



ASIC
Australian Securities &
Investments Commission

REPORT 687

Response to submissions on CP 329 on advice fee consents and independence disclosure

March 2021

About this report

This report highlights the key issues that arose out of the submissions received on [Consultation Paper 329](#) *Implementing the Royal Commission recommendations: Advice fee consents and independence disclosure* (CP 329) and details our responses to those issues.

About ASIC regulatory documents

In administering legislation ASIC issues the following types of regulatory documents.

Consultation papers: seek feedback from stakeholders on matters ASIC is considering, such as proposed relief or proposed regulatory guidance.

Regulatory guides: give guidance to regulated entities by:

- explaining when and how ASIC will exercise specific powers under legislation (primarily the Corporations Act)
- explaining how ASIC interprets the law
- describing the principles underlying ASIC's approach
- giving practical guidance (e.g. describing the steps of a process such as applying for a licence or giving practical examples of how regulated entities may decide to meet their obligations).

Information sheets: provide concise guidance on a specific process or compliance issue or an overview of detailed guidance.

Reports: describe ASIC compliance or relief activity or the results of a research project.

Disclaimer

This report does not constitute legal advice. We encourage you to seek your own professional advice to find out how the Corporations Act and other applicable laws apply to you, as it is your responsibility to determine your obligations.

This report does not contain ASIC policy. Please see:

- [Regulatory Guide 175](#) *Licensing: Financial product advisers—Conduct and disclosure* (RG 175)
- [Regulatory Guide 245](#) *Fee disclosure statements* (RG 245).

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A Overview

- 1 The *Financial Sector Reform (Hayne Royal Commission Response No. 2) Act 2021* (Advice Fees and Independence Act) implements the Australian Government’s response to Recommendations 2.1, 2.2, 3.2 and 3.3 of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry (Royal Commission). These recommendations relate to financial advice and superannuation, particularly ongoing fee arrangements, lack of independence disclosure and deduction of advice fees from superannuation accounts.

Note: See Royal Commission, [Final report](#), 4 February 2019.

- 2 The Advice Fees and Independence Act introduces, among other changes, the following amendments:
- (a) a fee recipient must seek a client’s renewal of an ongoing fee arrangement (OFA) annually rather than every two years;

Note: A ‘fee recipient’ is an Australian financial services (AFS) licensee who enters into an OFA with a client or, if the rights of the person who entered into the OFA have been assigned, the fee recipient is the person who currently holds those rights (i.e. the assignee)—see s962C of the *Corporations Act 2001* (Corporations Act).
 - (b) a fee disclosure statement (FDS) must include information for the upcoming year;
 - (c) the fee recipient must not deduct, arrange to deduct, or accept the deduction of ongoing fees from a client’s account without the client’s consent;
 - (d) superannuation trustees must not pass on the cost of providing a member with financial product advice (other than for intra-fund advice) to a superannuation account unless they receive the member’s written consent;
 - (e) superannuation trustees must not pass on the costs of providing a member with financial product advice to a MySuper account under an OFA, but may pass on those costs under a non-ongoing fee arrangement; and
 - (f) a providing entity that is authorised to provide personal advice must state in a Financial Services Guide (FSG) that they are not independent, impartial or unbiased and the reasons why that is so, if they would be in breach of s923A(1) of the Corporations Act by assuming or using the words ‘independent’, ‘impartial’ or ‘unbiased’.

Note: A ‘providing entity’ is a person to whom the obligations in Pt 7.7 of the Corporations Act apply. This is the AFS licensee or an authorised representative that provides the financial product advice. For more information, see [Regulatory Guide 175 Licensing: Financial product advisers—Conduct and disclosure](#) (RG 175) at RG 175.30–RG 175.32.

3 The Advice Fees and Independence Act also introduces broader amendments to the OFA regime, including:

- (a) fee recipients are no longer required to provide clients with a renewal notice. The process for the client to ‘opt-in’ or renew the arrangement must now be outlined in the FDS (see s962H(2C));
- (b) fee recipients must give an FDS to a client within 60 days after the anniversary day each year. The anniversary day is the day on which the OFA was entered into—for example, if the OFA was entered into on 21 September 2021, the anniversary day is 21 September each year (see s962G(1)-(3)); and
- (c) clients have 120 days, beginning on the anniversary day, to renew an OFA. This is known as the renewal period. If a client does not provide written consent before the end of the renewal period, the OFA will terminate after a further 30 days (see s962L and 962V).

Note: The above amendments were made to the Advice Fees and Independence Act after we released [Consultation Paper 329](#) *Implementing the Royal Commission recommendations: Advice fee consents and independence disclosure* (CP 329)

4 These requirements commence on 1 July 2021 and apply to all OFAs entered into on or after that date. For the new written consent and FDS requirements (see paragraphs 2(a)–2(c)), a 12-month transitional period applies for OFAs entered into before 1 July 2021. The new requirement to provide a lack of independence disclosure (see paragraph 2(f)) applies to personal advice given on or after 1 July 2021.

5 Similarly, there is a staggered introduction of the new requirements to have written consent before deducting the costs of providing financial product advice from a superannuation account: see paragraphs 2(d)–2(e). These requirements apply from:

- (a) 1 July 2021 for fees payable under arrangements entered on or after that date; and
- (b) 1 July 2022 for costs deducted under all other arrangements.

6 The Advice Fees and Independence Act also introduces new provisions that give ASIC the power to make legislative instruments prescribing the requirements for written consents for OFA fee deductions, non-ongoing fee deductions from superannuation and lack of independence disclosures: see s962T, 942B(7A) and 942C(7A) of the Corporations Act and s99FA(2) of the *Superannuation Industry (Supervision) Act 1993* (SIS Act).

7 In [CP 329](#), we consulted on proposals to:

- (a) prescribe the requirements set out in draft ASIC Corporations (Consent to Deductions—Ongoing Fee Arrangements) Instrument 2020/XX (attached to CP 329) for the written consent that fee recipients must

- receive from clients before deducting, arranging to deduct, or accepting the deduction of ongoing fees from a client's account (Proposal B1);
- (b) prescribe the requirements set out in draft ASIC Superannuation (Consent to Pass on Costs of Providing Advice) Instrument 2020/XX (attached to CP 329) for the written consent that superannuation trustees must receive from members before non-ongoing fees are passed on to a member's account (Proposal B2);
 - (c) prescribe the requirements set out in draft ASIC Corporations (Disclosure of Lack of Independence) Instrument 2020/XX (attached to CP 329) that the FSG or Supplementary FSG include a statement about a providing entity's lack of independence (Proposal B3); and
 - (d) issue guidance on OFAs to address areas of uncertainty with the existing law at the time of release of the consultation paper on FDSs and renewal notices (Proposal C1).
- 8 This report highlights the key issues that arose out of the submissions we received on CP 329 and our response to those issues. Some issues—such as the level of prescription and the role that written consents should play in superannuation trustee oversight processes for advice fee deductions—were raised both in submissions on Proposal B1 and Proposal B2. To reduce repetition, we discuss these issues under the proposal that received the most number of submissions on the particular issue.
- Note: See paragraphs 25–27 for feedback on the issue of prescription and paragraphs 44–48 on the issue of trustee oversight and written consents.
- 9 This report is not meant to be a comprehensive summary of all responses we received. It is also not meant to be a detailed report on every question from CP 329. We have limited this report to the key issues.
- 10 Many submissions also raised issues about matters for the Australian Government. We passed on these issues to Treasury for its consideration.

Responses to consultation

- 11 We received three confidential and 19 non-confidential responses to CP 329 from financial services providers, industry associations, and other interested entities. We are grateful to respondents for taking the time to send us their comments.
- 12 For a list of the non-confidential respondents to CP 329, see the appendix. Copies of these submissions are currently on the [CP 329 page](#) of the ASIC website.

- 13 The main issues raised by respondents were:
- (a) for Proposal B1—the duplication of information, complexity of information requirements, privacy concerns when passing on consent and the level of prescription in the written consent (see Section B);
 - (b) for Proposal B2—the level of detail about services, complexity of information requirements, managing deductions where there are multiple accounts, providing details for advice providers, and trustee oversight of fees and other charges (see Section C);
 - (c) for Proposal B3—the heading for the disclosure statement, the level of prescription in the disclosure statement and guidance on the requirements in s923A of the Corporations Act (see Section D); and
 - (d) for Proposal C1—guidance on ongoing fee arrangements (see Section E).

B Consent to the deduction of ongoing fees

Key points

This section outlines the feedback we received on the following aspects of Proposal B1 in CP 329, and our approach to these issues:

- whether the written consent requirements will lead to unnecessary duplication of information set out in other disclosure documents (paragraphs 14–17);
- the difficulty of complying with the information requirements for the written consent (see paragraphs 18–20);
- how issues of privacy can be managed when passing on the written consent to multiple account providers (paragraphs 21–24); and
- the level of prescription required in the written consent (paragraphs 25–27).

Duplication of information

14 In [CP 329](#), we proposed to prescribe the requirements for the written consent that fee recipients must receive from clients before deducting, arranging to deduct, or accepting the deduction of ongoing fees from a client’s account. These requirements were set out in draft ASIC Corporations (Consent to Deductions—Ongoing Fee Arrangements) Instrument 2020/XX: see [Attachment 1 to CP 329](#) (PDF 85 KB).

15 The Royal Commission noted that the ‘invisible’ nature of the payment of ongoing fees from a client’s investment account contributed to the charging of fees for no service. For this reason, the Royal Commission recommended that clients give written consent for ongoing fees to be deducted from their accounts.

Stakeholder feedback

16 Most respondents agreed with our proposal to prescribe requirements for the written consent that fee recipients must receive before deducting, arranging to deduct or accepting the deduction of ongoing fees from a client’s account.

17 Some respondents submitted that:

- (a) certain aspects of the prescribed requirements duplicate what is provided in other advice documents—for example, FDSs, renewal notices and Statements of Advice (SOAs) all include information about fees and services that a client is entitled to receive; and

- (b) the prescribed requirements add significant complexity to the OFA regime and that we should therefore consider either reducing the overlap of information required in FDSs, renewal notices and written consents or streamlining these documents.

ASIC's response

We have retained the requirement to provide information in the written consent about the amount of fees that a client will pay under an OFA: see [ASIC Corporations \(Consent to Deductions—Ongoing Fee Arrangements\) Instrument 2021/124](#).

We consider this meets the underlying policy intention of the Royal Commission reforms, which is to remove the 'invisible' nature of ongoing fees being paid from client investment accounts and prevent fee for no service conduct. Further, given the purpose of the written consent is to consent to the deduction of ongoing fees, we consider that the disclosure of those fees is a critical part of the written consent.

However, in response to the stakeholder feedback, we have removed the requirement to stipulate in the written consent the services that a client will be entitled to under an OFA. We accept that this information is duplicated in other disclosure documents (importantly, the FDS).

We have also amended ASIC Corporations (Consent to Deductions—Ongoing Fee Arrangements) Instrument 2021/124 to specify that a written consent is not required to include information specified in the instrument if:

- the written consent is combined with an FDS; and
- the FDS already covers the information that must be included in the written consent.

We have made this amendment to minimise the duplication of information between a written consent and FDS when these two documents are combined.

Also, we intend to provide guidance in [Regulatory Guide 245 Fee disclosure statements](#) (RG 245) to clarify that there is some flexibility in how a fee recipient can provide an FDS and the written consent (e.g. they can be provided in a single document).

Complexity of information requirements

- 18 In [CP 329](#), we proposed to require that a written consent must include:
- (a) information about the timing of ongoing fees an account holder will pay under an OFA;
 - (b) a warning that the client's entitlement to benefits may cease or be reduced due to the deduction of ongoing fees; and

- (c) a breakdown of the proportion of the ongoing fees that will be deducted from each account, if the account holder will pay ongoing fees from more than one account.

Stakeholder feedback

- 19 Many respondents agreed with our proposals.
- 20 However, some respondents submitted that it would be difficult or administratively burdensome to provide:
- (a) information about the timing of the deduction of ongoing fees. This is because different product providers may each deduct ongoing fees from each account at different times;
- (b) a warning that the client's entitlement to benefits may cease or be reduced due to the deduction of ongoing fees. This is because the fee recipient will need to assess the terms of each product to determine whether a specific warning is needed. One submission suggested this would require a significant overhaul of the data they currently receive from account providers; and
- (c) a breakdown of the proportion of ongoing fees that are deducted between multiple accounts. This is because product providers may deduct ongoing fees from different accounts using different methods.

ASIC's response

In response to stakeholder feedback, we have removed the requirement that the written consent must include:

- information about the timing of each ongoing fee that is deducted from a client's account; and
- a warning that the client's entitlement to benefits may cease or be reduced due to the ongoing fee deductions.

We have also amended the requirement to provide a breakdown of the proportion of ongoing fees that will be deducted from each account (if the account holder will pay ongoing fees from more than one account). Instead, the written consent must provide details about:

- the accounts from which ongoing fees will be deducted; and
- how much is coming out of each of these accounts.

Privacy issues when passing on consent

- 21 If a client holds an account with a third-party account provider (e.g. an account with a superannuation trustee), a fee recipient must not arrange for, or accept, the deduction of ongoing fees from an account unless the client

has consented to the deduction. In the case of superannuation trustees, this is mirrored by an obligation in the SIS Act prohibiting deductions without the member's consent: see s99FA of the SIS Act.

- 22 Fee recipients must also give a copy of an account holder's consent to the third-party account provider when arranging for the deduction of fees under an OFA: see s962S(3)(c) of the Corporations Act. This means that if a client holds multiple accounts with different third-party account providers, the fee recipient must pass on the client's written consent to each of these account providers.

Stakeholder feedback

- 23 Some respondents' submissions raised the following practical problems with these requirements:
- (a) there are potential privacy concerns as a result of information about a client's investments and the balance of those investments being shared between multiple account providers, given the fee recipient must pass on the client's written consent to each account provider; and
 - (b) it may be difficult for a client to sign multiple consent forms for ongoing fees that are deducted from multiple accounts that the client holds with different account providers.
- 24 Respondents sought guidance on how to manage these privacy concerns and to meet the written consent requirements across multiple product issuers and different accounts held by a client.

ASIC's response

The need for fee recipients to give a copy of the account holder's consent to the third-party account provider when arranging for the deduction of fees under an OFA is a legislative requirement.

Fee recipients need to consider their privacy obligations when managing the issue of passing on a written consent that contains confidential information to different account providers, and seek independent legal advice if they deem it necessary. For example, to address potential privacy issues, a fee recipient can ask clients to sign separate written consents to deduct fees from each account. Another option fee recipients may want to consider is maintaining separate schedules to the one document containing consents to deduct fees from accounts with multiple account providers, with only the relevant schedule being passed to the applicable account provider.

Note: For more information on privacy, see Office of the Australian Information Commissioner, *Australian Privacy Principles guidelines*, [Chapter 6: APP 6—Use or disclosure of personal information](#).

Level of prescription in the written consent

- 25 Our proposal sought to strike a balance between adopting prescriptive standards for the written consent and providing flexibility for fee recipients to develop a written consent that meets their circumstances. In doing this, we considered factors in favour of, and against, a prescriptive approach—for example:
- (a) prescriptive standards may promote standardisation, but may also increase the likelihood of technical breaches that lead to OFAs being terminated under s962FA of the Corporations Act; and
 - (b) flexibility enables fee recipients to develop a written consent that suits the needs of their clients.

Stakeholder feedback

- 26 Most respondents did not support a more prescriptive approach and instead supported having the flexibility to prepare the written consent in a way that suited the needs of the business and the circumstances of the client.
- 27 However, some respondents supported a more prescriptive approach, arguing that this would ensure greater consistency between the written consents provided by fee recipients and reduce inefficiencies related to complying with the requirements. For example, it was submitted that we should prescribe:
- (a) the layout for the information in the written consent; and
 - (b) the types of services that must be disclosed in a written consent.

ASIC's response

We consider that it is impractical to prescribe further the types of services that must be disclosed in a written consent because this would depend on the services that each individual fee recipient provides.

Consistent with the views of the majority of respondents, we consider that our principles-based approach ensures that fee recipients can tailor their written consent to the specific circumstances of their OFAs. It is always open to fee recipients and/or industry as a whole to develop a standard consent form, provided that it complies with the law.

C Consent to the deduction of non-ongoing fees

Key points

This section outlines the feedback we received on the following aspects of Proposal B2 in CP 329, and our approach to these issues:

- the level of detail in the written consent about the services to be provided (paragraphs 28–32);
- the difficulty of complying with the information requirements for the written consent (paragraphs 33–37);
- how written consent may be managed when advice fees are deducted from multiple accounts (paragraphs 38–40);
- a requirement to include the name and contact details for advice providers (where applicable) in the written consent (paragraphs 41–43); and
- the role to be played by the written consent in a trustee’s oversight of fees and other charges being deducted from a member’s superannuation account (paragraphs 44–48).

Information about services in the written consent

28 In [CP 329](#), we proposed to prescribe the requirements for the written consent that superannuation trustees must have from members before non-ongoing fees are passed on to a member’s superannuation choice account (the draft legislation at that time prohibited advice fees being deducted from MySuper accounts). These requirements were set out in draft ASIC Superannuation (Consent to Pass on Costs of Providing Advice) Instrument 2020/XX: see [Attachment 2 to CP 329](#) (PDF 75 KB).

29 While the Advice Fees and Independence Act removes superannuation trustees’ ability to deduct ongoing fees from a MySuper account, trustees may deduct non-ongoing fees from MySuper products. Trustees must have a member’s written consent before non-ongoing fees are passed on to the member’s MySuper account.

Note: This amendment permitting non-ongoing fees to be deducted from MySuper accounts was made to the Advice Fees and Independence Act after we released CP 329.

Stakeholder feedback

30 We received different views on our proposal to require superannuation trustees to provide information about the services to be provided in the written consent.

- 31 Some respondents submitted that information about services will be set out in other documents and that the disclosure of services in the written consent duplicated this information. Some respondents also supported the use of standard services descriptors and suggested that superannuation trustees do not need to have visibility of the nature of the services to be provided.
- 32 By contrast, some respondents advocated for more detail about services to be included in the written consent. For example, one respondent submitted that the written consent should disclose the full range of services that a client will receive and should not refer the client to information contained in another document.

ASIC's response

We have retained the requirement that the written consent for non-ongoing fees include information about the services that the member will be entitled to receive under the arrangement: see [ASIC Superannuation \(Consent to Pass on Costs of Providing Advice\) Instrument 2021/126](#). We consider that members should be provided this information in the written consent because it cannot be assumed that members will receive it through other documents. In contrast to ongoing fee arrangements, the fee recipient is not required to provide an FDS for non-ongoing fees.

Our prescribed requirements do not prohibit information about the services to be given from being provided in an attachment to the written consent. For example, the requirement may be satisfied by attaching an extract of an SOA to the written consent.

There was some feedback that suggested the written consent use standard descriptions for services. We consider that industry is best placed to develop standard descriptions, drawing on consumer feedback.

If information about the services to be provided is in a separate document, that document must be provided contemporaneously with the written consent.

Complexity of information requirements

- 33 In [CP 329](#), we proposed to require that the written consent must include:
- (a) a breakdown of the proportion of the non-ongoing fees that will be deducted from each investment option, if a member will pay non-ongoing fees from more than one investment option;
 - (b) a warning that benefits to which the member is entitled may cease or be reduced due to the deduction of non-ongoing fees; and
 - (c) a requirement to include amounts of non-ongoing fees in dollar amounts.

Stakeholder feedback

- 34 Respondents provided feedback on how practical it would be to provide a breakdown of the proportion of non-ongoing fees deducted from investment options. It was noted that some superannuation trustees may not know the proportion to be deducted when the written consent is provided, as the proportion will change depending on the amounts invested in each option.
- 35 Respondents also noted that the requirement to warn that the client's entitlement to benefits may cease or be reduced due to the deduction of non-ongoing fees may mean advice providers have to approach superannuation trustees for regular updates. One submission suggested that written warnings may be ignored, overlooked or misunderstood by consumers. There was also uncertainty about the extent of warning necessary—for example, one respondent queried if warning of the risk of adverse market movements was required.
- 36 Further, it was noted that some non-ongoing fee arrangements do not involve charging a fixed dollar amount.
- 37 A respondent also raised concerns about the proposal for the written consent to state that consent may be withdrawn at any time. The respondent suggested that the withdrawal of consent should not be permitted after the agreed advice has been provided.

ASIC's response

In response to stakeholder feedback we have removed the requirements for the written consent to provide:

- a breakdown of the proportion of non-ongoing fees that will be deducted from each investment option (if applicable);
- a warning that the client's entitlement to benefits may cease or be reduced due to the fee deduction; and
- a dollar amount of non-ongoing fees.

These changes are consistent with amendments we made to and the requirements of [ASIC Corporations \(Consent to Deductions—Ongoing Fee Arrangements\) Instrument 2021/124](#): see paragraphs 18–20.

We have provided that the written consent may disclose a reasonable estimate of the amount of fees to be deducted, and an explanation of the method used to work out the estimate. This accords with s962H(2B) of the Corporations Act in relation to ongoing fees. It also follows feedback that the amount may not be determined at the time the fee recipient provides the written consent.

We have also clarified that the statement concerning withdrawal in the written consent may indicate that withdrawal must occur before the cost has been passed on to the member.

When advice fees are deducted from multiple accounts

- 38 The Advice Fees and Independence Act introduces requirements that superannuation trustees must receive written consent from a member for any advice fees (other than for intra-fund advice) that are to be deducted from their superannuation.

Stakeholder feedback

- 39 Several respondents queried how the written consent requirements would apply when a member has advice fees deducted from multiple accounts in different superannuation funds. Some respondents suggested that we implement changes to facilitate consent for fee deductions from multiple accounts, such as a common consent format.
- 40 Some respondents raised concerns about privacy when a written consent is passed on to multiple account providers: see paragraphs 23–24.

ASIC's response

We consider that a superannuation member's consent to deduct advice fees from multiple accounts may be included in a single written consent. However, the written consent must make it clear to the member that they are consenting to the deduction of advice fees from multiple accounts.

When providing the written consent, or a copy of the written consent, to deduct fees from multiple accounts to a superannuation trustee, privacy obligations need to be considered: see our response to the feedback discussed at paragraphs 23–24.

Name and contact details for advice providers

- 41 We proposed to prescribe a requirement that the written consent include the name and contact details of the regulated superannuation fund from which advice fees were to be deducted. We explained in [CP 329](#) that these contact details should include at least a phone contact for the superannuation fund.
- 42 However, we did not propose to prescribe a requirement that the written consent include the name and contact details of any advice provider who provided the advice that gave rise to the non-ongoing fee.

Stakeholder feedback

- 43 Some respondents submitted that we should prescribe a requirement that the name and contact details of any relevant advice provider be included in the written consent, as well as the name and contact details of the relevant

superannuation fund. It was suggested that the obligation to obtain written consent would fall on advice providers rather than the superannuation fund.

ASIC's response

We have included a requirement that the written consent must set out the name and contact details for the superannuation fund. This is because the fund holds the account from which the non-ongoing fees will be deducted. This does not mean that a written consent to deduct non-ongoing fees could not also include the name and contact details of any advice provider or that the advice provider cannot initiate the obtaining of the consent.

However, in view of respondents' feedback, we acknowledge there are benefits to including the advice provider's contact details in the minimum requirements, where applicable. We have amended our prescribed requirements accordingly: see [ASIC Superannuation \(Consent to Pass on Costs of Providing Advice\) Instrument 2021/126](#).

We have not amended our requirement that withdrawal of consent must be made by contacting the superannuation fund. This is because written consent is for the superannuation trustee to deduct non-ongoing fees from the member's superannuation account: see s99FA of the SIS Act. By contrast, the written consent to deduct ongoing fees is consent for the fee recipient to deduct, arrange to deduct, or accept the deduction of ongoing fees from a client's account: see s962R and 962S of the Corporations Act.

Written consent and trustee oversight of fees

- 44 In April 2019, ASIC and the Australian Prudential Regulation Authority (APRA) issued a [joint letter](#) to superannuation trustees reinforcing the importance of them undertaking appropriate oversight of fees and other charges being deducted from a member's superannuation account. This followed evidence before the Royal Commission in relation to fees being charged without the provision of relevant services and the identification by the regulators of a range of industry practices that fell below an appropriate standard.
- 45 The letter outlined issues that trustees needed to consider. It stated that all superannuation trustees must have in place strong governance, risk management and oversight processes. These processes should ensure that only authorised and appropriate fees and other charges are deducted from a member's superannuation account.
- 46 We note this issue is relevant to both the deduction of ongoing and non-ongoing fees from superannuation accounts.

Stakeholder feedback

- 47 Some respondents referenced the April 2019 joint letter in their submissions and sought clarity on the role that written consents should play in trustee oversight processes for advice fee deductions. Examples of concerns raised involved expectations on trustees:
- (a) to ensure that services were provided; and
 - (b) when an estimated cost is materially different from the actual cost passed on to the member.
- 48 Some respondents suggested additional information that should be included in our prescribed requirements—for example, confirmation that the relevant services were provided and that the advice was in relation to superannuation or retirement.

ASIC's response

We acknowledge the interest our respondents have in the role that written consents should play in trustee oversight of advice fee deductions. However, we have not amended our prescribed minimum requirements to specifically include the additional information suggested.

We have included some guidance about our expectations for a trustee's oversight of advice fee deductions in the Explanatory Statement to the [ASIC Superannuation \(Consent to Pass on Costs of Providing Advice\) Instrument 2021/126](#).

In addition, ASIC and APRA intend to release further guidance on our expectations about trustees' oversight of advice fees in a follow-up letter to the April 2019 joint letter. We will release the follow-up letter later in 2021.

D Lack of independence disclosure

Key points

This section outlines the feedback we received on the following aspects of Proposal B3 in CP 329, and our approach to these issues:

- the prescribed heading for the disclosure statement (paragraphs 49–54);
- the level of prescription in the disclosure statement (paragraphs 55–57); and
- guidance on the requirements in s923A of the Corporations Act (paragraphs 58–60).

Heading for the disclosure statement

- 49 In [CP 329](#), we proposed to prescribe requirements that the FSG or Supplementary FSG include a statement about a providing entity’s lack of independence. These requirements were set out in draft ASIC Corporations (Disclosure of Lack of Independence) Instrument 2020/XX: see [Attachment 3 to CP 329](#) (PDF 71 KB).
- 50 The Royal Commission recommended that financial advisers who would contravene s923A of the Corporations Act if they assumed or used the words ‘independent’, ‘impartial’ and ‘unbiased’ must give written disclosure of this and explain why that is so. This disclosure is intended to ensure that a providing entity’s lack of independence is brought to the client’s attention through prominent, clear and concise disclosure.
- 51 We proposed in CP 329 that the disclosure statement appear in a box under a heading titled ‘**Not Independent**’ (i.e. in bold font), on the first substantive page of the document.

Stakeholder feedback

- 52 Respondents broadly supported our proposal to prescribe a heading for the lack of independence disclosure statement.
- 53 However, they raised concerns about the specific heading we proposed to prescribe, including that:
- (a) the heading ‘Not Independent’ may be taken as a black and white statement that is not necessarily reflective of a situation where a providing entity is not able to use the terms ‘impartial, unbiased or independent’ under s923A of the Corporations Act;

- (b) the use of the term ‘Not Independent’ appears to be reliant on legal jargon, which can distort a consumer’s understanding of what is being disclosed; and
- (c) the blanket heading ‘Not Independent’ would not be helpful without additional clarity around a providing entity’s connection to the product issuers.

54 Some respondents also submitted that the heading does not appear to be consistent with other headings commonly used in an FSG (e.g. ‘Fees’ and ‘How to complain’ headings). One respondent suggested that an alternative heading could be ‘Statement on the independence of our firm’.

ASIC’s response

We acknowledge the feedback from respondents about the lack of flexibility with the heading of the prescribed disclosure statement.

We have amended [ASIC Corporations \(Disclosure of Lack of Independence\) Instrument 2021/125](#) to give providing entities different options for the heading. Providing entities will be required to use a bold heading that includes the phrase ‘**Not Independent**’, ‘**Lack of Independence**’, or another phrase of similar meaning.

While we have given some flexibility on the heading, we do not think headings such as ‘Statement on the independence of our firm’ are consistent with the objectives of the Royal Commission recommendation. We consider that they imply that the firm is in fact independent.

Level of prescription in the disclosure statement

55 Our proposal sought to give providing entities the flexibility to develop a statement that accurately reflects their circumstances and will be easily understood by their clients.

Stakeholder feedback

56 Most respondents agreed with our proposal and supported having the flexibility to prepare the written consent differently, depending on the circumstances. They did not support a more prescriptive approach.

57 Some respondents, however, requested that certain worked examples be provided, including disclosures for common business models (i.e. such as vertically integrated businesses or businesses that accept insurance commissions).

ASIC's response

We have considered the feedback received and, on balance, have not taken a more prescriptive approach.

We intend to provide general guidance on the matters that should be included in the disclosure statement. This will include some examples of why providing entities may not be able to use the words 'independent', 'impartial' or 'unbiased' under s923A of the Corporations Act.

However, we do not intend to prescribe specific wording for disclosure in relation to the different advice contexts. We consider that firms are best placed to describe their business model to their clients. As a result, we have provided the flexibility for firms to develop their own statements that will be easily understood by their clients.

Guidance on the requirements in s923A

- 58 We sought feedback on what further guidance we could provide to help a providing entity with complying with our prescribed requirements.

Stakeholder feedback

- 59 Respondents requested further guidance on the key areas summarised at paragraphs 20–57.
- 60 Some respondents also requested that we revisit our guidance in [RG 175](#) on s923A of the Corporations Act because:
- (a) there are limited circumstances in which a financial adviser may be able to use the terms 'independent', 'impartial' and 'unbiased'; and
 - (b) life insurance commissions are now subject to specific limitations in the law and s923A should be reconsidered in light of this.

ASIC's response

We intend to make consequential amendments to RG 175 to reflect the Advice Fees and Independence Act.

We already provide guidance on our interpretation of s923A in RG 175, and do not intend to update the guidance in response to the submissions to CP 329 at this time. The use of the restricted terms 'independent', 'impartial' and 'unbiased' (and other like terms) is prescribed in s923A. It was clearly intended by Parliament to limit the circumstances in which financial service providers can use those terms. Any change to the use of these terms would require legislative amendment.

E Guidance on ongoing fee arrangements

Key points

This section outlines the feedback we received, and our response to this feedback, on Proposal C1 in CP 329 to issue guidance on OFAs, including how the new FDS obligations will operate.

Additional guidance

- 61 In [CP 329](#), we proposed to issue guidance on OFAs to address areas of uncertainty with the existing law at the time of consultation.
- 62 Our proposal followed on from our work in [Report 636 *Compliance with the fee disclosure statement and renewal obligations*](#) (REP 636). We found that consumers who receive financial advice could be at risk of receiving incorrect information about advice fees or, in some cases, could be charged fees after OFAs had ended.

Stakeholder feedback

- 63 Most respondents supported ASIC providing guidance on the areas that we outlined for OFAs.

ASIC's response

We intend to make consequential amendments to our guidance on OFAs, which will be informed by the Advice Fees and Independence Act.

We note that some areas of the law that were uncertain at the time of release of CP 329 no longer require guidance. For example, there is no longer a need to provide guidance on renewal notices.

Appendix: List of non-confidential respondents

- Australian Advice Network
- Australian Financial Markets Association
- Australian Institute of Superannuation Trustees
- Association of Financial Advisers Limited
- ClearView Wealth Limited
- CPA Australia Ltd
- Financial Planning Association of Australia
- Financial Services Council
- First State Super
- FYG Planners Pty Ltd
- Industry Super Australia
- IRESS
- King Fisher Financial Services
- Profession of Independent Financial Advisers
- SMSF Association
- Stockbrokers and Financial Advisers Association Limited
- Super Consumers Australia
- The Association of Superannuation Funds of Australia Limited
- Xplore Wealth Limited