ING (NZ) Limited
ANZ National Bank Limited

Investigation into the promotion, marketing and distribution of the ING Diversified Yield Fund and Regular Income Fund

Purpose

1. The purpose of this paper is to provide ING (NZ) Limited (ING (NZ)) and ANZ National Bank Limited (ANZN) (Parties) with the Commerce Commission's preliminary assessment of the parties' conduct which is the subject of this investigation.

Conclusions

Potential Claims

2. On the basis of the information currently in its possession, the Commission believes it has sufficient evidence to commence criminal and/or civil proceedings against:

   (a) ING (NZ) and ANZN for contravention of sections 10, 11, 13(a), 13(b) and 13(e) of the Fair Trading Act in relation to conduct and representations made in marketing and promotional documents for the Funds;

   (b) against ANZN for contravention of sections 10, 13(a) and 13(e) of the Fair Trading Act in relation to its advisors' conduct and representations to individual investors about the suitability of the Funds for their purposes, having regard to investor risk profiles;

   (c) companies that are related to ING (NZ) and ANZ, in relation to the above conduct and representations, including ING (NZ) Administration Pty Limited **(ING (NZ) Admin)**, ING Australia Limited and Australia New Zealand Banking Group Limited.

3. In addition to the primary issues investigated against ANZN and ING (NZ), some additional queries were raised by complainants about the role of independent advisers in selling the Funds. There were also some queries/complaints about the role and conduct of Strategi Limited (Strategi) and Morningstar Research Limited (Morningstar) in regard to the allocation of the Funds in model portfolios prepared by Strategi with the assistance of Morningstar, for the benefit of ING aligned financial advisers.

Summary of findings

4. The Commission is of the view that ING (NZ)/ANZN (and, through their conduct, some of their related companies) engaged in misleading or deceptive conduct and/or made false or misleading representations as to:

- the nature, characteristics and suitability of the Funds for the investing public from the date of launch of the Funds to the date of suspension, in a range of marketing material for advisors and investors being:

    - advisor brochures/investor brochures;
    - ING direct mail templates for advisors;
    - Advisor Tips;
    - investment statements;
    - registered prospectuses;
    - individual investment plans and letters prepared by ANZ Financial Advisory staff; and
    - Advisor and Investor Updates.

  The representations in these documents were made expressly in relation to the actual level of investment risk associated with the Funds and through an inaccurate comparison of the Funds with traditional fixed interest rate securities such as government, local authority stock and bank deposits. This inaccurate comparison was reinforced by the stated investment objective of 90 day bank bill rates as a benchmark (ie, three month term deposits rates) plus 2% (for the DYF) and 1% (for the RIF). The registered prospectuses failed to identify all relevant risks in the Funds, in circumstances where they ought to. The Advisor and Investor Updates made representations about the Funds which influenced investors' decisions to continue or withdraw their investments from the Funds; and

- the extent and level of professional expertise with which the Funds would be managed by ING (NZ).

5. In relation to the conduct of some independent advisers, Westpac (and other parties), Strategi and Morningstar, the Commission, on balance, decided that that it would not continue with its investigation but will be issuing those parties with compliance advice letters.

Expert Evidence

6. The Commission has received expert advice that:

   (a) the DYF's risk profile was greater than "moderate";

   (b) the RIF's risk profile was greater than "low to moderate";

   (c) ING (NZ) did not provide the nature and extent of portfolio management services for the Funds that was represented in the Funds' marketing materials; and

   (d) ING (NZ) did not accurately represent the relevant risks in the Funds in the registered prospectuses issued for each Fund.

7. The Commission is of the view that, on the basis of this expert advice, the conduct and representations of ING (NZ) and ANZN (and some of their related companies) is likely to have contravened the Fair Trading Act.

Conduct of ING (NZ) and ANZN – Facts summary

8. The marketing and promotional documents prepared by ING (NZ) and distributed by ING (NZ) and/or ANZN (including through their advisors) over the period (ING (NZ) documents):

- contained various misrepresentations as to the "moderate" risk profile for the DYF and "low to moderate risk" profile for the RIF;
- made misleading and inaccurate comparisons with traditional fixed interest rate securities such as government, local authority stock and bank deposits which were reinforced by the stated benchmark of 90 day bank bill rates (i.e. three month term deposits) plus 2% (for the DYF) and 1% (for the RIF);
- failed to adequately disclose in the registered prospectuses all the relevant risks associated with the investment – the key one being pricing spread duration risk;
- did not amend the risk profiles over time, even though ING (NZ) purchased more risky tranches as it tried to maintain the benchmark returns promised; and
- made representations as to the level of management expertise and skill which would be exercised by ING (NZ) as fund manager, which would (together with the principals of diversification) reduce the risks even further of investing in the Funds.

9. The Commission's expert is of the view that:

- representations as to the "moderate" and "low to moderate" risk profiles, were incorrect;
- the Funds, as constructed, could not usefully be compared with traditional fixed interest securities, and the use of the 90 day bank bill rate as a benchmark plus returns of 2% (DYF) and 1% (RIF), was never achievable for the Funds, as constructed; and
- representations made as to the degree of expertise or level of care that ING (NZ) would exercise in management of the Funds were incorrect as ING (NZ) did not measure or manage risks, bought investments that it could not know the contents of, and did not perform appropriate returns attribution analysis or disclose the results.

10. The issue of the appropriate risk profile proposed for the DYF, and known risks associated with CDOs, were discussed internally by ING (NZ)[1] at a senior level and

[1] See ING.014.00254 – Email dated 10 March 2003 discussing new CDO fund (DYF) from [name] ING (NZ) to [name] ING– "The portfolio will predominantly be floating rate – meaning it will act more like a cash fund with consistent returns. We will give ourselves scope to take on duration – which may cause a bit of volatility, but should enhance the return of the fund. The real risk to the fund, given its total exposure to credit, is that credit craps out. This will happen if equity markets take a massive pasting –and then it will act more like an equity fund. If the credit market craps out to this extent, we won't have a business anyway!!"

between the directors of ING (NZ) Admin[2] and ING (NZ) senior staff, but despite issues raised, the DYF was approved for sale.

11. In addition, further material was published during the period of the Funds by ING (NZ) and distributed to advisors (both ANZ and ING (NZ) aligned advisors) updating advisors on the composition of the Funds and updating advisors / investors on returns. There were a number of false or misleading representations contained in these documents from June 2007 (when the Funds began to decline after the collapse of hedge funds in the US as the credit crisis intensified).

12. ING (NZ) sought to differentiate the Funds from the hedge fund collapses in a number of ways. One was by stating that the Funds applied no leverage which was misleading in the context, as the Funds had many underlying securities that were highly leveraged. The documents made other representations that were either false or misleading.

13. These representations appear to have been made in June 2007 and in the following months for the purpose of inducing / persuading advisors and investors to remain invested in the Funds and to prevent a run on the Funds, at a time when the returns were starting to decline, redemptions levels were increasing, and the credit crisis was affecting the price of securities.

14. The overall tenor of ING (NZ) updates to advisors / investors in this period was optimistic and reassuring; however, internally ING (NZ) was undertaking worst case scenario planning for the Funds (August 2007). An internal report from the Fund Manager stated that if combined redemptions reached 5% of the Funds (i.e. $45m) ING (NZ) should consider "closing the gate (suspension of repayment and redemption under clause 8.15 of the Master Trust Deed Poll") over the next two weeks".[3] The Funds, however, continued on until March 2008.

15. Even though at this time, ING (NZ) was making public statements about the state of the markets in the US, and differentiating between the Funds and the collapsing Hedge Funds, it had sent a report to the IRD dated February 2007[4] (6 months before) which painted quite a different picture of the nature and make up of the DYF (and suggesting a much higher than moderate potential risk of default).

16. In the report to the IRD, Funds Manager (in stark contrast to the earlier marketing material and risk profiles and later fund updates) stated that:

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[2] See ING.014.00010 – Email from [name] Director of ING (NZ) Admin to [Name] ING (NZ) dated 26 June 2003 stressing the importance of the Quick Outline in the Investment Statement to the investor and raising concerns about the risk of CDOs – refers to chequered history of CDOs and that the current wording may "significantly understate the potential risk and volatility with these type of investments and given that this is a new fund which is using relatively new securities which have experienced a number of difficulties that it is better to err on the side of caution" … "I am reasonably comfortable with the word "moderate" in the risk profile section on the basis that you are positioning this on a cash to equity universe"…."The only other question mark is the statement on the front cover "without taking unnecessary risk". Based on my comments above I think this is potentially misleading to an average investor, however agree that we could debate the statement either way for a long time. As a result we are prepared to accept the statement provided the risk profile of the fund is more adequately described in the introduction as per point (1) above. The statement should be reviewed / changed next time the whole document is reprinted." [ie that investors in addition to enjoying competitive returns…may suffer capital losses etc" This was not done expressly but rather the reader was directed to page 6 on What are my risks"].

[3] ING.017.13571 page 4.

[4] See ING.024.00283 – ING Structured Credit Group February 2007 – ING (NZ) advised that this report was prepared for a submission to the IRD on behalf of investors in relation to a request for a determination as to the tax treatment of the DYF. See ING response dated 19 March 2010.

- *"..the DYF invests in Class C Notes in CDO Debt securities [52% of the DYF]… "the Class C notes are leveraged 7 to 8x and their security status within the structure ranks behind or is subordinated to the A-1 notes, the A-2 Notes and Class B Notes – deeply subordinated in other words…The Class C notes, by virtue of their security status in the structure and the high levels of leverage, are highly sensitive to defaults, reinvestment risk, downgrades and distressed sales activity to the extent that the stated interest rate 9ie 3.0% over LIBOR) may be frozen over long periods of time. Principal losses are also common at this highly leveraged part of the structure….The CDO secondary equity market is highly illiquid…"*

- *"..CDO equity combos (18%)….Approximately 18% of the DYF is invested in equity combos. An equity combo is a CDO security where the Class C, BBB rated notes are combined with the equity notes of the same CDO….the equity tranche, by comparison represents the first loss position within the CDO structure. The equity tranche is the most deeply subordinated position within the CDO structure …"*

- *"Credit Opportunity Funds (16%)…DYF invests in the equity tranche of a typical COF….Like CDOs, the equity tranche of a COF represents the first loss position….COF equity is highly illiquid".*

- *"The Fund's [DYF] high degree of return sensitivity to default rates reflects:*

  - *The majority of the underlying assets that the CDOs invest in are below investment grade corporate debt securities (the corporation that issued these debt securities is highly leveraged and sensitive to weak economic cycles)*

  - *..CDOs and COS apply a significant degree of leverage to their structures. As a result even small up ticks in default activity can adversely impact return performance and market value…"*

  - *DYF marks to market the portfolio on a monthly basis. Increases in default activity quickly filter through to unit prices/ returns."*

- *"Concluding Comments. DYF invests in CDOs and COFs. These structured vehicles borrow heavily to leverage their structure and invest in predominantly below- investment grade securities. These structures generate relatively high returns, which are needed to compensate for their inherent sensitivity to credit cycles, their structural complexity and their limited liquidity. DYF, and the CDOs and COFs that the Fund invests in, share very few characteristics normally associated with typical government or investment grade debt securities. Rather their deeply subordinated nature, the degree of leverage and the variability of returns more closely aligns their characteristics along side stocks/equities".*

17. The Commission does not consider that the description of the DYF to the IRD in the above terms is consistent with the marketing material prepared by ING (NZ) for a moderate risk fund either at the launch or subsequently with its public statements a few months later when it was attempting to keep investors from redeeming units in the Funds.

18. It is acknowledged that ING (NZ) amended the registered prospectuses for both the DYF and the RIF in December of 2007, which involved further disclosure of the risks of the Funds; however, the Commission is of the view that it still did not disclose all relevant risks in the Funds, and did not amend the then current investment statement for either product, which was published throughout the period on the ING (NZ) website[5].

19. As the credit crisis deepened, the unit price on the Funds continued to drop in the period leading up to the suspension in March 2008. ING (NZ) engaged KPMG (in early March 2008) to confirm that the pricing methodology that ING (NZ) was using to value the Funds was valid, but shortly later ING (NZ) Admin as Trustee exercised it powers under the Trust Deed to suspend redemptions.

20. While it is acknowledged that ING (NZ) did disclose the fact that investors' money could be lost in the risk section of the investment statements, it also advised that these risks would be reduced through the management of the Funds by ING (NZ) and its experts.

21. In the view of the Commission's expert, this did not happen. The language in these statements was generally benign and the overall impression was that the investment would be "without unnecessary risk" as per the cover of the DYF investment statement, and which remained on the investment statement throughout the period, despite a request from a director of ING (NZ) Admin that it be removed.[6]

ANZN's involvement in the promotion and marketing of the Funds

22. The Commission is of the view that ANZN is liable under the Fair Trading Act for the representations made in the ING (NZ) documents.

23. The investigation discloses that in distributing and recommending the Funds, ANZN relied (to some extent) on the information provided by ING (NZ) as to product information and training. However, it is the Commission's view:

    - that it was not reasonable for the ANZN to have done so, without exercising proper due diligence about the nature of the Funds and their risks, given its claims that it was a professional advisory service[7] and because of the fiduciary nature of its relationship with its customers.

    - It did 'approve' the DYF prior to launch (the approval being subject to a risk review) although it is clear that this did not in fact happen[8].

    - It was more than a mere distributor because:

[5] See ING Response 9 October 2009.
[6] See ING.014.00010 Email from [name] 26 July 2003.
[7] See ANZ.001.00139 "Enjoying the benefits of professional advice Financial Advisory Services Guide" page 1 "An ANZ Financial Advisor offers you more than their knowledge and expertise –they'll also offer you the support, strength and resources of ANZ, a bank with decades of experience, a global network of contacts and an enviable record of financial performance. What's more, our relationship with international fund and research specialists such as ING and Russell Investments Group enable us to access some of the best fund managers and products in the world….Integrity…..All ANZ Financial Advisors are salaried professionals which mean they don't earn commissions or any other benefits, from the funds managers they recommend. This means that your advisor can give you balanced advice and solutions that will help you to achieve your financial goals…when you work with an ANZ Advisor as part of the ANZ Group of companies you work with one of Australia's largest companies with an international presence……What's more because we're part of a wider financial services organization you'll have invaluable access (via your advisor) to the skills and expertise of other financial specialists within the Bank."
[8] See ANZ response dated 22 January 2010 – also see ANZ.016.00001.

- of the Joint Venture relationship;
- it was a 49% effective ultimate owner of ING (NZ);
- it had directors sitting on the ING (NZ) board;
- it did review draft ING (NZ) investments statements;
- it requested amendments to the DYF investment statement when the tax laws were changing in 2005[9].

24. It later claimed to have relied on the advice of Morningstar as to how it should advise its clients, yet sought no formal opinion, reports or provided written instructions to Morningstar seeking its opinion, but merely relied on the specific advice given by Morningstar to Strategi for the benefit of ING (NZ) aligned advisors and independent advisors.

25. When the Funds began to decline in June 2007 it became clear that ANZN became concerned about its clients' position in the Funds, and began to seek more detailed and comprehensive information about the Funds' makeup and composition. As a result of this further analysis, Private Banking decided to redeem its clients' units valued at around $8m and did not rely on the advice of Morningstar which was to the effect that while not placing any new money with the Funds, redeeming units would crystallise 'paper' losses.

26. In a minute of the ANZN Managed Funds Governance Committee dated 22 August 2007 it was noted:

> *"The ANZNB Private Banking Committee has made the decision to exit the above funds for their clients with discretionary portfolios. This amounts to approximately $7m of FUM and will have minimal affect on the products overall (there is adequate liquidity to cope with a withdrawal of this size). The redemption notices were lodged and the redemption will take place at the next scheduled withdrawal window for these products.* [name] *(from Private Banking) and [name] are visiting ING on 23 August to review the exposures and risks involved in the two funds, with a view to fully understanding the reputational risk to the Bank and the viable options available for Bank customers in these products.. a paper from* [name] *on ANZ Financial Advisory's approach and response to date is pending."*

27. [name] paper to the Investment Management Governance Committee dated 29 August 2007[10] on the Financial Advisory position notes that ANZ Advisory business has 3283 clients in the funds as at that date with a total of $365m states:

> *"Many of the Advisory's clients are looking for a return slightly greater than Bank deposits but are not prepared to enter the Equity market in a substantial way. This results in a fairly heavy weighting towards fixed interest type assets. As a joint venture partner producing 50% of the inflows*

[9] See ANZ.001.0004 Minutes of the Investment Management Governance Committee 27 June 2005.
[10] ANZ.003.01640

it is inevitable that we will own 50% of some of their funds. Other than some external Capital Guaranteed products, some (very few) quality Finance Co, debentures there is not a lot available for diversification. This is a risk for the future that will be discussed with the JV.

This predominant position within these funds means that we are not able to make a decision to withdraw the investments. Although Advisory's view is that we would not be doing so at this time, with this product, we are in the difficult position of not being able to do so at all (on a total client basis)."

Conduct by ANZN – Facts summary

28. The additional alleged breaches of the Act by ANZN specifically relate to either false or misleading representations or conduct liable to mislead in relation to:

Representations made in letters sent to certain ANZN customers that the DYF was a "low risk highly diversified account ….which did not contain direct equities"

- In September 2006 ANZ advisor [name] distributed a letter stating that the DYF investment was a "low risk, highly diversified account". Email correspondence indicates that this letter was drafted by another Advisor [name] and also sent to his client list – with an estimated total circulation of 350-400 clients receiving the correspondence. (NB: Complainants [names], both of whom have provided statements to the Commission, have provided a hard copy of this letter which was sent to them from [name] in September 2006.)

- Two ANZ advisors used the internal sales officer referral process to promote the funds:

  - Advisor [name] provided direct instructions to sales officers in relation to referrals regarding the DYF over the 2003-2004 Christmas period with a view to assisting them to meeting their "KRA" ("Key Result Area" – possibly performance review criteria) sales targets. He instructed the sales officers to select 10 potential clients, send them a template letter regarding the DYF, follow up with a telephone call three days later.

  - In July 2006 Advisor [name] ran a "referral competition" which focussed on ANZ clients who held money on term deposit but were dissatisfied about rates, or wanted a top up of income, or were "very conservative investors who just want better returns". The [name] communication does not refer expressly to the RIF, but the stated features of the investment and the timing indicate the RIF[11].

Representations made in ANZN Financial Plans regarding the nature and characteristics of the Funds (many of which appear to have been produced from a standard template):

- that the DYF had minimum credit rating of BBB;

- that there was no capital volatility in the DYF/RIF;

- that there was no fund manager risk;

- that the DYF / RIF was suitable for a defensive or conservative investor; and

- recommending an over allocation of DYF or RIF to what would have been considered prudent.

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[11] See documents ANZRM.003.05782 and ANZRM.003.00658 – Email from [name] dated 4 July 2006 entitled "Top Tip" and letter from [name] dated 6 January 2004 re KRA Clarification.

The documentary evidence indicates that varying representations have been made by advisors in relation to the generalised investment risk associated with the fund indicating that at least some of the ANZ advisors did not have a sound understanding of the nature of the Funds and the associated investment risk.

See the following examples:

- ANZRM.003.01877, ANZRM.003.00678, ANZRM.003.00714; ANZRM.003.00715:

    - *The ING Diversified Yield Fund aims to return 2% greater than the current 90 day bank bill rate – without excessive risk.*

    - *ING have designed a fund based around high yielding investments – with a minimum credit rating of BBB (which therefore offer a greater degree of security). Also rather than invest all funds into one or two investments the funds are spread over several thousand (approximately 3500 at present) – again reducing risk associated considerably.*

    - *This fund does not have share exposure and uses a mix of cash and fixed interest investments – and can therefore be seen to be more at the conservative end of the scale.*

    - *In summary if you are looking for strong returns but still wish to maintain a conservative portfolio this* [the DYF] *may be ideal*.

      (Many complainants are of the view that in recommending the fund to them, their ANZ advisor (with knowledge of their personal circumstances and desire for low risk investment) was making a representation to them that the Funds were low risk and therefore suitable for them);

    - There are two file notes from Advisor [name] that state – when discussing the RIF with the client he advised – that the investment was “low risk” (ANZRM.003.03727.007 and ANZ.001.0129).

    - Advisor [name] also stated in a file note that he advised a client that the RIF was aimed at investors who wanted “something alternative to bank accounts” (ANZ.001.0129).

    - Advisor [name] compared the RIF with a cash investment when stating in a letter to an investor “Whilst this investment is classed as fixed interest, it does have similar characteristics of Cash investments and I have recommended it as an alternative to cash without taking unnecessary investment risk” (ANZRM.003.00510).

    - Advisor [name] represented in two documents that the DYF and RIF respectively were “low risk” investments – ANZ.003.00656, ANZRM.003.01377.

- Advisor [name] also represented in one letter to a client that that the RIF was a "low risk" fixed interest investment and would return a "2% better return without high risk" (ANZRM.009.00447).

- ANZRM.012.00019 – Private Banking and Financial Advisory Risk and Compliance Monthly Report dated January 2008 note likely future losses in relation to the sale of the funds due to poor performance after being sold as "low risk" income type products.

Representations in relation to comparison with a term deposit investment:

- The documentary evidence indicates that in some cases, advisors compared the DYF or RIF with a term deposit investment. Further, and as noted above, the pro-active selling process utilised by advisors identified term deposit holders as bank customers who may be interested in the DYF or RIF. See the following representations:

  - There is evidence of advisor [name] recommending in writing that the DYF was a "sound alternative to term deposits" – ANZ.003.03633.

  - There is evidence of advisor [name] recommending the RIF to a client expressly responding to a request to send "some information on an alternative to a Term Deposit" (ANZRM.003.05035).

  - There are other examples where Advisors have not expressly stated this; however, the Funds were recommended as an investment option where investor's funds were held on term deposit (see for example ANZRM.003.01877).

  - There are also examples where the comparison with a term deposit is made by comparing the return of the funds with that of a terms deposit – see for example ANZRM.003.00714:

    - "*Therefore if you were to find another investment that was performing as well (such as a term deposit) you would need to see it return 10.55%. As you are probably aware there just aren't term deposits out there offering anything near this level of return, and the investments that do have so much more risk associated with them that I certainly wouldn't suggest putting any funds into them.*"

  - A number of "product" or "portfolio comparison" charts have been provided by ANZN. These charts make direct comparisons between the DYF / RIF and term deposit investments and in some cases the charts seem to indicate that the DYF or RIF are in fact lower in risk than a term deposit – see for example ANZRM.00300583; ANZRM.003.584; ANZRM.003.00675; ANZRM.003.00674; ANZRM.003.00673; ANZRM.003.01422; ANZRM.003.01690; ANZRM.003.01164.

- Advisor [name] represented the RIF as similar to a "cash investment" (see ANZRM.003.00510 and ANZRM.003.02339).

Representations as to credit ratings:

- The evidence indicates that advisors [name] and [name] made numerous representations in financial plans and letter communications to investors that the DYF comprised high yielding investments with a "minimum credit rating of BBB (which therefore offer a greater degree of security)" (see ANZRM.003.01877; ANZRM.003.00678, ANZRM.003.00714; ANZRM.003.00715; ANZRM.003.01323)

- These representations appear to have been made following information being received from ING (NZ). ANZN has produced an email from [name] ING (NZ) dated 23 July 2003 where he refers to enquiries from ANZ advisors in relation to further clarification of the "targeted average credit rating of BBB" stated in the marketing material. This email states (ANZRM.008.08568, ANZRM.008.06107, ANZ.008.18228):

> *"For clarification, the DYF will not invest in any CDO that is below investment grade i.e. BBB. It will however invest into any CDO above investment grade, so there may be situations where the average credit rating is above BBB.*
>
> *That said, there is always the possibility that the CDO tranch we originally invested into was downgraded. Should this occur we would look at that CDO and make an assessment as to how we manage the risk associated with being in this particular tranch moving forward. Decisions and the resulting actions will be on a case by case basis.*
>
> *Would really appreciate if you could send this out to your FA's asap"*

- There are other communications from Advisors to clients where the credit rating relating to the Funds has been misrepresented. See for example:

  - *"The investment [RIF] is a Unit Trust that invests into global securities that carry a credit rating of BBB+ from Standard and Poors. This means that the fund is very secure"* – ANZRM.003.05035.

  - *"The ING DYF fund is officially a bundled group of CDO's which in lay terms is are wholesale term deposits – currently 40% of the investment are Sovereign Bonds with the remainder being invested in a range of AAA+ rated bonds through to BBB investment with an overage overall rating of A-, so still very secure particularly through the current diversity of parcels held"* – ANZRM.008.03298.

  - *"Should your main concern be security and access, then you could simply invest all funds in the ING Regular Income fund, this earns 2% pa more than the current 90 day bank bill … this fund invest 40% into* *govt stock the remaining funds are invested in a range of AAA+ to BBB rated fixed interest to achieve the higher wholesale rate of return…"* See ANZRM.003.04743.

Representations as to Capital Volatility:

- The documentary evidence indicates that ANZ advisors consistently made representations that investments in the DYF and RIF were not subject to the risk of capital volatility. Such representations were predominantly made in the product risk graphs contained in financial plans (a standard component of a financial plan – where the risk of capital volatility was not indicated for the Funds). This aspect of the graph concerned a number of advisors in late 2007 and early 2008 when the volatility of the DYF and RIF was increasing.

    - Evidence of email correspondence indicates that in September 2004 [name] forwarded the product risk table to [name] at ING for comment. An email sent between advisors in February 2008 (referring to the distribution of the graph via email from [name] to Advisors on the 24 November 2004) questions the fact that the graph indicates no volatility risk for the DYF (see ANZRM.008.43894, ANZRM.003.03340).

    - On 10 September 2007, Advisor [name] emailed [name] noting a query put to "[name]" (presumably [role [name] regarding statements in the plans that the DYF/RIF had no volatility. On 27 February 2008 [name] emailed other advisors in relation to this stating "please note the none (sic) cross on the volatility for the DYF" (sic). Advisor [name] went on to acknowledge that potential liability of the bank in relation to this and stated "How open does this leave ANZ? Should we send this to [name]?". See ANZRM.008.02773 and ANZRM.008.10201.

    - Further to this – there is email correspondence in relation to a complaint from an investor (who is also an employee of the bank) that comments on this aspect of his financial plan – "the plan indicated to me that the DYF fund did not have a Volatility risk that I should be concerned with". The subsequent email chain relating to this correspondence has been redacted (ANZRM.003.04567 – investor name [name].

    - A number of "product" or "portfolio comparison" charts contain the words "No capital volatility" when referring to the DYF and RIF – see above examples ANZRM.00300583; ANZRM.003.584; ANZRM.003.00675; ANZRM.003.00674; ANZRM.003.00673; ANZRM.003.01422; ANZRM.003.01690; ANZRM.003.01164.

Representations as to Fund Manager Risk:

- In addition to representations as to capital volatility, the investment risk charts contained in the financial plans also indicate that the DYF and RIF were not subject to fund manager risk (the relevant box in the graph is not indicated with an asterisk). For examples please refer to financial plans obtained in complainant files.

- As noted above, evidence of email correspondence indicates that in September 2004 [name] forwarded the product risk table to [name] at ING for comment. On 1 October, [name] from ING responded and asked why the DYF was shown as being subject to fund manager risk "given the range of underlying investments". There does not appear to be a response to this email; however, an email sent from [Advisor [name] to [name] on 11 March 2005 questions the fact that the graph indicates "fund manager risk" for the DYF. By reply email on 23 March 2005 [name] responds by saying that "After speaking with ING I will alter it on the graph" (thereby presumably removing the asterisk indicating fund manager risk for these investments) – ANZRM.003.03436.

Other representations:

- There is documentary evidence of other representations in relation to the nature and composition of the funds. See for example:

> *"The Bank also has a fund called the Regular Income fund which is effectively wholesale term deposits and is currently paying 9.03%pa – there is however a 1% implementation fee payable on deposit – this fund compounds daily (with an annual effect of 0.47%pa added as a result) and pays 1%pa more than the NZ Govt. 90 day bank bill"* – ANZRM.008.12963.

> *"Alternatively, for the next year until you ultimately make a final decision on placement of your funds you could look a t the Fixed interest portion – being the ING Diversified Yield fund currently paying 9.55%pa net (this is effectively wholesale term deposits and there is a one off brokerage/implementation charge of 2%, that would be reduced to 1.5% for you as high value clients – also if you initially placed funds in here and then moved them in a years time to the option above, no further fee would be charged for this switch)"* – ANZRM.008.03569.

> *"I think you should look at the ING Diversified Yield Fund for some dollars but it needs to be explained. The bargain of the year*." – ANZRM.008.01924

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