capital. Accordingly, as this requirement does not apply to the Conversion or Redemption of WCN8, the Commissioner will not make a determination to treat the whole or a part of the capital benefit received by Holders as an unfranked dividend.

Section 45B of the ITAA 1936

109. Section 45B of the ITAA 1936 applies where certain capital benefits are provided to shareholders in substitution for dividends. Where the conditions are met, the Commissioner may make a determination under paragraph 45B(3)(b) of the ITAA 1936 that section 45C of the ITAA 1936 applies to the whole, or a part, of the capital benefit such that it will be treated as an unfranked dividend.

110. The issue of Ordinary Shares to Holders on Conversion and the Redemption of WCN8 will each constitute a scheme under which Holders are provided with a capital benefit by Westpac (paragraphs 45B(5)(a) and (5)(b), and subsection 45B(7) of the ITAA 1936). As a result, paragraph 45B(2)(a) of the ITAA 1936 will be satisfied.

111. At least some Holders will obtain a tax benefit as defined in subsection 45B(9) of the ITAA 1936 as a result of a Conversion or Redemption. Accordingly, paragraph 45B(2)(b) of the ITAA 1936 will be satisfied.

112. Therefore, whether section 45B of the ITAA 1936 will apply to a Conversion or Redemption turns on whether paragraph 45B(2)(c) of the ITAA 1936 will be satisfied. This involves considering the relevant circumstances, including but not limited to those listed in subsection 45B(8) of the ITAA 1936, of the Conversion and Redemption schemes to establish whether one of the persons who will enter into or carry out the schemes will do so for a more than incidental purpose of enabling a relevant taxpayer (the Holder) to obtain a tax benefit.

113. Having regard to the relevant circumstances, it could not be concluded that the Conversion or Redemption of WCN8 will be entered into for a more than incidental purpose of enabling Holders to obtain a tax benefit. Accordingly, paragraph 45B(2)(c) of the ITAA 1936 would not be satisfied and 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 the whole or a part of the capital benefit provided to Holders on Conversion or Redemption.

References*Previous draft:*

Not previously issued as a draft

Related Rulings/Determinations:

TD 2007/29

Legislative references:

- ITAA 1936 6(1)
- ITAA 1936 26BB
- ITAA 1936 26BB(1)
- 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(2)
- ITAA 1936 45B(2)(a)
- ITAA 1936 45B(2)(b)
- ITAA 1936 45B(2)(c)
- ITAA 1936 45B(3)(a)
- 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 45B(9)
- ITAA 1936 45C
- ITAA 1936 70B
- ITAA 1936 former 160APHD
- ITAA 1936 former 160APHJ
- ITAA 1936 former 160APHM
- ITAA 1936 former 160APHM(2)
- ITAA 1936 former 160APHN
- ITAA 1936 former 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)(b)
- ITAA 1997 6-5
- ITAA 1997 8-1
- ITAA 1997 Div 67
- ITAA 1997 67-25
- ITAA 1997 67-25(1C)
- ITAA 1997 67-25(1D)
- ITAA 1997 104-10
- ITAA 1997 104-25
- ITAA 1997 109-10
- ITAA 1997 110-25(2)
- ITAA 1997 110-55(2)
- ITAA 1997 116-30(2)(b)(ii)
- ITAA 1997 130-60(1)
- ITAA 1997 130-60(2)
- ITAA 1997 130-60(3)
- ITAA 1997 Div 197
- ITAA 1997 204-30
- ITAA 1997 204-30(1)
- ITAA 1997 204-30(3)(c)
- ITAA 1997 Div 207
- ITAA 1997 Subdiv 207-D
- ITAA 1997 Subdiv 207-E
- ITAA 1997 207-20
- 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 207-145(1)(da)
- ITAA 1997 207-145(1)(db)
- ITAA 1997 207-145(1)(e)
- ITAA 1997 207-145(1)(f)
- ITAA 1997 207-157
- ITAA 1997 207-157(4)
- ITAA 1997 207-158(2)
- ITAA 1997 Div 230
- ITAA 1997 Div 974
- ITAA 1997 974-115
- ITAA 1997 974-120
- ITAA 1997 995-1(1)
- TAA 1953
- Banking Act 1959 11AF

Other references:

PCG 2021/1

ATO references

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 ATOLaw topic: Income tax ~~ Capital gains tax ~~ CGT events ~~ CGT events C1 to C3 – end of a CGT asset
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