

**ROYAL COMMISSION INTO MISCONDUCT IN THE BANKING,  
SUPERANNUATION AND FINANCIAL SERVICES INDUSTRY**

**MODULE 5: SUPERANNUATION**

**SUBMISSIONS IN RESPONSE TO LETTER DATED 23 NOVEMBER 2018**

**FILED ON BEHALF OF THE IOOF ENTITIES<sup>1</sup>**

**INTRODUCTION AND SUMMARY**

- 1 These submissions respond to the letter dated 23 November 2018 from the solicitor assisting the Royal Commission (**Commission's Letter**).<sup>2</sup>
- 2 The Commission's Letter invites IOOF to make submissions in respect of whether a finding<sup>3</sup> should be made that:
  - IIML's conduct in allowing IOOF to receive and retain money directly generated from Portfolio Services members' funds for nothing in return might have amounted to a contravention of the covenant to act in the best interests of members found in s 52(2)(c) of the *Superannuation Industry Supervision Act 1993*.
- 3 Such a finding is not reasonably open on the evidence or material before the Commission. It would be based on the existence of facts which do not exist.
- 4 In particular, IOOF did not receive and retain money from Portfolio Services members' funds for nothing in return. To the contrary, there was direct evidence before the Commission that:
  - (a) IOOF Holdings received payments in return for services provided to responsible entities of MISs (**Platform Operator Payments**); and
  - (b) IOOF Holdings passed the Platform Operator Payments on to Platform Operators (including IIML).
- 5 This evidence was unchallenged on any logical basis. In so far as Mr Mark Oliver was asked about these matters in cross-examination, it was on the basis of financial statements which he had not seen before and which he was not qualified, or in a position, to comment on. In particular, Mr Oliver stated that he did not know where the Platform Operator Payments would be reflected in those financial statements, and that he stood by his earlier evidence that IOOF Holdings passes on those payments to the platform operator (for example IIML).<sup>4</sup> In these circumstances, the facts relied upon by the Commission do not support a conclusion that IOOF Holdings retained those payments. The evidence is to the contrary.
- 6 Further, there was no other evidence or material from which the Commission could reasonably be satisfied that the facts it relies upon were established.

---

<sup>1</sup> Being IOOF Holdings Limited (**IOOF Holdings**) and IOOF Investment Management Limited (**IIML**).

<sup>2</sup> The Commission's Letter refers to the written closing submissions of Counsel Assisting dated 24 August 2018 (**Closing Submissions**), and to IOOF's response dated 31 August 2018 (**IOOF's Submissions**).

<sup>3</sup> Which was not previously raised in the Closing Submissions.

<sup>4</sup> T-4581.

7 It follows that it is not open to make the suggested finding.

#### PLATFORM OPERATOR PAYMENTS PASSED ON TO IIML

8 The Commission’s Letter concludes that it is not clear whether the Platform Operator Payments were passed on to IIML.<sup>5</sup> On this basis alone, the Commission could not rationally conclude that IIML allowed IOOF Holdings to retain the payments.

9 In any event, Mr Oliver gave direct evidence that ‘*IFL [IOOF Holdings] passes on the payment from each of the responsible entities of the MISs to the Platform Operator.*’<sup>6</sup> The only basis on which this evidence was sought to be challenged was by reference to IIML’s 2017 financial statements.<sup>7</sup> In particular, Mr Oliver was cross-examined about the entry in those financial statements which appeared under the heading “*Related Party Transactions*”. The proposition was put to Mr Oliver that the Platform Operator Payments received by IIML were not recorded in this section of the financial statements, which suggested that IIML never received the payments.<sup>8</sup>

10 However, this proposition<sup>9</sup> is misconceived. Ignoring proper accounting treatment, it incorrectly assumes that Platform Operator Payments are recorded as ‘*investment manager fees received from related entity*’ in note 30 of the IIML 2017 financial statements. They are not.

11 In accordance with paragraph 8 of AASB 118, the payments from external responsible entities are recognised as revenue by IIML in its 2017 accounts in the ordinary way,<sup>10</sup> and included in the ‘*Management and service fees revenue*’ entry (along with other fees meeting this description for the purposes of the accounting standards).<sup>11</sup> Consistent with this accounting treatment, these payments are not recorded in the IOOF Holdings financial statements and not treated as a ‘related party transaction’ in IIML’s financial accounts.

12 The reason for this accounting treatment is that, pursuant to paragraph 8 of AASB 118, IOOF Holdings is treated as having collected the payments from the external responsible entities as agent for IIML, and IIML is treated as the principal who is required to recognise it as revenue received from those external responsible entities (and not a related party) for accounting purposes.<sup>12</sup>

<sup>5</sup> Commission’s Letter, final bullet point, page 2, and penultimate bullet point page 3.

<sup>6</sup> Mr Oliver’s Witness Statement dated 26 July 2018 (**Oliver Statement**), which is Exhibit 5.99, at [44].

<sup>7</sup> Exhibit 5.102 (IFL.0006.0003.3737).

<sup>8</sup> T-4580 – T-4581.

<sup>9</sup> Which is repeated in the Commission’s Letter on the top of page 3.

<sup>10</sup> From 1 July 2018, AASB 118 has been replaced by AASB 15.

<sup>11</sup> I.O.O.F. Investment Management Limited, Financial Report – 30 June 2017 (IFL.0006.0003.3738 at .3752)

<sup>12</sup> In addition to paragraph 8 of AASB 118, see also paragraph 18 of the examples appended to AASB 118.

- 13 The amount of \$154,498 in respect of ‘*investment manager fees received from related entity*’ under the heading ‘*Related party transactions*’ in the notes to IIML’s 2017 financial statements relates to fees received by IIML from IOOF Ltd, a friendly society within the IOOF group of companies. More specifically, these fees relate to investment management services provided by IIML to IOOF Ltd in respect of benefit funds administered by the friendly society, IOOF Ltd. These fees have nothing to do with the Platform Operator Payments the subject of the Commission’s Letter.
- 14 It follows that IIML’s 2017 financial statements do not support the assumption relied upon by Counsel Assisting or in the Commission’s Letter. This is the only asserted basis for the finding that IIML allowed IOOF Holdings to retain money directly generated from Portfolio Services members’ funds. There was also no evidence or other material to justify the finding. It follows that the suggested finding would have no logical basis.
- 15 Further, there was evidence before the Commission to the contrary. In particular, Mr Oliver’s Witness Statement attached at Annexure D a table setting out the total amount of payments made by REs of MISs to an entity within the IOOF Group where the payment takes into account investments of the assets of the Fund, and noted the proportion of those payments that reflect investment of the assets of the Fund. The latter amount is noted at \$2.317 million.
- 16 Considerations of procedural fairness preclude any criticism of Mr Oliver or of IOOF in relation to the matters set out above. This is because reliance upon IIML’s 2017 financial statements was raised for the first time in the cross-examination of Mr Oliver. No prior notice was given to Mr Oliver or to IOOF that this matter was to be relied upon at all, let alone relied upon as a matter of fundamental importance. This is despite the Commission having previously served:
- (a) three lengthy Rubrics on IOOF<sup>13</sup> which resulted in IOOF providing 150 pages of witnesses statements.<sup>14</sup> None of the Rubrics asked IOOF to deal with this issue; and
  - (b) 40 Notices to Produce,<sup>15</sup> which resulted in the production of in excess of 327,000 pages of documents in the space of about 6 months.
- 17 Mr Oliver is the General Manager of Distribution. He is not the CFO, and does not work in a finance role or have any accounting qualifications. Unsurprisingly therefore, Mr

---

<sup>13</sup> Rubrics 5-19, 5-38, and 5-58.

<sup>14</sup> Mr Kelaher provided two Witness Statements, each dated 26 July 2018, being Rubric 5-58 (the **Questor Statement**), which is Exhibit 5.116 (with its annexures), and Rubric 5-19 (the **IIML Statement**), which is Exhibit 5.115 (with its annexures). Mr Oliver provided one Witness Statement dated 26 July 2018, being Rubric 5-38 (the **Oliver Statement**), which is Exhibit 5.99 (with its annexures).

<sup>15</sup> NTP-513; NP-537; NP-546; NP-579; NP-612; NP-664; NP-723; NP-776; NP-810; NP-836; NP-848; NP-873; NP-888; NP-913; NP-937; NP-962; NP-967; NP-974; NP-975; NP-976; NP-983; NP-984; NP-998; NP-1025; NP-1047; NP-1048; NP-1063; NP-1064; PRIV-017; PRIV-018; PRIV-019; NP-1079; NP-1081; NP-1082; NP-1088; NP-1126; NP-1127; NP-1138; NP-1139; NP-1180.

Oliver was unable to assist in explaining the financial statements during cross-examination: his evidence was that he had not seen or reviewed them before, and was not familiar with them.<sup>16</sup> The Commission's Letter acknowledges this.<sup>17</sup>

- 18 Despite this, Mr Oliver was then asked whether he still wished to maintain his statement in his Witness Statement at [44] that IOOF Holdings passes on the payments from each of the REs of MISs to the platform operator. Mr Oliver's answer was consistent with his previous evidence:

I do, because I – I – I don't understand the connection between the statements and – that you've shown me and.<sup>18</sup>

- 19 It is notable that these matters were not pursued with the Managing Director of IOOF – Mr Chris Kelaher - in his subsequent cross-examination, despite Mr Kelaher being obviously more qualified to deal with them.<sup>19</sup>

- 20 It follows that there is no evidence of any probative value that IIML's 2017 financial statements suggest that IIML did not receive that Platform Operator Payments. To the contrary, Mr Oliver's direct and consistent evidence that the payments were received by IIML is uncontradicted and must be accepted.

#### **PAYMENTS FOR SERVICES AND COST RECOVERY**

- 21 The Commission's Letter asserts that:<sup>20</sup>

Based on the material available to the Commission, most of the income received from responsible entities under these agreements appears to neither be genuine fee for service nor a fee based on cost recovery.

- 22 The only 'material' relied upon in the letter is the assertion that, pre 1 July 2013, Platform Operator Payments were calculated on the basis of percentage of funds invested, and after that time they became based on a flat fee of \$10 per member for '*exactly the same services*'. On this basis the Commission's Letter concludes that the pre-1 July 2013 payments '*represent a significant windfall for IOOF*.'<sup>21</sup>

- 23 These conclusions are misconceived. There is no evidence or other material from which the Commission could reasonably be satisfied that any of these matters are established. In particular:

---

<sup>16</sup> T-4580 to T-4581.

<sup>17</sup> Commission's Letter, page 3, lines two and three.

<sup>18</sup> His answer was cut off by the cross-examiner. T-4581.36-38.

<sup>19</sup> See [2] of the IIML Statement.

<sup>20</sup> Commission's Letter, page 3, first complete bullet point.

<sup>21</sup> Commission's Letter, page 3, first complete bullet point.

- (a) there is no evidence that, pre 1 July 2013, payments were calculated on the basis of percentage of funds invested. This proposition was put squarely to Mr Oliver in cross-examination, and his answer was that he did not know;<sup>22</sup>
- (b) there is no evidence that the services provided prior to 1 July 2013 and services provided at all times after that date were and are '*exactly the same*'; and
- (c) there is no plausible justification for the unqualified assertion that IOOF Holdings has therefore enjoyed a '*significant windfall*' from the Platform Operator Payments.

24 The relevant evidence before the Commission about these issues was direct and clear:<sup>23</sup>

IIML's position is that it should only receive such payments if it provides services to the responsible entities of MISs in respect of such payments. IIML does not provide such services. In respect of the Fund, those services are provided by other entities in the IOOF Group and those entities receive payment from the responsible entities of the MISs.

.....

Under the terms of the PSA, the responsible entities of the MISs pay IFL a fee for the services provided by or on behalf of IFL for the administration of the MISs offered on the platform. These services include the establishment of investors on the MIS, transaction management, distribution processing, tax and annual statement reporting (**Services**).

.....

IFL passes on the payment from each of the responsible entities of the MISs to the Platform Operator.

- 25 Mr Oliver was not challenged on these statements during cross-examination.
- 26 Mr Oliver gave further unchallenged evidence during cross-examination about the services provided in return for the Platform Operator Payments, and the cost recovery included in those payments. In particular, he referred to '*the operations that are required to facilitate an investor into those funds*.'<sup>24</sup>
- 27 In these circumstances, Mr Oliver's evidence about the services provided and costs recovered in relation to Platform Operator Payments precludes the suggested finding, for which there is no probative justification.

---

<sup>22</sup> T-4573.45 and T-4574.5.

<sup>23</sup> Oliver Statement at [40] – [44].

<sup>24</sup> T-4573.10 and T-4574.40.

**CONCLUSION**

- 28 In the circumstances set out in the Commission's Letter, the suggested finding of a possible contravention of s 52(2)(c) of the SIS Act could only be made if it was established that IIML allowed IOOF Holdings to retain money directly generated from Portfolio Services members' funds for nothing in return.
- 29 As demonstrated by the matters set out above, there was no evidence or other material from which the Commission could reasonably be satisfied that those matters have been established.
- 30 To the contrary, such a finding would be contrary to the direct and unchallenged evidence on these matters from IOOF.

Date: 3 December 2018

James WS Peters

B K Holmes

King & Wood Mallesons