



Banking Executive Accountability Regime (BEAR)

Exposure Draft – Reform in the fast lane

September 2017



Reform in the fast lane

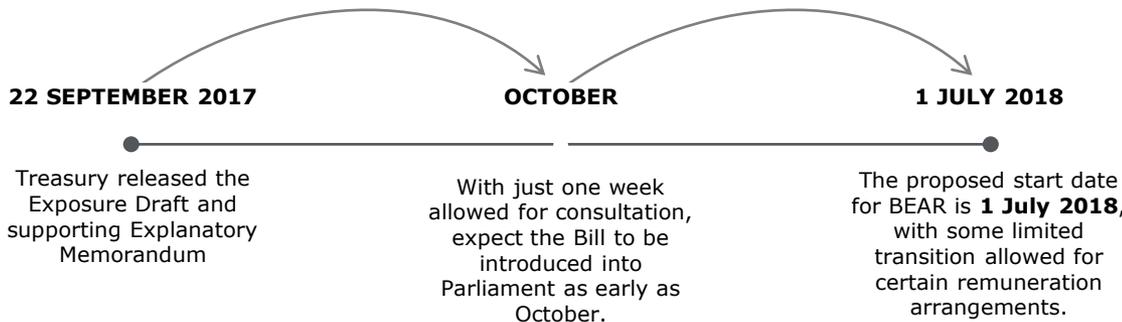
The Banking Executive Accountability Regime implications

In September 2017, Treasury released:

- the Exposure Draft of the *Treasury Laws Amendment (Banking Executive Accountability and Related Measures) Bill 2017*, and
- the supporting Explanatory Memorandum.

The purpose of the Bill is to implement a strengthened responsibility and accountability framework for directors and the most senior and influential executives in banks and other ADI groups. BEAR is intended to complement the existing regulatory framework.

Get ready: it's going to start soon.



A number of important issues have emerged from the Exposure Drafts, including some significant changes to the proposed accountability obligations for Accountable Persons.

? More information

IT'S ONLY GOING TO APPLY TO ADIs AND THEIR SUBSIDIARIES...FOR NOW

Despite submissions calling for a level playing field for insurers and superannuation trustees, BEAR only covers ADIs and their subsidiaries.

However, APRA has said that it's considering whether "some of the concepts" of BEAR have broader application. Watch this space.

PRUDENTIAL STANDARDS

We expect that APRA will need to provide guidance, and update and issue new Prudential Standards, to underpin the BEAR regime. Hopefully these will be available without delay, given the compressed transition period.

THE EXPOSURE DRAFT OF THE BILL AND THE EXPLANATORY MEMORANDUM DON'T ALIGN

Whilst these documents were released together, there are a number of important discrepancies between them about what is in the regime.

In preparing this document, we have generally used the draft Bill as the primary source material.

The BEAR Essentials

1 WHAT ORGANISATIONS ARE COVERED BY BEAR?

- Authorised Deposit-taking Institutions (ADIs)
- Subsidiaries of ADIs

ADI = Domestic banks, foreign subsidiary banks, branches of foreign banks, credit unions, building societies



ADI



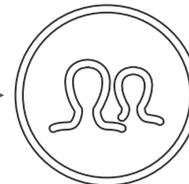
**ADI
SUBSIDIARIES**

2 WHAT REQUIREMENTS APPLY TO ADIs?

- ADIs and subsidiaries must meet four types of Obligations:
 - Accountability Obligations (see **page 6**)
 - Key Personnel Obligations (see **page 7**)
 - Notification Obligations (see **page 7**)
 - Deferred Remuneration Obligations (see **page 8-9**)
- Give APRA accountability maps and accountability statements, showing which accountable person is responsible for the various aspects of the ADI's business
- Notify APRA of any changes, and other events such as clawbacks of remuneration, or breaches of BEAR
- No indemnity or insurance permitted, except for legal costs

3 WHAT INDIVIDUALS ARE COVERED BY BEAR?

- Individuals who are "accountable persons" will be covered by BEAR (see **page 5**)
- Do you either:
 - Have responsibility relating to the ADI of a kind listed as one of the Prescribed Responsibilities? or
 - Meet the General Principle test?



**DIRECTORS
(of ADIs and ADI
subsidiaries)**



**SENIOR
EXECUTIVES
(of ADIs and some
subsidiaries)**

4 WHAT REQUIREMENTS APPLY TO ACCOUNTABLE PERSONS?

- Must be registered with APRA
- Must meet their individual Accountability Obligations (see **page 6**)
- Accountability statements will show what they are accountable for
- Senior Executives will have part of their remuneration deferred, which the ADI may clawback if there are breaches of BEAR

5 APRA POWERS

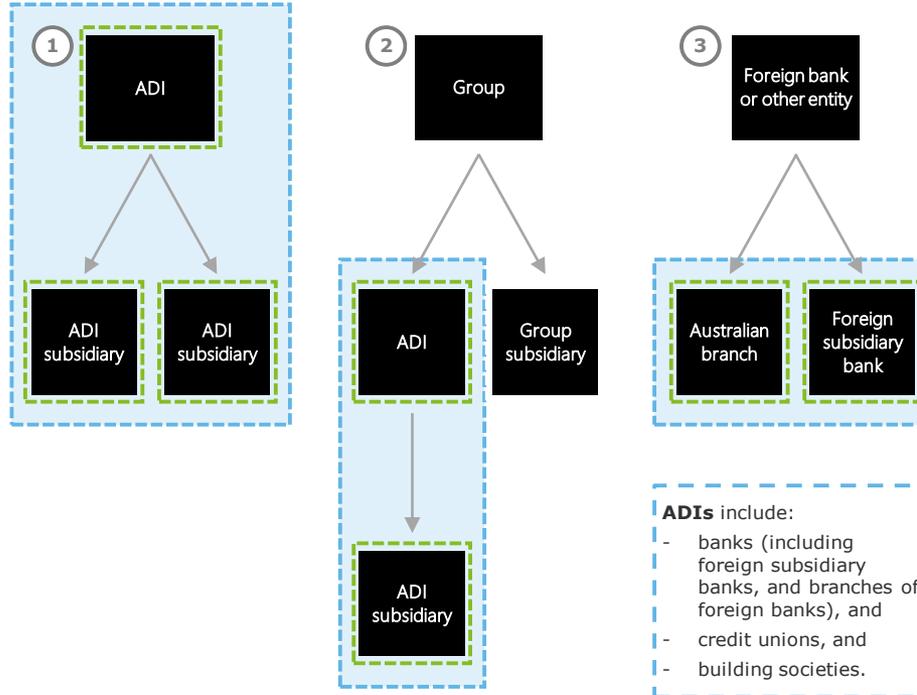
- Accountable Person Register
- Disqualification powers
- Examination powers
- Civil penalty regime
- Some exemption and other powers (see **page 10**)



Institutions captured by BEAR

Authorised Deposit – taking Institutions (ADIs) and their subsidiaries are going to be covered by BEAR.

The rationale is that ADIs play a critical role in the economy, and there is community concern regarding recent poor behaviour.



? More information

APPLICATION TO SUBSIDIARIES OF AN ADI

The term “subsidiaries” will have the same meaning as under the *Corporations Act* – so the tests will centre on control of the board or shareholder voting, and shareholdings.

The mechanics for how BEAR will apply to overseas subsidiaries of Australian ADIs, or what standards will apply, is not yet clear.

TRUSTEES

What implications could there be for already highly regulated subsidiaries, such as Trustees?

Could some of the accountability obligations, focused on protecting the prudential standing and reputation of the ADI, conflict with a Trustee’s duties to members?

UPSTREAM EXECUTIVES

Where the ADI is not the parent entity in a Group, Accountable Persons could include executives of parent or other upstream entities.



Individuals captured by BEAR

Directors and Executives of ADIs will be Accountable Persons if their role with the ADI means they either:

Have responsibility relating to the ADI of the kind listed as one of the Prescribed Responsibilities

OR

Meet the General Principle test

Prescribed Responsibilities

A person is an Accountable Person of an ADI if they hold a position in or relating to the ADI, and because of that position, have any of the following kinds of responsibility relating to the ADI:

Oversight of the ADI as a member of the ADI Board, or a subsidiary of the ADI

Carrying out management of all or a significant part of the business activities of the ADI and subs (CEO or BU Group Executives)

Management of ADI's financial resources (CFO)

Overall risks and controls and/or overall risk management arrangements (CRO)

Management of the human resources function (CHRO)

Management of the operations (COO or BU Group Executives)

Information Management, including IT systems (CIO)

Management of the internal audit function (Head of Internal Audit)

Management of the compliance function (CCO)

Management of the Anti-Money Laundering function

Conduct of all the activities of an Australian branch of foreign ADI

Any other responsibilities determined by APRA

General Principle

A person is an Accountable Person of an ADI, or a subsidiary, if they:

(i) hold a position in, or relating to, the ADI or the subsidiary

and

(ii) because of that position, they have actual or effective responsibility for management or control of:

- the ADI or the subsidiary, or
- a significant or substantial part or aspect of the ADI's or the subsidiary's operations.



Accountability Obligations

ADIs and accountable persons must meet the accountability obligations outlined below. Accountable persons have to meet them in relation to each of the responsibilities that cause them to be an accountable person of an ADI or its subsidiary

Obligation	Level of obligation	ADIs	Accountable Persons (of ADI or subsidiary of an ADI)
Honesty, integrity, due skill care and diligence	Must...	<ul style="list-style-type: none"> Conduct its business with honesty and integrity, and with due skill, care and diligence 	<ul style="list-style-type: none"> Conduct the responsibilities of his or her position as an accountable person with honesty and integrity, and with due skill, care and diligence
Co-operation with APRA	Must...	<ul style="list-style-type: none"> Deal with APRA in an open, constructive and cooperative way 	<ul style="list-style-type: none"> Deal with APRA in an open, constructive and co-operative way
Prevent matters that adversely affect prudential standing or reputation	Take reasonable steps...	<ul style="list-style-type: none"> In conducting its business to prevent matters from arising that would adversely affect the ADI's prudential standing or reputation 	<ul style="list-style-type: none"> In conducting those responsibilities to prevent matters from arising that would adversely affect the prudential standing or reputation of the ADI
Ensuring compliance with BEAR	Take reasonable steps...	<ul style="list-style-type: none"> To ensure that each of its accountable persons meets his or her accountability obligations 	
Ensuring subsidiaries comply with BEAR	Take reasonable steps...	<ul style="list-style-type: none"> To ensure that each of its subsidiaries that is not an ADI complies with the above as if it were an ADI 	



Key Personnel and Notification Obligations

ADIs will have to appoint the right people into accountable person roles, and giving APRA Accountability Maps, Statements, and other notifications.

Key Personnel Obligations



Ensuring the responsibilities of the ADI's accountable persons cover:

- each significant or substantial part of the ADI's operations, and
- each of the prescribed responsibilities;

Ensuring none of the Accountable Persons are prohibited (that is, they must be registered, and not have been disqualified)

Complying with any directions from APRA to reallocate responsibilities from an Accountable Person to another person

Taking reasonable steps to ensure each of the ADI's subsidiaries that is not an ADI complies with the above.



Notification Obligations

ADIs will need to prepare materials for APRA, including the following for the ADI and subsidiaries:

- **Accountability Maps**, which names all accountable persons, with their responsibilities, reporting lines, and lines of responsibility. These need to have enough information to identify an accountable person for each of the prescribed responsibilities.
- **Accountability Statements** for each accountable person, which contains:
 - a comprehensive statement of the part or aspect of the ADI or subsidiary's operations for which the accountable person has effective management or control, and
 - the responsibilities of that accountable person.

ADIs will also have to notify APRA of any changes to accountable persons, maps or statements, and other events such as clawbacks of remuneration, or breaches of BEAR, within the specified timeframes.

? More information

LEVERAGE OUR SMR MATERIALS



Materials produced for implementation in the UK are ready to be leveraged for the BEAR obligations. Whilst no entity is the same, we have existing tools and templates for accountability maps and statements, responsibility allocation matrices and job descriptions



Deferred Remuneration Obligations

ADIs must withhold a minimum amount of an accountable person's variable remuneration for at least four years.

Remuneration Policy

An ADI must have a Remuneration Policy that requires the ADI to make a proportional reduction in the amount of an Accountable Person's variable remuneration if:

- they have failed to comply with their accountability obligations, or
- they are likely to have failed to comply.

The deferred remuneration can be reduced to zero, and does not need to relate to the period in which the failure or likely failure occurred.

Applies to non-ADI subsidiaries

The ADI has to take reasonable steps to ensure that, if variable remuneration may become payable to an Accountable Person of a subsidiary of the ADI, and the subsidiary isn't an ADI, the subsidiary complies with above as if it's an ADI.

REVIEW PROCESSES

ADIs will need to establish processes to review whether each accountable person met their obligations if something goes wrong, to determine if some of their deferred remuneration should be clawed back, and whether to make a report to APRA.

DEFERRAL IN PRACTICE

In practice, an executive with several years' tenure with the ADI may have a large amount of remuneration deferred. They may lose remuneration that was accumulated over several years, and more than the mandatory deferral amounts. It will be the ADI that makes these decisions about whether to clawback some of their remuneration, not APRA.

? More information

APRA Determination

APRA can determine whether remuneration of a particular kind is variable remuneration or not, either for a specific ADI or subsidiary, or generally.

Shorter deferral period

The ADI can apply to APRA for a shorter deferral period, which APRA can approve if it is satisfied that:

- the person is no longer an Accountable Person, and death or serious incapacity applies (or such other reason that APRA determines), or
- the ADI has taken all reasonable steps to satisfy itself that the Accountable Person has complied with their accountability obligations, and it's unlikely additional information will become known before the end of the deferral period.



Deferred Remuneration Obligations

How much needs to be deferred?

ADI size (3-year average of total resident assets)	The accountable person is	The deferral amount is the lesser of
Large	The CEO	(a) 60% of the CEO's variable remuneration for the relevant financial year, or (b) 40% of the CEO's total remuneration for the relevant financial year.
Large (\$100b or more)	Someone other than the CEO	(a) 40% of their variable remuneration for the relevant financial year, or (b) 20% of their total remuneration for the relevant financial year.
Medium (\$10b-100b)	Any Accountable Person	(a) 40% of their variable remuneration for the relevant financial year, or (b) 20% of their total remuneration for the relevant financial year.
Small (\$10b or less)	Any Accountable Person	(a) 40% of their variable remuneration for the relevant financial year, or (b) 10% of their total remuneration for the relevant financial year.

? More information

What's "variable remuneration"?

The portion of the Accountable Person's total remuneration that is conditional on the achievement of objectives, or is a retention bonus. It's calculated based on when the decision was made to grant the remuneration.

Small ADIs

This obligation won't apply to small ADIs if the deferrable amount of the variable remuneration is under \$50,000.

How long is the deferral for?

The deferral period is at least 4 years from the date after which the decision was made to give the variable remuneration, but APRA can allow a shorter period in some cases.



Don't poke the BEAR



CIVIL PENALTY REGIME

Civil penalties will only apply to the ADI, not Accountable Persons.

Serious penalties can apply where an ADI contravenes its obligations under the BEAR provisions, and the contravention relates to prudential matters.

Whilst the penalties are expressed in penalty units, the current maximum penalties are:

- \$210m for large ADIs;
- \$52.5m for medium ADIs; and
- \$10.5m for small ADIs.

The Minister determines the kinds of ADIs in each size range (see page 9).

When imposing these penalties, the Court must have regard to the impact the penalty would have on the viability of the ADI.

Certain less serious penalties apply to an ADI or a subsidiary if they allow a disqualified person to be or act as an accountable person.



INDEMNIFYING ADIs AND ACCOUNTABLE PERSONS

Apart from legal costs, in general terms, ADIs and Accountable Persons can't be indemnified or obtain insurance to cover consequences of breaching the BEAR provisions.



More information

New powers for APRA and the Minister

1. EXAMINATION POWERS

APRA has additional examination powers to assist it in conducting investigations.

APRA will be able to require a person to provide all reasonable assistance in connection with an investigation, or to be examined under oath or affirmation.

These powers extend to all of APRA's supervisory and enforcement functions under the *Banking Act*, not just BEAR.

2. DISQUALIFICATION POWERS

APRA will be able to remove and disqualify a person from being or acting as an Accountable Person, for a period it considers appropriate. To do this, APRA needs to be satisfied that the person has not complied with his or her accountability obligations, and the disqualification is justified.

APRA decisions will be subject to judicial review.

3. EXEMPTIONS AND RELIEF

The Minister has power to exempt an ADI (or classes of ADIs) from the application of the BEAR.



Preparing for BEAR

Actions for the ADI and Accountable Persons

ADIs seem likely to have less than 9 months to implement BEAR; by contrast, Senior Managers' Regime (SMR) had a 12 month timeframe in the UK

1

GETTING THE HOUSE IN ORDER

What should you be doing or considering now to enable a timely and effective implementation ?

- ✓ Set up a project with robust project governance and the right executive sponsor:
 - Develop a detailed project plan and develop the scoping document which sets out initial in-scope roles.
 - Focus on the spirit, not just the letter of the law.
- ✓ Inform key people within the organisation about the short implementation period, and ensure plans to implement BEAR are accelerated and prioritised.
- ✓ Allocate clear responsibility to the right people in your organisation to analyse and respond to BEAR, including being ready to review and make submissions on any draft Prudential Standards that are circulated for consultation.
- ✓ Start thinking about how accountability mapping and statements might work for your business:
 - Review current role descriptions and update them
 - Undertake a responsibilities gap analysis
 - Commence drafting an initial accountability map and accountability statement
- ✓ Start talking to Boards and Senior Executives likely to be impacted, to assure them about what the organisation is doing.

2

EXECUTING ON YOUR PLAN

In carrying out the implementation project there are some critical steps, based on our UK SMR experience, that firms should be undertaking.

3

BUSINESS AS USUAL

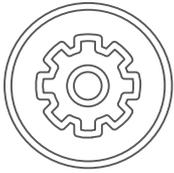
Organisations can take practical steps now to ensure ongoing compliance with the new regime

Start thinking about:

Project teams and dedicated resources for BEAR now and on-going

Who are your key stakeholders from across the business?

Internal communications on accountability and training plans



Setting up for BEAR

How Deloitte can help you

Deloitte’s BEAR team is made up of Australian experts, as well as members of our UK team with expertise from supporting over 40 banking clients to prepare for and implement SMR. Our Australian BEAR team includes experts in regulation, conduct, human capital, culture, and risk management, as well as people who have worked in senior industry roles.

Some of the capabilities we bring include:

Pre-Implementation Preparation	Implementation Support	Training Support
<p>Deloitte supported multiple organisations with pre-implementation preparation. This included activities such as reviewing current job descriptions and organisational charts, undertaking a gap analysis of current state against the new regulatory requirements, and devising project plans to address identified gaps and transition to the new regime.</p> <p>We assisted:</p> <ul style="list-style-type: none"> - UK retail banks - UK subsidiary of a large international banking group - Mid-tier UK retail banks 	<p>Deloitte supported multiple organisations with progressing implementation of the SMR. This included activities such as development of Statements of Responsibilities and Responsibilities Maps, governance arrangements in relation to senior management, development of a framework for the operation of the SMR, and project management.</p> <p>We assisted:</p> <ul style="list-style-type: none"> - UK subsidiary of a large international banking group - UK Branch of an European Economic Area banking institution - UK retail bank - Large Retail Bank - UK based branch of an international bank 	<p>Deloitte supported multiple organisations with the design and delivery of training material to educate key personnel on the new regime, and the impact on the bank in general, and their role in particular.</p> <p>We assisted:</p> <ul style="list-style-type: none"> - Board and Senior Management of a UK Retail Bank; - Compliance function of a UK subsidiary of a global bank; - Global banking group with a non-European Economic Area branch and an European Economic Area branch based in the UK - UK subsidiary and UK branch of a Non-European Economic Area wholesale banking - UK subsidiary of a large international banking group - Mid-tier UK retail bank - UK branches of a global bank

How we can support your BEAR implementation:

- Reviewing role descriptions;
- Supporting development of accountability map and statements;
- Supporting executing the gap analysis
- Testing and challenging accountability map, accountability statements, and gap analysis of processes and controls
- Developing and conducting training
- Project management support

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