



Status: **legally binding**

## Class Ruling

# Westpac Banking Corporation – off-market share buy-back

### **❶ Relying on this Ruling**

This publication (excluding appendixes) 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 shareholders of Westpac Banking Corporation (Westpac) who participated in the Westpac off-market share buy-back (Buy-Back) announced on 1 November 2021.
2. Full details of the Buy-Back are set out in paragraphs 42 to 67 of this Ruling.
3. All legislative references in this Ruling are to provisions of the *Income Tax Assessment Act 1936* or the *Income Tax Assessment Act 1997* (as detailed in the table in Appendix 2 of this Ruling), unless otherwise indicated.

### **Who this Ruling applies to**

4. This Ruling applies to you if you held ordinary shares in Westpac and sold some or all of those shares under the Buy-Back.
5. This Ruling does not apply to anyone who is subject to the taxation of financial arrangements rules in Division 230 in relation to the scheme outlined in paragraphs 42 to 67 of this Ruling.

**Note:** Division 230 will not apply to individuals, unless they have made an election for it to apply.

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### **When this Ruling applies**

6. This Ruling applies from 1 July 2021 to 30 June 2022.

## **Ruling**

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### **Off-market share buy-back**

7. The Buy-Back is an off-market purchase for the purposes of section 159GZZZK.

### **The Dividend Component**

8. You are taken to have been paid a dividend of \$9.56 (Dividend Component) on 14 February 2022 for each Westpac share you sold in the Buy-Back (section 159GZZZP).  $25,200 \text{ per J2A} \times 9.56 = \$240,912$

9. The Dividend Component is a frankable distribution pursuant to section 202-40 and is capable of being franked in accordance with section 202-5.

10. The difference between the Buy-Back price of \$20.90 (Buy-Back Price) and the Dividend Component (Capital Component) is not taken to be a dividend  $^{\wedge} \$526,680$  (subsection 159GZZZP(2)).

### **Assessability of the Dividend Component and tax offset**

#### ***Direct distributions***

11. If you are a resident individual, a resident corporate tax entity or the trustee of a resident complying superannuation fund who participated in the Buy-Back, then your assessable income for the income year in which the Buy-Back occurred includes:

- the Dividend Component of \$9.56 per Westpac share, and
- subject to the 'qualified person' rules (see paragraph 35 of this Ruling), the amount of franking credits attached to the Dividend Component (subsections 44(1) and 207-20(1)).

12. You will be entitled to a tax offset equal to the amount of the franking credits attached to the Dividend Component, subject to the qualified person rules (subsection 207-20(2)).

#### ***Partnerships***

13. If you are a partnership, your assessable income in the income year in which the Buy-Back occurred for the purposes of calculating the net income of the partnership includes:

- the Dividend Component per Westpac share (subsection 44(1) and section 90), and
- subject to the qualified person rules, the amount of franking credits attached to the Dividend Component (subsection 207-35(1) and section 90).

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### **Trusts**

14. If you are the trustee of a trust, your assessable income in the income year in which the Buy-Back occurred for the purposes of calculating the net income of the trust includes:

- the Dividend Component per Westpac share (subsections 44(1) and 95(1)), and
- subject to the qualified person rules, the amount of franking credits attached to the Dividend Component (subsections 207-35(1) and 95(1)).

### **Indirect distributions**

#### *Partners and beneficiaries*

15. If you are a partner of a partnership or a beneficiary of a trust in which the trustee participated in the Buy-Back and a franked distribution flowed indirectly (within the meaning of Subdivision 207-B) to you, subsections 207-35(3) to (6) set out the circumstances in which you are required to gross up your assessable income for your share of the franking credit on the franked distribution.

16. Where the franked distribution flows indirectly through a trust or partnership to you and you are a resident individual, a resident corporate tax entity (at the time the distribution flows indirectly to it) or a trustee mentioned in paragraphs 207-45(c) or (d), you will (subject to the qualified person rules) be entitled to a tax offset equal to your share of the franking credit on the franked distribution (section 207-45).

### **Refundable tax offset**

17. The franking credit tax offset is subject to the refundable tax offset rules in Division 67 (subsection 67-25(1)). However, certain trustees and corporate tax entities are excluded from the refundable tax offset rules (subsections 67-25(1A) to (1D)).

### **Non-resident shareholders**

#### *Dividends attributable to a permanent establishment in Australia*

18. If you are a non-resident shareholder and the Dividend Component is attributable to a permanent establishment in Australia, then your assessable income for the income year in which the Buy-Back occurred includes:

- the Dividend Component per Westpac share (paragraphs 44(1)(b) and (c)), and
- subject to the qualified person rules, the amount of franking credits attached to the Dividend Component (subsections 44(1), 207-20(1) and 207-75(2)).

19. You will be entitled to a tax offset equal to the amount of the franking credits attached to the Dividend Component, subject to the qualified person rules (subsection 207-20(2)). However, the franking credit tax offset is not refundable under the refundable tax offset rules (subsection 67-25(1DA)).

20. As you include the Dividend Component in your assessable income, you are not liable to pay Australian withholding tax in respect of the Dividend Component (subsection 128B(3E)).

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***Dividends not attributable to a permanent establishment in Australia***

21. If you are a non-resident shareholder and the Dividend Component is not attributable to a permanent establishment in Australia, then you do not include the Dividend Component in your assessable income (section 128D). You do not include the amount of the franking credits attached to the Dividend Component in your assessable income and you are not entitled to a tax offset for the franking credits attached to the Dividend Component (sections 207-20 and 207-70).

22. You are not liable to Australian withholding tax in respect of the Dividend Component because it is fully franked (paragraph 128B(3)(ga)).

**Sale consideration**

23. **You are taken to have received \$14.58 (Sale Consideration)** for each Westpac share you sold in the Buy-Back on 14 February 2022 (section 159GZZZQ), unless you are a corporate tax entity to which subsections 159GZZZQ(8) and (9) apply.

***Capital gains tax consequences***

24. CGT event A1 happened to you on 14 February 2022 when you disposed of each of your Westpac shares to Westpac in the Buy-Back (section 104-10).

25. The Sale Consideration of \$14.58 per Westpac share represents the capital proceeds for capital gains tax purposes you received for each Westpac share (subsection 116-20(1)).

26. If you did not hold your Westpac shares through a partnership, you made a capital gain on each Westpac share if the Sale Consideration was more than the Westpac share's cost base. The amount of the capital gain is the difference between the Sale Consideration and the Westpac share's cost base. Alternatively, you made a capital loss if the Sale Consideration was less than the Westpac share's reduced cost base (subsection 104-10(4)). The amount of the capital loss is the difference between the Sale Consideration and the Westpac share's cost base.

27. Where you made a capital gain, you can treat the capital gain as a 'discounted capital gain' if you acquired your Westpac shares on or before 13 February 2021 and the other conditions of Subdivision 115-A are met.

28. If you held the Westpac shares through a partnership, any capital gain or capital loss will be made by the partners individually (subsection 106-5(2)). Each partner in a partnership has a separate cost base and reduced cost base for the partner's interest in each Westpac share sold in the Buy-Back by the partnership. The partnership would allocate to you an appropriate share of the Sale Consideration which the partnership received for the sale of Westpac shares in the Buy-Back.

***Shares acquired before 20 September 1985***

29. If you acquired your Westpac shares before 20 September 1985 and your Westpac shares continue to be treated as acquired before that date, or you are otherwise taken to have acquired your Westpac shares before that date, you disregard any capital gain or capital loss you made from the disposal of the Westpac shares (subsection 104-10(5)). CGT event K6 under section 104-230 does not apply due to the exemption at paragraph 104-230(9)(a).

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**Shares held as trading stock**

30. If you held your Westpac shares as trading stock (as defined in subsection 995-1(1)) and sold them in the Buy-Back in the ordinary course of your business, the Sale Consideration of \$14.58 you received per Westpac share (which may be adjusted under subsection 159GZZZQ(8) if you are a corporate tax entity) is included in your assessable income (subsection 70-80(1)).

31. While CGT event A1 also happened when you sold your Westpac shares in the Buy-Back, any capital gain or capital loss made as a result of selling the Westpac shares you held as trading stock, or if you are a partner in a partnership, the Westpac shares that the partnership held as trading stock, will be disregarded (section 118-25).

**Shares held on revenue account**

32. If you held your Westpac shares as revenue assets (as defined in section 977-50), and they were not trading stock, the amount by which the Sale Consideration (which may be adjusted under subsection 159GZZZQ(8) if you are a corporate tax entity) exceeds the cost of each Westpac share is included in your assessable income (section 6-5). Correspondingly, if the cost of each Westpac share exceeds the Sale Consideration, the difference is an allowable deduction (section 8-1).

33. CGT event A1 also happened when you sold your Westpac shares in the Buy-Back. Where you made a capital gain as a result of selling your Westpac shares in the Buy-Back, you reduce the amount of the capital gain by the amount you otherwise include in your assessable income (section 118-20). The capital gain is reduced to zero if it does not exceed the amount otherwise included in assessable income (subsection 118-20(2)). If the capital gain exceeds the amount otherwise included in assessable income, the capital gain will be reduced by the amount otherwise included in assessable income (subsection 118-20(3)). There is a similar reduction if you are a partner in a partnership (paragraphs 118-20(1)(b) and (2)(b), and subsection 118-20(3)).

**Foreign-resident shareholders – capital gains tax consequences**

34. If you were a foreign-resident shareholder when you sold your Westpac shares under the Buy-Back, you will only have CGT consequences if the Westpac shares you sold in the Buy-Back are 'taxable Australian property' (section 855-10).

**Qualified persons**

35. You will satisfy the qualified person rules in relation to the Dividend Component for the purposes of paragraphs 207-145(1)(a) and 207-150(1)(a) (which refers to Division 1A of former Part IIIAA) if:

- you acquired your Westpac shares which you sold in the Buy-Back on or before 4 November 2021, and
- during the period you held your Westpac shares, you had sufficient risks of loss or opportunities for gain in respect of the Westpac shares (as defined in former section 160APHM), having regard to any positions you have taken in relation to your Westpac shares, for a continuous period of at least 45 days.

36. However, if you were, are, will be or are likely to be under an obligation to make a 'related payment' (as defined in former section 160APHN), in relation to the Dividend

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Component, the 45 continuous days must be during the period 21 September 2021 to 20 December 2021 inclusive.

37. The announcement of the Buy-Back, the making of an invitation to shareholders to offer to sell their Westpac shares, the making of an offer by a shareholder to sell their Westpac shares to Westpac or your participation in the Buy-Back does not affect whether the Westpac shares bought back in the Buy-Back are held 'at risk' for the purposes of Division 1A of former Part IIIAA.

38. The 'last-in first-out' rule in former subsection 160APHI(4) has no effect for the purposes of the Buy-Back in respect of any additional Westpac shares you acquired on or after 5 November 2021, as these Westpac shares did not confer an entitlement to participate in the Buy-Back.

### **The anti-avoidance provisions**

39. The Commissioner will not make a determination under subsections 45A(2) or 45B(3) that section 45C applies to the whole, or any part, of the Capital Component of the Buy-Back Price you received.

40. The Commissioner will not make a determination under paragraph 177EA(5)(b) to deny the whole, or any part, of the imputation benefits you received in relation to the Dividend Component of the Buy-Back Price.

41. 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 received in relation to the Dividend Component of the Buy-Back Price.

## **Scheme**

42. 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.

### **Westpac Banking Corporation**

43. Westpac is an Australian-resident public company listed on the Australian Securities Exchange (ASX) and an authorised deposit-taking institution for the purposes of the *Banking Act 1959*. Westpac is subject to prudential requirements as administered by the Australian Prudential Regulation Authority, including the maintenance of mandatory levels of Tier 1 Capital.

44. Westpac has generated capital growth through its annual operating performance. Additionally, as part of its portfolio simplification review, Westpac established a Specialist Business Division to manage (and exit) non-core businesses. Over the past few years, it has announced a number of divestments and the review of a number of other businesses is ongoing.

45. The financial statements of Westpac on a stand-alone basis as at 30 September 2021 disclosed total share capital of \$41.601 billion, reserves of \$2.148 billion and retained earnings of \$19.714 billion. Westpac had 3,668,591,808 ordinary shares on issue as at 30 September 2021.

46. Westpac's ordinary shareholders are a mix of individuals, companies, trustees and institutional investors, some of whom are non-residents. Where the shares were acquired

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before 20 September 1985, those shares are generally treated as pre-CGT shares in the hands of the shareholders. However, in specific circumstances, shares are taken to be acquired before or after that date.

47. Westpac does not expect the Buy-Back to impact Westpac's dividend settings and anticipates that it will continue to pay fully franked dividends for the foreseeable future.

48. Westpac's 2021 final ordinary dividend had an ex entitlement date of 5 November 2021 and a record date of 8 November 2021.

#### **Off-market share buy-back**

49. On 1 November 2021, Westpac first announced its intention to undertake the Buy-Back of its shares for up to \$3.5 billion (Original Announcement). Under the terms of the Buy-Back, Westpac reserved the right, in its complete discretion to buy back any number of Westpac shares or to not buy back any Westpac shares.

50. On 10 December 2021, Westpac announced amendments to the terms of the Buy-Back, including extending the closing date and changes to the discount range, following a fall in Westpac's share price (Supplementary Announcement).

51. The Buy-Back was conducted in accordance with a tender process and was open to all shareholders that held ordinary shares in Westpac on 8 November 2021, except for ordinary shares:

- acquired on an ex entitlement basis on or after 5 November 2021
- held by any 'Excluded Foreign Person', being any persons holding shares
  - who Westpac would otherwise be prohibited, pursuant to any act, rule or regulation in any jurisdiction, from making payments, including any person who is (or who is acting on behalf of or for the account of a person who is) located in the United States of America (US), a 'US Person' as defined by Regulation S of the *Securities Act of 1933* of the US (including any agent, fiduciary or other intermediary acting on such person's behalf), or a resident of Canada, or
  - who resides, or who is acting on behalf of or for the account of a person who resides, in a jurisdiction other than Australia or New Zealand
- held as shares or share rights under a Westpac employee share scheme (but not including shares that were awarded under an employee share scheme and have since vested, and are freely tradeable)
- held as American Depositary Receipts, or
- held by Directors and Group Executives as well as certain other management involved in the implementation of the Buy-Back.

52. Participation in the Buy-Back was voluntary and therefore eligible shareholders who did not wish to participate were not required to do anything. Non-participating eligible shareholders and ineligible shareholders did not receive any property, dividends or distribution by way of compensation.

53. The tender period opened on 17 November 2021 and closed on 11 February 2022.

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54. Under the tender process as amended by the Supplementary Announcement, eligible shareholders could make an offer to sell some or all of their Westpac shares to Westpac:

- at a discount nominated by shareholders to the market price at percentages of between 0% to 10% inclusive, at 1% intervals (Discount), or
- by offering to sell their shares at the final Buy-Back price (Final Price Application) as determined by Westpac after the close of the tender period.

55. The market price means the volume-weighted average price (VWAP) of Westpac shares on the ASX over the five trading days up to and including the closing date of the tender period.

56. Eligible shareholders were also entitled to make their tender conditional on the Buy-Back Price being no less than a specified minimum share price (Minimum Price).

57. The Original Announcement included a discount range of 8% to 14%, at 1% intervals. Eligible shareholders who did not withdraw or amend their tendered applications at discounts of 11% to 14% had their applications treated as Final Price Applications for the purposes of any scale back.

58. The Buy-Back Price was subject to two overriding limits:

- Westpac would not buy back any shares at a discount greater than 14%, calculated by reference to the VWAP of Westpac shares on the ASX over the five trading days up to and including 11 February 2022, and
- the Buy-Back Price would not exceed the market value of a share worked out in accordance with Taxation Determination TD 2004/22 *Income tax: for Off-Market Share Buy-Backs of listed shares, whether the buy-back price is set by tender process or not, what is the market value of the share for the purposes of subsection 159GZZZQ(2) of the Income Tax Assessment Act 1936?*

59. If the total number of Westpac shares tendered at Discounts equal to or greater than the discount set by Westpac (Buy-Back Discount) and as Final Price Applications was more than the total number of shares that Westpac determined to buy back, a scale back would apply.

60. If the Buy-Back Discount was 10%, for those tenders with a Discount equal to 10% and Final Price Applications (where the Minimum Price condition does not apply):

- (a) Westpac would accept an initial allocation of up to 380 Westpac shares (Priority Allocation) or such lesser number of Westpac shares it determined to be Priority Allocation as was required to ensure that Westpac bought back only the number of Westpac shares it determined to buy back
- (b) Westpac would accept any remaining Westpac shares in successful tenders, but would scale these back on a pro rata basis (other than 'Small Residual Applications' described in subparagraph 60(c) of this Ruling), and
- (c) where a shareholder would be left with a small holding (of up to 75 Westpac shares) as a result of Westpac's acquisition of the Priority Allocation and any scale back, those Westpac shares would be accepted in full (Small Residual Application). However, if the shareholder tenders all of their shares and also became the registered holder of a greater number of shares at 11 February 2022 (being the date the tender closed) than the shareholder held at 8 November 2021, then it was not treated as a Small Residual Application.

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61. The terms of participation were intended to simplify the Buy-Back for shareholders with small holdings and provide them with a greater degree of certainty in respect of their participation, because either all or none of their Westpac shares would be bought back.

62. If the Buy-Back Discount was less than 10%, tenders with a Discount greater than the Buy-Back Discount and Final Price Applications would generally be accepted in full. The scale back mechanism outlined in paragraph 60 of this Ruling applied for tenders at the Buy-Back Discount (other than Final Price Applications).

63. On 14 February 2022, Westpac announced that:

- it had successfully completed the Buy-Back of approximately 167.5 million Westpac shares, representing 4.6% of Westpac ordinary shares on issue
- the total amount of Westpac shares purchased under the Buy-Back was approximately \$3.5 billion
- the Buy-Back Price was set at \$20.90 per Westpac share, representing a discount of 6% to the VWAP of \$22.2387 per Westpac share over the five days up to and including 11 February 2022
- eligible shareholders who tendered their Westpac shares at a 7% Discount or greater discount, or as a Final Price Application, had their applications accepted in full at the Buy-Back Price
- eligible shareholders who tendered their Westpac shares at a 6% Discount had a Priority Allocation of 380 shares bought back before any scale back was applied. Applications for more than the Priority Allocation were accepted, but scaled back by approximately 95% on a pro rata basis after taking into account Priority Allocations and Small Residual Applications
- successful shareholders who offered to sell all of their Westpac shares at a 6% Discount and who would be left with a Small Residual Holding of 75 Westpac shares as a result of the scale back, had all of their shares bought back in full, and
- applications at Discounts of 0% to 5% and applications conditional on a Minimum Price above the Buy-Back Price were not accepted.

64. Under the Buy-Back, Westpac debited \$11.34 per Westpac share to its untainted share capital account (the Capital Component), and the balance of the Buy-Back Price was debited to Westpac's retained profits (the Dividend Component). The Dividend Component of the Buy-Back Price was fully franked.

65. All Westpac shares bought back under the Buy-Back were cancelled.

66. The key dates of the Buy-Back were:

Date	Buy-Back
1 November 2021	First announcement date
4 November 2021	Last day to acquire Westpac shares to be eligible to participate in the Buy-Back and be entitled to franking credits
5 November 2021	Ex entitlement date
8 November 2021	Record date
17 November 2021	Opening date
10 December 2021	Amended discount range and revised Buy-Back timetable announced

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7–11 February 2022	The five trading days over which the market price is calculated
11 February 2022	Closing date
14 February 2022	Buy-Back date
18 February 2022	Buy-Back payment date

**Other matters**

67. At the time of the Buy-Back, the sum of the market value of Westpac's assets that were 'taxable Australian real property' did not exceed the sum of the market value of Westpac's other assets for the purposes of section 855-30.

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**Commissioner of Taxation**16 March 2022

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## Appendix 1 – Explanation

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**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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### **Off-market share buy-back**

68. For the purposes of Division 16K, where a company buys a share in itself from a shareholder, it is either an 'on-market purchase' (paragraph 159GZZZK(c)) or an 'off-market purchase' (paragraph 159GZZZK(d)).

69. Although Westpac's ordinary shares are listed for quotation in the official list of the ASX, the Buy-Back was not made in the ordinary course of trading on the ASX. Therefore, the Buy-Back is an off-market purchase within the meaning of paragraph 159GZZZK(d).

### **The Dividend Component**

70. The difference between the Buy-Back Price and the part of the Buy-Back Price which was debited against amounts standing to the credit of Westpac's share capital account is taken to be a dividend paid by Westpac to you.

71. The Buy-Back Price was \$20.90, and \$11.34 per share was debited against the amounts standing to the credit of Westpac's untainted share capital account. Therefore, the Dividend Component is taken to be \$9.56 per share.

72. The Dividend Component is a frankable distribution, but only to the extent that the Buy-Back Price did not exceed the market value of a Westpac share at the time of the Buy-Back if the Buy-Back did not occur and was never proposed to occur (paragraph 202-45(c)).

73. TD 2004/22 sets out the Commissioner's view as to how to determine what would have been the market value of a Westpac share at the time of the Buy-Back if the Buy-Back did not occur and was never proposed to occur. In respect of the Buy-Back, the Buy-Back Price per share did not exceed the market value (determined in accordance with TD 2004/22) of \$24.14 per share. As a result, the entire Dividend Component is frankable.

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### **Sale Consideration**

74. For the purposes of determining the amount of a gain or loss you made from your Westpac shares which you sold in the Buy-Back, the consideration in respect of the disposal of a share that you are taken to have received is determined in accordance with section 159GZZZQ.

75. Subsection 159GZZZQ(1) provides that you are taken to have received an amount equal to the purchase price (in this case the Buy-Back Price you received for each Westpac share you sold) as consideration in respect of the sale of the share bought back. However, this amount is subject to certain adjustments in order to arrive at the Sale Consideration.

76. Subsection 159GZZZQ(2) is an adjusting provision. It provides that if the purchase price is less than the market value of the share at the time of the buy-back (calculated as if the buy-back did not occur and was never proposed to occur), then you are taken to have received an amount equal to the market value of the share as consideration in respect of the sale of the share bought back.

77. For the purposes of determining the application of subsection 159GZZZQ(2), Westpac proposed to use the methodology outlined in TD 2004/22 to calculate the market value of the share (which the Commissioner accepts) – the relevant market value of a Westpac share is the VWAP of the share on the ASX over the last five trading days before the first announcement of the Buy-Back, adjusted for the percentage change in the S&P/ASX 200 Banks Index from the commencement of trading on 1 November 2021 to the close of trading on 11 February 2022.

78. Under this methodology, the market value of a Westpac share bought back was \$24.14 per share. As a result, you are taken to have instead received consideration of \$24.14 for the sale of each Westpac share rather than the Buy-Back Price.

79. Pursuant to subsection 159GZZZQ(3), the deemed consideration of \$24.14 is reduced by a 'reduction amount'. The reduction amount is an amount calculated pursuant to subsection 159GZZZQ(4). In the circumstances of the Buy-Back, the reduction amount is equivalent to the Dividend Component. As a result, the Sale Consideration for each Westpac share you sold under the Buy-Back is \$14.58 per share (being \$24.14 less the Dividend Component).

80. However, where you are a corporate tax entity which is entitled to a tax offset under Division 207 in respect of the Dividend Component, a further adjustment may be made to the Sale Consideration. Under subsection 159GZZZQ(8), if you also make either a capital loss or a deductible loss (or any increase in such a loss) in respect of the sale of a Westpac share you sold under the Buy-Back, the Sale Consideration is increased by an off-settable amount determined under subsection 159GZZZQ(9). The Reduction Amount (being the Dividend Component) is itself reduced by so much of the off-settable amount that does not exceed the capital loss or the deductible loss.

### **Foreign-resident shareholders – capital gains tax consequences**

81. If you are a foreign-resident shareholder, you will only have CGT consequences if the shares you sold under the Buy-Back are 'taxable Australian property' (section 855-10). The term 'taxable Australian property' is defined in the table in section 855-15. Your Westpac share was not an 'indirect Australian real property interest' (table item 2 of

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section 855-15). Therefore, your Westpac share will constitute taxable Australian property if:

- you used the share in carrying on a business through a permanent establishment in Australia (table item 3 of section 855-15), or
- your share is a CGT asset that is covered by subsection 104-165(3), which is about you choosing to disregard a capital gain or capital loss on ceasing to be an Australian resident (table item 5 of section 855-15).

### **Qualified persons**

82. Paragraph 207-145(1)(a) provides that, in relation to a franked distribution made by an entity, only a qualified person in relation to the distribution for the purposes of Division 1A of former Part IIIAA is required to include the franking credit in its assessable income and is entitled to claim the franking credit as a tax offset. Paragraph 207-150(1)(a) is a similar provision that applies to indirect distributions. Broadly speaking, to be a qualified person in relation to the Dividend Component, you must satisfy the 'holding period rule' (former section 160APHO).

83. The holding period rule requires a shareholder to hold the shares on which the dividend is paid 'at risk' for a continuous period of at least 45 days during the relevant qualification period. The relevant qualification period is:

- in the absence of a related payment, the primary qualification period, which commences on the day after you acquired the shares and ends on the 45th day after the day on which the shares became ex dividend, or
- if a related payment was made (see paragraph 85 of this Ruling), the secondary qualification period, which commences on the 45th day before, and ends on the 45th day after, the day on which the shares became ex dividend.

84. In determining whether you have satisfied the holding period rule, any days during which you have materially diminished risks of loss or opportunities for gain in respect of the relevant shares are not counted. The day of acquisition and the day of disposal of the relevant shares are also not counted.

85. Broadly, a related payment arises under former section 160APHN where you are or were under an obligation to make, or will make, a payment in respect of the dividend, which effectively passes on the economic benefit of the dividend to another person. The rule also applies if an associate of yours is or was under an obligation to, or will, make the payment.

86. Under former subsection 160APHM(2), you are taken to have materially diminished risks of loss and opportunities for gain in respect of shares if your 'net position' in respect of the risks and opportunities reduces your exposure to those risks and opportunities to less than 30%.

87. The announcement of the Buy-Back, the making of an invitation to shareholders to offer to sell their Westpac shares, the making of an offer by a shareholder to sell their Westpac shares to Westpac, or your participation in the Buy-Back does not affect whether the Westpac shares bought back in the Buy-Back are held 'at risk' for the purposes of Division 1A of former Part IIIAA.

88. There are 45 clear days from 5 November 2021 (the ex entitlement date) to 13 February 2022 (the date prior to the date tender offers were accepted). As a result, if you acquired Westpac shares on or before 4 November 2021 that were bought back under

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the Buy-Back, you would satisfy the holding period rule as long as those shares were held at risk for at least 45 continuous days. Where a 'related payment' arises in relation to the Dividend Component, the 45 continuous days must be during the period 21 September 2021 to 20 December 2021 inclusive.

89. Generally, under the holding period rule you will be deemed to have disposed of the most recently acquired shares first (former subsection 160APHI(4)). The 45-day rule operates on a 'last-in first-out' basis, so that shareholders will be deemed to have disposed of their most recently acquired shares first for the purposes of applying the 45-day rule.

90. If you acquired ex entitlement Westpac shares and participated in the Buy-Back with cum entitlement shares (which conferred an entitlement to participate in the Buy-Back), you will not be considered, for the purposes of the 45-day rule, to be subject to the last-in first-out rule in former subsection 160APHI(4) and so you will not be considered to have participated in the Buy-Back with the 'ex entitlement' shares. Westpac shares commenced trading on an ex entitlement basis on 5 November 2021, and ex entitlement shares do not constitute 'related securities' for the purposes of former subsection 160APHI(2) in relation to any cum entitlement shares.

91. Accordingly, the last-in first-out rule in former subsection 160APHI(4) will not apply to any additional Westpac shares you acquired on or after 5 November 2021 on an ex entitlement basis.

92. If you are an individual, you are not required to satisfy the holding period rule in relation to the Dividend Component if you:

- received franking credit offsets not exceeding \$5,000 for the income year ending 30 June 2022, and
- were not under an obligation to make, or would not or will not make, a related payment in respect of the Dividend Component (former subsection 160APHT(1)).

### **The anti-avoidance provisions**

#### **Section 45A**

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

94. Although a 'capital benefit' (as defined in paragraph 45A(3)(b)) was provided to you under the Buy-Back, the circumstances of the Buy-Back indicate that there was no streaming of capital benefits to some shareholders and dividends to other shareholders. Therefore, section 45A does not apply to the Buy-Back.

#### **Section 45B**

95. Section 45B applies where certain capital payments are paid to shareholders in substitution for dividends.

96. While the conditions of paragraphs 45B(2)(a) and (b) were met in respect of the Buy-Back, the requisite purpose of enabling a person to obtain a tax benefit as a result of the capital distribution was not present.

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97. Having regard to the relevant circumstances (as set out in subsection 45B(8)) of the Buy-Back, it cannot be concluded that a person would have entered into, or carried out, the Buy-Back for a more than incidental purpose of enabling a participating shareholder to obtain a tax benefit. Therefore, the Commissioner will not make a determination under subsection 45B(3) that section 45C applies to treat all or part of the distribution of share capital as an unfranked dividend paid by Westpac.

### **Section 177EA**

98. Section 177EA is a general anti-avoidance provision that applies to a wide range of schemes designed to obtain imputation benefits. In essence, it applies to schemes for the disposition of shares or an interest in shares, where a franked distribution is paid or payable in respect of the shares or an interest in shares. This would include a buy-back with a franked dividend component.

99. It is the Commissioner's view that section 177EA applies to the Buy-Back, having regard to all the relevant circumstances of the scheme as outlined in subsection 177EA(17). Among the circumstances of the Buy-Back reflected in subsection 177EA(17) is the greater attraction of the Buy-Back to resident shareholders (because of the franking credits on the Dividend Component of the Buy-Back Price) than to non-resident shareholders.

100. Where section 177EA applies, the Commissioner may make a determination to debit Westpac's franking account pursuant to paragraph 177EA(5)(a), or deny the imputation benefit to each participating Westpac shareholder pursuant to paragraph 177EA(5)(b).

101. The Commissioner will not make a determination that the whole, or any part, of the imputation benefits you obtained by participating in the Buy-Back will be denied under paragraph 177EA(5)(b).

### **Section 204-30**

102. 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.

103. The requirements of subsection 204-30(1) are satisfied in respect of the Buy-Back because:

- participating shareholders received an imputation benefit (within the meaning given by subsection 204-30(6)) as a result of receiving the fully franked Dividend Component of the Buy-Back Price
- some participating Westpac shareholders would have derived a greater benefit from franking credits than other Westpac shareholders (for example, non-resident Westpac shareholders (see subsections 204-30(7) and (8)), and
- it is reasonable to conclude that the features of the Buy-Back influenced some non-resident Westpac shareholders not to participate in the Buy-Back, and as a result not receive any imputation benefits in respect of the Buy-Back.

104. Accordingly, the conditions in subsection 204-30(1) are met and the Commissioner can make a determination under subsection 204-30(3), including a determination under

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paragraph 204-30(3)(c) to deny the imputation benefit to each participating Westpac shareholder.

105. However, the Commissioner will not make a determination under subsection 204-30(3), including a determination under paragraph 204-30(3)(c).

Status: **not legally binding****Appendix 2 – Legislative provisions**

106. This paragraph sets out the details of the provisions ruled upon or referenced in this Ruling.

<i>Income Tax Assessment Act 1936</i>	subsection 44(1)
<i>Income Tax Assessment Act 1936</i>	paragraph 44(1)(b)
<i>Income Tax Assessment Act 1936</i>	paragraph 44(1)(c)
<i>Income Tax Assessment Act 1936</i>	section 45A
<i>Income Tax Assessment Act 1936</i>	subsection 45A(2)
<i>Income Tax Assessment Act 1936</i>	paragraph 45A(3)(b)
<i>Income Tax Assessment Act 1936</i>	section 45B
<i>Income Tax Assessment Act 1936</i>	paragraph 45B(2)(a)
<i>Income Tax Assessment Act 1936</i>	paragraph 45B(2)(b)
<i>Income Tax Assessment Act 1936</i>	subsection 45B(3)
<i>Income Tax Assessment Act 1936</i>	subsection 45B(8)
<i>Income Tax Assessment Act 1936</i>	section 45C
<i>Income Tax Assessment Act 1936</i>	section 90
<i>Income Tax Assessment Act 1936</i>	subsection 95(1)
<i>Income Tax Assessment Act 1936</i>	paragraph 128B(3)(ga)
<i>Income Tax Assessment Act 1936</i>	subsection 128B(3E)
<i>Income Tax Assessment Act 1936</i>	section 128D
<i>Income Tax Assessment Act 1936</i>	Division 16K
<i>Income Tax Assessment Act 1936</i>	section 159GZZZK
<i>Income Tax Assessment Act 1936</i>	paragraph 159GZZZK(c)
<i>Income Tax Assessment Act 1936</i>	paragraph 159GZZZK(d)
<i>Income Tax Assessment Act 1936</i>	section 159GZZZP
<i>Income Tax Assessment Act 1936</i>	subsection 159GZZZP(2)
<i>Income Tax Assessment Act 1936</i>	section 159GZZZQ
<i>Income Tax Assessment Act 1936</i>	subsection 159GZZZQ(1)
<i>Income Tax Assessment Act 1936</i>	subsection 159GZZZQ(2)
<i>Income Tax Assessment Act 1936</i>	subsection 159GZZZQ(3)
<i>Income Tax Assessment Act 1936</i>	subsection 159GZZZQ(4)
<i>Income Tax Assessment Act 1936</i>	subsection 159GZZZQ(8)
<i>Income Tax Assessment Act 1936</i>	subsection 159GZZZQ(9)
<i>Income Tax Assessment Act 1936</i>	Division 1A of former Part IIIAA
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHI(2)
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHI(4)

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<i>Income Tax Assessment Act 1936</i>	former section 160APHM
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHM(2)
<i>Income Tax Assessment Act 1936</i>	former section 160APHN
<i>Income Tax Assessment Act 1936</i>	former section 160APHO
<i>Income Tax Assessment Act 1936</i>	former subsection 160APHT(1)
<i>Income Tax Assessment Act 1936</i>	section 177EA
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(5)(a)
<i>Income Tax Assessment Act 1936</i>	paragraph 177EA(5)(b)
<i>Income Tax Assessment Act 1936</i>	subsection 177EA(17)
<i>Income Tax Assessment Act 1997</i>	section 6-5
<i>Income Tax Assessment Act 1997</i>	section 8-1
<i>Income Tax Assessment Act 1997</i>	Division 67
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1)
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1A)
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1B)
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1C)
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1D)
<i>Income Tax Assessment Act 1997</i>	subsection 67-25(1DA)
<i>Income Tax Assessment Act 1997</i>	subsection 70-80(1)
<i>Income Tax Assessment Act 1997</i>	section 104-10
<i>Income Tax Assessment Act 1997</i>	subsection 104-10(4)
<i>Income Tax Assessment Act 1997</i>	subsection 104-10(5)
<i>Income Tax Assessment Act 1997</i>	subsection 104-165(3)
<i>Income Tax Assessment Act 1997</i>	section 104-230
<i>Income Tax Assessment Act 1997</i>	paragraph 104-230(9)(a)
<i>Income Tax Assessment Act 1997</i>	subsection 106-5(2)
<i>Income Tax Assessment Act 1997</i>	Subdivision 115-A
<i>Income Tax Assessment Act 1997</i>	subsection 116-20(1)
<i>Income Tax Assessment Act 1997</i>	section 118-20
<i>Income Tax Assessment Act 1997</i>	paragraph 118-20(1)(b)
<i>Income Tax Assessment Act 1997</i>	subsection 118-20(2)
<i>Income Tax Assessment Act 1997</i>	paragraph 118-20(2)(b)
<i>Income Tax Assessment Act 1997</i>	subsection 118-20(3)
<i>Income Tax Assessment Act 1997</i>	section 118-25
<i>Income Tax Assessment Act 1997</i>	section 202-5
<i>Income Tax Assessment Act 1997</i>	section 202-40
<i>Income Tax Assessment Act 1997</i>	paragraph 202-45(c)

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<i>Income Tax Assessment Act 1997</i>	section 204-30
<i>Income Tax Assessment Act 1997</i>	subsection 204-30(1)
<i>Income Tax Assessment Act 1997</i>	subsection 204-30(3)
<i>Income Tax Assessment Act 1997</i>	paragraph 204-30(3)(c)
<i>Income Tax Assessment Act 1997</i>	subsection 204-30(6)
<i>Income Tax Assessment Act 1997</i>	subsection 204-30(7)
<i>Income Tax Assessment Act 1997</i>	subsection 204-30(8)
<i>Income Tax Assessment Act 1997</i>	Division 207
<i>Income Tax Assessment Act 1997</i>	Subdivision 207-B
<i>Income Tax Assessment Act 1997</i>	section 207-20
<i>Income Tax Assessment Act 1997</i>	subsection 207-20(1)
<i>Income Tax Assessment Act 1997</i>	subsection 207-20(2)
<i>Income Tax Assessment Act 1997</i>	subsection 207-35(1)
<i>Income Tax Assessment Act 1997</i>	subsection 207-35(3)
<i>Income Tax Assessment Act 1997</i>	subsection 207-35(4)
<i>Income Tax Assessment Act 1997</i>	subsection 207-35(5)
<i>Income Tax Assessment Act 1997</i>	subsection 207-35(6)
<i>Income Tax Assessment Act 1997</i>	section 207-45
<i>Income Tax Assessment Act 1997</i>	paragraph 207-45(c)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-45(d)
<i>Income Tax Assessment Act 1997</i>	section 207-70
<i>Income Tax Assessment Act 1997</i>	subsection 207-75(2)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-145(1)(a)
<i>Income Tax Assessment Act 1997</i>	paragraph 207-150(1)(a)
<i>Income Tax Assessment Act 1997</i>	Division 230
<i>Income Tax Assessment Act 1997</i>	section 855-10
<i>Income Tax Assessment Act 1997</i>	section 855-15
<i>Income Tax Assessment Act 1997</i>	section 855-30
<i>Income Tax Assessment Act 1997</i>	section 977-50
<i>Income Tax Assessment Act 1997</i>	subsection 995-1(1)

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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TD 2004/22; TR 2006/10

*Legislative references:*

- TAA 1953
- Banking Act 1959

*Other references:*

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