# ANZ Protected Equity Leveraged Solutions (APELS)

## Supplementary Information Memorandum

Australia and New Zealand Banking Group Limited ABN 11 005 357 522, AFSL 234527

This Supplementary Information Memorandum (SIM) is dated **28** May 2008 and is supplementary to the Information Memorandum (IM) dated 19 October 2007 issued by Australia and New Zealand Banking Group Limited (ANZ) for APELS. This SIM must be read in conjunction with the IM and terms defined in the IM have the same meaning where used in this SIM.

The information below is to supplement and amend information presently contained in the IM.

1. The section headed 'Recommendation to Seek Advice' on the Disclosures page is deleted and replaced with the following.

**Recommendation to Seek Advice**
Neither ANZ nor any member of the ANZ group of companies guarantees the performance of APELS. Potential investors should note that no person is authorized by ANZ to give any information to investors or to make any representation other than as contained in this Information Memorandum. Nothing contained in this Information Memorandum constitutes the giving of general or personal financial product advice or a recommendation concerning the entry into transactions or participation in APELS. This Information Memorandum does not take into account the investment objectives, financial situation or particular need of any individual investor. Potential investors should not rely on this Information Memorandum as the sole basis for entering into a Transaction under APELS, and should seek independent legal, tax and investment advice, taking into account their own particular needs and financial circumstances. Nothing in this Information Memorandum is, or may be relied upon as, a representation as to the future performance of the Nominated Approved Securities or the suitability of APELS for an investor's needs. ANZ has recently received a Product Ruling from the Australian Taxation Office ("ATO") to confirm the tax consequences for applicants. You need to confirm whether this Tax Ruling is applicable to your particular circumstances.

2. The section headed 'Potential tax advantages' on page 3 in Section 2 of the IM is deleted and replaced with the following.

**Potential Tax Advantages**
APELS offers potential tax deductions for a significant portion of the interest payable. A general summary of the likely tax treatment for applicants is provided in the tax opinion prepared by Baker and McKenzie in Section 9 of this Information Memorandum. This tax opinion has been revised in light of the Federal Government's announced changes to tax deductibility of interest payments on capital protected products and is contained in the Supplementary Information Memorandum. ANZ has also recently received a Product Ruling from the Australian Taxation Office ("ATO") which confirms the tax consequences for applicants. You should confirm whether a Tax Ruling issued by the ATO in relation to APELS is applicable to your particular circumstances.

3. The section headed 'Limit on tax deduction for interest' on page 7 in Section 4 of the IM is deleted and replaced with the following.

**Limit on tax deduction for interest**
As more fully explained in the Tax Opinion in Section 9, a deduction for interest costs in the relevant year will be limited to the RBA Indicator Rate for personal unsecured loans (the "indicator rate") for capital protected borrowing arrangements entered into before 7.30pm on 13 May 2008. For arrangements entered into after that time, the indicator rate will be the RBA Indicator Variable Rate for Standard Housing Loans. If the interest costs associated with your APELS Transaction are greater than the RBA Indicator Variable Rate for Standard Housing Loans then this excess will not be deducible. Please refer to the Tax Opinion in Section 9 for more details.

It is important to note that the RBA Indicator Variable Rate for Standard Housing Loans is subject to change and should be reviewed in relation to each income year during which the Investor continues to have an outstanding debt. We recommend that Investors seek their own advice in relation to the announced changes pertaining to capital protected products.

4. The Tax Opinion contained in Section 9 is deleted and replaced with the replacement Tax Opinion overleaf.

28 May 2008

The Directors
Australia and New Zealand Banking Group Limited
Level 12
530 Collins Street
Melbourne VIC 3000

Dear Directors,

## Tax Opinion

This letter is a summary of our opinion concerning the Australian taxation implications for an Investor who borrows funds from Australia and New Zealand Banking Group Limited (***ANZ***) to invest in certain Nominated Approved Securities, through the ANZ Protected Equity Leveraged Solutions (the ***APELS***) pursuant to the Information Memorandum dated on or about 28 May 2008 (***IM***).

Investors should seek their own independent taxation advice before entering into the APELS as the taxation consequences for a particular taxpayer may differ from the summary below.

The summary is based upon the Australian law and administrative practice in effect at the date of this IM. Investors should be aware that the ultimate interpretation of taxation law rests with the Courts and that the law, and the way the Commissioner of Taxation (***Commissioner***) administers the law, may change at any time.

This summary is provided only for the benefit of ANZ and is necessarily general in nature and does not take into account the specific taxation circumstances of each individual Investor. Investors should seek independent professional advice in relation to their own particular circumstances before making any investment decision.

References in this section to the "1936 Act" and the "1997 Act" are references to the *Income Tax Assessment Act 1936* (Cth) and the *Income Tax Assessment Act 1997* (Cth) respectively.

In this letter, undefined capitalised terms have the same meaning as in the IM.

Baker & McKenzie is not involved in the marketing of the APELS and its role should not be interpreted to mean that it encourages any party to invest.

Product Ruling 2008/50 has been obtained regarding the APELS. A copy of Product Ruling PR 2000/50 may be obtained from the Australian Taxation Office's website at www.ato.gov.au.

## 1. Assumptions

This opinion is based on and assumes that:

1.1 An Investor using the APELS:

(a) is an Australian resident for income tax purposes;

(b) is an individual;

(c) either:

(i) having previously acquired certain Nominated Approved Securities, enters into the APELS; or

(ii) enters into the APELS to acquire certain Nominated Approved Securities;

(d) is a "qualified person" as defined at Division 1A of Part IIIAA of the 1936 Act for the purpose of being eligible to utilise franking credits attached to dividends distributed on its holding of Nominated Approved Securities;

(e) holds its Nominated Approved Securities on capital account;

(f) is not engaged in a business of trading or investment of securities; and

(g) acquires the Nominated Approved Securities for the purpose of deriving assessable income in the form of dividends or trust distributions, and not for the purpose of resale at a profit.

1.2 The Investor and ANZ are, at all times, in relation to the APELS, dealing with one another at arm's length.

1.3 Where, pursuant to the Sponsorship Agreement, ANZ Securities Limited (which term includes, for the purposes of this letter, any other nominee or "controlling participant" of securities to which the APELS relate) (***ANZ Securities***) participates in Scrip Lending of the Nominated Approved Securities, it enters into a securities lending arrangement that complies with section 26BC of the 1936 Act.

1.4 Only ASX quoted shares, units and stapled shares and units will be the subject of the APELS.

1.5 The documents for APELS will be executed by both parties at least one day before any CHESS instruction form is executed and at the time of execution of these documents, no specific class of security will have been identified as being the subject of an APELS. General discussion as to possible classes of securities to be subject to the APELS may previously have occurred.

This opinion does not take into account the taxation consequences of Corporate Actions, Market Disruption events and other Adjustments such as a takeover of a company or a company entering into a scheme of arrangement or reducing its capital or making bonus issues (other than those specifically addressed in this opinion).

## 2. Income Tax

2.1 **Interest Deductions**

Generally, deductions are allowed for interest expenditure incurred on monies borrowed that are applied to income producing activities (this rule does not extend to monies borrowed for the purpose of producing income by way of capital gains). Therefore,

subject to Division 247 of the 1997 Act, investors should be able to deduct their interest expenditure incurred under the APELS.

Division 247 limits the allowable deductions for expenditure incurred under a "capital protected borrowing". Broadly, a capital protected borrowing is created where an amount is borrowed under an arrangement where the borrower is protected against the fall in value of some specified shares or units in a trust where that borrowing is made for the purpose of investing in those shares or units. Where there is such a capital protected borrowing, part of the interest expenditure may be attributed to acquiring "capital protection" and thereby not be deductible, but rather form part of the cost base of a notional put option.

Under the terms of the APELS, the Loan should be characterised as a capital protected borrowing. Division 247, as currently drafted, will apply to deny an Investor a deduction for interest if, and only if, for the relevant income year:

(a) the aggregate of the interest on the amount borrowed;

(b) **exceeds** the total interest that would have been incurred for the year if the interest rate on the amount borrowed had been the Reserve Bank of Australia's Indicator rate for Personal Unsecured Loans – Variable Rate (as determined when the interest rate is fixed – or, if the interest rate is variable, the average of the rates during the variable interest rate period).

If (a) exceeds (b), the excessive amount is attributed to acquiring "capital protection" and will not be deductible. Instead, it will form part of the cost base of the notional put option deemed to be acquired by the Investor.

(c) On 13 May 2008 the Federal Treasurer announced in the Federal Budget a proposed change to the capital protected borrowing rules in Division 247. The Treasurer has proposed to adjust the benchmark interest rate downwards to the Reserve Bank of Australia's Indicator Variable Rate for Standard Housing Loans. Relevantly, it is proposed that this Budget announcement will apply to arrangements entered into after 7.30 pm (AEST) on 13 May 2008. If this announcement is enacted in its proposed form, it may reduce the amount of interest that an Investor may claim as a deduction. Interest expenditure in excess of this level on a capital protected borrowing entered into after this date will not be deductible but rather will be included in the cost base of the notional put option deemed to be acquired by the Investor.

Finally, as each interest payment made under the APELS is for a period not exceeding 12 months, the prepayment rules should not apply to spread the deduction over more than one income year.

2.2 **Dividends**

(a) Dividend Income

Dividends received with respect to Nominated Approved Securities should be included in the investors' assessable income in the income year in which they are received.

(b) Franking Credits

To the extent such dividends are franked, and provided the investors satisfy the 'qualified person' rules, investors are required to include in their assessable income an additional amount equal to the franking credits there attached. Investors should be able to claim a tax offset equal to the additional amount included in their assessable income, claiming any refunds on excess franking credits.

An Investor who is not a qualified person will not be entitled to the benefit of the franking credits attached to the dividend.

The qualified person rules described below are expressly stated not to apply on or after 1 July 2002. However, the Government's intention is to re-write these rules into the 1997 Act as part of its comprehensive re-write of the dividend imputation regime in 2002.

As at the date of preparing this advice, the re-written rules have yet to be enacted despite the fact that the Government has made express statements to the effect that there has been no intended change of policy regarding the application of these rules.

In Taxation Determination TD 2007/11 the Commissioner has indicated that his position is that the qualified person rules continue to have ongoing effect at the present time as outlined in the repealed Division 1A of Part IIIAA of the 1936 Act. The comments below are based on the provisions of Division 1A of Part IIIAA of the 1936 Act as they operated just prior to 1 July 2002 and assume that those provisions will not change (when they are eventually re-written into law). No assurances can be given that the new rules will operate in exactly the same way and investors should monitor these developments in this regard.

An Investor will be a qualified person if it satisfies the ‘holding period’ rules with respect to the Nominated Approved Securities. These rules vary depending on whether there are any 'related payments' with respect to any dividends.

The holding period rules require the Investor to hold the Nominated Approved Securities continuously for at least 45 days (not counting the days of acquisition or disposal) ‘at-risk’, that is, without a material diminution of risk. There is a material diminution of risk where the Investor has less than 30% of the risks of loss and opportunities for gain associated with the Nominated Approved Securities (in which case the Investor would not be a qualified person).

There is a diminution of risk where the Investor takes "short" positions (being anything that limits the risks of loss or opportunities for gain associated with the Nominated Approved Securities). The Investor's notional put option (discussed in more detail at paragraph 2.4) and sold call options are such positions.

Importantly, where there are no related payments, once the holding period rules are satisfied for a Nominated Approved Security, they are satisfied with respect to all future dividends (assuming the taxpayer has not undertaken any subsequent additional risk diminution strategies).

The related payment rules require the Investor to hold the Nominated Approved Securities continuously for at least 45 days ‘at-risk’ (again, at least 30% of the

risks of loss and opportunities for gain associated with the Nominated Approved Securities) within a period commencing 45 days before, and ending 45 days after, the day on which the Nominated Approved Securities become ex-dividend. That is, unlike the general holding period rules discussed above, where there is a related payment, the period during which the Nominated Approved Securities must be held at risk must be tested again. Furthermore, where there are related payments, it will be necessary to recalculate the positions held by an Investor. Very broadly, in these circumstances, the recalculation of the positions will need to be undertaken just prior to 45 days before the relevant ex-dividend date.

Broadly, a related payment is made by the Investor where it (or its 'associate') is under an obligation or may reasonably be expected to pass on the benefit of the dividend to one or more other persons. Where this is the case, the related payment rules apply with respect to that dividend and to determine whether the Investor is entitled to the benefit of the attached franking credits.

In the context of special dividends, Investor is expected to pass on the benefit of such dividends to ANZ. It therefore would be making related payments. Accordingly, with respect to special dividends, to be a qualified person, Investor would need to satisfy the related payment rules.

For completeness, we note that there is an exemption from these rules for individuals whose franking credit entitlement in any one year does not exceed $5,000.

As this risk exposure determination will ultimately depend on the particular circumstances of each individual Investor, and the combination of positions it takes with respect to the Nominated Approved Securities, investors should seek their own independent taxation advice as to whether they are a qualified person and therefore entitled to the benefit of the franking credits attached to a dividend.

(c) Scrip Lending by ANZ Securities

Where investors themselves hold the 'holding statement' associated with the Nominated Approved Securities, then pursuant to the Sponsorship Agreement, such investors are required to appoint ANZ Securities as a "controlling participant" for the purposes of CHESS. Thereafter ANZ Securities is permitted to lend each Investor's Nominated Approved Securities. Provided such lending is done under a "securities lending arrangement" that complies with section 26BC of the 1936 Act, investors will remain entitled to the franking credits attached to any franked dividends.

2.3 **Trust Distributions**

Certain Nominated Approved Securities may be unit trusts. Where this is the case, investors should include in their assessable income the proportion of net income of the relevant trust for that year of income to which they become entitled (even if actual receipt is in a subsequent income year).

Generally, the character of the trust distribution in the hands of the Investor should be the same as the income (from which the distribution is made) as in the hands of the unit trust.

2.4 **Capital Gains Tax (*CGT*)**

(a) By entering into the APELS, investors hold the Nominated Approved Securities as CGT assets. Broadly, the cost base (or reduced cost base) of the Nominated Approved Securities should consist of their acquisition price, any incidental costs of acquisition and disposal, which can include costs such as professional advisory fees, brokerage fees and stamp duty on transfer (if any).

If there is a Corporate Action such that the issuer of the Nominated Approved Securities makes a Distribution by way of return of capital, so much of that Distribution that is not a dividend or deemed to be a dividend should reduce the cost base (or reduced cost base) of the Nominated Approved Securities.

(b) Investors potentially hold a further CGT asset, namely, the notional put option. In the event there is "capital protection", such that there is a notional put option, it should be the case that there is only a single put option with a cost base equal to the sum of the excessive amounts calculated as per the equation in paragraph 2.1.

To elaborate, in those income years where, pursuant to the equation, an excessive interest amount is calculated, that amount is incorporated into the cost base of the notional put option. In this manner, the cost base of the notional put option will increase during the term of the APELS if there is more than one income year where an excessive interest amount is so calculated.

(c) The CGT analysis below assumes that there is capital protection, such that there is a notional put option.

(i) *Closing Price on Maturity Date below the Protection Level*

In this instance the Investor will be taking advantage of the capital protection and will be taken to have exercised the notional put option (as it would be in-the-money). Consequently, the cost base of the notional put option will be added to the cost base (or reduced cost base) of the Nominated Approved Securities, there being no capital gain or loss with respect to the option itself.

Where there is physical settlement, there will be a disposal of the Nominated Approved Securities. The Investor will make a capital gain to the extent that the Protection Level exceeds the cost base of the Nominated Approved Securities or a capital loss to the extent that the Protection Level is less than the reduced cost base of the Nominated Approved Securities.

Where instead there is cash settlement, the Investor will make a capital gain to the extent that the Cash Settlement Amount exceeds the cost base of the notional put option.

If the Protection Level exceeds the purchase price of the Nominated Approved Securities, the Commissioner may (in certain circumstances) argue that the gain is assessable as ordinary income - essentially as a

"profit making scheme". We have assumed that this is not the case for the purpose of this opinion (see paragraph 1.1(e), (f) and (g) above), but you should discuss this with your own tax advisor.

(ii) *Closing Price on Maturity Date above the Protection Level and below the Cap Level if there is one*

In this instance the Investor will not be taking advantage of the capital protection and the notional put option will be taken to have expired (as it would be out-of-the-money). With respect to the notional put option, the Investor will therefore make a capital loss equal to its reduced cost base. The reduced cost base should be equal to the cost base, which is equal to the sum of the excessive amounts as described in subparagraph 2.4(a).

If the Investor disposes of the Nominated Approved Securities, the Investor will make a capital gain to the extent that the sale proceeds exceed the cost base of the Nominated Approved Securities or a capital loss to the extent that the sale proceeds are less than the reduced cost base of the Nominated Approved Securities.

(iii) *Closing Price on Maturity Date above the Cap Level if there is one*

The analysis here is the same as that set out immediately above in paragraph 2.4(b)(ii). However, in this instance, ANZ is entitled to the Sold Call Adjustment Amount. The preferred view is that this amount is included in the cost base of the Nominated Approved Securities.

(d) In the event that no Valid Exercise Notice is delivered to ANZ, the Investor will be taken to have elected Cash Settlement and therefore, the consequences described above in relation to Cash Settlement will apply to the Investor.

(e) An Investor who has held the Nominated Approved Securities for at least 12 months prior to disposal (being the time at which the sale contract is entered into) should be entitled to a 50% discount on the capital gain made on the disposal of the Nominated Approved Securities, subject to the Investor first applying any prior year or current year capital losses against the full capital gain, and so long as an indexed cost base is not used in relation to the Nominated Approved Securities.

(f) Where, pursuant to the Sponsorship Agreement, ANZ Securities lends an Investors' Nominated Approved Securities, provided such lending is done under a "securities lending arrangement" that complies with section 26BC of the 1936 Act, the Investor will remain entitled to the franking credits attached to any franked dividends.

2.5 **Securities and "Traditional Securities"**

From the point of view of the Investor, by entering into the APELS, the Investor is not acquiring a "qualifying security" for the purposes of Division 16E of Part III of the 1936 Act or a "traditional security" for the purposes of sections 26BB and 70B of the 1936 Act.

2.6 **Anti-avoidance**

(a) *Dominant purpose*

The general anti-avoidance provisions contained in Part IVA of the 1936 Act can only apply to disallow a tax deduction in circumstances where either the Investor or another person entered into or carried out the scheme or any part of the scheme for the sole or dominant purpose of enabling the Investor to obtain a tax benefit. As this will depend on the particular circumstances of each individual Investor, investors should seek their own independent taxation advice.

However, where it can be demonstrated that no person entered into the scheme for the sole or dominant purpose of enabling the Investor to obtain a tax benefit, Part IVA will not operate to deny tax deductions claimed by the Investor in relation to the Facility.

(b) *Dividend stripping and franking credit trading*

The dividend stripping provisions are specific anti-avoidance provisions that can only apply to a scheme that is, in relation to a company, either by way of, or in the nature of, a dividend stripping scheme or having substantially the effect of such a scheme. In our opinion, based on the Terms of the Facility, the Facility itself is not a dividend stripping scheme.

The franking credit trading provisions apply to deny a taxpayer the ability to claim a franking credit in relation to a dividend under certain circumstances. Relevantly by entering into the APELS, investors will both reduce the risk of loss and limit the opportunity for profit or gain that accrue to the Investor as a result of holding the Nominated Approved Securities. However, merely entering into the APELS does not of itself lead to the application of the franking credit trading provisions.

2.7 **Break Costs**

Break Costs which an Investor incurs if it repays the APELS prior to the Maturity Date may be deductible under section 8-1 of the 1997 Act. This would be the case if the Break Costs were incurred to prevent the Investor from having to incur recurring interest expenses under the APELS in the future: *FCT v Marbray Nominees Pty Ltd* (1985) 17 ATR 93, and *Metals Exploration Ltd v FCT* (1986) 17 ATR 786. In most other circumstances, these Break Costs will not be deductible.

Investors should seek their own independent taxation advice with respect to the deductibility of these Break Costs.

2.8 **Change of Nominee: ANZ Securities**

As mentioned in paragraph 1.3., the identity of the Nominee may change at some point of time in the future. A change of Nominee would not be a taxable (or dutiable) event for tax (or stamp duty) purposes.

## 3. Goods & Services Tax (*GST*)

Dealings in securities the subject of APELS, relevant loans and mortgages will not be taxable for GST. Input taxation is likely to apply with the result that GST costs included in expenses incurred by Investors in relation to APELS, eg, brokerage fees, will not be creditable at all or, at best, partially creditable.

## 4. Stamp Duty

No Australian stamp duty will be payable on any acquisition or subsequent transfer of a security the subject of an APEL provided the security remains quoted on the ASX at all relevant times.

No mortgage duty will be payable.

Yours faithfully,
**Baker & McKenzie**

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