

## **EXPLANATORY STATEMENT**

### **Issued by authority of the Assistant Treasurer**

*National Consumer Credit Protection Act 2009*

*National Consumer Credit Protection (Large ADI) Determination 2023*

Subsection 5(1A) of the *National Consumer Credit Protection Act 2009* (the Act) provides that the Minister may, by legislative instrument, determine the kinds of ADIs (that is, authorised deposit-taking institutions) that are large ADIs.

The *National Consumer Credit Protection (Large ADI) Determination 2023* (the Determination) sets out the methodology to determine whether an ADI is a large ADI for the purpose of the Act. It replaces the *Banking Executive Accountability Regime (Size of an Authorised Deposit-taking Institution) Determination 2021* (BEAR Determination) to ensure continuity in the meaning of large ADI, consequential to the establishment of the Financial Accountability Regime. The key change from the BEAR Determination is the rebase of indexation calculations.

On 4 February 2019, the Financial Services Royal Commission released its Final Report on Misconduct in the Banking, Superannuation and Financial Services Industry. This included recommendations to extend the Banking Executive Accountability Regime to other Australian Prudential Regulation Authority (APRA) regulated industries.

The *Financial Accountability Regime Act 2023* implements relevant recommendations of the Financial Services Royal Commission by establishing the Financial Accountability Regime, which introduces a new accountability regime for institutions and their senior executives in the banking, insurance, and superannuation sectors.

The *Financial Accountability Regime (Consequential Amendments) Act 2023* makes consequential amendments to relevant legislation to support the implementation of the Financial Accountability Regime. This includes:

- the repeal of the Banking Executive Accountability Regime under the *Banking Act 1959* six months after the commencement of the *Financial Accountability Regime Act 2023*, including the repeal of the provision conferring power on the Minister to make the BEAR Determination;
- the replacement of the definition of ‘large ADI’ in section 5 of the Act. Prior to being amended, the Act provided that ‘large ADI’ had the same meaning as the *Banking Act 1959*. The BEAR Determination sets out the kinds of ADIs that are large ADIs for the purpose of the *Banking Act 1959*. The Act now provides that a ‘large ADI’ means an ADI of a kind determined under subsection 5(1A) of the Act; and
- the conferral of power on the Minister to determine the kinds of ADIs that are large ADIs for the purposes of the Act. Subsection 5(1A) of the Act provides that

the Minister may, by legislative instrument, determine the kinds of ADIs that are large ADIs.

The mandatory comprehensive credit reporting regime under the Act applies to ‘eligible licensees’. Eligible licensees include large ADIs. Large ADIs must provide comprehensive credit information on consumer credit accounts to certain credit reporting bodies.

The Determination sets out the methodology to determine whether an ADI is a large ADI. The methodology for determining the size of an ADI is based on total assets reported to APRA in earlier financial years. An ADI will need to monitor its size every financial year to know whether it is a large ADI and the mandatory comprehensive credit reporting regime applies to it.

No consultation was conducted because the Determination will continue the definition of large ADI under the BEAR Determination. Any changes from the BEAR Determination, such as the rebase of indexation calculations, are minor in nature.

The Final Report on Misconduct in the Banking, Superannuation and Financial Services Industry has been certified as being informed by a process and analysis equivalent to a Regulation Impact Statement for the purposes of the Government decision to implement this reform (including the Determination). The Financial Services Royal Commission Final Report can be accessed through the Australian Parliament House website.<sup>1</sup>

Details of the Determination are set out in Attachment A.

The Determination is a legislative instrument for the purposes of the *Legislation Act 2003*.

The Act does not specify any conditions that need to be met before the power to make the Determination may be exercised.

The Determination commenced on the day after the instrument was registered.

The Determination was made after the enactment, but before the commencement, of Part 2 of Schedule 1 to the *Financial Accountability Regime (Consequential Amendments) Act 2023* in accordance with subsection 4(2) of the *Acts Interpretation Act 1901*. It does not confer a power or right or impose an obligation on a person before the commencement of the *Financial Accountability Regime (Consequential Amendments) Act 2023*, except so far as is necessary or convenient for the purpose of bringing the instrument into effect.

A Statement of Compatibility with Human Rights is at Attachment B.

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<sup>1</sup><https://parlinfoaph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22publications%2Ftabledpapers%2Fbc83795c-b7fa-4b42-a93b-fa012cffffc2%22>

**Details of the *National Consumer Credit Protection (Large ADI) Determination 2023***

**Part 1 — Preliminary**

**Section 1 – Name**

This section provides that the name of the instrument is the *National Consumer Credit Protection (Large ADI) Determination 2023* (the Determination).

**Section 2 – Commencement**

This section provides that the instrument commences on the day after the instrument is registered on the Federal Register of Legislation.

**Section 3 – Authority**

This section provides that the instrument is made under subsection 5(1A) of the *National Consumer Credit Protection Act 2009* (the Act).

**Section 4 – Definitions**

This section sets out the definitions that are used in the Determination. A brief explanation of the key definitions is set out below.

***final report*** means a report submitted by an ADI to APRA in relation to the final reporting period for the ADI's financial year, under:

- Reporting Standard ARS 323.0, as set out in the Schedule to the *Financial Sector (Collection of Data) (reporting standard) determination No. 25 of 2021*; or
- Reporting Standard ARS 720.0, as set out in the Schedule to the *Financial Sector (Collection of Data) (reporting standard) determination No. 14 of 2018* (as in force before 11 February 2020).

***financial year***, in relation to an ADI, means the ADI's financial year (see section 323D of the *Corporations Act 2001*) and includes financial years that begin before the commencement of this instrument. In most circumstances a financial year for an ADI will be a period of 12 consecutive months, with its first financial year commencing on the day the ADI is registered or incorporated.

***large ADI*** is an ADI that has a total asset size above a certain threshold at the start of the financial year. Section 5 sets out the threshold for a large ADI.

***Reporting Standard*** refers to a relevant Reporting Standard determined under section 13 of the *Financial Sector (Collection of Data) Act 2001*. Section 7 sets out what happens when a Reporting Standard with a particular identifier is replaced by a Reporting Standard with a different identifier.

***total asset size*** is the amount used to determine the size of an ADI. The amount is the total resident assets value reported to APRA over one financial year, or the average

total resident assets value reported to APRA over two to three financial years. Section 5 describes how this amount is determined.

***total resident assets value*** is the amount of total assets as reported to APRA in a final report. The amount is used to determine total asset size. Section 6 describes how this amount is identified.

## **Part 2 — Determining the kinds of ADIs that are large ADIs**

### Section 5 – Size of an ADI

This section introduces the term ***total asset size***, which is used to determine whether an ADI is a ***large ADI***. The total asset size is in turn determined by reference to the ***total resident assets value*** in a final report (explained in section 6), or the average total resident asset value across several final reports an ADI has submitted to APRA.

If an ADI has submitted:

- a final report for only one financial year, its total asset size is the total resident assets value reported in that final report;
- final reports for only two financial years, its total asset size is the average of the total resident assets value reported in those two final reports; and
- final reports for three or more financial years, its total asset size is the average of the total resident assets value in the three most recent reports in three financial years.

An ADI is a large ADI at a time during a financial year, if its total asset size at the start of that financial year is greater than or equal to a certain threshold.

If the start of an ADI's financial year occurs before 1 January 2024, the threshold for a large ADI is \$124 billion. The reason \$124 billion is used as the base amount in the Determination is because under the BEAR Determination, the threshold for a large ADI is \$107 billion, subject to the indexation provision in that instrument. The \$107 billion threshold was first indexed under the BEAR Determination on 1 January 2022, raising it to \$111 billion, before being indexed again on 1 January 2023, raising it to \$124 billion. The Determination makes the latest threshold of \$124 billion the new base amount from which indexation is calculated.

If the start of an ADI's financial year occurs on or after 1 January 2024, the threshold is the amount resulting from the base amount of \$124 billion being indexed in accordance with section 8. Indexation will occur on 1 January each calendar year, commencing 1 January 2024. Section 8 sets out the methodology for the indexation of the base amount of \$124 billion.

The size of an ADI is calculated on the first day of each financial year for that ADI. If an ADI is a large ADI, that designation applies for the duration of that financial year. Due to the fact that a final report is lodged in the year following the year to which the report relates, there is a lag between the financial year that a final report covers, and the financial year to which a designation of size applies based on that final report and any previous final reports.

Some ADIs have submitted, or currently submit, reports to APRA under Reporting Standard ARS 720.0 and Reporting Standard ARS 323.0 in the same financial year.

If an ADI has submitted final reports for a financial year under both Reporting Standard ARS 720.0 and Reporting Standard ARS 323.0, the total resident assets value reported under Reporting Standard 720.0 is used. For ADIs that only report under Reporting Standard ARS 323.0, the total resident assets value reported under that Reporting Standard is used.

The methodology takes into account the fact that an ADI can have its own financial year under the *Corporations Act 2001* (section 323D), and this could differ from the standard financial year. Being able to use its own financial year minimises the regulatory burden on an ADI and ties in with its existing reporting obligations to APRA.

### **Example 1 – two-year average**

It is currently financial year 2023–24 for an ADI.

This ADI has submitted a final report for financial year 2021–22, and a final report for financial year 2020–21.

In the final report for financial year 2021–22, the total resident assets value reported is \$120 billion, while in the final report for financial year 2020–21, the total resident assets value reported is \$130 billion.

This ADI's total asset size is \$125 billion, the average of these two amounts:

$$(\$120 \text{ billion} + \$130 \text{ billion}) / 2 = \$125 \text{ billion}$$

This ADI is therefore a large ADI for the duration of financial year 2023–24.

Once this ADI has submitted a final report for financial year 2022–23, it would be able to recalculate its total asset size by taking the average of the three reported amounts for financial years 2022–23, 2021–22 and 2020–21. This average amount will determine the size of this ADI for financial year 2024–25.

### **Example 2 – three-year average**

It is currently financial year 2023–2024 for an ADI.

This ADI has submitted a final report for financial year 2021–22, a final report for financial year 2020–21 and a final report for financial year 2019–20.

In the final report for financial year 2021–22, the total resident assets value reported is \$125 billion, in the final report for financial year 2020–21, the total resident assets value reported is \$120 billion, and in the final report for financial year 2019–20, the total resident assets value reported is \$145 billion.

This ADI's total asset size is therefore \$130 billion, the average of these three amounts:

$$(\$125 \text{ billion} + \$120 \text{ billion} + \$145 \text{ billion}) / 3 = \$130 \text{ billion}$$

This ADI is therefore a large ADI for the duration of financial year 2023–24.

Once this ADI has submitted a final report for financial year 2022–23, it would be able to recalculate its total asset size by taking the average of the three most recently reported amounts from financial years 2022–23, 2021–22 and 2020–21. This average amount will determine the size of this ADI for financial year 2024–25.

### Example 3 – new ADI

It is currently financial year 2024–2025 for an ADI.

This ADI has not yet submitted any final reports because it is a newly formed ADI. It is not taken to be a large ADI for the duration of financial year 2024–2025.

### Section 6 – Total resident assets value

This section provides the methodology for determining **total resident assets value**. Total resident assets value is the total assets amount in a final report submitted to APRA.

For ADIs that are required to give information using forms under Reporting Standard ARS 720.0:

- for ADIs submitting Form ARF 720.0A, the total resident assets value is worked out by taking the amount reported in Section A, item 13 Total assets including intra-group assets, and then subtracting assets due from non-residents (items 11.1 and 12.1); and
- for ADIs submitting Form ARF 720.0B, the total resident assets value is the amount reported in Section A, item 13 Total assets including intra-group assets.

For ADIs that are not required to report under Reporting Standard ARS 720.0, the total resident assets value is found in item 11 in Section A: Assets in Form ARF 323.0.

The following table summarises how and when each type of form should be used:

Form	Total Resident Assets Value
ARF 323.0	Section A: Assets: item 11 Total assets
ARF 720.0A	Section A: Assets: item 13 Total assets including intragroup assets, less: <ul style="list-style-type: none"> <li>• item 11.1 Total assets excluding intra-group assets <i>of which</i>: Due from non-residents; and</li> <li>• item 12.1 Total intra-group assets <i>of which</i>: Due from non-residents</li> </ul>

ARF 720.0B	Section A: Assets: item 13 Total assets including intragroup assets
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### Section 7 – Reporting Standards

This section provides that where a provision of the Determination (sections 4, 5 and 6) refers to a particular kind of Reporting Standard with a specific identifier in relation to an ADI's final reporting period in a financial year, that provision is known as a **referring provision**. An **identifier** means a combination of letters and numbers (with or without punctuation marks, and whether or not followed by a title). The referring provision is taken to refer to the version of the Reporting Standard with that identifier that applied to that reporting period because of a determination made under section 13 of the *Financial Sector (Collection of Data) Act 2001*.

However, if no version of that Reporting Standard applies to the final reporting period in a financial year because it has been replaced by a different Reporting Standard (with a different identifier and included in a different determination), then a reference to the Reporting Standard that has been replaced is taken to be a reference to the new Reporting Standard. A reference to any material in the Reporting Standard that has been replaced, for example, the reporting form, is taken to be a reference to the corresponding material in the applicable version of the new Reporting Standard.

The intention of this section is to 'future proof' the Determination so that if a new Reporting Standard is determined under the *Financial Sector (Collection of Data) Act 2001*, and ADIs are required to report in accordance with that new Reporting Standard, the referring provisions in the Determination operate to refer to the new Reporting Standard. This section is intended to apply despite ARS 323.0 and ARS 720.0 being defined to mean the reporting standard set out in a specific determination under section 4.

### Section 8 – Indexation of large ADI threshold

This section provides for the indexation of the threshold for a large ADI. The base threshold of \$124 billion in subsection 5(2) is indexed on 1 January each calendar year, commencing on 1 January 2024.

Indexation is calculated by multiplying the base amount of \$124 billion by an indexation factor and rounding the result down to the nearest multiple of \$1 billion.

The indexation factor is a fraction calculated by dividing the relevant GDP number by the base GDP number. It is to be calculated to 3 decimal places (rounding up if the fourth decimal place is 5 or more).

The **relevant GDP number** is the first-published annual estimate of the Gross Domestic Product: Current Prices-Original series for the financial year that ends before the 1 January on which indexation occurs. This can be found in the Australian Bureau of Statistics' 5204.0 series at <https://www.abs.gov.au/ausstats/abs@.nsf/mf/5204.0>. For example, if indexation occurs on 1 January 2024, the relevant financial year is the one ending on 30 June 2023. For the purpose of this calculation, any revision of that estimate is disregarded.

The **base GDP number** is the annual estimate of the Gross Domestic Product: Current Prices-Original series most recently published by the Australian Statistician for the financial year ending on 30 June 2022.

If the indexation factor calculated is less than 1, then the indexation factor is taken to be 1. This means that the threshold amount would not change.

### **Part 3 — Transitional provisions**

#### Section 9 –Transitional provision for large ADIs

This section provides that an ADI that was a large ADI under the BEAR Determination (the **old determination**) immediately before commencement of the Determination, continues to be a large ADI for the remainder of the ADI's financial year (that is, the ADI's financial year in which the Determination commenced), for the purpose of subsection 5(1A) of the Act.

The *Financial Accountability Regime (Consequential Amendments) Act 2023* amended the Act to confer power on the Minister to determine the kinds of ADIs that are large ADIs. Prior to being amended, the Act relied on the definition of 'large ADI' in the *Banking Act 1959*, and, in turn, the BEAR Determination. The *Financial Accountability Regime (Consequential Amendments) Act 2023* will repeal the Banking Executive Accountability Regime under the *Banking Act 1959* six months after the commencement of the *Financial Accountability Regime Act 2023*, including the provision conferring power on the Minister to make the BEAR Determination.

This section is intended to facilitate a smooth transition from the BEAR Determination and ensure continuity in the definition of large ADI under the Act. ADIs that were large ADIs under the BEAR Determination will continue to be large ADIs under the Act and subject to the mandatory comprehensive credit reporting regime for the remainder of the ADI's financial year.



## **Statement of Compatibility with Human Rights**

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### ***National Consumer Credit Protection (Large ADI) Determination 2023***

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

### **Overview of the Legislative Instrument**

This Legislative Instrument sets out the methodology to determine whether an ADI (that is, an authorised deposit-taking institution) is a large ADI for the purpose of the *National Consumer Credit Protection Act 2009*. The methodology is based on total assets reported to APRA in earlier financial years.

The mandatory comprehensive credit reporting regime under the *National Consumer Credit Protection Act 2009* applies to ‘eligible licensees’. Eligible licensees include large ADIs. Large ADIs must therefore provide comprehensive credit information on consumer credit accounts to certain credit reporting bodies.

This Legislative Instrument replaces the *Banking Executive Accountability Regime (Size of an Authorised Deposit-taking Institution) Determination 2021* to ensure continuity in the definition of large ADI, consequential to the establishment of the Financial Accountability Regime. The key change from the *Banking Executive Accountability Regime (Size of an Authorised Deposit-taking Institution) 2021* is the rebase of indexation calculations.

### **Human rights implications**

This Legislative Instrument does not engage any of the applicable rights or freedoms.

### **Conclusion**

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.