

**COMMERCE COMMISSION
ANZ NATIONAL BANK LIMITED
ING (NZ) LIMITED**

DEED OF SETTLEMENT

**REGARDING COMMERCE COMMISSION INVESTIGATION INTO ING
DIVERSIFIED YIELD FUND AND REGULAR INCOME FUND**

DATE 22 JUNE 2010

PARTIES

This deed is entered into:

BETWEEN **ANZ NATIONAL BANK LIMITED** (*ANZN*)

AND **ING (NZ) LIMITED** (*ING (NZ)*)

AND **COMMERCE COMMISSION** a statutory body established under section 8 of the Commerce Act 1986 (*the Commission*)

(together, *the parties*)

1. PURPOSE OF DEED

- 1.1** The Commission has investigated alleged contraventions of the Fair Trading Act 1986 (*the Act*) by ANZN and ING (NZ) and other entities in relation to the marketing, promotion and sale of the ING Diversified Yield Fund (*DYF*) and ING Regular Income Fund (*RIF*) (together, *the funds*) (*the investigation*).
- 1.2** ANZN and ING (NZ) have cooperated fully with the Commission at all times in relation to the Commission's investigation.
- 1.3** This Settlement Deed (*the Deed*) records the background to the investigation, the conclusions reached by the Commission and the means by which the investigation is to be resolved.
- 1.4** By this Deed, ING (NZ) and ANZN acknowledge that some of their conduct may have breached the Act and agree to make further payments to eligible investors (*further payments*).
- 1.5** The parties agree to enter into a further agreement, subsequent to this Deed, to reflect the Commission's directions to ANZN and ING (NZ) as to the method by which they shall distribute the further payments to investors.
- 1.6** ANZN and ING (NZ) agree to effect those further payments to investors, and to satisfy the Commission that the payments have been made.
- 1.7** ANZN agrees to provide information to investors as to the timing, method and amount of making the further payments, including operating a call-centre

equipped to answer such questions and providing information on the ANZN and ING (NZ) websites. However, ANZN and ING (NZ) shall be entitled to refer enquiries about the rationale for the payment method determined by the Commission to the Commission for its response.

- 1.8** All parties agree to take such steps as are necessary or desirable to give full effect to the terms of this Deed.
- 1.9** The Commission acknowledges that nothing in this Deed constitutes an admission of liability by ANZN or ING (NZ) or their Related Parties.
- 1.10** By this Deed, the Commission agrees that it will not issue civil or criminal proceedings against ANZN, ING (NZ) and/ or each of their Related Parties in relation to the funds, and will not issue civil proceedings against any other person in relation to the funds.
- 1.11** All parties acknowledge that nothing in this Deed shall affect, compromise or exclude any legal claim that an eligible investor might have in respect of the funds, nor any opportunity eligible investors might have to recover compensation through the Banking Ombudsman and/ or the ANZN “Notice Seeking Additional Compensation” (*NSAC*) process provided through the ING Offer to purchase units made in June 2009.

2. INTERPRETATION

2.1 For the purposes of this Deed:

“*Eligible investor*” means all persons and entities who invested in the DYF and/ or RIF and suffered loss arising from that investment and have not already received 100% of the amount invested by them back from ANZN and/ or ING (NZ). For the avoidance of doubt this includes only those investors who held units at the date of suspension of the funds on 13 March 2008 (*the suspension date*).

“*Related Parties*” of ANZN include:

- (a) its past and present directors, officers, employees and agents; and
- (b) its subsidiary companies and each of their past and present directors, officers, employees and agents; and
- (c) Australia and New Zealand Banking Group Limited (*ANZBGL*) and its past and present directors, officers, employees and agents; and
- (d) *ANZBGL*’s subsidiary companies and each of their past and present directors, officers, employees and agents.

“*Related Parties*” of *ING (NZ)* include:

- (a) its past and present directors, officers, employees and agents; and
- (b) its subsidiary companies and each of their past and present directors, officers, employees and agents; and
- (c) *ING (NZ) Holdings Limited*, *ING (NZ) Administration Pty Ltd*, *ING Australia Limited*, *Strategi Limited*, *ING Insurance International BV* (*ING related companies*) and each of their past and present directors, officers, employees and agents; and
- (d) *ING related companies’ subsidiary companies* and each of their past and present directors, officers, employees and agents.

3. BACKGROUND

3.1 ENTITIES

- 3.1.1 ANZN is a registered bank under the Reserve Bank of New Zealand Act 1989. It is incorporated in New Zealand under the Companies Act 1993. ANZN was known as ANZ Banking Group (New Zealand) Limited prior to amalgamation with The National Bank of New Zealand Limited in June 2004. ANZN’s parent bank is ANZBGL which is incorporated in Australia and is registered at the New Zealand Companies Office as an Overseas Company. ANZBGL is also a registered bank under the Reserve Bank of New Zealand Act 1989.
- 3.1.2 *ING (NZ)* is incorporated in New Zealand under the Companies Act 1993 and registered at the New Zealand Companies Office. *ING (NZ)* is described in the Investment Statements for the funds as the Administration and Investment Manager of the funds.
- 3.1.3 *ING (NZ)* is a wholly owned subsidiary of *ING (NZ) Holdings Limited* (*ING (NZ) Holdings*). At all material times before 30 November 2009, ANZN was a 49% shareholder of *ING (NZ) Holdings* and the remaining 51% of shares were held by a Dutch entity, *ING Insurance International BV* (*ING BV*). Products manufactured and procured by this incorporated joint venture were distributed by ANZN (amongst others) in New Zealand.
- 3.1.4 *ING (NZ) Administration Pty Ltd* (*ING (NZ) Admin*) is incorporated in Australia and registered in the New Zealand Companies Office as an Overseas Company. It is described in Investment Statements for the funds as the Trustee and Manager for the funds.

3.1.5 On 30 November 2009, ANZN acquired full ownership of ING (NZ) Holdings.

3.2 THE DIVERSIFIED YIELD FUND

3.2.1 In July 2003 ING (NZ) Admin established the DYF. The DYF was a managed fund investing primarily, but not exclusively, in collateralised debt obligations (*CDOs*) and collateralised loan obligations (*CLOs*).

3.2.2 Although the DYF was an Australian unit trust, it was aimed at New Zealand investors only. ING (NZ) Admin delegated operational management and promotion of the DYF to ING (NZ).

3.2.3 The DYF was promoted to financial advisers (*advisers*), investors and prospective investors (together, *investors*) from June 2003, including by way of:

- (a) Investment statements;
- (b) Prospectuses;
- (c) Fliers, brochures, letters and advertisements;
- (e) ‘Roadshow’ presentations held in various locations during June 2003;
- (f) Fund updates,

(the DYF marketing materials).

3.2.4 The DYF marketing materials for the most part represented that the DYF was an investment of “moderate risk”, although in 2008 a fund update to advisers and investors mistakenly represented that it was of “low to moderate risk”.

3.2.5 The DYF was distributed by ING (NZ) in New Zealand through a range of distribution channels, including a network of independent financial advisers and ANZN’s network of financial advisers (*ANZN advisers*).

3.2.6 The DYF closed to new investors in April 2006, but traded for existing investors until redemptions were suspended on the suspension date. On 12 March 2008 (the day prior to the suspension date), the published unit price of the DYF was 81 cents, as against a high-watermark month-end price of \$1.1286 on 28 February 2006.

3.3 THE REGULAR INCOME FUND

- 3.3.1 In September 2005 ING (NZ) Admin established the RIF as another Australian unit trust. The RIF was a managed fund investing primarily, but not exclusively, in CDOs and CLOs.
- 3.3.2 Although the RIF was an Australian unit trust, it was aimed at New Zealand investors only. ING (NZ) Admin delegated operational management and promotion of the RIF to ING (NZ).
- 3.3.3 The RIF was promoted to advisers and investors from September 2005, including by way of:
- (a) Investment statements;
 - (b) Prospectuses;
 - (c) Fliers, brochures, letters and advertisements;
 - (d) Fund updates,
- (the RIF marketing materials).*
- 3.3.4 The RIF marketing materials represented that the RIF was a “low to moderate risk” investment.
- 3.3.5 The RIF was distributed by ING (NZ) in New Zealand through a range of distribution channels, including a network of independent financial advisers and ANZN advisers.
- 3.3.6 Trading of units in the RIF ceased on the suspension date. On 12 March 2008 (the day prior to the suspension date), the published unit price of the RIF was 71 cents, as against a high-watermark month-end price of \$1.0460 on 28 February 2007.

3.4 ADDITIONAL REPRESENTATIONS ABOUT THE FUNDS BY ANZN ADVISERS

- 3.4.1 In addition to the representations about the funds contained in the DYF and RIF marketing materials, some ANZN advisers made further representations to some customers as to the suitability for purpose, nature and composition of the funds.

3.5 COMPLAINTS AND REMEDIAL STEPS TO DATE

- 3.5.1 Shortly after the suspension date (and in a small number of cases prior to suspension), ANZN began to receive complaints from customers who had invested in the funds on the advice of an ANZN adviser (*ANZN customers*) alleging that they had received inappropriate investment advice from ANZN in respect of the funds.
- 3.5.2 ING (NZ) and some other advisers also received complaints about the funds.
- 3.5.3 Some investors also made complaints about the funds to the Insurance and Savings Ombudsman, who declined jurisdiction to deal with complaints about the funds.
- 3.5.4 Other investors including some ANZN customers also complained to the Banking Ombudsman (*the Ombudsman*). The Ombudsman's role is to consider complaints and potential remedies on a case by case basis, with reference to an individual's particular circumstances. Some complaints were upheld by the Ombudsman, and she has recommended remedies that include return of capital and lost earnings. Some complaints were not upheld by the Ombudsman, or were partly upheld and rejected in part. Other complaints are still awaiting her decision.
- 3.5.5 The Commission also received complaints about the funds, and in April 2008 commenced its investigation.
- 3.5.6 In June 2009 ING NZ AUT Investments Limited (a wholly owned subsidiary of ING (NZ) (*ING NZ AUT*)) offered to purchase all units in the funds from investors then holding units in the funds (*existing investors*) (*the ING Offer*). The ING Offer provided existing investors with the opportunity to sell their units in the funds to ING NZ AUT for 60 cents per unit in the DYF and 62 cents per unit in the RIF.
- 3.5.7 In addition, the ING Offer enabled existing investors to choose whether they would receive immediate payment for their units or would invest the proceeds of the sale of their units in a special on-call cash account with ANZN that would pay 8.30% per annum fixed for 5 years (*the ANZN cash account*).
- 3.5.8 Almost all existing investors chose to accept the ING Offer. Of those existing investors who chose to accept the ING Offer, approximately 85% chose to take up the opportunity to deposit the proceeds of sale of their units in the funds into the ANZN cash account.
- 3.5.9 Those existing investors who accepted the ING Offer gave a release, agreeing, inter alia, "*to surrender, release and settle all claims, known and unknown in*

connection with that Fund or your investment in the Fund” (the release). The release was accompanied by a disclosure schedule, explaining to investors the nature and consequences of the release.

- 3.5.10 In addition to the ING Offer, ANZN customers who accepted the ING Offer and considered that they were entitled to additional compensation from ANZN were given the opportunity to lodge a complaint with ANZN to have their individual circumstances reviewed as part of the NSAC process with a further referral to the Office of the Banking Ombudsman if required.
- 3.5.11 ANZN and ING (NZ) have, in aggregate, made available more than NZD500 million to investors (*compensation*).
- 3.5.12 ANZN and ING (NZ) consider that the compensation was reasonably offered and accepted in discharge of ANZN’s and ING (NZ)’s respective liabilities to investors. Nevertheless, and despite the release, ANZN and ING (NZ) are willing to make a further payment to investors to achieve closure for the investors and the parties.

4. TERMS OF SETTLEMENT

4.1 COMMISSION INVESTIGATION

- 4.1.1 The Commission has investigated complaints that some of the DYF and RIF marketing materials prepared by ING (NZ) were misleading, some of which complaints allege that the materials:
 - (a) Understated some of the risks associated with the funds.
 - (b) Made incorrect comparisons to, or described the funds as being viable alternatives to, other types of investments (including to government and local authority stock, bank deposits and finance company debentures).
 - (c) Contained misleading or insufficient references to the liquidity risks associated with the funds.
 - (d) Stated that unitholders could make complaints about the funds to the Insurance and Savings Ombudsman.
- 4.1.2 The Commission has investigated complaints that some advice tendered by some ANZN advisers in respect of the funds was misleading, some of which complaints allege that:

- (a) Advice was given that understated some of the risks associated with the funds.
- (b) Advice was given that funds were appropriate investments for some customers, given their investment goals and objectives and their risk profiles, when the funds were not.
- (c) Advice was given comparing the funds to cash investments, term deposit investments or bank account investments without also discussing the comparable risks of the funds.
- (d) Advice was given that understated the risk of capital volatility associated with the funds.
- (e) Advice was given that the DYF had a minimum, and not a targeted average, credit rating of BBB.

4.2 COMMISSION DECISION

4.2.1 The Commission has concluded that there is a sufficient foundation for it to commence legal proceedings alleging breaches of the Act by ING (NZ) and ANZN in respect of some, though not all, of the matters investigated.

4.2.2 However, the Commission acknowledges that:

- (a) ING (NZ) and ANZN have not had the opportunity to challenge or test the Commission conclusions.
- (b) The Commission conclusions have not been tested in Court.
- (c) ING (NZ) and ANZN do not accept all of the Commission conclusions.
- (d) ING (NZ) and ANZN do not accept that proceedings (criminal or civil) against ING (NZ) and/ or ANZN would necessarily succeed, or that further compensation would be payable at law.

4.3 ACKNOWLEDGMENTS OF POSSIBLE BREACH

4.3.1 ING (NZ) and ANZN acknowledge that some, though not all, of their conduct in relation to the funds may have contravened sections 10, 13(a), 13(b) or 13(e) of the Fair Trading Act 1986.

4.4 FURTHER PAYMENTS TO ELIGIBLE INVESTORS

- 4.4.1 ANZN and ING (NZ) will make further payments to eligible investors in the aggregate amount of NZD45 million in accordance with a payment method to be determined by the Commission (*the payment method*) and in other respects agreed between the parties (together, *the payment process*).
- 4.4.2 The parties agree to enter into a further agreement, subsequent to this Deed, to record the payment process, including:
- (a) The payment method and timing of the further payments to eligible investors.
 - (b) The process by which ANZN agrees to provide information to eligible investors as to the payment method, timing, and amount of the further payments.
 - (c) The process (including timing) by which ANZN will satisfy the Commission as to its completion of the further payments, including the process by which the Commission will satisfy itself as to compliance with the agreed payment method.
- 4.4.3 ANZN and ING (NZ) agree that, within 5 working days of receiving a request from the Commission to provide information reasonably necessary for the Commission to determine the payment method, or as soon as reasonably practicable thereafter, they will provide such information as is within their possession and control.
- 4.4.4 The Commission recognises that considerations to be applied by it in determining the payment method include that:
- (a) The Commission will be required to make some assumptions as to the financial positions and circumstances of eligible investors, and as to tax adjustments available to them.
 - (b) A further payment may not be made to every eligible investor.
 - (c) Eligible investors who have already been fully compensated by ANZN and/ or ING (NZ) will not receive a further payment.
- 4.4.5 The Commission will determine the payment method within 20 working days of the date of this Deed using the information available to it within that time. If necessary, and if the parties agree, the time within which the Commission is to determine the payment method may be extended. ANZN and ING (NZ) agree to effect the further payments as directed by the Commission.

4.4.6 The parties agree that the further payments will be tendered to eligible investors as soon as reasonably practicable after the Commission has determined the payment method, but in any event not later than 90 working days from the date of this Deed, or such other date as may be agreed by the parties.

4.5 COMMUNICATIONS

4.5.1 ANZN and ING (NZ) agree that:

- (a) They will provide to the Commission, for its comment, advance drafts of all mass written communications to investors (or a large subset of investors) including web page information and investor mail-outs, regarding this Deed or the payment process (until completion of the payment process, as advised by the Commission). ANZN and ING (NZ) will consider in good faith any matters raised by the Commission in its comments.
- (b) The initial communication to investors concerning the settlement reached by the parties will be in the form of a written letter, on ING (NZ) letterhead, sent by mail to each eligible investor, containing a description of the settlement reached by the parties. The communication will state that the payment method will be determined by the Commission and will direct enquiries about the rationale for the payment method to the Commission.
- (c) An electronic copy of the initial communication will also be posted in a prominent position on the home pages of www.anz.co.nz and www.ingnz.com within 3 working days of the initial communications being mailed to investors.

4.6 HANDLING OF SETTLEMENT ENQUIRIES

4.6.1 ANZN and ING (NZ) agree that they will provide easily accessible points of contact for persons with questions about the payment process, and that they will make the methods of contacting them publicly known.

4.6.2 ANZN and ING (NZ) agree that upon the signing of this Deed they will operate easily contactable call-centres equipped to answer questions from eligible investors and other interested persons, and will additionally post relevant information on their websites.

- 4.6.3 ANZN and ING (NZ) agree that upon the signing of the Deed their customer service and call centre staff will promptly be properly informed and will be given appropriate instructions with respect to the handling of resulting enquiries.
- 4.6.4 ANZN, ING (NZ) and the Commission agree that call centre staff may be instructed to refer enquiries about the rationale for the payment method to the Commission for its response, and may advise persons making such enquiries that the payment method was determined by the Commission.
- 4.6.5 ANZN and ING (NZ) agree that they shall not cease fulfilling their obligations in clauses 4.6.1 and 4.6.2 above until at least 4 weeks after completion of the payment process.

4.7 PAYMENT OF COSTS

- 4.7.1 ANZN and ING (NZ) shall, jointly or severally, within 20 working days of the date of this Deed, pay the Commission's actual and estimated further costs in relation to this investigation (including completion of this Deed and any steps taken to meet commitments under the Deed, including determining the payment method and agreeing and reviewing the payment process), in the amount of NZD1 million.

4.8 NO FURTHER ACTION BY COMMISSION

- 4.8.1 The Commission shall close its investigation upon satisfying itself as to completion of the payment process (including the payment of costs to it).
- 4.8.2 The Commission undertakes not to issue or encourage any civil or criminal legal proceeding in relation to the funds against ANZN, ING (NZ) and/ or each of their Related Parties.
- 4.8.3 The Commission undertakes not to issue or encourage any civil proceedings in relation to the funds against any other person including but not limited to The New Zealand Guardian Trust Company Limited (in its capacity as statutory supervisor of the funds), Morningstar Research Limited (*Morningstar*) and any adviser who provided advice to investors in the funds.

4.9 UNAFFECTED RIGHTS

- 4.9.1 Nothing in this Deed constitutes an admission of legal liability by ANZN or ING (NZ) or their Related Parties.

- 4.9.2 Nothing in this Deed shall limit or affect the ability of any person who has not consented to be bound by the terms of this Deed from pursuing any rights available to him, her or it under the Act or under any other law, or by way of the Banking Ombudsman's complaints process.
- 4.9.3 Nothing in this Deed shall limit or affect the ability of the Commission to issue criminal proceedings against any person other than ANZN, ING (NZ) and each of their Related Parties in relation to the funds.
- 4.9.4 Nothing in this Deed shall limit or affect the ability of the Commission to issue proceedings against ANZN, ING (NZ) and/ or their Related Parties in respect of matters not related to the funds, or in respect of conduct engaged in by any of them after the date of this Deed.
- 4.9.5 If there is any material breach by ANZN or ING (NZ) in fulfillment of this Deed, the Commission may in its complete discretion recommence the investigation and take any action it deems appropriate including commencing civil proceedings or prosecution under the Act, or issuing civil proceedings for breach of this Deed.
- 4.9.6 If the Commission commences any proceedings pursuant to clause 4.9.5 above, each of ANZN and ING (NZ) waive any limitation defence that arises solely because of the time that elapsed between the signing of this Deed and the alleged material breach.

4.10 GIVING EFFECT TO DEED

- 4.10.1 All parties agree to take such steps as are necessary or desirable to give full effect to the terms of this Deed.

4.11 APPLICABLE LAW AND JURISDICTION

- 4.11.1 This Deed is governed by the laws of New Zealand.

4.12 MISCELLANEOUS

- 4.12.1 Any party may release or publish this Deed, including to the public at large, after it has been signed.
- 4.12.2 The Commission has prepared a summary of the conduct which is the subject of the investigation (*the investigation summary*), a copy of which has been provided to ANZN and ING (NZ). The Commission will accept any response by ANZN and ING (NZ) to the investigation summary within 10 working days

of the date of this Deed (*the ANZN/ ING (NZ) response*). The Commission agrees that, to the extent it is required by law to disclose the investigation summary to any third party, including as a result of a request under the Official Information Act 1982 (such disclosure being subject to clause 4.12.3 below), the Commission will also be obliged to disclose a copy of the ANZN/ ING (NZ) response.

4.12.3 The Commission acknowledges that some of the information provided by each of ANZN and ING (NZ) to the Commission may be confidential and/ or commercially sensitive (*the ANZN/ ING (NZ) information*). In this context, the Commission agrees that, if it receives a request pursuant to the Official Information Act 1982 which covers or might cover and/ or record or reveal all or some of the ANZN/ ING (NZ) information (*an information request*), it will notify ANZN and ING (NZ), as required, of that request and will consult with ANZN/ ING (NZ) as to whether there are grounds for the requested material to be withheld under Part 1 of the Official Information Act 1982. The Commission will also:

- (a) Take full and proper account of the confidential and/ or commercially sensitive nature of the ANZN/ ING (NZ) information, and of any views expressed by ANZN and ING (NZ), in accordance with the provisions of the Official Information Act when considering any information request; and
- (b) Notify ANZN and ING (NZ) at least 5 working days prior to complying with the request if, notwithstanding such consideration, it determines that no grounds exist on which it may refuse to comply with the request for information.

4.12.4 For the purposes of the Contracts (Privity) Act 1982, this Deed is intended to confer a benefit on, and is enforceable by, the Related Parties of each of ANZN and ING (NZ), The New Zealand Guardian Trust Company Limited, Morningstar and any adviser who provided advice to investors in the funds.

4.12.5 The Commission agrees to provide ANZN with a copy of any media release or other formal statement that the Commission issues in announcing this settlement not less than 1 working day in advance of publication, and will provide ANZN with an opportunity to comment on the proposed media release/ public statement, and will consider in good faith any matters raised by ANZN in its comments. This requirement applies only to the initial announcement of this settlement in the period immediately following the Deed's signing, and not to subsequent media releases or public statements concerning the investigation or settlement, or to responses to questions from media, Government officials or members of Parliament.

4.12.6 ANZN and ING (NZ) agree to provide the Commission with a copy of any media release or other formal statement that ANZN and ING (NZ) issue/s in announcing this settlement not less than 1 working day in advance of publication, and will provide the Commission with an opportunity to comment on the proposed media release/ public statement, and will consider in good faith any matters raised by the Commission in its comments. This requirement applies only to the initial announcement of this settlement in the period immediately following the Deed's signing, and not to subsequent media releases or public statements concerning the investigation or settlement, or to responses to questions from media, investors or analysts.

4.12.7 Any notice or communication that is given or served under or in connection with this Deed must be given in writing in the following manner:

(a) If addressed to the Commission, by hand delivery or email to the following address:

Commerce Commission
Level 19, ASB Building
135 Albert Street
AUCKLAND 1143
Attention: Graham Gill, Manager
Enforcement Branch, Commerce Commission
Email: graham.gill@comcom.govt.nz

(b) If addressed to ANZN, by hand delivery or email to the following address:

ANZ National Bank Limited
Level 6, 1 Victoria Street
1 – 9 Victoria Street
WELLINGTON
Attention: Debra Blackett, General Counsel
ANZ National Bank Limited
Email: debra.blackett@anz.com

(c) If addressed to ING (NZ), by hand delivery or email to the following address:

ING (NZ) Limited
Level 27, ASB Bank Centre
135 Albert Street
AUCKLAND
Attention: Helen Troup, Chief Executive Officer
ING (NZ)
Email: htroup@ingnz.com

EXECUTED by and under the name and seal of the **COMMERCE COMMISSION** by:

Commissioner

Commissioner

EXECUTED by **ANZ NATIONAL BANK LIMITED** by:

Director/ Authorised Signature

Witness Signature

Director/ Authorised Name

Witness Name

Witness City, Country

Witness occupation

Director/ Authorised Signature

Witness Signature

Director/ Authorised Name

Witness Name

Witness City, Country

Witness occupation

EXECUTED by **ING (NZ) LIMITED** by:

Director

Director