

9 October 2022

Ms Mira Mouawad
Director
Corporate Tax Policy Unit
Treasury
Langton Crescent
PARKES ACT 2600

By email: frankeddistconsult@treasury.gov.au

Dear Mira

**Exposure Draft – *Treasury Laws Amendment (Measures for a later sitting) Bill 2022* –
Franked distributions funded by capital raisings**

Thank you for the opportunity to provide comments on the Exposure Draft of the *Treasury Laws Amendment (Measures for a later sitting) Bill 2022*. It is our clear understanding from helpful discussions we have had with officers of Treasury and the ATO that the proposed provisions are not intended to affect the regular dividends typically paid by banks on their ordinary shares or their hybrid Tier 1 capital instruments, even taking into account the fact that in their ordinary course of business capital management activities, those banks may often be issuing capital instruments at times, and in amounts, which may coincide with their distribution of those regular dividends. (The commercial reasons why those issuances may from time to time coincide in that way include the general need for recent financial statements to offer the instruments, which statements are typically issued shortly before regular dividend payment dates, and the market efficiency of underwriting dividend reinvestment plan participation as a cost-effective means of raising relatively small amounts of capital.)

Westpac is concerned, on the basis of legal advice we have received, that the drafting of the proposed amendments is such that their actual scope may be wider than intended, particularly in relation to Banks as described above. Accordingly, we request that in finalising the form of the proposed amendments, serious consideration be given to the following suggested drafting improvements and changes:

- 1 In each of paragraphs 207-159(1)(c)(i) and (ii), replace the phrase "or part of the relevant distribution" with the phrase "or a substantial part of the relevant distribution". This would exclude merely incidental or coincidental purposes or effects of capital raisings from attracting the provisions, aligning their scope with what we understand is their intended application to quite deliberately structured arrangements.
- 2 Omit subsection 207-159(3). The potential scope of the principal effects test in paragraph 207-159(1)(c)(i) is so wide, that the inclusion of subsection 207-159(3) has the potential to undermine the intended operation of the regularity condition in paragraph 207-159(1)(a).
- 3 For clarity, insert an interpretive provision along the lines of: "In this section, references to a *distribution* include each and all of the individual distributions made by an entity pursuant to the same particular resolution or other authorising action of the entity."
- 4 Make clear, if only in the Explanatory Memorandum, that the purpose and principal effect tests of paragraphs 207-159(1)(c)(i) and (ii) are not satisfied in relation to the usual operation of elective dividend reinvestment plans (perhaps on the basis that the way such plans operate, the issue of shares does not fund the dividend, instead, the dividend funds the issue of the shares).

- 5 Clarify, if only in the Explanatory Memorandum, the extent to which an issue of equity interests would be taken to "indirectly fund" a distribution. At present, the connection required between the relevant issue of equity interests and the payment of the distribution is vague and potentially broad.
- 6 Clarify in the Explanatory Memorandum that the ordinary course of business capital management activities of a prudentially regulated ADI (which might include underwriting dividend reinvestment plan participation) would not be regarded as having the purpose or effect of funding the regular distributions of that entity.
- 7 Apply the proposed amendments prospectively or, at least, retrospectively only from the date the Exposure Draft was released publicly. This is crucial given the substantial period of time which has passed since the 2016 MYEFO announcement. Alternatively, if the currently proposed retrospectivity is retained, and if proposed subsection 207-159(3) is not omitted as we have suggested, then that subsection should have application only from the date the Exposure Draft was released publicly.

We very much appreciate your willingness to engage with us in relation to these issues.

Yours sincerely



Michael Barbour

Group Head of Tax, Group Taxation