

## Banking's new BEAR is a teddy bear not a grizzly

Written by The Conversation

---

The government's new [Banking Executive Accountability Regime](#) (BEAR) legislation is a confused mess that is not going to do what it claims to do, which is make bankers accountable for [scandals](#).

Rather than being a terrifying polar or grizzly, it is already an old teddy bear that has had the stuffing knocked out of it.

Earlier this year when announcing the budget, the [Treasurer](#) was out in front, leading the mob to the very gates of the big banks, [threatening](#) to take bank executives out and (at least figuratively) roast them.

“These measures will mean executives will be more accountable, will be subject to greater scrutiny and there will be increased consequences for when executives and banks do not meet expectations.”

Unfortunately, in reality the legislation is a damp squib.

### Why is the legislation confused?

The [confusion](#) stems from the regulatory body chosen to implement this new legislation. The government has chosen the Australian Prudential Regulation Authority (APRA) to run the new regime. But in doing so, it has confused the roles of APRA and the Australian Securities and Investment Commission (ASIC), the “Twin Peaks” of our regulatory system.

Having two peaks allows each regulator to concentrate on its particular areas of expertise.

In Australia, APRA, the “prudential” regulator, is responsible for ensuring that banks do not do anything that threatens the integrity of the banking system (like lending too much money to the

## Banking's new BEAR is a teddy bear not a grizzly

Written by The Conversation

---

wrong people). ASIC is the “conduct” regulator, responsible for ensuring that financial institutions act fairly (such as not selling dodgy products to customers).

While the two agencies are created with equal power and insulated from each other, Dr. Schmulow of the University of Western Australia [notes](#) there is a natural tendency for governments to favour the regulator charged with avoiding financial crises (APRA). This is for reasons that are easy to understand - system-wide financial crises cause the worst sort of harm to governments, they lose power.

The Australian regime mirrors that in the UK where the Prudential Regulation Authority (PRA) is, as the name suggests, the prudential regulator, and the Financial Conduct Authority (FCA) is the conduct peak.

In the United Kingdom, the FCA runs their equivalent of BEAR, the [Senior Managers and Certification Regime](#). This makes eminent sense given the FCA's remit is to regulate conduct.

### Why has APRA been chosen?

So why has the government chosen APRA to operate the BEAR? The reason given in a [consultation paper](#), is that APRA already operates what is called a “Fit and Proper” regime, to ensure that senior managers are in fact up to the job of managing a financial institution.

This is true but only half so.

APRA's [Fit and Proper standard](#) does nothing other than require banks to have a fit and proper policy, which should contain certain clauses. But APRA does not enforce this. In fact, this standard is one of the last vestiges of the old industry “self-regulation” regime that failed miserably in the run up to the global financial crisis (GFC).

This also fails to take into account that ASIC also has a [Fit and Proper](#) regime, and one that

## Banking's new BEAR is a teddy bear not a grizzly

Written by The Conversation

---

they take an  
[in enforcing](#)

[active role](#)

And in a classic case of left and right hands not knowing what the others are doing, there is currently a Treasury taskforce [working](#) on how to expand ASIC's powers in this very area.

At one level, it does not really matter which regulator does what, provided that money and resources are given to the regulator to do its job. However, in choosing APRA, Treasury has adjusted the legislation to suit APRA's existing role and capabilities and as a result has seriously compromised the very objectives of the legislation.

For instance, the [legislation will apply only](#) "where there is poor conduct or behaviour that is of a systemic and prudential nature".

In other words, the regime will apply if, and only if, poor conduct creates risks that threaten the stability of a bank and, by extension, of the entire banking system. That is an extraordinarily high bar to clear.

This also means, for instance, that BEAR cannot be used to go after conduct that harms customers. For instance, [unjustly withholding insurance claims](#), does not jeopardise the viability of institutions involved let alone the entire banking system. Such misconduct is effectively now removed from the BEAR's mandate.

To create any systemic prudential risk, a bank has to do something pretty horrendous over a long period of time, such as [lending too much money to housing investors for years](#).

It is conceivable that an individual banker might, working alone, do something that jeopardises the profitability of a bank. But it is inconceivable that working alone, a single person (even a number of people in a business unit) could jeopardise an entire institution, given the checks and balances in most banks.

## Banking's new BEAR is a teddy bear not a grizzly

Written by The Conversation

---

Banks, such as the [State Bank of Victoria](#), have failed in Australia. But this was not the fault of one individual. Rather it was a failure of corporate governance by directors and an abrogation of responsibilities on the part of senior managers and also regulators.

## APRA is already overburdened

With the IMF recently identifying [serious prudential problems](#) in Australian banks, and the RBA [concerned](#) over [rising levels of household debt](#), APRA already has its hands full.

In fact, when he last fronted a Parliamentary Committee, Westpac CEO Brian Hartzler [admitted](#) that some 50% of the bank's mortgages were "interest-only". This is after [APRA recently ordered](#) banks to reduce their exposures to such loans to 30%.

If CEOs don't pay attention to APRA on serious stuff such as [interest-only lending](#), what chance on softer conduct problems?

## Are the banks worried by the BEAR?

In his evidence to parliament, Mr Hartzler appears to have let the cat out of the bag as regards bankers' perceptions of the BEAR:

"BEAR imposes severe penalties when things go wrong and we are keen to work with the government and regulators to avoid unintended consequences."

Mr Hartzler added that, despite the fact that the draft legislation has only just been introduced to parliament, and without bipartisan support, Westpac was already implementing BEAR.

This is either remarkable foresight or the banks think the BEAR will be a pussy cat. A bit of tweaking here, a bit of box ticking there and nothing bad will happen.

## Banking's new BEAR is a teddy bear not a grizzly

Written by The Conversation

---

APRA has form here. For 19 years APRA has had the [power to remove directors](#) under the Banking Act and it could cite its own [standard on corporate governance](#) when exercising that power. But the number of times in 19 years APRA has exercised the power? Zero!

Having two (very confused) regulators, competing with one another, will ultimately mean that neither has the skills, capabilities nor the time to properly regulate banks. This will be extremely dangerous in a crisis.

And with the appointment of a regulation and corporate culture expert as the new [Chairman of ASIC](#), it makes even more sense to retain the existing Twin Peaks model and to allow ASIC to tame the BEAR.

**Read more** <http://theconversation.com/bankings-new-bear-is-a-teddy-bear-not-a-grizzly-85687>