



COMMERCE COMMISSION

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# Media Release

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## **Commerce Commission settles with ANZ and ING over investment funds**

In its largest monetary settlement to date, the Commerce Commission has secured \$45 million for thousands of New Zealanders who invested in two funds marketed by ING (NZ) Limited (ING) and ANZ National Bank Limited (ANZN). This settlement follows an investigation into alleged breaches of the Fair Trading Act relating to the marketing and promotion of the funds by ING and ANZN.

The Commission's investigation focused on whether representations made by ING and ANZN when promoting and marketing the ING Diversified Yield Fund (DYF) and the ING Regular Income Fund (RIF) breached the Fair Trading Act by misrepresenting the degree of risk of the funds. The funds were frozen in March 2008 affecting around 15,000 investors.

“In the Commission's view, representations made by ANZN and ING concerning the degree of investment risk in the funds were likely to be misleading, in that the actual risk was understated. We concluded that there was sufficient evidence to commence proceedings against both parties for breaches of the Fair Trading Act,” said Commerce Commission Chair Dr Mark Berry.

“It is important that consumers are able to make properly informed decisions, based on clear and accurate information. Investors decide where to invest their money based largely on their appetite for risk. Throughout our investigation investors have told us that they would not have invested in

these funds if the actual risk had been represented accurately,” said Dr Berry.

As part of this settlement ING and ANZN have accepted that some of the representations made in marketing material and by ANZ advisors may have breached the Fair Trading Act and they have agreed to make payments totalling \$45 million to affected investors. As a result, the Commission will not be issuing legal proceedings against ING and ANZN over the alleged breaches of the Fair Trading Act.

“After careful consideration, the Commission believes that this settlement serves the best interests of New Zealand consumers, and the affected investors in particular, who, in many cases, stood to lose part of their life-savings. The \$45 million settlement represents the largest compensation sum the Commission has achieved for consumers,” said Dr Berry.

“Any court proceedings were likely to have involved significant delay, cost and risk, with no certainty of achieving an outcome that would benefit the affected investors,” said Dr Berry. “In addition to compensating investors, this settlement also sends a clear message that a failure to provide accurate information to consumers can lead to significant financial consequences.”

The Commission settlement with ANZN and ING will be a two stage process. While the compensation fund of \$45 million has now been agreed, the Commission will now determine the payment process including the amount of payments to investors, working with ANZN and ING.

The target date for payment is within five months from today – around mid to late November 2010. ANZN will be responsible for implementing the process of making payments to eligible investors, and investors eligible for a payment will be contacted by ANZN/ING. Investors with questions should contact ING on 0800 737 575 and information will also be provided on both the ANZN and ING websites. Information will also be available on the Commission’s website and will be updated when the payment method has been determined.

Not all ING investors will receive a payment under the settlement. The settlement only relates to those investors who were still in the funds at the date of suspension. The individual amounts received by eligible investors will be determined by a number of factors and some necessary assumptions by the Commission. This may take into account such issues as whether investors have already been made right, and to what degree, by ANZN, or through remedial actions taken by the Banking Ombudsman, or through tax adjustments.

The Commission acknowledges the cooperation of ANZN and ING, throughout this investigation and during the settlement discussions. The Commission also recognises the patience of investors, many of whom have been greatly affected by the funds being frozen. The investigation involved over 300,000 pages of information, and interviews with complainants, financial advisors and a range of other parties, throughout New Zealand.

The Commission has now concluded its investigation and will not be taking any legal action against individual advisers, advisory services or other parties arising out of its investigation.

For further detailed information please refer to the Background section and the attached Q and A sheet.

## **Background**

**History of ANZ/ING case.** Around 15,000 investors had their money frozen in the two ING funds (DYF and RIF) on 13 March 2008. ING and ANZN facilitated an offer to buy suspended investor units at 60c for the DYF and 62c for the RIF in July 2009. The offer was conditional on investors not taking or benefitting from any legal action in relation to the funds.

**Timeline.** In July 2003, ING (NZ) Administration Pty Limited (ING (NZ) Admin) established the DYF as an Australian unit trust. At the same time, ING (NZ) Admin directed ING (NZ) Limited (ING) to promote the New Zealand dollar denominated participatory units in the DYF to New Zealand resident investors.

The DYF invested principally in CDOs (collateralised debt obligations) and used derivatives to hedge currency risk. The DYF's performance target was to outperform the New Zealand 90-day bank bill rate by 2 per cent per annum after taxes and the deduction of fees. The DYF was promoted to investors and prospective investors as having a moderate risk profile.

Beginning in late 2004, there were changes to the tax laws in Australia and New Zealand that affected investors' obligations to pay tax on their investments in the DYF. In response, the DYF's objective was changed from "after taxes and fees" to "after fees".

In September 2005, ING (NZ) Admin established the RIF as another Australian unit trust. ING (NZ) Admin directed ING (NZ) to promote the RIF to New Zealand resident investors. The RIF had a similar investment strategy to the DYF. The RIF's performance target was to outperform the New Zealand 90-day bank bill rate by 1 per cent per annum after fees. The RIF was promoted to investors and prospective investors as having a low to moderate risk profile.

In March 2008, the DYF and the RIF (collectively referred to as the Funds) were suspended by ING (NZ) Admin. The Funds had a total of 8,280 unit holders as at the date of suspension made up of 5741 in the DYF and 2809 in the RIF. The value of the Funds as at the date of suspension was \$369.81m for the DYF and \$163.7 million for the RIF, a total of \$533.51 million.

Around 2800 ANZ customers invested in the Funds as at the date of suspension. The remainder were introduced by a variety of financial planners either directly or via a wrap platform. Altogether approximately 15,000 individual investors were affected.

**Penalties under the Fair Trading Act.** It is up to the Courts to determine penalties. The maximum fine for a business convicted of breaching the Fair Trading Act is \$200,000, and the maximum for an individual is \$60,000.

The largest individual fine imposed under the Fair Trading Act was \$900,000 against Carter Holt Harvey in 2006 for selling timber that did not meet the grade claimed on the packaging.

In 2007 the Commission concluded the last of nine prosecutions against banks and credit card providers for inadequate disclosure of currency conversion fees. In those cases, compensation, fines and costs paid by the banks as part of the prosecutions and settlements totalled just under \$30 million.

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## COMMERCE COMMISSION

### **Commerce Commission settlement with ING (NZ) Limited (ING) and ANZ National Bank Limited (ANZN) regarding the Diversified Yield Fund (DYF) and Regular Income Fund (RIF)**

**22 June 2010**

#### **Questions and Answers for Investors**

##### **Why isn't the Commerce Commission prosecuting?**

The Commission's decision to enter into a settlement with the ANZ National Bank Limited (ANZN) and ING (NZ) Limited (ING) was based on a number of factors that, in the end, amount to what would serve the best interests of the investors whose funds had been frozen. The Commission has had to consider the risks of litigation, the length of time the court processes might take, and the likelihood of securing substantial refunds through the court process. Unlike many other situations where investors have lost their savings, in this case ANZN has the financial ability to make substantial further payment to investors. Weighing all of these factors, the Commission considered the best outcome was to obtain the largest financial settlement possible through a negotiated outcome at the earliest possible date.

##### **Are all ING DYF and RIF investors included in the settlement?**

No. The only eligible investors are those ING DYF and RIF investors who held units in the Funds as at the date of suspension of 13 March 2008, and who have not already recovered 100% of their capital. Investors may have already recovered their capital through the ING Offer, from the sale of their units directly to ANZN, or from payment agreed with the Banking Ombudsman's office or the ANZN's Notice Seeking Additional Payment process (NSAC). Eligible investors also include existing unit holders who did not accept the ING offer to purchase units.

Investors who were invested in the DYF /RIF as at the date of suspension through wrap platforms will also be eligible.

##### **Why are those investors who left the Funds prior to the Suspension not included?**

The Commission and ANZN were unable to agree that the benefits of this settlement should extend to exited investors. There are differences between the exited investors and investors eligible under the settlement. A large number of exited investors as a group had generally made a profit; the investors redeemed their units when the unit price was higher than the Offer price; the investors did not have their funds frozen and exited the Funds prior to 13 March 2008 and could therefore reinvest their money. However, the key difference is that these investors did not sign away their rights to take their own private action against ANZN and

ING, as they were not part of the ING Offer. If these investors are dissatisfied in respect of the funds it still open to them to pursue their own legal rights.

**Did the Commission consider the ING release (waiver) to be valid and did it impact on the Commission's decision to enter into a settlement with ANZN / ING?**

Only the courts could have determined whether the release was valid. But the Commission was prepared to challenge its validity, had it been necessary to go to court on behalf of investors. In the event, the Commission decided that it was in the best interests of investors for the Commission to reach a settlement now.

**If I am an eligible investor, how much money will I get and when?**

The Commission is working with ANZN/ING on the actual payment structure and we will enter into another deed setting out how the payments are to be made.

This is a complex process due to the number of investors and differing circumstances in respect of each. It is hoped that payments to eligible investors will be able to be made within five months of the settlement – mid to late November 2010.

It is planned that the Commission will update investors on the actual payment process once this has been determined - within 20 days of the settlement. A media release will be issued and further relevant information will be published on the Commission's website. ANZN will contact those investors receiving payment to tell them how much, how and when they will receive the payment.

**Will investors have to pay tax on their payments?**

The Commission cannot give financial or tax advice on any individual circumstances and investors will need to take their own advice from an accountant or other financial expert on any tax implications.

Some customers may have to pay tax on their payment. Ultimately, the tax status of the payments depends on the nature of the investor and whether the investor has claimed or is eligible to claim a rebate from the Inland Revenue Department for the tax losses incurred on the Funds in past years.

The Commission understands that those investors who are considered as 'de minimis investors' (those who are natural persons with overseas investments of less than \$50,000) are unlikely to have to pay tax on any payment received from the settlement. Non-de minimis investors – those who are not natural persons (ie, Companies or trusts) or those who had units valued at over \$50,000 in the Funds, - may face tax liability on the payment, particularly where they have already offset the losses made on the investments against their income in previous tax years.

**What action is the Commission taking against individual advisers or other parties?**

The Commission has now concluded its investigation and will not be taking any legal action against individual advisers, advisory services or other parties arising out of its investigation. The Commission considered that the main concerns raised under the Fair Trading Act

regarding the accuracy of the risks associated with the Fund have been dealt with through the administrative settlement.

The settlement with ANZN covers the actions of individual ANZN advisers, so the Commission will not issue proceedings against these advisers. The Commission will not issue proceedings against other advisers also. But we expect to issue compliance advice letters to them (describing their obligations under the Fair Trading Act).

Where any investor is concerned about the actions of his or her own non-ANZN adviser as to the nature of the advice he or she received they can take their own private action through the Disputes Tribunal or financial services body if applicable, although we note that the release signed by investors accepting the ING Offer included all advisers and may prevent further legal action.

**Is the Deed of Settlement between the Commission and ANZN and ING available to the public?**

Yes. The Deed of Settlement is available on the Commission's website [www.comcom.govt.nz](http://www.comcom.govt.nz) under Fair Trading/Enforcement Outcomes

**Is the Commission releasing a report of its investigation?**

The Commission does not usually publish enforcement investigation reports as they can contain large amounts of legally privileged information. However recognising the high level of public interest, a public version of the ANZ/ING investigation report will be available following request under the Official Information Act.

**Is the Securities Commission taking any action?**

We understand that ANZN and ING have entered into a Deed and Undertakings with the Securities Commission in relation to concerns over possible breaches of the Securities Act and Financial Reporting Act arising out of information obtained by the Commerce Commission during its investigation. The Commission kept the Securities Commission informed of its progress in the investigation and the overall views that it reached.

**What about the on-call accounts provided under the ING offer?**

The call accounts are not affected by the Commission's settlement with ANZN which has advised that this facility will continue. Any amounts received by investors under the settlement are not, however, able to be deposited to that account.

**What impact does this have on the Banking Ombudsman/NSAC process?**

The Deed of Settlement specifically records that nothing in the Deed shall affect, compromise or exclude any legal claim that an eligible investor might have in respect of the Funds, nor the opportunity eligible investors might have to recover compensation through the Banking Ombudsman and / or the NSAC process.

You should direct any enquiries to ANZN in the first instance.

**If the Commission says there has been a breach, why are investors not getting all their money back?**

The Commission has reached an out of court settlement under which ANZN and ING have acknowledged that some of their conduct may have breached the Fair Trading Act. ANZN and ING do not accept all of the Commission's conclusions regarding their conduct and, as such, the settlement amount accepted as part of the settlement will not necessarily restore all the money invested. However, the settlement amount will represent a significant additional sum on top of what investors have already received either directly from the ANZN, through the ING offer process, through the NSAC process or through tax adjustment, in circumstances where the majority of investors had previously agreed, by signing the release, not to seek further compensation.

**What happens if an investor is not happy with the payment amount (or non-payment)?**

The settlement by the Commission with ANZN/ING does not affect any person's ability to take their own action in relation to the Funds although if they signed the release they need to be aware that it could affect their right to take legal action.

**Who do I contact if I have a question?**

You should contact ING on 0800 737 575.