Measures that enhance the independence and accountability of the South African consumer credit industry's market conduct regulators

by

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PREFACE

I believe that there is only one God, *El Echad*, and this journey has taught me much about the God that I serve: He is *El Roi* (‘The God who sees [me]’), He is the God who is near (*Elohay Mikarov*), and He is the God who forgives me (*Elohay Selichot*). In everything, He is *Elohay Tehilati* (‘God of my praise’) and *El Yeshuati* (‘God of my salvation’).* I am privileged and very thankful to know Him.

I have been blessed with a strong support structure. The following people deserve so much more than this small token of appreciation, and I would like to recognize them for their consistent devotedness and much needed encouragement: My mother, Jurita van Wyk; my father, Frans van Wyk; and my brother, Frans-Pieter van Wyk.

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* www.allaboutgodcom/names-of-god.htm (for bible verses where these Names are explained); www.lwf.com.

SUMMARY

The South African financial sector is modern, complex, and made up of multiple role-players, services and products. The consumer credit section is in itself a complex part of the overall sector. The monetary value of the South African credit sector is in the estimated billions, there are multiple forms of credit extension, and the sector serves diverse consumer communities – ranging from poverty-stricken participants who use credit to purchase food, to participants who use credit to create better futures through education, starting businesses and accessing products such as cars and houses.

Regulators – created to ensure the proper functioning of the financial sector – are designed to be expert, independent institutions with considerable responsibilities. Internationally, independence has featured prominently as a desired character for market conduct regulators of the consumer financial sector. The empowerment of regulators in line with their mandates has culminated in a corresponding requirement for proper accountability measures.

In South Africa, the policies underlying the creation of the market conduct regulator for the broad financial sector created in the style of the Financial Sector Conduct Authority were inclusive of enhanced independence and accountability. The National Treasury cited international best practices as foundations for the attention to independence and accountability. Likewise, the National Credit Regulator, created to regulate the consumer credit industry as a specialist regulator, is statutorily endowed with independence and the underlying policy clearly envisioned it as an entity that must be accountable.

The research question for this thesis is whether the market conduct regulators for the consumer credit market in South Africa are indeed independent and accountable as initially envisaged. Although the policy drafters and legislators marked the National Credit Regulator and the Financial Sector Conduct Authority as independent and accountable, the research indicates that these are two complex concepts underscored by multi-disciplinary theoretical considerations.

This thesis firstly studies the features of a financial system that affect independence and accountability of market conduct regulators. South African literature on the prevalence of independence and accountability of regulators is scarce and even more so where financial regulators are the objects of scrutiny. The South African position could not be analysed in a meaningful way without first extrapolating the factors that affect the independence and accountability of financial market conduct regulators from existing literature. Secondly, the thesis assesses the presences, and absences, in the South African system against the identified mechanisms that enhance independence and accountability in foreign jurisdictions, or in the opinions of international commentators. The ultimate purpose of the thesis is to ascertain the manners in which the South African regime can be enhanced to align with international best practices and potentially viable options sourced from foreign jurisdictions and international scholarship.

Two specific aspects are taken into account. Firstly, absolute independence and absolute accountability are, according to the research conducted, not the intended outcomes. Secondly, the various features affect each other and the system as a whole, meaning that the combined as opposed to isolated impact is important. I determine whether the combination of features results in a sufficient degree of independence and accountability, considering the effect that features of independence has on features of accountability and *vice versa*. The ultimate purpose is to recommend remedial steps that can be taken to ameliorate the current framework in order to enhance the independence and accountability of South African market conduct regulators.

The core research theme is the independence and accountability of National Credit Regulator and the Financial Sector Conduct Authority as the market conduct regulators for the consumer credit industry in South Africa. A proper analysis of the independence and accountability measures currently in place for the two regulatory bodies referred to above, indicates that statements to effect independence and accountability are mere lip service and insufficient without the deliberate incorporation of multiple features to support a structured arrangement for independence and accountability. The South African position, as it currently stands, is found wanting when compared to international benchmarks for independence and accountability. The contribution of the thesis lies not only in its extrapolation of factors that are relevant for the South African financial sector regulators and its evaluation of the South African position against these factors, but also in its remedial recommendations to enhance the prevailing regime.

TABLE OF CONTENTS

PREFACE ..... **III**

SUMMARY ..... **IV**

TABLE OF CONTENTS ..... **VI**

PART 1: FUNDAMENTAL PRINCIPLES **1**

CHAPTER 1: INTRODUCTION **1**

1. GENERAL INTRODUCTION 1
2. INTRODUCTION TO THE RESEARCH MILIEU 3
   2.1. A modern and developing financial sector 3
   2.2. A necessary regulated sphere 6
   2.3. A changing legal landscape 13
   2.4. Developments in financial sector regulation 15
3. ORIENTATION OF THE RESEARCH PROJECT 19
   3.1. Contents 19
   3.2. Limitations 26
   3.3. Research questions 29
   3.4. Structure of the thesis 30
   3.5. Preliminary commentary on available literature 33
4. CONCLUDING REMARKS 35

CHAPTER 2: CONCEPTUALISATION AND CONTEXTUALISATION **36**

1. INTRODUCTION 36
2. REGULATION 37
   2.1. Introduction 37
   2.2. Conceptualisation 40
3. REGULATORS 45
   3.1. Introduction 45
      3.1.1. General introduction 45
      3.1.2. Conceptualisation 46
   3.2. New institutionalism 48
      3.2.1. Rational choice institutionalism 49
      3.2.2. Sociological institutionalism 53
      3.2.3. Historical institutionalism 54

3.2.4. Path dependency 55
3.3. Principal-agent theory 60
3.3.1. Introduction 60
3.3.2. Rationales for delegation 61
3.3.3. Consequences of delegation 64
3.3.4. Independence and accountability in a regulatory context 68
3.4. Institutional configuration 74
3.4.1. Importance 74
3.4.2. Different schemes 76
3.4.3. Regulatory objectives 83
4. CONCLUDING REMARKS 86

CHAPTER 3: INDEPENDENCE 89

1. INTRODUCTION 89
1.1. Outline of the chapter 89
1.2. Orientation 89
2. INDEPENDENCE 93
2.1. Introduction 93
2.2. Delegation 95
2.3. Challenges 98
3. FORMS OF INDEPENDENCE 102
4. INDEPENDENCE-ENHANCING FEATURES 107
4.1. Introduction 107
4.2. Human resources 110
4.3. Mandate 126
4.4. Setting 129
4.5. Deceitful practices 130
4.6. Miscellaneous 133
5. IMPORTANT CONSIDERATIONS 136
6. CONCLUDING REMARKS 138

CHAPTER 4: ACCOUNTABILITY 141

1. INTRODUCTION 141
1.1. Outline of the chapter 141
1.2. Orientation 141
2. ACCOUNTABILITY 144
2.1. Introduction 144

2.2. General 145
2.3. Conceptualisation 148
3. ACCOUNTABILITY-ENHANCING MEASURES 156
3.1. Mandate-orientated measures 156
3.1.1. Introduction 156
3.1.2. Challenges 156
3.1.3. Solutions 157
3.2. Compliance-driven measures 162
3.2.1. Introduction 162
3.2.2. Challenges 163
3.2.3. Solutions 164
3.3. Comprehensive accountability measures 165
3.3.1. Introduction 165
3.3.2. Challenges 166
3.3.3. Solutions 168
3.4. Forms of accountability 170
3.4.1. Robust forms 170
3.4.2. Anticipatory versus reactionary forms 171
3.4.3. Official and unofficial forms 174
3.4.4. Administrative law 181
4. ACCOUNTABILITY MECHANISMS 185
4.1. Introduction 185
4.2. The judiciary 190
4.3. The tribunal-system 191
4.4. Politically elected or designated officials 192
4.5. Parliament 193
4.5.1. Commissions and enquiries 193
4.5.2. Reports 194
4.5.3. Legislation 195
4.6. The executive 195
4.6.1. Ministers 196
4.6.2. Public announcements 196
4.6.3. Regulatory Impact Assessments 197
4.6.4. Discharge and other internal affairs 197
4.6.5. Pecuniary grants 198
4.7. Additional regulatory authorities with authority over regulators 199

4.8. The public and regulatees 199
5. SPECIFIC MEASURES 200
5.1. Regulatory oversight authorities 201
5.2. Information dissemination and accumulation mechanisms 204
5.2.1. Reports 204
5.2.2. Outcome assertions 207
5.2.3. Impact assessments 211
5.3. Regulatory performance 218
6. IMPORTANT CONSIDERATIONS 225
7. CONCLUDING REMARKS 227

PART 2: THE SOUTH AFRICAN REGULATORS 230

CHAPTER 5: THE CONSUMER CREDIT REGULATORY LANDSCAPE 230

1. INTRODUCTION 230
2. LEGISLATIVE REGULATION OF CONSUMER CREDIT IN SOUTH AFRICA 233
2.1. Incentives for revised consumer credit legislation 233
2.2. Subsequent revised consumer credit legislation 236
2.3. Institutional financial market conduct legislation 240
3. INSTITUTIONAL REGULATION OF CONSUMER CREDIT IN SOUTH AFRICA 244
3.1. The Micro Finance Regulatory Council 245
3.2. The National Credit Regulator 247
3.2.1. Introduction 247
3.2.2. General characteristics and mandate 249
3.2.3. Market improvement 253
3.2.4. Information compilation and dissemination 256
3.2.5. Strategic direction 261
3.2.6. Registrations 264
3.2.7. Conduct management 269
3.3. The Financial Sector Conduct Authority 273
3.3.1. Introduction 273
3.3.2. General characteristics and mandate 274
3.4. Collaborative efforts of the Financial Sector Regulation Act 276
3.4.1. Financial Stability Oversight Committee 276
3.4.2. Financial Sector Contingency Forum 277
3.4.3. Financial System Council of Regulators 278
3.4.4. Financial Sector Inter-Ministerial Council 279

3.4.5. Interaction between regulators 280
3.5. Jurisdiction in respect of consumer credit 281
3.5.1. Financial products 281
3.5.2. Financial services 285
3.5.3. Financial sector laws 286
3.6. Additional comments on the South African consumer credit market 289
4. CONCLUSION 292

CHAPTER 6: INDEPENDENCE 296

1. INTRODUCTION 296
1.1. Outline of the chapter 296
1.2. Orientation 297
2. INDEPENDENCE 298
3. INDEPENDENCE AND THE SOUTH AFRICAN REGULATORS 299
4. REGULATORY AUTHORITY 301
4.1. The National Credit Regulator 301
4.1.1. Introduction 301
4.1.2. Guidance 302
4.1.3. Registration 307
4.1.4. Case studies 310
4.2. The Financial Sector Conduct Authority 312
4.2.1. Introduction 312
4.2.2. Guidance 313
4.3. Preliminary analysis of the regulatory authority of the National Credit Regulator and the Financial Sector Conduct Authority 315
5. SUPERVISORY AUTHORITY 319
5.1. The National Credit Regulator 319
5.1.1. Introduction 319
5.1.2. Registration 321
5.1.3. Enforcement 324
5.1.4. Case studies 327
5.2. The Financial Sector Conduct Authority 331
5.2.1. Introduction 331
5.2.2. Licensing 331
5.2.3. Enforcement 335

5.3. Preliminary analysis of the supervisory authority of the National Credit Regulator and the Financial Sector Conduct Authority......341

6. COMPARATIVE ANALYSIS OF THE REGULATORY AND SUPERVISORY AUTHORITY OF THE NATIONAL CREDIT REGULATOR AND THE FINANCIAL SECTOR CONDUCT AUTHORITY......347

7. INSTITUTIONAL AND OPERATIONAL AUTONOMY......351

7.1. Introduction......351

7.2. The National Credit Regulator......352

7.2.1. Financial resources......352

7.2.2. Human resources......353

7.2.3. Institutional framework......358

7.3. The Financial Sector Conduct Authority......365

7.3.1. Financial resources......365

7.3.2. Human resources......367

7.3.3. Institutional framework......369

8. COMPARATIVE ANALYSIS OF THE AUTONOMY OF THE NATIONAL CREDIT REGULATOR AND THE FINANCIAL SECTOR CONDUCT AUTHORITY......371

9. RECOMMENDATIONS AND CONCLUSION......383

CHAPTER 7: MECHANISMS OF ACCOUNTABILITY......390

1. INTRODUCTION......390

1.1. Outline of the chapter......390

1.2. Orientation......390

2. THE CONSTITUTIONAL CONTEXT INFORMED BY TRIAS POLITICA......392

2.1. Introduction......392

2.2. Delegation......396

2.3. The place of independent regulators......406

3. ACCOUNTABILITY......411

4. GOVERNMENT......413

4.1. Introduction......413

4.1.1. The executive branch......413

4.1.2. The legislative branch......414

4.2. The National Credit Regulator......415

4.2.1. The Public Finance Management Act (Act 1 of 1999)......415

4.2.2. The executive branch: general......417

4.2.3. The executive branch: the Minister......418

4.2.4. The executive branch: reporting 421
4.2.5. The executive branch: performance 427
4.2.6. The legislative branch 432
4.3. The Financial Sector Conduct Authority 443
4.3.1. The Public Finance Management Act (Act 1 of 1999) 443
4.3.2. The executive branch 444
4.3.3. The legislative branch 445
4.4. The Auditor-General 449
4.5. Analysis of the role of government as an accountability mechanism in South Africa .. 453
5. REGULATORS, REGULATORY FORUMS AND REGULATEES 461
5.1. Introduction 461
5.2. Regulators 462
5.3. Regulatory forums 471
5.4. Regulatees 480
5.5. Analysis of the role of regulators, regulatory forums and regulatees as accountability mechanisms in South Africa 483
6. ADJUDICATION STRUCTURES 489
6.1. Introduction 489
6.2. The Public Protector 491
6.3. The Tribunal 495
6.3.1. The National Consumer Tribunal 495
6.3.2. The Financial Services Tribunal 506
6.3.3. Analysis of the role of the Tribunals as accountability mechanisms in South Africa 508
6.4. The courts 516
6.4.1. The National Credit Regulator 516
6.4.2. The Financial Sector Conduct Authority 520
7. MISCELLANEOUS MATTERS 521
7.1. Introduction 521
7.2. Information dissemination 522
7.2.1. The Promotion of Administrative Justice Act (Act 3 of 2000) and the Promotion of Access to Information Act (Act 2 of 2000) 522
7.2.2. The information dissemination mandate of the National Credit Regulator and the Financial Sector Conduct Authority 523
7.2.3. Other stakeholders and industry role-players 523
7.2.4. Consumer education 523

7.2.5. Participation: The National Credit Regulator 524
7.2.6. Participation: The Financial Sector Conduct Authority 531
7.3. Analysis of miscellaneous matters 532
8. COMPARATIVE ANALYSIS OF THE ACCOUNTABILITY OF THE NATIONAL CREDIT REGULATOR AND THE FINANCIAL SECTOR CONDUCT AUTHORITY . 536
9. RECOMMENDATIONS AND CONCLUSION 540

CHAPTER 8: CONCLUSION AND RECOMMENDATIONS 547

1. INTRODUCTION 547
2. THE SOUTH AFRICAN SYSTEM 549
3. PURPOSE AND SCOPE OF THE RESEARCH 550
4. ASSESSMENT OF FUNDAMENTAL CONSIDERATIONS 552
5. INDEPENDENCE 560
5.1. Assessment of some salient findings 560
5.2. Assessment of the overall position 563
6. MECHANISMS OF ACCOUNTABILITY 567
7. RECOMMENDATIONS 572
8. CONCLUSION 581

BIBLIOGRAPHY 582

1. LEGISLATION, BILLS, RULES AND DRAFTS 582
2. CASE LAW AND TRIBUNAL DECISIONS 583
3. POLICY AND DISCUSSION DOCUMENTS 585
4. REPORTS AND GUIDES 586
5. JOURNAL ARTICLES AND WORKING PAPERS 592
6. BOOKS, CHAPTERS IN BOOKS, THESES AND DISSERTATIONS 598
7. CIRCULARS, GUIDELINES AND RULES OF CONDUCT 601
8. MEDIA AND OTHER STATEMENTS 603
9. WEBSITES AND OTHER SOURCES 607

PART 1: FUNDAMENTAL PRINCIPLES

CHAPTER 1: INTRODUCTION

1. GENERAL INTRODUCTION

The South African financial sector is modern, complex and made up of multiple role-players, services and products.[1] The consumer credit section is in itself a complex part of the overall sector.[2] The monetary value of the South African credit sector is in the estimated billions, there are multiple forms of credit extension and the sector serves diverse consumer communities – ranging from poverty-stricken participants who use credit to purchase food, to participants who use credit to create better futures through education, starting businesses and accessing wealth-products such as cars and houses.[3]

The regulators that are created to ensure the proper functioning of the financial sector are generally designed to be expert, independent institutions with considerable responsibilities.[4] Independence *per se* has internationally featured prominently as a desirable character for market conduct regulators of the consumer financial sector.[5] In addition, the empowerment of regulators in line with their mandates has culminated in a corresponding requirement for proper accountability measures.[6]

In South Africa, the policies underlying the creation of the market conduct regulator for the broad financial sector created in the style of the Financial Sector Conduct Authority included enhanced independence and accountability of this regulatory body.[7] The National Treasury cited international best practices as foundations for the attention to independence and accountability.[8] Likewise, the National Credit Regulator has been created as the specialist

[1] See par 2.1 *infra*; National Treasury *Treating Customers Fairly in the Financial Sector: A Draft Market Conduct Policy Framework for South Africa Discussion Document* December 2014 15 & 18-19; Financial Stability Board *Peer Review of South Africa Review Report* 5 February 2013 27-28.

[2] See par 2.1 *infra*.

[3] See paras 2.1 & 2.2 *infra*; National Treasury *Treating Customers Fairly in the Financial Sector* (n 1) 21; FinMark Trust *FinScope Consumer Survey South Africa* November 2016; Department of Trade and Industry South Africa (hereinafter 'DTI') *Consumer Credit Law Reform – Policy Framework for Consumer Credit* August 2004 par 1.

[4] See chs 3 & 6 *infra*. See also National Treasury *A Safer Financial Sector to Serve South Africa Better: National Treasury Policy Document* 23 February 2011 25-26; World Bank *Good Practices for Financial Consumer Protection* 2017 11.

[5] See par 2 of ch 1; paras 1 & 2 of ch 3 *infra*.

[6] See par 3.3 of ch 2; par 2 of ch 3; paras 1 & 2 of ch 4 *infra*.

[7] National Treasury *Treating Customers Fairly in the Financial Sector* (n 1) 31 & 72; National Treasury 'Media statement Implementing the twin peaks model of financial regulation Invitation for public comments on the draft Financial Sector Regulation Bill, 2013' 11 December 2013; National Treasury *Twin peaks in South Africa: Response and Explanatory Document Accompanying the Second Draft of the Financial Sector Regulation Bill* 2014 5; par 2.4 *infra*.

[8] National Treasury *Twin peaks in South Africa* (n 7) 15; par 2.4 *infra*.

regulator for the consumer credit industry[9] and is statutorily endowed with independence and the underlying policy clearly envisioned it as an entity that must be accountable.[10]

The core research question that I aim to answer through the course of this thesis is whether the market conduct regulators for the consumer credit market in South Africa are indeed independent and accountable as initially envisaged in policy documents and enabling statutes: this is necessary in order to ascertain whether any remedial steps could be taken to enhance the independence and accountability of the researched regulators.[11] Although the policy drafters and legislatures denoted the National Credit Regulator and the Financial Sector Conduct Authority as independent and accountable, the research will show that these are two complex concepts underscored by multi-disciplinary theoretical considerations.[12]

A proper analysis of the independence and accountability measures currently in place for the two regulatory bodies referred to above, will indicate that statements to effect independence and accountability are mere lip service and insufficient without the deliberate incorporation of multiple features to support a structured arrangement for independence and accountability.[13] The South African position, as it currently stands, will be found wanting when compared to international benchmarks for independence and accountability.

This chapter introduces the research theme and orients the reader in respect of the setting for the research. I start my discussion of the research milieu by briefly considering the maturity and development of the South African Financial Sector and the role of the consumer credit market in the financial sector.[14] Thereafter, I deal with the recent changes in the regulatory landscape and the government's focus on policies of independence and accountability.[15] This part of chapter one is a preliminary contextualisation of the research problem set forth in this thesis. The discussion is of an introductory nature and intended to orient the reader in respect of the South African milieu.

The rest of chapter one purports to provide the reader with a structural depiction of the thesis, culminating in this summative paragraph. I set out the contents of the thesis together with the core research questions that I wish to address, and the manner in which I aim do so.[16]

[9] See the reference to 'specialist' bodies in Goodhart *et al Financial Regulation: Why, how and where now?* (1998) 153 & 154.
[10] See par 2.4 *infra*.
[11] See par 3 *infra*.
[12] See chs 2, 3 & 4 *infra*.
[13] See chs 3 & 4 *infra*.
[14] See paras 2.1 & 2.2 *infra*.
[15] See paras 2.3 & 2.4 *infra*.
[16] See paras 3.1, 3.2 & 3.3 *infra*.

I also discuss the specific comparative aspects of the thesis.[17] After this paragraph, I briefly deal with the available literature on the subject matter of the thesis and elaborate on the methodology that I used to assess the South African position, also with reference to the comparative aspects of the thesis.[18]

2. INTRODUCTION TO THE RESEARCH MILIEU

2.1. A modern and developing financial sector

South Africa has a composite economy and the consumer credit segment suitably reflects this.[19] Internationally, the credit market has been described as mature and progressive,[20] and South Africa classified as a developing country,[21] an emerging market,[22] and an 'upper-middle-income econom[y]' country.[23] In the World Bank's report of its analysis of the credit industry against contemporary norms,[24] it noted *inter alia* that the financial sector had been cultivated and that advancements in this segment had occurred swiftly.[25] Domestically, Statistics South Africa reported that '[t]he finance industry was the second largest contributor to GDP growth in the second quarter of 2017, growing by 2,5% on the back of higher activity in financial intermediation and auxiliary activities'.[26] We are therefore dealing with a sizeable, modern, developing, and multi-layered system.[27]

The consumer credit industry has expanded in the years since 2006, which marked the implementation of the National Credit Act (Act 34 of 2005)[28] and the accumulation of

[17] See par 3.1 *infra*.

[18] See paras 3.4 & 3.5 *infra*.

[19] World Bank *Report on the Observance of Standards and Codes Insolvency and Creditor Rights Systems South Africa* June 2012 (hereinafter 'ROSC') 20; Kelly-Louw with input from Stoop *Consumer Credit Regulation in South Africa* (2012) preface v. The World Bank's report was not solely concerned with the credit market, but Ingrid Goodspeed highlights the interrelation between the economy and credit market when she states that credit markets are significant for the maintenance of economic development – see Goodspeed 'The Credit Market' in Van Wyk *et al* (eds) Understanding South African Financial Markets (2012) 492.

[20] World Bank *ROSC* (n 19) 2 & 5. In 2012, the World Bank described the South African credit market as 'developed' – see World Bank *ROSC* (n 19) 2.

[21] World Bank *ROSC* (n 19) 20. In 2016, Tim Fernholz reported that the terminology of 'developing country' was no longer used by the World Bank – see 'The World Bank is eliminating the term "developing country" from its data vocabulary' Quartz Media LLC [US] 17 May 2016.

[22] MSCI 'Market classification', https://www.msci.com/market-classification.

[23] World Bank 'World Bank Country and Lending Groups', https://datahelpdesk.worldbank.org/knowledgebase/articles/906519.

[24] World Bank *ROSC* (n 19) 3-4.

[25] *Idem* at 2 & 5.

[26] Statistics South Africa 'Agriculture and finance help lift SA out of recession' 5 September 2017.

[27] The economic sphere has been described as having a 'diverse structure' – see Statistics South Africa 'Economic Growth', http://www.statssa.gov.za/?page_id=735&id=1.

[28] Hereinafter 'NCA'.

specific comparable sets of data for dissemination by the National Credit Regulator.[29] In June 2017, the Regulator reported that 24.78 million consumers were operating as such in the South African credit domain, with 80.02 million recorded accounts existing.[30] The debt owed by consumers or, in other words, the financial interests of stakeholders as at the end of June 2017, was estimated at 1.72 trillion rand with 'new credit granted' approximated at 120.08 billion rand.[31]

I mentioned earlier that the credit market is intricate; furthermore the industry is characterised by numerous role-players and intersecting legal frameworks.[32] Apart from the number of credit consumers alluded to above, the Regulator reported in its 2016/2017 annual report that it held records for about 5 591 registered credit providers with 37 608 offices, 14 credit bureaus, 3 payment distribution agents, 4 alternative dispute resolution agents and 2 000 debt counsellors.[33] Participants in the consumer credit industry also include debt collectors, legal professionals, intermediaries (such as mortgage brokers) and courts. Not all of the role-players and parties with vested interests in the industry are necessarily in a direct creditor-

[29] Hereinafter 'NCR'. See NCR *CBM Data Q2 2007 – Q2 2017*. According to this data set, the number of credit-active consumers as at June 2007 was 16.78 million and the number of accounts 52.06 million. The number of consumers and accounts 'in good standing' as at June 2007 were 10.67 million and 40.69 million respectively.

[30] NCR *Credit Bureau Monitor Second Quarter* June 2017 1. A 'consumer' would be deemed 'credit-active' where the consumer has the responsibility to perform in monetary terms towards a 'credit provider[…]' or 'service provider[…]' – see 8. The credit bureaus, from where the information is sourced, also retain information in respect of non-active persons and this information primarily relates to the credentials of the person – see 1 & 2. However, only 15.10 million of consumers' records are considered to be 'in good standing' and the formal credit records held by the bureaus indicate that 60.9% of consumers with formal credit records do not have 'impaired records' – see 1. 'Good standing' does not refer to an impeccable record as the concept includes consumers that have up to 2 months' outstanding instalments, although the consumer's accounts are not classified as showing 'adverse listings' or 'judgments' – see 8. Only 49.2% of consumers for whom records are held are 'current', meaning that the records do not reflect present or previous overdue payments for any of the consumer's accounts – see 1 & 8. A consumer whose record reflects as 'impaired' refers to '[a] record on which a consumer and/or any of the accounts, are either classified as three or more payments or months in arrears, or which has an "adverse listing", or that reflects a judgment or administration order' – see 8.

[31] NCR *Consumer Credit Market Report Second Quarter* June 2017 1. The reason why I refer to the data as estimated, even though this particular description does not appear in the source, is that the information disseminated is not based on data sourced from all credit providers but only from those with statutory reporting obligations towards the NCR as required by the NCA – see 2. The report refers to the 'total outstanding gross debtors book of outstanding credit', which is the terminology referenced in these quarterly reports published by the NCR – see 1. The credit extension-request rejection-rate was 50.76% – see 1.

[32] Kelly-Louw (n 19) preface v. See also Devnomics *Literature Review on the Impact of the National Credit Act (NCA) has had on South Africa's Credit Market – Final report* June 2012 12 & 33-47.

[33] NCR *Annual Report* 2016/2017 24.

debtor relationship with a consumer, but they are nonetheless stakeholders in the efficient functioning and development of the market.[34]

In addition to the above, a number of regulators and statutes interact within the South African financial sector. Apart from the National Credit Act and the National Credit Regulator,[35] the Financial Sector Regulation Act (Act 9 of 2017)[36] and the Financial Sector Conduct Authority[37]– the body previously known as the Financial Services Board[38] – regulate the sector. The industry is also regulated by the Prudential Authority[39] and South African Reserve Bank.[40] Legislation such as the Financial Advisory and Intermediary Services Act,[41] the Short-term Insurance Act,[42] and the Long-term Insurance Act[43] and the Banks Act[44] set out substantive statutory obligations of market participants. The above examples name but a few, and this must be seen within the context of the diversity of products and services found within the regulated sphere.[45]

The National Credit Act is currently at the core of substantive consumer credit regulation and has specific objectives as its *raisons d'être*.[46] It has been hailed as quite an achievement in consumer credit regulation, with some even comparing the transformation that its onset brought about, together with other consumer protection statutes, with that of the Constitution.[47] The subsequent alteration of the consumer credit legislative framework post-

[34] See e.g. Goodspeed (n 19) 497-516 for an exposé of the partakers in, and products of, the broad credit industry. In Goodspeed's depiction, the 'credit market' is understood in a wider sense than the scope of regulation of the NCA and refers to 'the marketplace where trading, structuring and investing in the credit/credit risk of governments, businesses and consumers take place either through instruments such as bonds and loans or through credit derivatives and structured credit products' – see 492. In contrast, the NCA is primarily concerned with consumer credit and related matters – see e.g. the Long Title of the NCA; DTI *Consumer Credit Law Reform* (n 3).

[35] The NCR was established in terms of s 12 of the NCA.

[36] Hereinafter 'FSRA'. See *Commencement of the Financial Sector Regulation Act 9 of 2017* National Treasury Notice 169 of 2018 in GG 41549 of 29 March 2018 for the dates of incremental implementation of this Act.

[37] Hereinafter 'FSCA'. The FSCA was established in terms of s 56 of the FSRA.

[38] Financial Regulatory Reform Steering Committee *Implementing a twin peaks model of financial regulation in South Africa Published for public comment* 1 February 2013 6 & 47; National Treasury *Treating Customers Fairly in the Financial Sector* (n 1) 78; ss 293-294 of the FSRA. The Financial Services Board was established by s 2 of the Financial Services Board Act (Act 97 of 1990).

[39] The Prudential Authority was established in terms of s 32 of the FSRA.

[40] The Reserve Bank was established in terms of s 223 of the Constitution of the Republic of South Africa, 1996. See also ch 2 parts 1 & 2 of the FSRA & the South African Reserve Bank Act (Act 90 of 1989).

[41] Act 37 of 2002.

[42] Act 53 of 1998.

[43] Act 52 of 1998.

[44] Act 94 of 1990.

[45] See National Treasury *Treating Customers Fairly in the Financial Sector* (n 1) 16, 17 & 78. See also National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 4) 35 for the position prior to the FSRA.

[46] Long Title; s 3 of the NCA.

[47] Scholtz 'The implementation, objects and interpretation of the National Credit Act' in Scholtz *et al Guide to the National Credit Act* (June 2017 Service Issue 9) par 2.1.

2005 was extensive and greatly affected an established statutory regime that had prevailed for a notable period in South Africa.[48] The National Credit Act has also been instrumental in founding the National Credit Regulator as the specialised regulatory institution responsible for the consumer credit industry and in determining the scope of its mandate.[49] In light of the above, the following comment on the outcomes of the National Credit Act is valuable to keep in mind:

> 'The National Credit Act … has been the most significant regulatory intervention in South African household credit markets since democratic transition. It is therefore important to ensure that it has the intended effects and has few unintended consequences. This is especially important in the area of developmental credit and more specific, in terms of the objective of the act [*sic*] to improve access to credit.'[50]

2.2. A necessary regulated sphere

Regulation in respect of consumer credit is particularly challenging when considering the nature and role of credit.[51] Notwithstanding the monetary significance of this segment of the financial sector *vis-à-vis* 'other' segments,[52] it has bearing on the economic and financial strength of a nation[53] and the welfare, actual and potential, of its inhabitants.[54] In regulatory terms, the facets of credit invoke considerations in respect of financial stability[55] and market conduct, the latter being the behavioural aspects pertaining to credit provider and consumer interaction.[56] Consumer credit is imperative for personal and national wealth accumulation in

[48] *Ibid*: 'The National Credit Act is a far-reaching piece of legislation which forms part of a raft of contemporaneous legislation or proposed legislation aimed at protecting consumers and making credit and banking services more accessible. Cumulatively these measures constitute perhaps the most comprehensive change of the legal landscape (and the common law) since the adoption of the Constitution in 1996. Credit providers and consumers should not, therefore, see the Act as merely an amendment of the Usury Act and the Credit Agreements Act: it is a wholesale replacement of legislation that has regulated consumer credit for more than a quarter of a century.'

[49] See ss 12-16 of the NCA.

[50] Genesis Analytics *Regulatory impact assessment of the National Credit Act, 2005 – Baseline study Summary Report* 2 September 2008 1.

[51] See e.g. the concerns expressed in DTI *Consumer Credit Law Reform* (n 3) paras 1.3-1.15 & National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 4) 7-8, 13-14 & 15.

[52] Goodspeed (n 19) 492 – the author notes at 492 that the 'value' of the credit industry is much larger than other financial industries.

[53] Goodspeed (n 19) 491; National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 4) 7-8 (in respect of the impact of credit extension on financial stability). See also Landie *The impact of the National Credit Act (NCA) on risk in the South African Banking System* January 2013 PhM (Economics) Department of Economics and Econometrics University of Johannesburg 33-35.

[54] DTI *Consumer Credit Law Reform* (n 3) paras 1.3 & 1.6-1.7.

[55] Goodspeed (n 19) 491; National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 4) 7-8 & 13.

[56] National Treasury *Treating Customers Fairly in the Financial Sector* (n 1) 6-7 & 10-11; National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 4) 13; DTI *Consumer Credit Law Reform* (n 3) paras 1.3, 1.9 & 1.12. See also Goodhart *et al* (n 9) 6.

a contemporary society.[57] It remains a core factor for progressive well-being of role-players on either side of the receiver-grantor relationship.[58]

The South African government took the view that the credit market has to be regulated in South Africa and developed a new credit regulation framework for the post-apartheid market.[59] The consumer credit legislative reformation was primarily undertaken in response to the growing realisation that progressive government intervention was essential to achieve certain social and economic objectives when considering the current and envisaged financial positions of certain sectors of the South African population.[60] As such, the changes were founded on the notions of financial welfare and empowerment.[61]

I discuss the impact that credit has on the individual and the financial system in differing degrees of detail in the previous and upcoming paragraphs. Although the South African consumer credit market has been regulated by statute for decades,[62] I briefly deal with the purpose of credit regulation in the upcoming paragraphs – it provides some background information to the milieu within which the South African regulators function. The discussion is based on international scholarship[63] and the reader will notice that many of the rationales

[57] DTI *Consumer Credit Law Reform* (n 3) paras 1.3 & 1.6-1.7.

[58] Kelly-Louw (n 19) preface v. See e.g. DTI *Consumer Credit Law Reform* (n 3) paras 1.3 & 1.6-1.7 in respect of the importance of credit to consumers and NCR *Consumer Credit Market Report* (n 31) 1 in respect of the credit actually extended to consumers by credit providers like banks and retailers.

[59] DTI *Consumer Credit Law Reform* (n 3) par 1.3 & p 8 (1).

[60] *Idem* at paras 1.1-1.3 & p 8 (1); DTI *Credit law review – Summary of the findings of the technical committee* August 2003 4-9; DTI 'Credit law review: Setting the scene' Media Statement 2003 read with the long title of the NCA & s 3(a); Otto 'Credit agreements: General introduction and historical background' in Nagel *et al Commercial Law* (2015) par 19.08.

[61] DTI *Consumer Credit Law Reform* (n 3) paras 1.1-1.3 & 1.5; Minister of Trade and Industry *Draft National Credit Act Policy Review Framework, 2013* GN 559 of 2013 GG 36504 29 May 2013 paras 1.2.1 & 1.12.

[62] Prior to the NCA, the Usury Acts (Act 37 of 1926 & Act 73 of 1968) and the Hire-Purchase Act (Act 36 of 1942) applied to the South African credit market.

[63] I do not deal with the underlying theoretical approaches to justify intervening consumer law or explain certain manners of regulatory intervention. For examples, explanations and applications, see Ramsay *Consumer Law and Policy – Text and Materials on Regulating Consumer Markets* (2012) 42-49, Campbell *et al* 'Consumer Financial Protection' 2011 *Journal of Economic Perspectives* 91 92-93 ('neo-classical'); Ramsay (n 63) 24-28 ('liberalism' & 'consumerism'); Goodhart *et al* (n 9) 2 & 64 ('liberal economic doctrine'); Ramsay (n 63) 7-9, Ramsay & Williams 'The Crash that Launched a Thousand Fixes: Regulation of Consumer Credit after the Lending Revolution and the Credit Crunch' 15 September 2009 1, Mudge 'What is neo-liberalism?' 2008 *Socio-Economic Review* 703, Hawthorne 'Public Governance: Unpacking the Consumer Protection Act 68 of 2008' *Journal for Contemporary Roman-Dutch Law* 345 345; Williams 'Who wants to watch? A comment on the new international paradigm of financial consumer market regulation' 2013 *Seattle University Law Review* 1217 1220-1221 ('neo-liberalism'); Ramsay (n 63) 49-56 ('information failures'); Ramsay (n 63) 56-67, Ramsay & Williams (n 63) 7-8, Campbell *et al* (n 63) 93-95 ('behavioural economics'); Ramsay (n 63) 67-70 ('competition policy'); Ramsay (n 63) 70-80 & 82-83 ('equity' & 'sustainable consumption'); Ramsay (n 63) 81-82 ('paternalism'); Campbell *et al* (n 63) 95 ('libertarian paternalism'). See also Spooner 'Long Overdue: What the belated reform of Irish Personal Insolvency tells us about comparative consumer bankruptcy' 2012 *The American Bankruptcy Law Journal* 243 260-261.

for credit regulation are reflected in the South African government's policies on credit regulation.[64]

Charles Goodhart and his co-authors identify a number of rationales for 'public sector regulation': financial system welfare and consumer protection.[65] In respect of consumer protection, they categorise the need for protection in the context of financial regulation by distinguishing between 'protect[ing] the customer against monopolistic exploitation' and availing protective measures to 'smaller, retail (less informed)' consumers.[66] They rationalise the need for 'external regulation' of the financial sector from a prudential perspective by viewing financial systems as structurally frail.[67] On the one hand, they refer to 'liberal' theorists who dismiss the need for regulation.[68] These theorists view prudential failings as an outcome of regulation because the presence of regulation negates the need to adhere to self-imposed behavioural norms.[69] The ambitious outcomes that stakeholders and role-players attribute to regulatory intervention cannot be achieved without causing a number of detrimental economic results.[70] In order to counteract the societal request for regulation, Goodhart *et al* write that liberal doctrinists advocating for deregulation show the costs associated with regulatory intervention.[71] Some aspects of financial regulation are not amenable to fixed rules because of complexity, a changeable nature or a need for variable regulatory rules.[72]

Notwithstanding the negative outcomes that may be associated with state-based regulatory intervention, the public adversity to financial system failures occurring in schemes where regulation is absent can override considerations of costs and prejudicial regulatory outcomes.[73] Although public opinion does not have to dictate the presence of regulation, Goodhart *et al* write that the consequences of the unregulated failing or underperforming market are comparatively graver than the prejudicial effects of regulation.[74]

[64] See also par 2 of ch 5 *infra*.
[65] Goodhart *et al* (n 9) 4.
[66] *Ibid*.
[67] *Idem* at 1.
[68] *Idem* at 2 & 64.
[69] *Idem* at 2.
[70] *Ibid*.
[71] *Idem* at 64 (incl fn 6).
[72] *Idem* at 2-3.
[73] *Idem* at 3-4. This is not always the case – see Goodhart *et al* (n 9) 64 at fn 6 for a historical example.
[74] Goodhart *et al* (n 9) 4.

The financial crisis highlighted the role of credit regulation in the prudential welfare of financial institutions and the stability of a financial system.[75] James Nehf tracks the decline of strong consumer protection legislation in the United States of America over the course of the two decades preceding the financial crisis and views this process as 'a contributing cause' of the calamity that occurred in 2008.[76] He notes the following in the context of credit regulation:

> 'Politicians, regulators and voters should understand that there are good reasons for consumer protection laws: (a) they help ensure that consumers are well informed about the benefits, risks, and options when deciding whether to enter into a transaction and under what terms, (b) they channel consumers who probably should not be entering into a transaction away from transactions they are not well suited for, or if they are not channeled away the consumers at least go forward fully aware of the risks, and (c) they foster efficiencies in the investment markets that depend on transparency and accurate valuation of the assets that support the investment.'[77]

The challenges in respect of the financial welfare of the state include stability and, according to Mallory SoRelle, a need for credit to advance the national economy.[78] Her studies show that credit regulation has a political dimension insofar as it can be used to invigorate an economy by encouraging consumption, and transform conventional welfare into 'credit-welfare' due to the ability of credit to provide for the needs of individuals.[79] SoRelle argues as follows:

> 'Even as the financial industry collapsed around their ears in 2007, in part as a result of unsustainable debt generated by risky consumer lending practices, the major financial reform measures enacted by federal policymakers failed to depart form a model of consumer protection via information disclosure. Why, despite increasing evidence that disclosures are an ineffective form of consumer protection, have policymakers continued to rely on them as the primary – and in many cases the only – policy remedy designed to aid borrowers? … Traditional explanations point to the acceptance of a behavioral economic approach to regulation, one that prizes disclosure above all else … I argue, however, that the continued adoption of a failed policy cannot be justified purely as a rational economic choice. Instead I offer a political explanation. This chapter explores the development over the course of the twentieth century of what I argue is a political economy of credit in the United States: an economic arrangement, deliberately promulgated by federal

[75] CCH Attorney-Editor Staff Dodd-Frank *Wall Street Reform and Consumer Protection Act Law, Explanation and Analysis* (2010) 480; Hawkins & Torr 'Banks' in Van Wyk *et al* (eds) *Understanding South African Financial Markets* (2012) 77-78; Ramsay (n 63) 362; Nehf 'Consumer Credit Regulation and International Financial Markets: Lessons from the Mortgage Meltdown' 7 September 2011 1.

[76] Nehf (n 75) 1 & 5-7.

[77] *Idem* at 7.

[78] SoRelle *Democracy declined: The failed politics of consumer credit* August 2016 PhD Faculty of the Graduate School of Cornell University (Department of Government) 250.

[79] SoRelle (n 78) 17-18, 43-44 & 249-250. See also Campbell *et al* (n 63) 108.

> policymakers, whereby governing institutions established and continued to support a consumption-based economy fueled by access to credit.'[80]

Academic studies that research the reasons for regulation proceed from a problem-solution perspective: 'market failure' is defined with reference to specific adversities, including those that manifest for consumers, and the regulation is pitted as a reaction to a specific problem.[81] The motivation behind the regulation of a financial market is linked to a particular outcome,[82] or solving a particular problem.[83] In addition to the stability issues recognised earlier, the challenges in respect of consumer protection regulation seeks to address include consumer confidence in the system, access to credit, specious lending activities, expensive and unaffordable credit extension and over-indebtedness. [84] In lieu of the aforementioned, consumer credit regulation has a number of goals that it seeks to achieve[85] and the manners in which the goals can be attained differ from specific legislative interventions to the creation of regulatory bodies with the sole aim of protecting consumers.[86] Oren Bar-Gill and Elizabeth Warren specifically advocated the creation of the current Consumer Financial Protection Bureau in this light:[87]

> 'The market for consumer credit is not operating efficiently. Evidence abounds that consumers are sold credit products that are designed to obscure their risks and to exploit consumer misunderstanding. Ordinary market mechanisms, such as competition and expert advisers, cannot fully correct these deficiencies. Without regulatory intervention, market distortions and

[80] SoRelle (n 78) 43-44.

[81] Campbell *et al* (n 63) 92-93. See also Bar-Gill & Warren 'Making Credit Safer' 2008 *University of Pennsylvania Law Review* 1 100; Ramsay (n 63) 6 & 13; Prates 'Why prudential regulation will fail to prevent financial crises. A legal approach' Banco Central Do Brasil Working Paper 335 November 2013 8 & 9. See Ramsay (n 63) 42: 'Market failure is the central economic rationale for government regulation of the marketplace. The general value of an economic approach to consumer protection is its ability to focus clearly on the objectices of consumer-protection measures, to identify the sources of consumer problems and to analyse the potential consequences of alternative policies in terms of their costs and benefits and direct and indirect effects on market behaviour.'

[82] Campbell *et al* (n 63) 93; Ramsay & Williams (n 63) 2.

[83] Campbell *et al* (n 63) 93, 95 & 109.

[84] Ramsay & Williams (n 63) 2 & 22, 'Enforcement of Consumer Credit Regulation' 1960-1961 *Northwestern University Law Review* 403 403; Organisation for Economic Co-operation and Development (hereinafter 'OECD') *G20 High-Level Principles on Financial Consumer Protection* October 2011 4 & 5.

[85] See the sources referred to in fn 63 & 84 *supra*.

[86] See SoRelle (n 78) 34 & 200. See also SoRelle (n 78) 200 (in the context of the United States of America): 'As the main goal was to support national economic stability, I argue, Congress felt little need to centralize these regulations under a new agency designed with consumer protection in mind, even when the existing agencies themselves expressed reservations about their ability to effectively carry out their new duties. Unfortunately for consumers, the existing regulatory *infra*structure was primarily tasked with ensuring the profit and stability of financial institutions—a so-called "safety and soundness" mission—and not the protection of consumers. Thus, regulators often lacked the expertise and resources to manage new consumer protection mandates. The result is that consumer credit policies were administered through a fragmented regulatory arrangement in which protecting consumers took a back seat to protecting the profits of financial institutions.'

[87] SoRelle (n 78) 161

> inefficiencies will continue to grow, imposing substantial costs on American families and on the economy.'[88]

Many of the considerations discussed above that prompt regulatory reform are also relevant for the South African market. Credit is used for a broad range of purposes in South Africa – from sustenance to personal and professional development.[89] It has an enabling character because it allows credit users to access goods and services prior to actually divesting the user's estate of the finances necessary to obtain the goods and services.[90] Credit functions in such a manner that the user may access goods and services immediately and only part incrementally with the monetary equivalent of the goods and services out of his or her estate.[91] Consumers are therefore enabled to obtain goods and services, whose values exceed the present financial boundaries of the user's estate,[92] through the dissemination of the full financial value of the goods and services over future financial assets by way of deferred payment and forthcoming scheduled payments against anticipated income of the user's estate:

> 'Consumers would generally not be able to purchase items such as houses or cars if it were not possible to obtain finance. In acquiring such items, it is necessary to be able to spread the payments over a number of months. For a huge number of people the same is true in respect of the purchase of a fridge, bed, radio or television. It is also true in respect of the cost of a university education and even true for a great many South Africans in respect of the cost of items such as school fees and school uniforms, or the equipment or trading stock for a small business. Credit thus unlocks a diverse range of opportunities, some which are economic, others educational and yet others simply improvement of "standard of living".'[93]

In contrast to the aforementioned positive elements – such as the capacity to increase amenities of life and access wealth, wealth-producing assets, and opportunities[94] – credit is not devoid of hazards. [95] The consumer-credit provider interaction is amenable to

[88] Bar-Gill & Warren (n 81) 100-101.

[89] DTI *Consumer Credit Law Reform* (n 3) paras 1.7-1.8. A study by FinScope found that 47% of adults (based on the sampled population) made use of credit – they 'borrow' – and of those, 47% utilise the funds for '[f]ood/emergency', 11% for '[t]ransport fees', 11% for '[b]uilding/renovating/buying house', 9% for '[b]ills', 6% for '[g]iving to family members', 9% for '[e]ducation' and 7% '[t]o buy [a] motor vehicle': see FinScope South Africa 2015 9, http://www.finmark.org.za/wp-content/uploads/pubs/Broch_FinScopeSA2015_Consumersurvey_FNL.pdf. See also FinScope South Africa 2015 (n 89) 2 for the methodology used.

[90] DTI *Consumer Credit Law Reform* (n 3) par 1.6-1.7; Goodspeed (n 19) 491-492.

[91] *Ibid*. See also par 2.2 *infra*.

[92] DTI *Consumer Credit Law Reform* (n 3) paras 1.6-1.8.

[93] *Ibid*; Goodspeed (n 19) 491-492.

[94] DTI *Consumer Credit Law Reform* (n 3) par 1.7.

[95] *Idem* at paras 1.8-1.10. See also Bar-Gill & Warren (n 81) 1; Warren 'Unsafe at any rate' Summer 2007 *Democracy Journal*.

malpractices.[96] Credit is inherently perilous because it burdens future assets irrespective of the state of affairs at the time when the payment becomes due and payable.[97] Credit-related behaviour can also have broader harmful effects on consumers and persons related to the credit consumer,[98] and adversely affect the financial market.[99]

In respect of the credit consumer, financial troubles cause other social crises, such as suicide and criminal behaviour; [100] have harmful effects on residential tenure, employment opportunities, pensions and marriages;[101] and adversely affect children, elders and other family members related to the prejudiced credit consumer.[102] In respect of the broader financial market, legislation affect the well-being of credit-providing banks, particularly as the protective measures implemented in respect of consumer affordability could concurrently decrease risk for the bank.[103] Denzel Landie writes that

> '[r]eckless lending or over-indebtedness is harmful to the economy because increased defaults resulting from these practices increases the credit risk of banks portfolios. This in turn increases that systemic risk in the banking system.'[104]

The International Monetary Fund assessed the South African regime in its *Financial System Stability Assessment* and highlighted the following as 'credit risks' – showing that individuals and the larger banking sector can be prejudicially affected by credit-related factors:

> '**Slow growth and rising interest rates could make debt service more difficult, especially for highly indebted households.** Household loans account for 44 percent of bank lending, and a large proportion of them are floating-rate mortgages. Most mortgages are held by high income households, which should have a higher debt service capacity, but a sharp rise in interest rates could still hamper their ability to service their debt. In addition, 48 percent of new mortgages, and 35 percent of mortgages outstanding, have loan-to-value (LTV) ratios above 80 percent, leaving banks with a relatively small collateral buffer. The stock of unsecured loans is not large in comparison to

[96] DTI *Consumer Credit Law Reform* (n 3) par 1.9: 'The credit market is not a risk-free arena. There is a considerable imbalance of power between consumers and credit providers, consumer education levels are frequently low, consumers are poorly informed about their rights and unable to enforce such rights through either negotiation or legal action. Commission-driven agents, deceptive marketing practices and weak disclosure can easily cause consumers to enter into unaffordable credit contracts.' See National Treasury *Treating Customers Fairly in the Financial Sector* (n 1) 11 for malpractices that can affect the credit consumer.

[97] DTI *Consumer Credit Law Reform* (n 3) paras 1.8-1.10.

[98] *Ibid*. See also Bar-Gill & Warren (n 81) 59-62; Warren (n 95); National Treasury *Treating Customers Fairly in the Financial Sector* (n 1) 11 for a list of malpractices affecting the credit consumer.

[99] Goodspeed (n 19) 491; National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 4) 7-8 & 13.

[100] DTI *Consumer Credit Law Reform* (n 3) par 1.10.

[101] Warren (n 95).

[102] Bar-Gill & Warren (n 81) 59-60.

[103] Landie (n 53) 33-35 – the author specifically refers to the NCA.

[104] *Idem* at 34.

> mortgages, but the proportion that is impaired is high. Lending to the corporate sector accounts for 32 percent of bank loans.'[105]

2.3. A changing legal landscape

The initial and underlying consumer credit framework documents and policies catered primarily for the consumer credit industry and did not allude to a broader impact on the overall financial services sector in South Africa.[106] In recent years, the consumer credit industry has been deliberately and patently included in considerations pertaining to the renovation of broader financial sector regulation.[107] The intention to regulate the South African financial sector stringently is apparent from recent policy documents and new legislation,[108] particularly as challenges in respect of the consumer-welfare component of financial sector regulation – specifically financial services regulation – are significant.[109]

> 'Asymmetry of information between financial services consumers and financial institutions makes consumers vulnerable to exploitation. The nature of financial products and services is such that the consequences of unfair treatment or poor decisions are often only felt many years after transacting, potentially resulting in significant hardship. In South Africa, these challenges are exacerbated by low levels of financial literacy. Financial transactions are often premised on a promise to deliver funds at a later date. It is important that customers have confidence in such promises. Market conduct regulation and supervision mitigate the risk of vulnerable consumers being exploited and complement prudential objectives to enhance confidence in the financial system. … The document [Government's policy document] also highlights the need to design legislation for the financial services sector to protect consumers from risks inherent in financial products and services, and to set standards of conduct that are more stringent than those generally applied to non-financial services.'[110]

International developments in financial regulation generally, and consumer credit specifically,[111] have not been disregarded by South African policymakers.[112] This is especially true in respect of the regulatory changes that were proposed for the broader South

[105] International Monetary Fund *South Africa Financial System Stability Assessment* December 2014 16.

[106] See DTI *Consumer Credit Law Reform* (n 3); DTI *Credit law review* (n 60). See also Genesis Analytics (n 50) & the NCA.

[107] See National Treasury *Treating Customers Fairly in the Financial Sector* (n 1) 11, 13, 21-23, 35 & 43-45; National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 4) 6-8, 13-15, 21, 33, 35 & 43. See also International Monetary Fund *South Africa Financial System Stability Assessment* (n 105) 23; the FSRA.

[108] National Treasury *Treating Customers Fairly in the Financial Sector* (n 1) 8; National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 4) 8; the FSRA.

[109] National Treasury *Treating Customers Fairly in the Financial Sector* (n 1) 8, 10-13 & 19. See also Goodhart *et al* (n 9) 7.

[110] Financial Regulatory Reform Steering Committee (n 38) 47.

[111] DTI *Consumer Credit Law Reform* (n 3) paras 8.4-8.6.

[112] Financial Regulatory Reform Steering Committee (n 38) 20-24, National Treasury *Treating Customers Fairly in the Financial Sector* (n 1) 25, 27 & Appendix 2.

African financial sector.[113] In its strive to align South African regulatory frameworks for the financial sector with international developments, the reigning South African government drafted legislation to implement its newest structural financial regulatory policy – modelling the financial sector regulatory scheme on the 'Twin Peaks' design.[114] The model anticipates a differentiated approach to prudential and market conduct regulation, which necessitates the establishment of separate regulators for institutional welfare and consumer protection respectively.[115] In its current form, the model does not introduce new objects of regulation but merely a different approach to regulation, including increased and enabling legislative support for the new regulators.[116]

The Financial Sector Regulation Act is the first legislative outcome in the process of revamping the financial sector and focuses on the supervisory structure.[117] It is the founding legislation for two new regulators, created in the styles of the Prudential Authority and the Financial Sector Conduct Authority.[118] Apart from its foundational properties, the Act is the enabling legislation to the Reserve Bank in respect of nationwide financial stability supervision ('macroprudential' regulation) and likewise to the novice regulators in respect of the empowering provisions deemed necessary to achieve their respective outcomes of 'microprudential' and market conduct regulation.[119] The Act has also not eradicated the

[113] National Treasury *Treating Customers Fairly in the Financial Sector* (n 1) 25 & 36; National Treasury *A Safer Financial Sector* (n 4) 8, 27 & 28; Financial Stability Board *Peer Review of South Africa* (n 1) 13.

[114] National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 4) 12 & 28; National Treasury *Treating Customers Fairly in the Financial Sector* (n 1) 7, 8 & 19; National Treasury *Twin peaks in South Africa* (n 7) 4-5; the FSRA. See generally Godwin *et al* 'Twin Peaks: South Africa's financial sector regulatory framework' 2017 *South African Law Journal* 665, Schmulow 'Retail Market Conduct Reforms in South Africa Under Twin Peaks' 2018 *Law and Financial Markets Review* 1 & Godwin 'Australia's Trek towards Twin Peaks – Comparisons with South Africa' 2018 *Law and Financial Markets Review* 1.

[115] Taylor 'Regulatory reform in the U.K.' 2013-2014 *North Carolina Banking Institute* 227 228-229; Pan 'Structural reform of financial regulation' 2011 *Transnational Law & Contemporary Problems* 796 820; Goodhart *et al* (n 9) 157; Van Wyk 'Regulation of the Financial Markets' in Van Wyk *et al* (eds) *Understanding South African Financial Markets* (2012) 123.

[116] See Millard 'CoFI and T(CF): Further along the road to Twin Peaks' in Hugo & Du Toit (eds) *Annual Banking Law Update 2017 Recent legal developments of special interest to banks* (2017) 113 114 (writing from an insurance industry-related perspective): 'Even though there is a lot of hype around the market conduct aspect of Twin Peaks, it would be incorrect to state that there has never been legislation to promote the safety and soundness of insurers as financial institutions. It will be even more erroneous to argue that market conduct regulation is new, which is why the point of departure of any valuable discussion should be the existing rules on market conduct. As legislative reforms are published and promulgated, it makes sense to contextualise these by considering whether it bears resemblance to well-established rules that served the market well.' See also Otto 'Introduction and historical background to the National Credit Act' in Scholtz *et al Guide to the National Credit Act* (June 2017 Service Issue 9) par 1.2.1 in respect of consumer welfare laws over the ages.

[117] National Treasury *Treating Customers Fairly in the Financial Sector* (n 1) 31 & 78 ('Phase 1'). 'Phase 2' is concerned with substantive 'sectoral' legislation – see National Treasury *Treating Customers Fairly in the Financial Sector* (n 1) 78-79.

[118] Ss 32 & 56 of the FSRA.

[119] Chs 2-4 of the FSRA; National Treasury *Twin peaks in South Africa* (n 7) 7; Van Wyk (n 115) 117-118 & 123.

jurisdiction of the National Credit Regulator, which retains its market conduct responsibilities in respect of consumer credit.[120] The South African version of 'Twin Peaks' is also not precisely two peaked as there are a number of regulators functioning within the system.[121] The National Treasury refers to a 'modified "twin-peaks" model' in respect of South Africa.[122]

The changes aim to resolve the challenges brought about by a splintered structure.[123] The initial approach to regulation brought about complexity, arbitrariness, the ability for role-players to take advantage of intersecting jurisdictions and *lacunae* in regulatory jurisdiction because the different segments that construct the financial landscape of South Africa were regulated by different regulators and corresponding subject-specific legislation.[124] Different legislative provisions culminated in varied approaches when considering the diverse statutes that serve as the primary regulatory authority for a particular sub-sector of the financial sector.[125] Disjointed regulatory practices were prime considerations advanced by the State in support of the new structure.[126]

2.4. Developments in financial sector regulation

Internationally, many segments of the financial sector are highly regulated for reasons ranging from consumer protection to financial stability.[127] The disposition of the regulated market is intrinsically inclined towards innovation, progress and change – which can pose

[120] Schmulow (n 114) 4-5; National Treasury *Twin peaks in South Africa* (n 7) 30-31.

[121] Van Heerden 'Twin Peaks: The role of the Central Bank' Paper delivered at the Colloquium on 'Twin Peaks' on 28 September 2017, Huls 'Twin Peaks in a flat country – Bank supervision in the Netherlands' Paper delivered at the Colloquium on 'Twin Peaks' on 28 September 2017 & Schmulow (n 114) 4-5.

[122] National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 4) 5. See also Van Niekerk & Van Heerden 'Twin Peaks: The role of the South African central bank in promoting and maintaining financial stability' 2017 *Journal for Contemporary Roman-Dutch Law* 636 639-640 *et seq*.

[123] National Treasury *Treating Customers Fairly in the Financial Sector* (n 1) 15 & 16; Van Wyk (n 115) 121-122.

[124] *Ibid*; National Treasury 'TWIN PEAKS: Second draft of Financial Sector Regulation Bill and draft Market Conduct Policy Framework discussion document published for comment' Media Statement 11 December 2014 1.

[125] National Treasury *Treating Customers Fairly in the Financial Sector* (n 1) 15 & 16.

[126] *Idem* at 15 (figures on 16 & 17 referenced): '… South African financial institutions are subject to an incomplete and inconsistent legal framework for market conduct, creating opportunities for regulatory arbitrage, and meaning that the level of customer protection depends on the industry and distribution channel. Within this fragmented system financial customers tend to be easily overwhelmed … These effects are heightened by regulatory requirements that tend to focus on sub-sector rules rather than on consistent, cross-sectoral outcomes. Financial institutions find this structure cumbersome and costly, requiring multiple licenses and being subject to multiple Registrars which typically each operate in a different way, with different and at times competing objectives. A siloed approach to financial sector regulation – with each sub-sector governed by a separate and distinct piece of legislation – has naturally led to siloed supervision.'

[127] DTI *Consumer Credit Law Reform* (n 3) par 1.11; Goodhart *et al* (n 9) 4; Prates (n 81) 5-6, 8 & 10.

challenges when attempts are made to regulate this naturally variable sector.[128] There are limits to the capacity of regulation and regulatory mechanisms to achieve certain set outcomes in respect of the financial sector.[129] This has necessitated a convergence of focus on the evolution of regulatory means and manners in order to address the need for adequate and appropriate regulation. [130] International developments in the financial markets have highlighted the important roles that regulation and regulators fulfil within the financial sector.[131] Regulators and regulatory structures have subsequently received much attention[132] and regulators face many challenges:

> 'As business has become more complex and networked so too has the job of regulating. Often in unchartered waters, regulating agencies have to regulate discretely so as not to upset markets, act tactfully to keep government satisfied, and be directly accountable to Courts as well as business, media and stakeholders, at the same time as developing innovative regulatory strategies to govern innovative regulatory practices.'[133]

In light of the awareness of the role of regulators, the independence of financial regulatory authorities has garnered further international attention.[134] Independence alone does not

[128] Prates (n 81) 5-10; Lumpkin 'Regulatory issues related to financial innovation' 2009 *Organisation for Economic Co-operation and Development Journal: Financial Market Trends* 2-4; Awrey 'Regulating financial innovation: A more principles-based approach?' 2010-2011 *Brooklyn Journal of Corporate Financial & Commercial Law* 273 273 & 315.

[129] Prates (n 81) 5 *et seq*; Lumpkin (n 128) 12-13.

[130] Prates (n 81) 5 *et seq*; Awrey (n 128) 275 & 281-282; Porteous 'Policy Focus Note 2: Consumer Protection in Credit Markets' Financial Initiative Framing Note July 2009 16. See also Baldwin & Black 'Really responsive regulation' 2008 *Modern Law Review* 59 59 *et seq* for an example in this regard.

[131] See e.g. National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 4) 11-13; Awrey (n 128) 281-282; Nagarajan 'From "command-and-control" to "open method coordination": Theorising the practice of regulatory agencies' 2008 *Macquarie Law Journal* 5 5; Mollentze 'The South African Reserve Bank' in Van Wyk *et al* (eds) *Understanding South African Financial Markets* (2012) 46; Hawkins & Torr (n 75) 77-79. See also Financial Stability Board *Consumer Finance Protection with particular focus on credit* 26 October 2011 4 & 5; Georgosouli 'The revision of the FSA's approach to regulation: an incomplete agenda?' 2010 *Journal of Business Law* 599 607 & Prates (n 81) 9, 14 *et seq* for examples in this regard.

[132] See e.g. Jones 'Back to basics: Why financial regulatory overhaul is overrated' 2009-2010 *Entrepreneurial Business Law Journal* 391; Hadjiemmanuil 'Institutional structure of financial regulation: A trend towards "megaregulators"?' 2000-2001 *Yearbook of International Financial and Economic Law* 127; Georgosouli (n 131) 599; Goodhart *et al* (n 9) 150-159.

[133] Nagarajan (n 131) 18. See also Weber 'Structural regulation as antidote to complexity capture' 2012 *American Business Law Journal* 643 (specifically noting 'challenges' in respect of 'complex systems' at 649 & 680) for banking regulatory challenges.

[134] See e.g. Zywicki 'The Consumer Financial Protection Bureau: Savior or Menace?' 2013 *George Washington Law Review* 856 875; Quintyn & Taylor *Should financial sector regulators be independent?* 2004 *International Monetary Fund Economic Issues* No 32; Quintyn *et al The Fear of Freedom: Politicians and the Independence and Accountability of Financial Sector Supervisors* (IMF Working Paper WP/07/25) 2007; Mwenda *Legal aspects of financial services regulation and the concept of a unified regulator* (2006) ch 2; Metzger 'Through the looking glass to a shared reflection: The evolving relationship between administrative law and financial regulation' 2015 *Law and Contemporary Problems* 129; Bressman & Thompson 'The future of agency independence" 2010 *Vanderbilt Law Review* 599; OECD *G20 High-Level Principles* (n 84) 5; Financial Stability Board *Consumer Finance Protection* (n 131) 9.

guarantee proficiency in regulation,[135] but it has been hailed as a legitimate consideration where these institutions are concerned because independence can contribute to sound financial sector regulatory oversight.[136] The other relevant aspect, recognised by international scholars and drafters of best practices, is the matter of the accountability of financial sector regulators.[137] Accountability is often deliberated in the context of independence and *vice versa*, as the two aspects are juxtaposed in the regulatory sphere when it comes to regulators.[138] In this regard, Colin Scott notes the following:

> 'Debates over accountability have to grapple with the uncomfortable dilemma of how to give sufficient autonomy to these actors for them to be able to achieve their tasks, while at the same time ensuring an adequate degree of control.'[139]

In South Africa, the National Treasury indicated that the new legislation modelling Twin Peaks, would provide for independent and accountable regulators – independence and accountability are therefore explicitly stated as government policy priorities:

> 'Principle 5a: Regulators must operate objectively with integrity and be operationally independent, but must also be accountable for their actions and performance. Regulators must be empowered to work without fear or favour and be operationally independent within an approved legislative and policy framework. They must operate transparently and fairly within the law, and be accountable for their actions – meeting agreed performance objectives and targets for each year. Special mechanisms may need to be considered to protect the integrity of regulators, and avoid abuse and unwarranted interference from those breaking the rules.'[140]

The drafters of the policy documents cited international best practices as foundations for the attention to independence and accountability.[141]

[135] Mwenda (n 134) 26.

[136] Quintyn & Taylor (n 134); Mwenda (n 134) 25 & 32; Zywicki (n 134) 875.

[137] See e.g. Hüpkes *et al Accountability of Financial Sector Supervisors: Principles and Practice* (IMF Working Paper wp/05/51) 2005; Bird 'Regulating the regulators: Accountability of Australian regulators' 2011 *Melbourne University Law Review* 739; Scott 'Evaluating the performance and accountability of regulators' 2014 *Seattle University Law Review* 353; Goodhart *et al* (n 9) 68-69; OECD *Policy Framework for Effective and Efficient Financial Regulation General Guidance and High-Level Checklist* 2010 18-19; OECD *G20 High-Level Principles* (n 84) 5; Financial Stability Board *Consumer Finance Protection* (n 131) 11. In respect of Australia specifically, see *Financial System Inquiry Final Report* November 2014 238: 'The system must have highly skilled, effective regulators that are both independent and accountable for discharging their mandates.'

[138] Quintyn & Taylor (n 134); Quintyn *et al* (n 134) 4-5, 11 & 34-35; Mwenda (n 134) 25; Metzger (n 134) 130; Bird (n 137) 743-745; Scott 'Evaluating the performance and accountability of regulators' (n 137) 356-357 & 360.

[139] Scott 'Accountability in the regulatory state' 2000 *Journal of Law and Society* 38 39.

[140] National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 4) 25-26. See also National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 4) 30-31; National Treasury *Treating Customers Fairly in the Financial Sector* (n 1) 31 & 72; National Treasury *Twin peaks in South Africa* (n 7) 5; Financial Regulatory Reform Steering Committee (n 38) 31-32.

[141] National Treasury *Treating Customers Fairly in the Financial Sector* (n 1) 73 & 91; National Treasury *Twin peaks in South Africa* (n 7) 15; Financial Regulatory Reform Steering Committee (n 38) 9.

The Financial Sector Regulation Act provides for the construction of one of the regulators with which this research is concerned, namely the Financial Sector Conduct Authority, and confers extensive abilities on the Authority to enable it to reach its objectives.[142] However, the Act does not specifically denote the Authority as independent.[143] The applicable legal framework must therefore be analysed in order to determine whether the Authority is indeed independent and accountable.

The National Credit Regulator is specifically endowed with independence by virtue of section 12 of the National Credit Act and the initial policy document indicated that it would be 'accountable to Parliament through the offices of the' Department of Trade and Industry.[144] The Regulator is still a separate financial regulator but the Financial Sector Regulation Act has imposed additional duties on it in order to achieve the outcomes envisaged by the new proposed legislation.[145]

Nevertheless, the regulatory scope of the Financial Sector Regulation Act includes consumer credit,[146] but the substantive provisions of the National Credit Act have remained untouched by the financial sector reformations so far. A similar analysis of the legal framework is therefore also necessary to determine whether the Regulator is indeed independent and accountable in line with international prescriptions.[147] The reforms in the South African sector have to be considered and changes to the regulatory structure can bring certain concerns to the front, as Renee Jones notes:

> 'The unprecedented size and power of the newly proposed agencies also cautions restraint. Consolidation could result in the creation of unwieldy agencies that are difficult to administer and control. Risks of regulatory capture and regulatory missteps intensify with a consolidated regulator. The elimination of alternative agencies with jurisdiction over financial institutions means the absence of a backstop when the principal regulator falls asleep at the switch.'[148]

[142] See ch 4 part 1 & e.g. chs 7-10 of the FSRA.

[143] Nevertheless, see National Treasury *Twin peaks in South Africa* (n 7) 29: 'The law makes it clear that both authorities are operationally independent in the sense that they are not subject to direction, other than as provided for in the Act. This requirement, coupled with the way in which members of the authorities are appointed and dismissed, the statutory protection afforded to staff of the authorities (provided they do not act in bad faith), and the way in which they are funded, aligns with international best practice for operational independence.'

[144] DTI *Consumer Credit Law Reform* (n 3) par 7.6.

[145] See the Long Title, ch 2 (parts 2, 3 & 5) & ch 5 (parts 1-3) of the FSRA. See also National Treasury *Twin peaks in South Africa* (n 7) 30-31.

[146] See s 2(1)(g) of the FSRA regarding the inclusion of 'the provision of credit in terms of a credit agreement regulated in terms of the National Credit Act' in the definition of a 'financial product'.

[147] See e.g. OECD *G20 High-Level Principles* (n 84) 5; Financial Stability Board *Consumer Finance Protection* (n 131) 11.

[148] Jones (n 132) 401.

3. ORIENTATION OF THE RESEARCH PROJECT

3.1. Contents

The point of departure of the thesis is the following: The National Credit Regulator and the Financial Sector Conduct Authority are sufficiently independent and accountable. This hypothetical view is based on the expressions of independence and accountability in the South African policy documents and legislation referred to above.[149] In order to prove or disprove the policy- and legislation-based hypothesis, I identify the features of a regulator that would render it independent and accountable from international scholarship. Against this background, I assess the South African regime in order to determine which features affect the independence and accountability of the National Credit Regulator and the Financial Sector Conduct Authority as statutory market conduct regulators of the consumer credit industry. Based on the aforementioned evaluation, the research disproves the hypothesis by finding that the National Credit Regulator and Financial Sector Conduct Authority are not adequately independent and accountable by virtue of the notations in policy documents and legislation to this effect. The thesis recommends changes in order to ameliorate the *status quo*. These changes show that independence- and accountability-enhancing features must be incorporated into the institution deliberately.[150]

I have divided the thesis into two parts. The first part of the thesis is descriptive and sets the groundwork for the South African analysis undertaken in the second part. This thesis is written for the South African audience and the first part does not aim to add to, or subtract from, theories, principles and recognised elements of independence and accountability. It deals with concepts that may be familiar to the international audience because the framework is drawn from international scholarship. I have also aimed to identify features recognised by multiple scholars as opposed to regulatory features hailed as enhancing independence and accountability on isolated occasions.

The rationale for this approach is the following: The South African position cannot be analysed meaningfully without a proper referencing framework and part one is therefore instrumental. The contribution of the thesis lies in the application of the assessment framework (developed in part one) to the South African regime (undertaken in part two). I will recommend changes to the South African regime based on international developments.

[149] See par 2.4 *supra*.

[150] See Barkow 'Insulating agencies: Avoiding capture through institutional design' 201 *Texas Law Review* 15 18 & 79; Thatcher & Stone Sweet 'Theory and practice of delegation to non-majoritarian institutions' 2002 *Western European Politics* 1 5.

As such, the research focuses on domestic regulators and not on international regulators or bodies that have regulatory functions.

The first part of the thesis deals with some theoretical underpinnings that have a bearing on the issue of entrusting state responsibilities to autonomous entities mandated to regulate and supervise an identified industry, namely 'new institutionalism'[151] and the 'principal-agent' theory.[152] I examine the reasons for the establishment and empowerment of regulators through desktop research in order to consider the need for measures to ensure independence and accountability of these regulators for the proper performance of their duties and achievement of their outcomes.[153] It serves as an important feature of the thesis to highlight the impact of regulators on the structure of government.[154] This part is not only aimed at providing information to found the coming enquiries, but also justifies the research.

South African literature on the prevalence of independence and accountability of regulators is scarce and even more so where financial regulators are the objects of scrutiny. I could therefore not analyse the South African position in a meaningful way without first extrapolating the factors that affect the independence and accountability of financial market

[151] See e.g. Gilardi 'Institutional change in regulatory policies: regulation through independent agencies and the three new institutionalisms' in Jordana & Levi-Faur (eds) *The Politics of Regulation Institutions and Regulatory Reforms for the Age of Governance* (2004); Spruyt 'New institutionalism and International Relations' in Palan (ed) *Global Political Economy Contemporary Theories* (2013); Black 'New institutionalism and naturalism in socio-legal analysis: Institutionalist approaches to regulatory decision making' 1997 *Law & Policy* 51.

[152] See e.g. Thatcher & Stone Sweet (n 150); Thatcher 'Delegation to independent regulatory agencies: Pressures, functions and contextual mediation' 2002 *Western European Politics* 125; Lodge 'Accountability and transparency in regulation: critiques, doctrines and instruments' in Jordana & Levi-Faur (eds) *The Politics of Regulation Institutions and Regulatory Reforms for the Age of Governance* (2004) 126; Gilardi 'The formal independence of regulators: a comparison of 17 countries and 7 sectors' 2005 *Swiss Political Science Review* 139.

[153] See ch 2 *infra*.

[154] See e.g. Mwenda (n 134) 34: 'Some commentators have branded independent regulatory agencies as the "fourth branch of government," implying that they are outside the control of the traditional three branches that keep mature democratic systems in equilibrium through a system of checks and balances. Quintyn and Taylor observe that, although such fears appear to be exaggerated, they nevertheless demonstrate the importance of having proper forms of accountability to balance the disadvantages of agency independence.' See also Thatcher & Stone Sweet (n 150) 15-16.

conduct regulators from existing literature.[155] This is done in part one of the thesis and the summaries of the chapters in the subsequent paragraph shed more light on the specific themes discussed in this regard.

As the research necessitated a comparative element, I perused the work of international scholars and some foreign jurisdictions that identified the challenges associated with independence and accountability, or at least highlighted the need for appropriate measures. In order to delineate the scope of the research, I focused on jurisdictions that reflect the position of the South African regime, taking into account the developments in its regulatory frameworks for consumer credit and the financial sector.[156]

I discuss some features of the consumer protection agency of the United States of America, which is a separated institution[157] and, to some extent, comparable to the current position of the National Credit Regulator in the regulatory framework of South Africa. The Commonwealth of Australia and the United Kingdom have financial sector market conduct regulators functioning in a Twin Peaks context.[158] The measures employed in, experiences of, and criticisms against the approaches of these jurisdictions proved to be bountiful grounds for gathering information for this thesis. As such, I integrated the specific comparative research into the chapters that set out the principles pertaining to independence and accountability, instead of devoting separate chapters to specific regulators in foreign jurisdictions. This

[155] I considered a variety of literature about 'regulation' in general, which structured my understanding of the concept and which influenced my thinking – over and above authors already referred to, see Ford 'Financial innovation and flexible regulation: Destabilizing the regulatory state' 2013 *North Carolina Banking Institute* 27; Black *et al* 'Making a success of principles-based regulation' 2007 *Law & Financial Markets Review* 191; Black 'Proceduralisation and polycentric regulation' 2005 *Revista Direito GV Law Review* 99; Scott 'Regulation in the age of governance: the rise of the post-regulatory state' in Jordana & Levi-Faur (eds) *The Politics of Regulation Institutions and Regulatory Reforms for the Age of Governance* (2004); Coglianese & Lazer 'Management-based regulation: Prescribing private management to achieve public goals' 2003 *Law & Society Review* 691; Black 'Critical reflections on regulation' 2002 *Australian Journal of Legal Philosophy* 1; Black 'Regulatory conversations' 2002 *Journal of Law and Society* 163; Black 'Regulation as facilitation: Negotiating the genetic revolution' 1998 *Modern Law Review* 621; Black 'Constitutionalising self-regulation' 1996 *Modern Law Review* 24. Julia Black's writings on regulation have been instrumental in shaping my understanding of what the concept entails as well as the manner in which I view the complexity of the South African regulatory system. See also Ramsay (n 63) 10, who notes that '[t]here is also the increasing use of "international benchmarking" to compare the effectiveness of regulatory regimes'.

[156] Financial Stability Board *Peer Review of South Africa* (n 1) 13.

[157] Levitin 'The Consumer Financial Protection Bureau: An Introduction' 2012-2013 *Review of Banking & Financial Law* 321 322 & 339-340; Zywicki (n 134) 875.

[158] Financial Stability Board *Peer Review of South Africa* (n 1) 13; Mwenda (n 134) 9; ch 6 of the Financial Services Act of 2012. I also found the papers and discussions of Andrew Godwin ('The Trek towards Twin Peaks in Australia'), Justin O'Brien ('Bears, Benchmarks, Codes of Conduct and Regulatory Authority – The Inherent Contradiction and Dysfunction of Australia's Twin Peaks Model'), Andy Schmulow ('Seismic Activity and Fault Lines') & Gail Pearson ('Twin Peaks: Consumer Protection and Credit') delivered during the Colloquium on 'Twin Peaks' in Pretoria on 28 September 2017 insightful.

approach is necessary in order to understand all the features of independence and accountability prior to evaluating the South African regulators.

In light of the detailed aspects under consideration, the decision was made to refer mainly to the positions in the United States of America and the Commonwealth of Australia for comparative purposes and specific examples of features that enhance independence and accountability. However, there were also valuable lessons to be learnt from the United Kingdom. The following paragraphs provide selected reasons for this decision.

I refer to the Bureau of Consumer Financial Protection of the United States of America in this thesis. The Bureau is a federal institution responsible for consumer safety when it comes to financial products and services.[159] This entity has been a source of contention in literature as it has unusual authority and enjoys extraordinary regulatory liberties.[160] Special attention was given to render the Bureau autonomous and enabled to address the challenges that prompted its creation.[161] The United States has a long history of independent agencies and this particular characteristic of an agency has been debated in academic circles as well as political and judicial forums.[162] In addition, the mandate of this particular regulatory body reflects a combination of those found in the National Credit Act and the Financial Sector Regulation Act, as can be seen from perusing the Consumer Financial Protection Act of 2010.[163] As such, the general and Bureau-specific views of writers of the United States' position insofar as independent agencies are concerned, are frequently referred to in this thesis.

[159] Levitin (n 157) 335 & 339; McCoy 'Public engagement in rulemaking: The Consumer Financial Protection Bureau's new approach' 2012-2013 *Brooklyn Journal of Corporate, Financial & Commercial Law* 1 1; Peterson 'Consumer Financial Protection Bureau law enforcement: An empirical review' 2016 *Tulane Law Review* 1057 1067-1068. I do not deal with the federal-state interaction in this thesis – for some comments in this regard, see Barkow (n 150) 15 74-76. In respect of state law, see also Subtitle D of Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act Public Law 111-203. Title X is also called the Consumer Financial Protection Act of 2010 – see s 1001 for its 'short title'.

[160] See Financial Stability Board *Consumer Finance Protection* (n 131) 11 in respect of the entity being 'an independent bureau with autonomous rule-writing authority' and which is highlighted in the report as an 'exception' as 'it is uncommon for financial conduct regulators to have independent rule-making authority included in their mandates'; CCH Attorney-Editor Staff (n 75) 480, 484 & 485; Zywicki (n 134) 875; Levitin (n 157) 337.

[161] CCH Attorney-Editor Staff (n 75) 480, 484 & 485; Barkow (n 150) 72-78; Levitin (n 157) 334, 337 & 339. See also Kirsch & Squires *Meltdown: the financial crisis, consumer protection, and the road forward* (2017) (for an in-depth (and narrative progressive) discussion of the ideology, development and activities of the Consumer Financial Protection Bureau (hereinafter 'CFPB')); Kirsch & Mayer *Financial justice: the people's campaign to stop lender abuse* (2013) 69-70 & 72.

[162] See generally e.g. Barkow (n 150) 16; Verkuil 'The purposes and limits of independent agencies' 1988 *Duke Law Review* 257 257 & 258. For specific examples relating to the CFPB, see e.g. *PHH Corporation, Et Al.*, Petitioners, *v. Consumer Financial Protection Bureau*, Respondent No. 15-1177 (Argued April 12, 2016. Decided October 11, 2016.) United States Court of Appeals, District of Columbia Circuit; Peterson (n 159) 1061-1062; Levitin (n 157) 337-338 (including fn 85) & 339; Zywicki (n 134) 860-861.

[163] Compare e.g. the definitions in ss 1002(5), (7) & (15) (e.g. (15)(A)(i) & (viii)) of the Consumer Financial Protection Act of 2010 with s 1 of the NCA & ss 2 & 3 of the FSRA; ss 1021 of the Consumer Financial Protection Act of 2010 with s 57 & 58 of the FSRA.

I mentioned earlier that Australia has a Twin Peaks regulatory framework and I refer to the Australian Securities and Investments Commission in this thesis, as there are a number of similarities between the South African and Australian position[164] – aspects that have not been ignored by academic authors writing comparatively on Twin Peaks.[165] The Commission is first and foremost a market conduct regulator and its mandate parallels that of the South African National Credit Regulator and Financial Sector Conduct Authority in many instances.[166] However, it also has some prudential tasks.[167]

In contrast to the National Credit Regulator, but in line with the position of the regulators under the Financial Sector Regulation Act, the Australian legislative framework for the Australian Securities and Investments Commission is set out in one statute with additional powers sourced from substantive legislation, such as the Corporations Act and the National Consumer Credit Protection Act.[168]

[164] See fn 158 *supra*. The Australian Securities and Investments Commission (hereinafter 'ASIC') forms part of the Australian Council of Financial Regulators and makes use of memoranda of agreement – see Australian Council of Financial Regulators 'Homepage', http://www.cfr.gov.au/; Reserve Bank of Australia 'The Council of Financial Regulators', http://www.rba.gov.au/fin-stability/reg-framework/cfr.html; Reserve Bank of Australia 'Media Release Memorandum of Understanding The Australian Securities and Investments Commission and the Reserve Bank of Australia', http://www.rba.gov.au/media-releases/2002/mr-02-08.html. See also ss 79 (Financial System Council of Regulators) & 77 (Memoranda of understanding) of the South African FSRA.

[165] See e.g. Godwin *et al* (n 114); Schmulow (n 114); Godwin (n 114) & Pearson 'A credit lens: implementing twin peaks' 2017 *Law and Financial Markets Review* 1.

[166] See e.g. ASIC 'Our role', http://www.asic.gov.au/our-role; International Monetary Fund *Australia: Report on the Observance of Standards and Codes* 2012 34 & 36-37; ss 14 & 15 of the NCA; ss 57 & 58 of the FSRA; ss 1(2), 11(6) & 12A (& division 2 of part 2 for some substantive provisions) of the Australian Securities and Investments Commission Act (Act 51 of 2001); s 239 (& see ch 2 for some substantive provisions) of the (Australian) National Consumer Credit Protection Act (Act 134 of 2009). See Comino 'Effective Regulation by the Australian Securities and Investments Commission: The Civil Penalty Problem' 2009 *Melbourne University Law Review* 802 803 & *Fit for the Future A capability review of the Australian Securities and Investments Commission A report to Government* December 2015 30 for a brief review of the Commissions' history. See also *Fit for the future* (n 166) 34: 'ASIC's mandate is extensive, and is not fully replicated by any other conduct regulator globally. It broadly covers three areas: 1. financial markets, financial services and corporate regulation; 2. business and company registration; 3. credit and insolvency practitioners.'

[167] International Monetary Fund *Australia: Report on the Observance of Standards and Codes* (n 166) 34, 36-39. See also Pearson (n 165) 1, who reasons that the comparison with Australia is for a discussion on a financial services sector that is quick to change and that the '… consumer credit regime illustrates the interaction of prudential and conduct regulation, the importance of sensitivity to both wholesale and retail markets in credit, and the risks that market failures in the distribution of credit can pose to individuals and the system.'

[168] See ss 11(1) & 12A of the Australian Securities and Investments Commission Act; Australian Securities and Investment Commission 'Our role' (n 166); Welsh 'Civil penalties and responsive regulation: The gap between theory and practice' 2009 *Melbourne University Law Review* 908 908-909. See also Bird *et al* 'Strategic regulation and ASIC enforcement patterns: Results of an empirical study' 2005 *Journal of Corporate Law Studies* 191 191 *et seq* specifically the reference at 203 to the Australian Securities and Investment Commission Act-related legislation predating the 2001 Act but incorporated into the current legislative framework. The sections in part 16 of the 2001 Act relates to aspects such as bodies previously brought into existence (see s 261), regulations (see s 264) and other transitional provisions (see part 16). See also Comino (n 166) 803 for a brief history of the Commission.

The Commission is described as independent,[169] and powerfully enabled to change and adjust the regulatory landscape.[170] It is empowered to 'modify the primary legislation' as opposed to the more general capability to effect 'delegated legislation'[171] – Stephen Bottomley refers to the Australian Securities and Investments Commission as 'the Notional Legislator'.[172] Its powers include the ability to correct inaccuracies or mistakes in legislation, mandate exclusion of the application of the legislation in respect of certain provisions, increase the scope and harmonise the functioning of the legislation.[173] Although there are benefits to these regulatory capacities, the shortcomings and potential dangers have been noticed and criticised.[174] Accountability is an aspect that raises concern.[175]

The Australian Department of the Prime Minister and Cabinet has established an Office of Best Practice Regulation.[176] This office is responsible for quality regulatory development through the management of assessment protocols that are aimed at achieving the Australian Government's objective of 'deliver[ing] effective and efficient regulation – regulation that is effective in addressing an identified problem and efficient in terms of delivering benefits while minimising the costs to the economy'.[177] The government has also invested in developing a 'Regulator Performance Framework'.[178] Against this backdrop of regulator-specific mandates and capacities, inter-regulator collaboration and relations, and a larger structure pertaining to regulatory policy development and deliberation, the Australian position is ideally suited for comparative purposes.

I refer to the United Kingdom, albeit to a lesser extent than the references made to the positions in the United States and the Commonwealth of Australia. The references are only

[169] See Government of Australia 'Financial regulation', http://australia.gov.au/topics/economy-money-and-tax/financial-regulation; ASIC 'Our role' (n 166); *Fit for the future* (n 166) 30. Independence is important, as can be seen from the recommendations to strengthen it – see International Monetary Fund *Australia: Report on the Observance of Standards and Codes* (n 166) 30.

[170] Bottomley 'The notional legislator: The Australian Securities and Investments Commission's role as law-maker' 2011 *Federal Law Review* 1 2 & 5.

[171] *Idem* at 2. Bottomley (n 170) states at 9 that these provisions 'do not have the formal status of sections in the legislation … [but] nevertheless, have force of law. Their effect is the same as that of formal legislative provisions.'

[172] See fn 171 *supra*.

[173] Bottomley (n 170) 11-12.

[174] *Idem* at 17 et seq.

[175] *Idem* at 31. The discussion from 17 also indicates shortcomings in the areas that support accountability.

[176] Department of the Prime Minister and Cabinet – Office of Best Practice Regulation (Australia) 'Office of Best Practice Regulation', http://www.dpmc.gov.au/deregulation/obpr/.

[177] Department of the Prime Minister and Cabinet – Office of Best Practice Regulation (Australia) 'Best Practice Regulation Making', http://www.dpmc.gov.au/deregulation/obpr/proposal/index.cfm; see also Scott 'Evaluating the performance and accountability of regulators' (n 137) 365; Office of Best Practice Regulation *Best Practice Regulation Report 2006-07* 2007 Annual Report Series, Productivity Commission, Canberra xv.

[178] Australian Government *Regulator Performance Framework* 2014.

made where I came upon a particular element employed within the jurisdiction that added to the topic under discussion. The structure of financial regulation in the United Kingdom mirrors that of the South African regime insofar as provision is made for a market conduct regulator in the style of the Financial Conduct Authority as part of the Twin Peaks model.[179] The legislation sets out the compilation and some powers of the regulator including a set of regulatory principles that regulators have to consider when executing their duties.[180]

Further sources for comparative purposes are international best practices on regulatory policy, regulation and consumer protection.[181] The following are of particular relevance: the work of the United Nations,[182] Organisation for Economic Co-operation and Development, [183] the Financial Stability Board,[184] the International Association of Securities Commissions[185] and the World Bank.[186] These sources of international best practices do not relate to a specific jurisdiction and set out general norms and standards that can guide national policy drafters and legislators when designing regulatory institutions.[187] The value of the work of these organisations is two-fold: the organisations recognise that financial regulators should be independent and accountable, and they set out characteristics that increase independence and accountability.[188]

[179] See par 2 & fn 158 *supra*; 1A – 1E of the Financial Services and Markets Act 2000.

[180] See e.g. chs 1 & ch 3 (specifically 3B) of the Financial Services and Markets Act 2000.

[181] The commentary by Mwenda (n 134) 89 deserves mention at this stage (taking note of the specific context within which the comment is made): ‘Although there is not much evidence of the existence of broadly accepted standards of best practices in the structuring of unified financial services regulators, there is some evidence of common threads that could guide policy makers and law reform institutions in the design of a sound legal framework for the unified supervision of financial services.’

[182] United Nations Conference on Trade and Development *United Nations Guidelines for Consumer Protection* 2016.

[183] OECD *G20 High-Level Principles* (n 134); OECD *Policy Framework for Effective and Efficient Financial Regulation* (n 137); OECD *Regulatory Policy Committee Indicators of Regulatory Management Systems 2009* Report 2009.

[184] Financial Stability Board *Consumer Finance Protection* (n 131).

[185] International Organisation of Securities Commissions (hereinafter ‘IOSCO’) *Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation* May 2017.

[186] World Bank *Good Practices for Financial Consumer Protection* (n 4). However, the World Bank notes at 1: ‘The 2017 edition of the Good Practices is also specifically designed not as high-level principles, guidelines, or “best” practices. Rather, it is intended to serve as a practical, helpful collection of “good” practices in financial consumer protection, more detailed than principles or guidelines and drawing on successful practices seen around the world.’

[187] World Bank *Good Practices for Financial Consumer Protection* (n 4) 1-2; OECD *G20 High-Level Principles* (n 134) 4; OECD *Policy Framework for Effective and Efficient Financial Regulation* (n 137) 3 & 7-8; OECD *Indicators of Regulatory Management Systems* (n 183) 7-8; IOSCO (n 185) 8-9; Financial Stability Board *Consumer Finance Protection* (n 131) 1 & 3.

[188] World Bank *Good Practices for Financial Consumer Protection* (n 4) 67; OECD *G20 High-Level Principles* (n 134) 4 & 5; OECD *Policy Framework for Effective and Efficient Financial Regulation* (n 137) 18-19 & 48; OECD *Indicators of Regulatory Management Systems* (n 183) 55 *et seq* (in respect of regulatory impact assessments – see par 5.2.3 of ch 4 *infra*); IOSCO (n 185) 5 & 25-29; Financial Stability Board *Consumer Finance Protection* (n 131) 9 & 11.

The second part of the thesis is a country-specific analysis in which the positions, mandates and powers of the South African National Credit Regulator and the Financial Sector Conduct Authority are considered and compared. Proper and accurate analyses of the aforementioned aspects relating to the regulators are, for three reasons, of cardinal importance in order to establish the domestic frameworks for independence and accountability. Firstly, the South African financial sector regulatory framework is under construction and the positions of the regulators within the novel structure new-fangled.[189] Secondly, I am of the opinion that the mandate of the National Credit Regulator has been misinterpreted in the past.[190] Thirdly, *what* the regulators should account for must be identified, together with the extent to which they should be clothed with real autonomy.[191]

I consider, compare and evaluate the current independency and accountability measures in place in respect of these two regulators. This part sets the scene for the South African predicament and validates the research by showing the need for enhancement of the South African regime. The positions of the two regulators within the South African financial sector are also discussed within the context of consumer credit regulation.

3.2. Limitations

This research is not directly concerned with the following aspects but they feature in the thesis from time to time due to their close proximity to the research theme:

Regulation: In chapter two, I deal with the reason for the establishment of a regulator (primarily to regulate) and deal with the notion of regulation on a very basic level.[192] The thesis is not concerned with regulation *per se*. I nevertheless need to deal with regulation at some stage or another because regulators are responsible for regulation and, as I show in chapters three and four, the mandated responsibilities of regulators are important considerations when independence and accountability are assessed.[193] I deal briefly with various forms or manners of regulation[194] in order to give the reader a broad understanding of

[189] See paras 2.1, 2.3 & 2.4 *supra*.

[190] See my comments in chs 5 & 6 of part 2 *infra* on the submissions made by Govender *Has the National Credit Regulator fulfilled its mandate in promoting a credit market as envisaged in the preamble and purposes of the National Credit Act 34 of 2005?* November 2014 LLM Dissertation Faculty of Law University of Johannesburg. See also the comments and dialogue relating to Herbert Kawadza and Stephen Logan in Kawadza 'Now is the time to end credit chaos' Business Times LIVE 26 October 2014; Kawadza 'Twin peaks regulation deserves a fair chance' Business Times BDLive 21 September 2014; Logan 'Twin peaks and the NCR' Personal Finance 1 November 2014 – this is dealt with in ch 2 of part 1 *infra*.

[191] See e.g. Bird (n 137) 742, 745-747; Scott 'Evaluating the performance and accountability of regulators' (n 137) 360 & 361; Mwenda (n 134) 26 & 33-34; Lodge (n 152) 124.

[192] See par 3.1 of ch 2 *infra*.

[193] See *inter alia* par 4.3 of ch 3; par 3.1 of ch 4 *infra*.

[194] See par 2 of ch 2 *infra*.

what the concept entails. Although I do not deal with every possible manifestation of regulation in chapter two or elsewhere in this thesis, it is still a valuable aspect to keep in mind for future developments in, or research in respect of, the South African sphere, and the development of performance indicators as recommended in chapters seven and eight.[195]

The interaction between prudential and market conduct regulation:[196] The broader framework for the thesis is the market conduct regulation of the South African consumer credit industry. I have noted earlier that the National Credit Regulator and the Financial Sector Conduct Authority are not the only statutory regulators that affect the consumer credit industry, or regulate stakeholders and role-players involved in this particular industry.[197] The South African Reserve Bank and Prudential Authority are also legislatively established regulators but, in the context of consumer credit, they focus primarily on the stability of the financial sector and financial institutions.[198] The National Credit Regulator and the Financial Sector Conduct Authority are consumer protection and market conduct regulators, meaning that they *inter alia* control the behaviour of stakeholders and role-players towards each other, mostly in a customer-provider relationship.[199] Notwithstanding the separation of specialities, the policy document generated by the National Treasury on the aptness of the Twin Peaks model for South Africa indicated that market conduct regulation could not be wholly removed from prudential considerations:

> ‘Market conduct regulation restricts such abuses and also complements prudential objectives. As was demonstrated in the subprime crisis, inappropriate selling of financial products can have systemic effects and, a lack of confidence in the financial system due to poor market conduct practices causes losses to consumers and inhibits economic growth.’[200]

[195] See par 8 of ch 7; par 7 of ch 8 *infra*.

[196] See par 2.2 *supra*; par 1 of ch 3 *infra*.

[197] See par 2.1 *supra*.

[198] See par 1.3 *supra*; Mollentze (n 131) 37-38 *et seq* (for a broader view of the duties of the Reserve Bank) & 46-48 (for the pre-Twin Peaks prudential role of the Reserve Bank); chs 2 (parts 1, 2 & 6) & 3 (part 1) of the FSRA; National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 4) 1, 12, 28-29 & 31-32, Financial Regulatory Reform Steering Committee (n 38) 37-39, 42, 43 & 46. See also Goodhart *et al* (n 9) 5 for the difference between systemic regulation and prudential regulation.

[199] National Treasury *Treating Customers Fairly in the Financial Sector* (n 1) 24 & 31; National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 4) 32-33 & 39-40; Financial Regulatory Reform Steering Committee (n 38) 3, 6 & 18 (see also 47-57 for the full range of tasks envisaged for the market conduct regulator).

[200] National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 4) 40 (see also 13, 27, 28 & 32). See Pearson ‘A credit lens’ (n 165) 4 in respect of the stability issues to which credit can contribute – she notes the following: ‘A critical issue here is the distribution system for credit and misalignment of incentives to sell credit and the provision of suitable and affordable credit … South Africa has a complex system of providing access to credit to the different market segments for credit. The National Credit Regulator has responsibilities to ensure all aspects of this market do not imperil individuals or the overall credit market through misaligned conduct.’

Credit regulation: I am of the view that credit should be regulated and do not enter into the regulation/deregulation debate.[201] This is a complicated debate because it does not pertain solely to the research field of law but incorporates economics and politics, to name but a few subject areas.[202] The thesis is concerned with a credit regime and credit regulators that are already in existence (and have been for some time) and no purpose is served by debating whether credit should be regulated in South Africa or not. The context of this project differs from a project aimed at researching the rationales for credit regulation.

I do not delve into the mandates of regulators or aim to establish whether the regulators meet the outcomes set by theorists for credit regulation:[203] My research is focused on regulators and regulatory practices that pertain to the institutional dispensations, specifically focusing on independence and accountability, and I am not of the opinion that theorising about credit regulation, over and above what was stated earlier in this chapter, will contribute significantly to the debate with which this thesis is concerned. To do so would change the departure, and nature, of this particular thesis. It would also add to the length of the thesis because the theoretical considerations for financial service regulation would also be needed – catapulting the thesis firmly into the substantive, as opposed to institutional, sphere of financial and credit regulation. However, this does not mean that it could not be a relevant research theme for future research but the focus, aims and outcomes of such a research project would differ notably from this thesis.

The introduction to the research milieu above set out the main reasons why the South African government focused on regulating credit and financial services but I elaborate on this theme in chapter 5.[204] I have also briefly set out some rationales for credit regulation, but it is by no means comprehensive.[205] 'Credit', for purposes of this thesis will be understood as

> '[t]he right granted by a credit provider (or lender or creditor) to a borrower (or debtor) to defer payment of a debt (or an obligation) or to incur debt and defer its payment. It results from a transaction between the two parties in terms of which the lender supplies the borrower with money, goods, services or securities in return for the promise of future rather than immediate payment, i.e.

[201] See e.g. Ramsay (n 63) 379.
[202] See par 2.2 *supra* and the sources referred to in fn 63.
[203] *Ibid*.
[204] See par 2 *supra*. See also par 2 of ch 5 *infra*.
[205] See par 2.2 *supra*.

> the borrower receives something of value now and agrees to repay the lender at some date in the future, generally with interest'.[206]

In contrast to the above model of immediate receipt and suspended payment, it must be noted that other financial products and services work in an inverted manner – the product, such as insurance, is obtained through the immediate payment of premiums, but the benefit thereof only arises upon the occurrence of an unfortunate event, such as loss of property.[207]

The Twin Peaks regulatory model: I do not enter into the debate as to whether the transition to a Twin Peaks model of regulation in South Africa was a constructive adjustment. Nevertheless, the model has to be discussed because the manner in which it was implemented in South Africa resulted in a design that was not an exact replica of the original model.[208]

In light of the above, the thesis does not present detailed discussions, over and above what is necessary to aid understanding of, and add context to, the research theme. I have also deferred to references and brief discussions in the footnotes where the reader should understand the matter from the main text but where the footnote can assist with a deeper understanding of the issue at hand. Many of the aspects that I deal with in this thesis are specialist areas on their own and I have aimed to deal with the most relevant matters in my discussions.

3.3. Research questions

The primary research questions are the following:

1. Are the National Credit Regulator and the Financial Sector Conduct Authority sufficiently independent and accountable when assessed against factors extrapolated from international scholarship?
2. How can the South African regime be enhanced to align with international best practices and potentially viable options sourced from foreign jurisdictions and international commentators?

In order to address the primary questions, I consider the following secondary questions:

- What are the *raisons d'être* for statutory regulators?

[206] Van Wyk *et al* (eds) *Understanding South African Financial Markets* (2012) xxv-xxvi. See also Hornby *Oxford Advanced Learner's Dictionary of Current English* (2010) 344-345. See par 1.2 *supra;* Otto (n 60) paras 19.01-19.03; Otto 'Credit agreements: Application of act and conclusion of credit agreements' in Nagel *et al Commercial Law* (2015) paras 20.01-20.09 (for a composition of the application of the NCA to credit agreements).

[207] See e.g. National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 4) 41; Hornby (n 206) 780; Gehle & La Grange 'Insurers' in Van Wyk *et al* (eds) *Understanding South African Financial Markets* (2012) 137.

[208] Van Niekerk & Van Heerden (n 122) 642.

- What are the *raisons d'être* for measures that advance independence and accountability in respect of statutory regulators?
- What are the measures that advance independence and accountability of regulators as per international best practices and practices in foreign jurisdictions, and are there any specifically applicable to statutory regulators of consumer credit? In order to gather the necessary information and delineate the search, I kept the additional questions in mind. Firstly, I asked what the mandates of the statutory regulators for market conduct regulation of consumer credit in the United States of America, the Commonwealth of Australia and the United Kingdom were. Secondly, I considered the measures that advance the independence and accountability of these regulators,
- What are the measures that advance the independence and accountability of the South African market conduct regulators for consumer credit? I kept the following question in mind: What are the mandates of the statutory regulators for market conduct regulation of consumer credit in South Africa?
- In order to link parts one and two of the thesis, I kept the following question in mind: How does the South African system compare with the identified international benchmarks for independency and accountability?
- How can the South African system be aligned – as indicated above – to the extent that the research identifies shortcomings that can be ameliorated with reference to the identified international options and practices?

3.4. Structure of the thesis

The thesis is divided into two parts and structured as follows: Part one deals with the foundational principles of the research theme and part two deals with the specific domestic regime. I isolate the general features that affect independence and accountability in the first part. It includes the discussion on international best practices and references the Consumer Financial Protection Bureau, the Australian Securities and Investment Commission and the Financial Sector Conduct Authority (United Kingdom).

Part one serves as the basis for evaluating the South African position against the identified features. Part two deals with the specific South African regulators, namely the National Credit Regulator and the Financial Sector Conduct Authority. The second part determines the state of the existing framework in respect of independence and accountability. The two parts are ultimately linked in that part one is the source for the recommendations, based on the findings of part two, to enhance the domestic framework through alignment with international best practices and potentially viable options sourced from foreign jurisdictions.

Chapter one introduces the research theme and orients the reader in respect of the setting for the research. I start my discussion of the research milieu by briefly considering the maturity and development of the South African Financial Sector and the role of the consumer credit market in the financial sector.[209] Thereafter, I deal with the recent changes in the regulatory landscape and the government's focus on policies of independence and accountability.[210] This part of chapter one is a preliminary contextualisation of the research problem set forth in this thesis. The discussion is of an introductory nature and I elaborate on the South African consumer credit market and subsequent developments in more detail from chapter five onwards. Likewise, I address some of the core considerations surrounding the research problem in chapters two and three.

The rest of chapter one provides the reader with a structural depiction of the thesis, culminating in this summative paragraph. I set out the contents of the thesis together with the core research questions that I wish to address, and the manner in which I aim do so.[211] I also discuss the specific comparative aspects of the thesis.[212] After this paragraph, I briefly deal with the available literature on the subject matter of the thesis and elaborate on the methodology that I used to assess the South African position, also with reference to the comparative aspects of the thesis.[213]

Chapter two conceptualises important themes and contextualises these within the broader scope of theoretical considerations. I deal specifically with the concepts of 'regulation' and 'regulator'.[214] The discussion on the concept of regulation firstly deals with an understanding of the notion and manifestations thereof.[215] Secondly, I deal with various forms or manners of regulation.[216] The discussion on the concept of the regulator is a theoretical discussion that revolves around the rationales for institutional arrangements in a regulated sector. I start with a brief introduction on the purpose and nature of regulators where after I deal with 'new institutionalism' and the 'principle-agent theory'.[217] The theme also necessitates a discussion of the design of institutions that have regulatory tasks although country-specific discussions are primarily undertaken in later chapters.[218]

[209] See paras 2.1 & 2.2 *supra*.
[210] See paras 2.3 & 2.4 *supra*.
[211] See paras 3.1, 3.2 & 3.3 *supra*.
[212] See par 3.1 *supra*.
[213] See par 3.5 *infra*.
[214] See paras 2 & 3 of ch 2 *infra*.
[215] See par 2.1 of ch 2 *infra*.
[216] See par 2.2 of ch 2 *infra*.
[217] See paras 3.1, 3.2 & 3.3 of ch 2 *infra*.
[218] See par 3.4 of ch 2 *infra*.

Chapters three and four deal with the independence and accountability of regulators respectively and introduce the reader to the general principles in respect of these two concepts. I discuss two aspects depicting the relations that regulators have with the government and industry, namely 'delegation' and 'regulatory capture'.[219] The chapters elaborate on the indicators of independence and accountability as well as some general international best practices to enhance independence and accountability of financial sector regulators.

In chapter five, I deal with the legislative and institutional regimes for consumer credit regulation in South Africa. I give brief overviews of the matters that lead to the existing frameworks for consumer credit regulation in South Africa.[220] In respect of the legislative regime, I touch on the policy considerations and incentives for the review that preceded and informed the formulation of the National Credit Act of 2005, and the review that preceded the National Credit Amendment Act (Act 19 of 2014).[221] The discussion includes a consideration of the aims and outcomes of the National Credit Act as well as those of the Financial Sector Regulation Act of 2017.[222] Insofar as the institutional regime is concerned, I deal with the mandate(s) of the regulator(s) and, to some extent, the authority or empowerment of the regulator(s). I further discuss the arrangements established in terms of the Financial Sector Regulation Act and the framework within which these establishments are to function.[223]

Chapters six and seven consider the state of the South African financial sector framework in respect of independence and accountability respectively. I focus on the National Credit Regulator and the Financial Sector Conduct Authority in each chapter. The discussion frameworks are based on the mechanisms identified in chapters three and four, underscored by the theoretical considerations of chapter two. In chapter seven, I deal mostly with statutory accountability mechanisms. The desktop research that I conducted was also not conducive to dealing with all the available mechanisms.

Chapter eight concludes the thesis. In this chapter, I summarise the challenges that were identified and the solutions proposed to some of these challenges by the sources that I consulted. I finish with recommendations for the South African legal system in respect of independence and accountability of autonomous institutions responsible for consumer credit regulation.

[219] See par 2 of ch 3 *infra*.
[220] See paras 2.1 & 2.2 of ch 5 *infra*.
[221] *Ibid*.
[222] See paras 2.1 & 2.3 of ch 5 *infra*.
[223] See paras 3.3-3.5 of ch 5 *infra*.

3.5. Preliminary commentary on available literature

Academic literature on the substance and procedures pertaining to the National Credit Act is profuse.[224] However, critical academic literature pertaining to the National Credit Regulator and the National Consumer Tribunal is notoriously scarce unless it is incorporated as part of a larger reference to a specific substantive theme such as reckless credit, consumer over-indebtedness, registration of credit providers or the Consumer Protection Act (Act 68 of 2008).[225] In respect of the Financial Sector Conduct Authority, the academic literature is also limited and sources mostly discuss the Authority within the broader 'Twin Peaks' structure or in comparison with Australia and/or the United Kingdom.[226]

Monica Vessio is probably the only academic writer that published an article written exclusively on the regulatory powers and functions of the National Credit Regulator.[227] Her article was published in 2008, but the references to her electronic sources indicate that the actual writing of the article was done in 2007 – at most, some six months after the National Credit Act became fully operational on 1 June 2007. Her article highlights areas that interested parties could focus on when considering the then-forthcoming performance of the Regulator.[228]

[224] Otto 'The National Credit Act: Default notices and debt review; the ultra duplum rule – *Nedbank Ltd v National Credit Regulator Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 (SCA)' 2012 *Journal for Contemporary Roman-Dutch Law* 133 133; Otto 'The history of consumer credit legislation in South Africa' 2010 *Fundamina* 257 270 fn 128.

[225] See e.g. Renke *An evaluation of debt prevention measures in terms of the National Credit Act 34 of 2005* November 2012 LLD Thesis Faculty of Law University of Pretoria; Kelly-Louw 'The prevention and alleviation of consumer over-indebtedness' 2008 *South African Mercantile Law Journal* 200 209-210 (and occasionally *et seq*); Van Heerden & Renke 'Perspectives on selected aspects of the registration of credit providers in terms of the National Credit Act 34 of 2005 (1)' 2014 *Journal for Contemporary Roman-Dutch Law* 614 627-631; Van Heerden & Renke 'Perspectives on selected aspects of the registration of credit providers in terms of the National Credit Act 34 of 2005 (2)' 2015 *Journal for Contemporary Roman-Dutch Law* 80 99-100; Van Eeden & Barnard *Consumer Protection Law in South Africa* (2017) ch 13. Tanya Woker delivered a paper on the National Consumer Tribunal but only a draft version of her paper is available – an official version published in an accredited academic journal could not be found: see Woker 'A critical examination of the role that the National Consumer Tribunal plays in debt relief with suggestions for reform' draft paper presented at the 2010 International Conference on Consumer Indebtedness hosted by the University of Pretoria Law Clinic. This statement does not refer to reference works such as, *inter alia*, Scholtz 'Consumer credit institutions' in Scholtz *et al Guide to the National Credit Act* (June 2017 Service Issue 9) paras 3.1 & 3.2; Otto 'Credit agreements: Consumer credit institutions and regulative matters' in Nagel *et al Commercial Law* (2015); Jones 'The National Credit Act 34 of 2005' in Schoeman (ed) *An introduction to South African Banking and Credit Law* (2013) 181-186. The article by Swart & Lawack-Davids 'Understanding the South African Financial Markets: An overview of the Regulators' 2010 *Obiter* 619 does not refer to the National Credit Regulator and they limit the concept of 'Financial Markets' to the commerce of securities – see 621.

[226] See e.g. Schmulow (n 114); Godwin (n 114); Pearson (n 165).

[227] Vessio 'What does the National Credit Regulator regulate?' 2007 *South African Mercantile Law Journal* 227.

[228] See e.g. Vessio (n 227) 228, 230 & 242.

Deshni Govender produced a dissertation titled: 'Has the National Credit Regulator fulfilled its mandate in promoting a credit market as envisaged in the preamble and purposes of the National Credit Act 34 of 2005?'[229] She gathered information through interviews with the Chief Executive Officer of the National Credit Regulator, the Executive Director of the Credit Providers Association and the General Manager: Legislation and Regulatory Oversight of the Banking Association of South Africa.[230] The author further visited the premises of the Regulator to ascertain its internal workings.[231] I refer to the contents of this particular source, particularly the annexures to her dissertation that are typed versions of recorded interviews, as it contains valuable information not otherwise attainable. However, I treat the contents of the dissertation with caution at times, as it contains some errors and the lack of context for some of her thought-provoking statements could result in inaccurate interpretation of her work. In this regard, I preferred to reference her work *verbatim*.

A review of non-academic literature has provided a plethora of information in respect of the conduct of role-players and stakeholders, including the National Credit Regulator. The annual reports published by the Regulator and other research reports, comment on the efforts of the Regulator in respect of the research milieu.[232] In addition, the media has shown an interest in consumer affairs and has not hesitated to report on conduct and behavioural issues where credit was the issue under consideration.[233]

I indicated earlier that the approach taken to assess the South African regime was gleaned from perusing literature on foreign regimes. Thus, I considered the approaches adopted by international writers considering general aspects as well as authors who deliberated on

[229] Govender (n 190).

[230] *Idem* at chs 4 & 5 & annexures A-C. In respect of objective information provided in the dissertation, the work is particularly useful for further research. However, many of the contentious statements made by the author is poorly supported by authority, arguments or statistical evidence and although her opinions that are relevant to this study is referenced herein, limited authoritative reliance is placed on it (as indicated where applicable). In addition, the interviews reflect but one representative from three different sectors of the credit industry, namely the regulatory authority, the industry organisation representing the banks in South Africa (see Banking Association of South Africa, http://www.banking.org.za/about-us/association-overview, for more information on this organisation as this is not reflected in the dissertation) and an organisation primarily focused on data exchange by credit providers (see Credit Providers Association, www.cpa.org.za, for more information on this organisation as this is not reflected in the dissertation). The questions posed during the different interviews also differ, which allows for limited comparison of views under certain circumstances. The information is therefore treated as data from a single source, and mostly as only reflecting the opinions of the interviewees.

[231] Govender (n 190) ch 4.

[232] See e.g. NCR *Annual Report* 2015/2016 Part B; Devnomics (n 32) 15 & 36; Business Enterprises *An assessment of the current state of the debt counselling process: December 2010* 2010 paras 3.4.2 & 3.4.6 of the executive summary.

[233] See e.g. Arde 'NCR in hot water over enforcement' Personal Finance 2 April 2016; Ensor 'Regulatory bodies face restructuring' BDLive 19 January 2015; Cairns 'Cambist: where are the regulators?' Moneyweb Special Investigations 17 December 2014; Sapa 'Watchdog steps up credit fight' Fin24 2 May 2013; Jacks 'Debt review woes' Fin24 20 January 2012.

aspects that are more specific, for example, accountability measures in respect of the Commonwealth of Australia. The contextualisation of certain concepts therefore relies on international, as opposed to domestic, writers. Similar approaches were followed in respect of the South African position where information, academic and non-academic, was available under the South African regime to support a similar approach. This further facilitated the section incorporating comparative research as the South African regime was already in a recognisable and comparable format.

In this thesis, quoted phrases omit the references in the original text unless specifically indicated otherwise. The sources referenced in the footnotes are set out comprehensively the first time that I refer to that particular source in each chapter. Subsequent footnotes referencing the same source refer to the first footnote with the full reference in brackets, for example, World Bank (n 1). I refer to the term ‘regulator’ in general in part one of the thesis, unless specifically stated otherwise or a contrasting meaning can be gleaned from the context. In part two, or where a distinction is made between the National Credit Regulator and the Financial Sector Conduct Authority, I refer to the National Credit Regulator as the ‘Regulator’ and to the Financial Sector Conduct Authority as the ‘Authority’.

4. CONCLUDING REMARKS

The international concerns raised in relation to developments in financial sector regulation, specifically with reference to regulatory bodies established for this purpose, and the manner in which international trends are closely followed by South African Authorities[234] induced this research theme. In this thesis, I evaluate the South African regime to determine whether the South African National Credit Regulator and the Financial Sector Conduct Authority enjoy sufficient independence and accountability.[235] Although policy documents and legislation denote the Regulator and the Authority as independent and accountable,[236] the thesis assesses the South African position against mechanisms sourced from scholars, foreign jurisdictions and international best practices. The ultimate purpose is to recommend remedial steps that can be taken to ameliorate the current framework in order to enhance the independence and accountability of South African financial market conduct regulators.

[234] See par 2 *supra*.
[235] See par 3.3.4 of ch 2 & 3 of ch 3 *infra*.
[236] See par 2.4 *supra*.

CHAPTER 2: CONCEPTUALISATION AND CONTEXTUALISATION

> ‘Agencies have tended to gain power and importance. They have become key actors in decisions, acquiring expertise, reputations and political weight. They have developed objectives and conceptual frameworks that have structured their policy domains.’[1]

1. INTRODUCTION

This chapter conceptualises important themes and contextualises these within the broader scope of theoretical considerations. The purpose of the chapter is to orient the reader in respect of the milieu within which a regulator functions.

I deal specifically with the concepts of ‘regulation’ and ‘regulator’ in the first substantive part of this chapter.[2] The discussion of the concept of regulation deals with an understanding of the notion and the manifestations thereof.[3] I deal with the reasons for the establishment of a regulator, amongst others to regulate, and the notion of regulation on a very basic level because this thesis is not concerned with regulation *per se*. However, I have to discuss regulation at some stage because regulators are responsible for regulation and the responsibilities of regulators are important considerations when independence and accountability are assessed.[4]

The various forms or manners of regulation are dealt with briefly in order to give the reader a broader understanding of what the concept entails.[5] Although I do not deal with every possible manifestation of regulation here or elsewhere in the thesis, it is still a valuable aspect to keep in mind for future developments in South Africa.

The part of the chapter on the concept of the regulator leads to a theoretical discussion about the rationales for institutional arrangements in a regulated sector.[6] I concur with the research and findings of the sources referred to and do not add to the international debate in this chapter. The purpose of the second part of the chapter is three-fold. Firstly, I determine the reasons for creating *independent* regulatory bodies because this adds to the understanding of their contribution to the regulatory regime.[7] I deal specifically with the theory of ‘new institutionalism’ and the ‘principle-agent theory’.[8] Secondly, and in light of the

[1] Thatcher ‘Delegation to independent regulatory agencies: Pressures, functions and contextual mediation’ 2002 *Western European Politics* 125 140.
[2] See paras 2 & 3 *infra*.
[3] See par 2.1 *infra*.
[4] See par 2.2; chs 3 & 4 *infra*.
[5] See par 2.2 *infra*.
[6] See par 3 *infra*.
[7] See paras 3.2 & 3.3 *infra*.
[8] See paras 3.1, 3.2 & 3.4 *infra*.

aforementioned discussion, I deal with the challenges that arise when a regulatory institution is created to be independent and accountable because the features attributed to each characteristic interact in a complex manner.[9] Thirdly, the overall theme necessitates a discussion of the design of institutions that have regulatory tasks.[10] I discuss the manner in which regulatory institutional frameworks can be designed because the regulatory framework affects the independence and accountability of the regulator and is important for South Africa, which transitioned to a Twin Peaks model.[11] Some of the challenges pertaining to the different design models are dealt with because I am of the opinion that some of the challenges associated with institutional structures may still manifest within the new regulatory framework.[12]

2. REGULATION

2.1. Introduction

'Regulation' is a complex concept when the various components and manifestations thereof are considered.[13] The purpose of this part of the chapter is to give the reader a broader understanding of what the concept entails because regulators have regulatory responsibilities and these responsibilities are important considerations when independence and accountability are assessed.[14] In order to understand the role of the regulator and regulatory structures, some background knowledge is needed on the various ways of looking at 'regulation'. Iain Ramsey notes the following in this regard:

> 'The decentred approach should make us sensitive to the complexity of regulation of consumer markets and also expand our horizons. For example, we might see credit market regulation as a combination of measures informed by several objectives such as market failure, access to justice and social justice … This may involve a variety of approaches to regulation that attempt to harness consumers as "responsible borrowers" amd lenders as "responsible lenders".'[15]

Julia Black has described regulation in terms as wide as 'all mechanisms of social control or influence affecting all aspects of behaviour from whatever source, whether they are

[9] See par 3.3; paras 2 of chs 3 & 4 respectively *infra*.

[10] See par 3.4 *infra*.

[11] See par 3.4 *infra*; paras 1.3 & 1.4 of ch 1 *supra*.

[12] See par 3.4 *infra*.

[13] See Black 'Critical reflections on regulation' 2002 *Australian Journal of Legal Philosophy* 1 10-25. See also Coglianese *Measuring Regulatory Performance Evaluating the Impact of Regulation and Regulatory Policy* Expert Paper No. 1 9.

[14] See par 2.2; chs 3 & 4 *infra*.

[15] Ramsay *Consumer Law and Policy – Text and Materials on Regulating Consumer Markets* (2010) 90. See also par 2.2 of ch 1 *supra*.

intentional or not'.[16] Regulation in this context can commonly be understood as any mode employed by a role-player within a set community that is aimed at, or has the effect of, changing the conduct of other role players in the community.[17] She has also delineated the concept to include a more restricted meaning – as 'the promulgation of rules by government accompanied by mechanisms for monitoring and enforcement, usually assumed to be performed through a specialist public agency'.[18] It is this latter concept that the thesis is concerned with, although a deeper understanding of regulation does assist to appreciate the intricate workings of a regulatory system.[19]

The concept is ordinarily associated with 'law' – in the sense of a mandatory set of rules in respect of which non-compliance is commonly sanctioned through punitive enforcement action.[20] This understanding of the concept of regulation signifies a hierarchical structure in which there is a 'command-and-control'[21] or 'top-down' relationship between the regulator and the regulated.[22] The perspective further contemplates the physical embodiment of regulation as ascertainable laws and rules or even standards and norms.[23] It allows for recognition of the aforementioned, configured as instruments such as legislation or codes of conduct and institutional arrangements such as regulatory bodies and professional associations.[24]

[16] Black 'Critical reflections on regulation' (n 13) 11.

[17] *Idem* at 11 & 26; Black 'Proceduralisation and polycentric regulation' 2005 *Revista Direito GV Law Review* 99 101. See Black 'Regulatory conversations' 2002 *Journal of Law and Society* 163 170: 'The conception of regulation adopted here is that of a process involving the sustained and focused attempt to alter the behaviour of others according to identified purposes with the intention of producing a broadly identified outcome or outcomes which may involve mechanisms of standard-setting, information-gathering and behaviour-modification.'

[18] Black 'Critical reflections on regulation' (n 13) 11. See also Coglianese (n 13) 8.

[19] See Black 'Regulatory conversations' (n 17) 164 in respect of 'see[ing] what we have not already seen, and understand[ing] better what it is we have' – although this comment of hers is made in the context of using 'discourse analysis' when scrutinizing 'regulation'. See also Black 'Critical reflections on regulation' (n 13) 4: 'For the moment I anticipate the argument below by assuming that we can construct a conceptualisation of regulation that is consistent with the decentring perspective so as to develop a understanding of decentred regulation that will enable us to recognise better how certain forms of power and control are exercised throughout society.' See also Ramsay *Consumer Law and Policy* (n 15) 90.

[20] Coglianese (n 13) 8; Black 'Critical reflections on regulation' (n 13) 2. However, see also Black 'Critical reflections on regulation' (n 13) 30-34 for a discussion of how 'Law and regulation' relate to each other.

[21] Black 'Critical reflections on regulation' (n 13) 2-3. See also Nagarajan 'From "command-and-control" to "open method coordination": Theorising the practice of regulatory agencies' 2008 *Macquarie Law Journal* 5 7-9.

[22] Bottomley 'The notional legislator: The Australian Securities and Investments Commission's role as law-maker' 2011 *Federal Law Revie*w 1 19. My thanks to Prof Nick Huls who alerted me to this term during a conversation in 2014.

[23] Coglianese (n 13) 8; Black 'Critical reflections on regulation' (n 13) 2-3; Black 'Regulation as facilitation: Negotiating the genetic revolution' 1998 *Modern Law Review* 621 621.

[24] Coglianese (n 13) 8; Black 'Critical reflections on regulation' (n 13) 3 & 11.

This perspective accounts for only two potential parameters of regulation.[25] The view that regulation has a mandatory and/or punitive nature coupled with a government-subject relationship.[26] Secondly, the manifestation of regulation in an official form is set as a pre-requisite and requires an observable embodiment of regulation and/or the institutionalisation thereof.[27] In respect of the context of my research, this manifestation of regulation will be embodied in the Financial Sector Regulation Act, National Credit Act, regulations and other forms of legislative or state-based guidance affecting the consumer credit industry.[28]

The aforementioned view encompasses a narrow understanding of the concept of 'regulation' which, in reality, has many other facets.[29] Consequently, a plethora of perspectives can be assumed to define and demarcate the term.[30] A different view of regulation can be taken when the purpose of regulation or the reason for its consideration is taken into account, instead of the mere embodiment of same in an official instrument with the capacity to be enforced by a state-sanctioned entity.[31] This would allow a further element to be added to the concept in respect of which the status of the architect of the regulatory instrument or the regulatory instrument itself is not the primary concern.[32] The aforementioned means that regulation can be present even where no legislation exists to regulate a specific scenario.[33] The latter approach would mandate the consideration of scenarios where regulation is not directly founded in government or government-endorsed institutions.[34] Black, specifically, advocates a dispersed or decentred view of regulation.[35] If her perspective is taken, the

[25] See e.g. Black 'Regulatory conversations' (n 17) 170-172; Black 'Critical reflections on regulation' (n 13) for perspectives on the parameters or paradigms for and of regulation (specifically 15-16 & 34).

[26] Black 'Critical reflections on regulation' (n 13) 2.

[27] *Idem* at 11-12; Black 'Regulation as facilitation' (n 23) 623-624.

[28] 9 of 2017 (hereinafter 'FSRA'); 34 of 2005 (hereinafter 'NCA'). See also Coglianese (n 13) 8 & 10-11.

[29] Black 'Critical reflections on regulation' (n 13) 2-4.

[30] See e.g. Black 'Critical reflections on regulation' (n 13).

[31] Black 'Critical reflections on regulation' (n 13) 13 (see also the discussion from 13-21).

[32] *Idem* at 11-12, 14 & 16.

[33] *Idem* at 8 & 10-12.

[34] See Black 'Critical reflections on regulation' (n 13) 1-2 & 5-6, who refers to this different approach as 'decentred perspectives', argues that '[w]e should also begin to take seriously the notion [of] a "regulatory society" in which we recognise that regulation is not "centred" on the state, but instead is "decentred", diffused throughout society … Government does not have a monopoly on the exercise of power and control. Rather it is dispersed between social actors and between actors and the state … Regulation occurs in many locations, in many fora; there is "regulation in many rooms".'

[35] See e.g. Black 'Critical reflections on regulation' (n 13) 1 *et seq*; Black 'Proceduralisation and polycentric regulation' (n 17) 99 *et seq*.

concept of regulation expands notably to include sectors previously excluded due to a focus on the state itself, or state-centred regulation.[36]

Regulation involves 'a complex chain of interventions, interactions and impacts'.[37] This necessitates a proper understanding of what regulation is, how regulation can be perceived, what the different components of regulation are, who the relevant role-players are and what their roles/influences are in the regulated industry sphere.[38] This may seem as a redundant exercise because legal scholars have a common understanding of 'regulation' as something that exists within the boundaries of legislation and enforceable mediums.[39] Black notes:

> 'A decentred understanding of regulation … has significant implications for our understanding of regulation, requiring us to face squarely the issue of what it is that we are looking at, and looking for, when we seek to analyse "regulation"… Decentred understandings of regulation thus require us to find answers to what values regulation should be made subject to, and how, if those issues of power, authority and legitimacy are to be addressed.'[40]

2.2. Conceptualisation[41]

I have found it necessary to review the concept and contextualise the term 'regulation' for purposes of the forthcoming discussion. The primary aim is not to identify and discuss the manifestations and views comprehensively – primarily because this thesis is concerned with regulators in the traditional sense of the word.[42] It is not concerned with regulation *per se*, but the importance of a proper understanding of regulation becomes apparent when the challenge of accountability arises in respect of the factors for which regulators are held accountable.[43] This is an important consideration of the regulator within the ambit of regulation in order to

[36] Black 'Critical reflections on regulation' (n 13) 3-4; Black 'Regulatory conversations' (n 17) 170; Black 'Proceduralisation and polycentric regulation' (n 17) 105. See also Scott 'Regulation in the age of governance: the rise of the post-regulatory state' in Jordana & Levi-Faur (eds) *The Politics of Regulation Institutions and Regulatory Reforms for the Age of Governance* (2004) 145 – Colin Scott, in his discussion of the 'post-regulatory state', highlights the importance of regulatory mechanisms as opposed to state dominance in the regulatory sphere ('[He] argues for shifting the focus of analysis from state law to the wider range of norms and mechanisms through which control is asserted or achieved, however indirectly.') (see also 146 *et seq*).

[37] Coglianese (n 13) 9.

[38] See Black 'Critical reflections on regulation' (n 13) 13 *et seq*.

[39] Coglianese (n 13) 8. See also Jordana & Levi-Faur (eds) *The Politics of Regulation Institutions and Regulatory Reforms for the Age of Governance* (2004) 2-5.

[40] Black 'Critical reflections on regulation' (n 13) 34 & 35.

[41] See Black 'Critical reflections on regulation' (n 13) 21-25 for her version of '[c]onceptualising "regulation"'.

[42] '[R]egulator' is defined as 'a person or an organization that officially controls an area of business or industry and makes sure that it is operating fairly' in the Hornby *Oxford Advanced Learner's Dictionary of Current English* (2010) 1240. See also Coxhead 'The Academic Word List: A tool for vocabulary learning' in the aforementioned dictionary at R44. In the financial context, see 'Glossary' in Van Wyk *et al* (eds) *Understanding South African Financial Markets* (2012) xxix & Mwenda *Legal Aspects of Financial Services Regulation and the Concept of a Unified Regulator* (2006) 6-7 & 12-13.

[43] See ch 4 *infra*.

determine *inter alia* whether a regulator is accountable with regard to a particular regulatory outcome.[44] Regulation has three attributes when viewed 'in functional terms': it influences conduct, procures information and sets standards.[45]

In the context of the South African financial market, Karin van Wyk distinguishes between the goals and components of regulation, and methods of compelling adherence to regulatory stipulations.[46] She divides the components of regulation into three groups – the creation and release of directives onto the industry, the overseeing of observance of the directives, and the sanctioning of nonconformity to the directives.[47] In order to obtain acquiescence to the provisions of the regime, certain mechanisms are executable in order to compel compliance, hence the rationale for 'enforcement options'.[48]

Kenneth Mwenda's understanding of the concept of 'regulation' relates to the manifestation of an authoritative exercise and therefore to the 'set of binding rules issued by a private or public body'.[49] Insofar as regulators effect 'regulation', these entities' tasks are more complicated: they control, direct, survey, manage and oversee.[50]

> 'Financial regulation is a powerful instrument and has traditionally been a key instrument of policy in the financial sector. Financial regulation can set out, in clear, pre-determined fashion, certain

[44] See e.g. Coglianese (n 13) 8, 10 & 13-14; Organisation for Economic Co-operation and Development (hereinafter 'OECD') *Policy Framework for Effective and Efficient Financial Regulation* 2010 35 & 38; Bird 'Regulating the regulators: Accountability of Australian regulators' 2011 *Melbourne University Law Review* 739 742. See also Black 'Critical reflections on regulation' (n 13) 19-20 & 28.

[45] Black 'Critical reflections on regulation' (n 13) 22. The defining attributes (see Black 'Critical reflections on regulation' (n 13) 22-24) can be summarised as follows: 'We can begin by asking how we should define "regulation", in functional terms, in essential terms or in conventionalist terms. A functional definition is based on the function that "regulation" performs in society … An essentialist definition identifies central facets of the phenomenon and says that when they are present, then the phenomenon may be termed "regulation" … A conventionalist definition looks to the way that the term is used in practice, and where the community being considered identifies something as "regulation" …' See also Lodge 'Accountability and transparency in regulation: critiques, doctrines and instruments' in Jordana & Levi-Faur (eds) *The Politics of Regulation Institutions and Regulatory Reforms for the Age of Governance* (2004) 127. In order to contextualise the attributes in practical terms, see par 2.2 of ch 1 *supra*.

[46] Van Wyk 'Regulation of the Financial Markets' in Van Wyk *et al* (eds) *Understanding South African Financial Markets* (2012) 112-114.

[47] *Idem* at 112.

[48] *Idem* at 113. The author highlights the following at 113 as 'enforcement options': 'Referral for criminal prosecution ... [w]ithdrawal of authorisations or licences to do business and the consequent winding down of businesses ... [c]uratorships to take over control of the business of the regulated firm ... [j]udicial management ... [p]enalties ... [o]rders to compensate prejudiced consumers.' Also, see the discussion in respect of responsive regulation and punitive measures in par 2.2 *infra*.

[49] Mwenda (n 42) 5. Black also refers to this view of regulation – see Black 'Critical reflections on regulation' (n 13) 16.

[50] Van Wyk (n 46) 111 & 112-113; Mwenda (n 42) 7; Goodhart *et al Financial Regulation: Why, how and where now?* (1998) 190. Goodhart *et al* (n 50) 189 discern between '*regulation* (the establishment of specific rules of behaviour), *monitoring* (observing whether the rules are obeyed), and *supervision* (the more general observation of the behaviour of financial firms)'. The authors note at 189 that there are variant features to each of these concepts and that there is divergence in the value attached by foreign jurisdictions to each *vis-à-vis* the others. They also note at 189 that 'there is currently a shift in emphasis away from detailed and prescriptive regulation towards monitoring and supervision'.

> outcomes for participants in the financial system (*e.g.*, special rights for policyholders in an insolvency), or can seek to influence the behaviour and actions of participants through compulsion, the alignment of risks and incentives, and the establishment of governmental expectations (*e.g.*, prudential regulation).'[51]

Various forms of regulation exist, each with benefits and shortcomings.[52] Academic and non-academic writers have dealt with 'State regulation',[53] 'quasi-regulation',[54] 'self-regulation',[55] 'meta-regulation',[56] 'command-and-control regulation',[57] 'decentred regulation',[58] 'punitive' and 'responsive regulation',[59] 'principle-based regulation',[60] 'flexible regulation',[61] and

[51] OECD (n 44) 20.

[52] Throughout this thesis, the approaches, mechanisms, techniques, etc. referred to will not necessarily be written in inverted commas after it was first referenced in this manner and in order to signify yet again that the concept (the 'name') is gleaned directly from the sources referred to in the footnotes. In some instances the terms are ordinarily used (e.g. principles-based or state regulation) whilst in other circumstances, authors have termed concepts specifically (e.g. management-based or flexible regulation). It is also envisaged that these terms will be used prolifically, which may impair the ease of reading. The terms as indicated, e.g. principles-based or management-based, are not re-termed in this thesis and are by necessity sourced as is from the authors referred to in the footnotes, which use the terms as set out in this thesis.

[53] Ramsay 'Consumer law, regulatory capitalism and the "new" learning in regulation' 2006 *Sydney Law Review* 9 13-14. See also Black 'Critical reflections on regulation' (n 13) 1-2.

[54] Department of the Prime Minister and Cabinet – Office of Best Practice Regulation (Australia) 'Better Regulation FAQ', http://www.dpmc.gov.au/deregulation/obpr/faq.cfm, defines this as follows: 'Quasi-regulation includes a wide range of rules or arrangements where governments influence businesses and individuals to comply, but which do not form part of explicit government regulation. Broadly, whenever the government takes action that puts pressure on businesses to act in a particular way, the government action may be quasi-regulatory.'

[55] Black 'Constitutionalising self-regulation' 1996 *Modern Law Review* 24 26-28; Ramsay *Consumer Law and Policy* (n 15) 91 & 92-93.

[56] Rahim 'Meta-regulation approach of law: A potential legal strategy to develop socially responsible business self-regulation in least developed common law countries' 2011 *Common Law World Review* 174 178; Ramsey *Consumer Law and Policy* (n 15) 91.

[57] Nagarajan (n 21) 7; Black 'Critical reflections on regulation' (n 13) 2.

[58] Black 'Critical reflections on regulation' (n 13) 2 *et seq*; Black 'Proceduralisation and polycentric regulation' (n 17) 101 *et seq*; Ramsay *Consumer Law and Policy* (n 15) 90-91; Ramsay 'Consumer law, regulatory capitalism and the "new" learning in regulation' (n 53) 12-13.

[59] Welsh 'Civil penalties and responsive regulation: The gap between theory and practice' 2009 *Melbourne University Law Review* 908 909-911 & 914; Nagarajan (n 21) 8; Baldwin & Black 'Really responsive regulation' 2008 *Modern Law Review* 59 62; Baldwin 'The new punitive regulation' 2004 *Modern Law Review* 351 352.

[60] Black *et al* 'Making a success of principles-based regulation' 2007 *Law & Financial Markets Review* 191 191.

[61] Ford 'Financial innovation and flexible regulation: Destabilizing the regulatory state' 2013 *North Carolina Banking Institute* 27. Ford argues at 29 that the term 'flexible regulation' is a wide encompassing term, which incorporates a variety of approaches including 'Meta-regulation' and 'Management-based regulation'. The author further notes at 38 and in respect of 'bright line, old style, top down, traditional rulemaking' that '[i]nnovation has shown itself to be very adept at getting around bright line rules, which is one of the reasons that flexible and principles-based regulation emerged in the first place'.

'management-based regulation',[62] have been identified through a perusal of academic and non-academic documents.[63]

The purpose of this part of the discussion is to clarify some relevant concepts on a very basic level, and I do not to enter into a lengthy and in-depth discussion of the perspectives, variations, positive and/or negative aspects of each concept. This part of the discussion also does not purport to explain the finer nuances of each of the terms, such as a targeted phase,[64] or the potential deeper behavioural change that is desired through the employment of a specific form of regulation or the interaction between different forms of regulation.[65] It is merely an exposé on the forms of regulation available to regulators.[66]

State, quasi- and self-regulation attract colloquial meanings for now although true 'self-regulation' can be difficult to define in an all-encompassing term.[67] Meta-regulation refers to the incorporation of a variety of 'strategies' in order to procure set regulatory outcomes.[68] It has been referred to in the context of 'the regulation of self-regulation'.[69]

Responsive regulation can be associated with punitive action or the regulatory arsenal and refers to manners of enticing compliance from regulatees through various mechanisms as, for

[62] Coglianese & Lazer 'Management-based regulation: Prescribing private management to achieve public goals' 2003 *Law & Society Review* 691 692-696. The authors define this term at 692 as a 'regulatory instrument … [which] does not specify the technologies to be used to achieve socially desirable behavior, nor does it require specific outputs in terms of social goals. Rather, a management-based approach requires firms to engage in their own planning and internal rule-making efforts that are supposed to aim toward the achievement of specific public goals …'

[63] These are a few examples – for others, see e.g. Ramsay *Consumer Law and Policy* (n 15) 86-87; Baldwin & Black (n 59) 65-68.

[64] This includes considerations as to which stage of the regulated entity's conduct is referred to such as 'the planning, acting, or output stages' – see Coglianese & Lazer (n 62) 693.

[65] See e.g. the writings on meta-regulation and punitive responsive regulation in Parker 'The 'compliance' trap: The moral message in responsive regulatory enforcement' 2006 *Law & Society Review* 591; Baldwin (n 59); Rahim (n 56). See also Coglianese (n 13) 8 & 12.

[66] See also Ramsay *Consumer Law and Policy* (n 15) ch 3 for more information in this regard.

[67] Black 'Constitutionalising self-regulation' (n 55) 26-28. The author duly points out that the construction of the concept is dependent on a variety of aspects ranging from the meanings attributed to 'self', 'regulation' and 'the state's involvement', differentiating between 'self-regulation' and 'individualised regulation' to considering the numerous manners in which state intervention is related to the realisation of a form of self-regulation. I do not delve into this aspect but see also National Treasury *Treating Customers Fairly in the Financial Sector: A Draft Market Conduct Policy Framework for South Africa Discussion Document* December 2014 76.

[68] Rahim (n 56) 178-179.

[69] Baldwin (n 59) 374; Ford (n 61) 30 (Ford quoting this phrase from Christine Parker's work). See also Rahim (n 56) 179 quoting Morgan: 'Bronwen Morgan puts this regulatory approach in a broader perspective, considering it as a regulatory policy that "desire[s] to think reflexively about regulation, such that rather than regulating social and individual actions directly, the process of regulation itself becomes regulated".'

example, illustrated by the Braithwaite enforcement pyramid.[70] In brief, responsive regulation embraces numerous regulatory approaches to manipulate behaviour within a given industry.[71] It incorporates a variety of tactics in a set hierarchy of application, which is primarily based on the level of interference or severity of intercession by the regulatory authority.[72]

This form of regulation has been characterised as an approach that 'seeks to build moral commitment to compliance with the law'.[73] Strict compliance-driven approaches can reportedly have the effect that the compliance-effort is not determined purely by a need to align the regulated entity with the aims and objectives of the regulator, but solely to minimise punitive regulatory risk that can adversely affect profit.[74] The imposition of a fine is a prime example and a risk-management approach may be to obtain third-party insurance instead of altering the activities of the regulated entity, especially where the risk of sanctioning is deemed to be of a low frequency.[75] This implies that a regulatory authority should firstly have a variety of mechanisms at its disposal to coach conformity from role players in respect of regulatory prescriptions, ranging from preliminary interference through low severity mechanisms such as written warnings to highly invasive and severe penalties such as criminal prosecution or license revocation.[76]

Responsive regulation is intricately linked with the deliberations and decision-making processes of the regulator,[77] which is of particular importance when considering regulatory policy.[78] A rigid application of the process advocated by responsive regulation theorists has been criticised as such an approach would be mechanical and improper if not required by the facts of the matter – they submit that the methodology should be used as a guideline,

[70] Nagarajan (n 21) 8; Scott 'Regulation in the age of governance' (n 36) 157-158. Nagarajan (n 21) states at 8: 'The core idea of responsive regulation is that regulators should be responsive to the conduct of those they seek to regulate in deciding whether a more or less interventionist response is needed and they should be responsive to how effectively citizens or corporations are regulating themselves before deciding whether to escalate intervention.'

[71] *Ibid*; Welsh (n 59) 910-911 & 914.

[72] Nagarajan (n 21) 8; Welsh (n 59) 910-911 & 914; Scott 'Regulation in the age of governance' (n 36) 157-158. Ideally, according to Scott, the choices should be exercised in an 'escalating' manner – in effect 'running through the pyramidal approach with each regulatee' – see Scott 'Regulation in the age of governance' (n 36) 159.

[73] Parker (n 65) 592.

[74] Baldwin (n 59) 370-372; Parker (n 65) 591-592.

[75] Baldwin (n 59) 370-371. See also Young *Operational Risk Management – The practical application of a qualitative approach* (2006) on the various components and considerations pertaining to risk management.

[76] Welsh (n 59) 909-913 & 924; Grabosky 'Discussion paper: Inside the pyramid: Towards a conceptual framework for the analysis of regulatory systems' 1997 *International Journal of the Sociology of Law* 195 196-197; Parker (n 65) 592.

[77] Welsh (n 59) 909 *et seq*; Scott 'Regulation in the age of governance' (n 36) 157-159.

[78] Coglianese (n 13) 10 & 13-14.

tempered by the regulator's discretion as to the most appropriate course of action under the given circumstances.[79]

'Principles-based' regulation is often contrasted with strict 'rule-based' regulation.[80] Instead of dictatorial, precise and potentially stringent rules, a set of 'high-level, broadly stated rules or Principles' are provided with the intention of aligning the regulated entity's behaviour with certain prescribed norms.[81] Principles-based regulation has been advocated as an approach to regulation that allows the regulated entity the autonomy to conform to the standards set by the regulator in a manner that is innovative and allows for a consideration of the unique characteristics of each regulated entity.[82] Mwenda has argued that the resolve to adopt a particular approach in this regard can also be a factor when deliberating the structural form of the regulatory regime, such as the configuration of the bodies tasked with regulation and supervision.[83]

In the next paragraph, I deal with the concept of the 'regulator', which is a cardinal aspect of this thesis.

3. REGULATORS

3.1. Introduction

3.1.1. General introduction

This thesis is concerned with regulators and to this end the 'regulator' has to be conceptualised. I will limited the discussion to entities established in terms of legislation or direct government intervention because the thesis analyses characteristics of two South African regulators established by way of legislation. Although the concept can be elaborately

[79] Baldwin & Black (n 59) 62-63; Welsh (n 59) 923-924. See, however, Scott 'Regulation in the age of governance' (n 36) 158-159 where he refers to empirical research that supported the view that the regulatory authority would rather choose 'the appropriate arrow from the quiver rather than running through the pyramidal approach with each regulate'.

[80] Black *et al* (n 60) 191-192; Georgosouli 'The revision of the FSA's approach to regulation: an incomplete agenda?' 2010 *Journal of Business Law* 599 601; Mwenda (n 42) 12.

[81] Black *et al* (n 60) 191. See also Black *et al* (n 60) 192: 'The Principles enable supervisors and enforcers to police the spirit of the rules as well as the letter, avoiding "creative compliance" and the need for the rules to anticipate every possible situation.' The article was written in the context of the combined principles-and-rules-approach of the United Kingdom's Financial Services Authority (see also Georgosouli (n 80) 600-601 in this regard). Note that this body has been changed to the Financial Conduct Authority (and some of its obligations allocated to the Prudential Regulation Authority) – see s 6 of the Financial Services Act of 2012 amending ss 1A (specifically s 1A(1) in respect of the renaming of the Financial Services Authority as the Financial Conduct Authority) & ch 2 of the Financial Services and Markets Act of 2000) & see Cox *et al* 'United Kingdom regulatory reform: emergence of the twin peaks' 2012 *Compliance Officer Bulletin* 1 2 & 7; Kokkinis 'The Financial Services Act 2012: the recent overhaul of the UK's financial regulatory structure' 2013 *International Company and Commercial Law Review* 325 325-326; Financial Stability Board *Consumer Finance Protection with Particular Focus on Credit* 26 October 2011 6-7.

[82] Georgosouli (n 80) 605. See also Black *et al* (n 60) 193.

[83] Mwenda (n 42) 12.

construed to include non-statutory role-players who direct the conduct of others through membership and contractual relations, I will not juxtapose these role-players with the regulators under consideration based on their roles as conduct reviewers.[84] Rather, the role-player – regulator interaction will be considered in chapter three within the broader context of 'regulatory capture'.[85]

The purpose of this part of the chapter is three-fold. One, I determine the reasons for creating *independent* regulatory bodies because this adds to the understanding of their contribution to the regulatory regime.[86] I deal with the theory of 'new institutionalism' and the 'principle-agent theory'.[87] Two, I deal with the challenges that arise when a regulatory institution is created to be independent and accountable because the features attributed to each characteristic interact in a complex manner.[88] Three, the overall theme necessitates a discussion of the design of institutions that have regulatory tasks.[89] I discuss the manner in which regulatory institutional frameworks can be designed because the regulatory framework affects the independence and accountability of the regulator and is important for South Africa, which transitioned to a Twin Peaks model.[90] Some of the challenges pertaining to the different design models are dealt with because I am of the opinion that some of the challenges associated with institutional structures may still manifest within the new South African regulatory framework.[91]

3.1.2. Conceptualisation

There are differences between the concept of a 'regulator' and that of a 'supervisor'.[92] Nevertheless, the functional distinction between the regulator and supervisor does not necessarily translate – practically speaking – into two distinctive entities effecting the respective duties.[93] According to Mwenda,

> 'the role of a regulator should not be confused with the role of a supervisor. Whereas a regulator is concerned mainly with preparing and issuing regulations and promoting a culture of compliance

[84] See paras 2.1 & 2.2 *supra*, especially Black 'Critical reflections on regulation' (n 13) 12, 14, 16 & 17-18; Black 'Constitutionalising self-regulation' (n 55) 26-28.

[85] See par 2.3 of ch 3 *infra*; Mwenda (n 42) 33; Lodge (n 38) 126; Barkow 'Insulating agencies: Avoiding capture through institutional design' 2010 *Texas Law Review* 15 21-22. See also Spiller 'Politicians, interest groups, and regulators: A multiple-agency theory of regulation, or "let them be bribed"' 1990 *Journal of Law & Economics* 65.

[86] See paras 3.2 & 3.3 *infra*.

[87] See paras 3.1, 3.2 & 3.4 *infra*.

[88] See par 3.3; paras 2 of chs 3 & 4 respectively *infra*.

[89] See par 3.4 *infra*.

[90] See par 3.4 *infra*; paras 1.3 & 1.4 of ch 1 *supra*.

[91] See par 3.4 *infra*.

[92] Mwenda (n 42) 5; Financial Regulatory Reform Steering Committee *Implementing a twin peaks model of financial regulation in South Africa* 1 February 2013 24 fn 10.

[93] Mwenda (n 42) 5.

> with these regulations, a supervisor, by contrast, may undertake on-site and off-site supervision of financial services business'.[94]

The role of regulatory organisations as mere operational functionaries has changed.[95] Ordinarily, financial regulators are tasked with the execution of the legislative framework, and not with the modification thereof outside of the usual legislative or judicial spheres.[96] However, a change in the conventional construction of regulatory authority has been observed over the years, specifically in respect of the United States' Consumer Financial Protection Bureau,[97] the Australian Securities and Investment Commission,[98] and – as will be discussed below – the South African Financial Sector Conduct Authority.[99] The trend includes the ability of financial regulators to add to, or amend, the regulatory landscape through the introduction and enforcement of self-created and legally binding directives.[100]

Some regulators have further been clothed with independence.[101] Fabrizio Gilardi, for example, regards the phenomenon of sanctioned autonomous institutes tasked with regulatory functions as a characteristic of the 'regulatory state'.[102] He describes these institutions as having a non-private nature but lacking express citizen nomination or subjection to complete

[94] *Ibid*. See also Joubert & Faris 'Regulation and supervision' in *Law of South Africa* vol 12(2) 350 adding a further collective dimension: 'The expressions "regulation", "supervision" and "regulatory oversight" are commonly used interchangeably. "Regulation", strictly speaking, has to do with the framing and application of laws with which financial institutions are required to comply; "supervision" in turn is the oversight vested in a public entity by law to monitor and enforce compliance with regulatory laws by financial institutions; and "regulatory oversight" covers both.'

[95] See e.g. Thatcher (n 1) 139-140; Scott 'Evaluating the performance and accountability of regulators' 2014 *Seattle University Law Review* 353 358-359; Financial Stability Board (n 81) 11.

[96] Scott 'Evaluating the performance and accountability of regulators' (n 95) 358-359; Financial Stability Board (n 81) 11.

[97] Financial Stability Board (n 81) 11. See also Scott 'Evaluating the performance and accountability of regulators' (n 95) 359 in respect of the United States in general.

[98] Bottomley (n 22).

[99] See paras 4.2 & 5.2 of ch 6 *infra*.

[100] Financial Stability Board (n 81) 11; Bottomley (n 22) 2 & 5.

[101] See e.g. Quintyn *et al The Fear of Freedom: Politicians and the Independence and Accountability of Financial Sector Supervisors* (IMF Working Paper WP/07/25) 2007 5; Scott 'Evaluating the performance and accountability of regulators' (n 95) 356-358.

[102] Gilardi 'Institutional change in regulatory policies: regulation through independent agencies and the three new institutionalisms' in Jordana & Levi-Faur (ed) *The Politics of Regulation Institutions and Regulatory Reforms for the Age of Governance* (2004) 67. See also Scott 'Evaluating the performance and accountability of regulators' (n 95) 356-357, discussing '[t]he global financial crisis': 'Independent regulation is, of course, supposed to be a solution to the problem of politicians favouring powerful industrial interests. It is striking that this cataclysmic regulatory failure occurred at a time when the … "rise of the regulatory state" had occurred, offering solutions to at least two sets of governance problems.' See Scott 'Regulation in the age of governance' (n 36) 149-150 for comments on the 'welfare state' and the 'regulatory state' & 150 *et seq* for a discussion on 'the post-regulatory state'.

state command.[103] In an attempt to determine the theoretical rationales for autonomous regulators, he considers a number of matters, such as the origin of independent regulators and explanations for dissimilarities between these regulators.[104] He deals with the questions that arise in the theoretical context of rationales that explain the existence of regulators and refers to 'new institutionalism', which is a theory that revolves around the creation and development of regulatory institutions.[105]

I have found the reasons behind the establishment of autonomous entities from the institutionalism-perspective insightful because it sets the theoretical foundation for the creation of the type of entity with which this thesis is concerned.[106] 'Principal-agent theory', and delegation studies specifically, have also proven insightful in this regard because it explain some of the challenges brought about by independence and accountability in the same sphere.[107] The last mentioned theory highlights the circumstances under which delegation would occur as well as the challenges pertaining to delegation of authority to an independent organisation.[108] In addition, the two theories' explanations for autonomous entities tasked with regulatory functions sometimes overlap with each other and with the findings of authors that conducted research without infusing deliberate recourse to the aforementioned theoretical approaches into their studies.[109]

3.2. New institutionalism

'New institutionalism' is concerned with the development of entities, particularly so-called 'political institutions'.[110] Gilardi applies this theory in an attempt to theorise the rationales for so-called 'independent regulatory agencies'.[111] He considers three 'branches', namely

[103] Gilardi (n 102) 64 – the author refers to 'independent regulatory authorities ... as public organizations with regulatory powers that are neither directly elected by the people, nor directly managed by elected officials. In other words, they are non-majoritarian institutions ... carrying out regulation'. See also Thatcher (n 1) 125; Thatcher & Stone Sweet 'Theory and practice of delegation to non-majoritarian institutions' 2002 *West European Politics* 1 2.

[104] Gilardi (n 102) 68 *et seq*.

[105] *Idem* at 67-69.

[106] See par 3.2 *infra*.

[107] See par 3.3 *infra*.

[108] See Bendor *et al* 'Theories of delegation' 2001 *Annual Review of Political Science* 235; Thatcher & Stone Sweet (n 103) 1 & Thatcher (n 1) 125.

[109] See par 3.3. *infra*.

[110] Hathaway 'Path dependence in the law: The course and pattern of legal change in a common law system' 2000-2001 *Iowa Law Review* 601 639. It is a theory sourced from political science – see Hathaway (n 110) 639; Gilardi (n 102) 69. See also Black 'New institutionalism and naturalism in socio-legal analysis: Institutionalist approaches to regulatory decision making' 1997 *Law & Policy* 51 56-57 for the discussion of 'New institutionalism in political science' and how it differs from new institutionalism in other disciplines – one of the important aspects that she highlights at 56 is that the concept of the 'institution' does not have the same meaning in the political context that it has in other disciplines.

[111] Gilardi (n 102) 68. Gilardi (n 102) refers to 'independent regulatory agencies', abbreviated as 'IRAs' in the context of 'delegation of regulatory competencies to IRAs' – see 67-68.

'rational choice institutionalism', 'sociological institutionalism' and 'historical institutionalism'.[112] He highlights that there is an inherent predisposition towards constancy in these three aspects and they therefore lack the properties necessary to account for transformation of institutes.[113] In particular, this dispensation favours factors that rationalise change based on variations that are not innate to the 'institution' itself.[114] In other words, it ignores factors inherent to or existing in the institution itself as the basis for institutional change.[115] As will be shown in the next chapter, many of the reasons forwarded in this regard by Gilardi and the other authors mentioned herein are similar, although not all sources refer to a particular theoretical dispensation such as institutionalism.

3.2.1. Rational choice institutionalism

'Rational choice institutionalism' supposes that role-players' conduct is determined by certain directives and that these directives are intentionally constructed in a manner that is advantageous to the role-players.[116] Rational choice therefore has an element of calculated composition of behaviour-shaping mechanisms, with the set aim of addressing specific identified challenges.[117] In this context, directives are the 'rules of the game'.[118] The aims and designs of these rules are structured according to the positive outcomes that may be achieved for role-players.[119]

Pablo Spiller, writing in the context of 'the self-interest theory of regulation', notes that intercession by the controlling regime of a country is the consequence of pressure by activists.[120] According to Gilardi, the regulator – through its reactive rules – is directly

[112] Gilardi (n 102) 68 *et seq*. The author discusses empirical verification of each of the theories, 'rational choice institutionalism', 'sociological institutionalism' and 'historical institutionalism' at 75, 78-79 & 81-82.
[113] Gilardi (n 102) 68.
[114] *Idem* at 70.
[115] *Ibid*.
[116] Gilardi (n 102) 69-70. See also Braithwaite & Drahos *Global Business Regulation* (2000) 16.
[117] Gilardi (n 102) 70-71.
[118] *Idem* at 69.
[119] *Idem* at 70.
[120] Spiller (n 85) 65.

connected to the challenges that it seeks to manage.[121] Subsequently, the rationalisation of the regulator lies in its ability to resolve identified obstacles.[122] The political value of regulators who are unrelated to government is situated in the ability of these regulators to act as vessels for political strategies and, in doing so, to enhance the integrity of the strategies.[123]

Gilardi refers to this as the 'credible commitments' challenge[124] and highlights that the segregation of political authority from regulatory entities that become custodians of their strategies is an important signal of dedication to the chosen policy.[125] He further notes that this is of particular importance where investors are involved.[126] In addition to the commitment challenge, transporting political policies to independent agencies assists in safeguarding these policies against political interferences from consecutive political regimes that may have alternative perspectives.[127]

[121] Gilardi (n 102) 69-71. See also Braithwaite & Drahos (n 116) 17, who argue the following: 'Mechanisms, it might be said, imply systems. And in fact system theoreticians routinely talk about mechanisms of social control and mechanisms of socialization. One can say a lot or a little about functionalist systems approach to globalization. We will say only a little. The crucial difference between a functionalist approach and ours is that the former would require an explanation of the globalization of business regulation in terms of a system need (perhaps a world system) or a group of system needs. In a functionalist approach, international organizations such as the WTO or IMF emerge because there is a fundamental need for such an organization … This need is systemically defined in terms of the increased complexity of relations between states, or something of that sort. The important thing to note about this kind of explanation is that the consequences of creating an organization (reduction of complexity) becomes in some sense the explanation for the emergence of the organization.'

[122] Gilardi (n 102) 70-71. See Gilardi 'The formal independence of regulators: a comparison of 17 countries and 7 sectors' 2005 *Swiss Political Science Review* 139. See also Braithwaite & Drahos (n 116) 17 quoted in fn 121 *supra*.

[123] Gilardi (n 102) 71, 72-73 & 75.

[124] *Idem* at 72. See also Bendor *et al* (n 108) 259-260 & 264-265.

[125] Gilardi (n 102) 73 & 75. See also Gersen & Vermeule 'Delegating to enemies' 2012 *Columbia Law Review* 2193 2223-2224.

[126] Gilardi (n 102) 75. The author refers to empirical research at 75 and notes that '…the extent of independence accorded to regulators is positively affected by the economic nature of regulation, and negatively by the number of veto players. This result supports the hypothesis, as credibility problems are more severe when governments have to deal with investors rather than consumers, and veto players, since they lead to policy stability, can be conceived as a functional equivalent of delegation as a means of precommitment.' In addition, Bendor *et al* (n 108) 265 make the following statement in the context of credibility challenges and the strategies of politicians in respect of agents with delegated authority: 'In contrast, in systems with separation of powers, it is unlikely that any one party will have the kind of commanding position enjoyed by (single-party) winners in parliamentary systems … Separation of powers systems are designed to favor retaining the status quo, which tempts the incumbent party to surround an important agency with stabilizing (yet debilitating) constraints.' They also deal with the desire of politicians to influence state matters after their reign and the behaviour of politicians in the event of foreseeable loss of office (where they note the desire would be to bound agencies in order to limit change by the successive party) or in the event of foreseeable retention of office (where they note that the reaction would be to endow the entity with discretion in order to respond to changes in the environment without having to confer with politicians) – see Bendor *et al* (n 108) 265.

[127] Gilardi (n 102) 74 & 75. At 75, the author refers to features that support this outcome as 'insulation mechanism[s]'. See also Barkow (n 85) 24-25 in respect of 'stability' and institutional insulation.

The rational choice element of institutionalism further incorporates the view that there are specific political factors that stimulate support for the independence of regulators.[128] The existence of these factors lies in the supposition that political investment in regulators does not support an independent or 'insulating' approach to regulatory agencies.[129] According to Gilardi, political players are concerned with 'credibility and political uncertainty' when they develop agencies.[130] He means that political constituents are apprehensive of being perceived as unreliable as this may influence the actions of other influential role-players and stakeholders.[131] Mechanisms that support the authenticity of politicians regarding compliance with previously stated undertakings can affect a nation's financial well-being, particularly as it increases the security of participants and their interests in the economic sphere.[132]

Thus, pledging conformity to a particular policy and providing the necessary assurances that the policy will realise can be done by establishing an autonomous entity tasked with effecting the policy and, in doing so, disassociating the implementation from the ambit of the politician's desires.[133] The matter of the unknown in politics refers to the retention or loss of office by political actors, which can also influence the creation and structure of an autonomous entity.[134] Delegation to entities with particular independence-characteristics can be a strategy to safeguard developed policies from upcoming political actors.[135]

[128] Gilardi (n 102) 72.

[129] *Ibid*. Gilardi, referring to and quoting Moe, states the following at 72: '[I]nsulating an agency from politics is a structural design that politicians "would never favour on technical grounds alone". Hence, there must be some other reasons.'

[130] Gilardi (n 102) 75. One of the negative outcomes highlighted by Hadjiemmanuil 'Institutional structure of financial regulation: A trend towards "megaregulators"?' 2000-2001 *Yearbook of International Financial and Economic Law* 127 144 in respect of reconfiguring regulatory bodies to align with a solitary model, is political motivation that supports a redundant reconfiguration. He states the following at 144: '[S]imply launching a debate on potential regulatory reform may surreptitiously lead to institutional changes, even where these are not necessary, because powerful political and bureaucratic actors may use strategically the opportunity offered to them, in an attempt to improve their position within the governmental system.' See also Bendor *et al* (n 108) 264.

[131] Gilardi (n 102) 72. See also Thatcher (n 1) 131 although his comments are made within the context of delegation to autonomous entities (Gilardi (n 102) 81 comments on Thatcher's work and notes the following in the context of historical institutionalism: 'Although in these analyses path-dependence is not invoked explicitly, it appears quite clearly in the background ...') I deal with delegation in the context of the principal-agent theory in par 3.3 *infra*.

[132] Gilardi (n 102) 72: 'Credible commitment capacity has been shown to be necessary for economic growth and investment, because it is a guarantee against public expropriation for economic actors… In addition, credibility is a valuable asset for politicians when they carry out regulatory policy … The outcome of regulatory policies depends crucially on the response of a myriad of actors, notably investors. Coercion is often not a viable option. Rather, policy-makers have to credibly signal their commitment to the announced course of action.'

[133] Gilardi (n 102) 73.

[134] *Idem* at 74.

[135] *Ibid*.

The authority to command public power legitimately can be viewed 'as a property right of sorts'.[136] The reigning administration may therefore strategize to protect these rights by retaining influence over policies through the creation of independent agencies that continue to exist notwithstanding varying future administrations.[137] In cases of diminished prospects of re-election, Gilardi's research shows that incidences of delegation to autonomous organisations increase.[138]

Colin Scott shares this view, even though he does not deal with institutionalism in his article.[139] He highlights two reasons for the creation of autonomous bodies, being protection and professionalism.[140] Firstly, the institutional arrangement shields from political interference for purposes detrimental to the regulated sphere, such as personal advancement and unsustainable measures that are not conducive to the future well-being and progression of the industry.[141] Secondly, there is a desire to construct a knowledgeable and skilful centre dedicated to the execution of specific obligations, and within a specific policy sphere.[142] This is in reaction to the inability of publicly selected representatives to effect the necessary control due to their unfamiliarity with complicated subject fields.[143]

I will deal with the delegation of authority by government officials to independent institutions under the topic of the principal-agent theory at a later stage. Jonathan Bendor and his co-authors highlight that delegation occurring for credibility purposes is mentioned notoriously

[136] *Ibid*.

[137] *Idem* at 74-75. See also Bendor *et al* (n 108) 264 – the author highlights the dilemma faced by politicians and the 'inefficien[cy]' outcome. The choice varies between establishing an entity that is able to conform to variants in the regulatory sphere and vulnerable to influences from succeeding parties or to create an entity suitable bound by process and form and able to withstand influence – see 264. Bendor *et al*'s discussion also refers to the desire of office-holding parties to structure institutions in such as manner to avoid interference and change by upcoming persons, but their explanation as to how this is done, differs from Gilardi's explanation. At 264-265, they state that 'constraints' negate influence whilst 'discretion' ameliorates the potential of successful outside influence.

[138] Gilardi (n 102) 75.

[139] Scott 'Evaluating the performance and accountability of regulators' (n 95). See also Barkow (n 85) 19-26 for a discussion of the answers to the question of institutional autonomy – she does not indicate any link between her work and new institutionalism, but her comments are valuable as she notes at 19 that '…one cannot begin to think about what makes an agency independent without thinking about what the agency is supposed to be independent of'.

[140] Scott 'Evaluating the performance and accountability of regulators' (n 95) 356-357.

[141] *Idem* at 357. See also Barkow (n 85) 20.

[142] Scott 'Evaluating the performance and accountability of regulators' (n 95) 357. See also Barkow (n 85) 19.

[143] Scott 'Evaluating the performance and accountability of regulators' (n 95) 357. The author states the following at 357 in relation to political interference in the regulatory process: 'The second problem is the limited technical capacity of elected government officials to undertake regulation in areas as complex as financial markets. The establishment of independent agencies, with a focus on particular tasks, is one of the key mechanisms for drawing in and developing expertise in particular regulatory policy areas. The establishment of regulation with its governance through rules, with arms-length regulators, is intended to support agencies in establishing a high degree of technical expertise …'

in writings on national financial interests and central banks.[144] However, it is important to note at this stage that some of the considerations that underlie the decision to delegate to a specific person as well as the optimal circumstances, under which this would occur, do not apply in the case of monetary policy and central banks.[145] In this case, institutionalism and delegation studies highlight that the credibility challenge is mediated by the autonomy of the regulatory entity.[146]

3.2.2. Sociological institutionalism

Directives include 'norms' under 'sociological institutionalism' and not just official 'rules and procedures'.[147] Sociological institutionalism is less concerned with structured outcomes in the form of official decrees and calculated actions, and more with the representative potential of the institution.[148] In short, this view of institutionalism – whilst still influencing conduct – focuses on the intellectual effect of conduct-shaping mechanisms.[149] This approach emphasises the image that the regulator as regulatory entity provokes and 'the set-up of an organization can be a ceremony intended to provide legitimacy to certain decisions by diverting the attention from more substantial concerns'.[150] The perception that entities have of regulators may be manipulated by authorities to justify political choices and render these acceptable to others through the connotation with the regulator.[151]

Another view considered under this theory is that autonomous regulatory entities are 'taken for granted as the appropriate organizational form for regulators'.[152] In this context, regulation through an independent entity is not the result of optimal selection but merely the

[144] Bendor *et al* (n 108) 260.

[145] *Idem* at 261. See also Gersen & Vermeule (n 125) 2224.

[146] See e.g. Gilardi (n 102) 82-83; Gersen & Vermeule (n 125) 2223-2224; Thatcher (n 1) 130-131; Bendor *et al* (n 108) 259-260.

[147] Gilardi (n 102) 70. Although I do not delve into this aspect in much depth, it is important to note that Gilardi still applies this concept to independent institutions (meaning 'independent regulatory agencies') although the main aspects of his work resonate with Black's work. Black writes the following (Black 'New institutionalism and naturalism in socio-legal analysis' (n 110) 57): 'Notably, the definition of "institution" differs from that of political scientists in that it does not include organizations. For organizational and sociological new institutionalists, institutions are socially constructed, routine-reproduced (ceteris paribus) program or rule systems that operate as relative fixtures and are accompanied by taken-for-granted accounts, rationales or functions for their existence. Thus institutions comprise not organizations but those norms and conventions which have a rule-like status in social thought and action, which may or may not be legal, but which are taken for granted as legitimate …' Gilardi (n 102) 83 notes the following: 'Sociological institutionalism rejects this functional view of institutions, and emphasizes the importance of normative structures and symbolic diffusion. In this perspective, organizations are created not because of the function that they perform, but because of their symbolic properties.'

[148] Gilardi (n 102) 70.

[149] *Ibid*. See also the discussion of Black 'Regulation as facilitation' (n 23) 623 *et seq* in respect of the 'dimensions of regulation' including the 'cognitive dimension'.

[150] Gilardi (n 102) 70 & 76.

[151] *Idem* at 76-77 & 83.

[152] *Idem* at 71.

customary feature.[153] In direct contrast to rational choice theory, the sociological theory advances the presumption that reigning political parties are subject to cross-border influences and that the choices made by foreign governments may persuade a domestic regime to introduce similar regulatory structures.[154] The resultant action may be either due to the observation of the effect of the extraterritorial choice or because of comparable principles.[155]

3.2.3. Historical institutionalism

Gilardi also reviews 'historical institutionalism' as a theory for the existence of autonomous entities tasked with authoritative functions.[156] This theory considers the causational event that brings about an autonomous establishment aimed at fulfilling a particular government purpose and the factors that endorse the particular course of action that the creation of the establishment effects.[157] Past events are of importance when analysing the existence of regulators and the theory of 'path dependence' therefore plays a role.[158]

Even though path dependence is thought to be a valuable theory in respect of regulatory modification, it is a theory that is challenging in itself.[159] Firstly, path dependency is not a given occurrence in all instances.[160] Gilardi does not infer that path dependency is constantly present and takes care to delineate the concept,[161] but he generally presents historical institutionalism and path dependency as theories capable of explaining the phenomena of delegation to autonomous entities.[162] As a point of departure, he highlights that path dependency is a core aspect of historical institutionalism and, even though he foresees

[153] *Idem* at 76-77.

[154] *Idem* at 75-76. See also Thatcher (n 1) 136-137.

[155] Gilardi (n 102) 76. Thatcher (n 1) adds an additional motivating factor through examples from Europe at 137 – that non-conforming jurisdictions can be viewed as 'the "odd men out"'.

[156] Gilardi (n 102) 78-82.

[157] *Idem* at 79-80.

[158] *Idem* at 71 & 82 – Gilardi (n 102) notes at 79: 'Path-dependence seems a good way to give a common ground to rather diverse historical institutionalist analyses of IRAs.' See also Rixen & Viola 'Putting path dependence in its place: toward a Taxonomy of institutional change' 2015 *Journal of Theoretical Politics* 301. The authors also note that they 'use path dependence as a starting point for the taxonomy because it is one of the best developed and most explicitly theorized explanations of institutional change that is available, and it is often used as a basis for further development of theory' – see Rixen & Viola (n 158) 303. However, it is important to note that these authors discuss path dependency in a neutral fashion and 'institutions' are defined based on the respective contributions of North and Krasner as 'the rules of the game in a society … implicit or explicit principles, norms, rules, and decision-making procedures around which actors' expectations converge' – see Rixen & Viola (n 158) 308 (Rixen & Viola also note at 308 that they deliberately adopt a wide meaning so as to facilitate multiple views of what 'institutions' can be). This is in contrast with Gilardi's contribution (n 102), which deals specifically with entities created for regulatory purposes.

[159] See Rixen & Viola (n 158) 302-303. In respect of modification, see Gilardi (n 102) 81 & 83.

[160] Rixen & Viola (n 158) 303.

[161] Gilardi (n 102) 79 & 81. Gilardi notes at 81: 'The presence of path-dependence, however, should be demonstrated rather than assumed.' See also Rixen & Viola (n 158) 302-303 in respect of proper delineation.

[162] Gilardi (n 102) 81.

criticism, he links the latter with the former.[163] He rationalises this approach by noting that path dependence 'embodies' two important features of historical institutionalism.[164] These are the significance of organisations and the influence of time on politics.[165] Secondly, the 'inertia' associated with path dependency increases the difficulty of the challenge, that Gilardi identifies in respect of new institutionalism in general, to explain 'institutional change' on a theoretical level.[166]

3.2.4. Path dependency

Oona Hathaway defines path dependency by stating that 'an outcome or decision is shaped in specific and systematic ways by the historical path leading to it'.[167] As such, in a path dependent process, each subsequent period in time is instrumental in determining the reality of the next consecutive periods – thus, initial events affect future events.[168] The result is that these prior occurrences are instrumental in structuring subsequent occurrences and deviation from the undertaken course will occur infrequently.[169] A detrimental consequence, of importance to regulatory bodies, is the lethargy associated with change from the implemented course.[170] However, Thomas Rixen and Lora Anne Viola argue that path dependency is not synonymous with stagnation, as organisations do change.[171] They argue that path dependency enhances the course of direction that the entity is on, improves its constancy and intensifies its adversity to alteration from the course.[172] Thus:

> '[P]ath dependence captures a particular dynamic of reproduction over time in which the equilibrium is deepened. In path dependence, what changes is that as it reproduces itself the institution becomes *increasingly* stable, locked-in, and resistant to reversal. So although path dependence does not provide an explanation of path switching – that is, the movement to a different equilibrium – it does provide an explanation of change along a path – that is, the increasing entrenchment of an equilibrium.'[173]

Gilardi states the following:

> 'Historical institutionalism, finally, puts a strong emphasis on path-dependent process that severly limit, though do not rule out, the possibilities of change once a given institutional path has been

[163] *Idem* at 79.
[164] *Ibid*.
[165] *Ibid* – he refers to 'the time dimension in the study of politics'.
[166] Gilardi (n 102) 68 & 80.
[167] Hathaway (n 110) 604.
[168] *Ibid*.
[169] *Ibid*; Gilardi (n 102) 80.
[170] Gilardi (n 102) 80, 81 & 83. See also Freeman & Rossi 'Agency coordination in shared regulatory space' 2012 *Harvard Law Review* 1131 1143-1144.
[171] Rixen & Viola (n 158) 310 & 319.
[172] *Ibid*.
[173] *Idem* at 310. Original emphasis.

> embraced. Pressures for the creation of IRAs [independent regulatory agencies], then, are mediated by the prevailing institutional arrnagements as long as the mechanisms that sustain them hold. … Finally, historical institutionalism can in principle account for institutional change without relying on external advice, but is stronger in explaining why change occurs (notably because the mechanisms sustaining previous institutional arrangements disappear or weaken) than the precise direction of change.'[174]

Gilardi presents three minimum requirements for 'path-dependent processes' and Rixen and Viola two.[175] However, the reason for this discrepancy is that Rixen and Viola identify the central characteristics that serve as the foundation of the observed phenomenon.[176] Some of Gilardi's requirements are what Rixen and Viola also view as 'features' ordinarily seen where a course is path dependent or describe as 'effects' of the two characteristics that they identified.[177]

Rixen and Viola state that path dependency is a causality of internal drivers that support positive responses – the so-called 'process of self-reinforcement … caused by *increasing returns*'.[178] As such, the factors that determine the course, and existing course, of the institution are found within the organisation itself.[179] The internalisation or '[e]ndogeneity' of the factors and the positive experiences exuded from these factors, result in a circuitous course and thus the retention of the direction or behaviour of the entity.[180]

A phenomenon such as this is therefore characterised by three aspects: Firstly, that at the beginning of the course of events there are various possibilities; secondly, that the succession of events determine the ultimate outcome; and thirdly, the course is set when the earliest

[174] Gilardi (n 102) 83 & 85.

[175] Gilardi (n 102) 79-80; Rixen & Viola (n 158) 305.

[176] Rixen & Viola (n 158) 305-306. They note the following at 306: 'Increasing returns and endogeneity, which are the characteristics upon which we will build our taxonomy, are causal attributes of path dependence, meaning that they describe the types of variables and mechanisms that *cause* path dependence. In contrast, initial contingency, the importance of sequence, and lock-in are consequences or *effects* of endogenous increasing returns. While identifying these effects is an important component of path dependence theory, a path dependence explanation will only be complete if it can be shown that there are endogenous increasing returns that cause it.' Original emphasis.

[177] *Idem* at 305-306 – they refer to 'consequences or effects'. See Gilardi (n 102) 79-82.

[178] Rixen & Viola (n 158) 305. Original emphasis. See also Gilardi (n 102) 80.

[179] Rixen & Viola (n 158) 305-306.

[180] *Idem* at 305. The authors note at 307: 'Endogeneity is what makes the idea that "history matters" different from a simple time-series notion of causality: the cause and effect amplify each other. One example of such endogeneity may be an institution creating a constituency that comes to condition its actions on that institution, and that experiences increasing returns from the continuation of the institution. Thus, the constituency created by the institution has an interest in maintaining and expanding the institution.' They note at 308-309: 'A variable is endogenous when its value is determined or influenced by an institution, and it in turn affects that institution's development. Legitimacy, for example, may be a property cultivated by an institution but it can in turn affect the development of that institution by increasing the institution's attractiveness to investors.'

decisions are made.[181] Gilardi also discusses the characteristics of path dependent courses in the context of the regulatory agency and in respect of those features associated with the initial episodes in the development history of the course of events.[182] The initial episodes occur and are of significant importance in the development history.[183] The significant incident for purposes of the discussion of regulators is the formation and acceptance of the autonomous establishment.[184]

In addition, the incidents initiate a course of action that can be projected and is inclined to remain on this course in respect of a particular result.[185] The ascertainable course is a result of a variety of factors that contribute to support the direction taken.[186] Factors include indicators that constructively signal the suitability of the selected regulatory structure – in this case, the regulatory organisation.[187]

Awareness and recognition of path dependency, determined empirically when and where the central characteristics are present,[188] highlight the importance of decisions taken in the early stages of an entity's existence, however small,[189] that can influence the ultimate course of that organisation.[190] Detrimental effects include lack of change due to costs associated with deviation from a set path[191] whilst positive effects include increased solidity of an organisation.[192]

[181] Rixen & Viola (n 158) 305-306. See also Hathaway (n 110) e.g. 609-613 for a deeper discussion of the forms of path dependency that also reflects some of the aspects discussed herein.

[182] Gilardi (n 102) 79-80.

[183] *Idem* at 79-80. The author at 80 refers to the approval and implementation of a regulatory body as the 'critical juncture', which must be 'contingent, that is, unexplainable by available theory or knowledge'. He explains at 80: 'If the critical juncture can be explained, then it does not lead to a path-dependent process.' See also Rixen & Viola (n 158) 306.

[184] Gilardi (n 102) 80.

[185] *Idem* at 79-80. See also Rixen & Viola (n 158) 306.

[186] Gilardi (n 102) 80.

[187] *Ibid*. The author specifically mentions some factors at 80, such as 'positive feedback' and 'increasing returns' as well as political features such as 'the use of political authority to enhance power asymmetries, the coordination benefits deriving from institutions, and the assets political actors develop on the basis of existing institutions'.

[188] Rixen & Viola (n 158) 316.

[189] Hathaway (n 110) 664.

[190] Rixen & Viola (n 158) 305-306. See also Hathaway (n 110) 604.

[191] Hathaway (n 110) 607 fn 16. However, Gilardi (n 102) refers to Vogel when he states at 81 that 'governments have undertaken reforms that reinforce distinctive national trajectories based on different underlying ideas about the appropriate role of the state in the market and on structural features of the political economic context. Common pressures for reforms are mediated by national institutions. In other words, change is carried out along distinct and well-established (national) institutional paths. This reasoning embodies a clear path-dependent argument'.

[192] Rixen & Viola (n 158) 319 – the authors state that 'some interpret path dependence to be a concept of non-change. But in our view this conflates stability and stasis. Stability itself is a property of institutions that is subject to change, even though a highly stable institution might appear to be static. Our discussion suggests, then, that path dependence does indeed capture change – an increase in the stability of an institutional equilibrium (i.e., its robustness to shocks grows over time).'

Independence plays an important role in respect of entities clothed with regulatory authority, but the role of proper accountability measures is also of importance.[193] I elaborate on this in chapter three, but for sake of brevity, some preliminary comments. We have seen that path dependency can be a reality for regulatory institutions and that whilst this instils some predictability into the regulatory regime; it has detrimental attributes, such as lack of change[194] or inefficaciousness.[195]

Hathaway argues that path dependent structures are vulnerable to 'critical … junctures' or 'punctuations' – like the introduction of statutory rules.[196] These events effect change, as 'historically evolved institutions are "sticky" – they tend to resist change until an external crisis requires it'.[197] Gilardi deals with critical junctures as a feature of path dependency, in effect the instance that marks the start of a path dependent course and the attributes thereof,[198] whilst Rixen and Viola dismiss the relevance of such a juncture for the existence of path dependency.[199] They argue that such a juncture is an outside factor and therefore does not meet the requirement of '[e]ndogeneity' necessary for true path dependency.[200]

I find this of relevance to my study because if accountability measures, when and where implemented, are seen as turning points in time, any designed measure must be strong and able enough to effect deviation from a set path as and when necessary.[201] As Hathaway puts

[193] See e.g. Hüpkes *et al The Accountability of Financial Sector Supervisors: Principles and Practice* (IMF Working Paper WP/05/51) 2005 4; Quintyn *et al* (n 101) 4 & 5; Mwenda (n 42) 25.

[194] Gilardi (n 102) 81 argues that 'if the establishment of IRAs is part of a path-dependent process, then the observable implications should be, among others, institutional inertia …, which is something close to the claim that state traditions and structures mediate pressures for institutional change …' See also Hathaway (n 110) 613: 'Where a process of change exhibits increasing returns dynamics, each step in one direction makes additional steps in that same direction more likely. This characteristic leads to predictable results and helps explain why some processes of change fail to evolve toward a single, stable, efficient equilibrium.' See Hathaway (n 110) 641 & 641 fn 161.

[195] See Hathaway (n 110) 638, arguing that within the context of 'evolution of the common law' and that it does not, by default, denote that the 'most efficient legal rule' will prevail.

[196] Hathaway (n 110) 641-642: 'In this sense, legal evolution bears more similarity to political and institutional change as described by the "critical junctures" model, which focuses on periods of state-building crisis during which there is rapid change in political and institutional arrangements. The literature on critical junctures varies greatly, but the works in this vein all share the view of institutional change as occurring in a burst (a critical juncture) followed by a period of relative stability. New arrangements achieved during the critical juncture shapes the period of stability that follows in important ways. Each critical juncture, in other words, produces a distinct legacy that remains largely intact until the next critical juncture breaks down and reshapes the political and institutional arrangements anew.'

[197] Hathaway (n 110) 641 fn 161.

[198] Gilardi (n 102) 79-80.

[199] Rixen & Viola (n 158) 316-317 – the rejection is based on the 'exogenous' nature of 'critical junctures' which does not accord with their requirement of 'endogenous path dependence'.

[200] Rixen & Viola (n 158) 305 & 316-317

[201] See Bovens 'Analysing and assessing accountability: A conceptual framework' 2007 *European Law Journal* 447 453, referred to *infra*.

it, '[p]ath dependence theory therefore predicts that, where punctuations occur more frequently, the system "self-corrects" more frequently'.[202]

Mallory SoRelle makes a valuable observation in one of the chapters of her thesis on the American approach to credit regulation when she views in the context of path dependency.[203] This is a practical illustration of the impact of the above on the subject-theme of this thesis:

> 'Chapter Two discusses the development of the consumer credit policy regime in the United States. It argues that the creation of a U.S. political economy of credit eventually led to the adoption of disclosure requirements as the primary policy remedy employed to regulate consumer credit transactions. The chapter traces how New Deal policymakers built a government-backed infrastructure to jumpstart consumer credit in order to boost the construction industry and drive economic revitalization. In so doing, policymakers created a path dependent process in which consumer credit policies were and continue to be been designed to promote broad consumer purchasing power in support of the national economy … I offer an alternative, policy-driven explanation for the lack of political action in response to predatory lending. People's strategies for engagement on credit issues have been shaped by their experiences with the policies at the heart of the political economy of credit. By concerning themselves primarily with consumer credit as a way to bolster the national economy, policymakers have made specific, often path dependent, decisions with respect to policy design and implementation of consumer credit regulations.'[204]

In this regard, I have found the work of Mark Bovens of value.[205] Although the author does not refer to path dependency, but writes about one of core aspects of this thesis – accountability, he makes the following remark:

> 'The line between retrospective accounting and proactive policy making can be thin in practice. It is perfectly sensible to hold actors accountable for their participation in decision-making procedures: members of parliament may scrutinise ministers for their role in European Councils; lobby and interest groups may have to account to their members or constituencies for their stand in deliberative processes. Moreover, accountability is not only about *ex post* scrutiny, it is also about prevention and anticipation. *Norms are (re)produced, internalised and, where necessary, adjusted through accountability*.'[206]

[202] Hathaway (n 110) 655.

[203] SoRelle *Democracy declined: The failed politics of consumer credit* August 2016 PhD Faculty of the Graduate School of Cornell University (Department of Government) 28 & 108.

[204] SoRelle (n 203) 28 & 108.

[205] Bovens (n 201).

[206] *Idem* at 453. I have added the preceding lines for some context and placed the sentence that is the crux of the matter for purposes of my discussion in cursive/italics.

3.3. Principal-agent theory

3.3.1. Introduction

Principal-agent theory is particularly relevant to autonomous entity development as delegation is a core part of the establishment and functioning of organisations endowed with regulatory responsibilities.[207] Apart from sources that discuss this theory in general terms, there have also been a specific application thereof to 'independent regulatory authorities' or 'non-majoritarian institutions'.[208] The characteristics of an entity categorised as such include the authoritative and public nature of the entity, the segregation of the entity from other entities and the absence of elective or governmental management dimensions even though the entity is established by virtue of the administration.[209] The theory is also of particular importance for this study as delegation is a key factor in establishing independence, whilst also creating the challenges associated with accountability.[210] In addition, the two regulators under discussion in this thesis can be categorised as purported autonomous entities with regulatory responsibilities.[211]

The interaction between a principal and an agent is characterised by two major decisions.[212] The principal, in this case the State,[213] has to decide between delegating authority to an independent entity or to exert continuous control over the entity by not extending certain rights and responsibilities to it.[214] There are multiple theoretical reasons behind delegation in the first place, such as the deficiency of knowledge on the part of the principal, the expertise or the ability of the agent to obtain special knowledge and skills or become 'informed',[215] and

[207] Thatcher (n 1) 125.

[208] Gilardi (n 102); Thatcher (n 1); Thatcher & Stone Sweet (n 103).

[209] Gilardi (n 102) 67; Thatcher (n 1) 127; Thatcher & Stone Sweet (n 103) 2: '[T]hose governmental entities that (a) possess and exercise some grant of specialised public authority, separate from that of other institutions, but (b) are neither directly elected by the people, nor directly managed by elected officials.' Thatcher (n 1) 127 gives a similar definition but clearly breaks it up into three elements, whereas the quoted reference of Thatcher & Stone Sweet at 2 includes two elements under part (a).

[210] Scott 'Accountability in the regulatory state' 2000 *Journal of Law and Society* 38 39; Thatcher (n 1) 125.

[211] See chs 5 & 6 *infra*.

[212] Bendor *et al* (n 108) 236.

[213] Gilardi (n 102) 68; Spiller (n 85) 65. See par 2 of ch 7 for the specific South African context.

[214] Bendor *et al* (n 108) 236. See also Scott 'Accountability in the regulatory state' (n 210) 39. See further the definition of delegation presented by Thatcher & Stone Sweet (n 103) 2: 'Given our substantive concerns, we define *delegation* as an authoritative decision, formalised as a matter of public law, that (a) transfers policy making authority away from established, representative organs (those that are directly elected, or are managed directly by elected politicians), to (b) a non-majoritarian institution, whether public or private.' Original emphasis. See also Hornby (n 42) 386.

[215] Bendor *et al* (n 108) 248. The authors state at 240: 'This feature of delegation games is obviously important when there are informational asymmetries between principal and agent, and scholars in this field tend to regard such asymmetries as central to delegation'.

other positive effects resulting from delegation.[216] In the context of autonomous entities, the rationales behind delegation activity range from lack of knowledge or expertise to safeguarding the principal's interests.[217] In fact, Mark Thatcher and Alec Stone Sweet note:

> 'For our purposes, *principals* are those political officials who use their authority to establish non-majoritarian institutions through a public act of delegation. *Agents* are those who govern by exercising delegated powers. By assumption, principals are initially in control, in the strict sense that the precise terms of the agent's remit are a matter of institutional design, and the authority to constitute or not to constitute agents fall within the principal's jurisdiction. Because principals are willing to pay the costs of delegation (for example, time and deployment of resources to establish the new institution and to monitor its activities), they must have found it in their interest to do so. Indeed, it must be that the expected benefits of delegation outweigh the costs. Put simply, delegation is functional for principals.'[218]

3.3.2. Rationales for delegation

A couple of primary beneficial outcomes of delegation are put forward by Thatcher and Stone Sweet.[219] The entity clothed with the delegated duties enhances the authenticity of a principal's undertakings and mediates credibility challenges.[220] Gilardi recognises the value of delegation as a form of 'precommitment' within the context of rational choice institutionalism and ventures that this can serve as an indicator of the realisation of expectations advocated by the principal.[221]

Thatcher links the establishment of autonomous entities, or delegation to these entities, and commitment challenges to undesirable developments in certain sectors coupled with decreasing confidence in state authority.[222] Bendor *et al* highlight that the credibility issue is a central feature in financial sector discussions, particularly in relation to 'central banks and monetary policy'.[223] The mediation of credibility contests directed at the principal undermine

[216] Thatcher (n 1) 129-130. See also other reasons forwarded by Thatcher (n 1) 134-139 that are not based on gains for the principal. See also Gilardi (n 102) 81 & 83.

[217] Thatcher (n 1) 125: '... [I]n response to powerful pressures, elected officials delegated to IRAs [independent regulatory agencies] to fulfil functions such as overcoming information asymmetries, blame shifting, commitment, and dealing with complex, technical issues.'

[218] Thatcher & Stone Sweet (n 103) 3-4.

[219] *Idem* at 4.

[220] *Ibid*; Bendor *et al* (n 108) 259-260. See also Gilardi (n 102) 72-74 in respect of his discussion of rational choice institutionalism and credibility challenges; par 3.2.1 *supra*.

[221] Gilardi (n 102) 72-73.

[222] Thatcher (n 1) 132.

[223] Bendor *et al* (n 108) 260. See also Gersen & Vermeule (n 125) 2224.

a basic feature found in principal-agent theory, namely that of 'the ally principal – that a boss prefers subordinates who resemble herself ideologically'.[224]

In the context of the financial sector and in particular monetary policy, the benefits that can be achieved by the agent increase when the preferred choices of the principal and agent are not aligned.[225] Delegation to similarly minded agents would negate the delegation and delegation to unaligned parties would increase the perceived dedication of the principal to the policy.[226]

An adversity to ignorance is the second reason for delegation, in the sense that the ability of the agent to advance its knowledge and expertise in specialised sectors aids the principal in acting in a suitable manner, such as choice of policy.[227] The third aspect links with the second in that it relates to expertise.[228] The autonomous entity is able to hone regulatory activity (the example used is rule making) as opposed to the principal who is concerned with development of broader principles.[229]

Lastly, the principal is removed from contentious issues that create discomfort in the regulated market because the regulatory agency deals with these uncomfortable or 'unpopular' issues.[230] The aforementioned outcomes represent the 'functional' value of delegation for principals.[231]

[224] Bendor *et al* (n 108) 259. See Gersen & Vermeule (n 125) in general for instances where '[d]elegating to enemies' is the preferred option – they discuss the '*enemy principle*' (see 2195). Original emphasis.

[225] Bendor *et al* (n 108) 259 & 263. See also Gersen & Vermeule (n 125) 2223-2224.

[226] *Idem* at 261: 'In the following, we think of Congress or the Executive as the boss delegating monetary policy to a central bank. If the central bank has the same objectives as the boss, the delegation has no real effects. The interesting question is, can the performance of the economy be improved by delegating to a central bank whose preferences differ from the boss's? The surprising answer is yes.' The authors note at 263 that this is a form of 'strategic delegation' and at 264 that 'common sense supports the finding that it is often rational for an uninformed principal to delegate authority to an informed agent; it is rather obvious that tapping the agent's greater expertise can provide gains. (Further, when delegation is beneficial for this reason, then the ally principle is typically operative.) But the value of deliberately handing authority over to an agent whose goals differ markedly from one's own – more, that this preference difference is essential to delegation being useful – is much less intuitive.'

[227] Thatcher & Stone Sweet (n 103) 4.

[228] *Ibid*. See also Barkow (n 85) 19.

[229] Thatcher & Stone Sweet (n 102) 4. Knowledge is also an aspect forwarded by Bendor *et al* (n 108) 240-242 that is relevant to the choice to delegate, the risks involved and the outcomes thereof. Whilst I have extracted some core statements made by the authors, their interaction with the concept of delegation is much more extensive. On a theoretical and mathematical level, they deal with delegation in the context of *inter alia* basic game theory, with relevant assumptions, variables, equilibriums, etc. In a similar manner, I also did not include Rixen & Viola's application of game theory/prisoners' dilemma to their categorisation of path dependency – see Rixen & Viola (n 158) 311-312.

[230] Thatcher & Stone Sweet (n 103) 4; Thatcher (n 1) 130; Bird (n 44) 744.

[231] Thatcher (n 1) 131 & 142.

The rationales for delegation are not constricted to these benefits but also influenced by 'contextual' aspects.[232] The milieu within which the decision to delegate has to be taken is of importance and includes factors such as extraterritorial developments[233] and domestic realities.[234] The replication of organisational structures across jurisdictions is recognised as a core feature responsible for the multiplicity of autonomous establishments in Europe.[235] Delegation to autonomous entities can be viewed as the customary action to take, or become a solution to challenges and demands made.[236]

The involvement of specialists in the affairs of autonomous entities has also influenced the form of the institutions and models of what is acceptable and what is not.[237] Principals can be persuaded by role-players and stakeholders to delegate, some with stakes in the matter.[238] Secondly, the condition and history of the domestic jurisdiction are other noteworthy aspects that affect the creation and form of autonomous entities.[239] Political authority is a core variable that not only promotes or diminishes the possibility of independent organisations but also influences the structure of these organisations, such as the construction and appointment of the governing body or the creation of an organisation headed by one person.[240] Changes in the regulatory landscape can also induce the establishment of regulatory entities.[241]

[232] *Idem* at 136. The author states that mere 'functional advantages' are not sufficient to argue that autonomous entities are thus established by default due to these benefits – he also supports his argument by referring specifically to differentiation between the timing and forms of organisations across Europe – see 134-136.

[233] See also the discussion of Gilardi's take of sociological institutionalism – Gilardi (n 102) *supra*. Thatcher (n 1) 136-137 further refers to '[c]ross-national learning and institutional isomorphism'.

[234] Thatcher (n 1) 137-139 refers to this as '[s]tate traditions and existing state structures', '[p]olitical leadership' and 'reforms of state structures'.

[235] Thatcher (n 1) 136-137; Thatcher & Stone Sweet (n 103) 12.

[236] Thatcher (n 1) 143; Thatcher & Stone Sweet (n 103) 12-13. See also Gilardi (n 102) 77.

[237] Thatcher & Stone Sweet (n 103) 12 states that '[m]uch of the day-to-day politics in domains governed by NMI [non-majoritarian institutions] is heavily structured by the activities of knowledge-based elites. These include scientists, other technical experts, economists, bankers, and lawyers. Such actors have developed strong corporate or professional interests in the work of NMIs. They help to diffuse NMIs and the models of governance that go with them facilitate institutional isomorphism, not least by working to legitimise some forms of governance while delegitimising others. In increasingly Europeanised and internationalised domains such as central banking, utilities regulation or competition policy, transnational communities of professionals have contributed to making delegation to NMIs part of "good governance" norms that have become orthodoxy. The process has not been disinterested: these actors increase their own social power and influence.' See also Black 'Regulation as facilitation' (n 23) in respect of the different roles that participants such as experts play in a regulatory environment.

[238] Thatcher & Stone Sweet (n 103) 11; Thatcher (n 1) 132-133 – this also includes international pressures.

[239] Thatcher & Stone Sweet (n 103) 13 – broadly referred to as 'institutional legacies'. See also Thatcher (n 1) 137 in respect of the role of 'traditions' in nations.

[240] Thatcher (n 1) 138.

[241] *Idem* at 138-139.

3.3.3. Consequences of delegation

The agent-entity, in our case the regulator,[242] has to decide whether to execute its duties or to avoid it.[243] The agent can 'work or shirk' – it can become an expert in the field (or not), or effect favourable outcomes for the principal (or not).[244] Agents can also deviate from the envisaged results that preceded and motivated the act of delegation.[245] In respect of autonomous entities, Spiller notes the following:

> 'Agency problems between politicians and regulators arise because regulators' actions are intrinsically unobservable. Thus, congressional (or presidential) delegation of regulatory authority generates agency discretion. Regulators, then, may pursue interests not aligned with those of the politicians who appoint them.'[246]

A basic principal-agent model will not explicate all the dimensions of the relationships with a regulatory agency, such as a market conduct regulator.[247] The issue of 'control', under the 'standard theory of political of bureaucracies' based in principal-agent theory, constructs the act of delegation as the establishment of a contractual relationship between the principal and agent.[248] Answerability will be structured in correlation with the pre-determined acts and the realisation of same as per the consensual agreement.[249] The interrelation between answerability and autonomy is ostensibly conflicting – the autonomy of the regulatory authority as effected and endorsed by the act of delegation, is founded in its self-assessment of acquiescence to the contractual provisions whilst external assessment is a form of hegemony.[250] Thus, Eva Hüpkes and her co-authors note the following:

> 'Conceived in this way, the problem of accountability can be thought of in terms of the conventional principal-agent problem of ensuring agreed-upon contractual performance. However, this conceptual framework impales agency independence on the horns of a dilemma: either the agency determines whether it has performed according to the contract (independence) or another body or institution makes that determination (control). The dilemma is that if the agency itself makes the determination, it becomes an "unelected fourth branch of government" that cannot be

[242] Gilardi (n 102) 68; Spiller (n 85) 65-66.

[243] Bendor *et al* (n 108) 236. The authors highlight some examples at 236 of how the agent can 'work or shirk' as they call it.

[244] Bendor *et al* (n 108) 236. See also Lodge (n 45) 126.

[245] Thatcher & Stone Sweet (n 103) 4-5; Spiller (n 85) 65-66.

[246] Spiller (n 85) 65-66.

[247] Hüpkes *et al* (n 193) 18 (specifically in the context of regulatory and supervisory agencies (abbreviated as 'RSAs' – see 3) excluding central banks – the authors note at 18 that '…the traditional, vertical "single principal-single agent" model that can be applied to central banks is inapplicable to RSAs'); Curtin 'Holding (quasi-) autonomous EU administrative actors to public account' 2007 *European Law Journal* 523 526; Gilardi (n 102) 72. See also Spiller (n 85).

[248] Hüpkes *et al* (n 193) 4.

[249] *Ibid*.

[250] *Ibid*.

> properly held to account for its performance. If another body makes that determination, the RSA [regulatory and supervisory agency] cannot be genuinely independent.'[251]

As will be shown hereafter, answerability and autonomy can be mutually enforcing if an appropriate equilibrium can be obtained.[252] A rudimentary conception of the relationship between the principal and agent within the constraints of conduct aligned with contractual instructions is arguably insufficient.[253]

'Delegation' and 'control' are two opposing factors that the principal-agent theory deals with.[254] Although the whole bearing of the act of delegation only manifests after the fact,[255] the question of whether to retain some measure of command over the regulatory body is a significant consideration prior to the act of delegation.[256] The observations made during this period of deliberation influence whether delegation occurs or not, and to which extent it occurs where the choice is indeed made to delegate.[257] The delegating authority would attempt to limit the potential occurrences of 'agency losses'.[258] These losses occur when the delegatee's conduct departs from the intended behaviour anticipated by the delegator and this deviation is facilitated by the authority that has been delegated.[259] An example is a regulator endowed with wide discretionary powers that utilises these powers to effect outcomes that supports its own vision.[260]

Before I proceed with the discussion, the following reference to the work of Mark Bovens is important for purposes of clarifying some concepts in light of the overall theme of this thesis:

> 'Similarly, there is a fine line between accountability and control. Some would equate accountability with controllability. Lupia, for example, adopts a control definition of accountability: "An agent is accountable to a principal if the principal can exercise control over the agent". Accountability mechanisms are indeed important ways of controlling the conduct of public

[251] *Ibid*.

[252] See e.g. Hüpkes *et al* (n 193) 5; par 3.3.4 *infra*.

[253] Hüpkes *et al* (n 193) 5. Curtin (n 247) 524: 'What is happening in practice is that there are multiple accountability forums with a role to play in ensuring such actors are held to account; forums that are not tied to a principal-agent relationship with the actors that they hold to account.' See also Curtin (n 247) 525-526.

[254] Bendor *et al* (n 108) 236-237 & 242; Thatcher & Stone Sweet (n 102) 4-5.

[255] Thatcher (n 1) 139.

[256] *Idem* at 129-130 & 139; Bendor *et al* (n 108) 242. See also Thatcher & Stone Sweet (n 103) 5.

[257] Thatcher (n 1) 139. See also Scott 'Accountability in the regulatory state' (n 210) 39: 'Debates over accountability have to grapple with the uncomfortable dilemma of how to give sufficient autonomy to these actors for them to be able to achieve their tasks, while at the same time ensuring an adequate degree of control.'

[258] Thatcher (n 1) 130; Thatcher & Stone Sweet (n 103) 4.

[259] *Ibid*. See also Spiller (n 85) 65-67.

[260] Thatcher & Stone Sweet (n 103) 4: 'For now, let us agree that principals know that agents are likely to develop their own interests – including an interest in producing the best policies, given their own understanding of the nature of the policy problem and the environment – and that these interests may conflict with those of the principals.'

> organisations. However, "control", used in the Anglo-Saxon sense, is broader than accountability and can include both *ex ante* and *ex post* mechanisms of directing behaviour. Control means "having power over" and it can involve very proactive means of directing conduct, for example through straight orders, directives, financial incentives or laws and regulations. But these mechanisms are not mechanisms of accountability per se, because they do not in themselves operate through procedures in which actors are to explain and justify their conduct to forums. Accountability is a form of control, but not all forms of control are accountability mechanisms.' [261]

The primary method to restrict deviating conduct, after having decided to delegate, is through the official determination of the domain of the regulator and accompanying restraints on the regulator.[262] This is not an easy feat as the positive returns to the delegating party decrease in the wake of restrictive discretionary authority.[263] Some control mechanisms annul the rationale for delegation and are not viable options to restrain delegates.[264] The act of delegation therefore needs to be calibrated accurately in order to allow for delegation of adequate authority to meet the regulator's mandate whilst restricting the potential for deviating behaviour.[265] A delegating party's choice to delegate (or not to delegate) is

[261] Bovens (n 1201) 453-454. See also Hüpkes *et al* (n 193) 5 where the authors take a similar approach insofar as they agree that 'accountability is not synonymous with control' but indicate that '[a]ccountability is established through a **combination of control mechanisms** …' They seem to view 'control' as a one-sided exercise that only functions in a linear fashion as opposed to 'accountability' that functions as 'a network of complementary and overlapping checking mechanisms…' See also Scott 'Accountability in the regulatory state' (n 210) 40.

[262] Thatcher (n 1) 130 & 139.

[263] Thatcher & Stone Sweet (n 103) 5.

[264] *Idem* at 5-6 & 14.

[265] *Idem* at 4 & 5. See also Scott 'Accountability in the regulatory state' (n 210) 39.

influenced by considerations of 'control'.[266] In fact, in Bendor *et al*'s analysis of delegation games, 'delegation' and 'control' are opposing outcomes or contradicting choices.[267]

Thatcher and Stone Sweet note that the principal constructs the arena within which the agent is to function through the conscious delegation of specific authority, coupled with deliberately construed controlling mechanisms.[268] Hüpkes *et al* note that, in the context of 'self-interest', politicians have vested interests to preserve some measure of control over receivers of delegated authority, such as the prospect of receiving benefits in the form of 'rents, campaign contributions, or bribes' or advantages that could assist with forthcoming political appointments.[269]

The mechanisms incorporated into the system are closely related to the motivating factor for, and circumstances surrounding, the formation of the regulator itself.[270] Thus, where the principal wishes to show dedication to a given cause in a tangible and reliable manner, and this is an underlying rationale, the delegating authority would be generous with the delegation of authority but inhibited in establishing methods to manage the regulator after delegation.[271] Strict managerial instruments would negate the rationale for delegation in the aforementioned

[266] Scott 'Accountability in the regulatory state' (n 210) 39; Bendor *et al* (n 108) 236, 237 & 242; Thatcher & Stone Sweet (n 103) 5.

[267] See Bendor *et al* (n 108) 237 & 238. I need to reiterate my approach to theoretical models that are not law-related, specifically the theories based in political sciences and mathematical/statistical analyses, such as those pertaining to delegation in the style of game theory. Bendor *et al* (n 108) lean on game theory when discussing delegation but I do not incorporate the specifics or statistical possibilities of certain occurrences in respect of 'who does what when' in relation to the options and benefits available (see 236 *et seq*). I do, however, extract and incorporate into the thesis those options that are available, the benefits that may be gleaned, the factors that may affect decisions and outcomes, irrespective of the chances of the scenarios actually realising or the likelihood of certain decisions made, depending on the factors present in that specific scenario. The statistical analyses purport to set out the optimal factors that lead to a possibility of decisions made and outcomes achieved (see Bendor *et al* (n 108)) and this thesis is not the forum to reiterate same. Bendor *et al*'s work is important to me, as their point of departure for their game theory analysis is simplistic and relevant (see 236 *et seq*): The 'decision makers' or 'players' are the 'boss (or principal)', in my case primarily the government and the 'subordinate (or agent)', in my case the regulator. Likewise, the behaviour is manageable (see 236): 'The boss can either delegate or not; the subordinate can either work or shirk.' Bendor *et al*'s article aims to deal with, *inter alia*, some of the manifestations of delegations in different ways: 'Different preference orderings identify different kind of delegation situations…' (see 236) which I do not deal with in detail, specifically as it involves certain suppositions made by the authors, the presence of certain variables and the absence of other variables. I also deal primarily with considerations in respect of the 'Delegation-of-authority game' as opposed to the 'signalling game', which are both forms of 'delegation games' – see Bendor *et al* (n 108) 241. A similar approach was taken in the work of Spiller (n 85) & Ting 'A strategic theory of bureaucratic redundancy' 2003 *American Journal of Political Science* 274.

[268] Thatcher & Stone Sweet (n 103) 5. The authors attend to the concept of the 'zone of discretion', which they find instrumental to determining the phenomenon that is the allowed variance between the conduct of the agent and the desires of the principal – see 5. Thus, the relevant factors to take into account are '(a) the sum of delegated powers (policy discretion) granted by the principal to the agent, minus (b) the sum of control instruments, available for use by the principals to shape (constrain) or annul (reverse) policy outcomes that emerge as a result of the agent's performance of set tasks'.

[269] Hüpkes *et al* (n 193) 3.

[270] Thatcher & Stone Sweet (n 103) 5-6. See also Bird (n 44) 744.

[271] Thatcher & Stone Sweet (n 103) 5 & 14.

instance.[272] On the other hand, if there are various policy options that are available for the regulator to choose from, the delegating authority will likely impose stricter management methods subsequent to the act of delegation.[273] Likewise, under circumstances where the delegation is motivated by a principal's desire to enhance expertness, lessen its obligations or augment its knowledge, the imposition of far-reaching accountability measures does not conflict with the aims of the act of delegation.[274]

Control mechanisms are intended to delineate and structure, or invalidate and withdraw, the outcomes of regulatory behaviour.[275] Actual reliance on these mechanisms by the delegating authority is dependent on whether the results of the agent's actions are acceptable to the principal.[276] Under circumstances where the scope for the agent to exercise its discretion without exceeding the boundaries of the principal's desires is small, the agent may track the effects of its behaviour on the delegating authority in order to circumvent adverse rejoinders to regulatory choices.[277]

Another matter that affects post-delegation management is the principal and its priorities.[278] It becomes extremely important to determine the affiliation between the agent and principal where it cannot be presumed that the principal has managerial authority over the agent.[279] Under circumstances where multiple authorities are involved concerning an agent or where the managerial obligations are diffused between various authoritative bodies, the ability to manage the agent *vis-à-vis* its conduct effectively is attenuated.[280]

3.3.4. Independence and accountability in a regulatory context

In many cases, specific outcomes are politically generated and the regulatory body commissioned to reach the outcomes.[281] In other cases, the regulator can be influential in determining policy.[282]

[272] *Idem* at 14; Bird (n 44) 744.

[273] Thatcher & Stone Sweet (n 103) 6.

[274] *Idem* at 15.

[275] *Idem* at 5.

[276] *Idem* at 6.

[277] *Ibid*. See also Farina 'Administrative law as regulation: The paradox of attempting to control and to inspire the use of public power' 2004 *South African Public Law* 489 491-492.

[278] Thatcher & Stone Sweet (n 103) 6.

[279] *Ibid*.

[280] *Ibid*. See also Bendor *et al* (n 108) 245.

[281] Mwenda (n 42) 26: 'In many countries, politicians define regulatory and supervisory goals in the same way that they set a country's targets for monetary policy, but it is the regulators, like the central bank as is customary in the case of monetary policy, that determine how to achieve these goals. Thus, where regulators fail, they should be held accountable, since they determine how to achieve regulatory goals.' See Spiller (n 85) 65; Quintyn *et al* (n 101) 7.

[282] Thatcher & Stone Sweet (n 103) 16 & 17.

Autonomous bodies obligated to execute regulatory tasks are also not ordinary state entities and fit haphazardly into the administrative categorisation of state power as executive, legislative or judicial.[283] Martin Lodge mentions that the role of regulators in respect of policy determination and the institutionalisation thereof become important aspects to consider in respect of accountability.[284] He also states that ordinary civil service matters are distinguishable from regulatory matters.[285]

Thatcher remarks that every entity tasked with regulatory obligations is subjected to some form of hegemony by the delegating authority.[286] Accountability of financial regulators has increasingly gained importance – factually in light of the economic crisis and substantively in light of the authority dispersed to financial regulators.[287] Scott holds that confidence in regulatory authorities is one of the factors that underlie answerability debates.[288] On the one hand, the autonomy and segregation of regulatory entities are seen as important factors that prevent undesirable incentives and outcomes associated with regulation by the government – as commanded by politicians of the reigning political regime – and those associated with self-regulation where the influence of the regulated industry is at the forefront.[289] In addition, these entities are specialised establishments that have been created to regulate scientific sectors.[290] On the other hand, and notwithstanding the anticipation of 'apolitical and expert' conduct by regulators, unsuccessful regulation has generated distrust in the ability to achieve the outcomes set for these regulators.[291]

I have noted the concern of some writers in respect of the powers and positioning of these regulatory agencies and their subsequent categorisation of same as 'the fourth branch of government' or, as Scott puts it, 'governments in miniature'.[292] In the authoritative spectrum, some regulators are enabled to determine legal stipulations or institute punitive action

[283] See e.g. comments by Thatcher & Stone Sweet (n 103) 18-19; Mwenda (n 42) 34; Quintyn & Taylor *Should financial sector regulators be independent?* 2004 *International Monetary Fund Economic Issues* No 32.
[284] Lodge (n 45) 124.
[285] *Ibid*.
[286] Thatcher (n 1) 127.
[287] Scott 'Evaluating the performance and accountability of regulators' (n 95) 357-358 & 360.
[288] *Idem* at 360.
[289] *Idem* at 357.
[290] *Ibid*.
[291] *Idem* at 358.
[292] See par 2.1 of ch 1 *supra;* Mwenda (n 42) 34; Quintyn & Taylor (n 283)*;* Thatcher & Stone Sweet (n 103) 16; Scott 'Evaluating the performance and accountability of regulators' (n 95) 358. See also the comments of Verkuil 'The purposes and limits of independent agencies' 1988 *Duke Law Review* 257 257 for the historical origin of this phrase.

unsanctioned by automatic judicial input or oversight.[293] Most, however, are tasked with supervisory duties to inspect observance of rules determined by the law-making authority of the nation or as assigned to a member of the executive by way of delegated authority.[294] Ordinarily, the authority to effect official punitive action is conferred on the judiciary or administrative bodies.[295] The authority granted to these agencies is as important because many of the concerns are associated with the (independent) execution of authority and the concomitant accountability measures.[296] Firstly, Marc Quintyn and Michael Taylor, for example, view this 'fourth branch' denotation as 'irresponsible' and they doubt whether these organisations' actions are as unrestrained as some fear.[297] Secondly, the authority granted is an important component to determine accountability as it delineates the actions or omissions for which the regulator is held accountable.[298] In addition, Joanna Bird notes:

> '[T]he accountability of regulators is hampered by the difficulty of effectively measuring and assessing their performance. It is very difficult to hold someone to account if you cannot actually determine when they have performed well and when they have performed badly … Given the complex nature of many regulatory mandates, it is notoriously difficult to set meaningful performance measures or standards for regulators and to actually measure their substantive, as opposed to procedural or financial, performance.'[299]

Independence and accountability are juxtaposed in the regulatory sphere when it comes to regulators.[300] Whilst independence may ostensibly be considered the antithesis of accountability, in the sense that increased independence results in decreased accountability,[301] there are authors that argue that both concepts can exist simultaneously and in a manner that

[293] Scott 'Evaluating the performance and accountability of regulators' (n 95) 358-359. See the reference to the United States at 359 (the reference is neutral in the sense that Scott only refers to U.S. regulators in general) as well as that of the Financial Stability Board (n 81) 11 (in this report, specific reference is made to the Consumer Financial Protection Bureau – hereinafter 'CFPB') and it seems that the American position is outside the norm for regulatory powers.

[294] Scott 'Evaluating the performance and accountability of regulators' (n 95) 358-359.

[295] *Idem* at 359.

[296] Quintyn & Taylor (n 283); Scott 'Evaluating the performance and accountability of regulators' (n 95) 360; Bird (n 44) 741-742; Goodhart *et al* (n 50) 68 & 195.

[297] Quintyn & Taylor (n 283).

[298] Bird (n 44) 742 & 746-747; Hüpkes *et al* (n 193) 10.

[299] Bird (n 44) 743 & 745.

[300] See e.g. Bird (n 44) 743-744; Hüpkes *et al* (n 193) 4; Quintyn *et al* (n 101) 6. See also Levitin 'The Consumer Financial Protection Bureau: An Introduction' 2012-2013 *Review of Banking & Financial Law* 321 337-338.

[301] Goodhart *et al* (n 50) 68-69; Bird (n 44) 743-744.

is conducive to an effective regulatory regime.[302] In addition, neither independence, nor accountability can be perceived as 'absolute'.[303] I concur with this approach and it is also the point of departure for my analysis of the South African regime in part two of the thesis.

On the one hand, when considering the respective definitions of 'accountability' and 'autonomy', accountability by definition presumes subjection to a higher authority whilst independence presumes liberty from subjective forces.[304] At first glance, two contrasting views on the interaction between these two concepts exist in the literature. On the one hand, Charles Goodhart and his co-authors, quoting Lastra, are of the opinion that there is a counteractive interaction between independence and accountability insofar as excessive autonomy can effect 'a state within a state' and excessive answerability diminishes the efficacy of autonomy.[305] The recommendation is that a correct balance should be reached between autonomy and answerability.[306]

Bird reiterates this dichotomy when she writes that one of the challenges associated with answerability is the emasculation of certain coveted characteristics of regulatory entities such as autonomy, proficiency, and competency.[307] She highlights that the incentive for the establishment of autonomous entities is to effect determinations by skilled and self-directed persons.[308] In addition, the scientific disposition and complexity of contemporary sectors are not conducive to a regime where a political stakeholder or role-player is enabled to effect the expert regulation.[309]

[302] Hüpkes *et al* (n 193) 4; Financial Stability Board (n 81) 11. See also Mwenda (n 42) 25 in respect of his submission that both independence and accountability are necessary for efficacy. See also Quintyn *et al* (n 101) 6: 'Das and Quintyn … identified four components that bring together the elements that form the basis for good governance: independence, accountability, transparency, and integrity. The essence of bringing together these four components is that they interact and reinforce each other at various levels in supporting good governance. Independence and accountability are two sides of the same coin. Independence cannot be effective without proper accountability. Transparency is a key instrument to make accountability work. It is also a vehicle for safeguarding independence. By making actions and decisions transparent, chances for interference are reduced.'

[303] Pan 'Structural Reform of financial regulation' 2011 *Transnational Law & Contemporary Problems* 796 811; Hüpkes *et al* (n 193) 5; Quintyn & Taylor (n 283)*;* Bird (n 44) 743. See also Lodge (n 45) 142.

[304] See Hornby (n 42) 10 ('accountable … responsible for your decisions or actions and expected to explain them when you are asked') & 84 ('autonomy … the freedom for a country, a region or an organization to govern itself independently … the ability to act and make decisions without being controlled by anyone else …'). See further the definitions for 'accountability' and related terminology given by Hüpkes *et al* (n 193) 5-6. See also Scott 'Accountability in the regulatory state' (n 210) 40.

[305] Goodhart *et al* (n 50) 68-69. They refer to central banks but the authors state that '[s]imilar considerations could apply to regulation more generally' – see 68.

[306] Goodhart *et al* (n 50) 68-69 – they refer to a 'trade-off'.

[307] Bird (n 44) 743-745.

[308] *Idem* at 743.

[309] *Ibid*. See also Black 'Regulation as facilitation' (n 23) in respect of the various stakeholder components of a regulatory regime and the difficulties associated with varying views and circumstances.

Government departments are not inclined to obtain the required proficiency in each of the complex and varied sectors for which they are responsible.[310] Certain officials may obtain the necessary knowledge and counsel the executive accordingly but, in some instances, the proper manner of effecting the wellbeing of those regulated or affected by regulation may be through 'regulatory' or 'administrative' resolutions by structures that are distanced from the political domain.[311] These segregated entities are not subject to political and nomination pressures that encourage action that yield fast, observable results.[312] They are of a specialised nature, enabled to consider the public interest skilfully and sustainably.[313] Scott notes that challenges associated with regulatory answerability manifest due to endowment of these agencies with autonomy and notwithstanding the crucial role of answerability in the context of delegation.[314] This specialised nature contributes to the challenge of suitable answerability,

> '[t]herefore, the very purpose of regulators (that is, to act with expertise and independence) is undermined when they are held to account, especially using strong accountability mechanisms that lead to responses imposed by those who do not possess the same level of expertise and independence as the regulators'.[315]

Quintyn and Taylor argue that accountability and independence are not contra-indicated, but that these concepts are 'complementary'.[316] They argue that accountability plays an important role to realise 'effective independence' and view accountability as an autonomy-supporting feature.[317] As such, they are of the opinion that answerability is required for proper independence, and that the significance of answerability measures are enhanced as autonomy increases.[318] The perspectives of the authors that I just referred to converge in respect of the

[310] Bird (n 44) 743 & 752.

[311] *Idem* at 743.

[312] *Idem* at 743-744 – the author states that '[s]uch persons do not have to appeal to populism or appease vocal lobby groups to ensure re-election or reappointment … the electoral cycle means that politicians, and those directly answerable to them such as government departments, have strong incentives to take a short-term view'.

[313] Bird (n 44) 743 – the author states that '[t]hey have the luxury of taking a long-term and expert view of the public interest …'

[314] Scott 'Evaluating the performance and accountability of regulators' (n 95) 357 & 360.

[315] Bird (n 44) 744. Thatcher (n 1) 139 makes a valuable observation in respect of the persons appointed in regulatory positions – he observes that Britain primarily selected regulatory personnel from a group of persons who were 'non-party partisan experts and officials', whilst European nations on the continent preferred those who were 'party political, with nominees frequently being either party politicians or clearly identified with a party'.

[316] Quintyn & Taylor (n 283).

[317] *Ibid.* See also Goodhart *et al* (n 50) 69 where the authors note that excessive accountability can have adverse effects on efficacious autonomy.

[318] Quintyn & Taylor (n 283). See also Mwenda (n 42) 14, where the author notes that independence is an indication of accountability.

outcome, namely 'effective independence', but differ with regard to the contrasting elements of these concepts.[319]

I agree with Goodhart and his co-authors that one should acknowledge the contrasts between the concepts of independence and accountability, but I also agree that a functional system can include independence and accountability in a harmonised fashion.[320] It seems to me that the equilibrium of the system is the defining factor – in an unbalanced regulatory system, accountability and independence will have contra-indicating effects but in a balanced system, these two features can enhance the efficacy of the system with accountability affecting independence and independence affecting the system.[321] A holistic approach is therefore as necessary here as it is in the case of independence.[322]

Mwenda's statement relating to indications of accountability, when read with that of Quintyn and Taylor, can also be interpreted in the light of confidence in accountability measures – greater extension of independence may be an indication of faith in the established methods of holding the regulator sufficiently accountable.[323] Thus, whilst the accountability of entities is often the source of contention – in the sense that accountability is preferred over independence – proper accountability measures have a broader application than just ensuring that authority is controlled in order to ensure adherence to the delegating authority's preferences.[324] Hüpkes *et al* argue that 'accountability' is not the same as 'control' and that the ideal equilibrium is found when the following scenario, worded by Moe, realises: '[N]o one controls the independent agency, yet the agency is "under control".'[325] In this regard, Quintyn and his co-authors note the following:

> 'Independence and accountability are two sides of the same coin. Independence cannot be effective without proper accountability. Transparency is a key instrument to make accountability work. It is also a vehicle for safeguarding independence. By making actions and decisions transparent, chances of interference are reduced. … Transparency also helps to establish and safeguard integrity in the sense that published arrangements provide even better protection for agency staff. Independence and integrity also reinforce each other. Legal protection for agency staff, as well as clear rules for

[319] Goodhart *et al* (n 50) 68-69; Quintyn & Taylor (n 283).
[320] See Mwenda (n 42) 34; Quintyn & Taylor (n 283); Quintyn *et al* (n 101) 6. See also Goodhart *et al* (n 50) 69.
[321] See Mwenda (n 42) 34; Quintyn & Taylor (n 283). See also Bird (n 44) 745: '[T]hose devising accountability mechanisms must find an uneasy balance between accountability and these other desirable attributes.'
[322] See Bird (n 44) 743 where the author states that 'accountability is not an absolute good' and Quintyn & Taylor (n 283) where they note that '[i]ndependence can never be absolute, because even among "equal and independent partners," cooperation and coordination are essential'.
[323] See Quintyn & Taylor (n 283); Mwenda (n 42) 14.
[324] Quintyn *et al* (n 101) 4-5 & 34; Hüpkes *et al* (n 193) 4-6. See also Thatcher (n 1) 130.
[325] Hüpkes *et al* (n 193) 5.

> appointment and removal of agency heads, support both their independence and their integrity. Finally, accountability and integrity also reinforce each other. Because of accountability requirements, there are additional reasons for heads and staff to keep their integrity.'[326]

3.4. Institutional configuration

3.4.1. Importance

I discuss the manner in which regulatory institutional frameworks can be designed because the regulatory framework affects the independence and accountability of the regulator and is important for South Africa, which transitioned to a Twin Peaks model.[327] Some of the challenges pertaining to the different design models are dealt with because I am of the opinion that some of the challenges associated with institutional structures may still manifest within the new regulatory framework.

The formation of the entity to which authority and responsibility will be directed is a factor to consider when delegation is contemplated.[328] Bendor *et al*, referring to the work of Fiorina on the nature of the institution to which a principal will delegate, note that a principal with a certain outcome in mind can either decide to develop a special organisation or determine that legal instruments should be created to serve as litigation tools that can be implemented via the judicial process.[329] They note that the decision-maker could consider the potential of positive enforcement outcomes through each option and then choose the option with the superior outcome.[330]

[326] Quintyn *et al* (n 101) 6-7. See also Quintyn *et al* (n 101) 8; Quintyn & Taylor (n 283) & Mwenda (n 42) 25, who opine (in the context of 'institutional independence' – see par 3 of ch 3 *infra*) that the resolutions of the regulator should ideally be effected in a manner that enables and allows the regulated community access and insight into the activities of the regulator, and that openness in this regard should be countered with the need to restrict access where it is of economic importance not to disclose the information.

[327] See par 3.4 *infra*; paras 2.3 & 2.4 of ch 1 *supra*.

[328] Bendor *et al* (n 108) 247.

[329] *Ibid*.

[330] *Ibid*.

A well-considered formal organisational arrangement is invaluable.[331] Goodhart *et al* have stated that '[t]he goal is not simply to create a tidy regulatory structure'.[332] The proper construction of the regulatory scheme of establishments plays a role in overall regulatory efficacy,[333] the reduction of negative outcomes because of improper decision-making and conflict resolution, and unnecessary costs.[334] However, a specific structure does not guarantee successful regulation and the performance of the regulator is a decisive factor.[335] Neither does a failsafe structure exist:

> 'There is no perfect way of demarcating responsibilities between regulatory agencies; there will always be problems at the boundaries. To some extent, a pragmatic approach is needed, because a perfect institutional structure is unattainable.'[336]

The Financial Stability Board indicates that a number of advantageous institutional features have been identified over the years – irrespective of the construction of the particular regime.[337] The Board recommends that all regulatory entities responsible for the safeguarding of customer affairs are to be given unambiguous, comprehensible and tasks combined with sufficient authority and the means to execute their duties.[338] These organisations would further benefit from suitable management, autonomy in the execution of their functions and

[331] Goodhart *et al* (n 50) 151-152. Goodhart *et al* at 152 references Taylor (writing in the context of the United Kingdom) by stating 'that the multiplicity of regulatory agencies causes problems associated with regulatory overlap and underlap, duplication, duplicate rule books, potential for regulatory arbitrage, lack of co-ordination between regulatory agencies, bureaucratic infighting, and lack of transparency in the regulatory system. In his words, "*These examples show why structure does, and should, matter if we wish to create an efficient, effective system of financial services regulation*"'. My emphasis. See *contra* Hadjiemmanuil (n 130) 128 fn 1 referring to a statement made by Howard Davies: 'Howard Davies expressed his "lack of enthusiasm for the topic of regulatory structure … based on two prior beliefs. First, that the relationship between structure and effectiveness is loose. I know of little evidence that structural reforms are quickly followed by an enhancement of the effectiveness of the activity in which those agencies are engaged. Secondly, … that regulatory structure should follow market structure, rather than the other way round. Regulators should seek to respond to changing markets which, in turn, respond to changing customer demand and new product availability, rather than seeking to dictate either."' Hadjiemmanuil (n 130) 128 himself, however, notes that reformation occurs nevertheless.

[332] Goodhart *et al* (n 50) 151. The need for simplification in the South African system due to customer disorientation was one of the primary driving forces of the new regime – see National Treasury *Treating Customers Fairly in the Financial Sector* (n 67) 15.

[333] Goodhart *et al* (n 50) 156; Hadjiemmanuil (n 130) 128.

[334] Goodhart *et al* (n 50) 151, 156-157. See 151, where the authors note the following: 'An inappropriate institutional structure, although it may reduce the institutional costs of regulation, may raise overall costs if it leads to inappropriate regulation. Put another way, the wrong institutional structure may cause an increase in compliance and structural costs that exceeds the savings in institutional costs associated, perhaps, with economies of scale. For example, a mega regulator may appear to reduce institutional costs, but if that regulator fails to make appropriate distinctions between wholesale and retail business, then the overall costs of regulation may increase to the detriment of the industry and consumer.'

[335] Goodhart *et al* (n 50) 151 & 181; Hadjiemmanuil (n 130) 128.

[336] Goodhart *et al* (n 50) 155.

[337] Financial Stability Board (n 81) 8-9.

[338] *Idem* at 9.

proper remedial processes.[339] In addition, regulatory entities should be enabled and incentivised to compel compliance and discourage undesirable behaviour.[340] They ought to encourage new policy strategies and be answerable for their actions.[341]

Christos Hadjiemmanuil notes that the factors to consider necessitate an evaluation that exceeds a mere comparison of the positive and negative aspects of certain structures.[342] He views the 'concrete national context' as a focal point when constructing institutional arrangements.[343] In a similar fashion, Mwenda highlights the value of 'country-specific' considerations and his selection revolves around the principled outcomes that underlie the selected scheme, the maturity of the financial system and the existence of intersecting conglomerates.[344]

Goodhart *et al* also state that there are various aspects to take into account when deciding on an appropriate system.[345] 'Accountability' features prominently in the authors' list, as do the mandate(s) of the regulator(s), the ultimate outcomes to be achieved, efficacy, associated regulatory expenses,[346] considerations of competition levels, and the convergence of authority in these establishments.[347]

3.4.2. Different schemes

The configuration of institutional structures tasked with financial sector regulation differs from jurisdiction to jurisdiction.[348] Frameworks oscillate between solitary and compound schemes.[349] Options available within the financial sector are therefore one, two or multiple agencies[350] and the regulatory institutional configuration can be structured according to 'institution', 'function' or 'objectives'.[351]

In addition, financial regulatory systems have three elements, namely 'systemic', 'prudential' and 'conduct of business'[352] and these can further be viewed as the 'objectives of

[339] *Ibid*.
[340] *Ibid*.
[341] *Ibid*.
[342] Hadjiemmanuil (n 130) 128-129.
[343] *Idem* at 129.
[344] Mwenda (n 42) 9.
[345] Goodhart *et al* (n 50) 150.
[346] Goodhart *et al* spend some time on the impact of the institutional configuration on regulatory expenses. The authors divide these expenses into three categories, namely '[i]nstitutional', '[c]ompliance' and '[s]tructural'. In this regard, see Goodhart *et al* (n 50) 150-151.
[347] Goodhart *et al* (n 50) 150. See also similar comments by Mwenda (n 42) 12 & Financial Stability Board (n 81) 8-9.
[348] Financial Stability Board (n 81) 8.
[349] *Ibid*; Goodhart *et al* (n 50) 151; 155-156 & 159; Mwenda (n 42) 9-10.
[350] Financial Stability Board (n 81) 8; Goodhart *et al* (n 50) 150-156; Mwenda (n 42) 9-10.
[351] Goodhart *et al* (n 50) 156; Mwenda (n 42) 8-10.
[352] Goodhart *et al* (n 50) 159.

regulation'.[353] This means that the choice to establish a sole regulator tasked with regulating the whole of the financial sector;[354] or the choice to establish regulators tasked with the perceived core objectives of financial regulation;[355] or the choice to regulate each segment of the sector individually by establishing a variety of specialist regulators;[356] depend to some extent on the requirements of the underlying regime and the features of the various options.[357]

Even though the South African regime is changing, and aiming to eradicate multiplicity of regulatory agencies,[358] I am of the opinion that some of the challenges associated with some institutional structures may still manifest within the new regulatory framework. As such, I will briefly discuss some of the issues relating to the solitary and variety models respectively.

The solitary model entails the establishment of one organisation responsible for the entire financial sector, also referred to as 'a monopoly regulator' or 'mega regulator'.[359] I refer to the model that establishes more than one regulator; whether these diversified regulators are constructed around financial subsectors or the objectives of regulation, as the variety model.[360] South Africa has begun to implement a 'Twin Peaks' regime, which is categorised under the variety model because it entails at least two regulators.[361] Some writers have recognised that the regulator for customer affairs and industry behaviour is a 'consolidated' entity under such a regime.[362] This will be the position under the South African regime, as the market conduct regulator will regulate most of the financial sector, although there are critiqued exceptions that I discuss at a later stage.[363]

There are various benefits associated with the solitary scheme, most relating to a streamlined structure that allows for greater control, decisiveness, resourcefulness, coherency and

[353] *Ibid*; Mwenda (n 42) 8-9; Hadjiemmanuil (n 130) 137. Substantively speaking, the regime for the South African financial sector is intended to 'protect consumers or investors ... ensure the solvency and financial soundness of the country's financial institutions ... promote fairness, efficiency and transparency in the securities markets [and] ... promote a stable financial system by monitoring, mitigating and managing systemic risk' – see Van Wyk (n 46) 113-114. See also Pan (n 303) 805-808.

[354] Goodhart *et al* (n 50) 151-152; Pan (n 303) 819-820; Jones 'Back to basics: Why financial regulatory overhaul is overrated' 2009-2010 *Entrepreneurial Business Law Journal* 391 392-397; Hadjiemmanuil (n 130) part IV.

[355] Goodhart *et al* (n 50) 155-156; Pan (n 303) 818; Hadjiemmanuil (n 130) 137-138.

[356] Pan (n 303) 817; National Treasury *Treating Customers Fairly in the Financial Sector* (n 67) 15 & 16.

[357] Goodhart *et al* (n 50) 150-151 & 156-159; Mwenda (n 42) 9-11 & 91.

[358] National Treasury *Treating Customers Fairly in the Financial Sector* (n 67) 15 & 16.

[359] See Goodhart *et al* (n 50) 151 & 154; Hadjiemmanuil (n 130) 140.

[360] See Goodhart *et al* (n 50) 156-159.

[361] See National Treasury *Treating Customers Fairly in the Financial Sector* (n 67), specifically ch 2. See Pan (n 303) 819: '…two regulators focused respectively on prudential regulation and business conduct regulation plus a market stability agency …' See also Taylor 'Regulatory reform in the U.K.' 2013-2014 *North Carolina Banking Institute* 227 228-229.

[362] Financial Stability Board (n 81) 9.

[363] See chs 5 & 7 *infra*. See also National Treasury *Treating Customers Fairly in the Financial Sector* (n 67) 15; National Treasury *A Safer Financial Sector to Serve South Africa Better: National Treasury Policy Document* 23 February 2011 46.

proficiency.[364] An amalgamated entity is capable of managing affairs with autonomy by concentrating core sections in one organisation.[365] This includes regulatory action and interaction with industry stakeholders through a solitary management and a unified enforcement detail, as well as exclusive collection and organisation of data and information.[366] The expenses associated with multiple regulatory entities are reduced because the financial obligations brought about by numerous entities with similar needs are lessened and there is a collective dependence on human and other resources.[367]

Expertise is an indispensable part of regulation,[368] and a single regulator facilitates the convergence, employment, and professional growth of knowledgeable persons, especially where expert professionals are scarce.[369] As a result, the stature of the regulator in respect of proficiency can increase.[370] Cohesion can be developed in respect of 'functional areas of regulation', facilitated by the existence of one institution responsible for all forms of regulation[371] as well as the accessibility of 'specialist functional supervisors' consolidated within the institution.[372]

Apart from uniform approaches, such as enforcement measures,[373] the creation of a minimalistic structure facilitates ease of comprehension by stakeholders and may minimise expenses to market participants, as regulatory interaction is restricted to a single entity.[374]

[364] Goodhart *et al* (n 50) 151-152; Hadjiemmanuil (n 130) 140-142; Jones (n 354) 396-397; Pan (n 303) 819. See also Hadjiemmanuil (n 130) 141: 'The megaregulator would achieve economies of scale and scope. In particular, it would be able to rely on a single central administration, a uniform information-gathering system and a consolidated database, as well as a single enforcement mechanism. It could utilise resources and expertise efficiently, shift excess resources to areas of current need, increase employee specialisation, but also take advantage of potential synergies amongst specialist functional supervisors, now operating under a single umbrella.'

[365] Hadjiemmanuil (n 130) 141; Pan (n 303) 819.

[366] Hadjiemmanuil (n 130) 141. See also Pan (n 303) 819.

[367] Goodhart *et al* (n 50) 152: 'There might be economies of scale within regulatory agencies, especially with respect to skill requirements. If so, the smaller the number of agencies, the lower should be the institutional costs. A single regulator might be more efficient because of shared resources.' See also Hadjiemmanuil (n 130) 141.

[368] Mwenda (n 42) 31; Goodhart *et al* (n 50) 193. See also Barkow (n 85) 19.

[369] Goodhart *et al* (n 50) 152: 'If expertise is in short supply, such expertise might be more effectively utilised if it is concentrated within a single agency.' See also Hadjiemmanuil (n 130) 141: 'The consolidation of regulatory responsibilities would lead to greater agency prestige and more extensive professional development and career prospects for staff.'

[370] Hadjiemmanuil (n 130) 141.

[371] Goodhart *et al* (n 50) 152.

[372] Hadjiemmanuil (n 130) 141.

[373] *Ibid*.

[374] Goodhart *et al* (n 50) 152. See also Hadjiemmanuil (n 130) 140 & 141: 'The regulatory structure would be simple and transparent, eliminating confusions about the exact allocation of competencies.... This could be in the interest of both regulators (who, as a result, would face fewer jurisdictional uncertainties) and regulated firms and consumers (who would have a one-stop point of contact with the regulatory regime) … The costs of compliance for regulated institutions would be reduced, as a result of the elimination of multiple authorisations, multiple reporting and the need to comply with multiple (and potentially contradictory) sets of rules.'

Some authors have recognised the resemblance between the contemporary formation of the regulated and the regulator – both have multiple functions these days.[375] These authors state – and assume – the potential value of comparable organisational business models as enabling mechanisms to facilitate outcomes without specifying the reason for this.[376] Their respective lines of argument are as follows:

> ‘There might be advantage in having a structure that mirrors the business of regulated institutions. To the extent that financial institutions have steadily diversified, traditional functional divisions have been eroded. Although there are other ways of addressing overall prudential requirements for diversified institutions, a single, conglomerate regulator might be able to monitor the full range of institutions’ business more effectively and might be able to detect potential solvency risks emanating from different parts of the business.’[377]

Also:

> ‘The regulatory agency would emulate the market trend of conglomeration. It would thus be able to effectively monitor the regulated institutions on a one-to-one basis.’[378]

A single regulator avoids the challenges and inefficiencies associated with multiple and dissimilar authorities.[379] Examples include the manifestation of discrepancies between, and repetition of, regulatory acts or miscommunication between regulators and regulators’ jurisdictional scopes.[380] Inefficiencies associated with conflict and the incompatibility of

[375] Goodhart *et al* (n 50) 152 & 153. See also Pan (n 303) 819; Hadjiemmanuil (n 130) 140.

[376] See the arguments of Goodhart *et al* (n 50) 152 & Hadjiemmanuil (n 130) 140. Pan (n 303) 819 states that the singularity of jurisdictional competency is well suited to the complexity of businesses and products that it deals because it removes disputes over authority.

[377] Goodhart *et al* (n 50) 152.

[378] Hadjiemmanuil (n 130) 140.

[379] Goodhart *et al* (n 50) 152: ‘A single agency should, in principle, avoid problems of competitive inequality, inconsistencies, duplication, overlaps and gaps, all of which can arise in a regime based upon several regulatory agencies.’ See also Hadjiemmanuil (n 130) 141: ‘The system would result in reduced problems of regulatory communication and co-operation, since these can be resolved more efficiently and effectively within a single organisation, with unified management, than between separate organisations … An all-purpose agency would be able to internalise conflicts between the various regulatory objectives and to adopt the most efficient solutions, taking into consideration a broad range of factors.’ Hadjiemmanuil (n 130) 140-141 includes ‘regulatory arbitrage’ as a challenge that one regulator would address. In South African policy documents also refer to ‘regulatory arbitrage’ but in a different context, namely inconsistency between applied regulatory frameworks – see National Treasury *Treating Customers Fairly in the Financial Sector* (n 67) 10 & 12. However, the meaning that Hadjiemmanuil (n 130) 140-141 ascribes to this term is ‘in so far as financial institutions can choose their primary supervisor, [which] is supposed to lead to a relaxation of regulatory standards and a “race to the bottom”, as competing agencies strive to attract the same population of regulatees.’ However, he also refers to consistency (and adapted regulation) at 140-141: ‘The regulatory net would be even and coherent, avoiding both overlaps and jurisdictional gaps, but also precluding regulatory arbitrage …. Normative coherence could be achieved through a unified and consistent set of regulatory rules, which would ensure consistent treatment of similar issues across the various sectors and, accordingly, the competitive neutrality of the regulatory regime. At the same time, the possibility would be left open of differentiated treatment, where this is deemed appropriate in view of the special characteristics of particular regulated institutions and their transactions.’

[380] Goodhart *et al* (n 50) 152; Hadjiemmanuil (n 130) 141. Compare the Cambist-matter discussed in par 3.6 of ch 5 *infra*.

regulators, and statutory regimes, are limited.[381] Lastly, the structure is better at holding the regulator answerable for its performance – or lack thereof – as liability can be ascribed with certainty to a specific entity.[382]

The disadvantages of this set-up relate to some extent to the internalisation of challenges ordinarily experienced externally where a structure of multiple regulators exists.[383] One regulatory agency responsible for various outcomes necessitates distinctive tactics and the solitariness of the monopolist regulator may complicate such an approach.[384] In order to regulate a sector with dissimilar subsectors, incapable of functional assimilation, an internal segmented construction may be assumed.[385] In this regard, Eric Pan notes that

> '… the lack of clear lines of responsibility within the single regulator model could lead to confusion, especially if the single regulator is attempting to integrate previously independent, and single-minded, regulatory agencies. It is unclear whether a single regulator that is assuming the responsibilities of several former regulatory agencies will be able to organize itself in a more effective manner to eliminate the turf battles and blind spots associated with the older regulatory system.'[386]

[381] Goodhart *et al* (n 50) 152; Hadjiemmanuil (n 130) 141.

[382] Goodhart *et al* (n 50) 152; Hadjiemmanuil (n 130) 142; Pan (n 303) 819.

[383] Goodhart *et al* (n 50) 153-154 & 157; Pan (n 303) 819-820. See also Hadjiemmanuil (n 130) 143: 'The promised operational coherence may not be easily achievable. Specialist units will exist even within a single regulatory agency, especially if this is large. But this can be a source of acute problems and lead to dissipation of the supposed benefits of the new regime. The mega regulator may encounter problems of internal co-operation, information available to the organisation may not be shared effectively between departments, and the latter may reach inconsistent decisions. In this context, much will depend on the institutional culture and management practices of the agency … Rather than producing economies of scale, the creation of a megaregulator may lead to diseconomies and bureaucratisation. This is more likely to happen if the new agency is very large and has diverse responsibilities.'

[384] Goodhart *et al* (n 50) 153 & 154: 'There remain, and will remain for the foreseeable future, major differences between banks, securities firms and insurance companies in the nature of their business, the type of contracts they issue, and hence the nature and form of asset transformation. … The natures of the risks are sufficiently different to warrant a differentiated approach to prudential regulation. As the Reserve Bank of Australia stated: "For instance, insurance companies have long-term liabilities with ill-defined value, while their assets are generally marketable with readily ascertainable values. Banks, in contrast, tend to have relatively short-term liabilities, with assets which are difficult to liquidate and to value. Consequently, the applicable prudential supervisory regimes are different and there would be few (if any) efficiencies in bringing their supervision together" … A single regulator might not have a clear focus on the objectives and rationales of regulation, and might not make the necessary differentiations between different types of institutions.' See also Hadjiemmanuil (n 130) 143.

[385] Goodhart *et al* (n 50) 153 & 154: 'Even if the different regulatory requirements of different types of firms were managed within specialist divisions of a mega regulator, it is not self-evident that supervisors within the same organisation but responsible for different types of business would necessarily communicate and co-ordinate more efficiently and closely that they would within different, specialist regulatory agencies … It is not self-evident that a single mega regulator would in practice be more efficient than a series of specialist regulators with clearly defined objectives.' See also Goodhart *et al* (n 50) 157; Hadjiemmanuil (n 130) 143.

[386] Pan (n 303) 820.

This means that a fragmented external structure will be replaced by a fragmented internal structure.[387] In addition, whilst a variety model may lead to, and a monopolist structure may counteract, variances and disharmony, the alignment exercise may cause authoritarian, narrow and possibly habitual approaches.[388] Human resource transfer from disintegrated regulators and administration of same may prove challenging in light of past differentiated and potentially adversary interactions, experiences, approaches and customs.[389]

As indicated above, enhanced accountability features as a beneficial characteristic of the single regulator due to certainty of command.[390] However, Jones is of a different opinion:

> 'Consolidation by itself does not guarantee improved regulation and would likely increase risks of regulatory failure. Regulatory overlap and redundancy, while seemingly inefficient, actually provide important protections because regulatory agencies can backstop one another, making it less likely that misconduct and abuse will fall through the cracks in the regulatory mortar.'[391]

Another negative outcome that affects accountability measures relates to the achievement of regulatory goals.[392] This particular institutional arrangement does not denote fewer objectives or increase the compatibility of varying aims.[393] It only entails that one regulator has multiple objectives.[394] A single regulator may therefore seemingly assist with facilitating accountability by determining the primary responsible party, but the accountability exercise itself is complicated, as the regulator has to manage multiple responsibilities of divergent

[387] *Idem* at 819 (writing in the context of choice of policy and funding distribution); Goodhart *et al* (n 50) 155; Hadjiemmanuil (n 130) 143. See also Freeman & Rossi (n 170) 1154.

[388] Goodhart *et al* (n 50) 153. See also Hadjiemmanuil (n 130) 142 (writing on the challenges of '"one-size-fits-all" regulation' notwithstanding the integrated nature of financial institutions and products – one the one hand, variances may not be acknowledged where they should; whilst on the other hand, differing approaches to different institutions may undermine 'regulatory simplicity'); Goodhart *et al* (n 50) 154 (warning of the lack of potential to retain important information and generate new input through 'a degree of competition and diversity in regulation so that lessons can be learned from the experience of different approaches').

[389] Hadjiemmanuil (n 130) 143 – he warns of the inability to positively assimilate personnel from different now-defunct agencies into the regulator's singular framework.

[390] Goodhart *et al* (n 50) 152; Hadjiemmanuil (n 130) 142; Pan (n 303) 819.

[391] Jones (n 354) 393-394.

[392] Hadjiemmanuil (n 130) 143-144; Pan (n 303) 819.

[393] Hadjiemmanuil (n 130) 143-144: 'Conflicts between the varied (and often ill-specified) regulatory objectives that are likely to be set for the megaregulator should not be internalised within a regulatory organisation. They are not purely technical matters, which can be properly resolved by unelectable bureaucrats. Instead, they should be resolved explicitly at a political level.' See also Goodhart *et al* (n 50) 157. See *contra* the position of Zywicki 'The Consumer Financial Protection Bureau: Savior or Menace?' 2013 *George Washington Law Review* 856 875-876 where he criticises the solitary aim of the US CFPB, describing it as one of the entity's 'flaws in [its] institutional design: a tunnel vision selection bias and commitment to regulatory mission …'. At 878, he notes that this dispensation where 'a counterbalancing regulatory purpose' is absent, together with the solitariness of the director *vis-à-vis* a board-like management scheme, 'create a breeding ground for tunnel vision, favouring one aspect of consumer protection to the detriment of other consumer benefits'. He contrasts this position at 877-878 with the Federal Trade Commission, which is tasked with both consumer protection and competition, stating that this disposition is inclined to favour customers in diverse manners.

[394] Goodhart *et al* (n 50) 151; Hadjiemmanuil (n 130) 140, 143-144.

natures.[395] Accountability requires an evaluation of the performance of the regulator, thus necessitating performance parameters.[396]

In contrast to the one-regulator model, there are options of multiple regulators tasked with regulating specific activities, or specific businesses, or meeting specific objectives of regulation.[397] Diverse regulators dedicated to specific sectors or specific outcomes develop specialist teams and superlative knowledge of their domain of supervision.[398] They are strategically focused on the sectors or outcomes that they regulate and supervise.[399] However, some of the strongest criticisms against a variety model (based on the benefits of consolidation) are the materialisation of complexity, disparity, inequity, replication, jurisdictional intersection, and areas where oversight is lacking.[400] Multiple regulators necessitate increased resources.[401] The allocation of responsibility is complex, both for accountability of the regulators and consumer assistance purposes.[402]

Pan highlights that the Twin Peaks scheme is designed to deal with the challenges that prompts recourse to a single regulatory framework and the challenges brought about by the one-regulator model itself.[403] It caters for the difference in regulatory methods to business

[395] Hadjiemmanuil (n 130) 144: 'While the simplicity of a megaregulator's institutional structure appears to facilitate accountability, the existence of multiple objectives, which can be traded off against one another, decrease transparency and make accountability meaningless, since there is no single standard of performance.'

[396] Scott 'Evaluating the performance and accountability of regulators' (n 95) 362-363; Bird (n 44) 743.

[397] Mwenda (n 42) 8; Pan (n 303) 816-819; Goodhart *et al* (n 50) 155-156.

[398] Pan (n 303) 817, 818 & 820; Goodhart *et al* (n 50) 154.

[399] Pan (n 303) 817 & 820; Mwenda (n 42) 8-10; Goodhart *et al* (n 50) 154; Hadjiemmanuil (n 130) 143-144.

[400] Goodhart *et al* (n 50) 152; Hadjiemmanuil (n 130) 140 & 141; Jones (n 354) 396-397; National Treasury *Treating Customers Fairly in the Financial Sector* (n 67) 15.

[401] Goodhart *et al* (n 50) 152; Hadjiemmanuil (n 130) 141.

[402] Goodhart *et al* (n 50) 152 & 155; Hadjiemmanuil (n 130) 142; National Treasury *Treating Customers Fairly in the Financial Sector* (n 67) 15.

[403] Pan (n 303) 820-821. See also Jones (n 354) 396 although she states that the single regulator model 'echoes the justification offered for Twin Peaks'. It therefore seems that the major difference is the approach to regulation as set forth by Taylor (n 361) 228: 'In summary, the Twin Peaks concept was based on the observation that the evolution of modern financial markets had blurred the boundaries between different types of firms and financial products, rendering obsolete regulatory systems that were structured around specific types of financial firms (the "institutional" model) or types of financial products (the "functional" approach). In place of these traditional agency structures, Twin Peaks proposed a regulatory system structured around the different objectives of regulation – broad financial system stability and consumer protection.' See Pan (n 303) 820: 'In the case of prudential regulation, the regulator assumes a more cooperative relationship with the financial institution. The regulator exists to assist financial institutions. Its role is to set standards and monitor the maintenance of those standards by the financial institution. To the extent a financial institution fails to meet certain standards or the regulator identifies a possible threat to the soundness of the financial institution, the role of the regulator is to work with the financial institution and find a solution. In contrast, a business conduct regulator is frequently in an adversarial position relative to the financial institution. This regulator is effectively a representative of the customers and investors, using rulemaking powers to impose new requirements on financial institutions, and enforcement powers to discipline and punish financial institutions for business conduct violations.'

conduct and financial stability regulation,[404] but does not diffuse responsibility for specific regulated actions or business entities across multiple regulatory authorities.[405]

3.4.3. Regulatory objectives

The arrangement of regulatory agencies can be correlated with the intended outcomes of the regulatory scheme.[406] Goodhart *et al* highlight the benefits associated with a regime where the aims and schematics of the system are coordinated.[407] They state that the scheme of establishments created for regulatory purposes should revolve around the achievement of efficacy in regulation and achieving the intended positive outcomes of the particular regime.[408] Thus, the necessity for a direct correlation between 'institutional structure' and 'the *objectives* of regulation', is driven by considerations such as increased competency, answerability, administrative attentiveness,[409] and the determination of disputes concerning divergent regulatory outcomes, regulatory methods and regulation of distinguishable market participants.[410]

Structural reformation can be based on a choice of '*functional* regulation', '*institutional* regulation', a regime that reflects a combination of elements of the two latter options, or 'regulation by objectives'.[411] The first approach categorises the regulatory structure according to the endeavours of an organisation irrespective of the nature of the organisation.[412] An example is insurance, which can be an activity undertaken by insurance companies or banks.[413]

[404] Pan (n 303) 820; Taylor (n 361) 228.

[405] Pan (n 303) 818; Goodhart *et al* (n 50) 158; Taylor (n 361) 228.

[406] Goodhart *et al* (n 50) 156; Mwenda (n 42) 8.

[407] Goodhart *et al* (n 50) 156-157.

[408] *Idem* at 156.

[409] *Ibid*.

[410] Goodhart *et al* (n 50) 156. See also Goodhart *et al* (n 50) 156: 'One merit of focusing institutional structure upon regulatory functions is that it requires significant conflicts between different objectives to be resolved at the political level. … Prudential, systemic, and conduct of business dimensions to regulation require fundamentally different approaches and cultures and there may be doubt about whether a single regulator would, in practice, be able to encompass them effectively.' See also Taylor (n 361) 228-229, who notes that internalisation of policy ranking is not always conducive and needs to be undertaken '… in the public realm rather than in the confines of an agency'.

[411] Mwenda (n 42) 8-10. Mwenda (n 42) 9-10: 'In a system that pursues functional regulation, there is a general view that it is more important to regulate the functions performed by financial services businesses than the type of businesses that undertake them' and '[i]n general, the idea of *institutional* regulation, unlike that of *functional* regulation, relates to the regulation of each single category of financial services business by a different authority, agency or agency division'. Original emphasis. See also Mwenda (n 42) 9 fn 31: 'Functional regulation is sometimes referred to as "regulation by activity".'

[412] Mwenda (n 42) 9; Pan (n 303) 817-818 (Pan refers to this as 'Activity-based regulation').

[413] Goodhart *et al* (n 50) 156; Mwenda (n 42) 10.

The second approach classifies the regulatory structure according to the nature of the organisation, such as a bank.[414] Mwenda notes:

> ‘A major difference between functional and institutional regulation is that the former emphasizes the setting up of departments in a supervisory agency that deals with such nonsectoral functions as licensing, legal, accounting, enforcement, and information technology, irrespective of the type of business activity being regulated. By contrast, a silo or institutional regulatory model encourages organization into departments that deal separately with all aspects of specific types of business activities. For example, the silo model could separately address banking, insurance, pension funds, and trading in securities, while the functional model would concern itself mainly with finding out whether the issue to be dealt with is one of licensing or any other regulatory norm, irrespective of the type of business activities.’[415]

Hadjiemmanuil highlights that:

> ‘In principle, in a function-based regulatory system, a single financial firm can be under the supervision of numerous ‘functional regulators’, without suffering a duplication of regulatory burdens, because each regulator is only responsible for particular activities. Nonetheless, this is not easily achievable in practice. The progress of financial engineering and the appearance of idiosyncratic, hybrid services can occasionally undermine functional distinctions, creating new jurisdictional conflicts.’[416]

However, Goodhart *et al* note that the distinction between functional and institutional is nonsensical:

> ‘In reality, a strict dichotomy between functional and institutional regulation is misleading, for the two serve different purposes. In practice, it is institutions and not functions that fail or become insolvent, and therefore institutions *per se* need to be regulated for safety and soundness. It is the overall institution that must be the focus of such regulation. Functional regulation, on the other hand, is concerned with how an institution conducts the various aspects of its business and how it behaves towards customers. If competitive neutrality of regulation is to be maintained, such functional regulation must apply to particular aspects of the business irrespective of which type of institution is conducting it. Thus, while regulation for the solvency of banks and insurance companies may be different (and conducted by different agencies), the

[414] Mwenda (n 42) 10 (Mwenda also refers to this as ‘the silo model’). See also Hadjiemmanuil (n 130) 130-131: ‘One idea that originally gained some ground was to revamp the formal criteria of regulatory jurisdiction: “institutional” classification of the regulatory population, whereby a financial institution was brought under the jurisdiction of a particular regulator on grounds of its historical background and conventional general description as a bank, insurance company, etc., should be replaced by function-based criteria. Under this system, all institutions, regardless of description, which carry on financial activities (“functions”) of a specific type should be placed under the supervision of a common regulator.’

[415] Mwenda (n 42) 10.

[416] Hadjiemmanuil (n 130) 131.

> conduct of insurance business needs to be the same whether conducted by banks or by insurance companies.'[417]

Based on the above, it seems to me as if Goodhart *et al*'s understanding of the terms necessitate a contextualisation as to whether prudential or market conduct regulation is present and they seemingly argue that functional regulation is not necessarily a viable option for prudential regulation.[418] Likewise, apparently they argue that institutional regulation is not necessarily conductive to market conduct regulation.[419] Hadjiemmanuil strengthens this sentiment when he differentiates between the aforementioned approaches to regulation whilst situating same in a market conduct/prudential regulatory regime.[420] Goodhart *et al* further opine that the twin peak scheme is not suited to proper acknowledgement of the inherent variances between entities and activities within the larger framework of the objectives of prudential and market conduct regulation.[421] As a policy recommendation, Goodhart *et al* recommend that regulatory aims must be definite and constrained.[422] The objectives are primarily to secure a durable financial system and achieve consumer protection.[423] The value of regulation is found in the ability to generate positive outcomes and enhance protection for customers where same is not present in the absence of said regulatory measures.[424] Adequately confined regulatory aims are important in order to assist proper outcomes:

> 'Effective and efficient regulation is difficult enough with limited objectives, and the more it is burdened by wider considerations, the more likely it is to fail in many of them.'[425]

There are benefits associated with a regime where the aims and schematics of the system are coordinated.[426] The scheme of establishments created for regulatory purposes should revolve around the achievement of efficacy in regulation and effecting the intended positive outcomes of the particular regime.[427] Goodhart *et al*, for example, are advocates for a system constructed primarily around the aims of regulation.[428] They argue that regulatory efficacy is the primary consideration supporting institutional construction and that regulatory aims

[417] Goodhart *et al* (n 50) 156.
[418] See Goodhart *et al* (n 50) 156.
[419] *Ibid*.
[420] Hadjiemmanuil (n 130) 131-132.
[421] Goodhart *et al* (n 50) 159: 'While institutional structure should focus on the objectives of regulation, the Twin Peaks model is too all embracing and does not recognize the significant differences between institutions and types of business with respect of both prudential and conduct of business regulation.'
[422] *Idem* at 192.
[423] *Ibid*.
[424] *Ibid*.
[425] *Ibid*.
[426] *Idem* at 156-157.
[427] *Idem* at 156.
[428] Goodhart *et al* (n 50) 156 & 181.

should direct the deliberations.[429] The construction of the regulators' framework is a factor that can assist to achieve goals in an effectual manner.[430] They also state that efficacy is not a given when structural decisions are made as the institutional configuration, when viewed in isolation, will not guarantee regulatory success.[431]

Pan holds a similar view because he does not perceive the design of the framework as being the ultimate goal:[432]

> 'The exact organization of the regulatory system is less important than the means by which regulatory agencies and internal regulatory divisions are made to work together and act in a coordinated fashion. With respect to each structure, coordination is vital, whether the coordination takes place internally (… the single regulator model) or externally (… the twin peaks and lead regulator models).'[433]

I concur with this approach and I analyse the collaborative prescriptions set by the Financial Sector Regulation Act in chapters five and seven.[434]

4. CONCLUDING REMARKS

Regulators are autonomous organisations tasked with the regulation and/or supervision of a specified sector.[435] The establishment of these entities is motivated by varying factors[436] and the existence of the agencies is both beneficial and challenging.[437] Regulators effect regulation and therefore it was important to consider the concept of regulation,[438] the manifestations thereof[439] and the manner in which forms or schemes of regulation affect the regulator.[440] Financial regulation has set objectives categorised according to the welfare of the domestic financial system, the wellbeing of individual financial entities and consumer protection.[441] Regulation can also be focused on entity, activity or goal.[442] I dealt with two

[429] *Idem* at 181.
[430] *Ibid*.
[431] *Ibid*.
[432] Pan also discusses the 'lead regulator model', which aims to retain the multiplicity of regulatory agencies but appoint a leading agency for coordination purposes – see 821-822. However, he does not recommend this model for the jurisdiction that he advises (Canada) as the model does not deal with regulatory overlap and reduced efficacy challenges as well as the single or twin peaks models do – see Pan (n 303) 822.
[433] Pan (n 303) 822.
[434] See par 4.7 of ch 4; par 5 of ch 7 *infra*.
[435] See par 3.2 *supra*.
[436] *Ibid*.
[437] See paras 3.2 & 3.4 *supra*.
[438] See par 2 *supra*.
[439] See par 2.2 *supra*.
[440] See paras 3.1 & 3.3 *supra*.
[441] See paras 3.4.2 & 3.4.3 *supra*.
[442] *Ibid*.

broad schemes for structuring financial regulatory bodies – one regulator for the whole of the financial sector or more than one regulator for the financial sector.[443]

The different institutional approaches showed that independent agencies are created as a result of a number of factors[444] – the perceived ability of an independent agency to address certain challenges or effect certain outcomes,[445] the view that an independent agency is the acceptable norm and authoritative voice when it comes to regulatory intervention,[446] and the continuation of a practice of regulation by independent institutions as a result of a path-dependent process.[447] Although the aforementioned factors explain the existence of the independent agency, the recognition of potential path-dependent processes in regulation highlights the importance of answerability mechanisms.[448]

The principal-agent theory explain some of the difficulties when it comes to independence and accountability within a single unit – delegation of authority in order to effect advantageous outcomes versus the knowledge that some control is lost in favour of discretion.[449] On the one hand, creating an independent agency with expertise to regulate a developed sector is a feat but on the other hand, there are risks involved if the agent's actions deviate from the principal's vision.[450] The factors that enhance independence and accountability are based on this dilemma.[451]

I concur with the views that independence and accountability do not enjoy unqualified preference within a regulatory arena *vis-à-vis* the other.[452] This is also the approach that I follow in the upcoming chapters and when constructing regulatory changes to the South African regime. As such, I follow the views of Quintyn and Taylor who argue that accountability and independence are not contra-indicated by function in a 'complementary' manner.[453]

Apart from distinguishing and explaining the different models as a precursor to the discussion on the South African regime, this chapter has also brought the following problematic aspect to the fore: Consolidation of different agencies into a single entity – whether one tasked with effecting all the objectives of regulation in line with the colloquial understanding of the single

[443] See par 3.4 *supra*.
[444] See par 3.2 *supra*.
[445] See par 3.2.1 *supra*.
[446] See par 3.2.2 *supra*.
[447] See paras 3.2.3 & 3.2.4 *supra*.
[448] See par 3.2.4 *supra*.
[449] See paras 3.3.2 & 3.3.3 *supra*.
[450] See par 3.3.3 *supra*.
[451] See par 3.3.3 *supra*; par 2.2 & 2.3 of ch 3; par 2 of ch 4 *infra*.
[452] See par 3.3.4 *supra*.
[453] *Ibid*.

regulator model, or one aimed at one objective but into which different regulatory agencies previously involved in functional or institutional regulation have been assimilated – can have certain negative outcomes.[454] In particular, compilation of multiple agencies can remove existing safeguards,[455] result in loss of variety,[456] and internalise challenges that were otherwise externalised – instead of lack of coordination between different agencies, the same lack of coordination can realise in respect of different departments within the regulator.[457] As such, Pan considers regulatory collaboration – whether between different institutions or the different departments within a regulatory organisation – to be of higher significance when compared to the choice of regulatory structure.[458] In this regard, I attend to the analysis collaborative prescriptions set by the Financial Sector Regulation Act in chapters five and seven.[459]

I deal with the independence and accountability of regulators hereafter and introduce the reader to the general principles in respect of these two concepts. The chapters elaborate on the indicators of independence and accountability as well as some general international best practices to enhance independence and accountability of financial sector regulators.

[454] See par 3.4.2 *supra*.
[455] Jones (n 354) 393-394; par 3.4.2 *supra*.
[456] Goodhart *et al* (n 50) 154; par 3.4.2 *supra*.
[457] Hadjiemmanuil (n 130) 143; par 3.4.2 *supra*.
[458] Pan (n 303) 822; par 3.4.2 *supra*.
[459] See par 3.4.3 *supra*.

CHAPTER 3: INDEPENDENCE

> 'NMIs [non-majoritarian institutions] have become powerful participants in policy making and may now constitute a "fourth branch of government" in Europe. Delegation to them has affected the distribution of power, with winners and losers.'[1]

1. INTRODUCTION

1.1. Outline of the chapter

This chapter deals with the independence of regulators whilst the next chapter deals with the accountability of regulators. I discuss the concept of independence in detail and this chapter has a bearing on the following questions set out in chapter one: What are the *raisons d'être* for statutory regulators and for measures that advance independence and accountability in respect of these regulators? I elaborate on these matters and aim to address the next question in the context of autonomy, which is more subject-specific: What are the measures that advance independence and accountability as found in foreign jurisdictions and international best practices, and are there any specifically applicable to statutory regulators of consumer credit? I discuss the following matters in this chapter:

- Independence as a concept with different facets;[2]
- independence as a result of delegation and challenges that may ensue;[3]
- the different forms of independence as put forth by Quintyn *et al*;[4] and
- the different features of a regulator that can enhance independence.[5]

1.2. Orientation

The reason for this chapter is three-fold. Firstly, I explain why independence is important and secondly, I deal with the challenges that arise when a regulatory institution is created to be independent.[6] Some of the challenges have already been discussed in chapter two, but discussion in this chapter sets the scene for the specific forms of independence and the measures that enhance independence in the rest of the chapter.[7] It shows how the features of a

[1] Thatcher & Stone Sweet 'Theory and practice of delegation to non-majoritarian institutions' 2002 *Western European Politics* 1 15-16. See also Mwenda *Legal aspects of financial services regulation and the concept of a unified regulator* (2006) 34; Quintyn & Taylor *Should financial sector regulators be independent?* 2004 *International Monetary Fund Economic Issues* No 32.

[2] See par 2 *infra*.

[3] See paras 2.2 & 2.3 *infra*.

[4] See par 3 *infra*.

[5] See par 4 *infra*.

[6] See par 2 *infra*.

[7] See paras 3 & 4 *infra*.

regulator that enhance independence can create difficulties as a result of delegated authority[8] and justifies the need for accountability notwithstanding the advantages that independence poses for financial sector regulation.[9]I also mentioned in chapter two that I concur with those scholars that view independence and accountability as paired characteristics of financial regulatory institutions and I build on this in chapter three.[10]

Thirdly, the need for this chapter lies in the need to locate internationally recognised measures that enhance the independence of regulatory institutions. South African literature on the prevalence of independence and accountability of regulators is scarce and even more so where financial regulators are the objects of scrutiny.[11] I explained in chapter one that the South African position can therefore not be analysed in a meaningful way without first extrapolating the factors that impact the independence and accountability of financial market conduct regulators from existing literature.[12] Some South African views reflected in case law where the independence of an entity was valued have been included, but I refer mostly to international scholars in this chapter. I isolate principles and highlight areas where authors note their concerns in respect of different jurisdictions.

Many of the international writers' perspectives were inclined towards financial stability and financial entities' welfare, and not necessarily in respect of market conduct regulators. The transcontinental writers' research that I considered relevant for purposes of setting out the reasons, forms and mechanisms relating to the independence of regulators – specifically in the context of financial sector regulators – are often concerned with those regulators of financial systems responsible for the health and well-being of financial institutions and the broader spectrum within which these institutions function.[13] In economic terms, these

[8] See par 2 *infra*. See also par 3.3 of ch 2 *supra*.
[9] See par 2 *infra*.
[10] See par 3.3.4 of ch 2 *supra*.
[11] See par 2.4 of ch 1 *supra*.
[12] See par 2.1 of ch 1 *supra*.
[13] See Mwenda (n 1); Quintyn & Taylor (n 1); Goodhart *et al Financial regulation: Why, how and where now?* (1998).

regulators are responsible for financial stability and prudential regulation, and the reasons for independence are often linked with financial crises.[14]

However, the focus of this thesis is on market conduct regulators whose primary responsibilities are mostly industry role-player behaviour and consumer protection.[15] The South African National Treasury reported the following:

> 'Poor conduct played a central role in the global financial crisis. Mortgage loans in the US were knowingly issued to households that could not afford to pay them back. The institutional market in turn supported the sustained funding of these reckless loans through a burgeoning but opaque and weakly regulated securitisation and OTC derivative market, and credit rating agencies continued to give the highest ratings for what ultimately proved to be toxic assets. … Shortcomings in the regulatory and supervisory frameworks of most jurisdictions, including across Asia, the US, the UK and Europe, meant that sizable conduct, prudential and stability risks went unnoticed for too long. Ultimately this exposed the global financial system, financial customers and governments to massive turbulence – from which the global economy is still recovering. …The crisis highlighted how conduct weaknesses in the financial sector can cause severe economic hardship for the man on the street, and extend more broadly to impact on financial stability and economic growth.'[16]

Some of the aspects of independence featured in the perused sources had to be carefully evaluated in order to ensure that the inclusion thereof within the framework for market

[14] Mwenda (n 1) 29-31; Quintyn & Taylor (n 1). In respect of delegation and monetary policy (discussed in ch 2), see Bendor *et al* 'Theories of delegation' 2001 *Annual Review of Political Science* 235 261-264. In respect of the distinctive functions of these regulators, including 'microprudential and macroprudential oversight', see National Treasury *Twin peaks in South Africa: Response and Explanatory Document Accompanying the Second Draft of the Financial Sector Regulation Bill* December 2014 7 & 17. However, compare the research of Gadinis 'From independence to politics in financial regulation' 2013 *California Law Review* 327 331-332 where the author notes the following: 'Leading academic commentators support agency independence in the financial regulatory sphere and track countries' progress toward more independent institutional mechanisms. In scholarly circles and in the field of policy action alike, agency independence has long been the hallmark of financial regulation.' However, Gadinis reports on the empirical research that he undertook, which showed a world-wide change towards increased government authority as opposed to autonomous banking regulators after the financial crisis – see 332. He notes at 333 that his observations show a 'new balance of power' between the regulatory organisation and the politician where the former still undertakes specialist duties but 'the decision over whether to intervene in the market belongs to politicians'. It must also be noted, from perusing some of his findings and the questions posed to participants, that financial stability regulation is the contextual milieu of the research – see e.g. the first finding documented at 333, and the questionnaire (at 356) which refers to the term 'prudential' and related matters in many of the questions.

[15] In this regard, there are international best practice manuscripts that, and extraterritorial researchers who, have proposed or investigated the independence of financial services regulators over and above central bank or prudential regulation alone – see e.g. World Bank *Good Practices for Financial Consumer Protection* 2017 (see 8, specifically including credit); Financial Stability Board *Consumer Finance Protection with Particular Focus on Credit* 26 October 2011 (see 10 & 11); Organisation for Economic Co-operation and Development (hereinafter 'OECD') *G20 High-Level Principles on Financial Consumer Protection* October 2011; Quintyn *et al The Fear of Freedom: Politicians and the Independence and Accountability of Financial Sector Supervisors* (IMF Working Paper WP/07/25) 2007; Hüpkes *et al The Accountability of Financial Sector Supervisors: Principles and Practice* (IMF Working Paper WP/05/51) 2005.

[16] National Treasury *Treating Customers Fairly in the Financial Sector: A Draft Market Conduct Policy Framework for South Africa Discussion Document* December 2014 85. See also par 2.2 of ch 1 *supra*.

conduct regulation could be justified. As such, the analyses by various authors pertaining to the independence of the United States' Consumer Financial Protection Bureau were particularly valuable to link some of the features enhancing independence with the core focus of this thesis.[17] I isolate features that affect independence in various jurisdictions, including the United States, in an objective fashion in this chapter. In the forthcoming chapters, I repeat some of these methods and mechanisms; however, this is done in the context of the South African legal and financial environments as opposed to the generalised discussion of the features of independence in this chapter.

The South African Constitutional Court case on the autonomy of the Directorate for Priority Crime Investigation, otherwise known as the 'Hawks' tasked with anti-corruption endeavours in South Africa, is also conversed in order to incorporate the existing configurations pertaining to an autonomous South African organisation into the discussion.[18] I have found the considerations of the court of value to contextualise, validate, and add to the contributions of international writers.

As a point of departure, the following extract from Marc Quintyn and Michael Taylor:

> 'Growing recognition of these factors, together with a growing trend toward the creation of "integrated" financial supervisory agenies that regulate banks, securities markets, and insurance companies – which forces policymakers and legislators to rethink institutional arrangements – has focused attention on the case for agency independence. Increasingly, a consensus is forming that regulatory and supervisory agencies should be independent – that they should not be embedded in the executive hierarchy and thus subject to political pressure. In theory, independent regulators can decide on and conduct market interventions shielded from political interference and improve regulatory and supervisory transparency, stability, and expertise. And, indeed, growing evidence suggests that independent regulators have made regulation more effective, have led to smoother and more efficient operation of the market, and are a distinct improvement over regulatory functions located in government ministries.'[19]

I commence with an overview of delegation and independence, in order to link this chapter to what was discussed in chapter two. Thereafter I deal with the configuration of independence, the forms of independence, and independence-enhancing features. The aim of this chapter is to set out the forms and features of independence in a logical manner and it therefore fosters a

[17] Levitin 'The Consumer Financial Protection Bureau: An Introduction' 2012-2013 *Review of Banking & Financial Law*; Zywicki 'The Consumer Financial Protection Bureau: Savior or Menace?' 2013 *George Washington Law Review* 856; CHH Attorney-Editor Staff *Dodd-Frank Wall Street Reform and Consumer Protection Act Law, Explanation and Analysis* (2010) 484 & 485.

[18] Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others [2014] ZACC 32.

[19] Quintyn & Taylor (n 1).

comprehensive understanding of the concept. This chapter will then be referred to when analysing the independence of South Africa's regulators – the National Credit Regulator and the Financial Sector Conduct Authority – in chapter six.

2. INDEPENDENCE

2.1. Introduction

An autonomous entity within the financial sector sphere is invaluable to safeguard financial interests, especially where the financial welfare of the nation is at stake.[20] Autonomy means that the body is not subject to domination by external institutional arrangements.[21] The rationale for this arrangement is the recognition that the measures taken by regulators, uninhibited by politics, will promote the constructive development of the regulator in the spheres of 'regulatory and supervisory transparency, stability, and expertise'.[22] However, there is no assurance of successful regulation just because a regulator is independent.[23]

There is seemingly a trend of increased devastation when and where political intrusion is sanctioned during financial crises.[24] Some authors have referred to case studies from Korea, Venezuela, Indonesia and Japan to illustrate this phenomenon.[25] Domestic rulers may, for example, derive benefits from the banking system and be biased in their decision-making.[26] The independent characteristics of some regulators are seen as protective measures to prevent interference by stakeholders, particularly politicians who are predisposed to 'powerful industrial interests'.[27]

[20] *Ibid*; Mwenda (n 1) 31.

[21] Quintyn & Taylor (n 1); Mwenda (n 1) 20. See Barkow 'Insulating Agencies: Avoiding capture through institutional design' 2010 *Texas Law Review* 15 19, who argues that the study of autonomy should concern deliberation of 'what the agency is supposed to be independent of'. As such, she argues at *inter alia* 19, that the primary objective is to 'immunize … [the organization] … to some extent, from political pressure'.

[22] Quintyn & Taylor (n 1); Mwenda (n 1) 31. See International Organisation of Securities Commissions (hereinafter 'IOSCO') *Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation* May 2017 25.

[23] Mwenda (n 1) 26 & 34-35.

[24] Quintyn & Taylor (n 1). See Mwenda (n 1) 28-31 & Gadinis (n 14) 339 referring to Quintyn & Taylor's work. See also Thatcher 'Delegation to independent regulatory agencies: Pressures, functions and contextual mediation' 2002 *Western European Politics* 125.

[25] Quintyn & Taylor (n 1); Mwenda (n 1) 30-31.

[26] Quintyn & Taylor (n 1).

[27] Scott 'Evaluating the performance and accountability of regulators' 2014 *Seattle University Law Review* 353 356.

Formal government intervention by state structures that are under the direction of chosen political leaders can be underscored by objectives of 'short-term political gain'.[28] This approach results in directives that are unsustainable and ill-suited to changing sectors, or biased towards political supporters as opposed to the general population.[29] It is also aimed at safeguarding directive choices from market players concerned with their own welfare within frameworks of self-governance.[30] Unfortunately, autonomy does not eliminate the risk of influence by stakeholders – including industry participants who aim to attain advantageous connections with the regulator through various methods.[31]

There is an inherent tension between the parties participating in the regulatory hierarchy: the delegating government, regulator as receiver and executor of the delegated functions and powers and the industry that is regulated.[32] Although the regulator is mandated by government, the entity is often designed to effect its mandate independently and without interference from the government.[33] The risk also manifests that the regulator may further its own agenda or avoid the optimal performance of responsibilities.[34]

Attempting to define, or constructing an understanding of, an autonomous entity is not an easy task.[35] In addition, the level of independence can vary from agency to agency.[36] Various

[28] Scott 'Evaluating the performance and accountability of regulators' (n 27) 356-357. Scott states at 356-357: 'Such political short termism yields, at best, regulation that is incapable of supporting the mature development of regulated markets over time and, at worst, regulation the purpose of which is to support the interests of those who are friendly with elected politicians rather than the public. The rise of the regulatory state has been about insulating regulatory decision making from both self-interested structures of self-regulation and self-interested structures of politics – across the financial industry, network industries, food and pharmaceuticals sectors, amongst others.' See also Gadinis (n 14) 331: 'Moreover, while politicians in pursuit of reelection are sensitive to their voters' urgent demands, independent agencies can prioritize long-term goals over immediate gains and ensure regulatory stability. Widely acclaimed as experts with long-term horizons, independent agencies have remained the bedrock of the institutional framework governing U.S. markets, even as successive waves of reforms have changed many other substantive aspects of U.S. financial regulation.' See also Barkow (n 21) 17; Bressman & Thompson 'The future of agency independence' 2010 *Vanderbilt Law Review* 599 613.

[29] Scott 'Evaluating the performance and accountability of regulators' (n 27) 356-357; Barkow (n 21) 20.

[30] Scott 'Evaluating the performance and accountability of regulators' (n 27) 356-357.

[31] Quintyn & Taylor (n 1); Levitin (n 17) 331.

[32] Spiller 'Politicians, interest groups, and regulators: A multiple-agency theory of regulation, or 'let them be bribed'' 1990 *Journal of Law & Economics* 65 66 & 69. See also Goodhart *et al* (n 13) xviii.

[33] Spiller (n 32) 66. See Gadinis (n 14) 337-338.

[34] Spiller (n 32) 66; Thatcher & Stone Sweet (n 1) 4-5. See also Lodge 'Accountability and transparency in regulation: critiques, doctrines and instruments' in Jordana & Levi-Faur (eds) *The Politics of Regulation Institutions and Regulatory Reforms for the Age of Governance* 2004 126, who is of the opinion that the undertaking by a regulator of activities that further its own objectives makes the system vulnerable to capture.

[35] Morrison 'How independent are independent regulatory agencies?' 1988 *Duke Law Journal* 252 252. See also Verkuil 'The purposes and limits of independent agencies' 1988 *Duke Law Review* 257 259-263.

[36] Gadinis (n 14) 336.

factors determine whether, and to which extent, an entity is independent.[37] Thus, some authors identify an organisation as an independent agency where a set of specific circumstances are present – so-called 'security of tenure' for high-level office-holders, authoritative functions, multi-member variety within the governing structure and budgetary freedom.[38] Others identify core functions in respect of which autonomy – in the sense of freedom from constraint or capacity of self-determination – has to be present.[39]

There may also be differences between independent agencies and 'executive' agencies.[40] Independence is therefore influenced by many features of a regulator.[41] Some of these features also relate to mechanisms that ensure that a regulator is sufficiently empowered to execute its duties – ranging from its mandate, granted authority, income and expenditures, personnel appointments and staff compensation, to its corporate structure and broader positioning within the legal and societal framework.[42]

2.2. Delegation

The activities that regulators are able to perform have been described as the result of delegation of state functions and responsibilities.[43] In the previous chapter, I mentioned that delegation is often the source of independence and discretion, which I do not put forward as synonyms but both bear a causal relation to the challenges perceived in respect of accountability.[44] Whilst this may be a suitable vehicle for the legitimate transfer of governmental prerogative, it is not without its challenges.[45] The predicament faced by the

[37] Morrison (n 35) 252; Mwenda (n 1) 20-22; Quintyn & Taylor (n 1); Barkow (n 21) 26. See also IOSCO (n 22) 25-29. Barkow (n 21) 45 notes (in the context of funding) that '[i]t is critical to assess the overall structure of the agency'.

[38] Quintyn & Taylor (n 1); Gadinis (n 14) 337; Morrison (n 35) 252; Barkow (n 21) 16; Verkuil (n 35) 259. See also *Glenister v President of the Republic of South Africa and Others* [2011] ZACC 6 par 210 for the basic elements identified by the court.

[39] Quintyn & Taylor (n 1).

[40] Bressman & Thompson (n 28) 607 *et seq* (who also argue that the distinction is not as clear-cut and that there are 'mechanisms [that] undermine the binary distinction that long has been understood to exist between independent and executive-branch agencies and suggest a spectrum of hybrid relationships' – see 672); Miller 'Introduction: The debate over independent agencies in light of empirical evidence' 1988 *Duke Law Review* 215 218, 220 & 221-222; Gadinis (n 14) 337; Verkuil (n 35) 259.

[41] Mwenda (n 1) 13-14 & 27-28; Gadinis (n 14) 336-337; Barkow (n 21) 18; paras 3 & 4 *infra*.

[42] OECD (n 15) 5; Mwenda (n 1) 13-14 & 27-28; Barkow (n 21) 18; paras 3 & 4 *infra*. See also IOSCO (n 22) 30-32.

[43] Spiller (n 32) 65-66; McGowan 'Congress, court, and control of delegated power' 1977 *Columbia Law Review* 1119 1120; Financial Stability Board (n 15) 11; par 3.3 of ch 2 *supra*.

[44] See par 3.3 of ch 2 *supra*; Scott 'Accountability in the regulatory state' 2000 *J. Law & Soc.* 38 39; Quintyn & Taylor (n 1).

[45] Quintyn & Taylor (n 1); Mwenda (n 1) 34.

delegating principal lies in the decision to extend a measure of authority to the agent *vis-à-vis* the measures constructed to retain some capacity to command.[46]

In South Africa, the Constitutional Court mentioned that these two contrasting concepts are influential in determining whether the delegation action is acceptable – considering the quantity of authority so delegated.[47] It is further important to note that the outcomes of delegation that ultimately realise are not always foreseeable at the time of the act of delegation.[48]

In the context of this intercession through regulation, delegation must then pose some advantage to the State in order for it to consider and proceed with delegating its authority.[49] Governments task autonomous bodies with effecting regulation and therefore, whilst the reigning political party may devise the policy framework for regulation, these designers do not execute this framework.[50] The realisation of the envisaged outcomes is the duty of the regulator and thus different actors have interests in the same policy.[51] Delegation also assists in validating the chosen policies[52] and in detaching politicians from the implementation and enforcement of uncomfortable and challenging policies.[53]

Generating autonomy, together with the envisaged political benefits, necessitates delegation and explains to some extent a foundation for delegation.[54] Benefits include fortification and continuation of politicians' policies notwithstanding removal from office and rendering policy determinations justifiable through cognitive association with regulatory bodies.[55] In other words, delegation to insulated entities provides political players with the opportunity to

[46] Scott 'Accountability in the regulatory state' (n 44) 39; Thatcher (n 24) 139. This is also what the principal-agent theory is concerned with – see Thatcher (n 24) 139.

[47] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC) par 87; par 3.3. *infra*. See also Hüpkes *et al* (n 15) 7: 'The position of the accountable agency is, ultimately, embedded in a country's constitutional system that governs the relationship between the branches of government, as well as the hierarchy of legal norms. The allocation of public powers to an independent agency will be limited to those powers necessary for the agency to achieve its objectives.'

[48] Thatcher (n 24) 139.

[49] Thatcher (n 24) 129-130; Thatcher & Stone Sweet (n 1) 11. I do not consider the *rationales* for regulation in-depth, however, I discuss the reasons for delegation on a number of occasions. For some *rationales*, see, e.g. Spiller's reference to the 'self-interest theory of regulation' in that this approach founds the notion of 'regulation' as a response to the request for political intercession – Spiller (n 32) 65.

[50] Spiller (n 32) 65; Mwenda (n 1) 26.

[51] Spiller (n 32) 65: 'There is no necessary divergence between politicians' optimal policies (as responses to interest groups' demands) and their implementation. Policies, however, are seldom implemented directly by the politicians themselves. Instead, they are delegated to regulatory agencies, departments or the courts.'

[52] Gilardi 'Institutional change in regulatory policies: regulation through independent agencies and the three new institutionalisms' in Jordana & Levi-Faur (ed) *The Politics of Regulation Institutions and Regulatory Reforms for the Age of Governance* 2004 76-77 & 83.

[53] Thatcher (n 24) 130; Thatcher & Stone Sweet (n 1) 4.

[54] Thatcher & Stone Sweet (n 1) 4. See also Gadinis (n 14) 336-337; Bressman & Thompson (n 28) 611.

[55] Gilardi (n 32) 82-83.

install their dogmas into the regulatory system, which will then retain their views even after these players are no longer presiding over the system.[56]

One of the driving forces behind acts of delegation is the attempt to instate or develop an erudite institution with the necessary authority to deal with complex sectors that require regulation but which are highly specialised.[57] Some of the confounding dilemmas faced by delegating authorities are related to disparate levels of knowledge and insight between various role-players and the disparate levels of expertise between the various role-players.[58] The prospects of the regulator increasing its levels of knowledge and expertise over time in order to meet industry levels logically entail that the disparity between the regulator and the government will increase as well:[59]

> 'Theorists have offered two major justifications for the independent agency model. A first group of scholars portray independent bureaucrats as dispassionate experts: rational actors who reach decisions on the basis of scientific evidence rather than partisan preferences. A second set of theories points out that, because independent bureaucrats do not have to win elections every few years, they can prioritize long-term goals and avoid the trap of policies with immediate benefits but disproportionate future costs. This Section looks at these two arguments for independence in turn and applies them in the context of banking regulation. Proponents of agency independence believe in the need to build an administration staffed by expert career bureaucrats, rather than opportunistic political appointees. Civil servants with deep knowledge of their policy fields are best suited to find scientific solutions to issues of regulatory policy. Issues of regulatory policy often involve questions of a highly technical nature that generalist politicians may find impenetrable. Indeed, some scholars argue that, in certain issue areas, the level of technical knowledge required can be so high that politicians will have trouble supervising agency policies and auditing agency practices. Perhaps few areas fit the mold of a highly technical field as well as financial regulation. Financial regulators

[56] *Ibid.* See Gadinis (n 14) 341. Barkow (n 21) states at 28-29: 'But this does not mean that current party politics is the only explanation for removal restrictions. Even if Congress is controlled by the same party as the current President, it may prefer a for-cause removal provision if the need for stability in policy is relatively great … Congress may agree with the current President's policies but worry that the short-term preferences of future administrations could undermine the longterm goals of law. The President … may support the creation of an independent agency in the name of stability and of helping the agency to avoid future partisan pressure from the opposite party.'

[57] Thatcher (n 24) 131-132; Barkow (n 21) 19-20; Gadinis (n 14) 330; Bressman & Thompson (n 28) 612-613. See Levitin (n 17) 331-332, noting that the restricted familiarity of regulators in the financial consumer sphere was one of the *rationales* behind the United States' Consumer Financial Protection Bureau (hereinafter 'CFPB'). See Goodhart *et al* (n 13) 52: 'Regulatory authorities are agents of governments and, therefore, ultimately of the citizens. In general, people with considerable experience and a reputation for stringency should be appointed to this task, because diligent and tough regulators will influence expectations appropriately in the financial sector. If the likelihood of being punished is high, bankers will have stronger incentives to keep their internal controls in good shape.'

[58] Bendor *et al* (n 14) 240-241 & 248 (the authors' approach is structured within the framework of game theory, in this case 'delegation games'); Goodhart *et al* (n 13) 45 & 46; Thatcher (n 24) 125*;* Thatcher & Stone Sweet (n 1) 4 & 16.

[59] Bendor *et al* (n 14) 240-241 & 248*;* Thatcher & Stone Sweet (n 1) 16.

> need officials who understand how financial markets work and who are familiar with the business model, transaction types, compliance mechanisms, and record-keeping procedures of leading financial institutions.'[60]

In turn, this increases the potential for regulatory conduct that is inconsistent with government interests.[61]

2.3. Challenges

Regulatory entities can play an important role in respect of policy generation – instigating interactive processes,[62] airing contrasting perspectives to that of public officers, drawing a variety of stakeholders into 'the "regulatory space"', disseminating data and diminishing the exclusivity of certain industry members *vis-à-vis* government.[63]

An example of the role of the regulator with regard to policy configuration is found where a regulator responsible for effecting multiple outcomes through adherence to multiple objectives has to effect a balancing act because there are contrasting elements to these objectives.[64] The result may essentially be that policy choices residing within the politician's domain become the concerns of the regulator.[65] One of the important aspects to take into account is that political determinations are subject to certain safeguards and that 'these judgements and decisions should be made at the political level, in a publicly accountable

[60] Gadinis (n 14) 339-340. Gadinis's work takes the research of Bendor *et al* (n 14) 240-241 & 248 and Thatcher & Stone Sweet (n 1) 16 (referred to in the previous footnote) a step further as this quote from his theoretical research shows.

[61] Thatcher & Stone Sweet (n 1) 4 – these are referred to as 'agency losses'. See also Thatcher (n 24) 130, who makes a distinction between 'agency losses' as a result of 'shirking' (which he defines as 'divergence from the preferences of IRA [independent regulatory agency] and its principals) and 'slippage' (which he defines as 'institutional design causing IRA decisions to differ from those desired by principals').

[62] Thatcher (n 24) 140 – the author specifically refers to 'public hearings and consultation documents'.

[63] Thatcher (n 24) 140. See also Thatcher & Stone Sweet (n 1) 16: 'It has also had impacts on processes of decision making, substantive policy making and further institutional reform.'

[64] Goodhart *et al* (n 13) 157. However, see also Financial Stability Board (n 15) 10: 'Most FSB jurisdictions view consumer protection and prudential supervision as complementary rather than competing objectives. It is clear that both consumer protection and prudential supervision have a shared interest in minimising the risks to financial stability. Few jurisdictions noted having a mechanism in place to resolve any conflicts in objectives and some noted that such conflicts have yet to be identified.' See also *contra* the position of Zywicki (n 17) 875-876 where he criticises the solitary aim of the CFPB, describing it as one of the entity's 'flaws in [its] institutional design: a tunnel vision selection bias and commitment to regulatory mission'. At 878, he notes that this dispensation where 'a counterbalancing regulatory purpose' is absent, together with the solitariness of the director *vis-à-vis* a board-like management scheme 'create a breeding ground for tunnel vision, favouring one aspect of consumer protection to the detriment of other consumer benefits'. He contrasts this position at 877-878 with the Federal Trade Commission, which is tasked with both consumer protection and competition, stating that this disposition is inclined to favour customers in diverse manners.

[65] Goodhart *et al* (n 13) 157.

way'.[66] The question therefore arises whether safeguards are circumvented or substituted where the nature and identity of the decision maker change.[67]

Entrustment of power and responsibility installs discretion in the regulator.[68] Pablo Spiller states that challenges materialise as the autonomous bodies' conduct is 'intrinsically unobservable' which I interpret to mean that the character of the establishment is such that its operations remain largely unseen.[69] Regulatory bodies could avoid executing their mandates either due to adversity towards the exertion that will accompany their actions or, where there is a discrepancy between the desires of the government *vis-à-vis* other interest groups, interest groups may award regulatory bodies in some form or another for non-execution of their mandates.[70] The regulator favouring industry welfare views the regulated market's welfare as similar to the public interest.[71]

This is one of the main challenges specifically related to the independence of a regulatory body and is referred to as 'regulatory capture' when the industry successfully manipulates the behaviour of the regulator.[72] Spiller is one of the numerous authors that highlight this phenomenon within the context of regulatory autonomy.[73] This concept refers to entrapment the regulated industry that affects the objectivity of the regulator.[74] Both the government and the regulated industry may endeavour to secure certain benefits for the interfering parties and may have undesirable outcomes where the regulator favours these parties.[75] Thus, 'Congress and interest groups will usually compete for the regulators' favours'.[76] Interest groups may

[66] *Ibid*.

[67] Spiller (n 32) 65-66; McGowan (n 43) 1120.

[68] Spiller (n 32) 66; Thatcher & Stone Sweet (n 1) 4. Spiller (n 32) refers to two perspectives at 66, namely that the political sphere is enabled to exercise comprehensive authority in order to properly manage regulators ('congressional instruments are powerful enough to fully control its regulators') alternatively that the autonomous entity is able to effect its actions freely ('agency problems are so acute that bureaucracies can work independently of congressional or presidential desires').

[69] Spiller (n 32) 65; Hornby *Oxford Advanced Learner's Dictionary of Current English* (2010) 790 & 1633. See also Lodge (n 34) 126-127 stating that the 'visibility' of conduct has two components. Firstly, the supporting political regime can conceal the expenditures associated with regulatory action through the transfer of same to the regulated population and obscuring reality through structures that are not as transparent as ordinary government administrative structures – see 126. Secondly, transparent conduct can be a resolution in order to secure benefits – see 126-127. The expenses associated with reconfiguration in response to knowledge inequalities ('information asymmetries') are shifted onto the regulated population – see 126. Or, from public perception for the regulator, public conduct may encourage favourable opportunities in respect of post-regulatory employment of regulatory staff – see 127.

[70] Spiller (n 32) 66 fn 5.

[71] Quintyn & Taylor (n 1).

[72] *Ibid*; Mwenda (n 1) 21 & 33; Spiller (n 32) 67; Levitin (n 17) 331; Gadinis (n 14) 348-349; Barkow (n 21) 21-24. See Quintyn & Taylor (n 1): 'When regulators are free from political control, the risk of "regulatory capture" by other groups – in particular, the industry they regulate – grows.'

[73] Spiller (n 32) 67. See fn 72 *supra*.

[74] Quintyn & Taylor (n 1); Mwenda (n 1) 33.

[75] Spiller (n 32) 66-67; Mwenda (n 1) 33.

[76] Spiller (n 32) 67.

manipulate the regulators or the relevant politicians may do so in order to secure favourable results for themselves.[77] The regulated industry can affect the behaviour of the regulator and sway the regulator to act in the interests of the industry.[78] This would include cognitive assimilation of the welfare of the industry or specific regulated institutions with public welfare, ultimately resulting in diminished regulatory efficacy.[79] The scenario may also arise where regulators develop directives aimed at reduced expenditure to the regulated without evaluating those expenses against public welfare and acting accordingly.[80] Conflicting interaction with regulated entities may ensue and the regulator's behaviour towards firms may be contradictory – even resulting in specific institutions being released from regulatory obligations.[81]

Incentives for industry bias are found, for example, in career advancements for staff after serving terms at a regulatory body, including prospects of increased income.[82] This could either entail employment within the regulated industry or at an organisation interacting with the industry, such as provision of legal services.[83] Influenced outcomes can manifest in the form of standards sympathetic to the expenses incurred by industry members due to regulation as opposed to considering both expenditures to the market and advantages to the public.[84] Such an approach can also lead to arbitrary implementation of regulatory stipulations.[85]

Government control over regulators involve pecuniary interests through budget allocation, whether through increase or reduction dependent on satisfactory performance from the state's

[77] *Ibid*. See also Levitin (n 17) 331 referring to the position in the US: 'Federal bank regulators would often leave government employment to find employment at banks, as bank lobbyists, as bank consultants, or as bank lawyers. Regulators might then attempt to curry favour with future employers by adopting regulatory stances favourable to those future employers, such as lax consumer protection.'

[78] Spiller (n 32) 67; Quintyn & Taylor (n 1); Mwenda (n 1) 33; Scott 'Evaluating the performance and accountability of regulators' (n 27) 355-356.

[79] Quintyn & Taylor (n 1): 'Agencies that suffer from such capture come to identify industry interests (or even the interests of individual firms) with the public interest. And industry capture can undermine the effectiveness of regulation just as political pressure can. Regulators may, for example, formulate rules so as to minimize industry costs rather than strike an appropriate balance between those costs and public benefits. They may also apply rules inconsistently and exempt individual firms from regulatory requirements.' See also Mwenda (n 1) 33.

[80] Quintyn & Taylor (n 1); Mwenda (n 1) 33.

[81] *Ibid*.

[82] Spiller (n 32) 74 – the author hypothesises at one stage about the ability of politicians to limit or diminish industry sway – this can be effected by 'impos[ing] a lifetime ban on private employment following governmental work and strictly control[ling] postagency earnings'. See also Levitin (n 17) 331.

[83] Spiller (n 32) 88.

[84] Quintyn & Taylor (n 1); Mwenda (n 1) 33. See also Scott 'Evaluating the performance and accountability of regulators' (n 27) 355-356 in respect of the 'undue deference shown to the banking sector' by the Irish Financial Regulator.

[85] Quintyn & Taylor (n 1); Mwenda (n 1) 33.

perspective; or career determination, whether through renewal (or not) of positions, advantageous placements in the government sphere or liaisons with politicians.[86]

I would assume that behaviour such as the aforementioned could only be categorised as 'capture' where it cannot be contextualised insofar as differentiated treatment is necessary due to institutional variances or the conduct of the regulator is detrimental to society.[87] In this regard, I would argue that the comments of Goodhart *et al* in respect of necessitated divergence of interaction with different institutions ought to be reiterated here.[88] Regulators have to consider the position of the regulated and avoid real or illusive predisposition towards the industry.[89] This is not an easy task as it necessitates sufficient awareness of the industry's views but aversion of encapsulation.[90] Levitin notes that capture by the industry can subsequently evolve to a point where the financial welfare of banking institutions is the preferred policy to customer safeguarding.[91] However, the absence of one form of capture by a certain stakeholder does not necessarily also mean that another form of capture is not possible or that another form is consequently also present.[92]

Consumers, as an industry interest group, can also motivate regulatory behaviour.[93] Customers are not in a position to review the actions of organisations with whom they transact constantly.[94] As such, regulators undertake surveillance as they are better equipped to do so.[95] The regulator performs certain functions for the regulated institution, national

[86] Spiller (n 32) 87; Barkow (n 21) 43.

[87] See the adverse outcomes of capture (also referred to as 'industry capture') set forth by e.g. Quintyn & Taylor (n 1); Mwenda (n 1) 33; Barkow (n 21) 22; Gadinis (n 14) 348-349.

[88] Goodhart *et al* (n 13) 153 & 154. See also Hadjiemmanuil 'Institutional structure of financial regulation: A trend towards "megaregulators"?' 2000-2001 *Yearbook of International Financial and Economic Law* 127 143.

[89] Goodhart *et al* (n 13) 193.

[90] *Ibid*.

[91] Levitin (n 17) 331.

[92] Mwenda (n 1) 33.

[93] Spiller (n 32) 69.

[94] Goodhart *et al* (n 13) 189-190: 'Because of the nature of contracts between financial firms and their customers (e.g. many are long term and involve a fiduciary obligation), there is a need for continuous monitoring of the behaviour of financial firms. Because most (especially retail) customers are not able to undertake continuous monitoring, and because there are substantial economies of scale in such activity, an important role of regulatory agencies is to monitor the behaviour of financial firms effectively and efficiently on behalf of customers. In effect, consumers delegate the task of monitoring to a regulatory agency; therefore, to some extent, that agency can be viewed as supplying monitoring services to customers of financial firms. In terms of resources used, consumer protection usually takes up the greater part of the time and effort of regulators and supervisors. This in turn raises the issue of the nature of any perceived implicit contract between the regulator and consumers of financial services.'

[95] Goodhart *et al* (n 13) 189.

administration and customers.[96] However, there are expenditures associated with governance by regulators and regulation, which are publicly borne.[97]

The government, regulator and industry are all players in the same regulatory space, albeit with different interests in the market segment.[98] Politicians' concerns reflect some, but not all, of the concerns of specific interest groups.[99] On the other hand, regulators as the operatives of policies, balance market stakeholder investments and therefore consider consumer and provider – not just the interests forwarded by politicians and selected interest groups.[100]

3. FORMS OF INDEPENDENCE

Marc Quintyn and his co-authors refer to four aspects of independence when it comes to regulators.[101] Their categorisation of autonomy have been useful as a broad, but comprehensive, structural guideline for the South African analysis that I undertake in chapter six. I have added the work of other scholars and the approach of the South African Constitutional Court to this part of the chapter in order to broaden the perspectives on independence even further.

[96] *Idem* at 190: 'Regulatory agencies (central banks or other bodies) are viewed as supplying regulatory, monitoring and supervisory services to various stakeholders, including financial firms, consumers and government. However, complications arise because, unlike most other services, they are not supplied through a market process but are largely imposed by the regulator, although there may be a consultation process. This leads to several problems: valuable information is lost about the type and the extent of regulation that consumers demand, and about how much consumers are prepared to pay for regulation. Above all (and this is probably the most serious aspect), regulation is largely perceived as being a free good.'

[97] Goodhart *et al* (n 13) 190: 'If the perception that regulation is costless is combined with risk-averse regulators, there is an evident danger that regulation will be overdemanded by consumers and oversupplied by the regulator. A major issue, therefore, is how to guard against overregulation … Regulation is not costless, but imposes a range of costs (*institutional, compliance* and *structural* …), which are ultimately reflected in the price of financial services. If regulation is 'excessive' (if it exceeds what is needed to achieve its limited objectives) or if it focuses on inappropriate objectives, avoidable costs are imposed upon society, and these costs could exceed the costs that regulation is designed to avoid.' Original emphasis.

[98] Spiller (n 32) 69; Goodhart *et al* (n 13) xviii.

[99] Spiller (n 32) 66-67. The author also mentions that politicians' values may be correlated with organisations that assist them financially to advance their careers – see 67. In South Africa, a *lacuna* has been identified by the Institute for Security Studies, namely the lack of statutory control over non-public funding provided to political parties – see ISS 'What's their secret'. The Public Funding of Represented Political Parties Act (Act 103 of 1997) determines the allocation of public funds but no legislation exist for private funding. Attempts to obtain information about such donations have failed in court – see *Institute for Democracy in South Africa And Others v African National Congress and Others* [2005] ZAWCHC 30.

[100] Spiller (n 32) 67 – see also 73: 'In other words, simply delegating regulatory powers to an agency whose interests are not perfectly aligned with those of Congress may imply a regulatory outcome that takes other interests into account'; Levitin (n 17) 331. See also Goodhart *et al* (n 13) 52, quoted in fn 57 *supra.*

[101] Quintyn *et al* (n 15) 7-10. See also Quintyn & Taylor (n 1); Mwenda (n 1) 20-22. Quintyn & Taylor (n 1) and Quintyn *et al* (n 15) refer to these as '[f]our dimensions of independence': 'regulatory, supervisory, institutional, and budgetary'. However, Quintyn *et al* (n 15) 8 make a distinction insofar as 'regulatory' and 'supervisory' autonomy are considered the 'core' aspects whilst 'institutional' and 'budgetary' autonomy are 'essential to support the execution of the core functions'.

The first and second categories pertain to the role of the regulator as such, namely 'regulatory' and 'supervisory independence'.[102] These features focus on the development of standards that apply to the regulated industry as well as the role of the regulator *vis-à-vis* the industry and in respect of these standards so developed.[103]

In respect of 'regulatory independence', this aspect is concerned with the binding prescriptions effected by the regulator and which necessitates conformation by the regulated industry.[104] A benefit associated with agency determination of directives is that it encourages the agency to compel compliance, hence the assertion that '[r]egulators who are able to set these rules independently are more likely to be motivated to enforce them'.[105] In addition, the ability of these entities to modify standards in accordance with industry developments is unconstrained by political courses of action that may be extensive and arduous.[106] Quintyn and Taylor argue for the 'ample discretion' of regulators tempered by national constitutional and bank-related legal frameworks.[107]

However, the Financial Stability Board opined that independence in this regard is not an ordinary feature and reflects on the position in the United States, Germany and Mexico.[108] The United States' Consumer Financial Protection Bureau is viewed as an anomaly in this sense as it is empowered to develop norms and standards in relation to federal legislation.[109] Regulators in the other jurisdictions referred to are only privy to this ability where it is specifically bestowed.[110]

'Supervisory independence' relates to the management and evaluation of regulated entities, and the reproach of non-conforming industry members.[111] This aspect is of core importance but challenging to realise and ensure.[112] The regulatory conduct is often obscured from the public and external manipulation may be cunning and varied.[113] There is a need to safeguard

[102] Quintyn & Taylor (n 1); Mwenda (n 1) 20-21; Quintyn *et al* (n 15) 8-10.
[103] *Ibid*.
[104] Quintyn *et al* (n 15) 8-9. Quintyn & Taylor (n 1) mention some examples – 'minimum capital ratios, exposure limits, and loan provisioning'.
[105] Quintyn & Taylor (n 1); Mwenda (n 1) 20.
[106] Quintyn & Taylor (n 1).
[107] *Ibid*.
[108] Financial Stability Board (n 15) 11.
[109] *Ibid*.
[110] *Ibid*.
[111] Quintyn *et al* (n 15) 9-10; Mwenda (n 1) 21.
[112] Quintyn & Taylor (n 1) state that this feature is 'crucial in the financial sector'. See also Quintyn *et al* (n 15) 9.
[113] Quintyn & Taylor (n 1).

the veracity of regulators.[114] In this regard, various mechanisms to enhance independence in respect of oversight exist. [115]

Firstly, legislative safeguards to prevent personal liability for actions taken in the course of executing duties are put into place.[116] Quintyn and Taylor mention that coercion through the course of judicial proceedings can be curtailed by legislative stipulations setting out a restrictive time-period for appeal processes where the appealing entity has been subjected to punitive measures.[117] Secondly, sufficient pecuniary resources must be allocated to retain and remunerate capable staff members and prevent members from being paid off.[118] Thirdly, specified regulatory powers relating to punitive and intrusive authority reduce the need for value judgments and limit the scope of manipulation by either the state or market.[119] This is an important consideration as, fourthly, it is preferable that the autonomous supervisory body is responsible to bestow and revoke permits as this function does not only speak to the expert knowledge of the configuration of the financial market but it is also a necessary authority to compel appropriate behaviour from regulated firms.[120]

The third and fourth categories are connected with the organisational aspects of the regulator as an entity, thus referring to 'institutional' and 'budgetary independence'.[121] The former relates to the positioning of the regulatory body within the institutional regulatory framework, thus whether it is assimilated into government or exists autonomously, whilst the latter is concerned with the financial sourcing, application of funds and pecuniary well-being of the regulator.[122]

[114] *Ibid*.

[115] *Ibid*; Mwenda (n 1) 21.

[116] Quintyn & Taylor (n 1); Mwenda (n 1) 21. See also IOSCO (n 22) 25.

[117] Quintyn & Taylor (n 1) See also Quintyn *et al* (n 15) 10 in respect of protection of regulators against legal suits.

[118] *Ibid*; Mwenda (n 1) 21.

[119] Quintyn & Taylor (n 1): 'Crafting a rule-based system of sanctions and interventions also lessens the scope for supervisory discretion – and thus for political or industry interference.' See also Quintyn *et al* (n 15) 9: '[S]upervisors should have the final word on who can enter the system. A typical situation that may lead to problems is one where the minister of finance or the council of ministers has the final say in the licensing of individual banks and may—either through corruption or lack of technical ability to assess business plans—license unviable banks. The same degree of autonomy should apply to exit procedures, based on the same argument that supervisors are in the best position to decide on the viability of individual banks.'

[120] Quintyn & Taylor (n 1); Mwenda (n 1) 21. Quintyn & Taylor (n 1): 'Independent supervisors, not a government agency or minister, should be given the sole authority to grant and withdraw licenses because they best understand the financial sector's proper composition – and because the threat to revoke a license is a powerful supervisory tool.' See also the suggestion of the IOSCO (n 22) 28: 'Criteria for decision-making also can insulate the process from inappropriate political interference. For example, the ability to reverse licensing decisions at the ministerial level without clear criteria both for the refusal to licence and related decision-making process would inappropriately infringe independence.'

[121] Quintyn & Taylor (n 1); Mwenda (n 1) 25; Quintyn *et al* (n 15) 8 & 10.

[122] Quintyn & Taylor (n 1); Mwenda (n 1) 21 & 25-26; Quintyn *et al* (n 15) 8.

The third aspect, 'institutional independence', relates to the structure[123] and location of the entity.[124] Quintyn and Taylor only refer to the regulatory entity in terms of its segregation from the government, specifically referencing the 'executive and legislative branches of government'.[125] For Mwenda, independence in this regard is validated where it increases the capacity of the regulator to function competently, resourcefully, openly and responsibly.[126] In the United States, the Consumer Financial Protection Bureau has been placed within another autonomous entity, the Federal Reserve, but its independence-enhancing features have ensured that it is described as 'an independent agency housed inside another independent agency'.[127]

In *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa*, the Constitutional Court highlighted that autonomy must at least encompass 'structural and operational' independence and measured autonomy according to specific features.[128] The National Treasury in its policy document issued on the new regulatory dispensation for the financial sector in South Africa,[129] the Organisation for Economic Co-operation and Development, [130] International Organisation of Securities Commissions, [131] the Financial Stability Board [132] and the World Bank all advocate 'operational independence'.[133] The International Organisation of Securities Commissions focuses on operational autonomy and adds to this discussion[134] by noting that the ministerial office and the regulator should not confer on matters that pertain to the regulator's

[123] Quintyn & Taylor (n 1); Mwenda (n 1) 21 & 25.

[124] Quintyn & Taylor (n 1).

[125] *Ibid.* See also IOSCO (n 22) 28: 'The Principles take no position on location of the regulator within the governmental structure… Independence or accountability is not necessarily compromised just because the regulator is part of the government and/or the top officials of the regulator are political appointments, including appointees that previously served in the government.'

[126] Mwenda (n 1) 21-25.

[127] Zywicki (n 17) 875. See also CCH Attorney-Editor Staff (n 17) 484 & 485.

[128] *Helen Suzman Foundation* (n 18) par 2.

[129] National Treasury *A Safer Financial Sector to Serve South Africa Better: National Treasury Policy Document* 23 February 2011 25-26 in respect of the envisaged financial sector regulatory framework reformative action: 'Principle 5a: Regulators must operate objectively with integrity and be operationally independent, but must also be accountable for their actions and performance.'

[130] OECD (n 15) 5.

[131] IOSCO (n 22) 25-29.

[132] Financial Stability Board (n 15) 11.

[133] World Bank (n 15) 11. The World Bank also specifies that the regulator must '…be operationally independent from external interference from political, commercial, and other sectoral interests' – see World Bank (n 15) 11. According to Hornby (n 69) 1031, 'operational' in this context means to be 'connected with the way in which a business, machine, system, etc. works'.

[134] The IOSCO (n 22) 25 further adds a type of definition or indications of 'interference': 'The regulator should be operationally independent from external political interference* and from commercial, or other sectoral interests, in the exercise of its functions and powers. *The term 'interference' means a formal or informal level and method of contact that affects day-to-day decision making and is unsusceptible to review or scrutiny.'

operational choices.[135] Issues that require conferencing should be delineated, and the procedures for discussing or obtaining consent and taking action of such a nature that it is evident or capable of review in order to protect the veracity thereof.[136] The Financial Stability Board also supports 'budgetary autonomy'.[137]

Mogoeng CJ introduces the majority judgment of *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* with the following statement:

> 'We also agree that that entity must enjoy adequate structural and operational independence to deliver effectively and efficiently on its core mandate.'[138]

This statement shows that there are four necessary elements.[139] First, sufficient autonomy is necessary in respect of both organisational and practical terms.[140] Second, this autonomy is necessary to reach the principled outcome of efficacy.[141] Third, the outcome is correlated and delineated by the purpose and duties of the entity and fourth, the outcome qualifies the purpose and duties of the entity.[142] Autonomy is further recognised as an aspect that is causational to achievement of the desired outcomes[143] and the court also deals with the degree of autonomy.[144]

Mwenda recognises that independence is not the best nor the most practical choice in all instances[145] and Thatcher recognises the existence of 'semi-independent' organisations.[146] Mogoeng CJ states that sufficient autonomy is needed, not complete autonomy.[147] The court then proceeds to view certain features against the norm of '… though not absolutely

[135] IOSCO (n 22) 26: 'Consultation with or approval by a government minister or other authority should not include operational decisions.'

[136] IOSCO (n 22) 26: 'In jurisdictions where particular matters of regulatory policy require consultation with, or even approval by, a government minister or other authority, the circumstances in which such consultation or approval is required or permitted should be clear and the process of consultation and criteria for action sufficiently transparent or subject to review to safeguard its integrity.'

[137] Financial Stability Board (n 15) 11. The IOSCO (n 22) 25 & 28 requires 'a stable source of funding' and 'an adequate allocation of resources' is proposed by the World Bank (n 15) 11.

[138] *Helen Suzman Foundation* (n 18) par 2.

[139] *Ibid*.

[140] *Ibid*.

[141] *Ibid*.

[142] *Ibid*.

[143] *Ibid*.

[144] *Ibid*.

[145] Mwenda (n 1) 26, 31-34.

[146] Thatcher (n 24) 129.

[147] *Helen Suzman Foundation* (n 18) par 9: 'Our anti-corruption agency, the DPCI, is not required to be absolutely independent. It, however, has to be adequately independent. And that must be evidenced by both its structural and operational autonomy.'

independent … nevertheless … adequately independent in terms of both its structure and operations'.[148] In doing so, it considers various aspects.[149]

The discussion hereafter expands on the preceding paragraphs by discussing the specific features that affect independence in more detail. I have categorised these features under various headings for ease of reference for the upcoming analysis in chapter six.

4. INDEPENDENCE-ENHANCING FEATURES

4.1. Introduction

I follow the view that the absence of a direct legislative statement denoting an entity as 'independent' is not an indication that the entity should not be independent.[150] Independence is a legitimate policy consideration where regulatory systems are concerned.[151] It can be strengthened in various ways and the endangerment thereof can affect sound supervision.[152] Although actual independence alone does not guarantee proficiency in regulation, it does contribute to regulatory competence, and is dependent on the level of independence as contextually determined by the particular country.[153] Stavros Gadinis notes the following:

> 'In the United States, independent agencies were a hallmark of the New Deal effort to build an efficient bureaucracy. As early as 1935, the Supreme Court embraced agency independence and situated it firmly within America's separation-of-powers tradition. The Court recognized Congress's authority to establish administrative agencies and limit the President's power to remove the members of these agencies' boards, except for cause. This limitation on the President's removal

[148] *Idem* at par 10.

[149] It must be taken into account that the independence of this particular entity is constitutionally sanctioned and the matter revolved around *inter alia* the implementation of ss 206(1) and 207(2) of the Constitution and effect of the provisions of the South African Police Service Amendment Act *vis-à-vis* the autonomy of the Hawks – see *Helen Suzman Foundation* (n 18) paras 15-17.

[150] See *Glenister* (n 38) par 131: 'Yet more insight is gained by comparing the relative level of political insularity called for by the Constitution with respect to different governmental institutions. The courts, for example, are required to be "independent and subject only to the Constitution and the law, which they must apply impartially and without fear, favour or prejudice." The prosecuting authority, on the other hand, must exercise its functions "without fear, favour or prejudice." By contrast, the constitutional provisions related to the police service are silent as to the need for the service to operate either independently or without fear, favour or prejudice. This distinction is drawn not to support a conclusion that the police, or specialised unit within the police, may lawfully operate with fear, favour or prejudice. Far from it. The distinction is significant merely because it reflects the Constitution's determination as to the appropriate level of independence from the political system of particular governmental institutions. These determinations must be kept in mind in assessing the specific provisions of the SAPS Act.' Also compare the wording of Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act, known as the 'Consumer Financial Protection Act of 2010' as per s 1001 of the Act (s 1011(a) refers to the CFPB as 'an independent bureau'), with that of the Australian Securities and Investments Commission Act (Act 51 of 2001) (the latter does not specifically refer to independence but is viewed as an independent organisation – see *Fit for the future – A capability review of the Australian Securities and Investments Commission* A report to government December 2015 30, 180).

[151] See par 2 *supra*.

[152] Quintyn & Taylor (n 1); Mwenda (n 1) 21.

[153] Mwenda (n 1) 26, 31-34.

> power is now the defining feature of agency independence in the United States. Most U.S. independent agencies are governed by a bipartisan commission, where members from the President's party constitute a bare majority. Outside the United States, the criteria for determining agency independence are more varied. European countries have emphasized the position of these agencies outside the traditional executive-body hierarchy. At a minimum, an agency is formally independent when it can exercise its powers without having to obtain the consent of elected government officials like ministers or prime ministers. Yet, elected politicians may be able to influence an agency's decision-making process in various ways. For example, the legislature may grant only limited powers to the agency, requiring it to seek politicians' support in order to further its policy goals. Or, the legislature may curtail the agency's budget. For all these reasons, academic studies of agency independence have moved away from relying on a single criterion of independence in favor of a more comprehensive analysis of the agency's institutional environment.'[154]

I deal with specific features in this part of the chapter because various features of the system can therefore contribute to the degree of independence.[155] The preceding discussion must be supplemented with detail, and I do this in this part of the chapter. The features range from forthright independence to 'legal', 'operational' or 'financial' independence, or self-determination of the structure of the entity and the selection and removal of staff.[156] In addition, no constitutional prescription exists for the financial market conduct regulators in South Africa but it is relevant in respect of autonomy as Thatcher and Stone Sweet note that political interference through re-construction is less challenging when no constitutional safeguards exist in respect of these specific agencies.[157]

The South African National Credit Act frames the National Credit Regulator as 'independent'[158] but also as 'impartial'.[159] In addition, the Regulator is to conduct itself by 'perform[ing] its functions … without fear, favour, or prejudice'.[160] Incidentally, these phrases echo the nature ascribed to the judiciary and chapter nine institutions.[161] In the South African constitutional dispensation, the legislative framework of the Constitution is the hierarchical prescriptive apex together with 'the law' where the National Credit Regulator's

[154] Gadinis (n 14) 337-338.

[155] Mwenda (n 1) 27-28. See also par 2.1 *supra*.

[156] Mwenda (n 1) 20-21. See also *Helen Suzman Foundation* (n 18) paras 15-21, 40-42 & 62-76 & 83-91.

[157] Thatcher & Stone Sweet (n 1) 13. See also the position pertaining to the European Union – Curtin 'Holding (quasi-) autonomous EU administrative actors to public account' 2007 *European Law Journal* 523 527.

[158] S 12(1)(c) of the NCA.

[159] S 12(1)(e) of the NCA.

[160] S 12(1)(f)(ii) of the NCA.

[161] Ss 165(2) & 181(2) of the Constitution, 1996; *Glenister* (n 38) par 131.

authority and actions are concerned.[162] However, there is no explicit designation of independence or constitutional considerations allocated to the Financial Sector Conduct Authority. The Authority is, in the main, subjected to the relevant legislative provisions[163] and tasked to function 'without fear, favour or prejudice'.[164]

As indicated above, substantive literature on the independence and accountability of financial sector consumer credit market conduct regulators is not abundant in South Africa.[165] In this part of the discussion, I deal with some general aspects relating to independent entities within the South African administrative sector by reviewing some Constitutional Court cases. I do not delve too deep into the facts of these cases and the decisions of the courts regarding the merits of the cases. In addition, I isolate the themes that the courts investigated because these themes were deemed relevant *vis-à-vis* the topic of independence under consideration. My approach is supplemented with context in some instances where a specific understanding is forwarded through an application of the facts of the case. This approach also facilitated the integration of the themes considered in both the majority and minority judgments.

The 2014 Constitutional Court case of *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* highlighted some aspects of independence in respect of an autonomous organisation, in this case an organisation tasked with anti-corruption endeavours namely the Directorate for Priority Crime Investigation or the 'Hawks'.[166] The considerations of the court were valuable to contextualise, validate, and add to the contributions of transcontinental writers.[167] This case and the 2011 Constitutional Court case of *Glenister v President of the Republic of South Africa and Others*, include a constitutional element which does not necessarily directly relate

[162] S 12(1)(c) of the NCA. See s 2 of the Constitution, 1996, which establishes it as the 'supreme law' of South Africa.

[163] S 58(1)(a) of the FSRA. This would include submission to the Constitution, 1996 by virtue of s 2 thereof.

[164] S 58(6) of the FSRA. However, see *Glenister* (n 38) par 131 quoted above in fn 150.

[165] See par 3.5 of ch 1 *supra*.

[166] *Helen Suzman Foundation* (n 18) par 4.

[167] The majority judgment was given by Mogoeng CJ (Moseneke DCJ, Jafta J, Khampepe J, Leeuw AJ and Zondo J concurring), the first minority judgment was given by Froneman J (Cameron J concurring), the second minority judgment was given by Cameron J (Froneman J and Van der Westhuizen J concurring), the third minority judgment was given by Nkabinde J and the fourth minority judgment was given by Van der Westhuizen J. Madlanga J concurred in part with some of the judgments.

to independence but which is concerned with establishing means to ensure efficacious conduct by these entities.[168]

4.2. Human resources

The features that revolve around the human resources of the regulator pertain to factors that can limit undue influence in respect of staff selection and dismissal, and the governance structure of the entity.[169] The capacity of the regulator to oversee its own human resource allocations and related matters is also an aspect taken into account to determine autonomy.[170]

The first aspect in this regard concerns the selection and removal of influential staff for and from service at the regulator.[171] Appointing a high-ranking person should ideally not be the responsibility of only one State body or branch.[172] Alternatively, if one government body is tasked with the appointment of these officials, the decision should be subject to statutory provisions setting out the requirements for positive selection (and removal) from position.[173] The removal of influential staff from office should ideally be restricted to clearly delineated incidences,[174] and be subjected to a petition process in terms of which the resolution to remove a person from office may be reconsidered.[175] The institutional autonomy of the regulator is supported by open and unambiguous guidelines that govern employment relationships – matters that also speak to expertise and limitation of intrusions through transparency:

[168] See *Glenister* (n 38) paras 84 & 113-114. The majority judgment held at paras 113, 116 & 118 'that there is no constitutional obligation to establish an independent anti-corruption unit … I accept that for the police service to effectively discharge its responsibilities under the Constitution, it must not be subject to undue influence. That is the extent of the obligation imposed by the Constitution, and it is in this context that the obligation imposed by s 7(2) must be understood. The question for determination … is whether the impugned laws establish an anti-corruption unit that has the capacity to "discharge its responsibilities effectively", as required by the Constitution … [w]hat is apparent from international instruments is that the requirement of independence is intended to protect members of the agency from undue influence. This is necessary to ensure that the anti-corruption unit can "discharge its responsibilities effectively".'

[169] Quintyn & Taylor (n 1); Mwenda (n 1) 25; Quintyn *et al* (n 15) 8.

[170] *Ibid*. The ability to employ the necessary employees resonates with 'budgetary independence' – see Quintyn & Taylor (n 1); Quintyn *et al* (n 15) 10.

[171] This aspect resonates with 'institutional independence' – see Quintyn & Taylor (n 1); Quintyn *et al* (n 15) 8; Mwenda (n 1) 25. See also par 3 *supra.*

[172] Quintyn & Taylor (n 1); Quintyn *et al* (n 15) 8; Mwenda (n 1) 25.

[173] *Ibid*.See also the wording of s 1011(b)(2) of the United States Consumer Financial Protection Act of 2010: '[T]he Director shall be appointed by the President, *by and with the advice and consent of the Senate*.' Own emphasis.

[174] Gadinis (n 14) 337; Barkow (n 21) 29; Quintyn *et al* (n 15) 8. This particular feature is traditionally considered a core indicator of an independent agency – see Barkow (n 21) 27; Miller (n 40) 216; Verkuil (n 35) 259. Barkow (n 21) 29 notes that a set employment period will also assist the development of expertness in senior officials. Where multiple persons head the regulatory body, the employment periods should be 'staggered so that institutional expertise can accumulate without gaps' – see 29.

[175] Quintyn & Taylor (n 1); Quintyn *et al* (n 15) 8; Mwenda (n 1) 25.

> ‘The terms of appointment and—even more critically—dismissal of its senior personnel. Independence is best served if there are clear rules on hiring and firing, which should primarily relate to regulators’ competence and probity. Under such rules, regulators would enjoy security of tenure, enabling them to speak and take action without fear of dismissal by the government of the day. Ideally, both the executive and legislative branches of government should be involved in the appointment process.’[176]

The United States’ Consumer Financial Protection Bureau, renowned by some authors for its high level of independence,[177] serves as an example. In respect of personnel appointments, the chief officer is employed for a set period of five years and only dismissed under circumstances stipulated in the statute – circumstances that would entail ‘inefficiency, neglect of duty, or malfeasance in office’.[178]

The aforementioned components were contextually considered in *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* and the discussions of the presiding officers resonate with the submissions of the writers that I referred to earlier.[179] In a minority judgment, Cameron J affirmed that appointees, especially senior members, could be a target of undesirable political influence:

> ‘The independence of an institution depends pivotally on the independence of those who staff it. Where political considerations influence the selection of the institution’s staff, its independence is, to that extent, limited. If compliant incumbents are selected at the outset, securing their tenure and preserving the autonomy of the institution within which they work will be inadequate to secure independence … And – this is the crucial point – the more the institution’s mandate threatens political office-bearers, the greater is the risk of political weight being brought to bear on its appointments.’[180]

[176] Quintyn *et al* (n 15) 8 (see also 6-7 in respect of ‘transparency’ and ‘integrity’). See also Bressman & Thompson (n 28) 610: ‘…[i]ndependent agencies are different in structure because the President lacks authority to remove their heads from office except for cause ... these agencies are independent in the sense that the President cannot fire their leaders for political reasons and … cannot use this ultimate sanction to back up particular policy recommendations.’

[177] Levitin (n 17) 337; Zywicki (n 17) 875.

[178] Zywicki (n 17) 873. See s 1011(c) of the United States’ Consumer Financial Protection Act of 2010: ‘TERM. – (1) IN GENERAL. – The Director shall serve for a term of 5 years. (2) EXPIRATION OF TERM. – An individual may serve as Director after the expiration of the term for which appointed, until a successor has been appointed and qualified. (3) REMOVAL FOR CAUSE. – The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office. (d) SERVICE RESTRICTION. – No Director or Deputy Director may hold any office, position, or employment in any Federal reserve bank, Federal home loan bank, covered person, or service provider during the period of service of such person as Director or Deputy Director.’

[179] See e.g. Quintyn & Taylor (n 1); Quintyn *et al* (n 15); Mwenda (n 1); Barkow (n 21); Verkuil (n 35); Miller (n 40).

[180] *Helen Suzman Foundation* (n 18) paras 153-154. See also paras 32 & 46-47 of the majority judgment. See also *Glenister* (n 38) par 118.

In the case of the Directorate, the Minister had the statutory authority in respect of a variety of matters directly affecting the unit: She had the prerogative to select and maintain the position of a specific individual as the leading senior member of staff;[181]make 'integrity testing' determinations;[182] regulate the salaries paid to and the employment stipulations of the most senior member of staff;[183] dismiss and suspend this senior member;[184] and determine the course and projects of the Directorate through policy selection and the selection of sanctioned investigations.[185] Mogoeng CJ highlighted that the determination had to be made as to whether there were 'inbuilt autonomy-protecting features' that facilitated the proper execution of the unit's mandate.[186]

In *Glenister v President of the Republic of South Africa and Others*, the Court accepted that the entity could only be efficacious where the legislation were conducive to restricting 'undue influence' and consequently enable it to 'discharge its responsibilities effectively'.[187] Mwenda also highlights that autonomy can increase proper performance by regulators and supervisors.[188] As mentioned above, the personnel that conduct the business of the autonomous entity are important elements of independence.[189] Appointees, especially senior members, can be targeted for influence by the selector.[190] There are also potential repercussions where a senior member is vulnerable to influence and simultaneously tasked with selecting other staff members.[191]

In respect of the selection of a particular person to lead the Directorate, the concerns of the applicant in *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* related to the insufficient provisions of the

[181] *Helen Suzman Foundation* (n 18) paras 62 & 72.
[182] *Idem* at par 43.
[183] *Idem* at paras 47 & 49.
[184] *Idem* at paras 83 & 84.
[185] *Idem* at paras 94, 96 & 103.
[186] *Idem* at par 32.
[187] *Glenister* (n 38) paras 114, 116 & 118.
[188] Mwenda (n 1) 31.
[189] See *Helen Suzman Foundation* (n 18) paras 153-154; *Glenister* (n 38) par 118.
[190] *Helen Suzman Foundation* (n 18) paras 164 (Cameron J); *Glenister* (n 38) par 118 & 138. See also *Helen Suzman Foundation* (n 18) par 117: '[T]he temptation to appoint an incumbent with an insufficiently robust sense of independence may be greater in the case of the DPCI – whose primary function is to investigate political office-bearers – than in the case of the NDPP, who handles all prosecutions in the country, and only incidentally those of the Executive.'
[191] *Helen Suzman Foundation* (n 18) par 164 (minority judgment: Cameron J with Froneman J and Van der Westhuizen J concurring): 'In addition, the Head and the Minister decide who appoints the deputy national heads of the DPCI and its provincial heads. So the Head's susceptibility to political influence is likely to trickle down, thus affecting the independence of those whom he or she appoints.'

legislation in respect of the requirements for the position.[192] It was argued that the basic provisions necessitating 'a fit and proper person' and 'due regard to his experience, conscientiousness and integrity' were inadequate insofar as the provisions were wide and lacked proper directional contents for the Minister.[193] The applicant held that the experience required was unrestricted.[194]

Mogoeng CJ, for the majority, interpreted the provisions in light of the reason therefore – the appointment of a person to a particular position.[195] The history, abilities and nature of the person has to align with the crucial position and assist with the proper execution of responsibilities.[196] In the absence thereof, any adverse selection should rather be referred to the forum of the judiciary for adjudication afterwards.[197] The court also found that the requirements for selection were 'objectively ascertainable' and easily understandable by the decision-makers.[198]

A further concern was the role of the Minister and Cabinet in selecting the leading office-bearer as this placed the authority solely in the ambit of the executive branch of government.[199] The executive was obliged to 'report' on the selection, but Parliament was not empowered to do anything more, such as 'approve'[200] or 'veto' the decision.[201] Whilst the majority judgment dismissed the concerns,[202] the minority judgment of Cameron J found the authority of Parliament wanting in this regard.[203]

[192] *Helen Suzman Foundation* (n 18) paras 62-63. In respect of determination of the conditions of service, in particular, remuneration amounts, the concerns of the applicant were similar to those argued in respect of the extension of tenure of the Head – see par 47. The majority decision held that determination of the amount payable to certain officials of the Directorate, which is determined by the Minister, after discussing the matter with the Minister of Finance, and approved by Parliament, was similar to that of other prominent officials – see paras 52 & 53. As the court's main contention was based on existing practices of remuneration, I did not find that it added to this discussion and the matter will therefore not be discussed in detail herein.

[193] *Helen Suzman Foundation* (n 18) paras 62-63.

[194] As opposed to the predecessor (the Directorate of Special Operations or 'Scorpions') whose lead officer was required to have 'legal qualifications' – see *Helen Suzman Foundation* (n 18) paras 4 & 63. This was deemed unnecessary by Mogoeng CJ (see par 66-69) as the duties of the employees did not relate to prosecution but 'policing'.

[195] *Helen Suzman Foundation* (n 18) paras 63 & 64.

[196] *Idem* at paras 63 (the court referred to qualities to determine appropriateness, such as 'integrity and conscientiousness' and not 'laziness, dishonesty and general disorderliness') & 71.

[197] *Idem* at par 64.

[198] *Idem* at par 71.

[199] *Idem* at par 72.

[200] *Ibid*.

[201] *Idem* at par 152 (minority judgment: Cameron J with Froneman J and Van der Westhuizen J concurring): 'So the Minister chooses the Head of the DCPI, subject to the concurrence of Cabinet. One the appointment has been made, the Minister must "report" to Parliament. But Parliament has no veto power, nor any other say in the appointment.'

[202] *Helen Suzman Foundation* (n 18) par 72.

[203] *Idem* at par 153 (minority judgment: Cameron J with Froneman J and Van der Westhuizen J concurring).

The majority judgment stated, in the context of comparing the previous position of the Scorpions in respect of which the former President played a cardinal role in appointments, that 'Parliament never had and still does not have any role to play in the appointment of these senior officials who are required to be independent'.[204] The minority judgment written by Cameron J, on the other hand, criticised this approach in the absence of a supervisory process[205] and noted that a selection process that allows for a variety of role-players to determine the ultimate appointee is a feature that enhances independence.[206] The concentration of the authority in the executive, thus to determine the head of the unit, adversely affected the autonomy of the organisation.[207] Cameron J highlighted that the acquiescence of the Cabinet of the Minister's decision was not a sufficient safeguard as all participants in the process are selected by the President and are mostly important constituents of the majority-seated political party.[208]

Comparative reference was also made to chapter nine institutions where the legislative branch has a clear role.[209] However, the two chapter nine institutions specifically referred to later, namely the Auditor-General and the Public Protector, are 'institutions of accountability whose gaze, like that of the DCPI, is fixed firmly on the political branches' and their appointments necessitate a 'supermajority' parliamentary endorsement.[210] Cameron J then quoted international authority setting out the recommended policy of assent by multiple

[204] *Helen Suzman Foundation* (n 18) paras 73 & 74.

[205] *Helen Suzman Foundation* (n 18) par 157 (minority judgment: Cameron J with Froneman J and Van der Westhuizen J concurring): 'This Court has long recognised these salutary principles in relation to other institutions whose independence is constitutionally required. It has authoritatively noted that there should be a body that "provides a check and balance to the power of the Executive" to make appointments; that if appointments are "at the discretion" of members of the Executive "there would be concern" about the appointees' independence; and that it is at odds with an institution's independence if the Executive can "tell [it] … whom to employ.".'

[206] *Idem* at par 155: 'That risk may be mitigated by a balanced appointment process that diffuses the power of selection and appointment among various stakeholders. It is aggravated when the power to appoint is consolidated in a single, politically prominent office bearer, or in a close-knit group of government executives who may have a shared interest in finding a compliant appointee.'

[207] *Idem* at par 151.

[208] *Idem* at par 162.

[209] *Idem* at par 158. See also the minority judgment of Van der Westhuizen J, specifically par 197.

[210] *Helen Suzman Foundation* (n 18) par 158.

authoritative figures as opposed to solitary decision-makers.[211] Parliament or 'a special selection committee' were the given options.[212] The available schemes vary between ministerial, presidential or parliamentary appointment of personnel such as the Chief Executive Officer and deliberations as to whether there are legislative provisions governing appointment processes or whether discretionary allowances are made.[213] As I indicated earlier, an example of a feature where legislative foundations endorse independence is in the case of strict legal stipulations pertaining to dismissals.[214] The 'security of tenure' element has manifested quite clearly in international literature as an independence-determining factor.[215]

The position in respect of the United States is the apex in respect of lack of legislative guidance insofar as the Director of the Consumer Financial Protection Bureau is concerned. The only requirement is that this highly-empowered individual must be an American national appointed by the President with concurrence of the Senate.[216] Once appointed, the removal

[211] *Idem* at par 160. At paras 165 & 166, Cameron J favours parliamentary involvement by stating that there are benefits associated with openness and counterbalancing of authority in government: 'The Head's appointment should, as the High Court held, be subject to parliamentary approval. This has many virtues. First, it dilutes the power possess by any single individual to appoint the Head he or she desires. Resonant with the separation of powers, it attaches a significant counterweight to the power of the Executive and its members. Second, it spreads scrutiny of the appointment across the political spectrum, ensuring that a diversity of political actors has a say – including parties whose members, not being in government, will feel less exposed to possible investigation. … This is no panacea, of course, especially since the votes of the ruling party's members may eventually be sufficient to carry through the appointment. But parliamentary involvement is salutary for a third reason. It is good for transparency, public accountability and democracy. It forces the appointment process out of the Executive's impenetrably private deliberations into the fresh light of the parliamentary chamber, whose proceedings are publicly accessible, and where they are ripe for dissection and disputation by every person in the country.'

[212] *Helen Suzman Foundation* (n 18) par 161.

[213] Mwenda (n 1) 27. See also Financial Stability Board (n 15) 11.

[214] Mwenda (n 1) 27; Quintyn *et al* (n 15) 8. See also Bird 'Regulating the regulators: Accountability of Australian regulators' 2011 *Melbourne University Law Review* 739 761-762 for a discussion of the legislative restrictions on dismissal of senior officials of ASIC and APRA in order to safeguard the entities' autonomy, in respect of ASIC ' …misbehaviour, physical or mental incapacity, certain absences from duty, breach of legislative requirements relating to disclosure of conflicts of interests, bankruptcy, and paid employment outside the duties of his or her office without consent of the Minister' and in respect of APRA, the person is discharge if he or she becomes a partaker ('director, officer or employee') of an APRA regulated entity or 'a body operating in the financial sector' (different provisions apply depending on whether the entity is regulated by APRA or involved in the financial sector). This is also referred to as 'security of tenure' – see Quintyn & Taylor (n 1).

[215] See e.g. Gadinis (n 14) 337; Zywicki (n 17) 873; Quintyn & Taylor (n 1); Quintyn *et al* (n 15) 8 & Mwenda (n 1) 25.

[216] S 1011(b)(2) of the United States' Consumer Financial Protection Act of 2010. Compare this with the wording of the Australian Securities and Investments Act determining the composition of the Australian Securities and Investments' members – specifically ss 9(2) ('The Governor-General appoints the members on the nomination of the Minister.') and 9(4) ('The Minister is to nominate a person as a member only if the Minister is satisfied that the person is qualified for appointment by virtue of his or her knowledge of, or experience in, one or more of the following fields, namely: (a) business; (b) administration of companies; (c) financial markets; (d) financial products and financial services; (e) law; (f) economics; (g) accounting.')

requirements are quite strict, especially when compared to the requirements for appointment.[217]

Some of the academic research papers that I perused, highlight independent agencies as a means to reduce the authority of the President and reallocate weight in favour of Congress.[218] Nevertheless, my impression from reading the actual wording of the legislation substantiates the view of authors such as Gilardi and Bendor *et al*, who see independent agencies as a means to ensconce a reigning governing group's policies into the system in a manner that outlives the actual reign of the party.[219] However, the recent developments in the United States in respect of the Consumer Financial Protection Bureau show that the agency is only as independent as the person heading it.[220] The extraordinary authority vested in the most senior of officers is as much a source of contention for the opposing party when an official sympathetic to Presidential policies is appointed, as it will be for the initiating party when the head is replaced by a person sympathetic to the new President, because the new head is greatly empowered by the legislative provisions.[221] In this regard, Mallory SoRelle noted the following in her 2016 study:

> 'Another potential problem relates to the eventual trajectory of the CFPB. While it is currently staffed by pro-consumer experts and directed by a long-time supporter of predatory lending reform, Richard Corday, a new presidential administration may mean changes to the agency's direction … But those same advocates recognize that what has been a strength under a proconsumer director could quickly turn into a weakness under more conservative leadership. … A change of leadership is only one way that the CFPB could distance itself from a more pro-consumer agenda.'[222]

The media reported on the resignation of the first director, Richard Cordray, appointed by Barack Obama, and the subsequent interim appointment by Donald Trump of Mick

[217] S 1011(c) of the United States' Consumer Financial Protection Act of 2010, quoted in fn 178 *supra*.

[218] Morrison (n 35) 253; Barkow (n 21) 25. See also Freeman & Rossi 'Agency coordination in shared regulatory space' 2012 *Harvard Law Review* 1131 1140.

[219] See par 3.2.1 of ch 2 *supra;* Gilardi (n 52) 74 & 75; Bendor *et al* (n 14) 265. See also the comments of Verkuil (n 35) 260 in respect of the employment periods that would 'extend beyond a President's four-year term of office'.

[220] See Barkow (n 21) 25: 'Stability is related to the goal of preventing capture because it aims to keep an agency free from unwanted political forces even as the enacting coalition fades from power. It is insufficient to insulate an agency from one-sided interest group pressures only as long as the designers stay in power. A policy maker concerned with the agency's long-term success must create insulating measures that will work even as the presidency and Congress undergo shifts in party leadership.'

[221] See e.g. s 103 of the United States' Consumer Financial Protection Act of 2010.

[222] SoRelle *Democracy declined: The failed politics of consumer credit* August 2016 PhD Faculty of the Graduate School of Cornell University (Department of Government) 244-245.

Mulvaney.[223] The reports do not shed a favourable light on the developments, especially in light of the negative perspective on the Consumer Financial Protection Bureau advocated by the Trump administration during the election period, their preference for a deregulation-regime, and the views expressed by Mulvaney on the Bureau compared with the reported successes of the Bureau and the consumer failures of the American financial market.[224] This example supports Rachel Barkow's research:

> '[T]he traditional focus on the relationship between personnel and independence has focused on how agency officials are removed, the requirements for appointment are just as critical to an agency's ability to serve the goals of independence … in recent decades, individuals selected to head agencies are picked based on ideological agreement with the President, not expertise.'[225]

Barkow suggests that clear expertise requirements be drafted or legislated in order to ensure that the ultimate head is not solely a political ally but chosen from a smaller group of people with a proper knowledge and skill-set relevant to the subject-matter of the agency.[226]

In respect of the dismissal and suspension of the prominent member of the South African Directorate, the concerns of the applicant were based on the Minister's authority, and correspondent authority of Parliament, in this regard.[227] It was reiterated that Parliament was not empowered to take any steps, nor guided in respect of time-periods, in the instances where the senior official of the Directorate is dismissed or suspended, and Parliament is informed thereof in accordance with statutory provisions.[228] Mogoeng CJ's concern was the following:

[223] There is a dispute between the Presidential appointee and the ex-Director's choice of interim Director on who has the legal authority to act after the resignation of Richard Cordray – see Smith 'Elizabeth Warren and the left go to war with Trump over the future of the top consumer watchdog agency' Business Insider 26 November 2017.

[224] White 'The dismal future of Trump's least favorite agency' The Atlantic 17 November 2017 ('The strangest thing about the man who's expected to be named the next leader of the Consumer Financial Protection Bureau is that he has long opposed the agency's work.'); Cassidy 'Why it matters who runs the Consumer Financial Protection Bureau' The New Yorker 27 November 2017; Chait 'The Consumer Financial Protection Bureau was designed to stop Donald Trump' New York Magazine 27 November 2017; Friedman 'Trump Administration Requests $0 in Funding for Consumer Protection Agency' Forbes 19 January 2018.

[225] Barkow (n 21) 45. I cannot express an opinion on the expertness of Mick Mulvaney, but it seems from the reported press that he, first and fore mostly, shares the President's views on the CFPB – see the sources referred to in fn 224 *supra.*

[226] Barkow (n 21) 47-48. In order to attract the right people, she further argues at 48 that 'the agency must present itself as an attractive place for an expert to work' through measures such as autonomy (in the sense of freedom from political distrust of the choices made – see the sources referred to in fn 184 of her article) or industry-related remuneration.

[227] *Idem* at paras 88 & 89 – this affects 'job security'. In some instances, the court also took issue with the phrase 'as the Minister deems fit' and those instances where the grounds for the Minister's authority were ambiguous or uncertain – see paras 84-86. The Court severed the parts that allowed the Minister to decide that the suspended person would not receive his or her remuneration and allowed her to act 'as [she] … deems fit' in respect of the reasons for suspension – see paras 91 & 112.

[228] *Helen Suzman Foundation* (n 18) paras 86-88.

> ‘Parliament has no meaningful role to play but merely to note the decision. One would have thought that the requirements that Parliament be informed of the removal, be furnished with reasons for the removal and the representations by the National Head within 14 days of the removal, were intended to facilitate speedy intervention by Parliament before more, possibly unjustified, damage is done to the life of the National Head or the functionality of the DPCI.’[229]

This is in contrast with the adequacy of processes set in place prior to suspension and dismissal.[230] The court approved of the procedure in respect of which an enquiry is held, chaired by a judge and guided by clear foundations for censure.[231] In addition, the official subjected to these procedures is not denied his or her remuneration prior to the ultimate outcome of the process.[232] The court highlighted that two important aspects of our legal system are preserved, namely the ‘presumption of innocence’ and the ‘*audi alteram partem* rule’.[233]

The second aspect deals with provisions that determine continuation of office by a particular person.[234] The concerns of Mogoeng CJ related to the potential of manipulation of the official by the person clothed with the authority to maintain the employment of the current position holder after the person is statutorily expected to vacate the position.[235] The majority decision held that, whilst the Minister has the discretion to lengthen the time of office of the official, this consideration only became plausible where the official reached the statutorily prescribed retirement age.[236]

Nonetheless, the possibility would exist at the time of taking office by virtue of the existence of the discretion.[237] The further statutory constraints on the Minister’s discretion exercisable at that time would be the bodily and psychological ability and keenness of the present appointee to accept any extension, if the Minister chooses to do so.[238] However, the Minister’s authority was ‘unfettered’ as there were no statutory restrictions placed upon the choice and the majority found that this could have adverse consequences on the autonomy of the entity:[239]

[229] *Idem* at par 87. The court compares this position to another position in respect of the National Prosecuting Agency Act where Parliament is enabled to overturn a dismissal – see par 87.
[230] *Helen Suzman Foundation* (n 18) par 85.
[231] *Idem* at paras 84-86.
[232] *Idem* at par 85.
[233] *Ibid*.
[234] *Helen Suzman Foundation* (n 18) par 81; Spiller (n 32) 87.
[235] *Helen Suzman Foundation* (n 18) par 78 & 80-81.
[236] *Idem* at paras 77 & 78.
[237] *Idem* at par 80 & 81.
[238] *Idem* at paras 77 & 78.
[239] *Idem* at par 78 & 80 – the court refers to this choice as a ‘favour’ that is ‘extendable to these functionaries on undisclosed bases’.

> 'Renewal invites a favour-seeking disposition from the incumbent whose age and situation may point to the likelihood of renewal. It beckons to the official to adjust her approach to the enormous and sensitive responsibilities of her office with regard to the preferences of the one who wields the discretionary powers to renew or not to renew the term of office. No holder of this position of high responsibility should be exposed to the temptation to "behave" herself in anticipation of renewal.'[240]

The third and fourth aspects are forwarded by Barkow, who adds a couple of thought-provoking considerations in the context of human resources. She discusses the benefits of a single-person regulator over board governance, and statutory prescriptions that determine the eligibility of important regulatory personnel for private employment after their period of employment at the regulator has come to an end.[241] I do not delve into the constitutional provisions that apply to the position in the United States, which is the context within which she writes, but only refer to the positive and negative aspects identified in respect of the available options.

Barkow views 'agency capture' as the probable cause for granting autonomy to regulatory agencies.[242] As such, she notes that an organisation may be independent, but the mechanism that denotes independency does not necessarily protect it from political interference – she briefly discusses adherence to informal requests by Presidents (such as resignation requests), which would likely be complied with in any event.[243]

As part of institutional independence, Quintyn and Taylor recommend that diversely constructed expert committees should be incorporated into the institutional scheme.[244] So-called 'multimember' governance structures are traditionally indicators of independent

[240] *Helen Suzman Foundation* (n 18) par 81. See the position in the United States, where no provision is made for renewal after the prescribed five year-term has been completed. The only provision is made for interim continuation as Director until a new appointment has been made (see s 1011(c)(2)). On the one side, there is also no prohibition that a specific individual may not be appointed anew again (meaning that there is no disqualification clause that pre-empts a person from applying and (ideally competitively) obtaining the position again). On the other side, the reference in s 1011(c)(2) to 'a successor' may imply that two different individuals are envisaged: '(2) EXPIRATION OF TERM. – An individual may serve as Director after the expiration of the term for which appointed, until a successor has been appointed and qualified.'

[241] Barkow (n 21) 37-41 & 45-49.

[242] *Idem* at 17. She goes further at 17 and links the agency's interest to that of 'a vulnerable segment of the public that, because of collective action problems or resource limitations, is often outgunned in the political process by well-financed and politically influential special interests'.

[243] Barkow (n 21) 30. See also Morrison (n 35) 254 & Miller (n 40) 219 with regard to their opinion of the efficacy of dismissal limitations – Miller, in particular, opines with reference to Robinson (at 219) that one should be hesitant to 'overstress the significance of removal in the scheme of presidential influence' as there are other ways in which the President can have an impact on the agency.

[244] Quintyn & Taylor (n 1). See also Mwenda (n 1) 25: 'The agency's governance structure should incorporate multimember commissions composed of experts.'

institutions,[245] which is one of the reasons the United States Court of Appeals was concerned about the structure of the Consumer Financial Protection Bureau in *PHH Corporation v Consumer Financial Protection Bureau.*[246] The court took issue with the novelty of the single-director as opposed to a multi-member structure, to which it accorded some weight in light of precedent dictating the importance of 'historical practice'.[247] It severed the 'for cause removal restrictions', effectively rendering the Director subject to 'at will removal'.[248] The matter has since been remitted for an *en banc* rehearing[249] and at time of writing the thesis, the court had not yet made its decision public.

Securing the favour of a single official in the most senior position is less challenging than securing the favour of multiple persons constituting the senior governing organ of the agency.[250] The outcomes generated by 'multimember agencies', although these can entail much deliberation, reflect concessional decisions as multiple and diverging opinions are channelled to ultimately reach a decision.[251]

[245] Barkow (n 21) 37; Verkuil (n 35) 260. See also *PHH Corporation, Et Al.*, Petitioners, *v. Consumer Financial Protection Bureau*, Respondent No. 15-1177 (Argued April 12, 2016. Decided October 11, 2016.) United States Court of Appeals, District of Columbia Circuit: 'In sum, the CFPB departs from settled historical practice regarding the structure of independent agencies. And that departure makes a significant difference for the individual liberty protected by the Constitution's separation of powers. Applying the Supreme Court's separation of powers precedents, we therefore conclude that the CFPB is unconstitutionally structured because it is an independent agency headed by a single Director.'

[246] *PHH Corporation v Consumer Financial Protection Bureau* (n 245): 'As should be clear by now, the distinction, of course, is that those departments and agencies are executive agencies. They operate within the Executive Branch chain of command under the supervision and direction of the President, and those agency heads are removable at will by the President. The President is a check on those agencies. Those agencies are accountable to the President. The President in turn is accountable to the people of the United States for the exercise of executive power in the executive agencies. So a single person at the helm of an executive agency is perfectly constitutional. By contrast, independent agencies are unaccountable to the President and pose a greater threat to individual liberty because they operate free of the President's supervision and direction. Therefore, they traditionally have been headed by multiple members who check one another. An independent agency operates as 'a body of experts appointed by law and informed by experience.' *Humphrey's Executor v. United States*, 295 U.S. 602, 624 (1935) …'

[247] *PHH Corporation v Consumer Financial Protection Bureau* (n 245): 'The CFPB's departure from historical practice matters. A long line of Supreme Court precedent tells us that history and tradition are important guides in separation of powers cases that, like this one, are not resolved by the constitutional text alone.'

[248] *PHH Corporation v Consumer Financial Protection Bureau* (n 245): 'In light of Congress's clear textual expression of its intent regarding severability, and because the Dodd-Frank Act and the CFPB may function without the CFPB's for-cause removal provision, we remedy the constitutional violation here by severing the for-cause removal provision from the statute. As a result, the CFPB now will operate as an executive agency. The President of the United States now has the power to supervise and direct the Director of the CFPB, and may remove the Director at will at any time.'

[249] See *John Doe Company v. Consumer Financial Protection Bureau and Richard Cordray, in his official capacity as Director of the Consumer Financial Protection Bureau* 849 F.3d 1129 (2017) 1131-1132.

[250] Barkow (n 21) 38.

[251] *Idem* at 37-38. See also Quintyn *et al* (n 15) 8; Vermeule 'Many-minds arguments in legal theory' 2009 *Journal of Legal Analysis* 1. Verkuil (n 35) 260 writes that '[c]ollegial decisionmaking has far different purposes and effects from single (or executive) decisionmaking. It is meant to be consensual, reflective and pluralistic. It expresses shared opinions rather than decisive ukases.'

The boards or commissions should further consist of a variety of political parties with the current regime represented by no more than a 'bare majority'.[252] Under circumstances such as these, where members also serve 'staggered terms', the time taken for a particular President to substitute the majority of the allocated positions with same-minded persons, have historically taken between thirteen and twenty months.[253]

Barkow further discusses the matter of re-integration of ex-employees of the regulator into the industry.[254] She notes that the fixed term of employment implies that the official may make provision for post-regulatory employment during the time of his or her appointment at the regulator's office.[255] This awareness may culminate in undue consideration of the industry's position whilst regulating in order to retain the possibility of industry appointments after their term with the regulator has expired.[256] She suggests options such as statutory delineation of post-regulatory employment options for the head, whether in the form of certain positions that the ex-employee may not hold or a time-limitation.[257] Nevertheless, she notes that this should be coupled with counteractive measures to lessen the deterrents generated by limiting the authority to work in the market after employment.[258] These measures can take the form of researching and specifying the type of positions prohibited, such as 'appear[ing] before or interacting directly with the agency', and offering high remuneration packages as a concession for the upcoming employment constraints.[259] Goodhart *et al* suggest that the personnel employed at the regulatory office must be capable

[252] Barkow (n 21) 39. She notes at 40-41: 'In particular, a partisan balance requirement can help achieve two goals of insulation: it can avoid extremely partisan decisions and help facilitate more stable agency policy. As a wealth of empirical research demonstrates, a group composed solely of ideologically like-minded people tends toward extreme decision making. Liberals and conservatives alike become more liberal and conservative, respectively, when they deliberate only with like-minded people. Thus, as Cass Sunstein has observed, "[a]n independent agency that is all Democratic, or all Republican, might polarize toward an extreme position, likely more extreme than that of the median Democrat or Republican, and possibly more extreme than that of any member standing alone." This kind of polarization could mean wide fluctuations in policy as presidential administrations change.'

[253] Barkow (n 21) 38. Barkow notes at 38: 'Once the President has a majority of members of his or her party, the commissions fall in line with the President's priorities and positions.' Where there is a Chair, the authority of the President over the Chair also has to be considered – see Barkow (n 21) 38-39.

[254] Barkow (n 21) 23, 45-49. See also Spiller (n 32) 88.

[255] *Idem* at 46.

[256] *Idem* at 46 & 48.

[257] *Idem* at 48-49.

[258] *Idem* at 49. She notes at 49, that whilst this may 'temper officials' incentives not to anger the industry in which they might work, [it] will hardly eliminate them. That said, every little bit helps when it comes to protecting against capture'. She also notes at 49 that care must be taken not to discourage potential employees through these measures.

[259] Barkow (n 21) 49.

and knowledgeable.[260] In addition, it is imperative to offer industry-related compensation to staff members in order to counteract the lure of the private market[261] and pre-empt bribery.[262]

The fifth aspect influences both independence and accountability – the matter of litigation against regulators.[263] Regulators may enjoy protection insofar as the berated action was effected *bona fides*[264] and positive protection against personal liability is advanced as part of Quintyn and Taylor's exposé of 'supervisory independence'.[265] Culpable conduct would include either positive steps taken or inaction where action was warranted.[266]

In *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa*, the court considered the role and authority of the Minister *vis-à-vis* the anti-corruption unit.[267] This was the beginning of various views taken of the involvement of politicians and the potential for undesirable interference from these stakeholders.[268] The court stressed that supervision by the Minister functioned as an accountability measure.[269] The policy choices made by the Minister must have been able to subsist jointly with the notion of autonomy and, if so, the consequential implementation of

[260] Goodhart *et al* (n 13) 193. Although the United States' Consumer Financial Protection Act of 2010 only requires the President (with concession of the Senate) to appoint the Director of the CFPB from the U.S. citizens' assemblage (s 1011(b)(2)), the Bureau is mandated under s 1012(a)(7) choose its employees by order of the Director (see s 1013(1)), who can the determine the workforce needed (s 1013(1)(a)(A)) and has to ensure that the employees meet the knowledge, skill and needs parameters set by s 1013(a)(1)(B). See also the suggestions in *Fit for the Future* (n 150) 19 when the panel recommended that '[t]he Government … apply a contemporary best practice merit based recruitment process to ensure fully transparent and robust appointments of the Chairperson, Deputy Chairperson and other Commissioners'.

[261] *Ibid;* Quintyn & Taylor (n 1). See ss 1013(2) and 1013(3) of the United States' Consumer Financial Protection Act of 2010, which sets out the authority of the Director to determine and modify basic remuneration for employees, subject to a stated minimum, and provides statutorily for access to retirement benefits for these employees. The CFPB and its employees are further, by virtue of s 1013(4), explicitly subjected to the labour-related determinants of Ch 71 of title 5 of the U.S. Code. See also the references to Barkow (n 21) in par 4.2 *supra*.

[262] Quintyn & Taylor (n 1) – the authors mention this in the context of 'supervisory independence' as they note that 'supervisors' integrity [should be protected by] … providing financial incentives that allow supervisory agencies to attract and keep competent staff and discourage bribery'.

[263] Mwenda (n 1) 21 & 27; Quintyn & Taylor (n 1); Quintyn *et al* (n 15) 10.

[264] Mwenda (n 1) 27. See also IOSCO (n 22) 26 & 29; Quintyn *et al* (n 15) 14; Bird (n 214) 750. This does not mean that there will be no repercussions – in respect of Quintyn *et al*'s discussion of 'Supervisory accountability', they note the following at 14: 'In the event that a regulatory agency is found to have breached its legal duties, the plaintiff must have some remedy available. However, the need to ensure agency independence means that there should be a variety of limitations on liability for supervisory mistakes. Any official of an agency who takes action in good faith should not be held personally liable for damages caused in the exercise of his functions. Because rules on immunity and limited liability of the supervisor are correlates of independence, their existence needs to be compensated by appropriate accountability arrangements, including judicial review and a procedure that offers administrative compensation in cases where loss was suffered due to unlawful action by the agency.'

[265] Quintyn & Taylor (n 1). See also Quintyn *et al* (n 15) 10, who note that the lack of this form of protection can have a 'paralyzing effect on supervision'.

[266] Mwenda (n 1) 27.

[267] *Helen Suzman Foundation* (n 18) paras 17-20.

[268] *Idem* at paras 17-20, 43-46, 47-53, 62-76, 77-82, 83-91, 151-177 & 179-192.

[269] *Idem* at par 18.

the policy would not adversely affect the autonomy of the entity.[270] The majority judgment pointed out that the provisions allowing for supervision are not necessarily the undermining factor, but the actual implementation of provisions through the practical supervision may have adverse effects.[271]

In the case of *Glenister v President of the Republic of South Africa and Others*, the court was particularly concerned with the potential of political manipulation.[272] Specifically, the court held that autonomy was not constitutionally guaranteed but that international guidelines highlighted that autonomy safeguards personnel from such intrusion, which assists the entity to achieve its outcomes efficaciously.[273]

An accountability-independence valuation therefore involves an assessment of the legitimacy of direct ministerial intervention in the conduct of the regulator, and the impact that the government can have due to its ability to select, release and compensate senior members of staff.[274] The position and ability of the person or body responsible for the instatement and removal of executive staff and the boundaries within which this has to occur must be considered including prescriptions regarding the credentials of the regulatory Head.[275] Financial resources

'Budgetary independence' is an important element of autonomy as financing strategies present a conduit through which the independence of a regulator may be compromised, particularly by and through the unit that is responsible for allocating funds.[276] Resource apportionment is a method through which political preferences can be coerced from regulators.[277] Coercion is a risk where units with political interests determine financial allowances, but coercion can also be effected by the industry where the latter contributes to the financial well-being of the regulator.[278]

[270] *Idem* at par 17.
[271] *Idem* at par 20.
[272] *Glenister* (n 38) paras 69, 118, 119 & 121.
[273] *Idem* at paras 114, 118 & 119.
[274] Mwenda (n 1) 27; Quintyn *et al* (n 15) 8. See also Thatcher (n 24) 138: 'Political leadership also influences the choice of agency form. In a country with majoritarian political systems and few constitutional veto points such as Britain, it is possible to create single-person agencies nominated by the executive (notably in the utilities in the 1980s). This appears an exception. In most countries, multi-partyism and multiple veto points (for instance, between heads of governments and presidents, or between the two legislative chambers) have encouraged an agency form that ensures representation for several parties and players.'
[275] Mwenda (n 1) 27. See also par 4.2 *supra*.
[276] Quintyn & Taylor (n 1); Mwenda (n 1) 25; Quintyn *et al* (n 15) 10; Financial Stability Board (n 15) 11; Barkow (n 21) 42.
[277] Quintyn & Taylor (n 1); Quintyn *et al* (n 15) 10.
[278] Quintyn & Taylor (n 1); Mwenda (n 1) 25-26. Barkow (n 21) 44 refers to this as 'an independent funding source' but Quintyn *et al* (n 15) 10 states that this creates 'a sense of budgetary dependence on the industry'.

In those instances where regulated entities contribute financially to the regulatory institution through payment of levies, there may be an increment of influence by the industry as opposed to that of the state.[279] However, under these circumstances where regulatees support the regulator, it is imperative that the imposed contributions are rational, that there is an understanding that members of industry can experience financial difficulties themselves, and that there is a contingency plan (such as 'reserve funds') to ensure that funds are available when industry contributions decrease.[280]

Financial sway may be alleviated by allowing the regulator to draft the budget subject to rationalisation thereof and neutral considerations of market developments.[281] In the case of industry contributions, financial sway may be alleviated by allowing the regulator and the State to set these contributions together, taking into account that regulated entities are also vulnerable to hard economic times and that the regulator must be enabled to conserve financial resources for subsequent use.[282]

It is important to determine who is responsible for drafting and executing the budget allocated to the regulator in respect of its business and staff.[283] Financial resource allocation can be an influential factor that affects the autonomy of a regulator – Joanna Bird discusses the practice of Australian officials to bestow pecuniary grants on the Australian Securities and Investments Commission in order to take on their preferred projects and notes the criticism of the International Monetary Fund in this regard.[284] '[T]ied funding' was also effected in order to manipulate regulators to engage in affairs that are significant in the opinion of the government, such as 'high-profile enforcement actions'.[285]

The Consumer Financial Protection Bureau is a prime example of independence in this regard.[286] The entity is empowered to request the amount of funding rationally needed to execute its mandate limited only by a legislative provision that sets out the maximum amount

[279] Quintyn & Taylor (n 1); Mwenda (n 1) 26.
[280] Quintyn *et al* (n 15) 10; Quintyn & Taylor (n 1); Mwenda (n 1) 26.
[281] Quintyn & Taylor (n 1); Mwenda (n 1) 26.
[282] Quintyn & Taylor (n 1).
[283] Mwenda (n 1) 27. The author refers specifically to the 'operational and administrative budget' at 27.
[284] Bird (n 214) 762-763.
[285] *Idem* at 763.
[286] Zywicki (n 17) 873.

payable.[287] Additional funding may be provided by Congress upon request from the Bureau.[288]

Apart from authority over the personnel and jurisdiction of the Directorate for Priority Crime Investigation, the court in *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* also dealt with the source of authority over the pecuniary determinations related to the needs of the unit.[289] Concerns were raised over the capacity of external parties to affect the financial planning of the unit in respect of 'the form and content of the budget' as well as 'the procurement of goods and services'.[290] Whilst it is acceptable for the executive to determine the financial needs of the unit and Parliament to accept same, the determinations should not be without constraints imposed on the discretion of the Minister.[291] The senior official of the unit drafts the budget, has discussions with the senior police official, dispute resolution interactions with the Minister but Parliament is the ultimate determinant of the resources approved to the Directorate.[292] In addition, the annual report to Parliament in respect of budget and expenditures of the unit is an opportunity for the senior official at the Directorate to discuss challenges with the budget.[293]

Mogoeng CJ also highlighted that, whilst complete financial independence is not needed, the ability of the unit to obtain the required resources should not be restricted because this would

[287] This amount is linked to the functioning costs of the Federal Reserve Bank – see Zywicki (n 17) 873; CCH Attorney-Editor Staff (n 17) 489-490. The specific legislative stipulation is s 1017(a)(1) & 1017(a)(2)(A)-(C) of the United States' Consumer Financial Protection Act of 2010: '(a) TRANSFER OF FUNDS FROM BOARD OF GOVERNORS. – (1) IN GENERAL. – Each year (or quarter of such year), beginning on the designated transfer date, and each quarter thereafter, the Board of Governors shall transfer to the Bureau from the combined earnings of the Federal Reserve System, the amount determined by the Director to be reasonably necessary to carry out the authorities of the Bureau under Federal consumer financial law, taking into account such other sums made available to the Bureau from the preceding year (or quarter of such year). (2) FUNDING CAP. – (A) IN GENERAL. –Notwithstanding paragraph (1), and in accordance with this paragraph, the amount that shall be transferred to the Bureau in each fiscal year shall not exceed a fixed percentage of the total operating expenses of the Federal Reserve System, as reported in the Annual Report, 2009, of the Board of Governors, equal to – (i) 10 percent of such expenses in fiscal year 2011; (ii) 11 percent of such expenses in fiscal year 2012; and (iii) 12 percent of such expenses in fiscal year 2013, and in each year thereafter. (B) ADJUSTMENT OF AMOUNT. – The dollar amount referred to in subparagraph (A)(iii) shall be adjusted annually, using the percent increase, if any, in the employment cost index for total compensation for State and local government workers published by the Federal Government, or the successor index thereto, for the 12-month period ending on September 30 of the year preceding the transfer. (C) REVIEWABILITY. – Notwithstanding any other provision in this title, the funds derived from the Federal Reserve System pursuant to this subsection shall not be subject to review by the Committees on Appropriations of the House of Representatives and the Senate.'

[288] Zywicki (n 17) 873; CCH Attorney-Editor Staff (n 17) 489-490.

[289] *Helen Suzman Foundation* (n 18) paras 40-42.

[290] *Idem* at par 40.

[291] *Idem* at par 41.

[292] *Idem* at par 42.

[293] *Ibid*.

impede 'functional' autonomy.[294] In a similar fashion, Quintyn and Taylor suggest as part of 'budgetary independence' that high-ranking staff members should be allowed to employ personnel as is deemed necessary and to meet the resource requirements of the entity.[295]

4.3. Mandate

The extent to which a regulator's duties are set out in the legal framework increases its independence from the industry and government, as the regulator cannot adjust its behaviour in accordance with a specific group.[296] In respect of legislative provisions, Mwenda enquires whether legislation governs aspects such as licensing, disclosure, marketing and other behavioural prescriptions for regulated persons.[297] I further assume that the purpose of considering legislation in respect of independence is due to its relative neutrality – although legislation is a product of a constitutional process, it is subject to certain procedures and cannot be changed or influenced at a whim.[298]

The ability to draft and modify rules for the regulated industry with the intention that regulated entities should follow these rules and that these rules may be enforced is a feature of independence.[299] However, independence in respect of rule-based normative direction is anomalous in the case of market conduct regulators.[300] In some instances, specific state authorisation bestows the ability to determine rules on regulators.[301] The Financial Stability Board specifically mentions the authority of regulators in the United States, Germany and Mexico under the theme of independence.[302] In respect of the Consumer Financial Protection Bureau, the Board notes that:

> 'The CFPB in the US is one exception, having been established under the Dodd-Frank Act as an independent bureau with autonomous rule-making authority. The CFPB has authority to promulgate

[294] *Idem* at par 41.

[295] Quintyn & Taylor (n 1). The wording of s 1013(a)(1)(B) of the United States' Consumer Financial Protection Act of 2010 is perhaps a good example hereof: 'The Director is authorized to employ attorneys, compliance examiners, compliance supervision analysts, economists, statisticians, and other employees as may be deemed necessary to conduct the business of the Bureau.' See also IOSCO (n 22) 25. At 30, the Organisation includes continuous professional development for personnel as an aspect to be included when considering the Regulator's finances.

[296] See Quintyn & Taylor (n 1): 'Crafting a rule-based system of sanctions and interventions also lessens the scope for supervisory discretion – and this for political and industry interference.' This resonates with 'supervisory independence' as it assists with safeguarding the regulator against interventions that may 'be subtle and can take many forms' – see Quintyn & Taylor (n 1). See also Quintyn *et al* (n 15) 9-10.

[297] Mwenda (n 1) 27-28.

[298] See Quintyn *et al* (n 15) 9. See also Quintyn & Taylor (n 1): 'They are also able to adapt the rules quickly and flexibly in response to changing conditions in the global marketplace without having to go through a lengthy, high-pressure political process.' This is mentioned as part of 'regulatory independence' – see Quintyn & Taylor (n 1); Quintyn *et al* (n 15) 8-9.

[299] Mwenda (n 1) 20; Quintyn & Taylor (n 1); Financial Stability Board (n 15) 11.

[300] Financial Stability Board (n 15) 11.

[301] *Ibid*.

[302] *Ibid*.

> and revise rules for the major federal consumer financial statutes and to restrict through rules unfair, deceptive and abusive practices in connection with consumer financial products or services. This is consistent with the long standing U.S. approach to implementing regulations by financial services regulators.'[303]

Similarly, the capacity of external role-players to reconsider and nullify determinations made by the regulator as part of executing its mandate is an aspect to consider[304] but also finds application under the theme of accountability.[305] In *Glenister v President of the Republic of South Africa and Others* the *amicus curiae* submitted detailed examples of independence-enhancing features, which were repeated, but not disputed in the judgment.[306] It was argued that the organisation ought to be enabled to commence inspections on its own accord[307] and that the inspecting and enforcement personnel ought to be enabled to make independent choices in respect of their assignments.[308]

In respect of the impact and determination of the endeavours of the anti-corruption unit, the concerns raised in *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* related to the ability of the Minister to issue directives as to the priorities of the unit.[309] The determination of policies in a discretionary manner was found to 'render the anti-corruption character of the DCPI dependant on whatever the Minister, in the exercise of her discretion, wants it to be'.[310] The majority decision held that any limitations upon the functions of the Directorate are the domain of the legislature and not the executive.[311] Thus, even subjecting any policy directives to parliamentary scrutiny and acceptance was found to be insufficient to safeguard the units'

[303] *Ibid.* This enforces the view of Mwenda (n 1) 28 that the domestic milieu plays an important role, including considerations of the form of the legal system ('civil law or common law') and the contents of the law ('regulatory norms or rules … doctrines of equity'). The level of development of the country also plays a role in determining the suitable level of independence – see Mwenda (n 1) 31-34.

[304] Zywicki (n 17) 874 (referring to the Financial Stability Oversight Council that has the ability to overrule certain decisions by the CFPB through a two-thirds vote). See also Quintyn *et al* (n 15) 9. See also IOSCO (n 22) 28 in respect of the need for open processes: 'For example, in some jurisdictions, rules or policies may require approval by a government minister or other authority, or other important regulatory matters may require consultation with or approval by a government minister or other authority. Also, sometimes matters are reviewed within the government for compliance with applicable law. The circumstances in which such consultation or approval is required or permitted should be clear, and the process sufficiently transparent or subject to review as to safeguard its integrity.'

[305] See ch 4 *infra*.

[306] *Glenister* (n 38) par 117.

[307] *Ibid*.

[308] *Ibid*.

[309] *Helen Suzman Foundation* (n 18) par 96.

[310] *Idem* at par 97.

[311] *Ibid*: 'The legislation should itself spell out the parameters of the operational scope of the DCPI, not the Minister's policy guidelines. The power to make guidelines does violence to the necessary functional autonomy of the DCPI.'

independence.[312] The court approved of the ability of the senior officer of the unit to decide the priorities of the Directorate.[313]

A further issue was taken with the wording of the legislation in respect of the objects of the unit's focus, in effect the uncertain phrase 'selected offences'.[314] This alluded to indistinctive functional responsibilities that left the organisation vulnerable to external influences and impeded its autonomy.[315] The ability of the National Commissioner to refer specific issues to the Directorate for investigation – again supported by the directives set out in the Minister's policy determinations and indistinct meaning attributed to the envisaged offences – was detrimental to the unit:

> 'This is an undesirable encroachment which is exacerbated by the role that the ministerial policy guidelines play in the selection of these offences for referral. The fluidity of the situation and the vagueness in relation to the nature of the offences contemplated, the National Commissioner's license to interfere in the operational space of the DCPI and the preponderance of the policy guidelines in the determination of the DCPI's functions, are all at odds with the imperative to establish an adequately independent anti-corruption unit.'[316]

The International Monetary Fund took issue with a comparable ability of Australian ministers to provide guidance to regulatory authorities, including on matters of policy and preferences to be assumed.[317] Bird states that the 'directions power' is subject to criticism because of its adverse effect on regulatory specialism and autonomy, particularly as it incorporates the regulatory entity into the 'political process'.[318] She is further of the opinion that reliance on this prerogative is reserved for exceptional circumstances, as the interference with autonomy

[312] *Idem* at par 98.

[313] *Idem* at par 100. See also IOSCO (n 22) 26: 'In jurisdictions where particular matters of regulatory policy require consultation with, or even approval by, a government minister or other authority, the circumstances in which such consultation or approval is required or permitted should be clear and the process of consultation and criteria for action sufficiently transparent or subject to review to safeguard its integrity.'

[314] *Idem* at par 101.

[315] *Ibid*.

[316] *Idem* at par 104.

[317] Bird (n 214) 754. See also s 12 of the Australian Securities and Investments Act (& Bird (n 214) 755 in respect of prior notification to the Regulator, which may constitute a 'threat of a direction' – see also fns 320 & 321 *infra*), specifically s 12 (1) & (3): 'The Minister may give ASIC a written direction about policies it should pursue, or priorities it should follow, in performing or exercising any of its functions or powers under the corporations legislation (other than the excluded provisions) … The Minister must not give a direction under subsection (1) about a particular case.' However, there does seem to be safeguards insofar as the directive has to be published and presented to each House of Parliament (s 12 (5)). Although not strictly in the same context, see in this regard IOSCO (n 22) 26: 'In jurisdictions where particular matters of regulatory policy require consultation with, or even approval by, a government minister or other authority, the circumstances in which such consultation or approval is required or permitted should be clear and the process of consultation and criteria for action sufficiently transparent or subject to review to safeguard its integrity.'

[318] Bird (n 214) 754.

would otherwise render its use 'politically unacceptable'.[319] The existence of this authority has intimidation potential as it encourages compliance with unofficial directives from the minister in order to avoid the generation of an actual directive.[320] This arrangement, facilitating accidental or purposeful intervention, is statutorily endorsed through procedural requirements to inform the relevant regulatory authority of the Minister's contemplation of a formal directive.[321] Unfortunately, it is challenging to ascertain the frequency of such an occurrence due to its 'informal[…]' nature.[322]

4.4. Setting

The entity's location within the institutional framework is subject to two basic considerations – whether the entity is part of or distinct from government,[323] and whether the entity is a solitary unit or part of another larger organisation.[324] Quintyn *et al* are of the opinion that, in respect of '[i]nstitutional independence', the authority should be established distinct from the political framework as those organisations that are components of the ministerial office are rarely autonomous.[325] This matter was also considered in *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa*, were the court evaluated the positioning of the entity – in that case, the point of contention was that the anti-corruption organisation was placed within the South African Police Service.[326]

The location of regulator was an important consideration for the South African court in respect of the institutional structure and placement *vis-à-vis* the government and political players.[327] However, placement in itself is not necessarily a problematic issue and a holistic approach must be taken by considering all the independence-enhancing features of the

[319] *Ibid*.
[320] *Idem* at 755. In terms of s 12(1) of Australian Securities and Investments Commission Act, '[t]he Minister may give ASIC a written direction about policies it should pursue, or priorities it should follow, in performing or exercising any of its functions or powers under the corporations legislation (other than the excluded provisions).' In terms of s 12(2), '[t]he Minister must not give a direction under subsection (1) unless he or she has: (a) notified ASIC in writing that he or she is considering giving the direction; and (b) given the Chairperson an adequate opportunity to discuss with the Minister the need for the proposed direction' but 'must not give a direction under subsection (1) about a particular case' – see s 12(3). ASIC is compelled to adhere to the directive (s 12(4)).
[321] Bird (n 214) 755 – the author refers specifically to the provisions of the Australian Prudential Regulation Authority Act of 1998 (Cth) and that of the Australian Securities and Investment Commission Act of 2001 (Cth).
[322] Bird (n 214) 755.
[323] Quintyn & Taylor (n 1).
[324] See Goodhart *et al* (n 13) 55, Zywicki (n 17) 875; Thatcher (n 24) 127 & 129.
[325] Quintyn *et al* (n 15) 8. See IOSCO (n 22) 28 for a different view.
[326] *Helen Suzman Foundation* (n 18) par 15.
[327] *Idem* at paras 17-20, 43-46 & 179-192.

entity.[328] The majority decision of the Constitutional Court held that location in itself was not a ground for contention and that additional factors were required for the placement of the unit to be challenged successfully.[329]

4.5. Deceitful practices

Independence is not just a protective measure against external pressure groups, but also a prominent consideration where a country is subject to fraudulent practices.[330] South Africa is no exception, making Mwenda's concern with corruption[331] a very realistic consideration for this country – as per the following observation by Justice Mogoeng:

> 'All South Africans across the racial, religious, class and political divide are in broad agreement that corruption is rife in this country and that stringent measures are required to contain this malady before it graduates into something terminal.'[332]

Mwenda states that one should consider the bearing that these fraudulent practices in the financial sector and government would have on the effectiveness of the various structures aimed at providing oversight over this sector.[333] It is also necessary to determine whether the exposure of the regulatory body to corruption can be limited and what the level of autonomy of the body would be when it is structured within the civil service and situated in the Finance Ministry.[334]

A theme that deviates slightly from the core discussion in this paragraph, but which does relate to some extent to veracity, is 'integrity testing' measures also discussed by the Constitutional Court in *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* is of particular

[328] *Idem* at paras 21 & 32. See also paras 174 ('Put differently, the DSO was adequately independent *despite* the process for its head's appointment. But the countervailing factors that justified a conclusion of adequate independence there are absent here') & 176. Original emphasis. See also IOSCO (n 22) 28.

[329] *Helen Suzman Foundation* (n 18) par 21. It is important to note some of the facts of the case here: The argument forwarded by Glenister as one of the applicants was that the South African Police Service was in itself a corrupt institution and as such, it was not feasible to position the anti-corruption unit within this structure – see paras 15, 119 & 128. However, this was not allowed to serve as the additional requirement necessitated by the court because the majority disallowed Glenister from forwarding evidence to support this contention based on the finding that it was 'scandalous, vexatious or irrelevant' – see paras 30 & 35. The minority judgment of Froneman J, however, found that the majority misinterpreted the civil procedural requirements for admissibility of evidence insofar as they dismissed it on the merits of the evidence as opposed to the correct approach of deciding whether the evidence was relevant (which the minority held it was) and whether it was prejudicial (which the minority found it was not) – see paras 127-146. The minority judgment also noted that the discomfort and disgrace accompanying assertions that insinuate government corruption could not be the ground for disallowing such evidence at that stage of the proceedings (application to strike out) – see paras 127-132.

[330] Mwenda (n 1) 29.

[331] *Ibid*.

[332] *Helen Suzman Foundation* (n 18) par 1.

[333] Mwenda (n 1) 29.

[334] *Ibid*.

interest.[335] In respect of the impact and determination of the features of integrity testing, the concerns related to the authority of the Minister to determine the manner in which the tests would be conducted, such as polygraphs, and that which is to be verified, such as the veracity of submissions made.[336] Concerns were raised in respect of the possibility of coercion through the testing methods and the misuse of the authority in the absence of provisions regulating the discretionary use of these methods.[337]

The majority decision held that the limitations to the Minister's authority were found in the values ascribed to the exercise of the Directorate's duties, namely that the execution thereof shall be unbiased and *bona fides*.[338] In addition, undue manipulation of staff during the execution of the mandate of the Directorate was prohibited.[339] The court further held that the pre-emptive argument was baseless as there were no indications that the methods set forth by the Minister would be 'intrusive'.[340] As such, the capacity of the Minister to determine matters relating to these tests were not problematic in itself,[341] and prescribed methods should rather be challenged as and when these materialise in the form of regulations.[342]

Van der Westhuizen J in his minority judgment agreed by stating that the foundations of neutrality, *bona fides* and prohibition on undesirable influence, sanctioned the reconsideration by the judiciary of the evaluation methods determined by the Minister.[343] The majority also held that the ability to delegate some determinations in respect of the integrity tests to the senior office-bearer does not adversely affect autonomy.[344] In conclusion, the court held that these tests were cardinal to ensure accountability of members of the unit.[345]

[335] *Helen Suzman Foundation* (n 18) paras 43-46.
[336] *Idem* at par 43.
[337] *Ibid*.
[338] *Idem* at paras 43 & 45.
[339] *Idem* at par 43.
[340] *Idem* at par 44.
[341] *Idem* at par 45.
[342] *Ibid*. See also par 186.
[343] *Helen Suzman Foundation* (n 18) par 196.
[344] *Idem* at par 45.
[345] *Idem* at paras 45 & 46: 'The mere fact that the power to prescribe measures for integrity testing is vested in the Minister should not without more raise alarm bells. It is part of accountability from which DPCI members need not be insulated. Instead of seeking to invalidate the Minister's powers to prescribe the measures, the correct approach would be to challenge the prescribed regulations on their content and application. … Members of the DPCI must always prove to be above reproach – be men and women of integrity. And this underscores the need for integrity testing to obviate the abuse of power and victimisation of innocent citizens, by members of the DPCI. While it is quite fitting to be on high alert about the possible manipulation and abuse of the system by anybody including political executives, it is equally important that the public and even senior politicians themselves be protected from the possible abuse, blackmailing and victimisation by or through the DPCI or its individual members.'

The minority judgment of Nkabinde J, however, took grave issue with the authority of the Minister in this regard.[346] The judge did not take issue with the testing measures, but with the discretionary role of the Minister in setting the mechanisms[347] and the practical implications thereof on judicial review.[348] Nkabinde J set out the requirements for delegated discretion.[349] In brief, the basic point of departure is that authority that could have detrimental results on subjects when exercised should be adequately restricted.[350] In this case, the court specifically referred to authority that can effect adverse outcomes.[351] Thus, whilst discretionary authority is of practical value when contextualising the application of universal prescriptions to differentiated circumstances,[352] it should be limited to the extent that the boundaries of the delegation are ascertainable.[353] This is of particular importance to enable those who were the subjects of the exercised powers to observe when and where they can challenge the outcomes of the effected authority.[354]

Nkabinde J found, in particular, that the *lacunae* in the legislation and the capacity of the Minister did not conform to those events that justify the delegation of extensive authority.[355] These justifications for delegation are three-fold.[356] Firstly, delegation is allowed where there are diverse aspects applicable and eligible for consideration, and therefore these features are not capable of comprehensive pre-emptive determination.[357] Secondly, delegation is an option in cases where the appropriate aspects that the decision-maker has to consider are unequivocally determinable.[358] Thirdly, the person vested with the discretion through delegation has the necessary professional capacity to make the determination.[359] In this case, the Minister was found not to be an expert and the apposite features were not observably set out in the legislation.[360]

In addition, there was uncertainty as to the grounds for review to be argued by those challenging the Minister, particularly in respect of 'what is relevant to the exercise of the

[346] *Helen Suzman Foundation* (n 18) paras 179-193.
[347] *Idem* at par 179.
[348] *Idem* at paras 184 & 187.
[349] *Idem* at paras 182 & 183
[350] *Idem* at par 182.
[351] *Ibid*: 'It is a general characteristic of the law that any power that can have pernicious effects should be better and more extensively circumscribed to the person tasked with administering that power.'
[352] *Helen Suzman Foundation* (n 18) par 182.
[353] *Idem* at par 183.
[354] *Ibid*.
[355] *Idem* at par 184.
[356] *Ibid*.
[357] *Idem* at par 182.
[358] *Ibid*.
[359] *Ibid* – the person 'is possessed of expertise relevant to the decision to be made'.
[360] *Idem* at paras 184 & 188.

power or in what circumstances they are entitled to seek relief if her decision adversely affects them'.[361] The judge further found that aspects such as the prohibition of intrusion on the domain of the Directorate were insufficient to limit the discretionary authority.[362]

The minority decision also dismissed the majority's argument that the Minister's actions could be dealt with appropriately after it had been effected.[363] Nkabinde J supported the *Glenister* decision insofar as it expressed concern with a reactive process as opposed to a framework that was pre-emptive.[364] The restorative capacity of challenges and review are limited.[365] In addition, not all instances of influence are observed or necessarily formally challenged.[366]

Therefore, a pre-emptive system would rather aim to avoid undesirable acts.[367] In addition, the ability of the challenger to do so is again dependent on his or her capacity to ascertain a cause for complaint, which is complicated by the absence of statutorily determined legal grounds in respect of the execution of the Minister's discretion.[368] Nkabinde J further held that the regulations set forth by the Minister were not secured from modification by the Minister herself and was closely linked with the stipulations set out in the legislation, which offer scant direction.[369]

4.6. Miscellaneous

The minority judgment by Froneman J added to the discussion in *Glenister v President of the Republic of South Africa and Others*, by referring to public perception of independence.[370] In this regard, the judge quoted the court's statement that the trust of the population in those features that safeguard the autonomy of a specific organisation is of cardinal importance and a standard-setting indication of independence.[371] Therefore, the belief of '*a reasonably informed and reasonable member of the public*' as to those aspects supporting autonomy is an

[361] *Idem* at par 184.
[362] *Idem* at par 185.
[363] *Idem* at paras 186 & 187.
[364] *Idem* at par 186.
[365] *Ibid*.
[366] *Ibid*.
[367] *Ibid*.
[368] *Idem* at par 187.
[369] *Idem* at par 190.
[370] *Helen Suzman Foundation* (n 18) par 122. The case of *Glenister* (n 38) was decided in 2011 and reference was made to this judgment in *Helen Suzman Foundation* (n 18) on multiple occasions – see e.g. *Helen Suzman Foundation* (n 18) par 1.
[371] *Ibid*.

important indication of the existence of the necessary level of independence of that entity and forms part of the evaluation into independence when and where undertaken.[372]

A further miscellaneous aspect that I wish to refer to comes from the research conducted by Barkow and deals with the interaction between various agencies within a particular legal landscape.[373] The observation that agencies, through their respective mandates and powers, can have an effect on other agencies,[374] is one that is very relevant for the new South African financial landscape.[375]

This matter entails numerous factors.[376] Where there are common regulatory mandates between agency role-players, this can either assist or detract from the independent conduct of one agent where the different role-players have different levels of independence.[377] The question of institutional configuration becomes applicable again as constructors are faced with bestowing multiple mandates (whether aligned or opposing) on one organisation or to create specialised regulators.[378] Whilst a wide-ranging mandate may pose a challenge for interested parties to capture due to the lack of singularity, opposing mandates may result in the regulator having to look after both industrial and citizen's needs.[379]

To return to the multiple-agency interaction, a single-viewed regulator may have difficulty dealing with an agency with a contrasting mandate.[380] It can be complicated for an independent agency trying to execute its mandate in an unbiased manner, where the agency's conduct is prescribed or checked by another agency which does not necessarily meet similar

[372] *Ibid*. The court refers to par 207 of *Glenister* (n 38) but par 206 is also of interest for this thesis.
[373] Barkow (n 21) 49-58.
[374] *Idem* at par 50.
[375] See e.g. par 3.4 of ch 5; paras 5.2 & 5.3 of ch 7 *infra*.
[376] Barkow (n 21) 49-58.
[377] *Idem* at 50 et seq.
[378] *Idem* at 50.
[379] *Idem* at 50 read with 17. She further notes at 50 that 'there is a significant risk that industry pressure and a focus on short-term economic concerns that are easily monitored will trump the long-term effects on the public that are harder to assess'.
[380] Barkow (n 21) 51. See also Barkow (n 21) 53: 'If authority is shared between two or more agencies that have been designed to be maximally insulated, the effect is harder to predict. On the one hand, shared responsibility may create a healthy competition between the two agencies, and it will be harder to capture two agencies instead of one. On the other hand, shared authority may undercut the goals of both agencies. Because these agencies may be charged with serving somewhat different politically vulnerable populations, they may undermine each other by engaging in costly and time-consuming turf battles.' See also Freeman & Rossi (n 218) 1135.

criteria for autonomy (such as an 'executive agency') or even where the other agency has oversight or collaborative functions without proper delineation of tasks.[381]

The same consideration applies where the different agencies have concurrent quasi-legislative authority, as this can have an emasculating effect on the autonomous agency's endeavours.[382] Where concurrent enforcement powers manifest, other problems ensue – such as regulatory lethargy, in the absence of clear responsibilities and accountability lines.[383] In this regard, Barkow advocates for a 'designated ... primary enforcer'.[384]

Finally, there are measures that can be taken to harvest benefits through politics:[385]

> 'Agencies are political creatures; even if one Congress sets up an agency in a way that maximizes its insulation from political pressures, another Congress may disagree and pass legislation that undermines it. That is the nature of our government structure, and this Article does not attempt to do the impossible by taking the politics out of agency design or operation. On the contrary, to help an agency charged with protecting relatively powerless interests requires one to be particularly attentive to the political environment in which it operates and to give the agency tools that help it negotiate that landscape as effectively as possible.'[386]

Reliance on an informed public for support or a sympathetic political supporter can strengthen a regulator's position vis-à-vis its protection mandate.[387] Edifying a population that cannot secure its own welfare or protection, or which is not properly resourced, can assist in dealing with information irregularities that prevent people from knowing about, and addressing, issues that affect them.[388] It gains support for the regulator's mission and can be realised through a research department with the necessary powers to gather the needed

[381] Barkow (n 21) 51-52. This is not necessarily the case, as Barkow points out at 52: 'A consultation or veto requirement that gives either the executive or traditionally independent agencies more power over an insulated agency with equalizing factors may, however, serve a different goal of insulation, namely expertise. Consultation may bring more experts into the process and improve decision making by presenting competing viewpoints.' Barkow's terminology i.e. 'equalizing factors', refers to those non-traditional means that safeguard an agency from capture – see 18. See also Freeman & Rossi (n 218) 1135.

[382] Barkow (n 21) 52.

[383] *Idem* at 56.

[384] *Ibid*. She further states at 56-58, that by permitting individual states to enforce similar compliance issues than the agency, regulatory lethargy can be countermanded.

[385] Barkow (n 21) 58-64.

[386] *Idem* at 58-59. See also *Glenister* (n 38) par 67: 'Under our constitutional scheme it is the responsibility of the executive to develop and implement policy. It is also the responsibility of the executive to initiate legislation in order to implement policy. And it is the responsibility of Parliament to make laws. When making laws Parliament will exercise its judgment as to the appropriate policy to address the situation. The judgment is political and may not always coincide with views of social scientists or other experts. As has been said, "[i]t is not for the court to disturb political judgments, much less to substitute the opinions of experts."' See also par 2 of ch 7 *infra*.

[387] Barkow (n 21) 59-62.

[388] *Idem* at 59.

information and/or give executively uncensored input at 'oversight hearings' or when dealing with citizens.[389]

A supporter of the agency's mission with powerful political ties can also assist the regulator when encountering potential capturing factions.[390] The leading official should have policy expertise; the regulator should be able to offer politically feasible suggestions that can attract constituents; sympathetic politicians should be integrated into the governing structure of the regulator insofar as the administrative laws would allow this; the agency should resort under supervising commissions that focus on citizen welfare as opposed to industrial favours; and assistance should be obtained from other similar-minded agencies.[391]

The last recommendation that I deal with is the creation of 'a formal position of public advocate who is charged with representing the public's interest before the agency'.[392] Research supports the notion that such a position with an agency is influential insofar as the regulator's policy is concerned.[393] However, the correct person must be chosen for this position, appointed on a full-time basis and properly resourced.[394]

5. IMPORTANT CONSIDERATIONS

Autonomy is an internationally recognised feature of regulatory entities, whether concerned with systemic welfare or financial customer safety.[395] It is also a domestic endeavour for regulators of the South African financial sector.[396] Independence, whilst not guaranteeing regulatory proficiency, has an important role in enhancing regulatory success and international case studies have shown that political interventions in regulatory commissions adversely affected outcomes.[397] State officials delegate regulatory authority in order to reap

[389] *Idem* at 60. Apart from proper resources, this section of the regulator should be able to compel industry members through subpoenas or investigative powers to provide the researchers with the required data and information in order to execute their duties – see 60.

[390] Barkow (n 21) 60-62.

[391] *Idem* at 61-62.

[392] *Idem* at 62. My understanding of Barkow's suggestion is that it is not an ombud in the sense of an adjudicative or mediating body (see Melville 'Has ombudsmania reached South Africa? The burgeoning role of ombudsmen in commercial dispute resolution' 2010 *South African Mercantile Law Journal* 50 for the different institutions that can qualify as ombudsmen under different circumstances and the common features that these institutions share) – see specifically the contention by Melvill at 56 that 'neutrality is paramount' and at 53 that '[a]n advocate ombuds may be located in either the public or private sector and, like the others, evaluates claims objectively but is authorised or required to advocate on behalf of individuals or groups found to be aggrieved.'

[393] Barkow (n 21) 64.

[394] *Idem* at 63.

[395] See paras 1 & 2.1 *supra*.

[396] See par 2.4 of ch 1 *supra*.

[397] See par 2.1 *supra*.

the benefits associated with an entity tasked with regulatory responsibilities.[398] Delegation and the nature of the authority bestowed on the regulator necessitate discretion.[399] In the financial sector, the swiftness with which advances occurs makes it essential that regulators are able to deal with matters appropriately.[400]

The primary concern is to limit undue influence through state or industry manipulation.[401] State interference can be effected through budget allocations determined in accordance with behaviour that is pleasing to the delegating authority or in a manner that can restrict the efficacy of the unit for political reasons.[402] It can occur via control of staffing requirements of the regulator by determining if staffing occurs, how and when it occurs and who ultimately staffs the regulator.[403] The exercise of other discretionary powers such as if, how, when and in respect of which employee evaluations are conducted have an effect on the autonomy of the entity.[404] Determining the mandate and manner of fulfilling same or being in a position to manipulate the focus and outcomes of the regulator are means of interference.[405]

The responsiveness of regulatory institutions to certain industry organisations may result in equating the industry welfare with that of the public.[406] Industry enticement can range from extracting benefits from a sympathetic regulator to private sector employment opportunities for regulatory staff.[407] The risk lies in the adjustment of regulatory behaviour in accordance with foreseen career opportunities due to the experience and contacts of the staff member.[408]

Four forms of independence were identified: ‘regulatory, supervisory, institutional, and budgetary’ autonomy.[409] The Constitutional Court noted that ‘structural and operational’ independence were necessary.[410] The court considered the following aspects to have bearing on the independence of the entity in a South African ministerial context: The positioning of the institution;[411] the authority of the Minister *vis-à-vis* the entity;[412] the pecuniary power of

[398] See par 2.2 *supra*.
[399] See paras 2.2 & 2.3 *supra*.
[400] See par 2.4 of ch 1 *supra*; Prates ‘Why prudential regulation will fail to prevent financial crises. A legal approach’ Banco Central Do Brasil Working Paper 335 November 2013; Quintyn & Taylor (n 1).
[401] See paras 2.3 & 4 *supra*.
[402] See paras 2.3; 3 & 4.3 *supra*.
[403] See par 4.2 *supra*.
[404] See paras 4.2 & 4.6 *supra*.
[405] See par 4.4 *supra*.
[406] See paras 2.3 & 4 *supra*.
[407] See paras 2.3 & 4.2 *supra*.
[408] *Ibid*.
[409] See par 3 *supra*.
[410] *Ibid*.
[411] *Helen Suzman Foundation* (n 18) paras 15-21 & 128.
[412] *Idem* at paras 17-20, 43-46 & 179-192.

the executive over the institution;[413] the involvement of the executive in, and requirements for, personnel appointments and employment contracts;[414] the directional authority of the executive branch of government;[415] the public opinion of the independence of the entity;[416] and the capacity and adequacy of the authority of the branches of government to safeguard the autonomy of the entity.[417]

6. CONCLUDING REMARKS

In this chapter I highlighted various aspects that are important in respect of a regulator's independence. The features will serve as the points of departure for the analyses of the regulators in the upcoming chapters. Specific features that enhance a regulator's independence were dealt with in detail and will form the basis of the discussion in chapter six together with the forms of independence discussed.[418] The forms of independence were supervisory, regulatory, institutional, budgetary and operational.[419] The specific features were the following:

Directives: The ability to draft and modify rules for the regulated industry with the intention that regulated entities should follow these rules and that these rules may be enforced.[420] In *Glenister v President of the Republic of South Africa and Others* it was mentioned that the organisation ought to be enabled to commence inspections on its own accord and that the inspecting and enforcement personnel ought to be enabled to make independent choices in respect of their assignments.[421] As mentioned above, the role of autonomous regulatory entities' roles in society have become much more involved, including in policy domains.[422]

Positioning: The entity's location within the institutional framework is subject to two basic considerations – firstly, whether the entity is part of or distinct from government and secondly, whether the entity is a solitary unit or part of another larger organisation.[423] In light of *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* we have also seen that placement in itself is not

[413] *Idem* at paras 40-42.
[414] *Idem* at paras 47-53, 62-76, 77-82, 83-91 & 151-177.
[415] *Idem* at paras 92-105.
[416] *Idem* at paras 31 & 122.
[417] *Idem* at paras 152, 157, 160-166, 186 & 196-197.
[418] See paras 3 & 4 *supra*.
[419] See par 3 *supra*.
[420] See paras 3 & 4.4 *supra*.
[421] *Glenister* (n 38) par 117.
[422] See par 2.3 *supra*. See also Barkow (n 21) 56 in respect of enforcement, which she notes has a 'policy-making component' due to the inability to enforce each and every wrongdoing and the resultant course of action to deal with the main concerns.
[423] See par 4.5 *supra*.

necessarily a problematic issue and that a more holistic approach must be taken by considering all the independence-enhancing features of the entity.[424]

Ministerial and political/state prerogatives: The level of influence that the Minister or executive branch has over the entity, and the aspects that the Minister could influence, are features that restrict autonomy.[425] This includes a variety of facets that range from operational matters, staff selection and monetary allocations to interference with the mandate and focus of the regulator.[426] Clear legislative stipulations that limit discretion support the autonomy of regulatory institutions.[427] The Minister should also be unable to intrude on daily regulatory activities.[428]

Financial needs: The pecuniary power of government or the industry over the institution is a factor that must be considered as government manipulation can occur via financial allocations.[429] The available options range from instances where the regulator drafts the budget on its own to budget allocation, funding that is entirely or partially within the domain of the government or instances where the market contributes to the financial welfare of the entity.[430] The agency should determine its needs and budgetary demands in order to achieve financial autonomy.[431] The determination should be tempered by considerations of rationality, validation and ascertainable factors to determine whether the financial proposal is realistic.[432] Where the market is involved, the contributions should be determined by the agency and state.[433]

Human resources: Employees are central to the proper functioning of the regulatory authority, because the requirements of expertise and knowledge are of cardinal importance where highly technical sectors are regulated.[434] The available options vary between ministerial, presidential or parliamentary determination of senior personnel and deliberations as to whether there are legislative provisions governing appointment processes or whether discretionary allowances are made.[435] Clear and comprehensive legislation plays an important

[424] *Ibid*.
[425] See par 4 *supra*.
[426] *Ibid*.
[427] See paras 4.2 & 4.4 *supra*.
[428] See par 4.4 *supra.*
[429] See par 4.3 *supra.*
[430] *Ibid*.
[431] *Ibid*.
[432] *Ibid*.
[433] *Ibid*.
[434] See par 4.2 *supra.*
[435] *Ibid*.

role in setting the criteria for appointment and dismissal of personnel.[436] Goodhart *et al* suggest that the personnel employed at the regulatory office must be capable and knowledgeable.[437] Industry-related compensation must be offered to staff members to counteract the lure of the private market.[438] Quintyn and Taylor. and Mwenda propose that high-level members of staff should have certainty of employment and that the criteria for selection and removal must be evident.[439] Selection and appointment ought to be effected by more than one state organisation.[440] The management scheme of the regulatory organisation should be effected by various professional persons.[441]

Other aspects can protect an agency from political interference and enhance its independence: the public opinion of the autonomy of the entity; other agencies that affect the actions of the regulator; public edification; a sympathetic supporter with political ties and a public advocate[442]

The next chapter deals with accountability in a similar format to this chapter. The aim of the forthcoming chapter is to set out the forms and features of accountability in a logical manner. It will be instrumental to the analysis of the accountability of South Africa's regulators in chapter seven.

[436] *Ibid*.
[437] *Ibid*.
[438] *Ibid*.
[439] *Ibid*.
[440] *Ibid*.
[441] *Ibid*.
[442] See par 4.7 *supra*.

CHAPTER 4: ACCOUNTABILITY

> 'The core question, and one of intense interest to market and governmental actors, is how do we know whether regulators are doing a good job or not?'[1]

1. INTRODUCTION

1.1. Outline of the chapter

This chapter sets out the forms and features of accountability. The chapter deals with the concept of accountability in detail and has a bearing on the following questions set out in chapter one: What are the raisons d'être for statutory regulators and for measures that advance independence and accountability in respect of these regulators? It elaborates on this matter and aims to address the next question, which is more subject-specific: What are the measures that advance independence and accountability as proposed in foreign jurisdictions and international best practices and are there any specifically applicable to statutory regulators of consumer credit? I discuss the following matters in this chapter:

- Accountability as a concept with different facets;[2]
- the different measures that can enhance accountability, categorised according to mandate-orientated measures, compliance-driven measures and comprehensive accountability measures;[3]
- forms of accountability;[4]
- accountability mechanisms;[5] and
- some elaboration on specific measures, categorised according to regulatory oversight authorities, information dissemination and accumulation mechanisms and regulatory performance measures.[6] I selected a number of special measures in respect of which I formulate some manner of assessment strategy for the forthcoming chapters.

1.2. Orientation

I have discussed the principle of independence as a regulatory feature that is nationally and internationally renowned for supporting positive outcomes in regulation.[7] Accountability is

[1] Scott 'Evaluating the performance and accountability of regulators' 2014 *Seattle University Law Review* 353 362.
[2] See par 2 *infra*.
[3] See par 3 *infra*.
[4] See par 4 *infra*.
[5] See par 5 *infra*.
[6] See par 6 *infra*.
[7] Par 2.4 of ch 1; paras 1 & 2.1 of ch 3 *supra*.

also recognised as an important trait – even more so where the entity is autonomous.[8] On the one hand, some aspects of the regulatory regime, such as proscriptive oversight and dismissal capacities of government officials, enhance the accountability of the regulator.[9] On the other hand, this can affect the independence of the entity negatively if these features are not structured properly and insofar as the regulator's actions and outcomes can become subject to the will of the controlling official.[10] This was illustrated in the case of *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* that I discussed in chapter three.[11] Accountability mechanisms can also serve as protective measures built into the system in order to protect the autonomy of the organisation.[12]

Similar to the previous chapter, I use this chapter for comparative purposes and chapter seven evaluates the accountability of the National Credit Regulator and Financial Sector Conduct Authority respectively. I set the scene by discussing the value of answerability measures for a regulatory framework and include a part on the roles that accountability mechanisms play in the regulatory sphere.[13] This part of the chapter elaborate on the meaning of accountability in order to enhance understanding of the concept.[14] In the same manner as the independence-discussion, I identify and discuss accountability-enhancing measures categorised according to mandate, compliance and totality.[15] I include a part on forms of accountability based on the nature of the measure.[16] I then identify specific accountability mechanisms and discuss the

[8] Par 2.4 of ch 1; Quintyn & Taylor *Should financial sector regulators be independent?* 2004 *International Monetary Fund Economic Issues* No 32: 'Agency independence entails another important concern, namely, the need for accountability. An independent agency might pursue an agenda of its own, going against the wishes of the political majority. Some worried analysts have branded independent regulatory agencies the "fourth branch of government," implying that they are outside the control of the three traditional branches that keep mature democratic systems in equilibrium through a system of checks and balances. Although such fears appear to be exaggerated, they nevertheless demonstrate the need for proper forms of accountability to balance the advantages of agency independence with the disadvantages.'

[9] Quintyn *et al The Fear of Freedom: Politicians and the Independence and Accountability of Financial Sector Supervisors* (IMF Working Paper WP/07/25) 2007 13; Quintyn & Taylor (n 8); Bird 'Regulating the regulators: Accountability of Australian regulators' 2011 *Melbourne University Law Review* 739 761-762. See also Barkow 'Insulating agencies: avoiding capture through institutional design' 2010 *Texas Law Review* 15 42.

[10] *Ibid*.

[11] (CCT 07/14, CCT 09/14) [2014] ZACC 32 (27 November 2014); par 3.3.4 of ch 2; paras 3 & 4.2 of ch 3 *supra*.

[12] Hüpkes *et al The Accountability of Financial Sector Supervisors: Principles and Practice* (IMF Working Paper WP/05/51) 2005 7; Quintyn *et al* (n 9) 6-7; par 3.3.4 of ch 2 *supra*. This is over and above features aimed at enhancing independence – in this regard, see e.g. Barkow (n 9) 26 & 42.

[13] See paras 2.1 & 2.2 *infra*.

[14] See par 2.3 *infra*.

[15] See paras 3.1-3.3 *infra*.

[16] See par 3.4 *infra*.

details thereof.[17] This part of the chapter deals with some specific references to methods developed in foreign jurisdictions.[18]

This conceptual chapter is intended to set the framework for the forthcoming evaluation in part two of the thesis and is an information-gathering chapter similar to chapter three. I write from a South African perspective and evaluate the South African regulators against selected foreign jurisdictions and international practices – the South African analysis cannot be undertaken without knowledge of available accountability options.[19] The content of the current chapter is primarily sourced from the works of writers focused on foreign systems and best practices. I also indicated in chapter three that the application of certain sources had to be carefully evaluated to ensure its applicability to market conduct regulators[20] and for purposes of this chapter, the following extract from Eva Hüpkes and her co-authors serve as the point of departure:

> '[There are] … main differences between RSAs [Regulatory and Supervisory Agencies] and monetary policy authorities that have implications for accountability. The primary differences are as follow: (i) performance against their mandate is typically harder to measure for RSAs than for monetary policy authorities and RSAs very often have multiple mandates and may compete with other regulatory authorities in achieving those mandates; (ii) there is a greater tension between transparency and confidentiality for RSAs than in monetary policy; (iii) RSAs generally have broad regulatory (rule-making) powers, including prudential rules, reporting, and disclosure requirements, as well as organizational prescriptions and rules of conduct, which do not arise in the monetary policy context; (iv) RSAs have broad supervisory and enforcement powers, which require a special accountability relation with the regulated industry and the judiciary; and (v) RSAs operate in a multiple principals environment. Besides the typical principals of a monetary policy authority, such as the legislative and executive branches, the users of financial services are also a main category of principals for RSAs.'[21]

[17] See paras 4 & 5 *infra*.
[18] See par 6 *infra*.
[19] See par 2.4 of ch 1 *supra*.
[20] See par 1.2 of ch 3 *supra*.
[21] Hüpkes *et al* (n 12) 10. See Hüpkes *et al* (n 12) 12 for Table 1 (the summation of differences referred to at 10). There are international best practice manuscripts that, and extraterritorial (non-South African) researchers who, have proposed or investigated the accountability of financial services regulators over and above central bank or prudential regulation alone – see e.g. World Bank *Good Practices for Financial Consumer Protection* 2017 (see 9, specifically including credit); Financial Stability Board *Consumer Finance Protection with Particular Focus on Credit* 26 October 2011 (see 10 & 11); Organisation for Economic Co-operation and Development (hereinafter 'OECD') *G20 High-Level Principles on Financial Consumer Protection* October 2011.

2. ACCOUNTABILITY

2.1. Introduction

The non-negligible role of regulatory entities as well as the non-electoral manner in which they are established necessitates a system of accountability.[22] In particular, the consequential effect of these entities on regulated industry members and customer well-being illustrates the authority wielded in the market.[23] Four specific examples expand on this statement: regulators determine rules and directives that may have the force of law; their commands must be abided by; they are entitled to take punitive action; and they are subsidised with public funds.[24] Furthermore, the expenditures associated with so-called 'regulatory failures' can be excessive.[25]

Shortcomings or malfunctions in respect of accountability or control mechanisms manifest in various ways.[26] The intended outcomes envisaged when a specific approach is selected by Parliament, or regulatory entity, may not realise and the approach may actually have a contrasting effect.[27] Unforeseen adverse derivatives may ensue.[28] In some cases, the chosen approach may not address the important challenges and may deal with insignificant issues, or where the objectives set do realise, it occurs at excessive and redundant charges.[29]

The progressive development of regulatory entities has necessitated a renewed approach to the relationship between the agent and principal.[30] It requires a different view of control mechanisms.[31] Specific developments in the regulatory discipline have included the increased authority of regulators over regulated sectors insofar as they have structured their impact on the policy regimes for which they are responsible.[32] Regulators have become influential participants in delineating and contextualising policy schemes through the construction of

[22] Goodhart *et al Financial Regulation: Why, how and where now?* (1998) 68 & 195; Bird (n 9) 742; Thatcher & Stone Sweet 'Theory and practice of delegation to non-majoritarian institutions' 2002 *Western European Politics* 1 2; Thatcher 'Delegation to independent regulatory agencies: Pressures, functions and contextual mediation' 2002 *Western European Politics* 125 141-142. See also Hüpkes *et al* (n 12) 4-5.

[23] Goodhart *et al* (n 22) 68 & 195.

[24] Bird (n 9) 741.

[25] Farina 'Administrative law as regulation: The paradox of attempting to control and to inspire the use of public power' 2004 *South African Public Law* 489 491.

[26] *Idem* at 490. See par 3.3.3 of ch 2 in respect of the interrelation between accountability and control.

[27] Farina (n 25) 491. See par 3.3.3 of ch 2 & par 2.3 of ch 3 in respect of the behaviour of agents after delegation.

[28] Farina (n 25) 490.

[29] *Idem* at 490-491. See also Scott 'Evaluating the performance and accountability of regulators' (n 1) 363. See further Goodhart *et al* (n 22) 151-152 in respect of the 'costs of regulation'.

[30] Thatcher (n 22) 139-140.

[31] *Idem* at 141.

[32] *Idem* at 140.

purpose, intent, meaning and prioritisation.[33] This development has been amplified by the specialised, informed and involved nature of the regulator as well as the implementation of its regulatory authority.[34] In addition, the increased autonomy has resulted in some regulators' views diverging from approaches taken by the government.[35]

Historical developments have had an important role in reconstructing the power-and-control landscape.[36] The authority granted to regulatory agencies that enjoy a measure of autonomy were enhanced, matched with suitable sophistication in respect of oversight mechanisms by both the principal government and regulated sector.[37] Autonomous entities were tasked with regulatory obligations styled in ample terms in order to extend discretionary capacity but, originally, limited attention was given to bureaucratic processes and procedures.[38] The measures that were subsequently created in respect of 'accountability' and 'legitimacy' incorporated elements of 'control' and 'answerability'.[39]

2.2. General

Hüpkes *et al* set forth four roles of answerability.[40] Firstly, accountability effects supervision by the chief political delegators.[41] Secondly, it sustains and improves legitimacy and thirdly, forwards proper management skills, which also serves as exemplars to the regulated industry.[42] Fourthly, a properly constructed regime can assist with the progressive development of the regulators.[43]

Regulatory entities lack 'democratic legitimacy' due to their non-electoral status and thus the pursuit of answerability encloses a search for differentiated mechanisms to those applicable

[33] *Idem* at 140 & 141. See 140: 'Agencies have tended to gain power and importance. They have become key actors in decisions, acquiring expertise, reputations and political weight. They have developed objectives and conceptual frameworks that have structured their policy domains.'

[34] Thatcher (n 22) 140.

[35] *Ibid*: 'The agencies have become more independent of elected officials, able to challenge their views, sometimes even in public.' See also par 3.3 of ch 2; par 2 of ch 3 *supra*.

[36] Thatcher (n 22) 141; Gilardi 'Institutional change in regulatory policies: regulation through independent agencies and the three new institutionalisms' in Jordana & Levi-Faur (eds) *The Politics of Regulation Institutions and Regulatory Reforms for the Age of Governance* (2004) 76-78.

[37] Thatcher (n 22) 141.

[38] *Ibid*. Thatcher points out that the regulatory accountability debate must also be viewed within the context of historical development when 'delegation to IRAs [independent regulatory agencies] took place in a situation in which legislative models of accountability were closer to fiction than reality' – see Thatcher (n 22) 142.

[39] Thatcher (n 22) 142. See also Scott 'Accountability in the regulatory state' 2000 *Journal of Law and Society* 38 39: 'Trust in mechanisms of accountability is thus a central precondition for the legitimate delegation of authority.' See further Hüpkes *et al* (n 12) 5-6.

[40] Hüpkes *et al* (n 12) 6-9.

[41] *Idem* at 6.

[42] *Idem* at 6 & 7-8.

[43] *Idem* at 6 & 8-9. See also Scott 'Evaluating the performance and accountability of regulators' (n 1) 374; OECD *Policy Framework for Effective and Efficient Financial Regulation General Guidance and High-Level Checklist* 2010 38.

to the electorate, in addition to the justification of a regime that supports accountability of regulators.[44] The government is answerable to their constituents and, likewise, a method to enable the answerability of regulatory organisations to the public is necessary.[45]

Mark Thatcher and Alec Stone Sweet, however, present two arguments for the legality of independent regulators.[46] Firstly, they state that '"[o]utput legitimacy" is the current standard justification' for non-electoral entities.[47] This approach compares the current position with the default position where the chosen government effect regulation and substantiates its own presence.[48] The impact of regulatory agencies in respect of improved functioning, as opposed to that of governmental outcomes, arguably validates their establishment.[49] Improved functioning extends *inter alia* to enhanced efficacy in respect of policy determination processes and achievements and augmented safeguarding of rights.[50] Entrusting authority to these entities is considered impartial and advantageous and the subsistence of these organisations are only disputed where they are fraudulent or unsuccessful in achieving the desired outcomes.[51] However, this approach does not suffice to present a balanced perspective on delegation to autonomous entities, specifically as it presumes an overall favourable view of delegation and neglects significant factors associated with political activity.[52] It fails to account for adverse effects, such as negative outcomes for some sectors because of 'liberalisation and the re-regulation that comes with it'.[53]

The second perspective presented by Thatcher and Stone Sweet – 'procedural legitimacy' – centres on the selection methods that regulators implement when they take regulatory decisions.[54] This approach is also a comparative exercise, which considers the position of political processes with that of regulatory agency selection procedures.[55] The procedures are viewed as transparent as opposed to clandestine and the choices converged on delineated mandates.[56] Choices are validated and data circulated amongst the public.[57] In addition, regulatory agencies are approachable to stakeholders, also due to those processes that invite

[44] Bird (n 9) 742.
[45] *Ibid*.
[46] Thatcher & Stone Sweet (n 22) 18-19.
[47] *Idem* at 18.
[48] *Ibid*.
[49] *Ibid*.
[50] *Ibid*.
[51] *Ibid*.
[52] *Idem* at 18-19.
[53] *Ibid*. At 19, the authors note that '[t]here are winners and losers from delegation to NMIs [non-majoritarian institutions] which form part of political struggles'.
[54] Thatcher & Stone Sweet (n 22) 19.
[55] *Ibid*.
[56] *Ibid*.
[57] *Ibid*.

dialogue with the regulated sector.[58] The legitimisation of regulatory entities does not mean that government management is absent, as the legislature often retains authority in respect of some appointments, publication of data and enquiries.[59]

Thatcher and Stone Sweet view this latter approach as a rational and egalitarian form of answerability compared to the accountability forms applicable to elected officials when the objectives of delegation are considered.[60] They note that the approaches of 'output legitimacy' and 'procedural legitimacy', thus the manner in which decisions are made by regulators and the effect that these entities have in the regulated sector, have become intertwined insofar as both are applied simultaneously.[61] In this manner, the former is strengthened by the latter.[62]

Mark Bovens's research includes rationales for accountability, and he categorises these according different views: the 'Democratic Perspective', the 'Constitutional Perspective' and the 'Learning Perspective'.[63] The first view concerns the responsible exercise of public power and the ability of the electing populace to insist on proper performance.[64] The second view concerns the distribution of authority between the components of the government to avoid centralisation of power, which could lead to autocracy and dishonesty.[65] The third view is concerned with improving state functioning:[66]

> 'Accountability is a crucial link in this approach as it offers a regular mechanism to confront administrators with information about their own functioning and forces them to reflect on the successes and failures of their past policy.'[67]

The author proceeds to identify two other reasons why '[a]ccountability is indirectly of importance'.[68] He refers to authentication of state action,[69] and validation and resolution of public discontent.[70]

[58] *Ibid*.

[59] *Ibid*.

[60] *Ibid*.

[61] *Idem* at 18-19.

[62] *Idem* at 19.

[63] Bovens 'Analysing and assessing accountability: A conceptual framework' 2007 *European Law Journal* 447 462-465.

[64] *Idem* at 463.

[65] *Ibid*.

[66] *Idem* at 463.

[67] *Idem* at 464.

[68] *Ibid*.

[69] *Ibid*: 'Respect for authority is fast dwindling and the confidence in public institutions is under pressure in a number of Western countries. Processes of accountability in which administrators are given the opportunity to explain and justify their intentions, and in which citizens and interest groups can pose questions and offer their opinion, can promote acceptance of government authority and the citizens' confidence in the government's administration.'

2.3. Conceptualisation[71]

> 'Some dimensions, such as transparency, are instrumental for accountability, but not constitutive of accountability; others, such as responsiveness, are more evaluative instead of analytical dimensions. … Accountability in this very broad sense is basically an evaluative, not an analytical, concept. It is used to qualify positively a state of affairs or the performance of an actor.'[72]

Accountability manifests when a system allows for a regulator's actions or omissions to be rationalised by the entity itself and where it can be evaluated by an external party.[73] The concept 'accountable' is defined as being 'responsible for your decisions or actions and expected to explain them when you are asked'[74] and is sometimes used synonymously with 'answerability'.[75] This concept is strictly speaking not the same as 'liability', which is defined as 'the state of being legally responsible for [something]',[76] or 'responsibility', which is defined as 'a duty to deal with or take care of [somebody]/[something], so that you may be blamed if [something] goes wrong'.[77] From a lexical point of view, accountability is not synonymous with control, which is defined as 'the ability to make [somebody]/[something] do what you want' in the sense of 'power' or 'the act of restricting, limiting or managing [something]; a method of doing this'.[78] However, many authors writing on regulatory

[70] *Idem* at 464: 'Public processes of calling to account create the opportunity for penitence, reparation and forgiveness, and can thus provide social or political closure.' The 'South African "truth commissions"' are held as an example of the aforementioned – see 464. I do not deal with the issue of trust or confidence in regulators, the regulatory system or government authority separately, holistically or in much detail, but this is an issue that surfaced in some of the sources that I perused – see e.g. Scott 'Evaluating the performance and accountability of regulators' (n 1) 360; Farina (n 25) 501; National Treasury *Treating Customers Fairly in the Financial Sector: A Draft Market Conduct Policy Framework for South Africa Discussion Document* December 2014 25. See also Bovens (n 63) 448 in respect of the projection of 'trustworthiness' that answerability brings to the fore.

[71] Some authors are *ad idem* that it is important to conceptualise 'accountability' because it can inform and structure discussions about this topic – see Scott 'Evaluating the performance and accountability of regulators' (n 1) 353; Bird (n 9) 740. They also pay close attention to three core facets: 'who is accountable'; 'to whom' is accountability owed and 'what are [they] accountable for' – see Lodge 'Accountability and transparency in regulation: critiques, doctrines and instruments' in Jordana & Levi-Faur (eds) *The Politics of Regulation Institutions and Regulatory Reforms for the Age of Governance* (2004) 124; Bird (n 9) 741-742.

[72] Bovens (n 63) 450. However, see Hyland 'Who is watching the watchdog?: a critical appraisal of ASIC's administrative powers' 2009 *Journal of Australasian Law Teachers Association* 29 36: 'The Australian Law Reform Commission … appears to have endorsed this view, as it readily accepted that public regulators should be made accountable and that for "accountability" to be meaningful, the decision making process must be transparent and the public must understand the basis for the regulator's decision and, most importantly, how these decisions can be reviewed. Accountability concerns the "general transparency of the activities of the regulators" and not simply the review of individual cases.'

[73] Lodge (n 71) 128; Scott 'Evaluating the performance and accountability of regulators' (n 1) 361 & 362; Financial Stability Board (n 21) 11; Bird (n 9) 741; Scott 'Accountability in the regulatory state' (n 39) 40. See also Bovens (n 63) 450.

[74] Hornby *Oxford Advanced Learner's Dictionary of Current English* (2010) 10.

[75] Thatcher (n 22) 142.

[76] Hornby (n 74) 854-855.

[77] *Idem* at 1258.

[78] *Idem* at 318.

accountability seem to incorporate different elements into their understanding of the concept, as will be shown hereafter.[79]

Joanna Bird highlights that the colloquial understanding of accountability as elucidation and validation is inadequate when regulatory bodies are the focal points of a discussion pertaining to enhanced answerability.[80] In this case, a deliberate reactive mechanism is necessary as opposed to the common consequences of explanatory exercises, namely reputational risk and suggestions to the regulator that are discretionary in nature *vis-à-vis* that regulator.[81]

In her academic contribution, she typifies answerability methods into 'weak' and 'strong' as determined by the availability of measures that can be effected *ex post facto* the clarification exercises.[82] '[W]eak' methods conclude after description and defence of regulatory conduct whereas systems with 'strong' methods incorporate consequential corrective measures after the information session.[83] Colin Scott's reference to Bovens's understanding of 'accountability' also recognises that the ability to instate sanctions can form part of answerability schemes.[84] Bovens defines 'accountability' for purposes of his academic contribution as follows:

> 'Accountability is *a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences*.'[85]

Scott elaborates on the concept by adducing a further perspective, over and above the colloquial understanding of answerability in the administrative sense of a political regime where compliance with 'public' duties is monitored.[86] The need for expertise in the market necessitates that the answerability mechanisms be correlated to the 'technical' attributes of the contemporary financial regulatory regime.[87] This additional perspective does not detract

[79] See e.g. Lodge (n 71) 142: 'Talking about accountability and transparency is far from a mere obsession with institutional furniture arrangements or degrees of delegation between "principals" and "agents". Accountability and transparency are not just a "good thing" of which we should just have "more". The way in which such instruments are designed into a regulatory regime fundamentally affects the way in which power is allocated and negotiated in any regulatory regime and leads to potential intended and unintended consequences that are associated with particular and potentially substantial costs and benefits.'

[80] Bird (n 9) 741.

[81] *Ibid*.

[82] *Ibid*.

[83] *Ibid*.

[84] Scott 'Evaluating the performance and accountability of regulators' (n 1) 361.

[85] Bovens (n 63) 450. Original emphasis. Each of these 'elements' of 'narrow accountability' under the theme of '*Accountability as a Social Relation*' are further discussed, and illustrated, by the author Bovens at 451-452 (see also 450). Original emphasis.

[86] Scott 'Evaluating the performance and accountability of regulators' (n 1) 353.

[87] *Idem* at 353 & 357.

from the political nature of regulation as it still influences the welfare of others.[88] However, the specialist approach that he advocates enables the development of a connection between answerability methods with efficacy of regulation, execution appraisal and the refined assessment of regulation.[89] Incorporating efficacy deliberations into the construction of answerability methods, together with and without neglecting the administrative significance of due process, results in a system that allows distinctive components to address various concerns and that aligns with international trends.[90]

Accountability and control are closely related and I deal with the specifics thereof in more detail when I discuss delegation of authority within the context of accountability.[91] Suffice to say that Scott maintains that obligatory answerability is but a manifestation of a form of hegemony.[92] Some forms of control manifest in a sequential manner to other forms of control differentiated by the timing of the occurrence of the measures.[93] Thus, he states that

> '… the distinction sometimes drawn between accountability and control – control implying *ex ante* involvement in a decision, while accountability is restricted to *ex post* oversight – is not particularly helpful. This distinction, often found in public law accounts, appears to neglect the observation that there is implicit in the capacity to call to account some element of control capacity. It seems better to see control and accountability as linked concepts, operating on a continuum. If we were to redraw the distinction it might be in terms that *managerial* control refers to the right to *ex ante* involvement in decision making, while *accountability-based* control refers to *ex post* oversight.'[94]

Determining accountability and the extent thereof within a specific sector is also influenced by three practical elements, namely an identification of the entity that bears the burden to account, the actions or omissions for which the regulator is answerable, and the identification of those towards whom the regulator is answerable.[95] In order to conceptualise accountability,

[88] *Idem* at 353.
[89] *Idem* at 353-354: '… accountability needs to go beyond traditional public accountability forms, largely concerned with process, to include the effective evaluation of performance in terms of better regulation, direct performance evaluation and more sophisticated forms of regulatory audit.'
[90] Scott 'Evaluating the performance and accountability of regulators' (n 1) 354-355: 'Policies of deregulation, regulatory reform, better regulation, and smart regulation pursued in one form or another in most of the … OECD … member states are centrally concerned with promoting proportionate responses to problems defined as regulatory, with varying degrees of effectiveness. Distinct from better regulation are strategies of public sector audit concerned with promoting efficiency, economy, and effectiveness in the expenditure of public monies, including on regulation. A further distinct set of concerns within regulatory policy are measures targeted at developing performance indicators and the evaluation of performance.'
[91] See par 3 *infra*. See also par 3.3 of ch 2; par 2 of ch 3 *supra*.
[92] Scott 'Accountability in the regulatory state' (n 39) 39.
[93] *Ibid*.
[94] *Ibid*. However, consider the following correlation raised in the context of independence by Hüpkes *et al* (n 12) 4: 'An accountability arrangement is bad if it enables third parties to exercise de facto control/influence through what is a de jure accountability arrangement.'
[95] Lodge (n 71) 124; Bird (n 9) 742; Bovens (n 63) 450-451 & 454.

it is further important to note that the concept has a time-dimension[96] as well as a legal-[97] and relational-dimension,[98] as can be gleaned from the varying features presented as options by the authors referred to below.[99]

Charles Goodhart and his co-authors identify four versions of accountability centred on the recipients in the accountability relationship.[100] Their identification of potential demanders of answers include more options than, for example, Bird who only identifies the community ('the public') and the reigning political regime ('the government').[101]

Their four versions can manifest in singular or simultaneous format.[102] The commonality of these versions is found in the presence of a stakeholder of the regulated sector towards whom the regulatory authority is accountable – the specific stakeholder becomes the defining factor for each version.[103] The respective stakeholders are the 'marketplace', 'industry', government and the courts.[104] The 'marketplace' is effectively the customer who can publicly show disdain with the conduct of the party who is held to account through so-called 'signall[ing] in the market'.[105] However, this form of accountability if applied within the financial sector, does not realise that financial customers – in our case credit receivers – are subjected to the policies of government and therefore do not have options available in respect of preferred forms of regulation.[106] The deficiencies of a regulatory system are not amenable to disdain 'signalled' in an effective manner by customers.[107]

[96] See e.g. Thatcher (n 22) 127 (remarking that 'all regulatory agencies face continuing controls by elected officials'); Scott 'Accountability in the regulatory state' (n 39) 39 & Thatcher & Stone Sweet (n 22) 5 (in respect of '*ex post*' and '*ex ante*' forms).

[97] See e.g. Scott 'Evaluating the performance and accountability of regulators' (n 1) 361 (writing that 'the dominant strand of even a broadly based conception of accountability is compliance with rules').

[98] See e.g. Scott 'Evaluating the performance and accountability of regulators' (n 1) 361 (he remarks that 'Mark Bovens has suggested that accountability is best conceived of as a relationship in which the organization being held to account has an obligation to explain its activities to another organization that may pose questions, make judgments, and (possibly) deliver consequences for failings'). See Bovens (n 63) 450 & 452.

[99] See paras 3.2 & 3.3 *infra*.

[100] Goodhart *et al* (n 22) 69. See also Scott 'Evaluating the performance and accountability of regulators' (n 1) 360-361; Bovens (n 63) 455-457 for alternative groupings.

[101] *Ibid*; Bird (n 9) 742; Thatcher (n 22) 142 – ('executives and legislatures', 'regulatees and consumers').

[102] Goodhart *et al* (n 22) 69.

[103] *Ibid*.

[104] *Ibid*.

[105] *Ibid*: 'In essence, accountability is to the consumer through the marketplace. If the supplier of a service is not supplying what the consumer demands and is prepared to pay for, this inefficiency is immediately signalled in the market.'

[106] Goodhart *et al* (n 22) 69: 'The problem with financial regulation is that it is not in practice supplied through a market: consumers do not have an ability to express what type of regulation they are prepared to pay for, and what price they are prepared to pay, in a marketplace. In effect, the consumer has no choice but to accept the type of regulation chosen by the regulatory authorities.'

[107] Goodhart *et al* (n 22) 69.

Answerability designed around the industry is effectively 'self-regulation' as the party that is accountable is the regulatory agency and the agency is obliged to account to the regulated industry.[108] Nevertheless, Goodhart *et al* are critical of the viability of this form of regulation for the financial sector.[109] The level and design of the involvement of government officials, as politically elected commanders, with regulatory entities become relevant considerations where the entity is held to answer to these officials.[110] Arrangements between these stakeholders can range from uninterrupted accountability routes, thus 'directly' from the regulator to the relevant member of the executive or the legislature, or through another institution who is subsequently accountable to the relevant government structure.[111] The organisational considerations affect the proximity of the governmental structures to the business of the regulator.[112]

Answerability is closely related to the milieu of the nation and is influenced by features of the political scheme, such as levels and branches of government.[113] One of the challenges associated with composite administrative structures manifest when there is a divergence between different components of the structure in respect of the intended outcomes of the regulators.[114] I discuss solutions to this particular issue at a later stage when I deal with accountability-enhancing features.[115]

[108] *Ibid*: 'An alternative is for the regulatory authority to be accountable to the industry itself: this is an extreme form of self-regulation.'

[109] Goodhart *et al* (n 22) 69. See also Scott 'Evaluating the performance and accountability of regulators' (n 1) 358.

[110] Goodhart *et al* (n 22) 69.

[111] *Ibid*.

[112] *Ibid*.

[113] *Ibid*: 'In effect, the issue is how close political entities are to be to the actual operation of the regulatory authorities. Macdonald (1996) notes that questions of accountability are even more complex in countries where difference regulatory agencies are responsible to different layers of government (e.g. national and regional) or different bodies within government (e.g. executive, legislative, judiciary) that may not always have the same objectives. These are complex issues that raise difficult questions, which can only be settled within the context of the political structure of the particular country concerned.'

[114] Goodhart *et al* (n 22) 69.

[115] See par 3.3 *infra*.

Accountability regimes pose some challenges.[116] In instances where the financial sector is regulated by one empowered entity, concerns in respect of answerability arise.[117] Singularity removes contestation between different regulators and the centralization of regulatory authority may effect ineptness or have undesirable consequences.[118] In addition, the elevated status of these entities and the mechanisms of the regulatory system to prevent interference by courts and politicians have caused the incorporation, or calls for same, of restrictive measures into legislation governing jurisdictions such as the United Kingdom.[119] The methods to effect enhanced answerability were in reaction to trepidation of indiscriminate and unconstrained exercise of regulatory authority.[120] However, the outcomes have not been without criticism:[121]

> 'The introduction of burdensome consultation requirements, the proceduralisation of the FSA's [Financial Services Authority] internal operations (by way of detailed and quasi-formal diversification of functions within the organisation) and the general formalisation of the regulatory process – all in response to the fears of arbitrariness and unaccountability – may actually result in escalating costs, bureaucratic behaviour and a significant reduction of the system's (supposedly highly valued) flexibility.'[122]

[116] I do not deal with Autopoiesis in my discussion – for a discussion of the role and application of this theory in the legal and regulatory spheres, see Scott 'Regulation in the age of governance: the rise of the post-regulatory state' in Jordana & Levi-Faur (eds) *The Politics of Regulation Institutions and Regulatory Reforms for the Age of Governance* 2004 150-154; Black 'Proceduralisation and polycentric regulation' 2005 *Revista Direito GV Law Review* 99 103, Black 'Critical reflections on regulation' 2002 *Australian Journal of Legal Philosophy* 1 5; Teubner 'Autopoiesis in law and society: A rejoinder to Blankenburg' 1984 *Law & Society Review* 291. The brief references that I have come across during my readings have shaped my view of interacting systems, in particular Scott's explanation at 151-152, that the core subject fields relevant to regulation ('the political, the legal, the social and the economic') are different independent domains or 'subsystems' that are affected by developments in other domains, but which deal with these developments from the perspectives of their own value systems and not the value system of the domain that generated the development. He uses the example of laws that are constructed by politicians and classifies the statutes developed by the political domain as a mechanism of interaction with the legal domain – see 151. The reaction to this development, or the implementation of statutes by the courts, is done from the perspective of the law and not the political domain, begging the question as to whether 'legislatures [can] create new legal rules and simply expect that they will be translated into laws which are effective in the legal system and which produce the desired changes in behaviour by economic and social actors?' – see 151. The legal domain approaches developments through 'the adoption of a binary code – in which actions are classified as legal or illegal, lawful or unlawful' whilst this may not be the approach taken by the developing domain – see 151. Autopoiesis, when applied within the legal domain, attempts to explicate the challenges of 'regulatory control' and proposes solutions to these challenges – see 151.

[117] Hadjiemmanuil 'Institutional structure of financial regulation: A trend towards 'megaregulators'?' 2000-2001 *Yearbook of International Financial and Economic Law* 127 142. See *contra* Goodhart *et al* (n 22) 152. See also par 3.4.2 of ch 2 *supra*.

[118] Hadjiemmanuil (n 117) 142. See also Jones 'Back to basics: Why financial regulatory overhaul is overrated' 2009-2010 (4) *Entrepreneurial Business Law Journal* 391 393-394.

[119] Hadjiemmanuil (n 117) 142. See Zywicki 'The Consumer Financial Protection Bureau: Savior or Menace?' 2013 *George Washington Law Review* 856 (he has concerns *re* the United States' Consumer Financial Protection Bureau – hereinafter 'CFPB').

[120] Hadjiemmanuil (n 117) 142.

[121] *Idem* at 142-143.

[122] *Ibid*.

Regulators are known to make deliberate pre-emptive efforts to ameliorate the outcomes of *ex post* accountability mechanisms in their favour:

> 'The threat of judicial review, considered on its own, might be expected to act as a significant constraint on a regulator like OFTEL, and certainly there is evidence of such a constraining influence, found particularly in the way that major decision processes are built up with a clear eye on being able subsequently to demonstrate the fairness, rationality and legality of such procedures, and in some instances with frequent trips to counsel to seek opinions on how to draft policies in such a way as to be "judge-proof".'[123]

Similarly, Cynthia Farina reports on the effect that provisions in the administrative law of the United States, specifically the Administrative Procedure Act, had on the National Highway Transportation Safety Administration.[124] Even though the scheme was founded on sound principles and objectives, such as openness, answerability and reasonability, the specific application thereof in the above situation did not have the desired outcome.[125] In fact, the outcome was adverse in the sense that it caused the regulator to alter its means of regulation – from pre-emptive to responsive.[126] This strategy was in contrast with its developmental mandate,[127] but the Regulator was repeatedly defeated during judicial reviews because the courts evaluated rationality in the current milieu of 'the *status quo*'.[128] Another aspect that is problematic, and which I deal with in more detail when I discuss comprehensiveness of accountability regimes is the matter of adequate and meaningful assessment.[129] Competent or efficacious regulatory conduct and performance are challenging aspects to evaluate,[130] but an assessment mechanism is nevertheless a pre-requisite for accountability.[131] Specific aspects amenable to assessment included in the contents of regulators' acts when exercising

[123] Scott 'Accountability in the regulatory state' (n 39) 55. See also Bird (n 9) 751 stating that comprehension in this manner motivates compliance with certain values: 'A regulator's knowledge that its actions will be subject to intense and public scrutiny through the parliamentary committee system provides incentives to ensure that its actions are justifiable and explicable.'

[124] Farina (n 25) 491-492. At 492, she notes that '[t]his is an administrative law regulatory failure – an instance when a rational-seeming set of legal principles about how agencies should go about making rules, and then justifying their regulatory judgments to a reviewing court, produced an irrational result in a particular context'.

[125] Farina (n 25) 491-492.

[126] *Ibid*. See Farina (n 25) 492: 'So what happened? NHTSA [National Highway Transportation Safety Administration] simply stopped making rules. It stopped regulating *prospectively* to change automobile design in advance, and started regulating *reactively*, by recall.' Original emphasis.

[127] Farina (n 25) 492: 'NHTSA's regulatory mission is "technology-forcing" – to push the automobile industry to develop designs and manufacturing methods that will make vehicles safer.'

[128] Farina (n 25) 492.

[129] See in particular Bird (n 9) 745; Scott 'Evaluating the performance and accountability of regulators' (n 1) 362.

[130] Scott 'Evaluating the performance and accountability of regulators' (n 1) 362-363; Bird (n 9) 745. See in general Coglianese *Measuring Regulatory Performance Evaluating the Impact of Regulation and Regulatory Policy* Expert Paper No. 1.

[131] Scott 'Evaluating the performance and accountability of regulators' (n 1) 361; Bird (n 9) 746-747.

regulatory powers, are the feats of constructing rules, supervising same and inducing compliance with these standards:[132]

> 'Holding regulators to account for the substance of their actions in making rules, or in monitoring and enforcing them, is less common and more challenging. It requires us to ask more difficult questions about how effective the regulator is and how they can demonstrate the quality and effectiveness of what they do. The challenge for accountability is simultaneous to address technical weaknesses (substantive outcomes) and the fragile democratic legitimacy of regulation.'[133]

This does not mean that no performance indicators exist[134] as some jurisdictions have designed performance indicators for their regulators.[135] The Australian system, for example, became privy to six general markers against which their conduct and accomplishments are evaluated, which initiated discussions on further regulator-specific progress in this regard.[136] I focus primarily on the mechanisms of accountability in this thesis – particularly in respect of the South African regime – although accountability in respect of substantive matters is needed to complete the answerability scheme (as was indicated earlier in this paragraph) – in this regard, the following comment by Cary Coglianese:

> 'Regulatory policy is, after all, itself a type of regulation – a way of "regulating the regulators" … or of what can be called "regulation inside government" … The aim of regulatory policy, as with any regulation, is to change behaviour to improve outcomes, with the only difference being that the behaviour sought to be changed by regulatory policy is that of the regulatory institution or its members. Given the similarity in the causal logic of both regulation and regulatory policy, anything that can be said about evaluating regulation will apply to regulatory policy.'[137]

[132] Scott 'Evaluating the performance and accountability of regulators' (n 1) 361.

[133] *Ibid*.

[134] In 2011, Bird (n 9) 744 referred to ASIC (the Australian Securities and Investments Commission – hereinafter 'ASIC') and APRA (the Australian Prudential Regulation Authority) and noted that 'no one has come up with the perfect key performance indicators … for these regulators'. In 2014, the Australian government introduced 'KPIs [key performance indicators] [that] apply across the whole spectrum of regulatory oversight' – see Gilligan *et al* 'Regulating by numbers: the trend towards increasing empiricism in enforcement reporting by financial regulators' 2015 *Law & Financial Markets Review* 260 266. See also Australian Government *Regulator Performance Framework* 2014.

[135] See Gilligan *et al* (n 134) 266-267; Financial Conduct Authority (United Kingdom) 'Measuring our performance', https://www.fca.org.uk/about/measuring-our-performance. However, Scott reports that '[t]he OECD's work on the assessment of regulatory performance has found that there are few functioning examples of regimes available and that the task of evaluating regulatory performance is extremely challenging' – see Scott 'Evaluating the performance and accountability of regulators' (n 1) 362-363.

[136] Gilligan *et al* (n 134) 266. These are 'outcome-based' parameters and can be found, together of an explanation thereof, in the Australian Government (n 134) 4.

[137] Coglianese (n 130) 13 – see also 10 for a definition of 'regulatory policy'. Evaluation markers have an important niche in the regulatory answerability framework as they aid the validation of regulators and concretisation of developments and advancements – see OECD *Regulatory Policy Committee Indicators of Regulatory Management Systems 2009* Report 2009 10 (in the context of 'Regulatory indicators'); Coglianese (n 130) 13; Hüpkes *et al* (n 12) 7. See also Scott 'Evaluating the performance and accountability of regulators' (n 1) 362 *et seq.*

3. ACCOUNTABILITY-ENHANCING MEASURES

3.1. Mandate-orientated measures

3.1.1. Introduction

The mandate of the regulator must be apparent and precise – this is the point of departure to identify the ambit of the regulator's responsibilities and its performance in respect of the responsibilities for which it can be held accountable.[138] Certainty in respect of obligations and responsibilities enhances the efficacy and openness of answerability mechanisms.[139]

3.1.2. Challenges

I discussed the various options available in respect of the design of the regulatory institutional regime in a previous chapter.[140] One of the advantageous features of an uncomplicated structure is that it results in clear lines of accountability as the ability to transfer responsibility to another regulator is diminished.[141] However, a reliable manner of allocating obligations to specific entities has been evasive so far.[142] Solitary regulators do not *per se* advance efficacy in a manner that is more beneficial than various expert regulatory entities with identifiably delineated outcomes.[143] A framework with complicated policies and vague governmental imperatives can support a situation where an autonomous body will be able to direct its attention towards its own concerns.[144]

Accountability measures are further contextually dependent on the mandate of the regulator – a regulator is held accountable for its conduct referenced by the given mandate.[145] It becomes indispensable that an in-depth deliberation of proposed accountability measures is made as the imposition of such measures affects the professionalism and efficacy of the regulator and, in turn, the public interest.[146] There are expenditures associated with holding regulators to account and the positive and negative outcomes of answerability mechanisms may ultimately

[138] Hüpkes *et al* (n 12) 10; Goodhart *et al* (n 22) 156; Quintyn & Taylor (n 8); OECD *Policy Framework for Effective and Efficient Financial Regulation* (n 43) 17.

[139] Goodhart *et al* (n 22) 156.

[140] See par 3.4 of ch 2 *supra.*

[141] Goodhart *et al* (n 22) 152.

[142] See Goodhart *et al* (n 22) 155: 'There is no perfect way of demarcating responsibilities between regulatory agencies; there will always be problems at the boundaries.'

[143] Goodhart *et al* (n 22) 154.

[144] Spiller 'Politicians, interest groups, and regulators: A multiple-agency theory of regulation, or "let them be bribed"' 1990 *Journal of Law & Economics* 65 66: 'If policies were multidimensional, then Congressional interests might not be well defined, and delegation of regulatory authority might in itself provide substantial scope for regulators pursuing their own interests.' See also Hüpkes *et al* (n 12) 11, setting out the challenges associated with a variety of goals set for a single organization. See further Thatcher & Stone Sweet (n 22) 6.

[145] Goodhart *et al* (n 22) 156; Quintyn & Taylor (n 8). See also Hüpkes *et al* (n 12) 10, 13-14; Bird (n 9) 742.

[146] Bird (n 9) 744-745.

have counteractive implications for the system.[147] Regulators use resources allocated to them in order to meet their accountability obligations[148] and methods to ensure accountability can postpone the execution of the regulatory mandate.[149] The time taken to account to others, compliance with processes prior to taking certain steps and meeting the requisites for reports and analyses redirects the resources of the regulator.[150]

Specific examples of destabilising accountability factors include undermining the reassessment processes that 'second-guess' regulatory entities, evaluation by persons who do not possess the same measure of proficiency as the evaluated regulatory agency, and procedures that transfer the ultimate regulatory choices to entities that do not have the same level of openness as the evaluated agencies.[151] In addition, ambiguous and overlapping approaches and slow procedures are disadvantageous to the regulatory regime.[152]

Some authors have therefore noted that accountability measures can have a detrimental effect on the fulfilment of the regulator's mandate.[153] Bird notes that regulators expend resources during the course of answering to the different accountability forums and the allocation of these resources can delay outcomes, detract from the resources that can be directly implemented to effect the mandate or affect efficacy.[154] Farina uses the example of the United States' National Highway Transportation Safety Administration adapted to judicial review findings.[155] Others have noted the detrimental effect that the possibility of liability can have on the regulator and its personnel.[156]

3.1.3. Solutions

There are also benefits associated with a duly planned answerability regime because it can protect the regulator against mandate-orientated influences:

> 'Accountability is not only about monitoring, blaming, and punishment. It is also about enhancing the agency's performance. A properly structured system of accountability lays down rules for

[147] *Idem* at 745: 'We must understand the costs of accountability and accept that the gains from accountability will eventually be offset by losses.'

[148] Bird (n 9) 744-745. See also Public Protector *There are no heroes – Report of the Public Protector on an investigation into alleged abuse of power by the Director-General of the Department of Trade and Industry towards the former Commissioner of the National Consumer Commission* Report No: 1 of 2013/14 April 2013 50 par 10.3.1.

[149] Bird (n 9) 744-745.

[150] *Ibid*.

[151] *Idem* at 745.

[152] *Ibid*.

[153] See e.g. Bird (n 9) 744-745; Farina (n 25) 491-492; Quintyn *et al* (n 9) 10; Hüpkes *et al* (n 12) 28-29.

[154] Bird (n 9) 744 (in general), 744 (in respect of consultation procedures), 748 (in respect of review through courts and tribunals), 751 (in respect of parliamentary reporting duties), 752 (in respect of annual reports), 744 & 760 (in respect of regulatory impact statements).

[155] Farina (n 25) 491-492; par 2.3 *supra*.

[156] Quintyn *et al* (n 9) 10; Hüpkes *et al* (n 12) 28-29; Bird (n 9) 750; par 4.2 of ch 3 *supra*.

> subjecting the decisions and actions of the agency to review. As such, by reducing the scope for ad hoc or discretionary interventions, it potentially enhances the agency's performance. For example, a propertly structured judicial review sets parametres for the grounds on which agency decisions may be subject to challenge in the courts. An obligation to give periodic reports to the legislature protects senior management from being subjected to more frequent and deliberately vexatious questioning. Well-designed accountability can thus help to buttress the agency's independence.'[157]

Firstly, the authority, role and duties of regulatory entities need to be accurately described and unambiguous. [158] This is necessary for efficacious regulatory performance and answerability schemes.[159] The regulatory mandate needs to be set – embodied in a form that is disinclined to invite dispute.[160] An answerable entity can be identified with more certainty where the obligations of the regulator are discernible.[161] In this regard, the organisational scheme of the regulatory arena is an influential factor.[162]

Marc Quintyn and Michael Taylor, in their exposé of seven features of authentic answerability, highlight that a definite law-based foundation for the regulator is of cardinal value. [163] They recommend that the regulator draft an open declaration of aims and outcomes.[164] These aspects pertain to two of the seven features – the first being existential in nature and pertaining to the reality, duties and authority of the regulator; and the second being purposive in nature and pertaining to the envisaged outcomes to be generated by the regulator.[165] These attributes are both insightful and protective in the sense that, firstly, the role of the regulator is clarified for purposes of certainty and prevention of conflicting views

[157] Hüpkes *et al* (n 12) 8-9.
[158] Quintyn & Taylor (n 8); Goodhart *et al* (n 22) 152 ('Regulatory agencies are probably most effective and efficient when they have clearly defined, and precisely delineated, objectives and when their mandate is clear and precise') & 156 ('Accountability is likely to be more effective and transparent when it is clear precisely what regulatory agencies are responsible for … A clear internal management focus is more likely to be created when the objectives of the agency are clear and precise.')
[159] Goodhart *et al* (n 22) 152 & 156.
[160] Quintyn & Taylor (n 8)*:* 'Perhaps most important, the independent agency needs a *clear legal basis*. Its powers and functions should be set out, preferably by statute, to lessen the potential for disputes between the regulatory agency and other government agencies or the court system. The agency should also have a *clear, public statement of its objectives* – for example, preserving the stability of the financial system and the soundness of individual banks and protecting depositors and other financial services customers. A clear mandate makes it easier to measure the agency's performance against that mandate. A public mission statement protects the agency against claims by politicians and by the supervised institutions that it has not carried out its mandate.' Original emphasis.
[161] Goodhart *et al* (n 22) 152: 'Accountability of regulation might be more certain with a simple structure, if for no other reason than that it would be more difficult for different agencies to "pass the buck".' See also Hadjiemmanuil (n 117) 142: '[A]dopting a one-agency structure would automatically ensure much clearer lines of accountability for regulatory actions, since there can be no doubt as to where responsibility lies.'
[162] Hadjiemmanuil (n 117) 142. See further Goodhart *et al* (n 22) 156: 'There will be times when the objectives of regulation are in conflict; one of the issues to consider is what structure is most efficient at resolving conflicts. In a single agency, conflicts are internalised.'
[163] Quintyn & Taylor (n 8).
[164] *Ibid*.
[165] *Ibid*.

on the matter and, secondly, that safeguards are implemented to guard against varying interpretations and claims of failure to execute its duties.[166]

Goodhart *et al* recommend the following:

> '*The objectives of regulation need to be clearly defined and circumscribed.* Financial regulation should have only a limited range of objectives (more limited than consumers sometimes assume). In the final analysis, the objectives are to sustain systemic stability and to protect the consumer. The case for regulation depends on market imperfections and failures (especially externalities and asymmetric information) that, in the absence of regulation, produce suboptimal results and reduce consumer welfare. Regulation should not be overloaded with other and wider objectives, such as social outcomes. Effective and efficient regulation is difficult enough with limited objectives, and the more it is burdened by wider considerations, the more likely it is to fail in many of them.'[167]

Secondly, an aspect relevant to the delineation of the regulatory mandate is the proper allocation of responsibilities and expectations – not only in respect of different regulators if applicable, but also in respect of the other stakeholders in the regulated regime.[168] Goodhart *et al* write that it is important to ensure that the pressure on financial regulatory institutions to perform is 'kept to realistic levels' because unrealistic 'expectations' can have a number of adverse outcomes.[169] Demands that neglect to incorporate an understanding of the boundaries of regulatory intervention – such as a perfect score on elimination of unwanted outcomes – may result in regimes that are costly and overbearing, that humour careless consumers, and does not acknowledge the value of unsuccessful regulatory outcomes as 'disciplinary mechanism[s]'.[170]

The political sphere ordinarily has the duty to determine policy to be implemented by the regulator and discrepancies ought to be dealt with by politicians.[171] George Gilligan and his co-authors highlight some criticism against the Australian government insofar as limited direction is provided to regulatory authorities in respect of the 'balanc[ing of] their regulatory

[166] *Ibid*.

[167] Goodhart *et al* (n 22) 192. Original emphasis.

[168] Quintyn & Taylor (n 8): 'The agency's *relationships with the executive, legislative, and judicial branches* must be clearly defined. The issues on which, and the form in which, it must inform or consult the ministry of finance or seek its approval must be spelled out. The procedures by which the legislature holds the agency to account for using the powers delegated to it must be carefully defined. And its exercise of those powers should be subject to judicial review … Finally, for those rare occasions when the agency's independence must be overridden (during a financial crisis, for example), the *override mechanisms* and the circumstances in which they may be triggered must be defined.' See also Goodhart *et al* (n 22) 192.

[169] Goodhart *et al* (n 22) 192.

[170] *Ibid*.

[171] *Idem* at 157: '… the resolution of conflicting objectives involves judgments about important issues of public policy, and these judgments and decisions should be made at the political level, in a publicly accountable way.' In general, the OECD notes that the reality of various and varying policy goals is one of the reasons why state regulation of the financial sector is difficult – see OECD *Policy Framework for Effective and Efficient Financial Regulation* (n 43) 35.

objectives'.[172] Their research show that increased 'explicit' supervision and 'performance direction' is required from the administration.[173] If not properly delineated, mechanisms that involve ministerial interaction and reporting duties can have an undesirable effect on independence.[174]

Bird discusses a related manifestation in the form of a broadcasted manifesto styles as the Australian 'ministerial Statement of Expectation' and the 'regulator's Statement of Intent'.[175] The first document is the public embodiment of executive aspirations for regulatory performance and includes both political desires and the assessment standards for answerability purposes.[176] The second document is the reaction by the regulatory authority affected by the first document, which embodies both the strategic measures to achieve the stated government wishes and sets out the developed core performance markers as benchmarks for government evaluation.[177] She questions the value thereof for answerability purposes towards the executive branch of government, but does so based on the Australian experience, which was substantially flawed due to neglect of contents and because it was not contemporary.[178] The regulatory statements were supposed to set out specific performance indicators and only formulated a stated intention to develop same, whilst highlighting the challenges associated with determining material standards.[179] The assertions made in the Australian statements were unspecified, a reiteration in some ways and were not re-assessed as recommended (yearly or upon changed milieus such as appointments to the ministerial office).[180]

Thirdly, contradicting regulatory ideals have to be reconciled or managed.[181] This should be effected at the desired level, especially where interacting policies are at stake.[182] Regulatory

[172] Gilligan *et al* (n 134) 267.
[173] *Ibid* – the recommendation of the report that prompted this reference also referred to the provision of 'clearer guidance to regulators in Statements of Expectations and increase the use of performance indicators for regulatory performance'.
[174] Hüpkes *et al* (n 12) 4 & 25
[175] Bird (n 9) 755-756. The drafting and execution of these documents were recommendations in the Uhrig Report of John Uhrig titled 'Review of the Corporate Governance of Statutory Authorities and Office Holders – see Bird (n 9) 755. See also the criticism of another evaluation published in 2014 and referred to in Gilligan *et al* (n 134) 267, where it was recommended that the government should 'provide clearer guidance to regulators in Statements of Expectation'.
[176] Bird (n 9) 755.
[177] *Idem* at 755-756.
[178] *Idem* at 756.
[179] *Ibid*.
[180] *Ibid*.
[181] Goodhart *et al* (n 22) 157; Hüpkes *et al* (n 12) 10-11. Hüpkes *et al* write at 11 that this is not easily done within an answerability scheme (e.g. because it 'creates competing roles and responsibilities' and '[h]aving multiple objectives poses problems of prioritization and weighing when assessing the performance of the agency') but that it is nevertheless of cardinal importance to consider these aims when creating the scheme .
[182] Goodhart *et al* (n 22) 157.

agencies often end up making their own determinations, particularly where one entity has multiple mandates and the issues are 'internalised'.[183] This dilemma is ideally resolved at the political level.[184] Different specialist agencies are illustrative of a regime where the different policy objectives have been divided and addressed at the executive level.[185] As indicated above, ordinarily the bureaucracy drafts policy and the regulatory entity executes these policies.[186]

In conclusion, the regulator is accountable for its conduct and performance.[187] This extends the breadth of the regulatory realm and ranges from conduct and behaviour to achievements and outcomes.[188] As Bird puts it, 'they should be accountable for anything they do'.[189] However, regulators should also be accountable for anything that they do not do, but should have done.[190] Thus, the importance of an evident and delineated mandate becomes obvious again.[191]

Evident and unambiguous mandates must be effected by way of legislative stipulations and the communication of same styled in a declaration of aims.[192] The law is then set as the departure point to assess acts and accomplishments and the declaration informs critics of the true disposition of the institution in respect of its objects.[193] The Organisation for Economic

[183] *Ibid*.

[184] *Ibid*.

[185] Goodhart *et al* (n 22) 157 & 158-159.

[186] See par 2.2 of ch 3 *supra*; Mwenda *Legal Aspects of Financial Services Regulation and the Concept of a Unified Regulator* (2006) 26; Spiller (n 144) 65.

[187] Scott 'Evaluating the performance and accountability of regulators' (n 1) 353, 355 & 361; Bird (n 9) 742; Goodhart *et al* (n 22) 195. However, see also Spence's reference to 'dedication to mission [as] illustrating one form of ex ante structural control' and Metzger's reference (in the context of the CFPB) to 'programmatic accountability' – Spence 'Managing delegations ex ante: using law to steer administrative agencies' 1999 *The Journal of Legal Studies* 413 (I deal with his work in more detail in par 3.2.3 *infra*) 444 (he also notes at 444 that '[w]hile the 1935 Congress probably did not foresee the environmental challenge to hydroelectric licensing, it did create an agency that was able to stay the course in the face of that subsequent challenge'); Metzger 'Through the looking glass to a shared reflection: The evolving relationship between administrative law and financial regulation' 2015 *Law and Contemporary Problems* 129 148 (she states at 148 that 'though achieving greater accountability was an animating goal behind the CFPB's structure, the type of accountability sought was programmatic accountability to the substantive goals of consumer financial protection embodied in the statute rather than accountability to current national political leaders').

[188] See e.g. Scott 'Evaluating the performance and accountability of regulators' (n 1) 361; Bird (n 9) 742 & 745-747; Goodhart (n 22) 68.

[189] Bird (n 9) 742.

[190] Scott 'Evaluating the performance and accountability of regulators' (n 1) 361.

[191] Quintyn & Taylor (n 8); OECD *Policy Framework for Effective and Efficient Financial Regulation* (n 43) 18: 'Policy objectives provide a yardstick for measuring the effectiveness of government intervention and financial regulation and, as such, provide a framework for accountability. By specifying the expected outcomes of intervention, they help to measure the extent to which government and its administrative institutions have been successful in addressing identified market failures and identified broader economic and social.'

[192] Quintyn & Taylor (n 8).

[193] *Ibid*.

Co-operation and Development supports an approach that enables regulatory policy goals to be made known and to feature clearly in the responsibilities of regulatory entities.[194] Misconceptions of regulatory obligations and objectives are minimised,[195] and the views of the public stakeholders of the regulated sector structured.[196] Answerability can then also be enforced through demanded explication of non-performance on stated objectives.[197]

3.2. Compliance-driven measures

3.2.1. Introduction

The influence that politicians and the regulated industry can have on a regulator will not be dealt with again.[198] Nevertheless, it is useful to refer to Martin Lodge's description of 'drift' briefly.[199] The author identifies three forms of deviation by regulators that effect behaviour that does not conform to required conduct: '*agency drift*', '*bureaucratic drift*' and '*coalition drift*'.[200] His typing of drift highlights two important factors for this thesis when it is evaluated in light of comments made by other authors to whom I refer immediately hereafter. Firstly, deviation from the intended course of the regulator is benchmarked against the visions of the enacting regime of that specific regulator[201] and secondly, the factors that enable or encourage deviation can be internal or external to the agency.[202] This awareness is important because authorities contemplating delegation also consider elements of control to avoid scenarios of 'shirking'.[203]

[194] OECD *Policy Framework for Effective and Efficient Financial Regulation* (n 43) 19.

[195] See Quintyn & Taylor (n 8): '… to lessen the potential for disputes between the regulatory agency and other government agencies or the court system.' However, this approach does not guarantee aligned perspectives. See e.g. the comments of the presiding officer in *ABSA Bank Limited v Petersen* [2012] 4 All SA 642 (WCC) par 10 fn 6: 'Notwithstanding the courts' repeated deprecation of the demonstrated shortcomings in the wording of many of the Act's provisions, there is regrettably no evidence that NCR's [National Credit Regulator] mandate to review the legislation (s 16(1)(g)) is being carried out in a manner to bring about the obviously desired improvements.' A reading of section 16(1)(g) ('The National Credit Regulator is responsible to increase knowledge of the nature and dynamics of the consumer credit market and industry, and to promote public awareness of consumer credit matters, by … over time, reviewing legislation and public regulations, and reporting to the Minister concerning matters relating to consumer credit') does not infer that the Regulator is tasked with effecting legislative changes or influencing the Minister in a manner that effects same.

[196] OECD *Policy Framework for Effective and Efficient Financial Regulation* (n 43) 19.

[197] *Ibid*.

[198] See paras 2-4 of ch 3; paras 3.2.1, 3.2.2 & 3.3 of ch 2 *supra*.

[199] Lodge (n 71) 126.

[200] *Ibid*. Original emphasis.

[201] See the comments of Thatcher & Stone Sweet (n 22) 4 & Thatcher (n 22) 130.

[202] Lodge (n 71) 126.

[203] Thatcher (n 22) 130 & 139; Lodge (n 71) 126. See also Spruyt 'New institutionalism and International Relations' in Palan (ed) *Global Political Economy Contemporary Theories* (2013) 121 in respect of 'incomplete contracting theory', which recognises that the eventualities of a specific forthcoming situation cannot be foreseen in a comprehensive manner.

3.2.2. Challenges

I discussed the rationales for the creation of autonomous entities tasked with regulatory functions in a previous chapter.[204] One of the considerations that support a decision to create a regulator or delegate authority to a regulator is the political inclination to preserve the policies or strategies of a particular political party when its term of governance has prescribed.[205] '*[C]oalition drift*' occurs where an agency was established by a political predecessor and a political successor endeavours to alter the existing strategies infused by the departed party.[206] As a successful attempt in this regard would result in the regulator departing from its intended course of action, it would amount to 'drift' or 'shirking'.[207]

Thatcher and Stone Sweet's comment, although they write from the perspective of deviation motivated by intra-agency factors, is apt.[208] '[A]gency loss' occurs when the product of the regulatory entity's endeavours are not the same as those desired by the delegating authority.[209]

Apart from externally generated conflict, Thatcher, Stone Sweet and Lodge consider the potential for deviating behaviour motivated by the regulator itself.[210] Lodge expresses this phenomenon as '*bureaucratic*' and '*agency drift*'.[211] The first form is effected by the entity or administration itself through prejudicial application of rules and behaviour that would secure advantages for the agency, whether pecuniary through preferential allocation of funds or increased jurisdiction.[212]

This is noted by Lodge under the theme of accountability, but the contents reminds of the discussion in the previous chapter pertaining to the subjection of regulatory entities to

[204] See paras 3.2 & 3.3 of ch 2; par 2 of ch 3 *supra*.

[205] See par 3.3.2 of ch 2 *supra*.

[206] Lodge (n 71) 126: 'These involve … *coalition drift*, where the governing coalition seeks to move beyond the policy preferences established by the enacting coalition.' Original emphasis.

[207] Lodge (n 71) 126. See also Thatcher (n 22) 130 & 139.

[208] See Thatcher & Stone Sweet (n 22) 4: '[T]he extent to which an agent actually does generate outcomes that are "different from the policies preferred by those who [have] delegated power", is registered as an "agency loss".'

[209] Thatcher & Stone Sweet (n 22) 4. See also Thatcher (n 22) 129-130: 'For principal-agent models, IRAs [independent regulatory agencies] represent a prime example of delegation …The creation and design of IRAs are a matter of institutional choice. Principals, in this case elected officials, calculate the costs and benefits of regulation. They delegate because they find that agencies can perform functions useful to them to deal with pressures and problems. If they delegate, they also choose the formal institutional form (notably the powers delegated and controls imposed) that minimises "agency losses" arising from "shirking" (divergence from the preferences of IRA and its principals) or 'slippage' (institutional design causing IRA decisions to differ from those desired by principals).'

[210] Thatcher & Stone Sweet (n 22) 4; Thatcher (n 22) 130; Lodge (n 71) 126.

[211] Lodge (n 71) 126. Original emphasis. See Lodge (n 71) 126: 'These involve … *bureaucratic drift* by regulatory and bureaucratic authorities enforcing regulation through selective or biased attention, budget- and turf-maximising strategies.' Original emphasis.

[212] Lodge (n 71) 126.

influence by politicians where inadequate autonomy-protecting features resulted in the regulator adjusting its conduct in order to obtain certain benefits.[213] The second form accords with that discussed in previous chapters about the preference of the regulator to avoid attempts to direct its conduct, in accordance with the preferences of the delegating authority, in order to effect its own agenda.[214]

3.2.3. Solutions

David Spence writes that the prior legislative incorporation of specific matters and persons' views that have to be taken into account when making decisions is a manner of pre-emptive control as it forces certain perspectives into the ambit of the agency's considerations.[215] As such, the ultimate outcomes of decisions by agencies over which politicians do not have *ex post* authority, are still influenced by a method referred to as the 'structure and process hypothesis'[216] – this approach is brought about by the inherent problem posed by delegating to an independent institution: the ability to effect the discretion so delegated.[217]

Although Spence's analysis of the hypothesis through research into the conduct of the United States' Federal Energy Regulatory Commission shows that there are some challenges associated with this hypothesis, his research highlights aspects that need to be taken into account in order for the incorporated elements to be effective, rather than discrediting the hypothesis.[218] The hypothesis underscores the approach that indirect control can be effected by deliberately devising the missionary, organisational and resolution-making features of the independent agency in such a manner that these inherent characteristics will affect the conduct of the institution.[219] There are uncontrollable aspects that will still affect the decisions of the institution – such as the proficiency of expert employees (in effect 'technical

[213] See e.g. paras 3 & 4 of ch 3 *supra* (e.g. the discussion relating to 'budgetary independence' & renewal of tenure contracts).

[214] Lodge (n 71) 126: 'These involve *agency drift* by the regulated actor(s) through the evasion of control in the pursuit of self-interested action (potentially leading to "capture" of the regulatory regime).' Original emphasis. See also par 2.3 of ch 3 *supra*.

[215] Spence (n 187) 413 & 415-420.

[216] *Idem* at 414.

[217] *Idem* at 444.

[218] *Idem* at 414-415 & 444-446.

[219] *Idem* at 414 & 415-416. See Spence (n 187) 415: 'Put simply, the structure and process hypothesis states that while Congress cannot foresee many of the important policy decisions it delegates to the agency, it can use enabling legislation to shape the agency policy-making process in ways that influence subsequent agency policy decisions. These means of influence include (1) providing for interest group representation in the administrative process; (2) "stacking the deck" in favor of the interest groups supporting the original legislation (the "enacting coalition") by specifying how the statutory mandate will be implemented; and (3) structuring the agency so that it tends to favor particular interests ("autopilot" characteristics). These design decisions establish both ex ante predispositions in the agency and ex ante procedural rights for the enacting coalition, both of which can ensure that the enacting coalition's goals will be met in the agency policy-making process.'

expertise'), 'professional norms' and 'the relevant policy network'.[220] There are nevertheless specific features that can influence the manner in which agencies make their decisions – such as generating certain goals for the institution, allocating responsibilities to a specific chosen institution and requiring adherence to administrative rules such as transparency and participation.[221]

Jodi Freeman and Jim Rossi distinguish between agencies that '[share] regulatory space' and those where the division between institutions was deliberate:[222]

> 'This split enforcement regime appears to be the quintessential example of a situation in which coordination is not desirable. In this type of scheme, Congress seeks to divide a regulatory or policymaking function from an essentially adjudicatory or judicial function, often to promote values such as independence and impartiality in decisionmaking, though both roles stem from the same statute. If anything, the challenge posed by such delegations is keeping the functions separate.'[223]

3.3. Comprehensive accountability measures

3.3.1. Introduction

Scott submits that the question of answerability revolves around supervision and democracy.[224] There is a management component of accountability, which deals with the efficacy of regulation,[225] whereas a political component is engrossed with processes.[226] He forwards the notion that accountability entails 'both democratic and technical dimensions'.[227]

He makes a distinction between the outcomes of answerability methods, focusing respectively on the political and expert aspects of accountability.[228] In respect of the ordinary administrative focus of answerability, the outcomes of methods aimed at effecting accountability in this regard are procedural and thus evaluates the 'fidelity of regulators to

[220] Spence (n 187) 416-417.
[221] *Ibid*. However, see Spence (n 187) 445-446 where he notes that 'procedural controls' are not as effective unless they are 'sufficiently specific' and thus require some political 'foresight'.
[222] See also Freeman & Rossi 'Agency coordination in shared regulatory space' 2012 *Harvard Law Review* 1131 1188: 'Coordination instruments can control shirking (loosely defined to mean inaction) … by facilitating interagency monitoring as a supplement to direct congressional oversight. … the more robust consultation provisions ... allow agencies to 'lobby' each other to make sure important statutory goals are not ignored. …Likewise, interagency agreements can serve as proxy monitoring mechanisms for Congress.'
[223] Freeman & Rossi (n 222) 1145 & 1150.
[224] Scott 'Evaluating the performance and accountability of regulators' (n 1) 354.
[225] *Ibid* – specifically 'efficiency' and 'effectiveness'. See Hornby (n 74) 469 for the definitions of the aforementioned terms – 'efficiency' is defined as 'the quality of doing [something] well with no waste of time or money' and 'effective' is defined as 'producing the result that is wanted or intended; producing a successful result'.
[226] Scott 'Evaluating the performance and accountability of regulators' (n 1) 354.
[227] *Idem* at 353.
[228] *Idem* at 360.

their mandate, which would suggest addressing procedural weaknesses in their activities'.[229] Methods aimed at assessing the achievements of regulators, thus 'the outcomes of their activities', necessitate a differentiated approach.[230] In the latter instance, accountability requires display of the 'quality' and efficacy of the regulator.[231]

3.3.2. Challenges

The last-mentioned value-orientated approach integrates substantive performance assessment into the discussion concerning accountability.[232] It is not an easy feat, nor absolutely resolved.[233] A basic understanding of a successful accountability regime infers that public entities conduct themselves in a manner aligned with lawfulness and democratic preferences.[234] However, this approach is problematic as an enhancement of the merit of regulatory value judgments necessitates an expanded understanding of accountability.[235] The basic approach, notwithstanding incorporation of norms such as justness and reasonableness, strains to provide an acceptable scheme capable of resolving answerability challenges where regulatory conduct has a bearing on the broad population as opposed to individual interests.[236] An expanded perspective on an answerability regime incorporates further norms, such as transparency and economical worth.[237] Unfortunately, a normative system aimed at the material efficacy of answerability methods does not provide straightforward solutions for determination or quantification.[238]

It is challenging to determine, compute, and evaluate regulatory conduct in order to ascertain whether the content of the regulator's conduct is correct and sufficient.[239] Bird highlights a few challenging aspects of regulators, albeit within the contents of the Australian Securities and Investments Commission.[240] She notes that it is problematic to ascertain the level of positive 'substantial' performance in instances where the regulator has an extensive directive

[229] *Ibid*.
[230] *Ibid*.
[231] *Idem* at 361.
[232] *Idem* at 360-361 *et seq*.
[233] *Idem* at 361; Bird (n 9) 745-747. See also Scott 'Accountability in the regulatory state' (n 39) 42-43.
[234] Scott 'Accountability in the regulatory state' (n 39) 42-43.
[235] *Idem* at 43.
[236] *Ibid*: 'Even with the extension of juridical concerns to encompass rationality and fairness in decision making, and thus concerns to improve the quality of discretionary decisions, this narrow model is also very weak at holding public bodies to account for decisions which affect the collectivity, but have little bearing on the welfare of any individual.'
[237] Scott 'Accountability in the regulatory state' (n 39) 43.
[238] *Ibid*. Furthermore, and apart from the challenges to value the 'effectiveness' of answerability methods, the variances between those requisite attributes of specific regulatory regimes ('the conflict between desired values') are not considered by such a system – see Scott 'Accountability in the regulatory state' (n 39) 42-43.
[239] See e.g. Bird (n 9) 745-747.
[240] Bird (n 9) 745-747.

insofar as the directive encompasses diverse (and contrasting) objectives – in this case, the dual quests of 'business facilitation' and 'consumer protection'.[241] A mandate that includes a wide range of obligations together with plenteous regulatees, is challenging in itself.[242] The resource capacity of the regulator is indicative of its abilities and is a restrictive and influential factor that has to be considered when the regulator is assessed.[243] As such, the entity further delineates its activities in accordance with what is feasible.[244]

Various methods enable quantitative assessments, but the qualitative value thereof is debatable.[245] Impressive statistical analysis, such as compliance induction actions taken, positive outcomes in respect of the latter or the turnaround times for processing registrations, may not necessarily indicate peak performance.[246] High levels of compliance-related actions may be indicative of poor pre-emptive capabilities as opposed to an efficacious regulator.[247] Positive outcomes in respect of compliance imposition may point towards clear-cut case selection as opposed to skilful enforcement capabilities.[248] Short turnaround times may be indicative of undemanding procedures as opposed to efficacy in processing same.[249] Requesting evaluative information from the regulated industry also poses challenges as positive expression are not necessarily suggestive of proper performance but may be

[241] *Idem* at 745. See Goodhart *et al* (n 22) 155. See also e.g. ss 11 & 12A of the Australian Securities and Investments Act (Act 51 of 2001).

[242] Bird (n 9) 745-746. She notes at 745-746 that the Commission 'has an incredibly broad area of responsibility. It regulates corporations, consumer credit, financial markets and financial services. This brings with it responsibility for 1.84 million companies, 4883 Australian financial services licensees, 17 licensed financial markets, 5 licensed clearing and settlement facilities, 5114 company auditors, 669 registered liquidators, 4270 registered managed investment schemes and 6081 credit licensees'. See s 12A(1) of the Australian Securities and Investments Act for a list of the statutes that empowers and authorises it to act. See also *Fit for the future – A capability review of the Australian Securities and Investments Commission* A report to government December 2015 12 (in respect of legislation for which it is responsible) and 101 (stating that the workforce approximated 1 600 people in 2014-2015).

[243] Bird (n 9) 746.

[244] *Ibid*: 'Amongst these areas of responsibility, ASIC must decide what regulatory activities it considers most important and allocate resources accordingly. It would be unrealistic to expect it to supervise each and every one of these entities, to prevent every breach of the law by these entities or to even respond to every breach of the law of which it becomes aware. In this environment, where the regulator has to make judgment calls about what it can achieve with its limited resources, it is difficult to measure performance.' In this regard, see also Hüpkes *et al* (n 12) 10-11.

[245] See the observations made by Bird (n 9) 746 as well as Gilligan *et al*'s reference to the US Securities and Exchange Commission's dedication to authentic data for quantitative analyses – see Gilligan *et al* (n 134) 265 and that the idea behind increased quantitative reporting is to enhance efficacy in evaluation, which is not necessarily attained – see 269.

[246] Bird (n 9) 746.

[247] *Ibid*.

[248] *Ibid*.

[249] *Ibid*.

symptomatic of industry capture.[250] The counteractive elements in opposing mandates may complicate the assessment of performance by segments of the regulated industry.[251]

Likewise, Scott notes that the knowledge of quantitative assessments can side track regulators to pursue numerals and activities that would result in favourable statistics, as opposed to its mandate and qualitative results.[252]

3.3.3. Solutions

An aspect to consider is those towards whom accountability is owed.[253] Hüpkes *et al* argue that the conventional view of the principal-agent relationship as consisting of only two parties is not relevant for financial regulatory authorities as there are a variety of affected and interested partakers in the regulatory regime.[254] The hierarchical scheme does not suffice for a milieu where regulatory conduct influences business agreements and property rights.[255]The delegating (governmental) authority may enjoy superior standing, but provision needs to be made for other participants in the accountability framework.[256] In doing so, 'vertical' and 'horizontal' components are relevant parts of the framework, resulting in '360 degree accountability'.[257]

Goodhart *et al*'s versions of accountability also reflect on the identity of those to whom the regulator is accountable. [258] Scott differentiates between the assessors, but does so in accordance to the echelon *vis-à-vis* the regulator.[259] He refers to a variety of classifications made by different authors similarly based on the level of the entity or person to whom the regulator is answerable.[260] The topmost ranking entity is the 'higher authority' according to Scott, also typified by others as 'Parliamentary control and judicial and quasi-judicial review'.[261] The equal ranking entity is the 'broadly parallel institution', also typified as 'constituency relations and managerialism'. [262] The last category is the 'lower level

[250] *Ibid*.
[251] *Ibid*.
[252] Scott 'Evaluating the performance and accountability of regulators' (n 1) 367.
[253] See par 2.3 *supra*.
[254] Hüpkes *et al* (n 12) 18.
[255] *Ibid*.
[256] *Ibid*.
[257] *Ibid*.
[258] Goodhart *et al* (n 22) 69.
[259] Scott 'Accountability in the regulatory state' (n 39) 42.
[260] *Ibid*.
[261] *Ibid*, referred to as 'upwards accountability'. See also Scott 'Evaluating the performance and accountability of regulators' (n 1) 360 categorising 'courts, legislature, and ministers' hereunder.
[262] Scott 'Accountability in the regulatory state' (n 39) 42, referred to as 'horizontal accountability'. See also Scott 'Evaluating the performance and accountability of regulators' (n 1) 360 categorising 'other regulatory agencies such as ombudsman, supreme audit institutions, and information regulators' hereunder.

institutions and groups (such as consumers)'.[263] The various levels of answerability are intertwined, resulting in a multifaceted domain.[264]

The two clusters of interested parties that I referred to on a previous occasion, namely government and the industry, are the two basic groups towards whom the regulator is accountable.[265] In respect of 'political' answerability, the recipients are the politicians staffing the executive, the legislature or additional entities established in terms of the democratic process.[266] This form of answerability ultimately siphons through to realise accountability towards the electing population.[267] The regulator is then also answerable towards the judiciary in respect of compliance with the law, including legal norms of reasonability, justness and lawfulness.[268]

There is another way of identifying the features of accountability in order to cover all the aspects of this concept.[269] A distinction can be made between the elements relating to the operational and strategic conduct of the regulator, and the contents of its actions.[270] In other words, the manner in which the regulatory agency administers its pecuniary resources, the processes that it follows in order to execute its regulatory duties, and adherence to the substantiating values of neutrality, righteousness, and lawfulness, are subject to scrutiny.[271] The reasons for this are that the organisation is expending public funds and executing public authority.[272]

[263] Scott 'Accountability in the regulatory state' (n 39) 42, referred to as 'downwards accountability' – 'market mechanisms'. See also Scott 'Evaluating the performance and accountability of regulators' (n 1) 360 categorising 'regulatees and ... intended beneficiaries of a regime' hereunder & Scott 'Accountability in the regulatory state' (n 39) 48-49, also describing those industry-based answerability methods as 'the neo-liberal model of accountability'. Neo-liberalism rejects political regulatory intervention and supports industry configuration through non-public enterprise direction aimed at turnovers and returns (see Hornby (n 74) 989). The methods that are affiliated with this form of answerability include 'league tables' (this is a format that qualifies the functioning/conduct/accomplishments of contrasted entities relative to each other – see Hornby (n 74) 845), obligatory 'quality standards' and 'the introduction of capital market disciplines through privatization' – see Scott 'Accountability in the regulatory state' (n 39) 49. Clear principles do not feature in this form of accountability, particularly as competitive behaviour has dictated the substance or focus of answerability mechanisms – see Scott 'Accountability in the regulatory state' (n 39) 49.

[264] Scott 'Accountability in the regulatory state' (n 39) 49. See also Scott 'Evaluating the performance and accountability of regulators' (n 1) 360.

[265] Bird (n 9) 742.

[266] Scott 'Accountability in the regulatory state' (n 39) 42.

[267] *Ibid*; Bird (n 9) 742.

[268] Scott 'Accountability in the regulatory state' (n 39) 42.

[269] Bird (n 9) 743.

[270] *Idem* at 742: '… financial accountability, procedural accountability and substantive accountability.' She refers to the work of Ogus in this regard,

[271] Bird (n 9) 742.

[272] *Idem* at 741 & 742.

3.4. Forms of accountability[273]

3.4.1. Robust forms

I referred to Bird's typology of 'strong' and 'weak' answerability methods earlier.[274] Her distinction is based on the reactive nature of the mechanism: a lack of deliberate measures in a particular regime subsequent to conduct evaluation is considered 'weak' methods whereas the presence of such measures denotes 'strong' methods.[275]

In a preceding chapter, I dealt with the reasons for the establishment of independent regulatory agencies.[276] Autonomous entities can be founded as a strategy to dissociate governments from controversial policy choices.[277] Bird argues that the incentives to establish robust answerability measures decrease where this is the motivating factor underlying the establishment of the independent regulator.[278] Robust methods signal obligation on the side of the establishing party for the conduct of the autonomous entity.[279] A specific example sourced from Australian law is found in the different outcomes of reassessment of regulatory actions by the courts and tribunals respectively.[280] The judiciary refers the matter to the original decision-making authority upon finding that the necessary authority or just processes were lacking.[281] The regulator is then ordered to reconsider the matter in a manner that complies with the requisite legal provisions and principles.[282] Tribunal outcomes result in substitutive resolutions, thus the order replaces that of the regulatory authority if the latter is found wanting.[283] The former is considered a 'weak' means and the latter 'strong' by Bird, as the tribunal re-joins by restyling regulatory actions.[284]

[273] Hüpkes *et al* (n 12) 20 define some additional forms of accountability, which I do not deal with specifically under this subheading: '**Procedural** accountability refers to requirements imposed on the process to be followed by the accountee when taking action, for instance, due process rules. **Substantive** (or **functional**) accountability seeks to make sure that regulatory and supervisory actions are justifiable in terms of the objectives to be pursued. **Personal** accountability refers to the discharge of responsibilities delegated to individuals … **Financial** accountability refers to the presentation of proper financial statements. **Performance** accountability refers to the extent to which (measurable) objectives and criteria are met.' Original bold print.

[274] Bird (n 9) 741. See also the criticism of the court in *Helen Suzman Foundation* (n 11) in respect of the limited authority of Parliament – see e.g. par 4 of ch 3 *supra*.

[275] Bird (n 9) 741.

[276] See paras 3.2 & 3.3 of ch 2 *supra*.

[277] Bird (n 9) 744; par 3.2 of ch 2 *supra*.

[278] Bird (n 9) 744.

[279] *Ibid*.

[280] *Idem* at 747 & 748.

[281] *Idem* at 747.

[282] *Ibid*.

[283] *Idem* at 747 & 748.

[284] *Ibid*.

Likewise, measures that allow for civil or criminal culpability are robust answerability means because provision is made for sanctions and remedial action where regulatory behaviour does not conform to expected norms or statutory provisions.[285] On the other hand, mandatory reporting to government divisions are viewed as 'weak' measures as any discontent can only be expressed by way of 'political' manipulation or unenforceable advice to the regulator.[286] Discharge of an executive member of staff is an example of a robust form of answerability.[287]

Hüpkes *et al*'s distinction between 'explanatory' and 'amendatory' answerability relates to this topic to some extent.[288] They differentiate between forms that provide for explication and motivation of regulatory conduct and forms that compel remedial steps following shortcomings in policy or regulatory directives.[289]

3.4.2. Anticipatory versus reactionary forms

Methods for accountability can be classified as either '*ex ante*' or '*ex post*',[290] although both features may be present in a single system.[291] Anticipatory forms are pre-emptive in nature insofar as these methods precede significant regulatory decisions or conduct, and from a delegation-perspective, it allows the principal to obtain information and present it with opportunities for pre-action intervention.[292] These forms require accounts prior to regulatory

[285] *Idem* at 749.

[286] *Idem* at 751.

[287] *Idem* at 761.

[288] Hüpkes *et al* (n 12) 19 define these as follows: 'The duty to answer or explain is captured in the notion of **explanatory** accountability, which requires the giving of reasons and the explanation of actions taken. The obligation to redress grievances by taking steps to remedy defects in policy or regulatory rule making can be termed **amendatory** accountability.' Original bold print. See also Thatcher & Stone Sweet (n 22) 5; Scott 'Accountability in the regulatory state' (n 39) 39.

[289] Hüpkes *et al* (n 12) 19.

[290] *Ibid*: '**Ex ante** accountability refers to reporting before action is taken, for instance, consultations with the stakeholders on supervisory and regulatory policies. **Ex post** accountability refers to the reporting after action has been taken, for instance, the submission of annual reports to parliament.' Original bold print. See Curtin 'Holding (quasi-) autonomous EU administrative actors to public account' 2007 *European Law Journal* 523 525: 'An example of *ex ante* accountability is where the principal selects (or is involved in the selection of) the agents or where the consent of the principal is required in order for a decision of the agent to be final. *Ex post* accountability mechanisms are generally regarded as consisting of two categories of requirements—those relating to monitoring and reporting and those relating to a catch-all category: (additional) institutional checks and balances.' & 531 'This is the public accountability model that has been presented by Bovens and it shifts the focus only to the *ex post* level of analysis. Of course a classic delegation model of accountability will traditionally also include some *ex post* mechanisms of accountability but they are never the only focus (*ex ante* mechanisms and ongoing controls are also part of the delegation model). Once one adopts Bovens's definition then the fact that the actors are 'agents' is not salient; rather they can be viewed as (administrative) actors that will be held to account. The (multiple) forums do not then have to exist in a relationship of delegation with the actors: they are not the (original) principals; they are autonomous accountability forums existing in a social relationship with the (administrative) actor.'

[291] Thatcher & Stone Sweet (n 22) 4; Bendor *et al* 'Theories of delegation' 2001 *Annual Review of Political Science* 235 246; Scott 'Accountability in the regulatory state' (n 39) 39.

[292] Bendor *et al* (n 291) 246.

activity including interacting with affected parties in respect of schemes and strategies.[293] Methods that involve mandatory dissemination of information through consultation processes and validation of decisions by the regulator allow for the exposition of regulatory intent.[294] On the other hand, reactionary forms revolve around accounts on past conduct and include yearly testimony to legislatures.[295]

The former is held by some authors to be more effective than the latter as mechanisms that only become effective after the controversial act may not be feasible.[296] Specifically, where certain outcomes are advantageous to some principals, the necessary steps will not be taken to adjust regulatory behaviour notwithstanding the divergent conduct.[297] The delegating authority monitoring developments can contest the implementation of a particular course of action prior to its inception where anticipatory mechanisms are availed.[298] This approach denotes one of two administrative processes that is categorised as 'information revelation by the agency'.[299] Nevertheless, the pronouncement of intent can have different outcomes.[300] It may enable the delegating authority to intervene where the envisaged behaviour is displeasing and preserve the *status quo* or it may not have an empowering effect where other principals endorse the behaviour of the agent.[301] The public may become aware of the principal's attempt to retain a specific condition.[302] A further complication manifests where the regulatory entity is unable to adjust to changing environments due to restrictive determination processes.[303]

The other approach strengthens the hold of the delegating authority over the regulatory agency.[304] Specified role-players' perspectives have to be accommodated or specific criteria had to be followed when making regulatory determinations.[305] The *locus standi* of participants may be pre-determined and the onus of proof can be pre-disposed to safeguard

[293] Hüpkes *et al* (n 12) 19; Bendor *et al* (n 291) 246.
[294] Bendor *et al* (n 291) 246.
[295] Hüpkes *et al* (n 12) 19.
[296] Bendor *et al* (n 291) 246. These authors discuss anticipatory and reactionary forms in substantive detail, but they do so in the context of variables that affect the fundamental 'delegation-of-action model' – see Bendor *et al* (n 291) 244.
[297] Bendor *et al* (n 291) 246.
[298] *Ibid*.
[299] *Ibid*.
[300] *Idem* at 246-247.
[301] *Idem* at 247.
[302] *Ibid*.
[303] *Ibid*.
[304] *Idem* at 246.
[305] *Ibid*.

certain stakeholders.[306] In this manner, the agent's setting and preferences remain liaised with that of the principal.[307]

Delegation ordinarily results in discretion, which could result in regulators' deviating from the concerns of the authorities that initially granted the discretion in order for the regulators to achieve the outcomes that the authorities favoured.[308] A variety of factors contributes to this phenomenon, including the overriding concern of the regulator for its own welfare and priorities.[309] Some sources note that discretion is necessary in order to achieve successful outcomes, such as actions tailored to specific situations.[310] Others are of the opinion that discretion only manifests when and where an agent's conduct or preferences diverge from that of the delegating party.[311]

The authority contemplating delegation also takes into account the possibility of undesirable behaviour on the part of the regulatory agency[312] and therefore decides on a specific structure that incorporates the capacities bestowed on the agent as well as the oversight mechanisms.[313] In order to limit the deviating behaviour, the delegating authorities can bestow narrow authority on the regulator, continuously supervise, or sanction the entity.[314] An example is the allocation and re-assessment of pecuniary bequests on regulators.[315] Supervision during the pre-determination phase occurs when the specific amount to be allocated to the regulator is calculated whilst post-allocation assessment occurs when the financials of the regulator is evaluated.[316] Legislative constructions or alterations of specifications pertaining to the 'legal

[306] *Ibid*.

[307] *Ibid*.

[308] Thatcher & Stone Sweet (n 22) 4. See also par 3.3 of ch 2; par 2 of ch 3 *supra*.

[309] *Ibid*.

[310] *Ibid*.

[311] See Bendor *et al* (n 291) 245 referring to Calvert *et al*: 'Their model of appointment also suggests an interesting reconceptualization of agency discretion. That an agency sets policy without direct interference from politicians "does not constitute agency discretion. Rather, agency discretion occurs when the agency succeeds in choosing a policy in line with agency goals, when these goals *differ* from what the executive and legislature expected *at the appointment stage*".' Original emphasis.

[312] Thatcher & Stone Sweet (n 22) 4-5.

[313] *Ibid*; Thatcher (n 22) 139.

[314] Thatcher & Stone Sweet (n 22) 4.

[315] Quintyn & Taylor (n 8).

[316] *Ibid*. However, see the opinion of Quintyn *et al* (n 9) 15: 'To maintain agency independence, financial accountability should generally be limited to ex post budgetary accountability, which focuses on a review of the annual accounts and balance sheets by independent auditors to determine whether there has been proper financial management, whether the authority is managing its resources in an efficient way, and whether financial reports represent a true and fair view.'

basis on which' regulatory authorities conduct themselves, can be either anticipatory or reactionary mechanisms to effect accountability.[317]

Lodge's search for solutions to the dilemma of narrow focuses of accountability regimes,[318] leads him to make a division similar to the theme under discussion – 'input-oriented' and 'output-oriented' mechanisms.[319] The former addresses the substantive value of regulatory intervention whilst the latter deals with the outcomes of regulatory action.[320]

3.4.3. Official and unofficial forms

'Formal' measures include answerability towards politicians, the legislature and/or the judiciary.[321] Thatcher observes that official procedures following regulatory action are not necessarily a common occurrence as some sectors have seldom experienced the discharging of regulators or governmental counteraction of regulatory pronouncements.[322] Unofficial measures are more often used, in that the regulatory agency and bureaucratic entity communicate frequently.[323] Ordinarily, authority structures prefer to effect managerial pressure through unofficial schemes and interaction aimed at inducing desired conduct.[324] Autonomous entities also subject themselves to 'a type of self-censorship' of a bureaucratic nature, through which they remain conversant in respect of the preferences, desires and perspectives of government and gauge the stances of the delegating authority on prospective policy propositions.[325]

Quintyn and Taylor propose that unofficial accountability measures must be augmented with official processes and note that adequate answerability mechanisms require equalisation.[326] It

[317] Hüpkes *et al* (n 12) 22. The aforementioned authors note the following aspect at 22 (although they recommend at 20 that the legislature should not have 'immediate powers' that enable Parliament to 'interfere directly' with the work of the independent authority – in the stead, this particular branch's ability to effect oversight should be limited to 'its law-making powers' which still enables it to have a 'direct' impact by modifying the legislative scheme): '**Overseeing implementation of legislation.** As a corollary to the law-making process, certain oversight functions are vested in the legislature. The object of the oversight is to ensure that public policy is administered in accordance with the legislative intent. In this way, the legislature should be able to keep control over the laws that it passes. By monitoring the implementation process, members of the legislature may uncover any defects and act to correct misinterpretation or misadministration.'

[318] See par 3.3 *supra*.

[319] Lodge (n 71) 129.

[320] *Ibid*: '[I]nput-oriented tools … [are] those aimed at enhancing the quality of the process of regulatory decision-making and regulated service provision, and output-oriented tools … facilitate the evaluation of provided regulation and regulated services.'

[321] Scott 'Accountability in the regulatory state' (n 39) 40; Thatcher (n 22) 139.

[322] Thatcher (n 22) 139 & 140.

[323] *Idem* at 139. Quintyn & Taylor (n 8) refers to this as 'a kind of "dialogue model"'.

[324] Thatcher (n 22) 139: 'Thus, focusing on formal controls appears to be inappropriate; less formal networks of influence and linkages are the usual means whereby governments and legislatures have sought to control their agents.'

[325] Quintyn & Taylor (n 8).

[326] *Ibid*.

is observable from their suggestions that the foundations of the mechanisms ought to be explicit and formulated or firmly embedded in legislation: the establishment of the regulator, its mandate, its affiliation and interaction with the three divisions of government, its human resource designation and allocation, the exercise of its regulatory discretion and negation of regulatory autonomy.[327] I deal with the specifics of the seven elements that they prescribe when I deal with the contents and mechanisms of accountability hereunder.

Scott presents models of 'extended accountability', embodied under the topics of 'interdependence' and 'redundancy'.[328] These schemes differ from conventional methods in respect of the interaction of the different components of the answerability scheme.[329] Customary methods develop systematically in a so-called 'linear' fashion whereas non-traditional forms do not.[330] Instead of a hierarchical system, these other forms harness and are characterised by a web of connections.[331] Additional forms of accountability mechanisms manifest as an accompanying scheme to that of conventional mechanisms.[332] The normative framework is supplemented, as are the responsible entities.[333]

Accountability is interactive, as seen from Scott's 'interdependence'.[334] The reliance of stakeholders and role-players on each other specifically compliments conventional accountability frameworks.[335] It can be classified as an unofficial form of answerability in that the methods implemented are not always officially structured political, legal or governmental accountability measures.[336] Instead, the sway that various performers has in respect of the diffusion of regulatory elements such as power (official and unofficial), knowledge, specialism and the ability to authenticate other players, results in a network of

[327] *Ibid*.

[328] These are the terminologies used by Scott 'Accountability in the regulatory state' (n 39) 48 *et seq*. For ease of reference, I will be utilising the same terms. The author mentions, but does not deal with, the function of public interest/non-profit/charitable entities or the media as accountability mechanisms – see Scott 'Accountability in the regulatory state' (n 39) 59.

[329] Scott 'Accountability in the regulatory state' (n 39) 54-55. The author discusses the 'fragmentation' of obligations and answerability in contemporary nations' regulatory regimes and holds that this is one of the rationales for a differentiated perspective on answerability – see Scott 'Accountability in the regulatory state' (n 39) 48.

[330] Scott 'Accountability in the regulatory state' (n 39) 49-50 & 54.

[331] *Idem* at 50.

[332] *Idem* at 48 & 50.

[333] *Idem* at 48.

[334] *Idem* at 50-52.

[335] *Idem* at 50.

[336] *Ibid*.

interrelated affiliations where partakers are held to answer in order to obtain access to the aforementioned elements.[337]

At its primary level, interdependence is the exchange of conduct valuation for benefits from other authoritative players who do not necessarily possess the formal means of demanding entities to answer for their actions.[338] The need for validation by a regulatory entity may encourage it to conduct itself in a specific manner in order to obtain the desired attribute, such as increased transparency in its actions, interactive measures and public awareness strategies aimed at informing others of its involvement in inquisitions and compliance-inducing activities.[339]

The interrelation scheme consists of partakers with authority or faculties that enable them to demand answerability of other partakers on a daily basis and in an intrusive manner.[340] The system is kept in an optimised state through the push-and-pull of contrasting strengths and frictions.[341] Various opposing components diverge in accordance with their interests, authority, processes and ethos.[342] As such, these components verify compliance with the principles that are central to the regulated sector.[343]

Modifications to the system can be effected through altering the various equilibriums that exist.[344]

> '[T]he various accountability networks which operate uniquely within each policy domain have the character of a complex system of checks and balances in which particular forms of behaviour are inhibited or encouraged by the overall balance in the system at any particular time. In practice it is

[337] *Ibid*: 'Interdependent actors are dependent on each other in their actions because of the dispersal of key resources of authority (formal and informal), information, expertise, and capacity to bestow legitimacy such that each of the principal actors has constantly to account for at least some of its actions to others within the space, as a precondition to action.'

[338] Scott 'Accountability in the regulatory state' (n 39) 50 & 51: 'But these less formal and more hidden accountability mechanisms extend well beyond the capacities of central government, extending potentially to any actors, public or private, within a domain with the practical capacity to make another actor, public or private, account for its actions … Indeed it may be that the simple monolithic structures presented as the welfare state model are too simple, that they disguise intricate internal and opaque webs of control and accountability that are functionally equivalent to the new instruments of the regulatory state, but are less formal and transparent.'

[339] Scott 'Accountability in the regulatory state' (n 39) 52.

[340] *Ibid*: 'Each of these other actors has powers or capacities which constrain the capacities of the others and require a day-to-day accounting for actions, more intense in character than the accountability typically applied within traditional upwards accountability mechanisms.'

[341] Scott 'Accountability in the regulatory state' (n 39) 52: 'This form of accountability, premised upon interdependence, is not linear, but more like a servo-mechanism holding the regime in a broadly acceptable place through the opposing tensions and forces generated.' See also Scott 'Accountability in the regulatory state' (n 39) 57.

[342] Scott 'Accountability in the regulatory state' (n 39) 57.

[343] *Ibid*.

[344] *Idem* at 52: 'Such a model creates the potential to use the shifting of balances in order to change the way the model works in any particular case.'

> possible to see numerous examples of "opposed maximizers" holding one another in check and how changes in one aspect of an accountability regime affects the overall balance.'[345]

However, intersecting measures can also detrimentally affect each other and does not necessarily function in a manner that enhances answerability.[346] The outcomes of court-based re-evaluation processes may enjoy high status and diminish the capacity of other mechanisms to effect accountability in respect of similar issues.[347] The ruling on a particular matter can be held as a benchmark to counter other inputs on the matter.[348] Therefore, the elevated credence of a specific organisation as a component of the network may result in a form of 'capture' of the regulatory system by that entity.[349]

The other perspective on expanded answerability draws on the phenomenon of redundancy.[350] Singular methods of answerability can overreach their domains and Scott's identification of redundancy validates the existence of multiple layers of covering and apparently unnecessary means of holding regulators to account.[351] Dual accountability measures, both which can exist and function individually or autonomously, are incorporated into a single system as countering safeguards in case of malfunction of one of the individual mechanisms.[352] This is an occurrence observed when transformation and accompanying threats are existent, causing a deliberate construction of overlying mechanisms into the answerability scheme.[353]

In addition to intentional construction of intersecting measures, redundancy can also be inadvertent.[354] Scott's depiction of the prison-system in the United Kingdom illustrates the potential value of intersecting measures to counteract capture of the regulator by the regulated entity.[355] Directors of 'contracted-out prisons', subject to various levels and forms of answerability, are also subjected to an in-house or 'on-site' regulator tasked with overseeing adherence to contractual stipulations and mandated to impose official penalties for

[345] Scott 'Accountability in the regulatory state' (n 39) 55. See Scott 'Accountability in the regulatory state' (n 39) 57.

[346] Scott 'Accountability in the regulatory state' (n 39) 55.

[347] *Ibid*.

[348] *Ibid*, referencing OFTEL: 'Following an unsuccessful action by BT to judicially review OFTEL's decision to introduce new controls on anti-competitive conduct, the Director-General of Telecommunications was able to see off the Public Accounts Committee's criticism of the licence modifications that would give him powers "to become prosecutor, judge and jury" …'

[349] Scott 'Accountability in the regulatory state' (n 39) 60. See also Ting 'A strategic theory of bureaucratic redundancy' 2003 *American Journal of Political Science* 274.

[350] Scott 'Accountability in the regulatory state' (n 39) 52.

[351] *Idem* at 52-53.

[352] *Idem* at 53.

[353] *Ibid*.

[354] *Ibid*.

[355] See Scott 'Accountability in the regulatory state' (n 39) 53-54 for a discussion of redundancy models in the United Kingdom and European Union.

non-compliance.[356] As such, the regulator is at peril of internalising the requirements and restrictions of the regulated entity.[357] The existence of other means of ensuring proper conduct increases the possibility that capture can be perceived.[358] This is a conventional understanding of redundancy.[359]

A ‘multi-level governance’ understanding is a further manifestation of this phenomenon.[360] It is an intentional manner of including multiple organisations in the affairs of a regulator, either through combined pecuniary contributions resulting in oversight by contributing parties or through shared legal authority due to ‘concurrent jurisdiction’.[361] This occurs in the European Union, for example, where national and *supra*national principles and entities have interests in the same regulatory matter.[362]

Notwithstanding the rationales for overlapping measures, the faults can still occur and the system can fail.[363] Multiple features do not guarantee a fail-safe scheme, as failure in one section can also affect other areas – Scott uses the example of information retention that affects one answerability mechanisms and subsequently has an adverse effect on the other mechanisms’ dependence on the concealed information.[364] The breakdown of different segments can be effected by this one issue.[365] In addition, whilst some degree of traversing methods can be advantageous, there comes a point when the overlapping does become unnecessary.[366] Another problematic issue is the restricted openness of political interactions and the limited public involvement.[367]

Scott’s discussion is aimed at providing solutions for a scheme that does not perform optimally due to shortcomings in its answerability measures.[368] He recommends the tactical change of existing equilibriums, thus ‘strategic intervention, through shifting of balances’.[369] Unfortunately, I have found that his contribution does not present practical solutions, but

[356] Scott ‘Accountability in the regulatory state’ (n 39) 53.
[357] *Idem* at 54.
[358] *Ibid*.
[359] *Idem* at 53-54.
[360] *Ibid*.
[361] *Idem* at 54.
[362] *Ibid*. Scott also foresees the manifestation of same in the United Kingdom with the developments in respect of the Scottish Parliament, Northern Irish and Welsh Assemblies – see Scott ‘Accountability in the regulatory state’ (n 39) 54: ‘In each of these jurisdictions new executives and parliamentary/assembly committees have the potential to develop and reinvent the parliamentary oversight already exercised over United Kingdom-wide or multi-jurisdiction public functions.’
[363] Scott ‘Accountability in the regulatory state’ (n 39) 60.
[364] *Ibid*.
[365] *Ibid*.
[366] *Ibid*.
[367] *Idem* at 58.
[368] *Idem* at 55.
[369] *Ibid*. See also his reference to ‘collibration’ at 57.

creates awareness of certain aspects that I have found valuable. As such, a couple of important considerations become applicable to this thesis. Firstly, the implications of a differentiated perspective of accountability measures denote a differentiated view of the fundamental principled framework for the regime – the official, ordinary regime is underwritten by values of justness, reasonability and rationality.[370] The unofficial, blended regime is not – the discerning features are disseminated points of authority and influences.[371] An eradication of contrasting elements is not necessarily appropriate, but keeping the system in a suitable equilibrium is important.[372] In order to adjust the regime's equilibrium, the authority to effect change or exert influence of one particular group can be enhanced, for example by facilitating the ability of a particular stakeholder group to partake in formal measures.[373]

Freeman and Rossi highlight the importance of the timing of input by other regulators.[374] They argue that the earlier the input is provided, the more likely it is that it would have a meaningful impact on the ultimate outcome.[375] Input as part of the coordination efforts of regulators advances the knowledge and competencies of the different institutions and increases the likelihood of rational, considered[376] and 'quality' choices.[377]

Another important distinction made by Freeman and Rossi is their differentiation and categorisation of the different forms of jurisdictional interaction between regulators.[378] They classify these forms as '*overlapping agency functions*', '*related jurisdictional assignments*' and '*interacting jurisdictional assignments*'.[379] The former refers to the situation where multiple agencies have jurisdiction over the same matter or function.[380] Relatedness of tasks is concerned with scenarios where the duties of the regulators differ but are 'closely related', and the last category refers to differing but intersecting matters where coordination and

[370] Scott 'Accountability in the regulatory state' (n 39) 49, 59-60.
[371] *Idem* at 55 & 59-60. See also Braithwaite & Drahos *Global Business Regulation* (2000) for an in-depth discussion of inter alia the 'webs of influence' and interconnectivity in the financial sector, specifically chs 4 & 23.
[372] Scott 'Accountability in the regulatory state' (n 39) 57.
[373] *Idem* at 58 – the author uses the example of 'enhancing access of prisoners to grievance handlers or judicial review'.
[374] Freeman & Rossi (n 222) 1195.
[375] *Ibid*.
[376] See Freeman & Rossi (n 222) 1184: 'The obligation to consult with other agencies, especially those with different missions, can also help pierce a closed decisionmaking culture and overcome group polarization effects by introducing viewpoints that do not identify with the dominant agency culture.' See also Vermeule 'Many-minds arguments in legal theory' 2009 *Journal of Legal Analysis* 1 in respect of multi-party decision-making.
[377] Freeman & Rossi (n 222) 1184.
[378] *Idem* at 1145.
[379] *Ibid*. Original emphasis.
[380] Freeman & Rossi (n 222) 1145.

cooperation are specifically required by the legislature.[381] Collaboration and cooperation are challenges in all these scenarios.[382]

In the scenario where the same matter is dealt with by separate institutions, Freeman and Rossi warn that the regulatory approaches and means, such as 'policymaking' and 'enforcement systems', can be developed independently by each regulator but that harmonisation or collaboration could have been sufficient and more efficient.[383] They note that the qualities that make each agency unique, such as 'expertise, resources, and remedial tools', can result in so-called 'redundancy' whilst not being 'literally duplicative'.[384] In this case, the institutions are responsible for clarifying their respective roles and

> '[t]he challenge, when faced with such delegations, is to enable the agencies to bring their relative competencies to bear while ensuring they do not pursue conflicting or incompatible policies, which would undermine the larger shared mission under the relevant statutes. Effective administration thus requires the agencies to coordinate to some extent on matters of both process and substance – for example, deciding who will take the lead on what and how aggressive to be against which potential violations of law using which standards of proof.'[385]

Matters that are distinct but regulated with the same outcome in mind may also be wrought by disharmonised policies, supervisory variations and inefficiencies when it comes to resource expenditure.[386]

Discord amongst regulators should ideally not be referred to political office holders as it may 'politicize the regulatory process'.[387] Eric Pan argues against so-called 'contact committees' where political and other regulators come together but which has no stable place in the overall structure.[388] In this sense, he argues for formal coordination structures such as 'permanent coordinating bod[ies]' that enjoy 'independent legal authority' and against

[381] *Ibid.* The purpose – see Freeman & Rossi (n 222) 1146 – is to create 'situational interdependence among agencies that have different and potentially incompatible primary missions'.

[382] Freeman & Rossi (n 222) 1146-1149.

[383] *Idem* at 1146.

[384] *Ibid*.

[385] *Ibid*.

[386] *Idem* at 1146-1147.

[387] Pan 'Structural Reform of financial regulation' 2011 *Transnational Law & Contemporary Problems* 796 821.

[388] *Idem* at 861: 'Whether Canada chooses the single regulator model or the twin peaks model, it must ensure that there is a legal mechanism that will promote coordination of regulatory policy, sharing of real-time information, and cooperation on enforcement matters. To this end, Canada should avoid contact committees, such as the President's Working Group in the United States or the board of financial authorities in France, which consists of representatives from the finance ministry, central bank, and lead regulators, but has no independent legal authority.'

systems that base the enforceability of cooperative measures on the agreements entered into between agencies.[389]

In addition to the above, there is also the reality that collaborative arrangements can be effected informally, and whilst this is not necessarily to the detriment of the system or the regulators, there is some difficulty involved in ascertaining these agreements and evaluating same from an answerability point of view.[390] It is further possible that informal and formal arrangements can be supportive of one another.[391]

Barkow specifically notes that uncertainty in this regard can lead to undesirable neglect of action – a type of regulatory lethargy where a particular duty is neglected under the assumption that the other regulator will fulfil it.[392] This matter brings about fundamental considerations in the context of delegation and regulatory 'drift' or 'shirking'.[393] Multiple regulators 'backstop' each other, as noted by Renee Jones,[394] and this would be undermined by the aforementioned adverse behaviours. Another solution would be to create a 'joint working group' with the mandate to ascertain whether there are areas of dual jurisdiction, propose solutions to address jurisdictional issues, and interchange information.[395]

3.4.4. Administrative law

I categorise administrative law as a form of accountability based on the insights provided by Cynthia Farina.[396] She deals with familiar regulatory features that are quite relevant for the discussion under way because she views administrative law as a regulatory mechanism:

> 'Administrative law is a system of regulation. Administrative law is the regulation of regulation. It is the regulation of those who regulate; the regulation of the process by which regulation occurs; the regulation of the range of outcomes that can be reached by regulation.'[397]

Her identification of two challenging features of administrative law, namely opposing policies and a new perspective on the application of this field of the law, is valuable.[398]

[389] Pan (n 387) 861. Pan argues at 861 that 'Canada should also avoid relying on interagency agreements to provide the legal framework for the sharing of information or the coordination of rulemaking'.

[390] Freeman & Rossi (n 222) 1156-1157.

[391] *Idem* at 1156.

[392] Barkow (n 9) 56. See also the work of Ting (n 349) where the author deals with bureaucratic redundancy theory and creates a model that accounts for strategy in the context of game theory, specifically delegation games. One specific aspect that Ting deals with is the 'collective action problem, where individual agents free ride of the efforts of others' – see 275.

[393] See par 3.3 of ch 2; par 3.2 *supra*.

[394] Jones (n 118) 401. See also Freeman & Rossi (n 222) 1138.

[395] Pan (n 387) 836.

[396] Farina (n 25).

[397] *Idem* at 490. She deals with consequences, outcomes, malfunctions and shortcomings of administrative law in the context of the discipline of regulation – see Farina (n 25) 489 *et seq*.

[398] Farina (n 25) 502 & 507.

Firstly, she notes that administrative law is both aimed at confining public authority as well as to enable the implementation of public authority.[399] Secondly, she suggests that the perspective of administrative law as a mechanism of averting improper governmental behaviour should be adjusted and viewed as a measure to promote desired behaviour.[400]

If administrative law is a system of regulation, then it is capable of malfunctioning.[401] A prime example is found in the illogical outcome of an applied principled scheme dictating regulatory behaviour insofar as directives are set and validated.[402] The National Highway Transportation Safety dilemma referred to above is an example.[403] In this context, Farina argues for authentic information to inform decisions – particularly in respect of the practical observed impact of legal directives on regulatory entities in the affected sectors.[404] She also realises that the examples provided by '*substantive* regulatory failure literature' is inadequate for purposes of discerning administrative law problems.[405] The intended outcome when determining the failures and causes thereof is to rectify errors, prevent recurrences thereof and holistically advance the scheme of administrative law.[406]

The suggested approach is not to deviate from subject-specific content, such as ascertaining the objectives of regulation, the milieu that influences the successful attainment of these objectives,[407] the industry and potentially efficient regulatory techniques as well as the requirements and capacity of the group of persons whose wellbeing is promoted by answerability measures.[408] In the specific government-related regulatory context that Farina writes and the milieu of this particular thesis, there is value in Farina's suggestion that similar considerations should be applied to the evaluation of administrative regimes, thus determining what the objectives of administrative law are, identifying the regulatees and ascertaining the techniques that would induce compliant conduct.[409] She states the following:

[399] *Idem* at 502.
[400] *Idem* at 507.
[401] *Idem* at 490 & 492.
[402] *Idem* at 492.
[403] See par 3.1.2 *supra*; Farina (n 25) 491-492.
[404] Farina (n 25) 493 & 495. See Farina (n 25) 493: 'We need real world data. We need empirical research of both the quantitative and qualitative sort. We need reliable information on how legal rules and principles actually affect agency behaviour and culture, in the field and over time.'
[405] Farina (n 25) 495. Original emphasis.
[406] Farina (n 25) 495.
[407] *Idem* at 500 – she specifically refers to the relevant 'social' and 'economic' surroundings.
[408] Farina (n 25) 500.
[409] *Ibid*.

> ‘Administrative law must clarify its goals and focus on the regulated community whose behaviour it seeks to affect.’[410]

However, Farina recognises that the administrative regime differs from ordinary regulated sectors insofar as it is directed at those empowered public role-players as opposed to private constituents.[411] This has an impact on two aspects – the first being an articulation of how administrative authorities conduct themselves and the second being the identification of the techniques that are suitable to effect the desired outcomes.[412] The first aspect affects the second, as a position of distrust results in the imposition of strict measures such as excessive technical requisites, legal mechanisms to compel compliance with set obligations and restricted discretionary authority.[413] The result may be ineffective regulation, including protracted actions and slow transformation.[414] Complicated schemes of directives that affected persons have to deal with render these persons ‘dependent in a different, less obvious, and less controllable way’.[415]

Another manifestation of malfunction is found when the abilities of the architects of administrative directives do not align with the demands posed by the milieu of the substantive regulator.[416] This may necessitate the identification of a different authority to be tasked with developing the required administrative content.[417]

Farina identifies two opposing objects of administrative law[418] and she links this with a concept that I dealt with briefly – Scott’s argument that regulation and accountability are substantiated because of a lack of confidence in regulators.[419] Empowering the subject of governmental authority aims to protect it from improper application of the authority and restricts the ‘dangerous discretion of the state in its interactions with the citizen’.[420] On the other hand, the directives embedded in administrative laws purport to enable the state to

[410] Farina (n 25) 500.
[411] *Idem* at 503.
[412] *Ibid*.
[413] *Idem* at 505.
[414] *Idem* at 506 – she refers to the extreme ‘clogg[ing of] the course of regulation’. See also Hadjiemmanuil (n 117) 142 quoted above in par 2.2.
[415] Farina (n 25) 506.
[416] *Idem* at 496.
[417] *Ibid*.
[418] *Idem* at 501 & 502.
[419] See par 2 *supra*; Farina (n 25) 502: ‘One goal of administrative law, the goal of controlling power, is rooted in mistrust. It suspects that discretion will be abused and prerogative perverted. This goal leads us to hold regulatory government on a short leash, wrapping agency decision-making in tightly constraining procedure and being quick to second-guess agency behaviour.’
[420] Farina (n 25) 501.

achieve the public interest outcomes that it was tasked with and to do so in a manner that represents a 'wise and humane' exercise of its authority.[421]

This object is founded in confidence.[422] It realises that the administrative authorities are enabled to address challenges but that the suitable approach to dealing with challenges may diverge from traditional legal approaches.[423] The post-conduct evaluative entity's solutions to the challenges addressed by the regulatory body may diverge from the body's solution.[424] The suggested amelioration of these two objectives is as follows:

> 'Can we not reframe our goals, mediating and softening the conflict, by saying that administrative law seeks to facilitate the exercise of regulatory discretion when it is being employed unreasonably and in accord with the statutory charge, and to constrain the exercise of regulatory power when it is being abused?'[425]

An approach that departs from the perspective that administrative law should encourage positive behaviour and thus the legality of administrative conduct,[426] invites a specific environment.[427] Administrative policies should support an ethos of proficiency and urge officials to exert their authority in a manner that considers the public interest.[428] Internal evaluations are cardinal to support progressive development of the regulatory scheme.[429] The conduct of the regulatory entity should be open and reasonable and invite public input when exercising its authority.[430] This should be effected in a manner that is realistic when the capacities of the regulator are taken into account.[431] Lastly, the criteria for court-based

[421] *Ibid*.
[422] *Idem* at 502: 'The other goal, the goal of facilitating power, is rooted in faith. It believes in the capacity of public regulatory institutions to solve social and economic problems. This goal leads us to allow administrative government room to breathe, understanding that appropriate agency process may look very different from the familiar common-law models, and accepting that the answers agencies reach to regulatory problems may appropriately be very different than the answers reviewing bodies might reach.'
[423] Farina (n 25) 502.
[424] *Ibid*.
[425] *Idem* at 502-503.
[426] I do not deal with Farina's discussion (508-511) of the challenges in finding a suitable theory to sustain her approach – she states at 507 that '[n]either traditional political theory not even the conventional alternative theories have prepared us for this exercise of thinking about what sorts of legal rules will support and encourage those holding public power to exercise it wisely and humanely'.
[427] Farina (n 25) 507.
[428] *Ibid*: '…strategies that help build within agencies a culture of responsibility and professionalism … conditions which encourage decision-makers to use their discretion for public-regarding purposes …'
[429] Farina (n 25) 507: '… conditions which encourage decision-makers … to engage in the sort of self-critique from which regulatory systems "get smarter" ...'
[430] Farina (n 25) 507.
[431] *Ibid*: '…procedural requirements that encourage transparency, rationality, and public participation in administrative decision-making, without overwhelming the agency...'

evaluations should balance the importance thereof with the obligations of the regulator and account for its specialist nature.[432]

Finally, the characteristics of administrative law are often in conflict with internal prerogatives, as well as the prerogatives of other legal fields.[433] Cora Hoexter, referring to Farina, highlights the discord between inspiring administrative officials to deal expertly and autonomously with matters under their jurisdiction and the need to ensure that the authority is not abused to the detriment of those endowed with specific rights.[434] Farina suggests a renewed approach by construing the aim of administrative law as enabling, as opposed to restrictive.[435] Likewise, Gillian Metzger writes that administrative law is focused on accountability, whereas autonomy is the core concern for financial law.[436] Her research shows that measures implemented in the United States through the Dodd-Frank Act, have taken steps to ameliorate the discrepancies and, in some instances, to 'inject more political accountability into financial-system oversight'.[437] These include aspects such as commitment to the material outcomes of consumer protection, and public awareness and participation.[438]

4. ACCOUNTABILITY MECHANISMS

4.1. Introduction

Regulators are established for specific reasons and tasked to achieve certain outcomes.[439] A variety of mechanisms is available, depending *inter alia* on the desired outcomes and the unit that requires answers.[440] The basic elements of an accountability regime is the ability to impose an obligation to disclose and validate conduct and performances and, in some instances, to impress injunctions.[441]

[432] Farina (n 25) 507: '… standards of judicial review that are at once serious, yet expressly respectful of agency responsibility and expertise.'

[433] See e.g. Metzger (n 187) 130; Merrill 'A comment on Metzger and Zaring: the Quicksilver problem' 2015 *Law and Contemporary Problems* 189 199.

[434] Hoexter *Administrative Law in South Africa* (2012) 137-139.

[435] Farina (n 25) 502. See also 507 where she makes the following suggestion: 'However, in the end, the best protection, the greatest likelihood of success, will come if administrative law defines its objective as working to promote the validity of administrative action, rather than as struggling to prevent its invalidity.'

[436] Metzger (n 187) 130 & 155. She further notes at 144 that 'these differences between administrative law and financial regulation appear more contingent than inherent and appear to turn in large part on path dependency and political economy'.

[437] Metzger (n 187) 146 (see also 146-149). She specifically refers to the CFPB at 146 where she states that it '… presents a different structural approach, albeit one that similarly links independence and accountability'. See also 152, where she refers to the mechanisms incorporated into the Dodd-Frank Wall Street Reform and Consumer Protection Act.

[438] Metzger (n 187) 148 & 152.

[439] Scott 'Evaluating the performance and accountability of regulators' (n 1) 363.

[440] See e.g. Scott 'Evaluating the performance and accountability of regulators' (n 1) 360-361; Bird (n 9) 747 *et seq.*

[441] See Lodge (n 71) 128; par 2 *supra.*

The first outcome of an accountability regime is therefore answerability for its mandate in terms of the performance, obligations, and outcomes for which the regulator was established, and refers to form and substance.[442] In the second instance, the internal affairs of the regulator are subject to scrutiny.[443] As such, the accountability measures assess outcomes, or processes to achieve outcomes, in respect of the following summarised matters:[444]

- The manner in which aims and outcomes are determined,[445] classed in order of preference or importance;[446] and whether goals are met;[447]
- the manner in which the authority of the regulatory body is expended insofar as conduct-altering directives are given[448] and the duties of the entity executed;[449]
- how the executive's policies are implemented;[450]
- the outcomes of regulatory conduct;[451]
- the procedural complacency of the regulator's conduct;[452]
- the efficacy of the regulator's conduct and performances;[453]
- whether there was adherence to administrative and other official authority-execution principles,[454] and adherence to mandatory regulatory processes;[455]
- the manner in which internal affairs are conducted in accordance with set standards, such as fiscal and personnel management;[456] and
- the manner in which resources are consumed because regulatory intervention is costly.[457]

In respect of the substance, the above would speak to the monetary obligations, processes and practices of the regulator, the contents of its actions, the decisions made and the achievement

[442] See e.g. Scott 'Evaluating the performance and accountability of regulators' (n 1) 354-355; Bird (n 9) 742; Quintyn & Taylor (n 8).
[443] Bird (n 9) 742; Goodhart *et al* (n 22) 157.
[444] See also Bovens (n 63) 459-460.
[445] Goodhart *et al* (n 22) 68.
[446] *Ibid*; Bird (n 9) 742; Hüpkes *et al* (n 12) 11.
[447] Bird (n 9) 772; Quintyn *et al* (n 9) 17; OECD *Policy Framework for Effective and Efficient Financial Regulation* (n 43) 19.
[448] Bird (n 9) 742; Quintyn *et al* (n 9) 13.
[449] Bird (n 9) 742.
[450] Mwenda (n 186) 26.
[451] Bird (n 9) 742.
[452] Scott 'Evaluating the performance and accountability of regulators' (n 1) 361; Bird (n 9) 742.
[453] Goodhart *et al* (n 22) 68. See also Scott 'Evaluating the performance and accountability of regulators' (n 1) 363; Bird (n 9) 772.
[454] See Farina (n 25); Scott 'Evaluating the performance and accountability of regulators' (n 1) 360. See also Bird (n 9) 772: '… respect for non-instrumental values (such as procedural fairness, proportionality, predictability and transparency).'
[455] Scott 'Evaluating the performance and accountability of regulators' (n 1) 361; Quintyn *et al* (n 9) 13.
[456] Bird (n 9) 742; Quintyn *et al* (n 9) 6.
[457] Bird (n 9) 742; Quintyn *et al* (n 9) 17; Goodhart *et al* (n 22) 68. Goodhart *et al* state at 68: 'Regulation is not a free good, and accountability for the use of resources is necessary.'

of set outcomes.[458] In order to align regulatory accountability regimes with that of the regulatory regime itself, the accountability framework should deal with rule- and norm design, conduct alteration and data collection.[459] As the actions and outcomes of regulators are assessable under the auspices of accountability, the assessment has to examine how the regulator exercised its principle- and rule-making authority, the determination of the priority status of its concerns as well as whether it accomplished the regulatory tasks that had been entrusted to it.[460] In addition, the measures also take into account how the regulator executed its duties in respect of the regulated sector such as registrations, permissions, sanctions, punitive measures and information collection and dissemination.[461]

The responsibilities in respect of the regulator's human resources, thus the selection and discharge of high-ranking members of staff and the processes required in this regard, must be allocated with certainty.[462] The grounds for liaising with the government should be stipulated.[463] The different divisions of government authority's interaction with the regulator should ideally also be subject to legal guidance, especially those instances where the regulator is obligated to notify, confer with or obtain endorsement from the executive.[464] The courses of action for Parliament for demanding explanations from the regulator for its conduct should be demarcated.[465] The Judiciary's involvement should be effected by rendering the application of regulatory authority amenable to legal re-evaluation.[466] In instances where the regulator's autonomy must be countered, the conditions therefore and manner thereof must be ascertainable with certainty.[467]

Lastly, a brief reference to Bovens's research and rationales for accountability referred to earlier.[468] I only referred to the markers of accountability identified by Bovens.[469] However, he also identified the basic criteria to analyse each marker, which is a concise guiding factor to determine whether the assessed system meets the standard:[470]

[458] Bird (n 9) 742.
[459] Lodge (n 71) 127. See also Van Wyk 'Regulation of the Financial Markets' in Van Wyk *et al* (eds) *Understanding South African Financial Markets* (2012) 112; paras 2.2 & 3.1 of ch 2 *supra*.
[460] Bird (n 9) 742. See also Goodhart *et al* (n 22) 68.
[461] Bird (n 9) 742.
[462] Quintyn & Taylor (n 8).
[463] *Ibid*.
[464] *Ibid*.
[465] *Ibid*.
[466] *Ibid*.
[467] *Ibid*.
[468] See par 2.2 *supra*.
[469] See Bovens (n 63) 465 for a summary of these.
[470] Bovens (n 63) 465-467.

Standard	Analytical measure
'Accountability controls and legitimises government actions by linking them effectively to the 'democratic chain of delegation'.'[471]	'The degree to which an accountability arrangement or regime enables democratically legitimised bodies to monitor and evaluate executive behaviour and to induce executive actors to modify that behaviour in accordance with their preferences.'[472]
'Accountability is essential in order to withstand the ever-present tendency toward power concentration and abuse of powers in the execute power.'[473]	'The extent to which an accountability arrangement curtails the abuse of executive power and privilege.'[474]
'Accountability provides public office holders and agencies with feedback-based inducements to increase their effectiveness and efficiency.'[475]	'The degree to which an accountability arrangement stimulates public executives and bodies to focus consistently on achieving desirable societal outcomes.'[476]

The forthcoming list of aspects to consider is sourced from the accountability mechanisms of transcontinental jurisdictions, mostly Australia, but also the United States.[477] I do not refer to specifics, but reflect the elements that various authors and organisations discuss in order to show significance and set a framework for the upcoming chapters.[478] Bird, for example, broadly categorises her mechanisms according to those towards whom accountability is owed

[471] *Idem* at 465 – Box 4 titled 'Democratic Perspective: Accountability and Popular Control'.
[472] *Ibid*.
[473] *Idem* at 466 – Box 5 titled 'Constitutional Perspective: Accountability and Equilibrium of Power'.
[474] *Ibid*.
[475] *Idem* at 466 – Box 6 titled 'Learning Perspective: Effective Governance'.
[476] *Ibid*.
[477] Bird (n 9) 747-764; CCH Attorney-Editor Staff *Dodd-Frank Wall Street Reform and Consumer Protection Act Law, Explanation and Analysis* (2010) 489. I deal with the Australian position again and it must be stated that Bird's evaluation of the answerability mechanisms of this particular jurisdiction was published in 2011. Some developments have occurred since then, such as the introduction of performance markers (see Bird (n 9) 746-747 & Gilligan *et al* (n 134) 266). I do, however, find her criticism of the issues experienced with the system of value, especially for developing countries who are interested in incorporating some of these mechanisms into their schemes and want to avoid pitfalls.
[478] See also the list in OECD *Policy Framework for Effective and Efficient Financial Regulation* (n 43) 42-43 ('OECD Reference Checklist for Regulatory Decision-Making'); 48 ('High-level OECD Checklist' – 'Accountability') & 61-62 ('Principles for a *Policy Framework for Effective and Efficient Financial Regulation*' – 'Accountability').

and I see no substantive reason to depart from her method.[479] My intention is to minimise repetition and I have categorised some aspects that are applicable to multiple features, such as resource expenditures, separately. I draw on the work of Hüpkes *et al*, who refer to general forms of accountability and whose approach correlates with Bird's approach.[480]

I elaborate on some specific issues after the listed features, specifically reporting and public statements, regulatory impact assessments, regulatory audits and other mechanisms such as league tables, in-house assessments and management systems.[481] As such, I do not necessarily deal with these aspects in much detail in this paragraph. The spectrum of accountability in a given jurisdiction includes components that can be grouped under the judiciary, the tribunal-system, politically elected officials, Parliament, the executive, other regulatory authorities, the public and regulatees. Although this list of factors is not, for purposes of this thesis, aimed at an empirical analysis, I found that the method followed by Gadinis – who constructed a questionnaire on independence of financial regulators for purposes of his research – to be a constructive way of formulating a number of features in a manner conducive to empirical research.[482]

The statements in the upcoming list can therefore be converted into questions that would subsequently need to be asked, and the answers evaluated for each category, should an empirical study of the South African regime be undertaken at some stage.[483] Some queries are worded in a yes-no fashion (in effect, asking whether certain measures apply or not), but the analyst should also include an evaluation of the specific measure (in effect, what the measures are) as this is often what the original source required.[484]

[479] See Bird (n 9) 747 *et seq*.
[480] Hüpkes *et al* (n 12) 20-32.
[481] See par 5 *infra*.
[482] Gadinis 'From independence to politics in financial regulation' 2013 *California Law Review* 327.
[483] This method is used by a number of international organizations and scholars who evaluate jurisdictions (in respect of independence as well as accountability) – see Mwenda (n 186) 26-28; Quintyn *et al* (n 9) 39-41; OECD *Policy Framework for Effective and Efficient Financial Regulation* (n 43) 'High-level OECD Checklist'; International Organisation of Securities Commissions (hereinafter 'IOSCO') *Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation May* 2017 27.
[484] I refer to specific examples in footnotes of applicable statements hereunder.

4.2. The judiciary[485]

The analyst has to determine who has *locus standi* to partake in processes in judicial forums[486] and the form of dispute that can be dealt with by the courts.[487] Examples in this regard include review processes,[488] and civil or criminal matters.[489] The logical aspect to consider next would be that which could be addressed via the court system.[490] Insofar as recourse to the courts is concerned, examples include determination of the lawfulness of actions, compliance with set processes, compensatory or punitive suits.[491] The grounds for approaching the court must be canvassed[492] – does it include unauthorised actions by the Regulator, neglect of adherence to just processes or other forms of recognised culpable behaviour (financial misdeeds or common law causes of action)?[493]

A determination must be made as to whether there are restrictions on liability in terms of civil law, including compensatory awards.[494] The analyst has to consider the relief that can be

[485] Bird (n 9) 747; Hüpkes *et al* (n 12) 21, 26-29. See Quintyn *et al* (n 9) 14 insofar the they highlight the following important aspects under 'Supervisory accountability'. Firstly, allowance is made for a supervisory course of action for impacted persons insofar as the implementation of public authority is concerned (see 14). Secondly, the actor's conduct is evaluated in accordance with the limits of its allocated authority and can be assessed in accordance with processes and contents (see 14). This includes whether the proper course of action was taken ('due-process requirements') and whether the affected party was notified of 'legal remedies' – the aim is to promote a process that is 'as transparent as possible' and 'results in a fair and just decision' (see 14). In addition, judicial review may reconsider the value and content of the case in order to determine lawfulness, however, this assessment is challenging in light of the discretionary components to regulatory decision-making: 'The difficulty here is that the discretion conferred on a supervisor is typically broad, and courts in practice exercise restraint and defer to the expert knowledge of the supervisor, given that they do not normally possess the expertise in financial matters and are therefore reluctant to substitute their judgment on supervisors. Substantive accountability is therefore of less significance and judicial review is generally limited to the review of legality with a view to ensuring that discretion is not exercised in bad faith or for improper purposes' (see 14).

[486] Bird (n 9) 747. See Bendor *et al* (n 291) 246 in respect of the determination of participants with *locus standi* to address power balances in the regulatory regime.

[487] Bird (n 9) 747 & 749-750; Hüpkes *et al* (n 12) 26-28.

[488] Hüpkes *et al* (n 12) 26 & 27 makes a distinction between 'Administrative' and 'Judicial' review, over and above the traditional difference between 'review' and 'appeal'. The former is reserved for executive officials or autonomous specialists whilst the second is the court-based 'supervisory jurisdiction' insofar as the judiciary monitors the implementation of public authority – see 27. See Bird (n 9) 747-748.

[489] Bird (n 9) 747 & 749-750.

[490] *Ibid*; Hüpkes *et al* (n 12) 26-28.

[491] *Ibid*.

[492] *Ibid*.

[493] *Ibid*. Compare this to the impact on independence – see par 4.2 of ch 3 *supra*; Bird (n 9) 750; fn 494 *infra*.

[494] Bird (n 9) 749 & 750 – this development is intended to endorse the autonomy of the regulator (autonomy and competence prevails over answerability in this case), aims to limit apprehension by the regulator in pursuing its obligations and conserves resources that would be spent on civil suits. See Hüpkes *et al* (n 12) 28-29 – these authors also reflect the views of Bird, but add that the restrictions imposed in this regard necessitates the existence of means such as judicial review and 'administrative compensation' to counteract incidences where parties were detrimentally affected ('loss was suffered') as a result of 'unlawful action' by regulators. See also Quintyn *et al* (n 9) 14 insofar as they describe the need for corrective or counteractive measures where a violation of responsibilities occurred, but note that 'a variety of limitations on liability for supervisory mistakes' is necessary insofar as autonomy is concerned. This includes restrictions on individual accountability for *bona fide* acts (see 14).

granted by the court,[495] and whether this includes the authority to order the Regulator to reassess its resolution and act in a compliant manner, or grant punitive sanctions or pecuniary compensation.[496] Are the presiding officials perceived as experts?[497] The analyst also has to ask whether the forum has the capacity to provide for accountability towards influenced stakeholders, perhaps consumers,[498] insofar as restrictions are imposed[499] and, furthermore, whether litigious actions are at all useful – do these have an impact insofar as it results in the delineation and concretisation of behavioural standards?[500] It is also important to find out whether there are time-restrictions applicable to avoid abuse or misuse of the court process.[501]

4.3. The tribunal-system[502]

The aspects that need to be considered duplicate some of those that apply to the judiciary, such as the *locus standi* requirements,[503] the grounds for approaching the Tribunal,[504] and the capacity of this forum to provide for answerability towards influenced stakeholders, specifically 'individual members of the public'.[505]

Others that are also similar to the above, but where some elucidating examples or small differences apply, include the following: the form of dispute that can be dealt with by the Tribunal, such as whether a 'merits review' is possible; [506] the relief that can be granted by the Tribunal,[507] such as whether the Tribunal decides the contentious matter or whether it

[495] Bird (n 9) 747 & 749-750.

[496] *Ibid*.

[497] *Idem* at 748. See also the opinions of Bird (n 9) 748 and Hüpkes *et al* (n 12) 27. Bird (n 9) 748 writes that presiding court officials are subject-specialists when it comes to 'procedural fairness and natural justice' and does not query the matter much because the decision is referred back to the deciding regulator. Bird notes that the challenge lies in the administrative regime where the decision is retaken by the reviewing authority – under these circumstances, the substantive knowledge of the reviewing body (in her case specifically the tribunal-system) may be lacking when viewed against that of the regulator. Hüpkes *et al* (n 12) 27 note that the lack of expert financial knowledge of judicial officers renders '[s]ubstantive accountability … of less significance …and judicial review is generally limited to review of legality with a view to ensuring that discretion is not exercised in bad faith or for improper purposes'. A related manner is raised by Freeman & Rossi (n 222) 1137 in respect of the judicial approach to certain agency matters. The authors specifically refer to '…the conventional understanding about how courts should review agency legal interpretations may be ripe for reassessment, at least in contexts where multiple agencies share interpretive authority' – see 1137.

[498] Bird (n 9) 763 – she specifically refers to 'individual members of the public'.

[499] *Ibid*. See also Ramsay *Consumer Law and Policy – Texts and materials on regulating consumer markets* (2012) 262 *et seq* on class actions.

[500] Scott 'Accountability in the regulatory state' (n 39) 42-43.

[501] Hüpkes *et al* (n 12) 27. According to these authors, this requirement protects regulatory efficacy – see 27.

[502] Bird (n 9) 747-748. Bird views autonomous tribunals as 'a stronger form of administrative law accountability' – see Bird (n 9) 747.

[503] Bird (n 9) 747.

[504] *Idem* at 747-748 – an example would include the statutory authorisation of a review.

[505] Bird (n 9) 763.

[506] *Idem* at 747.

[507] *Idem* at 747 & 748.

remits the matter to the regulatory body for reconsideration;[508] and the perceived expertise of those presiding over tribunal hearings *vis-à-vis* the regulator.[509]

One has to determine the status of the tribunal-system (thus whether the system itself is autonomous or not)[510] and the approach taken by tribunal officials *vis-à-vis* the regulator[511] – does the Tribunal review the specific matter before it on the grounds that it is mandated to, and what is the effect of intervention where the regulator implements a widespread strategy that is holistically aligned with its mandate when making decisions?[512] Lastly, the analyst has to determine the costs of submitting to the review process insofar as expediency and resourcefulness are concerned.[513] This is also an aspect that can be considered in respect of court-based answerability mechanisms.[514]

4.4. Politically elected or designated officials[515]

Insofar as electees are involved in the accountability scheme, the following questions need to be asked and the answers evaluated: the means through which regulators can be held answerable to elected officials;[516] which of the branches of government are entitled to hold regulators accountable,[517] and the source of authority and grounds for demanding answers from regulatory bodies.[518] One can ask what the *rationales* for the accountability duties imposed on the elective are[519] and whether there are vested interests of government that may affect the execution of its regulatory assessment duties.[520] An analysis can be undertaken with reference to participation by the public in order to determine the capacity of this forum to allow for contributions by affected constituents.[521]

[508] *Ibid*.

[509] *Idem* at 748.

[510] *Idem* at 747.

[511] *Ibid*: '[T]he AAT [Administrative Appeals Tribunal] adjudicates the individual matter brought before it and will often have difficulty putting that individual matter into the broader decision-making and policy context. A regulator makes individual decisions about, for example, refusing a licence or banning an individual in the broad context of the market and that regulator's work in relation to that market. An individual decision will not just be designed to have an impact on the behaviour of the individual who it directly affects; it will also be designed to have a broader impact on the market …The short point, however, is that if the AAT is not able to do this, its decisions might undermine the regulator's attempt to achieve its broader regulatory mandate.' See also Hyland (n 72) 31 for the difference between an '[i]nternal merits review' and an 'external merits review' in the context of ASIC.

[512] Bird (n 9) 748.

[513] *Ibid*.

[514] *Ibid*.

[515] *Idem* at 750-763; Hüpkes *et al* (n 12) 20-26.

[516] *Ibid*.

[517] *Ibid*.

[518] *Ibid*.

[519] *Ibid*.

[520] See par 4 of ch 3 *supra*.

[521] Bird (n 9) 763-764.

The analyst has to determine the focus of government-sanctioned answerability: this would include considerations of compliance with obligations and tasks imposed by legislation; instigation of legislative provisions, and comprehensive monitoring of and conversant interaction on the legislative framework (legislature/Parliament);[522] guidance,[523] data and knowledge dissemination and exchange, interaction about and instigation of delegated legislative authority ('regulations') as well as matters concerning the internal affairs of the regulator, such as personnel selection (executive).[524]

4.5. Parliament

Parliament can be involved in many features of the accountability scheme.[525] These include assessment via commissions, enquiries, reports, and legislative determinations.[526] The forthcoming aspects need to be considered and the findings evaluated.

4.5.1. Commissions[527] and enquiries[528]

The level of expertise and specifics of the constituency of these commissions, including in comparison with the evaluated regulatory body, must be analysed.[529] One has to determine the approach of these commissions towards holding enquiries or otherwise exercising their

[522] Hüpkes *et al* (n 12) 20 & 22. See also Quintyn *et al* (n 9) 11-12 in respect of the role of parliament.

[523] Quintyn *et al* (n 9) 12: 'An independent [regulator] needs to have a direct line of accountability – or communication – to the executive branch because the latter bears the ultimate responsibility for the general direction and development of financial policies, and the minister of finance needs to be aware of developments in the financial system. In most jurisdictions, the government will also play an active role in financial crisis management.'

[524] Hüpkes *et al* (n 12) 24. See also Quintyn *et al* (n 9) 12-13 in respect of the duties of the minister and the challenge of adherence to the requirement of autonomy.

[525] Quintyn *et al* (n 9) 11-13 deal with the accountability roles of the legislative and executive parts of the state as part of 'Institutional accountability'. The authors note at 11-12 that the Legislature is tasked with ensuring – through its position as overseer of the executive – 'that public policy is administered in accordance with legislative intent' and that the regulator agency 'meet[s] the stated objectives in its mandate' – see 12. This is done because the Legislature issues the norms that guide the financial However, the authors caution at 12 that this does not sanction influences through implementation of its authority and giving of directives to steer regulatory conduct, but that management should be effected via 'its law-making powers … by making changes to the legal framework when needed'. The establishment of commissions and the ability to request appearances or reports by officials is also considered a means of allowing 'individual members of parliament to develop expertise on the complex financial and technical issues dealt with by the regulatory agency' – see 12. See Quintyn *et al* (n 9) 13 in respect of 'Regulatory accountability' towards the Legislature for the 'rule-making authority' expended as this is done in accordance with delegated authority. On the other hand, the executive is tasked with policy generation and managing financial crises – see 12. Quintyn *et al* (n 9) 12-13 provide a number of instances where the interactive nature of the relationship between the regulator and the executive can become manipulative and affect regulatory independence.

[526] Hüpkes *et al* (n 12) 22-23; Bird (n 9) 750-753.

[527] Bird (n 9) 750-752; Hüpkes *et al* (n 12) 21-23.

[528] Hüpkes *et al* (n 12) 21-23 distinguish between 'Annual reporting', 'Reporting to parliamentary committees', 'Appearances before parliament and ad hoc enquiries', 'Parliamentary representation in an oversight or supervisory board' and 'delegation to the finance ministry'.

[529] Bird (n 9) 751.

authority to demand answers from regulatory units[530] and the duties of the regulator towards these commissions.[531] This includes analysing the authority of these commissions,[532] for example, where their powers include the ability to query or assess regulatory actions and the contents of these questions or assessment (thus, whether there are any limitations as to what can be queried or assessed).[533]

It is important to note the possible outcomes and effects of commission-based accountability mechanisms including the capacity of this particular mechanism to effect meaningful accountability[534] and the resource burden that accompany commission-based accountability mechanisms.[535]

4.5.2. Reports[536]

The analyst has to consider the frequency with which reports are submitted to Parliament,[537] and the outcomes, and effects, of report-based accountability measures.[538] For example, are there enquiries on account of the submitted reports?[539] What is the resource burden associated with report-based accountability mechanisms?[540]

Insofar as the subject matter of reporting is concerned, one has to determine whether there is a prescribed contents for reports so submitted,[541] and consider the source that determines the contents of the report.[542] For example, does legislation determine the contents and is there a prospect of deviation from pre-determined (if any) content?[543] The analyst further has to evaluate the approach of the reporting authority and the degree of neutrality in effecting the reporting duty.[544]

[530] *Idem* at 750-752.
[531] *Idem* at 751-752.
[532] *Idem* at 750-751.
[533] *Ibid*.
[534] *Idem* at 751-752 – the author notes that parliamentary committees have the capability to evaluate actual compliance with regulatory obligations in a holistic manner, specifically as the approaches of regulators in respect of preferences and fund distribution over and above single events.
[535] Bird (n 9) 751.
[536] *Idem* at 752; CCH Attorney-Editor Staff (n 477) 489. Bird (n 9) 752 views these reports as a measure that enhances answerability to Parliament. See the contributions by the OECD *Policy Framework for Effective and Efficient Financial Regulation* (n 43) 19 in respect of reporting requirements and the contents of these reports. See further Hüpkes *et al* (n 12) 21 & 22. Reporting obligations can also be directed to the executive – see Quintyn *et al* (n 9) 12.
[537] Bird (n 9) 752; Hüpkes *et al* (n 12) 22; Quintyn *et al* (n 9) 16; CCH Attorney-Editor Staff (n 477) 489.
[538] Bird (n 9) 751; Quintyn *et al* (n 9) 12.
[539] Bird (n 9) 751.
[540] *Idem* at 752.
[541] *Ibid*. See also Quintyn *et al* (n 9) 13.
[542] Bird (n 9) 752; CCH Attorney-Editor Staff (n 477) 489.
[543] *Ibid*.
[544] Bird (n 9) 752.

4.5.3. Legislation[545]

Accountability towards Parliament firstly requires an evaluation as to whether the regulator regulates by way of directives that have the force of law or are classified as 'legislative instruments',[546] and whether there is special legislation governing regulatory conduct and processes in this regard.[547] The contents and effect of the statutory prescriptions and associated processes are further aspects to consider.[548]

Secondly, the analyst has to determine who the authority is to whom accountability is owed *via* the provisions of the legislation,[549] and what the outcomes and effects of the aforementioned statutory-based accountability measures are.[550] Examples include remedial action, the impact on the autonomy and specialism of the regulatory entity and the status of the designed regulatory instruments before, pending and after intervention.[551] One has to determine whether there are safeguards that prevent the misuse of statutory-based accountability measures.[552]

4.6. The executive

The executive branch of government can be involved in many features of the accountability scheme.[553] These include assessment via Ministers, public announcements, regulatory impact assessments, participation in internal governance and pecuniary matters.[554] The following questions need to be asked and the answers evaluated.

[545] *Idem* at 752-753; Quintyn *et al* (n 9) 13.
[546] This is a specific term used in the Australian context by Bird (n 9) 752-753. However, the Financial Sector Regulation Act (Act 9 of 2017) (hereinafter 'FSRA') makes provision for the drafting of 'legislative instruments' in ch 7 – see a discussion thereof in chs 5-7 *infra.*
[547] Bird (n 9) 752-753.
[548] *Ibid*.
[549] *Ibid*; Quintyn *et al* (n 9) 13.
[550] Bird (n 9) 753.
[551] *Ibid*.
[552] *Ibid*.
[553] Quintyn *et al* (n 9) 12-13.
[554] Hüpkes *et al* (n 12) 24-26 distinguish between 'Reporting of information', 'Appointment and dismissal procedures', 'Ministry of Finance as oversight authority' and 'Direct government involvement in management or oversight function'.

4.6.1. Ministers[555]

The analyst has to determine what the ministerial authority to direct the preferences, policies and conduct of the regulator, and the grounds therefore, are,[556] as well as the manner in which the guidance must occur[557] and those matters in respect of which this prerogative may be exercised.[558] Is there an ability, and use of, 'public warnings' to communicate expectations to regulators?[559] Are there informal means of effecting answerability to ministerial offices, such as unofficial directives?[560] It is also important to analyse the interrelation with other desired attributes of the regulator, including autonomy and specialisation,[561] and the impact that this subcomponent of accountability mechanisms has or may have on the autonomy of the regulatory entity.[562]

4.6.2. Public announcements[563]

Insofar as public announcements are concerned, one has to determine whether there are provisions regulating formal publication of functions and obligations,[564] what the contents,[565] and who the intended recipients, of these publications are.[566] It is also necessary to determine whether there are review and re-announcement requisites that apply.[567] I deal with this matter in more detail in paragraph five hereunder.

[555] Bird (n 9) 753-755. See ch 3 *supra* in respect of the adverse stance taken on intervention by the executive in this regard, as it was thought to have a detrimental impact on the autonomy of certain entities. Bird also refers to a similar approach taken by the International Monetary Fund when it evaluated the Australian position – see Bird (n 9) 754. See also Hüpkes *et al* (n 12) 21, 23 & 25, specifically insofar as the Minister of Finance is given supervisory responsibilities. See Quintyn *et al* (n 9) 12-13 insofar as the authors recommend that information can also be provided to the Executive in reports – this is an example of 'formal channels of communication' support the interaction between this branch of government and the regulatory authority – however, they caution that only 'aggregate' information be made available and not confidential matters.

[556] Bird (n 9) 753-754.

[557] *Idem* at 754 (see also 755).

[558] Bird (n 9) 754.

[559] Scott 'Accountability in the regulatory state' (n 39) 56.

[560] Bird (n 9) 755.

[561] *Idem* at 754 & 767.

[562] *Idem* at 754-755.

[563] *Idem* at 755-756. See also Quintyn & Taylor (n 8); par 3 *supra*.

[564] Bird (n 9) 755-756 & 767.

[565] *Idem* at 755-756 & 768.

[566] *Idem* at 755.

[567] *Idem* at 756.

4.6.3. Regulatory Impact Assessments[568]

I also discuss regulatory impact assessments as a specific accountability measure at a later stage, but note some aspects for the analyst to consider here. Firstly, one has to determine whether provision is made for impact assessments[569] and what the foundation for these assessments is.[570] Secondly, one has to determine the scope of application,[571] and the outcomes and effects of the impact assessments.[572] Thirdly, it is important to analyse the challenges pertaining to, and resources expended on, impact assessments.[573] The analyst also has to consider who the intended recipients of the documented assessments are.[574]

4.6.4. Discharge[575] and other internal affairs[576]

Insofar as operational activities and human resources are concerned, the analyst has to consider whether there are provisions that determine the ability to effect the discharge of a regulatory official;[577] the grounds for the discharge of a regulatory official;[578] the level of seniority to which these prescriptions apply;[579] and the source of these provisions, thus whether the prescriptions are of a legislative nature.[580] One has to determine the effect of this measure on the autonomy of the entity,[581] and any safeguards that prevent misuse or unmerited frequent use of the measures.[582]

[568] Bird (n 9) 756-760. See Scott 'Evaluating the performance and accountability of regulators' (n 1) 364-365; OECD *Policy Framework for Effective and Efficient Financial Regulation* (n 43) 31; Office of Best Practice Regulation *Best Practice Regulation Report 2006-07* 2007 Annual Report Series, Productivity Commission; Council of Australian Governments *Best Practice Regulation A guide for ministerial councils and national standard setting bodies* October 2007. See also par 5.2.3 *infra* where I discuss regulatory impact assessments as a specific accountability measure.

[569] Bird (n 9) 756.

[570] *Idem* at 756-757.

[571] *Idem* at 757.

[572] *Idem* at 756-760.

[573] *Idem* at 759-760.

[574] *Idem* at 758.

[575] *Idem* at 761-762. See par 4.2 of ch 3 *supra* in respect of the detrimental impact on the autonomy of certain entities. See also Hüpkes *et al* (n 12) 21 & 25.

[576] See Hüpkes *et al* (n 12) 25 insofar as the selection authority of the Executive is concerned; Quintyn *et al* (n 9) 13.

[577] Bird (n 9) 761-762; Quintyn *et al* (n 9) 13; Quintyn & Taylor (n 8).

[578] Bird (n 9) 762.

[579] *Ibid*; Quintyn & Taylor (n 8).

[580] *Ibid*.

[581] *Ibid*.

[582] See the provisions of s 65 the FSRA (the reference to 'an independent inquiry'); Quintyn *et al* (n 9) 13.

4.6.5. Pecuniary grants[583]

Insofar as the budgetary and monetary resources are concerned, the analyst has to consider the provisions that determine the resource allocations to regulatory authorities[584] and, similar to earlier considerations, the foundation (legal or not) of these provisions.[585] In addition, the analyst can determine whether there are any observed trends in respect of funding of regulators,[586] and whether there are validation of budget requests and endowments – if so, how often.[587] Lastly, the impact that oversight over financial resources as an accountability mechanism, and the outcomes thereof, can have on the autonomy of the entity, must be taken into consideration.[588]

[583] Bird (n 9) 762-763; CCH Attorney-Editor Staff (n 477) 489. See also Quintyn *et al* (n 9) 15; Thatcher (n 22) 127 & par 3.4.2 *supra* in respect of anticipatory and reactionary forms of accountability applicable to regulatory funding. See par 4.3 of ch 3 *supra* in respect of the detrimental impact on the autonomy of certain entities. See also Hüpkes *et al* (n 12) 31 – the authors discuss budgetary concerns under the auspices of 'Audit (Financial Accountability)' and provide for assessment of the financials of the regulatory by various persons (some comparative references are reflected, noting that some jurisdictions utilise autonomous auditors, commissions, Boards, etc.). They also refer to the possibility of constructing an 'Internal inspectorate' to conduct various enquiries (in this regard, specific reference is made to the Inspector General Act of the United States of America) – see 31.

[584] Bird (n 9) 762-763.

[585] See Bird (n 9) 762-763; Hüpkes *et al* (n 12) 31; Quintyn *et al* (n 9) 15 writing on funding sources and oversight forms.

[586] See Bird (n 9) 762-763 in respect of her observation that 'poor, rather than good performance tends to be rewarded by more money from the government because it is often assumed or argued that poor performance by regulators is caused by a lack of resources'.

[587] CCH Attorney-Editor Staff (n 477) 489; Quintyn *et al* (n 9) 15. Quintyn *et al* note at 15 that this includes 'the presentation of financial accounts, demonstrating the regularity of expenditures' but that this mechanism should not be a means of second-guessing regulators. Regulatory agencies should be entitled to draft its budget by incorporating aspects necessary to meet its financial requirements – see 15. These authors recommend that this should only be a reactionary form of answerability – see 15.

[588] Bird (n 9) 763. See also Quintyn *et al* (n 9) 15. See further the following sections in Title X of the Dodd-Frank Wall Street Reform and Consumer Protection Act (known as the 'Consumer Financial Protection Act of 2010' as per s 1001 of the Act) which requires financial reporting but does not empower the person to whom the reporting is done, in a manner that affects the budgetary autonomy of the Bureau – s 1017(a)(4): 'BUDGET AND FINANCIAL MANAGEMENT. – (A) FINANCIAL OPERATING PLANS AND FORECASTS. – The Director shall provide to the Director of the Office of Management and Budget copies of the financial operating plans and forecasts of the Director, as prepared by the Director in the ordinary course of the operations of the Bureau, and copies of the quarterly reports of the financial condition and results of operations of the Bureau, as prepared by the Director in the ordinary course of the operations of the Bureau. (B) FINANCIAL STATEMENTS. – The Bureau shall prepare annually a statement of – (i) assets and liabilities and surplus or deficit; (ii) income and expenses; and (iii) sources and application of funds. (C) FINANCIAL MANAGEMENT SYSTEMS. – The Bureau shall implement and maintain financial management systems that comply substantially with Federal financial management systems requirements and applicable Federal accounting standards. (D) ASSERTION OF INTERNAL CONTROLS. – The Director shall provide to the Comptroller General of the United States an assertion as to the effectiveness of the internal controls that apply to financial reporting by the Bureau, using the standards established in section 3512(c) of title 31, United States Code. (E) RULE OF CONSTRUCTION. – This subsection may not be construed as implying any obligation on the part of the Director to consult with or obtain the consent or approval of the Director of the Office of Management and Budget with respect to any report, plan, forecast, or other information referred to in subparagraph (A) or any jurisdiction or oversight over the affairs or operations of the Bureau.'

4.7. Additional regulatory authorities with authority over regulators

Other organisations can hold regulators to account.[589] The aspects that need to be canvassed include the presence of authoritative entities whose obligations are designed to evaluate some aspect of the regulator;[590] the powers that these additional establishments have in respect of regulatory assessment;[591] the scope of application of the authority, meaning which may be assessed;[592] and the approach or procedures implemented by the assessing authority.[593]

The analyst has to determine the outcomes, and effects, of the assessment authority exercised by these additional establishments[594] – for example, whether findings or recommendations are enforceable[595] – and question the capacity of this forum to provide for answerability to, and partaking by, influenced stakeholders.[596]

4.8. The public[597] and regulatees[598]

The stakeholders in the regulated arena include the public and regulated persons[599] who can be participants of the accountability network – in this regard, the analyst has to determine

[589] Bird (n 9) 760-761; Freeman & Rossi (n 222) 1181 *et seq*; Jones (n 118) 393-394. See also Hüpkes *et al* (n 12) 32 in respect of cross-border assessments by organisations such as the International Monetary Fund or World Bank.

[590] Bird (n 9) 765-766.

[591] *Idem* at 766 & 767.

[592] *Idem* at 766.

[593] *Idem* at 766-767.

[594] *Ibid*.

[595] *Ibid*.

[596] *Idem* at 763-764.

[597] *Ibid*. This exposé by Bird links with the comments by Scott 'Evaluating the performance and accountability of regulators' (n 1) 372 when he refers to John Keane's work: 'He observes the very wide range of structures that have emerged for soliciting and making transparent information about government action (both public and private) and processes for inclusion and participation. Examples include advisory bodies; town hall meetings; think tanks; advocacy services; networks; democratic audits; official inquiries; integrity commissions; reports and score cards; blogging, Twitter, and other social media; judicial activism; workplace tribunals; public interest litigation; and international forums and summits. I would also add the development of value for money audit, public and private sector ombudsman schemes, and international bodies that have become increasingly inclusive of civil society and business organizations such as the International Labour Organization. I include regulatory agencies as key mechanisms in this list as well. Regulatory agencies create sources of knowledge and authority that are partially independent of elected government and have the capacity to challenge and hold elected governments to account in key areas of decision making, sometimes through serial powers (in which either can veto) or sometimes through parallel powers (in which either can act without the other).' See also Hüpkes *et al* (n 12) 29-30.

[598] Hüpkes *et al* (n 12) 29-30. Quintyn *et al* (n 9) 13 highlight the importance of conversing with regulated firms as they form a core compartment of the answerability regime insofar as 'regulatory rule making' is concerned. Industry input should include matters relating to the suitability, efficacy and feasibility of interventions, authorities should consider the expenditures to the regulated sector and invite both 'participation' and 'representation', such as in 'an oversight board'.

[599] Hüpkes *et al* (n 12) 30: 'Rules adopted by the RSA [regulatory and supervisory agency] in the exercise of its regulatory powers are subordinate legislation. While they are not subject to any form of direct parliamentary or government control, they are of significant practical importance, since they set forth in detail the rules to be implemented by the industry. The supervisor should have arrangements in place for involving representatives of affected interests on the appropriateness and practicality of proposed rules.'

whether there are mechanisms in place to obtain information from regulators,[600] and interactive processes to allow for contributions by affected stakeholders.[601] One has to determine the source of these provisions, thus whether the prescriptions are of a legislative nature,[602] and evaluate the value of the information so obtained.[603] The analyst also has to consider the resource burden of information-based accountability mechanisms[604] and the benefits associated therewith.[605] Miscellaneous features that impact the accountability framework and have to be considered include the role of the media and the outcomes so effected,[606] the role of consumer education,[607] and the role and constituency of Consumer Councils,[608] special Boards,[609] Ombudsman and complaint-resolution offices.[610]

5. SPECIFIC MEASURES

The preceding paragraph highlighted some specific components of an accountability regime and I now proceed to deal with a selection of special measures. The colloquial answerability regime, consisting of the forums of the elected government and judiciary, has been expanded to include tribunals complimentary to the judiciary, complaint-management units, accounting firms tasked with engaging with public entities and incorporates audit-functions and in-house assessments.[611]

In order to formulate some manner of assessment strategy for the other forthcoming chapters, some specific references to methods developed in transcontinental jurisdictions, mainly that of the Commonwealth of Australia but also including some references to the United States and the United Kingdom.

[600] Bird (n 9) 764; Hüpkes *et al* (n 12) 29.

[601] Hüpkes *et al* (n 12) 29 & 30.

[602] Bird (n 9) 764. See also Hüpkes *et al* (n 12) 29 for a reference to good practice codes developed by the International Monetary Fund.

[603] Bird (n 9) 764; Hüpkes *et al* (n 12) 29.

[604] Bird (n 9) 764.

[605] Hüpkes *et al* (n 12) 30: 'Direct participation through consultation procedures serves to achieve greater acceptability and effectiveness of the regulatory process and also increases the RSA's [regulatory and supervisory agencies] legitimacy … A formalization of the rule-making process may lead to less covert influence and reduce inequalities in the power of pressure groups.'

[606] Bird (n 9) 765.

[607] Hüpkes *et al* (n 12) 21.

[608] Scott 'Accountability in the regulatory state' (n 39) 56.

[609] Hüpkes *et al* (n 12) 30.

[610] *Idem* at 21.

[611] *Idem* at 40-41.

5.1. Regulatory oversight authorities

Various features of regulatory authorities can be assessed by different organisations, as the Australian example shows.[612] The Office of Best Practice Regulation assesses compliance with processes designed to ensure necessary and quality regulation.[613] It focuses on 'regulation-making activities' through substance-evaluation of the steps taken and decisions made by a regulatory authority when developing new provisions.[614] The Auditor-General assesses compliance with pecuniary requisites and regulatory conduct, including whether the regulator is compliant with reporting requirements and financial standards, and efficacious insofar as it executes duties such as registrations, oversight and obtaining information on legal non-compliance.[615] This office can therefore assess financial and non-financial performance.[616] The Commonwealth Ombudsman deals with misconduct in administrative aspects upon receiving a grievance or on its own initiative.[617] The Ombudsman focuses on 'maladministration by regulators' and deals with matters by eliciting clarification and rationalisation of the regulator's action or inaction.[618] However, Bird notes that some these oversight forums cannot sanction misconduct but can suggest remedial action.[619]

Whilst multiple organisations may assess selected features of a regulator, the question needs to be asked as to whether proper avenues exist for adversely affected stakeholders, including consumers, to lodge grievances about the conduct and performance of regulators.[620] Multiple organisations may exist but these organisations assess selected features – the question needs to be asked whether a single organisation exists that can assess 'systemic regulatory issues', for example where numerous incidents occur that can establish a 'pattern'.[621]

[612] Bird (n 9) 760.

[613] *Idem* at 760, 756-759; Scott 'Evaluating the performance and accountability of regulators' (n 1) 364. See the Office's website at http://www.dpmc.gov.au/deregulation/pbpr/.

[614] Bird (n 9) 756-758.

[615] *Idem* at 760-761.

[616] *Ibid*. See also Scott 'Evaluating the performance and accountability of regulators' (n 1) 368 in respect of official audit offices that traverse the boundaries between financial and performance-related conduct.

[617] Bird (n 9) 761. In respect of the variances in meaning attributed to the term 'ombudsman', see Melville 'Has ombudsmania reached South Africa? The burgeoning role of ombudsmen in commercial dispute resolution' 2010 *South African Mercantile Law Journal* 50.

[618] Bird (n 9) 761.

[619] *Idem* at 760.

[620] *Idem* at 767.

[621] *Idem* at 766-767.

Gilligan *et al* refers to the criticism of the Australian system insofar as no provision is made for the assessment of 'overall performance'.[622] The individualist approach of answerability in the Australian context is a matter that has been raised with concern:

> 'Australia's financial regulators operate within complex accountability frameworks. A range of bodies carry out narrow rather than overall performance assessments. For example, the Australian National Audit Office … conducts performance audits in relation to particular programs or activities, and the Office of Best Practice Regulation reviews Regulation Impact Statements … on proposed regulatory changes, while the courts and other quasi-judicial bodies review specific decisions.'[623]

Incidental and case-specific governmental assessments are inadequate for this form of evaluation.[624] A government-authorised independent enquiry into the financial system[625] resulted in a recommendation that a 'Financial Regulator Assessment Board' be created in order to assist the Australian government to gauge regulatory progress regarding the realisation of outcomes.[626] In this regard, Andy Schmulow notes that the recommendation (founded in the Financial System Inquiry but ultimately rejected) was to empower the body with '*ex post*' appraisal authority and the ability to assess regulatory culture over and above conduct and related results.[627] He further notes that this recommendation would enable the system to have a body that can avoid its own internment by the regulator's interests and identify occurrences of 'regulatory capture' overall.[628]

[622] Gilligan *et al* (n 134) 267. See the *Financial System Inquiry Final Report* November 2014 – the report to which Gilligan *et al* refer – 235: 'Although there is no need for major change to the responsibilities of the regulators, the Inquiry has identified some weaknesses in how financial regulation is implemented and believes there is scope to improve regulatory processes. It notes: Government lacks a process for holding regulators accountable for their overall performance ... **Improve the regulator accountability framework**: Australia needs a better mechanism to allow Government to assess the performance of financial regulators. The Inquiry recommends establishing a new Financial Regulator Assessment Board (Assessment Board) to undertake annual ex post reviews of overall regulator performance against their mandates. It also recommends that Government should provide more clarity around its expectations of regulators, including its appetite for risk in the financial system, while regulators should develop better performance indicators. These new arrangements should ensure, among other things, regulators give stronger and more transparent consideration to competition and compliance cost issues.' See also the comments of Schmulow 'Retail Market Conduct Reforms in South Africa Under Twin Peaks' 2018 *Law and Financial Markets Review* 1 6 in respect of the Australian recommendation to institute a supervisory body in the form of a board.

[623] *Financial System Inquiry* (n 622) 241. See also *Fit for the future* (n 242) 59, where ASIC was criticised for not having 'consolidated performance reporting' that 'makes it challenging for stakeholders to make a judgment as to the degree to which ASIC is performing against its objectives, priorities and expectations'.

[624] Gilligan *et al* (n 134) 267.

[625] *Financial System Inquiry* (n 622) vii.

[626] Gilligan *et al* (n 134) 267. See also *Financial System Inquiry* (n 622) xxi: 'The Inquiry's recommendations to refine Australia's regulatory system and keep it fit for purpose aim to … Improve the accountability framework governing Australia's financial sector regulators by establishing a new Financial Regulator Assessment Board to review their performance annually … These recommendations seek to make Australia's financial regulators more effective, adaptable and accountable.'

[627] Schmulow (n 622) 6.

[628] *Ibid*.

At this stage, some brief remarks pertaining to the proposed (albeit unaccepted) 'Super Regulator of Regulators' styled in the form of the 'Inspector-General of Regulation' found in the Uhrig report.[629] Bird forwards this proposition as a measure to counteract the compound and intersecting nature of the organisations involved in regulatory assessment.[630] She forwards the possibility of an overseeing regulatory body as a solution to consolidate authorities and 'rationalis[e] … the accountability of regulators'.[631] The oversight entity is ideally situated to assess regulatory strategies holistically and deal with 'systemic' concerns.[632] Its courses of action would include enquiries of regulatory processes, evaluation of organisational aspects and the provision of remedial suggestions.[633] In contrast with ombud schemes aimed at individual complaint-resolution, the inspectorate would provide an additional forum for public discontent by investigating schematic defections.[634]

The interrelated partakers in the regulatory regime allow for two other phenomena that enhance accountability.[635] The cross-sectoral assessment of domestic regulators can be a valuable network-scheme to advance performance management.[636] This is not limited to domestic territory, as Scott shows, but also has application on international, regional and national level.[637]

Measures can also be gleaned from the private sector, such as the use of 'league tables' or, in this context also referred to as the 'Regulatory Scorecard'.[638] The method involves the evaluation of significant features of different regulatory bodies in a manner that allows the performances to be assessed against one another.[639] Substantively, the feats are not limited to process but also include end-results achieved by the assessed entities.[640] This method can be

[629] Bird (n 9) 765-767. See the views of Jones (n 118) 393-394 on multiple regulators and Scott's ('Accountability in the regulatory state' (n 39) 52 *et seq*) proposition of 'redundancy' discussed in par 3.4.3 *supra*.
[630] Bird (n 9) 765. See also Schmulow (n 622) 6 who mentions that there may be advantages for South Africa to consider a board-like supervisory body for regulatory institutions. See also the brief dissemination of the initial recommendation set out in the *Financial System Inquiry* (quoted in fn 622 *supra*) and Schmulow (n 622) 6.
[631] Bird (n 9) 766.
[632] *Ibid*.
[633] *Ibid*.
[634] *Idem* at 766-767.
[635] Scott 'Evaluating the performance and accountability of regulators' (n 1) 369. See also the discussion in par 3.3 *supra*.
[636] Scott 'Evaluating the performance and accountability of regulators' (n 1) 369.
[637] *Ibid* – see the author's reference to the assessments made by the OECD in respect of its constituents and the European system of regulatory authorities.
[638] Scott 'Evaluating the performance and accountability of regulators' (n 1) 369. See also 370-371 for a discussion of the value of proper assessment for the well-being of private regulators, both in respect of their significance or reliability as well as for information-gathering and development purposes.
[639] Scott 'Evaluating the performance and accountability of regulators' (n 1) 369.
[640] *Ibid*.

implemented for assessment purposes, to encourage policy and norm configuration or achieve other ends, such as the creation of an accessible forum for novice entities.[641]

5.2. Information dissemination and accumulation mechanisms

5.2.1. Reports

Reports have developed to include specific information, whether through statutory obligation or the selections made by the reporting regulatory authority.[642] Various formats exist – yearly reports (‘Annual Reports’), publications aimed at enhancing public relations (‘Media Releases’), reports reflecting on regulatory activity and compliance feats (‘Enforcement Reports’, ‘Final Notices’, ‘Administrative Proceedings Notices and Orders’ and ‘Litigation Releases’) and regulatory oversight actions (‘Market Supervision Reports’ or ‘Supervisory Notices’).[643] The United Kingdom’s Financial Sector Conduct Authority has a value marker in the format of its ‘Enforcement Annual Performance Accounts’, which is dedicated to consider the justness and efficacy of enforcement activities.[644]

Gilligan *et al* also consider certain information platforms, such as the Financial Sector Conduct Authority’s ‘Fines’ and ‘Market Abuse Outcomes’ collections, as reporting schemes even though some serve to catalogue information from other reports such as the ‘Press Releases’ and ‘Final Notices’.[645] A valuable observation on the Australian Services and Investments Commission’s approach to reporting, is that it shares the regulatory approach that the regulator advocates – it states that ‘ASIC is outcomes-focused’ and likewise ‘focus[es] on outcome reporting’.[646]

Specifics that the Organisation for Economic Co-operation and Development recommends be included in yearly reports published, are the following: The depiction of regulatory policy aims; the strategy for attaining aims; the depiction of the regulatory scheme; contemporary happenings in the regulated sector; the strategies for regulatory intercession and rule-making, oversight schemes and threat assessment; and cumulative statistics on core performance

[641] *Idem* at 369-370.
[642] Bird (n 9) 752. However, see *Fit for the Future* (n 242) 59.
[643] Gilligan *et al* (n 134) 262 & 264-266; OECD *Policy Framework for Effective and Efficient Financial Regulation* (n 43) 19.
[644] Gilligan *et al* (n 134) 265.
[645] *Idem* at 264.
[646] See Gilligan *et al* (n 134) 263. See also *Fit for the Future* (n 242) 58-57, where the review panel assessed and set out recommendations for ASIC’s reporting framework and ‘measurement approach’ – e.g. in respect of role-player questionnaires, the report notes that ‘Stakeholder surveys are not a direct measure of performance against strategic objectives’ and ‘[w]ill require careful nuancing and discussion to overcome concerns around potential bias in survey results’.

regarding the regulatory strategies in order to provide clarity as to the preferences and actions.[647]

In respect of data sets reflected in regulatory authorities' reports, Gilligan *et al* undertook a valuable study to show, and compare, the incidences of empirical reporting by financial regulatory agencies insofar as compliance-inducing actions are concerned.[648] Stakeholders and role-players in the regulated industry are often more interested in the enforcement-related conduct of regulators than other divisions of their regulatory reign.[649] The observed proclivity of regulators to analyse their performance by way of statistical methods as opposed to reflecting on specific case studies when reporting to higher authorities is apparently a conscious decision to adapt to the desires of those who hold them accountable or question the merit of their existence.[650]

The next list is an extracted combination of aspects, some qualitative but most quantitative, reported on by the regulators that were the subjects of Gilligan *et al*'s analysis supplemented by the requirements imposed on the United States' Consumer Financial Protection Bureau because Gilligan *et al*'s analyses do not include that specific regulator:[651]

- Case-studies;[652]
- regulatory approaches, such as 'transparency' and 'outcomes-based';[653]

[647] OECD *Policy Framework for Effective and Efficient Financial Regulation* (n 43) 19.

[648] Gilligan *et al* (n 134).

[649] *Idem* at 260.

[650] *Idem* at 261. The authors note at 261: 'In an era of budgetary pressures and deteriorating national balance sheets governments increasingly demand that regulators do more with less. A rising focus and premium are placed on achieving *better value for money regulation*; that is, more efficient regulation that can still achieve the core social, political, environmental and economic goals set by the government. The regulatory community demands transparent governance by regulators with a results-oriented approach to its regulatory practices to make possible information sharing, performance assessment and measurement of enforcement risks. Market participants depend on having reasonable levels of confidence in the regulatory oversight of financial markets, demonstrated in part by the production of data on the regulator's activities including enforcement actions taken. Each of these concerns has helped to propel regulators to produce technical reports detailing supposedly reliable, measurable, evidence-based outcomes as a means of justifying what they do and assessing their regulatory performance. In the case of enforcement practices, these reporting practices are a means of demonstrating their enforcement activity and helping to justify both the legitimacy of their regulatory activity and the value of their regulatory budget.' Original emphasis.

[651] Gilligan *et al* (n 134) 262 *et seq*. See s 1016(b) & (c) of the Consumer Financial Protection Act of 2010, in respect of reporting to the President and government committees, and the contents prescribed for these reports.

[652] Gilligan *et al* (n 134) 263 & 265 – it is important to note that the value of these reports for quantification purposes is low as, whilst these reports are issued often, the information contained differs from report to report. The authors question whether, over time, the preference for quantitative analysis may result in streamlined content capable to comparison – see 263. See also *Fit for the future* (n 242) 58 where the review panel wrote that the lack of incorporation of case studies in previous reports reduces the ability to 'fully assess [the] use' thereof.

[653] Gilligan *et al* (n 134) 263.

- particulars about envisaged outcomes, whether extensive purposes or focused objects;[654]
- mechanisms to meet the outcomes, including means apportionment to achieve regulatory outcomes;[655]
- regulatory feats and actual quantified evaluations of core accomplishments against core preferential outcomes;[656]
- a depiction of the regulatory arena including an enumeration and classification of the regulated stakeholders; a correlated classification of core obligations together with the quantity of dedicated officials for, and regulatees of, each division; and specific activities (such as 'surveillance' or 'supervisory functions such as varying permissions') [657] including
    - statistical indications of the activities within divisions of the regulated sector; the regulatees subjected to the specific activity;[658] the quantitative occurrences of the activity; qualitative information on specific matters; quantified information on the resources (time and funding) dedicated to legal action; and outcomes of actions;[659] and
- authentication and valuation of the information presented for quantitative analyses.[660]

[654] See the distinction made by the United States' Securities and Exchange Commission set out in Gilligan *et al* (n 134) 265: 'The SEC's Annual Performance Reports (APRs) contain a detailed performance indicator framework, including: broad "strategic goals" of the SEC and the resources allocated to each goal; the narrower "strategic objectives" involved in achieving each strategic goal; and then the even narrower "performance goals" and "performance indicators" involved in achieving each strategic objective.'

[655] Gilligan *et al* (n 134) 263-264.

[656] *Idem* at 263 (see also 270).

[657] Gilligan *et al* (n 134) 263 & 264. See CCH Attorney-Editor Staff (n 477) 489 in respect of the requirements that the CFPB provide a 'list' of 'significant' regulatory acts ('rules and other actions') in the past year as well as its propositions for the forthcoming year and a 'description' of 'supervisory and enforcement' feats. See s 1016(c)(3) of the Consumer Financial Protection Act of 2010: '[A] list of the significant rules and orders adopted by the Bureau, as well as other significant initiatives conducted by the Bureau, during the preceding year and the plan of the Bureau for rules, orders, or other initiatives to be undertaken during the upcoming period …' See also ss 1016(c)(5) & (6) of the Consumer Financial Protection Act of 2010: '(5) a list, with a brief statement of the issues, of the public supervisory and enforcement actions to which the Bureau was a party during the preceding year … [T]he actions taken regarding rules, orders, and supervisory actions with respect to covered persons which are not credit unions or depository institutions ...' Note, however, that in terms of s 1016(a), the Director also has to appear in front of the committees noted in this subsection. See also *Fit for the future* (n 242) 58, where, in light of the use of quantitative data, a proper '[n]arrative [is] important ... for proper interpretation'. See also *Fit for the future* (n 242) 59: 'Enhancing the use of performance narrative: In the absence of specific measures at the tier 1 level, it is important that ASIC develop a narrative to demonstrate how its actions have contributed to achieving its strategic objectives. Moreover, greater reliance on tier 3 metrics requires greater use of accompanying narrative to avoid the potential for perverse risk incentives (a high litigation success rate could suggest risk averse case selection), and outputs (number of financial literacy tools) misconstrued as effective outcomes.'

[658] See CCH Attorney-Editor Staff (n 477) 489 regarding information that must be provided on selected regulatees subjected to regulatory action.

[659] Gilligan *et al* (n 134) 265.

[660] Gilligan *et al* (n 134) 265 state that it is significant that the statistics are accurate, especially where the quantification scheme is intended to produce dependable answers used to influence compliance implementation strategies.

Ultimately, Gilligan *et al* conclude the following in respect of the Australian Securities and Investments Commission:

> 'The ASIC case study shows how ASIC utilises its Enforcement Reports to self-report its enforcement activity and provide an overview of its organisational response to wrongdoing. The increased detail regarding enforcement activity is welcome in terms of a greater commitment to transparency and accountability, but … the lack of accompanying explanatory information regarding classification processes and ambiguity in elements of the data dilute the transparency and accountability benefits. This attests to the OECD's warning that calculative practices have the potential to divert attention towards targeted measurable numbers and away from other important normative aspects of regulation that are less amenable to quantification. There is a risk that regulators may game the numbers, prioritising the numerical representation of a regulatory outcome over the actual delivery of that regulatory outcome.'[661]

The Consumer Financial Protection Bureau is further obligated to provide information in its reports to Congress on noteworthy challenges experienced by financial customers and an 'analysis' of customer grievances.[662] In addition, the report needs to contain an evaluation of important acts of state enforcers and regulators.[663] The Bureau has to include a section on its own internal affairs, specifically a validation of the pecuniary resources applied for and its endeavours to advance variety amongst its staff and service providers.[664]

5.2.2. Outcome assertions

I referred earlier to the public announcements of regulators or 'statements of intent', specifically those pertaining to their mandates and objectives.[665] Some recommendations forwarded by Bird deserve mention here, particularly as her view of this mechanism approximately five years after its inception was that it did not promote answerability.[666] Her criticism revolved on the neglect of prioritisation as an answerability method and lack of legislative endowment of statements of intent, based on comparative research with New Zealand.[667] Specifically, statutory provisions could pertain to the intended outcomes of the statement such as enlightenment of interested government parties in respect of the objectives

[661] Gilligan *et al* (n 134) 278. See also Bird (n 9) 746.

[662] See s 1016(c)(1) & (4) of the Consumer Financial Protection Act of 2010; CCH Attorney-Editor Staff (n 477) 489.

[663] See s 1016(c)(7) of the Consumer Financial Protection Act of 2010; CCH Attorney-Editor Staff (n 477) 489.

[664] See s 1016(c)(2) & (9) of the Consumer Financial Protection Act of 2010; CCH Attorney-Editor Staff (n 477) 489.

[665] See par 4.6.3 *supra*.

[666] Bird (n 9) 767.

[667] *Ibid*.

and projects of the regulatory authority.[668] The statement is an answerability method that delineates the evaluation detail applicable to regulatory authorities.[669]

The frequency and contents are set out, which allows for the relevance of the contents to be kept updated.[670] The contents include information on the domains in which the regulatory authority intends to affect change including the goals, achievements and effects that it desires;[671] maintenance of the internal welfare and capacities of the regulatory authority;[672] performance indicators for evaluation purposes, which include financial and non-financial markers,[673] and the perceived functioning of the authority in the forthcoming year.[674]

In addition, provision is made for an all-encompassing prescription that allows the regulatory authority to decide whether any other relevant aspects can be included in the statement as required for evaluation purposes in the forthcoming year.[675] The relevant member of the executive is empowered to respond to the statement and request alterations of the substance.[676] The document is also distributed to other divisions of the government, specifically the House of Representatives and made publicly available.[677]

Nevertheless, some challenges prevail.[678] Designing and expressing accurate and meaningful evaluation indicators are still complicated.[679] Bird has reservations about the depth and evocative nature of the statements, fearing 'superficial' and 'overly descriptive' norms and means for assessment, or propositions to enumerate the conduct of the regulatory authority as opposed to determining the true motivation for altered industry conduct.[680]

[668] *Idem* at 768.
[669] *Ibid*.
[670] *Ibid* – the legislation in New Zealand requires yearly statements that project outcomes for the three upcoming years.
[671] Bird (n 9) 768 – 'the specific impacts, outcomes, or objectives that the entity seeks to achieve or contribute to'.
[672] Bird (n 9) 768 – 'how the entity proposes to manage the organisational health and capability of the entity'.
[673] Bird (n 9) 768 – 'the main financial and non-financial measures and standards by which the future performance of the Crown entity may be judged'.
[674] Bird (n 9) 768 – '"a statement of forecast service performance" for the first year covered by the SOI [statement of intent]'.
[675] Bird (n 9) 768 – '"any other measures and standards necessary to assess the Crown entity's performance at the end of the [first] financial year" covered by the SOI [statement of intent]'.
[676] *Idem* at 768.
[677] *Ibid*.
[678] *Idem* at 768.
[679] *Idem* at 768-769 – this apprehension is specifically aimed at the 'non-financial measures and standards articulated in the SOI [statement of intent]'. She also notes at 769 that '[s]ome of the medium-term measures describe changes in the market that are either difficult to measure and/or not necessarily caused by the regulator's conduct'.
[680] Bird (n 9) 768-769. She bases her reservations of the contents of a specific report issued in New Zealand.

The prerogative of the ministerial official to prescribe the incorporation of information or the alternation of the statement has an impact on the autonomy of the asserting authority.[681] This position is ameliorated by restrictions to the exercise of same – the ability to prescribe content requirements for the document is only executable prior to the drafting thereof and is only in respect of overall achievement outcomes, regulatory approaches and means of assessment.[682] Bird views this mechanism as a substitute for the Australian means of 'tied-funding' or the 'ministerial directions power'.[683] She supports this contention by stating that a favourable equilibrium between answerability and autonomy is effected and the statements are produced in a routine, orderly and open manner.[684] Therefore:

> 'It leads to the creation of a transparent and comprehensive accountability document, which contains negotiated, albeit imperfect, performance measures and clearly articulates regulators' short and medium-term goals and strategies.'[685]

It does not seem as if the position has improved since Bird's paper of 2011.[686] In 2014, the Financial System Inquiry recommended that the Statements of Expectations and Intent, together with annual reporting requirements, be enhanced.[687] In particular, the Statement of Expectations lacked proper instruction.[688] In 2015, the review panel that conducted the capability review of the Australian Securities and Investments Commission, noted the following:

> 'The SoE [Statement of Expectations] is infrequently updated and does not clearly or transparently establish strategic priorities as understood by the Government. As a result, there is an opportunity to update and enhance the SoE to ensure better alignment and mutual understanding. There is a significant "expectations gap" between the internal and external perceptions of ASIC's performance, which must be managed by both the Government and ASIC, including through the SoE and SoI.'[689]

[681] Bird (n 9) 769.

[682] *Ibid*.

[683] *Ibid*.

[684] *Ibid*.

[685] *Ibid*.

[686] *Idem* at 756.

[687] *Financial System Inquiry* (n 622) 242.

[688] *Ibid*. See also *Financial System Inquiry* (n 622) 243: 'There appears to be widespread support for improving SOEs [statements of expectations] and SOIs [statements of intent], and increasing the use of performance indicators as a means of enhancing regulator accountability. The main issues are the extent to which Government is willing to be more explicit about trade-offs in regulatory policy (especially its risk appetite) and the capacity of regulators to devise performance indicators that adequately capture the complexity of their work. While Government may be reluctant to set out views, and developing performance indicators is a difficult exercise, the Inquiry believes that increased efforts in these areas would enhance regulator accountability.'

[689] *Fit for the future* (n 242) 43.

In this regard, the Panel drafted a model Statement of Expectations in the know that a balance has to be maintained between a proper reflection of state anticipations and the autonomy of the regulatory authority.[690] The proposed model sets out specific themes that should be covered, together with a draft example of the wording in respect of each theme.[691] The model suggests that information be provided in respect of the following matters:

- The purpose of the document;
- a recognition of the autonomous character of the regulator;
- the mandate of the regulator;
- the regulatory means of the regulator;
- factors that need to be balanced when executing the mandate within the existing means;
- the interests and changes that the state favours;
- internal and external pragmatic considerations that affect regulatory outcomes;
- State tolerance for risks and the manner in which the regulator should deal with risks;
- accountability mechanisms applicable to the regulator;
- the key role-players that the regulator interacts with and the manner in which the regulator is expected to work with these role-players.[692]

Other specific mechanisms have been developed to ensure that the regulatory entity's conduct remains aligned with the preferences of the delegating authority.[693] These include supervising units, [694] remonstrations by entities subjected to negative resolutions of regulatory authorities,[695] traversing penalties[696] and directives to ensure that the results of the conduct of the regulator remain within acceptable bounds, including rules for regulatory and human resource resolutions and statutory guidance.[697]

[690] *Idem* at 154 (Appendix B).
[691] *Idem* at 154-161 (Appendix B).
[692] *Ibid*.
[693] Lodge (n 71) 126.
[694] *Ibid* – referred to as 'police patrols'.
[695] Lodge (n 71) 126 – referred to as 'fire alarms'.
[696] Lodge (n 71) 126 – referred to as 'self-revelatory mechanisms such as cross-sanctions'.
[697] Lodge (n 71) 126 – referred to as 'structural-procedural devices'.

5.2.3. Impact assessments[698]

The 'Regulatory Impact Assessment' is a pre-emptive measure to restrain imprudent regulation and advance so-called 'better regulation'.[699] It is an anticipatory answerability method focused on the design of regulatory interventions.[700] The interventions to resolve policy issues through regulatory measures are subjected to an appraisal that ascertains whether there are other options available, and compares the advantages, disadvantages, and effects of the different envisaged interventions.[701] This is a mechanism imposed on rule originators as a pre-emptive control measure.[702] Impact assessments are problematic insofar some jurisdictions only implement this measure after the decision has been taken to effect further regulation.[703] This approach neglects to consider other options to regulation, namely inaction or endorsing measures through which the industry can organise itself.[704] The determination of advantages can be challenging to ascertain compared to the disadvantages and causes a prejudicial perspective on regulation.[705]

[698] I deal with regulatory impact assessments on a very basic level in this part of the thesis. For more information, see these less-referenced sources in this regard: OECD *Indicators of Regulatory Management Systems* (n 137) 61-69; Harrison 'Assessing the impact of regulatory impact assessments' 2009 *Agenda* 41; Kirkpatrick 'Regulatory impact assessment in developing and transition economies: A survey of current practice' 2004 *Public Money & Management* 291; Humpherson 'The National Audit Office's evaluation of RIAs: Reflections on the pilot year' 2004 *Public Money & Management* 277. See also the sources referred to in par 4.6.3 *supra*.

[699] Scott 'Evaluating the performance and accountability of regulators' (n 1) 364. This approach developed from the 'deregulation' drive that occurred – see Scott 'Evaluating the performance and accountability of regulators' (n 1) 364; Office of Best Practice Regulation (n 568) 99, 122 & 126; Council of Australian Governments (n 568) 7; Humpherson (n 698) 277 (who also note at 281 that this process is a primary mechanism for 'improving the quality of regulation'). In Australia, the requisites for this process differ depending on *inter alia* the level of government (e.g. State or Federal) – see Bird (n 9) 756-757.

[700] Bird (n 9) 756 & 757 – a very specific understanding of intervention is used: 'While these requirements apply to regulation-making activities only, regulation is defined broadly as "[a]ny 'rule' endorsed by government where there is an expectation of compliance."'

[701] Scott 'Evaluating the performance and accountability of regulators' (n 1) 364: 'Regimes of better regulation focus primarily on decisions around regulatory responses to policy problems with an evaluation process referred to generically (though it differs across jurisdictions) as a regulatory impact analysis (RIA). In the process of completing an [*sic*] RIA, officials concerned with introducing regulation consider alternatives and then evaluate potential costs, benefits, and impacts of rules and other actions.' See also Bird (n 9) 756; Council of Australian Governments (n 568) 7.

[702] Scott 'Evaluating the performance and accountability of regulators' (n 1) 364: 'Better regulation policies provide an example of regulation over government itself where some cross-departmental unit is typically concerned with setting and overseeing requirements on departments and others are responsible for setting regulatory rules to ensure that they properly evaluate them at the outset via review of both existing and new rules.'

[703] Scott 'Evaluating the performance and accountability of regulators' (n 1) 364.

[704] Scott 'Evaluating the performance and accountability of regulators' (n 1) 364. See also the recommendation of Harrison (n 698) 47 – he notes that an 'earlier' release of the impact assessment into the domain for dialogue purposes would enhance the beneficial impact of the exercise in respect of better regulatory choices. He specifically refers to the Australian practice of issuing the document eliciting comment to the coordinating body for feedback prior to distributing it in the public domain – see 47. See also Humpherson (n 698) 278.

[705] Scott 'Evaluating the performance and accountability of regulators' (n 1) 364-365. See 364: '… costs are often easier to pin down than benefits.'

In Australia, a tangible outcome of the regulatory impact assessment process is the 'Regulatory Impact Statement'.[706] It is applicable to government and related regulatory entities.[707] The statement contains the regulatory design process and cost-benefit analysis of the available alternatives that are plausible solutions to the identified challenge.[708] Impact statements are mandatory for the range of regulatory interventions that will probably affect the industry.[709] No differentiation is made between advantageous or adverse effects, or between commercial and organisations that are not established for gain.[710] However, these statements are not necessary where the intervention is of no consequence for the present position, only has a trivial effect or the effect 'is of a … machinery nature'.[711]

The impact statement is constructed through a number of phases.[712] Firstly, the oversight body in the style of the Office of Best Practice Regulation is alerted to the intention of a regulatory entity to design regulatory measures due to a need therefore.[713] The Office evaluates the data submitted by the entity in order to determine the need for an impact statement.[714] Depending on the outcome of the first phase, the statement is constructed during the second phase.[715] A problem statement or the causational factors that necessitate intervention must be reflected in the document, together with the intended outcomes.[716] The alternatives that present viable solutions to accomplish the envisaged outcomes must be dealt with, whether these are 'regulatory' or 'non-regulatory', together with the evaluation of the

[706] Bird (n 9) 757. On the issue of the Australian process, see Harrison (n 698) 47 in respect of the discrepancies in the process on paper versus in practice ('the actual process is far less rigorous').

[707] Bird (n 9) 756 & 757.

[708] *Idem* at 757.

[709] *Ibid*.

[710] *Ibid*.

[711] *Ibid*.

[712] *Ibid*. Harrison (n 698) defines the regulatory impact assessment as follows at 40: '[It] … sets out the problem the regulation addresses, the regulation's objectives, different options to achieve them, an assessment of the impacts of each option, and the consultation undertaken, and recommends an option (usually the one with the greatest net benefit). Assessing the impact of each option could include estimating the costs and benefits, measuring business compliance costs, analysing risks and considering the effects on competition. Sometimes the document that entails the RIA [regulatory impact assessment] is called a Regulatory Impact Statement (RIS).' See also Humpherson (n 698) 280 for the assessment framework developed in the United Kingdom to ascertain whether an impact assessment was undertaken in an acceptable manner – the National Audit Office considers matters such as the timing of the assessment ('Was the RIA process started early enough?'), efficacy (of the 'consultation' process and method), depth (of the ascertainment of 'costs' – particularly considering whether all interested parties were accounted for), rationality (of the evaluation pertaining to advantages of the proposed intervention), 'compliance' and post-intervention oversight and assessment of whether goals are ultimately realized. I deal with Bird's (n 9) version of the assessment, but see also Council of Australian Governments (n 568) for its own phases of assessments and statements.

[713] Bird (n 9) 757.

[714] *Ibid*.

[715] *Ibid*.

[716] *Ibid*.

attributes that affect the effects of the intervention.[717] In particular, the advantages, disadvantages and perils of the identified alternatives must be indicated *vis-à-vis* customers, enterprises, the political administration and society.[718] A favoured alternative must be indicated as well as a scheme to effect the alternative and re-assess same.[719] The severity of the effects of the intended interventions determines the extent of the examination recorded in the impact statement.[720]

The statement is 'certified' by the chief official or second in command of the relevant regulatory entity.[721] Apart from the initial evaluation, assessing the need for the investigation and report, the Office considers the aptitude of the submitted document.[722] An abstract of the impact statement, spanning a single page, must also be submitted and the Office verifies that this condensed version reflects the contents of the statement in an objective and true manner.[723]

This assessment precedes the third phase, which is the submission of the impact statement, the report of the Office pertaining to the sufficiency of the statement and its evaluation of the abstract, to the person ultimately responsible for selecting a regulatory option.[724] Arguably, the official or entity, aided by the submitted information, will make an educated selection.[725] The final phase consists of the dissemination of the impact statement, including to a 'central online public register' and as an annexure to explicatory documents.[726]

This mechanism and the associated procedures exude some discrepancies as the use of this mechanism has two motives.[727] It is informative and assists in the selection process but it is also a means to effect open, understandable and validated intervention.[728] The impact assessment does not necessarily document the final decision.[729] The official responsible for the final determination is guided by the contents and the preferences expressed in the statement.[730] However, the suggestions, even though these were endorsed by the Office, are

[717] *Ibid*.
[718] *Idem* at 757-758.
[719] *Idem* at 758.
[720] *Ibid*.
[721] *Ibid*.
[722] *Idem* at 757 & 758.
[723] *Idem* at 758.
[724] *Ibid*.
[725] *Ibid*.
[726] *Ibid*.
[727] *Ibid*.
[728] *Ibid*.
[729] *Ibid*.
[730] *Ibid*.

not binding and the official may deviate from the proposed solution.[731] On the one hand, this course ensures that the responsible official remains the deciding party.[732] On the other hand, a different conclusion, when considered in light of the published statement, could reflect adversely on the regulatory entity intended to effect regulation and who consequently prepared the impact assessment document.[733] As such, some undesirable effects manifest.[734] The impact statement could deliberately reflect the pre-expressed preferences of the deciding party, potentially resulting in expenditures validating choices already made.[735]

Alternatively, the document may be modified prior to its dissemination provided that consent is obtained from the Office.[736] The alterations to the document is permitted after selection of a regulatory option but prior to dissemination of the statement if a concept of the document contained confidential or state defence information or if the purpose is to incorporate investigations undertaken in respect of the chosen alternative insofar as this alternative was neglected in the initial document.[737] Ordinarily and in contrast with allowances made to introduce data, modifications that result in the eradication of information pertaining to alternatives will be disallowed.[738]

Impact assessment reporting is obligatory and adherence to the prescribed processes evaluated.[739] The Office recommends the aforementioned content of the impact statement, determines the incidences where impacts statements are to be prepared, evaluates same and has its own reporting requirements.[740] Nonetheless, the process is not founded in statute, but authorised 'by executive order'.[741] Determinations on regulatory interventions that require adherence to the regulatory impact assessment processes is only submitted to the deciding officials after the completion of a regulatory impact statement unless there are unusual conditions present.[742] The sanction for non-compliance is limited to adverse reputational exposure as opposed to the United States where non-adherence to pre-emptive analytical measures can mandate judicial intervention.[743]

[731] *Ibid*.
[732] *Ibid*.
[733] *Ibid*.
[734] *Ibid*.
[735] *Idem* at 758.
[736] *Idem* at 758 & 759.
[737] *Idem* at 758-759.
[738] Bird (n 9) 759.
[739] *Ibid*.
[740] *Ibid*.
[741] Bird (n 9) 756 & 759.
[742] *Idem* at 759.
[743] *Ibid*.

Although autonomous entities established for this purpose, such as the Australian Office of Best Practice, are a significant component of answerability frameworks in respect of the designing of regulatory measures,[744] these entities ordinarily and restrictively address state generated legal frameworks.[745] Scott argues that this particular mechanism is not often harnessed in the contexts of non-governmental entities and the execution of policy frameworks where comparative appraisals of advantages ('benefits') and disadvantages ('costs') can be of value.[746] Goodhart *et al* also lament on the expenditures associated with thoughtless and abundant regulatory interventions.[747] Therefore, Goodhart *et al* elucidate on the problem as follows:

> 'Regulation is not costless, but imposes a range of costs (*institutional*, *compliance* and *structural* …), which are ultimately reflected in the price of financial services. If regulation is "excessive" (if it exceeds what is needed to achieve its limited objectives) or if it focuses on inappropriate objectives, avoidable costs are imposed upon society, and these costs could exceed the costs that regulation is designed to avoid.'[748]

Scott notes the following:

> 'Obvious issues concerning the costs and benefits of enforcing regulation in different ways are rarely subject to the scrutiny of better regulation, though separate processes for reviewing the efficiency and effectiveness of enforcement have been undertaken in some countries, for example the United Kingdom and Australia.'[749]

The Organisation for Economic Co-operation and Development questions whether cost-benefit evaluations are suited to all scenarios, particularly as there are challenges to formulating meaningful measurements.[750] Likewise, Bird highlights the difficulties presented insofar as pre-emptive evaluations are concerned.[751] The scheme offers a methodological perspective on regulatory design but it concerns the arduous quantification of advantages and

[744] Office of Best Practice Regulation (n 568) 118 (see also 121 *et seq*).

[745] Scott 'Evaluating the performance and accountability of regulators' (n 1) 365. See Office of Best Practice Regulation (n 568) for a detailed explanation of Regulatory Impact Assessments, the process involved, the underlying motivations, etc. See also Council of Australian Governments (n 568). As I indicated in fn 712 *supra*, I deal mostly with Bird's (n 9) discussion, which was written in 2011 – after both these documents were released.

[746] Scott 'Evaluating the performance and accountability of regulators' (n 1) 365.

[747] Goodhart *et al* (n 22) 190.

[748] *Ibid*. Original emphasis.

[749] Scott 'Evaluating the performance and accountability of regulators' (n 1) 365.

[750] OECD *Policy Framework for Effective and Efficient Financial Regulation* (n 43) 31: 'Given the breadth and depth of financial regulation, and the difficulty in measuring benefits in many instances, it may not necessarily be appropriate or possible to conduct a full cost-benefit analysis of every regulation. The use of cost-benefit analysis should be proportionate to the regulation under consideration and its impact.'

[751] Bird (n 9) 759-760.

the concretisation of forthcoming profits.[752] The exercise therefore necessitates that presumptions be made, which can render the outcomes of the whole exercise questionable.[753]

The United Kingdom is renowned by some as having prominence in the domain of 'Regulatory audit' development, through its National Audit Office.[754] This approach developed from the jurisdiction's own attempt at advancing regulatory intervention and resulted in the transformation of conventional verification of the pecuniary affairs and conduct of government agencies into a scheme that evaluates the performance of the regulatory body.[755] The regime in the United Kingdom has also progressed to include, over and above regulatory impact assessments, the efficacy of regulation, the directives and affiliations between the regulatory authority and affected stakeholder businesses, the need to limit regulatory encumbrances and provides for supervision by the Audit Office.[756]

In respect of internal measures aligned with regulatory accountability, the Organisation for Economic Co-operation and Development promotes specific in-house means to promote a structure for state answerability.[757] The proposed means provide for continuous examination and feedback.[758] Exact means include dissemination and debate on 'sensitive' matters that could adversely affect the regulatory system if publicised, specifically through decrease of trust in the system and the debilitation of financial system solidity.[759] Performance evaluation markers should be designed to benchmark improvements in meeting regulatory aims and internal remedial actions developed in order to deal with severe incidences of state non-performance in respect of aims and outcomes.[760] Remedial actions can be constructive or punitive and include measures to enhance access to specialists, funding and other necessary means or serious interventions such as discharge of officials from office.[761] However, the Organisation cautions restrain in order to safeguard the autonomy of the unit.[762]

[752] *Ibid*.
[753] *Idem* at 760.
[754] Scott 'Evaluating the performance and accountability of regulators' (n 1) 368. The author states that '[r]egulatory audit in the United Kingdom has become more generally concerned with enhancing the effectiveness of the regulatory state, using the substantially soft power of the public sector audit functions'.
[755] Scott 'Evaluating the performance and accountability of regulators' (n 1) 368.
[756] *Idem* at 368-369.
[757] OECD *Policy Framework for Effective and Efficient Financial Regulation* (n 43) 19.
[758] *Ibid*.
[759] *Ibid*.
[760] *Ibid*.
[761] *Ibid*.
[762] *Ibid*.

Business management forms and strategies apply to regulatory bodies rendering the governance system influential.[763] This aspect differs from jurisdiction to jurisdiction and various schemes exist.[764] In South Africa, the National Credit Amendment Act effected a change in governance structure by removing the Board of the Regulator and established the Chief Executive Officer as the individual who is accountable for the performance of the National Credit Regulator, including responsibility for all aspects of the finances of the Regulator.[765] In Australia, the management units of the Australian Securities and Investment Commission and the Australian Prudential Regulatory Authority consist of permanent officials or 'executives' and do not distinguish between the chief executive officer and the presiding officer or 'chair' of the management unit.[766] Bird notes that '[t]he use of a board, comprising of executive and non-executive directors, to govern key Australian regulators has been firmly rejected in Australia'.[767] Boards of other regulatory bodies consist of 'non-executive directors', 'chairs' and 'chief executive officers'.[768] The Consumer Financial Protection Bureau is commanded by a solitary director.[769]

Arguments against corporate-emulating governance structures in Australia in the context of the accountability debate revolve on the limitations and inefficiencies brought about by a managerial unit in the form of a board.[770] Regulatory bodies are distinct and unique organisations, resulting in the attenuation or alteration of some of the strengths associated with accountability regimes found in ordinary corporate structures.[771] These powerful mechanisms, such as selection and discharge of senior management officials, veto rights over the executive, the capacity to determine regulatory approaches, norms and ethos and the ultimate decision-makers on the acquisition or release of property, are not necessarily the prerogatives of regulatory boards.[772] Thus, the capacity for meaningful conduct and outcome supervision and determination is restricted.[773]

[763] Bird (n 9) 769-770; Mwenda (n 186) 27. See also the comments with regard to the emulation of business forms by Bird (n 9) 769 (noting that the Australian regulators do not emulate those of the regulated firms), Goodhart *et al* (n 22) 152 & Hadjiemmanuil (n 117) 140 (who support emulation). See also the discussion in par 3.3.2. of ch 2 *supra*.

[764] Bird (n 9) 769.

[765] Ss 23(1) & (3) of the National Credit Act (Act 34 of 2005) after amendment by sections 3 & 4 of the National Credit Amendment Act (Act 19 of 2014).

[766] Bird (n 9) 770.

[767] *Ibid*.

[768] *Ibid*.

[769] CCH Attorney-Editor Staff (n 477) 484.

[770] Bird (n 9) 770.

[771] *Idem* at 770-771.

[772] *Ibid*.

[773] *Idem* at 771.

The unit is unable to select the chief executive officer, yet the designated officer is accountable to the unit that designates the obligations of the official.[774] *Vice versa*, the board is the liable unit in respect of the accomplishments of the regulator but the senior managerial officer of the regulatory body is not selected by the board.[775] In addition, it was argued that the answerability network was complicated due to a dual answerability-obligation towards both the unit and the government department of the Treasury.[776] Bird further notes the possibility of manipulation of the authoritative units of the board and government respectively, by the dually answerable official.[777]

Notwithstanding criticism, ordinary corporate structures have seemingly been incorporated with some success in other jurisdictions, notably Australasian regulators.[778] An attractive, problem-resolving attribute of a board is found in the equilibrium effected between answerability, autonomy and specialism.[779]The structure facilitates answerability towards, and sensitivity to, the requirements of the community as 'stakeholders' in in the same way that it deals with those invested in corporations.[780]

5.3. Regulatory performance

Earlier in this chapter, I referred to the challenge of consequential answerability mechanisms and the difficulties associated with drafting usable markers for assessment of performance for accountability purposes.[781] However, notwithstanding complexity, these markers are important for the regulatory answerability framework.[782]

> 'Regulatory indicators can contribute to the attainment of regulatory policy goals in a number of ways. Major uses of indicators include: ● measuring progress in implementing regulatory policies; ● highlighting priority areas for further action; ● demonstrating consistency between regulatory policy actions and regulatory quality outcomes; ● enhancing the legitimacy and accountability of

[774] *Idem* at 770.
[775] *Ibid*.
[776] *Ibid*. In South Africa, the removal of the board was motivated by a need to facilitate uninterrupted answerability to government – see Ensor 'Regulatory bodies face restructuring' BDLive 19 January 2015.
[777] Bird (n 9) 771.
[778] *Ibid*.
[779] Bird (n 9) 771; see par 2 *supra* regarding the challenging interrelation of answerability, autonomy and expertise.
[780] Bird (n 9) 771.
[781] See par 3.3 *supra*.
[782] Bird (n 9) 746-747; Scott 'Evaluating the performance and accountability of regulators' (n 1) 362 *et seq*. The conduct markers that the Commonwealth of Australia has developed for its regulatory regimes are cast in wide terms – see Gilligan *et al* (n 134) 266; Australian Government (n 134) 4. The Australian Government describes these markers as 'outcome-based key performance indicators' – see 4. This scheme serves to provide mandated reporting themes and support regulatory advancements in limiting superfluous or ineffective regulation – see Australian Government (n 134) *Foreword*, 2 & 4.

> the regulatory policy by demonstrating progress; and, ● raising awareness of regulatory policy issues among regulators.'[783]

Hüpkes *et al* also comment that the evaluation, or 'measurement', of the performance of regulatory authorities tasked with regulation and oversight in respect of their objectives is challenging, 'if not inherently impossible'.[784] They distinguish between answerability of certain regulators, such as a central bank tasked with a solitary enumerable purpose of regulating monetary policy, with that of a financial regulatory authority tasked with prudential and consumer welfare obligations.[785] Three issues affect this challenge: the absence of overt, law-based objects to pursue; the multiplicity of these goals supplemented by regulation by multiple authorities; and the complexity in assessing these outcomes.[786]

Varying objectives of an immeasurable nature are arguable 'inherently linked to the very nature of the [authority's] work'.[787] Consequentially, the precedence of outcomes will vary and in the process of executing regulatory obligations in order to accomplish these outcomes, regulatory discretion becomes a reality due to the employment of value-based appraisals in effecting its duties.[788] The inferences drawn by regulators in the process of setting its priorities, together with the discretionary component embedded in regulatory decision-making complicates answerability.[789] Regulatory authorities are often tasked to act pre-emptively in order to avert certain occurrences as opposed to the achievement of a set purpose.[790]

[783] OECD *Indicators of Regulatory Management Systems* (n 137) 10.

[784] Hüpkes *et al* (n 12) 13. See also 33: '[F]inancial sector regulators and supervisors have to cope with a comparatively greater range of contingencies; that their mandate (multiple, nonmeasurable, and often vague) is not easily amenable to simple scrutiny; that they have to cope with issues of confidentiality and market sensitivity; that they operate in an environment of multiple principals; and that they have extensive and far-reaching enforcement and sanctioning powers.'

[785] Hüpkes *et al* (n 12) 10-12 & 33-34.

[786] *Idem* at 10.

[787] *Ibid*.

[788] *Idem* at 14: 'For example, an RSA that has as its objective the protection of consumers is immediately faced with a number of choices: What is the appropriate level of protection for retail consumers? At what level of sophistication can individuals be reasonably assumed to be able to protect their own interests? Should the same protection be extended to natural and legal persons? Might not a sole trader reasonably expect the same level of protection as a business person as he or she might expect as an individual? Where to draw the line between these legal persons and a multinational conglomerate? These judgments are hard to make in law and, hence, must inevitably be left to regulatory discretion.' See also 17 in respect of the alternative available when faced with an enforcement issue and the considerations (such as expenditures, prospects of success and the status of certain 'high-profile' cases to pre-empt future non-compliance and to set legal precedence).

[789] Hüpkes *et al* (n 12) 14.

[790] *Ibid*.

In addition to the need for certainty of outcomes and legal backing,[791] the aforementioned authors present additional solutions.[792] They argue that outcomes can be articulated in respect of the adversity that it aims to pre-empt, which may assist to direct actions and available means.[793] Augmentative measures can be incorporated to enhance an accurate understanding of regulatory aims and obligations, such as operative norms, processes or the exact effects that are desired.[794] In this regard, the suggested course of action is the public dissemination of the regulatory scheme intended for implementation in order to effect answerability that is increasingly functional. [795] Various authors have acclaimed the value of articulating regulatory objectives and strategies in a revealing manner in order to keep interested parties informed, educated and involved in regulatory activities. [796] The development of a knowledgeable stakeholder-cluster insofar as regulatory feats and outcomes are concerned is incorporated in to the suggested solutions as it increases a holistic understanding of regulatory activities as well as informing the regulator's status.[797]

The unique challenges of regulatory authorities highlight the inadequacy of singular accountability mechanisms to achieve meaningful answerability.[798] I find that the following statement accurately summarises the complexity of the problem and presents a suitable approach to deal with it:

> 'Having established that there are several additional layers of complexity in the operation of RSAs [Regulatory and Supervisory Agencies] compared with monetary policy authorities, we turn now to the question of how these complexities can be addressed, in practice, through accountability arrangements to keep the independent RSA "in check" without curtailing its operational independence ... The guiding principle, which has emerged from the previous sections, is that a highly complex and specialized activity like regulation and supervision of financial markets, involved with such a broad range of principals, can only be monitored and held accountable by a combination of instruments and arrangements. Thus, the task is to create a network of

[791] *Idem* at 10; Quintyn & Taylor (n 8).

[792] Hüpkes *et al* (n 12) 14-15.

[793] *Idem* at 14: 'Regulatory objectives could be carefully expressed in terms of the negative goal of the prevention of certain undesirable outcomes. This can help focus regulatory activities and guide the use of resources.'

[794] Hüpkes *et al* (n 12) 14: 'The objectives could be complemented by, for instance, principles of operation, procedures, or by a very specific result to be achieved. These tools would describe the mandate or objectives with more precision. In this way, accountability would become more operational if the [authority] publishes the strategy or policy it promises to pursue over a given period of time.'

[795] Hüpkes *et al* (n 12) 14.

[796] See *inter alia* paras 3.1 & 5.2.2 *supra*; Hüpkes *et al* (n 12) 7-8 & 15.

[797] Hüpkes *et al* (n 12) 15: 'Accountability relations should be built with all stakeholders in order to create and foster a broad understanding of the objectives and the performance of the [regulator]. This would allow all stakeholders to see the different aspects of the work of the [regulators]. Building understanding will lead to building a reputation.'

[798] Hüpkes *et al* (n 12) 10-15 & 19.

> complementary and overlapping checking mechanisms. With such a combination of control instruments, the goal is to arrive at a situation where no one controls the agency, but the agency is nonetheless "under control." Instrument design and selection should also be such that incentives at "self-policing" are provided to the RSA.'[799]

I have found the Australian Government's *Regulator Performance Framework* quite insightful, particularly in light of the challenges identified earlier.[800] The work is valuable in the sense that it provides practical examples of how the assessments can be done, in a similar fashion to the International Organisation of Securities Commissions' *Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation* May 2017.[801] The framework attempts to limit encumbrance of the regulators.[802] It is intended to be adjustable to account for differentiation between regulatory bodies, 'complement, rather than duplicate',[803] and to comprise of a combination of self- and external evaluations.[804] In addition, the evaluation should be published,[805] all-encompassing, and rely on various attestations as to performance.[806] The latter would require that evaluations include assessments of qualitative and quantitative data, participation of varied informants or

[799] *Idem* at 19.

[800] See *inter alia* paras 3.3 & 5.3. See also Pearson 'A credit lens: implementing twin peaks' 2017 *Law and Financial Markets Review* 1 2 who argues that '[t]his framework can also be adapted to study the implementation of a new regulatory system'.

[801] IOSCO (n 483) – the organisation has developed specific questions that have to be answered when a jurisdiction is assessed in respect of accountability (see 27): 'With reference to the system of accountability for the regulator's use of its powers and resources: (a) Is the regulator accountable to the legislature or another government body on an ongoing basis? (b) Is the regulator required to be transparent in its way of operating and use of resources and to make public its actions that affect users of the market and regulated entities, excluding confidential or commercially sensitive information? (c) Is the regulator's receipt and use of funds subject to review or audit? … Are there means for natural or legal persons adversely affected by a regulator's decisions or exercise of administrative authority ultimately to seek review in a court, specifically: (a) Does the regulator have to provide written reasons for its material decisions? (b) Does the decision-making process for such decisions include sufficient procedural protections to be meaningful? (c) Are affected persons permitted to make representations prior to such a decision being taken by a regulator in appropriate cases? (d) Are all such decisions taken by the regulator subject to a sufficient, independent review process, ultimately including judicial review? … Where accountability is through the government or some other external agency, is confidential and commercially sensitive information subject to appropriate safeguards to prevent inappropriate use or disclosure?'

[802] Australian Government (n 134) 13.

[803] *Idem* at 6 & 11.

[804] *Idem* at 8-10. The regulator is given the prerogative to decide on the manner of annual self-evaluation but the internal responsible authority has to provide certain assurances (see 8). In addition, the outcomes are reported to an external committee as per the direction of the Minister for 'appropriate external validation' (see 8). This is over and above the ad hoc assessments conducted on certain chosen regulatory bodies (selected based on criteria including developing risks, state concerns, grievances, previous evaluations by other bodies) in a three-year cycle (see 9) or annual assessments (regulators again selected on criteria including 'economic value', 'value of regulatory burden', significance of the regulated market) (see 9-10).

[805] Australian Government (n 134) 12 – this requirement is further subject to differentiation based on the nature of the regulator.

[806] Australian Government (n 134) 11.

gathering of evidence from different informational sources, and consideration of results and actions.[807]

The framework developed by the Australian Government is a guiding document that offers principles to which the regulator has to conform (such as: 'Actions undertaken by regulators are proportionate to the regulatory risk being managed'), together with a short explanation thereof. [808] The above is correlated with appraisals denoting the preferred level of conformation (such as: 'Regulators recognise the compliance record of regulated entities, including using earned autonomy where this is appropriate. All available and relevant data on compliance, including evidence of relevant external verification is considered') and specific activities that show conformation to the principle (such as: 'Documented enforcement strategy includes options for graduated compliance actions consistent with regulators' powers' or 'Demonstrated engagement with regulated entities to inform them of the regulators' expectations').[809] Whilst the principles are valid, I do not think that the contents are necessarily universal and therefore reflect specific government priorities.[810]

Accountability measures can enhance the functioning of the regulator insofar as the presence thereof encourages intentional answerable conduct and the information gathered whilst complying with the methods results in better choices.[811] Answerability is not only beneficial to those who hold the regulator to account but can inform self-improving behaviour initiated by the regulator itself.[812] On the one hand, accountability cannot simply be a self-evaluation exercise.[813] On the other hand, the value of answerability outcomes for the regulator itself cannot be underestimated.[814]

Another mechanism used by the Australian regulatory sector is the 'capability review'.[815] In the 2015 review, the Australian Securities and Investments Commission was subjected to an assessment to determine the manner in which the Regulator applied its resources and

[807] *Ibid*.
[808] *Idem* at 15 & 20. The principles are each numbered as a 'Key Performance Indicator' or 'KPI' and the explanation is viewed as 'Better Practice'.
[809] Australian Government (n 134) 15 & 21. The correlating appraisals are called 'Measures of good regulatory performance' and the activities 'Examples of output /activity-based evidence'.
[810] See the foreword and introduction to Australian Government (n 134) respectively at i & 2.
[811] Bird (n 9) 744; Australian Government (n 134) 2, 8 & 15.
[812] See Australian Government (n 134) 9 & 15.
[813] See Australian Government (n 134) 8-9 & 15.
[814] Australian Government (n 134) 2 & 8. See Bird (n 9) 744: '… the regulator's knowledge that it may be called on to explain and justify its actions creates strong incentives to ensure that its actions are, in fact, explicable and justifiable. Likewise, consultation and regulatory impact analysis generally lead to improved regulatory decision-making. So in this way, appropriate accountability mechanisms will significantly improve regulators' performance of their core functions.'
[815] See *Fit for the Future* (n 242). This was upon recommendation – see *Financial System Inquiry* (n 622) 237.

executed its authority in meeting its projected legislative outcomes.[816] The aim was to assess its capacity to act as a competent and transparent regulatory institution and propose 'recommendations on how efficiently and effectively ASIC operates to achieve its strategic objectives' with the view of ensuring that it can manage present and future trials.[817] The assessment was not viewed as a 'performance review' by the assessors,[818] although some evaluation of its conduct was undertaken. The Commission was also given the opportunity to comment on the report and react to findings and recommendations with which it concurred or differed.[819] I do not deal with the specific outcomes of the review, as it is regulator-specific, but refer to the overall framework and features considered as it may present a model that can add value to determining whether a regulator is properly empowered, or conducting itself in a manner that increases functionality.

The assessors evaluated the Commission against a specific protocol designed around three main institutional features – 'Governance and Leadership', 'Strategy' and 'Delivery'.[820] The first feature considered the hierarchical management structure, which included the answerability mechanisms that were effected by external role-players, the internal management scheme including review of the most senior executive and operational personnel and institutional culture.[821] A noteworthy observation was that the assessors distinguished between legislative or schematic obstacles and application or practical implementation difficulties.[822] The report includes an assessment of an 'expectations gap', which is an evaluation based on a comparison of answers to the same questions posed to the regulator and to the regulated community.[823] The purpose of this evaluation was to determine whether there were discrepancies between the regulatee's views and understanding of the regulator's performance, abilities and mandate and that of the regulator's.[824] A further aspect that was assessed was performance reporting by the Commission, and this was done against a framework developed by Malcolm Sparrow.[825] Insofar as the leadership scheme of the

[816] *Idem* at 1. See also *Fit for the Future* (n 242) 26: 'The Review is a forward-looking, whole-of-agency exercise that assesses ASIC's ability to meet future objectives and challenges. It is not a performance review. This Review adopts a robust capability assessment methodology … which focuses on ASIC's governance and internal management strengths and weaknesses.'

[817] *Fit for the Future* (n 242) iii & 1.

[818] *Idem* at 4.

[819] *Idem* at Appendix E.

[820] *Idem* at 4.

[821] *Idem* at 43-44.

[822] *Idem* at 43. See e.g. the statement at 43: 'While the design of the external governance and accountability architecture is appropriate, it is being applied in a manner which is unnecessarily reactive and issue driven, and is not providing broad long term strategic oversight and thereby accountability for ASIC.'

[823] *Fit for the Future* (n 242) 50.

[824] *Idem* at 49.

[825] *Idem* at 56.

regulator was concerned, the aspects that were evaluated included the governance structure, the selection, expertise, performance, and functioning of the actual senior personnel.[826]

Various features related to the strategic thinking of the regulator was assessed, including the manner in which the strategy is constructed, defined and disseminated, and the resources expended on proper execution of the strategy.[827] In this regard, the assessment had a qualitative nature insofar as the plans and contents thereof were concerned.[828] The assessors were also attentive to the contents, timing and focus of information exchanges with regulatees, in which regard the observations were often value-based:

> 'ASIC's communication of its mandate and strategic priorities to stakeholders does not clearly highlight its expectations about the impacts and limitations of its activities, nor does it provide clear guidance on how the strategy will be delivered. …ASIC leadership's public articulation of its role places too heavy an emphasis on enforcement, and risks driving strategic focus and staff orientation too much towards this single aspect of the regulator's toolkit.'[829]

The evaluation of features that pertain to executing its mandate ('delivery') revolved around an assessment of the staff members' expertise, including expert skills needed in future, and the internal design of the regulator insofar as efficacy is concerned.[830] This part of the assessment included a look at the make-up of staff, including training, experience, length and conditions of tenure, work opportunities, interaction between levels of management and staff, and the 'professional confidence' of staff members.[831] The structuring of departments or sections and the impact of this on the efficacy of the regulator was also assessed.[832]

In addition, the capability review also considered the mechanisms to the regulator's disposal, and the way in which these mechanisms are used, in order to meet its targets.[833] This last-mentioned part of the report contains both an assessment and an evaluation of performance, particularly as the panel recommends specific actions in order to improve the regulator's conduct.[834] Many of the recommendations pertain to internal behavioural, or policy, changes.[835]

[826] *Fit for the Future* (n 242) 70-75.

[827] *Idem* at 80-81. The processes were also assessed – see 86.

[828] *Idem* at 80.

[829] *Idem* at 81. ASIC did not agree with the assessment of the observations of its views on enforcement, found in other parts of the report as well (e.g. 93-94) – see 178.

[830] *Fit for the Future* (n 242) 98-99.

[831] *Idem* at 103-109.

[832] *Idem* at 109-112.

[833] *Idem* at 99.

[834] *Idem* at 115-120.

[835] *Idem* at 120.

Lastly, the manner in which the correspondence with regulatees occurred and the data *infra*structure of the regulator was assessed,[836] and specific projects and approaches were dealt with.[837] The assessment panel did not only include internal issues, but also considered external matters. As such, the report reflects on three identified 'external constraints', being '*Legislative and regulatory complexity*', '*Perceived funding constraints*' and '*Cooperation with other regulators*'.[838]

The report suggested various remedial actions, together with an 'implementation plan', in order to address the shortcomings identified in the report.[839] A positive aspect, recognised but not elaborated on, is that good practices are also identified.[840] In addition, many of the evaluations are done against frameworks that have already been developed by other government departments, international academic or private institutions.[841] There are practical challenges to an effective, and trustworthy, review – the panel members need to be carefully selected to ensure that they have the necessary expertise to conduct an evaluation of this scale and nature and to ensure that they do not have stakes in or a bias, either against or in favour of, in respect of the evaluated regulator.[842]

6. IMPORTANT CONSIDERATIONS

Regulatory accountability has proven to be an intricate concept, relevant to all aspects of the regulated regime and not without its unique challenges.[843] It is also a closely related intersecting domain comprising of various stakeholders and role-players capable of inducing a robust management scheme.[844] Lodge states that 'accountability and transparency are not "good things" in their own right of which we should simply have "more"'[845] whilst Gilligan *et al* note that '[r]egulatory accountability, or the regulation of regulators, is an emerging discipline, the scope of which is not yet settled'.[846]

Prior to delegation, the delegating authority contemplates the release of its authority to another entity together with those means that will enable it to retain some influence over the

[836] *Idem* at 100.
[837] *Idem* at 103 & 130-131.
[838] *Idem* at 133.
[839] *Idem* at 18-24 & Appendix A.
[840] *Idem* at 5 & e.g. 58.
[841] See e.g. *Fit for the Future* (n 242) 50, 57 & 70.
[842] The dangers that a review such as this holds in was brought to my attention by Prof Justin O'Brien during his discussion of the review at the Colloquium on 'Twin Peaks' 28 September 2017.
[843] See paras 2-5 *supra*.
[844] See par 2.4.3 *supra*; Scott 'Evaluating the performance and accountability of regulators' (n 1) 373.
[845] Lodge (n 71) 128.
[846] Gilligan *et al* (n 134) 260.

empowered entity.[847] A delicate balance needs to be retained in respect of positive regulatory attributes, [848] specifically the internationally recognized principles of autonomy and answerability.[849] The impact of answerability methods on the expertise of the regulator, considering that specialist development is a *rationale* for the establishment of regulators and that many answerability means by necessity involve evaluations conducted by less informed and skilled persons, needs to be carefully monitored.[850] An estimation of the quality of regulation effected by regulators requires specialist assessment on an echelon equivalent to that of the regulator itself.[851] In addition, a differentiation needs to be made in respect of 'self-evaluation' and 'external performance evaluation'.[852]

The achievement and retention of an optimal equilibrium in answerability systems is of cardinal importance.[853] Thus, as with autonomy,[854] the question is not about quantity[855] but adequacy.[856] Meaningful answerability methods, capable of effecting accurate assessments and controlling the behaviour of regulatory entities, are invaluable.[857] I have also found that the Australian Government has a realistic approach when it comes to developing a proper system:

> 'The measurement and attribution of outcomes-based KPIs can be difficult and may not be immediately possible to accurately and meaningfully assess and attribute outcomes. It takes time to establish a pattern from which improvements in performance can be identified. For some regulators this may mean a period of time between the introduction of the Framework and a clearly assessed achievement of the stated objectives. Over time, reporting by regulators will demonstrate measurement and communication of outcomes, rather than simply reporting against outputs. It is important that the outcomes are clearly identified early, with data allowing an assessment against agreed output/activity-based evidence collected over time. This will allow efficient tracking of the performance of individual regulators and provide ongoing benchmarking of comparable regulators.'[858]

[847] See par 2.2 *supra*.
[848] Bird (n 9) 771.
[849] See paras 1.4 of ch 1; par 3.3.4 of ch 2 *supra*.
[850] See *inter alia* par 2.2 *supra*.
[851] Scott 'Evaluating the performance and accountability of regulators' (n 1) 362: 'Performance evaluation provides a mechanism to address claims to technical expertise of regulators and thus the potential to evaluate regulators on their own terms.'
[852] Scott 'Evaluating the performance and accountability of regulators' (n 1) 362.
[853] See par 3.3 *supra*.
[854] See ch 3 *supra*, specifically par 2.
[855] See also Scott 'Evaluating the performance and accountability of regulators' (n 1) 374.
[856] See Bird (n 9) 771-772.
[857] See *inter alia* paras 3.2 & 3.3 *supra*.
[858] Australian Government (n 134) 6.

The accountability regime is not only aimed at effecting traditional management over authority-bearing government-related regulatory bodies, but has an important developmental role insofar as the ascertainment of efficacious regulation and progressive determination thereof is concerned.[859] An important aspect of answerability that should be exploited is the corrective nature of prudent evaluations.[860] Scott urges the use of 'feedback learning' aimed at improving assessed conduct[861] whilst the Organisation for Economic Co-operation and Development highlights the use of regulatory aims and performance measurements for evaluation purposes as signalling methods to indicate when changes are required in a wide variety of regulatory divisions – 'policy approaches, policy instruments, and possibly even the institutional framework'.[862] The reliance on outcomes of accountability assessments can be dangerous, especially if the accuracy and authenticity of data is questionable[863] or if there is an inability to discern the true causes of altered conduct in regulated regimes.[864]

7. CONCLUDING REMARKS

In this chapter, the specific aspects that enhance a regulator's accountability were identified. These measures and mechanisms will lay the foundation for assessing the National Credit Regulator and the Financial Sector Conduct Authority and conclude with the relevant substantive aspects to be assessed.[865]

The regime should evaluate results, and the manner in which the goals and related results are determined and ranked according to importance.[866] The assessors should determine whether goals are met and how the regulators use their authority to meet their goals.[867] The regulators have to rationalise their actions and omissions, and this has to be evaluated by the external party.[868] In order to do so, the authority, role and duties of the regulators must be unambiguous and accurately demarcated.[869] The ambit of their responsibilities must be

[859] See *inter alia* paras 3.3 & 5.3 *supra*.
[860] Scott 'Evaluating the performance and accountability of regulators' (n 1) 374.
[861] *Ibid*.
[862] OECD *Policy Framework for Effective and Efficient Financial Regulation* (n 43) 38.
[863] Gilligan *et al* (n 134) 265 & 269.
[864] Scott 'Evaluating the performance and accountability of regulators' (n 1) 367-368.
[865] These notes are extracts from the discussions under paras 2.2, 3.1, 3.2, 3.3, 3.4.1, 3.4.2, 3.4.3, 4 & 5 of ch 4 *supra* and the footnotes/contents of these paragraphs can be viewed for the original sources referred to therein.
[866] See paras 3.3 & 4.1 *supra*.
[867] See par 4.1 *supra*.
[868] See par 2.3 *supra*.
[869] See paras 3.1.1, 3.1.3 & 4.1 *supra*.

properly set so that there is certainty about their obligations.[870] There should be a definite law-based foundation for these mandate-related aspects mentioned.[871]

The assessors should determine how the regulators employ their authority to change the behaviour of the regulated industry.[872] The outcomes of the regulators' actions and satisfaction with these outcomes, including whether the actions are effective and how resources are consumed, must be assessed.[873] The regulator's actions when executing internal, operational, and official duties must be assessed for lawfulness.[874] It is therefore important to assess how decisions are made, the processes and practices employed, the rule and norm design and data collection.[875] A sophisticated regulatory assessment regime evaluates not only what is done, but also whether it is competent, effective and proportionate – it links expertise with technical evaluations as forwarded by Colin Scott.[876]

The manner in which the executive's policies are implemented should be assessed.[877] This would also include proper delineation of policies, setting out the grounds for liaising with government, legislative and executive guidance, and those circumstances where the autonomy of the regulators may be countered.[878]

It is also important to note that the resources available to the regulators must be taken into account when evaluating their performances.[879] The responsibilities of other stakeholders in the market must be determined and articulated alongside those of the regulators.[880]

In chapter seven, I deal with answerability mechanisms of South Africa. I consider the existing mechanisms relating to the regulatory mandate aimed at enhancing compliance with the legal framework and performance indicators, if any, and those aspects aimed at preventing deviation from set policies and behavioural standards.[881] In addition, I consider the inclusiveness of the regime insofar as provision is made for Scott's typology of 'democratic' and 'technical' regulatory features, form and contents.[882]

[870] See par 3.1.1 *supra*.
[871] See paras 3.1.3 & 4.1 *supra*.
[872] See par 4.1 *supra*.
[873] *Ibid*.
[874] See paras 3.3.3 & 3.4.4 *supra*.
[875] See par 4.1 *supra*.
[876] See paras 3.3, 4.1 & 5.3 *supra*.
[877] See par 4.1 *supra*.
[878] See paras 3.1.3, 4.1 & 5.2.2 *supra*.
[879] See par 3.1.2 *supra*.
[880] See paras 3.1.3 & 5.3 *supra*.
[881] See paras 3-5 *supra*.
[882] See par 3.3 & 5.3 *supra*.

The specific measures are considered and assessed in accordance with the features discussed in this chapter: robust measures, which incorporate some effecting factor that allow for remedial action after assessment[883] and anticipatory and reactionary measures, which allow for pre-intervention or post-conduct assessment.[884] I look at official and unofficial measures, that incorporate a variety of role-players into the accountability regime, and the capacities associated with each of these means.[885] The use of qualitative and quantitative means,[886] the involvement and capacities of all divisions of government,[887] complementary avenues over and above political and judicial answerability (such as the tribunal system) are also discussed.[888]

This chapter concludes part one of the thesis, which was primarily concerned with laying the theoretical and conceptual foundations for the upcoming chapters. In chapter one, I set out the research milieu, problem statement and research question. In chapter two, I dealt with the theoretical foundations for regulators. In chapters three and four, I discussed the concepts of autonomy and answerability and set out the practical aspects of the regulatory regime that needs to be analysed when assessing these two concepts within a particular jurisdiction.

[883] See par 3.4.1 *supra*.
[884] See par 3.4.2 *supra*.
[885] See par 3.4.3 *supra*.
[886] See par 5.2 *supra*; Gilligan *et al* (n 134) 267.
[887] See par 4 *supra*; par 2.5 of ch 3 *supra*.
[888] See paras 3-5 *supra*.

PART 2: THE SOUTH AFRICAN REGULATORS

CHAPTER 5: THE CONSUMER CREDIT REGULATORY LANDSCAPE

> 'There are significant economic benefits to a credit market that works, helping individuals to accumulate assets and exploit economic opportunities and businesses to grow and create new jobs. However, it is an industry that needs to be regulated to ensure that potential consumer abuses are minimised.'[1]

1. INTRODUCTION

Part one of the thesis was concerned with laying the theoretical and conceptual foundations for the upcoming chapters. In chapter one, I set out the research milieu, problem statement and research question. In chapter two, I dealt with the theoretical foundations for regulators. In chapters three and four, I discussed the concepts of regulatory autonomy and answerability and set out the practical aspects of the regulatory regime that need to be analysed when assessing these two concepts within a particular jurisdiction.

I dealt with a number of secondary questions in these chapters in order to gather the necessary information to answer my primary questions.[2] In chapter two, I dealt with the *raisons d'être* for statutory regulators and for measures that advance independence and accountability in respect of statutory regulators. I continued studying the answers to the aforementioned questions in chapters three and four when I focused specifically on the measures that advance independence and accountability of regulators as per international best practices and practices in foreign jurisdictions. The purpose of the aforementioned chapters was to set the basis for the contribution that this thesis purports to deliver: How can the South African system be enhanced – to the extent that the research identifies shortcomings that can be ameliorated – with reference to the identified international options and practices?

In order to address the primary research questions, I now turn to the South African regime. I focus on answering the following secondary research questions in chapters six and seven: What are the measures that advance the independence and accountability of the South African market conduct regulators for consumer credit? In order to do so, I need to set the scene for the evaluation by considering the South African milieu within which the South

[1] Department of Trade and Industry (hereinafter 'DTI') *Consumer Credit Law Reform – Policy Framework for Consumer Credit* August 2004 par 1.3.

[2] See par 3.3 of ch 1 *supra*: Question 1 is: 'Are the National Credit Regulator and the Financial Sector Conduct Authority sufficiently independent and accountable when assessed against factors extrapolated from international scholarship?' Question 2 is: 'How can the South African regime be enhanced to align with international best practices and potentially viable options sourced from foreign jurisdictions and international commentators?'

African regulators – the National Credit Regulator and the Financial Sector Conduct Authority – function.

The legislative and institutional regimes for consumer credit regulation in South Africa are dealt with in this chapter. I give brief overviews of the matters that lead to the existing frameworks for consumer credit regulation in South Africa.[3] In respect of the legislative regime, I touch on the policy considerations and incentives for the review that preceded and informed the formulation of the National Credit Act of 2005, and the review that preceded the National Credit Amendment Act of 2014.[4] The discussion considers the aims and outcomes of the National Credit Act as well as those of the Financial Sector Regulation Act of 2017.[5] Insofar as the institutional regime is concerned, I deal with the mandate(s) of the regulator(s) and, to some extent, the authority or empowerment of the regulator(s).

I further discuss the arrangements established in terms of the Financial Sector Regulation Act and the framework within which these establishments are to function.[6] The frameworks set out in this chapter provide important background that is imperative in order to understand the milieus within which each regulator functions individually and in tandem with other regulators. In the forthcoming chapters, I rely on this information in order to analyse the independence and accountability of the National Credit Regulator and the Financial Sector Conduct Authority contextually.[7]

It is important to note that the purpose of this thesis is not to conduct an evaluation of the past regulatory acts of the National Credit Regulator (a matter that is not relevant to the Financial Sector Conduct Authority as it was only established in 2018).[8] In light of the abundance of criticism against the past conduct of the Credit Regulator,[9] it has been difficult not to give the impression that this research also aims at undertaking such an evaluation. I conduct an assessment, and develop a framework for South Africa – one of independence and autonomy – based on foreign experiences and practices.[10] Assessment of performance is a matter that is undertaken when answerability measures are implemented.[11] An example in this regard

[3] See paras 2.1 & 2.2 of ch 5 *infra*.

[4] *Ibid*. Acts 34 of 2005 (hereinafter 'NCA') & 19 of 2014 respectively.

[5] See paras 2.1 & 2.3 of ch 5 *infra*. Act 9 of 2017 (hereinafter 'FSRA').

[6] See paras 3.3-3.5 of ch 5 *infra*.

[7] Hereinafter 'NCR' & 'FSCA' respectively. See the comments on national circumstances in par 2.1 *infra*.

[8] See *Commencement of the Financial Sector Regulation Act 9 of 2017* National Treasury Notice 169 of 2018 in GG 41549 of 29 March 2018.

[9] See generally Govender *Has the National Credit Regulator fulfilled its mandate in promoting a credit market as envisaged in the preamble and purposes of the National Credit Act 34 of 2005?* November 2014 LLM Dissertation Faculty of Law University of Johannesburg.

[10] See par 2.4 of ch 1; chs 3 & 4 *supra*.

[11] See e.g. par 5.3 of ch 4 *supra*.

would be whether the regulator achieves the purposes of consumer credit regulation, as and where this falls within its mandate.[12]

In previous chapters, I discussed the fundamental aspects that can enhance the autonomy and answerability of a regulator. This chapter focuses on the South African consumer credit regulator, namely the National Credit Regulator, and the South African financial sector market conduct regulator, namely the Financial Sector Conduct Authority.

In the upcoming chapters, I will deal with the position of the National Credit Regulator *re* the financial sector regulatory framework in more detail. Suffice to say that my perspective is supportive of the current position insofar as the Regulator retains its independence from the assimilated regulatory body. I take this stance primarily on two grounds, namely the importance and uniqueness of consumer credit[13] and the inability of the consolidated market conduct regulator to address issues of fragmentation and necessitated specialisation.[14]

However, as will be seen from the analysis of both the National Credit Regulator and the Financial Sector Conduct Authority, the National Credit Regulator lacks the authority necessary to execute its mandate in the same manner as the Financial Sector Conduct Authority and to be a worthy component of the financial sector institutional framework.[15] An augmentation of the Regulator’s authority must be effected in order for it to achieve efficiency comparable to that envisaged for the Conduct Authority by virtue of its enhanced abilities.[16] This is also necessary for the National Credit Regulator to be in a position to realise some of the benefits associated with multiple regulators, such as surveying the actions of the Conduct Authority for accountability purposes[17] and increasing contestation and variance in regulatory methods.[18]

This chapter is linked with chapters six and seven and must be read in conjunction in order to obtain a holistic perspective on the South African frameworks within which two financial sector regulators function. Against this background, the regulators are supposed to be independent and accountable.

[12] See par 2 of ch 1; par 3.1 of ch 4 *supra*.

[13] See par 2 of ch 1; par 3.3.2 of ch 2 *supra*.

[14] See par 3.3 of ch 4 *supra*.

[15] See chs 5 & 6 *infra*.

[16] See par 9 of ch 6 *infra*.

[17] See par 5.3 of ch 7 *infra*; Jones ‘Back to basics: Why financial regulatory overhaul is overrated’ 2009-2010 *Entrepreneurial Business Law Journal* 391 393-394.

[18] See paras 4.2 & 5.2 of ch 6 *infra*; Goodhart *et al Financial Regulation: Why, how and where now?* (1998) 154.

2. LEGISLATIVE REGULATION OF CONSUMER CREDIT IN SOUTH AFRICA

2.1. Incentives for revised consumer credit legislation

Former legislative events in the development of a nation's consumer credit regime is a core consideration when dealing with contemporary legislation, and Jannie Otto argues that it is a mistaken belief that contemporary statutory regulation is innovative in its entirety.[19] Whilst this may be true, one has to keep the social, economic and political developments in mind, especially where the rationales supporting the introduction of the legislation are some of the primary considerations influencing the subsequent interpretation of the specific legislation.[20] The unique national milieu is an essential consideration when financial regulation is contemplated.[21]

The review of consumer credit legislation, and the subsequent drafting and promulgation of the National Credit Act, were founded on the notion of economic welfare and empowerment. [22] The initiative was primarily undertaken in response to the growing realisation that progressive government intervention was essential to achieve certain social and economic objectives when considering the current and envisaged financial positions of certain sectors of the South African population.[23] A core motivation for the new credit law

[19] Otto 'The history of consumer credit legislation in South Africa' 2010 *Fundamina* 257 257; Otto 'Statutêre regulering van kredietooreenkomste: 'n Kritiese evaluering' 1985 *Journal for the South African Law* 11 12 *et seq*.

[20] See e.g. the introductory comments by the Constitutional Court (majority judgment) on the social and economic considerations underlying the NCA in *Sebola and Another v Standard Bank of South Africa and Others* 2012 (5) SA 142 (CC) paras 38-39. Credit policy and the subsequent legislative products, bear a close resemblance to the historic development and future aspirations of a nation in respect of its social, political, and economic conditions – see Otto 'The history of consumer credit legislation in South Africa' (n 19) 259; DTI *Consumer Credit Law Reform* (n 1) 6 & 8 paras 1.1-1.3, 1.5, Objective (1).

[21] United Nations General Assembly Seventieth Session Second Committee Agenda Item 18(a) Macro-economic policy questions: international trade and development *Draft resolution submitted by the Vice-Chair of the Committee, Purnomo Ahmad Chandra (Indonesia) Consumer Protection* 11 November 2015 with annex (*Guidelines for Consumer Protection)* 5. See also Otto 'Introduction and historical background to the National Credit Act' in Scholtz *et al Guide to the National Credit Act* (June 2017 Service Issue 9) par 1.1.

[22] Minister of Trade and Industry *Draft National Credit Act Policy Review Framework, 2013* GN 559 of 2013 GG 36504 29 May 2013 6 par 1.2.1; DTI *Consumer Credit Law Reform* (n 1) paras 1.1-1.3 & 1.5; Grové & Otto *Basic Principles of Consumer Credit Law* (2002) 1: 'Credit has a vital role to fulfil in a free-market economy, since it enables a person who possesses innovative energy and a spirit of enterprise, but who lacks capital, to compete in the economy with others who do have access to the necessary capital. A lack of capital largely excludes one from the free market. For this reason most of the free-market-based economies oppose credit discrimination by means of legislation.' See also par 2.2 of ch 1 *supra.*

[23] DTI *Consumer Credit Law Reform* (n 1) paras 1.1-1.3; DTI *Credit law review – Summary of the findings of the technical committee* August 2003 4-9; DTI 'Credit law review: Setting the scene' Media Statement 2003 read with the Long Title of the NCA & s 3(a); Otto 'Credit agreements: General introduction and historical background' in Nagel *et al Commercial Law* (2015) par 19.08.

was the lingering effect of the pre-1994 dispensation, albeit that the Act was only promulgated a decade after the incorporation of a non-apartheid democracy in South Africa.[24]

An analysis of the reported reasons for the major reassessment event preceding the introduction of substantively modified consumer credit legislation in the past decade in South Africa sheds some light on the nature of the regulatory framework that is currently desired.[25] The Department of Trade and Industry's announcement of the pre-National Credit Act review in 2003 and the reasons therefore, conveyed an intention to create a framework that is modern, strong in respect of achieving regulatory outcomes, adaptable, consolidated, and standardised.[26]

These objectives were not adjusted in the course of the pre-National Credit Act amendment review of 2013 but were reiterated as intended outcomes that had to be strengthened through the proposed legislative amendments.[27] In particular, the first review of the contemporary legislation in the style of the National Credit Act – approximately seven years after its first implementation – revealed that the founding principles of the Act were commendable, but that the expression of the policies and the actual execution of the legislative directives did not result in the desired consequences.[28] In some instances, the review advocated for the strengthening of the existing policies.[29] Unfortunately, some of the challenges that were identified under the previous dispensation are still a reality under the new regime.[30]

[24] DTI *Consumer Credit Law Reform* (n 1) p 8 Objective (1).

[25] See DTI *Credit law review* (n 23); DTI 'Credit law review: Setting the scene' (n 23); DTI *Consumer Credit Law Reform* (n 1); Kelly-Louw 'The prevention and alleviation of consumer over-indebtedness' 2008 *South African Mercantile Law Journal* 200 201-207 (specifically 204-206) for a comprehensive discussion of the reasons for the review of the previous regime and the problematic issues identified to be addressed under the new regime. The regulatory framework for the consumer credit industry in South Africa has undergone multiple changes since the original introduction of the Usury Act in 1926 and the Hire-Purchase Act in 1942 – *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC) par 6 fn 7; Otto 'The history of consumer credit legislation in South Africa' (n 19) 261. See Otto 'General introduction and historical background' (n 21) par 19.11; Bester *'n Kritiese Analise van die Nasionale Kredietwet 34 van 2005* 3 February 2012 LLM Dissertation Faculty of Law University of the Free State 24-36 for a discussion of the legislation predating the NCA and some improvements effected by the current legislation in relation to the previous statutes. See also the comments of the following authors in respect of regulation of usury and hire-purchase agreements over the ages: Otto 'Statutêre regulering van kredietooreenkomste' (n 19) 12-18; Otto 'The history of consumer credit legislation in South Africa' (n 21) 260-264; Otto 'General introduction and historical background' (n 21) paras 19.09-19.10; Otto 'Introduction and historical background to the National Credit Act' (n 21) par 1.3; Bester (n 25) 24-36; Govender (n 9) 8-11.

[26] DTI 'Credit law review: Setting the scene' (n 23) 1.

[27] Minister of Trade and Industry (n 22) 7 par 1.5.

[28] *Idem* at 7 paras 1.5.4 & 1.5.5.

[29] *Idem* at 7 par 1.5.5.

[30] National Treasury *Treating Customers Fairly in the Financial Sector: A Draft Market Conduct Policy Framework for South Africa Discussion Document* December 2014 11; Minister of Trade and Industry (n 22); DTI 'Credit law review: Setting the scene' (n 23) 1 & 2; DTI *Consumer Credit Law Reform* (n 1) paras 1.9, 1.10, 1.14, p 8 (3)-(5), p 13 'Access to credit versus over-indebtedness'.

The regulatory purposes of the National Credit Act are primarily aimed at endorsing a consumer credit market that is accessible, just and unbiased.[31] The Act sets medians for the various substantive components that form the consumer credit regulatory framework, ranging from broad-spectrum standards – such as an endorsement of 'responsible borrowing' – to considerations that are more specific – such as the provisions relating to reckless lending.[32] The Long Title of the National Credit Act lauds it as the foundation for 'general' consumer credit regulation and indicates that the Act is intended to determine the benchmarks pertaining to consumer credit in South Africa.[33]

Detailed attention to core national objectives is already observed in the description of the Long Title and the provisions pertaining to black economic empowerment, tenure within the consumer credit sphere and access to credit.[34] In addition, the specific aspects for which the Act would become noted in the years postdating its promulgation are highlighted in the long title: Disallowance of inequity and the incorporation of safety mechanisms into various methods related to consumer credit advertising, credit information, granting of credit, assistance for distressed consumers and the enforcement of consumer credit obligations.[35]

Section 3 of the National Credit Act sets the outcomes that the law seeks to achieve:

> 'The purposes of this Act are to promote and advance the social and economic welfare of South Africans, promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers, by –
>
> (a) promoting the development of a credit market that is accessible to all South Africans, and in particular to those who have historically been unable to access credit under sustainable market conditions;
>
> (b) ensuring consistent treatment of different credit products and different credit providers;

[31] NCA Long Title. See also *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) par 18: 'It is well established that statutes must be interpreted with due regard to their purpose and within their context. This general principle is buttressed by section 2(1) of the Act, which expressly requires a purposive approach to the statute's construction. Furthermore, legislation must be understood holistically and, it goes without saying, interpreted within the relevant framework of constitutional rights and norms. However, that does not mean that ordinary meaning and clear language may be discarded, for interpretation is not divination and courts must respect the separation of powers when construing Acts of Parliament.'

[32] See e.g. NCA Long Title; ss 3 & 80 of the NCA; Van Heerden & Boraine 'The money or the box: Perspectives on reckless credit in terms of the National Credit Act 34 of 2005' 2011 *De Jure* 392 392, 396 & 405, 415; Vessio 'Beware the provider of reckless credit' 2009 *Journal for the South African Law* 274 228. The NCA is viewed as an 'activity based law[…]' – see National Treasury *Treating Customers Fairly in the Financial Sector* (n 30) 13.

[33] Nevertheless, the NCA does not apply to every credit agreement, or is limited in application under certain circumstances – see e.g. ss 4-6 of the NCA.

[34] NCA Long Title. See also DTI *Consumer Credit Law Reform* (n 1) 1 paras 1.1-1.2.

[35] See e.g. *Sebola v Standard Bank of South Africa* (n 20) par 41; Minister of Trade and Industry (n 22) paras 1.2 & 1.6-1.12. See also Pearson 'A credit lens: implementing twin peaks' 2017 *Law and Financial Markets Review* 1 4 referring to the significance of the work of the NCR in respect of 'access [to] credit' and 'monitoring reckless lending'.

(c) promoting responsibility in the credit market by –

(i) encouraging responsible borrowing, avoidance of over-indebtedness and fulfilment of financial obligations by consumers; and

(ii) discouraging reckless credit granting by credit providers and contractual default by consumers;

(d) promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers;

(e) addressing and correcting imbalances in negotiating power between consumers and credit providers by–

(i) providing consumers with education about credit and consumer rights;

(ii) providing consumers with adequate disclosure of standardised information in order to make informed choices; and

(iii) providing consumers with protection from deception, and from unfair or fraudulent conduct by credit providers and credit bureaux;

(f) improving consumer credit information and reporting and regulation of credit bureaux;

(g) addressing and preventing over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations;

(h) providing for a consistent and accessible system of consensual resolution of disputes arising from credit agreements; and

(i) providing for a consistent and harmonised system of debt restructuring, enforcement and judgment, which places priority on the eventual satisfaction of all responsible consumer obligations under credit agreements.'[36]

2.2. Subsequent revised consumer credit legislation

The National Credit Act introduced various novel regulatory components into the South African legislative framework governing the consumer credit industry.[37] Apart from the new consolidated consumer credit Act,[38] the legislation subsequently facilitated the establishment of the National Credit Regulator and National Consumer Tribunal as well as provisions pertaining to credit concepts such as reckless credit and debt review.[39]

[36] According to *Sebola v Standard Bank of South Africa* (n 20) par 36; Otto *The National Credit Act explained* (2013) 7; Govender (n 9) 14, s 3 contains the purposes and the ways to realise the purposes. See Scholtz 'The implementation, objects and interpretation of the National Credit Act' in Scholtz *et al Guide to the National Credit Act* (June 2017 Service Issue 9) par 2.3.

[37] Otto 'General introduction and historical background' (n 21) par 19.11.

[38] DTI *Consumer Credit Law Reform* (n 1) 23 par 4.7; Minister of Trade and Industry (n 22) 9. See also Scholtz 'The implementation, objects and interpretation of the National Credit Act' (n 36) par 2.1.

[39] See e.g. ss 12-25, 79-82 & 86. However, the notions of conducting an assessment on a prospective consumer to assert whether the consumer would be able to afford the credit requested and prohibition on providing unaffordable loans to prospective consumers are not novel concepts to some sectors of the credit industry – see the discussion pertaining to the rules of the Micro Finance Regulatory Council in par 3.1 *infra*.

It regulates the following basic elements of the consumer credit industry:

- consumer credit (the application of the National Credit Act to credit agreements and industry stakeholders' conduct);[40]
- consumer credit industry role players (registrants such as credit bureaux, credit providers and debt counsellors);[41]
- general and specific credit rights and obligations (credit information, market practices, costs relating to credit provision, enforcement and other credit related settings as well as consumer education);[42]
- credit debt enforcement and dispute resolution;[43] and
- regulatory institutional arrangements (the Credit Regulator and Consumer Tribunal).[44]

Deshni Govender submits that the unification of credit legislation together with the incorporation of innovative features are matters of overextension and that different statutes dealing with the prominent issues would have sufficed.[45] It is submitted that this approach is not supported by the reality of the pre-National Credit Act legislative framework and the explicit rationales for the introduction of the new regime, such as an incoherent, dissimilar and unsystematic approach explicitly due to the variety of statutes regulating consumer credit.[46]

Nicolaas Grové and Jannie Otto, writing in respect of the pre-National Credit Act legislative dispensation, criticise the statutory differentiation between the facets relating to the agreement and matters relating to the pecuniary features of the interaction between credit grantor and credit receiver, referring to the segregation as 'artificial'.[47] The authors note that these independent statutes were expected to operate in a harmonised fashion, but that this

[40] See e.g. ss 4-6, 8, 40-44, 48 & 54-55 of the NCA. See chs 19-23 in Nagel *et al Commercial Law* (2015) for a basic exposé of these aspects, and those referred to in the rest of the sentence (fns 41-44).

[41] See e.g. ss 40-59 of the NCA.

[42] See e.g. chs 4-5 of the NCA.

[43] See e.g. chs 6-7 of the NCA.

[44] See e.g. ss 12-25 & 26-34 of the NCA.

[45] Govender (n 9) 13. The author's argument is somewhat incoherent as reference is made to the 'preamble' of the NCA, in respect of which the author first states 'cannot be enforced as the sections of an act would' and then notes that '[t]he preamble of the National Credit Act, with ambitious endeavours, appears to be overreaching in that it aims to introduce a variety of new concepts in one piece of legislation instead of focussing on a few salient aspects. Perhaps it may have been prudent to have two or three pieces of accurately and concisely drafted legislation to cover the different aspects of the credit market than a single sweeping statute'. However, I assume that the author criticises the solitary notion of the NCA as the sole legislation on consumer credit in the context of the multiplicity of facets that it pioneers and regulates.

[46] Kelly-Louw (n 25) 203, 204, 206; DTI *Consumer Credit Law Reform* (n 1) 16, 22-23; DTI *Credit law review* (n 23) 10; Grové & Otto (n 22) 5. This approach is also not supported by the South African government in respect of financial sector regulation – see par 2.3 of ch 1 *supra*; National Treasury *Treating Customers Fairly in the Financial Sector* (n 30) 15 & 16; Van Wyk 'Regulation of the Financial Markets' in Van Wyk *et al* (eds) *Understanding South African Financial Markets* (2012) 121-122.

[47] Grové & Otto (n 22) 5.

expectation did not materialise.[48] The issue was further exacerbated because the respective responsibilities for the proper functioning of the Usury Act and Credit Agreements Act were initially diverted and only at a later stage consolidated under the ambit of the Department of Trade and Industry's authority.[49]

The various documents preceding the promulgation of the National Credit Act and academic writings on the findings of the assessment of the previous regime indicate that the segmented nature of the legislative framework was not desirable for South African consumer credit regulation.[50] Eradication of negative outcomes associated with a 'fragmented' system is also one of the motivating elements for the proposed Twin Peaks regulatory framework.[51]

The National Credit Act has been criticised for its phraseology and interpretation of same,[52] however, rarely for its objectives and necessity.[53] Even though the scope of the National Credit Act is substantial, particularly as the industry that it regulates is so multifaceted, it is submitted that the legislation does not manage to regulate all aspects relevant to the industry

[48] *Ibid*.

[49] *Ibid*.

[50] DTI *Consumer Credit Law Reform* (n 1) 16, 22-23; DTI *Credit law review* (n 23) 3, 10, 13, 23 & 27; Kelly-Louw (n 25) 206.

[51] Minister of Finance Financial Sector Regulation Bill Draft (including amendments and memorandum on the objects of the Bill) 10 December 2014 paras 1.3-1.5; National Treasury *Treating Customers Fairly in the Financial Sector* (n 30) 15 & 16.

[52] See Govender (n 9) 15 for some of the critique. However, complex credit legislation does not seem to be indigenous to South Africa or the NCA – see Grové & Otto (n 22) 3 and their quoting of Brandel, Terraciano & Abbott *Truth in Lending: A Comprehensive Guide* (1968) 2: 'The United States of America's Federal Consumer Credit Protection Act has, for instance, been described as: "[A] monstrous, an incomprehensible jackstraw heap of a statute, regulation, interpretive rulings and staff opinions … a riddle wrapped in an enigma, enshrouded in mystery [with] the potential of being a profound apparatus of injustice … It transforms loan documents into contest puzzles in which prizes are awarded to those who cannot uncover technical defects. Unfortunately, these prizes are not paid by the sponsors of the contest, the governments, but by the [lenders]"'; Kelly-Louw (n 25) 201 referring to the Usury Act: 'The Act was also rather complicated and often misunderstood by many.'

[53] See e.g. *Sebola v Standard Bank of South Africa* (n 20) paras 38 & 39; Minister of Trade and Industry (n 22) 7 par 1.5.4, 7-10 paras 1.6-1.10. However, see Govender (n 9) 13-14.

in a comprehensive manner.[54] Michelle Kelly-Louw, however, highlights an important general objective underlying the National Credit Act – the introduced legislative framework 'aim[s] to solve *specific problems* in the existing consumer credit market'.[55]

Notwithstanding the commendable ideals of the legislation, the major consumer credit challenges that the National Credit Act is purported to deal with has remained.[56] In 2004, the policy document preceding the Act highlighted *inter alia* concerns pertaining to irresponsible and exploitative lending practices.[57] Nevertheless, the subsistence of these prohibited

[54] See e.g. DTI *Credit law review* (n 23) 30-31 where the report highlights the connection of the credit market with financial and legal sectors. Until the 2014 amendments to the NCA, payment distribution agencies were not regulated by the Act but service level agreements were entered into between the NCR and these agencies – see Devnomics *Literature Review on the Impact of the National Credit Act (NCA) has had on South Africa's Credit Market – Final report* June 2012 par 4.6; see the position in respect of debt collection – Minister of Trade and Industry (n 22) par 2.3.12. See also the following contextualising statement (although the writers made this statement under the pre-NCA regime) by Grové & Otto (n 22) 2-3: 'The spectacular growth in consumer credit during the past thirty years has, no doubt, contributed to a general increase in the living standards of those people who were in a position to obtain it. It did, however, give rise also to a host of problems on the legal, social and economic fronts. Consumer-credit legislation cannot solve all these problems. It can, for instance, not solve problems that result from a injudicious utilization of credit. It does not, furthermore, provide any solution for persons who are unable to meet their credit commitments through unemployment, deficiency of income and ill health. Credit legislation can, however, provide an answer where exploitation occurs. It can be used to level a possible imbalance which may exist between the bargaining power of credit consumers and credit grantors, standardize the way in which credit information is disseminated, provide credit consumers with statutory rights in the formation and performance of a contract and limit a creditor's rights and remedies.' See *contra* Govender (n 9) 13 (a view that I do not support as it is factually incorrect – one only has to consider the scope of application of the NCA to come to this conclusion): 'The Act is the only piece of legislation that establishes and governs the conduct of the NCR and therefore, despite its shortcomings, is the edict of all credit related activities.'

[55] Kelly-Louw (n 25) 201. Own emphasis.

[56] See e.g. the pre-NCA references to increased over-indebtedness of consumers, consumer exploitation, etc. by National Treasury *Treating Customers Fairly in the Financial Sector* (n 30) 11-12, 21. Prejudicial behaviour does not seem to be an isolated incidence and is not restricted to developing countries – Porteous 'Policy Focus Note 2: Consumer Protection in Credit Markets' Financial Initiative Framing Note July 2009 4-5 lists signs that are present in 'many credit markets today' and which denote credit customer mistreatment. The noted features include indications of 'over-indebtedness' of many of the countries' inhabitants, the ambivalence of unlicensed credit providers in circumstances where licensing is mandatory, limited comprehension by consumers of the effect of agreements and in respect of consumer rights, inequitable treatment of consumers without regard for 'their credit risk' and numerous grievances in relation to credit providers – see 4.

[57] DTI *Consumer Credit Law Reform* (n 1) 31.

practices was again reported in the National Treasury's 2014 market conduct policy framework.[58]

2.3. Institutional financial market conduct legislation

As indicated above, some of the challenges that the new consumer credit legislation aimed to address still prevail, and these shortcomings have now been observed as a failure of the financial sector.[59] Some of the regulatory failures manifest in respect of credit matters in the following objectionable contemporary industry practices:

> '… Reckless lending practices that lead to over-indebtedness, especially payday lending … The sale of unsuitable, incorrectly targeted credit products … Poor sales incentives that drive unfair lending practices … A multiplicity of fees and commissions that are often high and opaque, compounded by inadequate or poor disclosures to customers … Abuse of the payments system to collect debt, including abuse of suretyships … Abuse of emolument attachment (garnishee) orders …'[60]

The purpose of the revised approach to financial sector regulation is centred on proper consumer protection, just dealings with consumers and the achievement of positive results for

[58] National Treasury *Treating Customers Fairly in the Financial Sector* (n 30) 10-13. See also NCR National Credit Regulator intensifies its fight against lenders flouting the National Credit Act in the Northern Cape' June 2013; NCR 'NCR intensifies its fight against lenders flouting the National Credit Act' May 2013; NCR 'National Credit Regulator, SASSA and SAPS clamp down on credit providers' illegal collection tactics' August 2012; NCR 'Joint SAPS, NCR, & SASSA operation bears fruit' March 2012; NCR 'National Credit Regulator and SAPS clamp down on credit providers' illegal collection tactics' March 2012; NCR 'National Credit Regulator clamps down on unfair lending practices' September 2010; NCR 'National Consumer Tribunal cancels credit provider's registration for retaining bank cards and pin codes' October 2008; NCR 'NCR slams credit providers retaining borrowers' bank cards' 30 January 2008. See also e.g. the reasons for the following referrals by the NCR to the National Consumer Tribunal (hereinafter 'NCT'): *National Credit Regulator v Christin Borman t/a Star Pawn Shop* [2014] ZANCT 46 (8 December 2014); *National Credit Regulator v Comprehensive Financial Services Witbank* [2014] ZANCT 30 (20 Augustus 2014); *National Credit Regulator v Midwicket Trading 525 CC t/a Butterfly Cash Loans* [2014] ZANCT 19 (9 June 2014); *National Credit Regulator v Rufus Alfonso Financial Consultants CC* [2014] ZANCT 25 (16 May 2014); *National Credit Regulator v Hosia Dedrick Kwape t/a Phakamisa Financial Services* [2014] ZANCT 20 (12 May 2014) & *National Credit Regulator v Alpha SCK Mikroleners BK t/a Alfa Konsultante Cash Loans* [2014] ZANCT 22 (22 March 2014).

[59] National Treasury *Treating Customers Fairly in the Financial Sector* (n 30) 6 & 10.

[60] *Idem* at 11 – this is in respect of 'banking and non-banking'. See also National Treasury *Treating Customers Fairly in the Financial Sector* (n 30) 13: 'Abusive practices exist even where there is already regulatory coverage, for example over-indebtedness exists in the credit sector and the continued selling of inappropriate retirement products, suggesting that in some instances regulation may not be achieving its intended outcomes.'

consumers.[61] The envisaged regime focuses on the market, market participants and statutory framework.[62] It would *inter alia* endeavour to increase the efficacy and reliability of the regulated sector,[63] protect the consumer,[64] increase the aptitude of the financial customer,[65] and combine and refine diverse legislation to establish a statute for the institutional framework and another statute for substantive prescriptions.[66]

In respect of financial regulation, it aims to enhance the norms regulating the financial sector, [67] improve results through behaviour modification brought about by integrated performance by entities tasked with regulatory functions,[68] increase government intercession where necessary,[69] and streamline the ombud scheme.[70] These pertain to the draft legislation on institutional arrangements, but the 2014 policy document in respect of market conduct also envisages harmonised substantive legislation in the form of the Conduct of Financial Institutions Act.[71]

Ultimately, the Financial Sector Regulation Act is aimed at achieving the following objectives:

> 'The object of this Act is to achieve a stable financial system that works in the interests of financial customers and that supports balanced and sustainable economic growth in the Republic, by

[61] National Treasury *Treating Customers Fairly in the Financial Sector* (n 30) 6 states that '[f]inancial consumers are not adequately protected in South Africa and more needs to be done to ensure that the providers of financial products and services treat their customers fairly … Weaknesses in the current framework include fragmentation, inconsistency and incompleteness of regulation across the sector, which together compromise the ability of the regulators to act against wrong-doers, leading to poor consumer outcomes'. The policy document proceeds to list consumer wrongdoings at 6 and 11-12. See also National Treasury *Treating Customers Fairly in the Financial Sector* (n 30) 21: 'Many abuses have been identified in the credit sector, including the abuse of garnishee orders, gaming of the debit order system, and poor practices in the sale of consumer credit insurance (CCI). Tougher licensing conditions and regulations, matched with strong enforcement actions, must apply to reckless lending that burdens ordinary South Africans, including in relation to pay-day lenders, balloon payments in vehicle finance and extended payment periods designed to circumvent interest rate caps (especially in the unsecured and motor car lending segments).'

[62] S 7 of the FSRA.

[63] National Treasury *Treating Customers Fairly in the Financial Sector* (n 30) ch 8.

[64] *Idem* at ch 2.

[65] *Idem* at ch 7.

[66] *Idem* at ch 3, 33-34.

[67] *Idem* at e.g. 18-20; see the approach of the FSCA in respect of the 'Treating Customers Fairly' campaign (National Treasury *Treating Customers Fairly in the Financial Sector* (n 30) 51; s 7(c) of the FSRA).

[68] *Idem* at e.g. 24-28.

[69] *Idem* at ch 4.

[70] *Idem* at ch 6.

[71] *Idem* at 34. The document states that the National Credit Act would not be assimilated into the regulatory framework and thus 'remain alongside the financial sector laws depicted [there]' – see National Treasury *Treating Customers Fairly in the Financial Sector* (n 30) 34. In respect of the insurance industry and the Conduct of Financial Institutions legislation, see Millard 'CoFI and T(CF): Further along the road to Twin Peaks' in Hugo & Du Toit (eds) *Annual Banking Law Update 2017 Recent legal developments of special interest to banks* (2017) 113.

> establishing, in conjunction with the specific financial sector laws, a regulatory and supervisory framework that promotes –
>
> (a) financial stability;
>
> (b) the safety and soundness of financial institutions;
>
> (c) the fair treatment and protection of financial customers;
>
> (d) the efficiency and integrity of the financial system;
>
> (e) the prevention of financial crime;
>
> (f) financial inclusion;
>
> (g) transformation of the financial sector; and
>
> (h) confidence in the financial system.'[72]

The attempt to implant a 'holistic' approach to regulation is not without its criticism.[73] The primary concerns revolve around the question of effectiveness, efficiency and necessity.[74] Kawadza argues that the proposed framework is deficient insofar as the National Credit Regulator is not incorporated into the structure.[75] The author bases his argument on the collapse of African Bank and Bridge, and states that 'the tide of distressed unsecured lending institutions has thrown the spotlight on just how risky it is to leave the regulation of consumer credit out of the Reserve Bank's mandate'.[76] Kawadza's point of view insofar as he advocates a synchronised approach to regulating credit extension is acceptable, however, Logan argues that the author's reasoning does not account for the true nature of the Twin Peaks mode of regulation, particularly the division of regulatory purpose.[77]

[72] S 7 of the FSRA.

[73] At present, the issue is mainly contested in the popular media as the relevant documents were released into the public domain in December 2014. Academic literature in this regard is therefore not abundant although one of the authors is an academic in the field of banking law – see Kawadza 'Now is the time to end credit chaos' Business Times LIVE 26 October 2014. De Jager 'The South African Reserve Bank: Blowing winds of change (Part 2)' 2013 *South African Mercantile Law Journal* 492 506-512 discusses the matter but primarily focuses on the South African Reserve Bank and does not reference the NCR. However, see

[74] See Kawadza 'Now is the time to end credit chaos' (n 73); Logan 'Twin peaks and the NCR' Personal Finance 1 November 2014.

[75] Kawadza 'Now is the time to end credit chaos' (n 573). The author also refers to the fact that different government departments are accountable for the NCR and South African Reserve Bank, stating that the 'regulatory framework governing consumer lending' is 'characterised by a turf war'. The author echoes his views in a further article whilst also addressing some additional problematic issues highlighted in respect of *inter alia* competency of staff – see Kawadza 'Twin peaks regulation deserves a fair chance' Business Times BDLive 21 September 2014. His reaction is to Vivian 'Creating a blind bureaucracy to lead insurers over the cliff' Business Times BDlive 17 August 2014, in which the author states *inter alia* that '[t]he bank has never regulated insurers before and does not have the skill, expertise, experience or background for the task. For its part, the FSB has never regulated banks and knows nothing about how banks operate in the real world'. The author further alleges that the model is at present 'under review by the British authorities'. See also the commentary on the clarification of the role of the NCR in National Treasury *Twin peaks in South Africa: Response and Explanatory Document Accompanying the Second Draft of the Financial Sector Regulation Bill* December 2014.

[76] Kawadza 'Now is the time to end credit chaos' (n 73).

[77] *Ibid*. See *contra* Logan (n 74). Govender (n 9) 49 makes a similar mistake as Kawadza when she states that '[t]he issue of overlapping of mandates between the Reserve Bank and the NCR means that there are competing priorities and interests, resulting in less harmonisation…'

Kawadza notes that it is necessary to improve the National Credit Regulator's answerability and decrease the disparity in respect of non-banks[78] and 'conventional banks'.[79] The proposed solution is the resolution of the supervision of unsecured lending under the auspices of the Twin Peaks model and subsequently the National Treasury.[80] The argument is to some extent twofold, in that he firstly highlights the 'National Credit Regulator's widely recognised failure to regulate unsecured lenders' and secondly states that the authority of the South African Reserve Bank, 'particularly macroprudential supervision and financial stability', is suited to address the regulatory breach in respect of unsecured lending.[81] In addition, he states that the National Credit Regulator is not tasked to supervise the financial health of banks or 'the solvency considerations of institutions that give credit' and needlessly notes that the Regulator is not adequately furnished to do so.[82] In conclusion, the author reiterates his proposal to engage the South African Reserve Bank in unsecured lending.[83]

Logan addresses some of the aspects alluded to by Kawadza and argues for the maintenance of the *status quo*.[84] As a point of departure, Logan notes that there are intrinsic differences in the ideals of the regulators under the Twin Peaks framework and that 'prudential regulation should not be allowed to undermine market conduct regulation'.[85] He cautions against the hypothetic notion that prudential and market conduct regulations can mutually subsist without conflict and refers to the contrasting position in the United States.[86] A further warning is given on founding the assimilation of the National Credit Regulator into, what he

[78] It is assumed that the author's reference to 'the unsecured lending sector' can only refer to the micro-lending industry as the so-called 'conventional banks' are not precluded from extending unsecured lending and are subject to supervision by the South African Reserve Bank. However, is it noteworthy to consider the following extract from Portfolio Committee on Trade and Industry *Report of the Portfolio Committee on Trade and Industry on Budget Vote 36: Trade and Industry* 16 May 2012: 'The rise in unsecured lending to finance consumption and its inflationary impact is a concern as it could jeopardise the recovery of the economy and be a threat to financial stability. The education of consumers about the dangers of unsecured lending is key to addressing this trend. Financial literacy is crucial so as to avoid the debt-trap and the role of the education authorities should not be underestimated in this regard. Access to credit remains targeted to the well-resourced and the high cost associated with loans for higher risk groups means that the historically disadvantaged group are further marginalised. The continued advancement of the consumer credit market regulatory system and the promotion of access to credit through responsible credit granting are essential for the maintenance of financial stability. In this regard, the Committee held a further meeting on unsecured lending to determine the severity of the trend with the major stakeholders, namely the NCR, the Banking Association and the SA Reserve Bank. None of the stakeholders regarded the growth in unsecured lending as a threat to the stability of our banking system, nor considered it likely to create a "bubble". However, the NCR confirmed that the trend would be continuously monitored to ensure that this remained the case.'

[79] Kawadza 'Now is the time to end credit chaos' (n 73).

[80] *Ibid*.

[81] *Ibid*.

[82] *Ibid*.

[83] *Ibid*.

[84] Logan (n 74).

[85] *Ibid*.

[86] *Ibid*. The author refers to the separation between the Consumer Financial Protection Bureau (hereinafter 'CFPB') and the Federal Reserve in the United States.

refers to as ‘a problematic twin peaks structure’, on the failure of African Bank.[87] Logan highlights that the management of African Bank’s financial health was the prerogative of the South African Reserve Bank and that the National Credit Regulator’s responsibility was limited to assessing whether suitable affordability assessments were done within the context of the prohibition of reckless lending.[88] In conclusion, the author notes the following:

> ‘There is every reason to believe that the incorporation of the NCR into a super regulator under the twin peaks model would result in a similar captive regulatory scenario that Senator Dodd describes as an abysmal failure. In the current proposals, government is right to exclude lending from the ambit of the twin peaks regime ... Unless we maintain a strong separation between these regulatory bodies, South Africa faces a grave risk of undermining the excellent progress we have made in forging effective consumer credit regulation and enforcement.’[89]

However, Logan and Kawadza’s views were based on the 2013 draft of the Financial Sector Regulation Bill and, in the interim, two revised versions have been published together with a final Act. Whilst the National Credit Regulator is still excluded from the ambit of the model, credit extension has been incorporated under the auspices of the concept of a ‘financial product’.[90] Although it is common cause that credit providers in South Africa will fall under the scope of the new regulatory regime,[91] it is also plausible that other registrants in terms of the National Credit Act will also have to comply with this overarching regime. At present, the sector is in a state of transformation with the Financial Sector Regulation Act being implemented in phases.[92]

3. INSTITUTIONAL REGULATION OF CONSUMER CREDIT IN SOUTH AFRICA

The National Credit Act in itself was a key event in credit industry history.[93] One of the most distinctive changes in recent years has been the introduction of regulators specifically tailored

[87] Logan (n 74).

[88] *Ibid*. See National Treasury *Treating Customers Fairly in the Financial Sector* (n 30) 24 – one of the prospects of market conduct regulation is also to ‘work[...] together with prudential regulation to support financial stability’.

[89] Logan (n 74).

[90] S 2(1)(g) of the FSRA; see par 3.5 *infra*.

[91] See Van Zyl ‘Registration and the consequences of non-registration’ in Scholtz *et al Guide to the National Credit Act* (June 2017 Service Issue 9) par 5.4.4 fn 142h where the author notes, albeit in the context of the NCA, the multiplicity of regulatory frameworks that apply to credit providers.

[92] Published as Act No. 9 of 2017: Financial Sector Regulation Act, 2017 on 22 August 2017 in GG 41060 Vol 626 No 853. See National Treasury Notice *Commencement of the Financial Sector Regulation Act 9 of 2017* (n 8).

[93] See Otto ‘Introduction and historical background to the National Credit Act’ (n 21) par 1.1; Genesis Analytics *Regulatory impact assessment of the National Credit Act, 2005 – Baseline study Summary Report* 2 September 2008 1.

for consumer credit regulation, first in the mode of the Micro Finance Regulatory Council,[94] secondly in the form of the National Credit Regulator[95] and thirdly, to some extent, through the introduction of the Financial Sector Conduct Authority.[96]

In the next paragraphs, I deal with the histories and mandates of these regulatory bodies. Although I analyse activities, specifically in respect of the National Credit Regulator's activities, the purpose of this thesis is not to conduct an evaluation of the regulators but to set a framework for evaluation insofar as accountability mechanisms are concerned. This necessitates reference to completed assessments so that the contribution of this part can also address attempts already undertaken.

3.1. The Micro Finance Regulatory Council

The Micro Finance Regulatory Council was established in 1998 by the micro-lending industry for a variety of purposes, even prior to its recognition as a regulatory body.[97] It applied for formal acknowledgement as a regulatory authority and, in 1999, the Minister subsequently recognised it as such.[98] The Council sourced its corporate ability to control micro-lenders, who were registered with the Council – albeit at the stage prior to obtaining government support – from its memorandum of association.[99] Upon its recognition by the Minister of Trade and Industry in 1999 as a recognised authority, a set of obligations and responsibilities were conferred on the Council.[100]

The Supreme Court of Appeal perceived the Council as a 'private regulator'[101] and the jurisdiction of the Council was limited to those lenders who wished to take advantage of the Minister's exemption notices, thus having to register with the Council.[102] Section 15A of the Usury Act empowered the Minister of Trade and Industry to set conditions that micro-lenders

[94] Kelly-Louw with input from Stoop *Consumer Credit Regulation in South Africa* (2012) 9-10; *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* (n 25) paras 2 & 12-13.

[95] S 12 of the NCA.

[96] Ch 4 of the FSRA.

[97] *Micro Finance Regulatory Council v AAA Investments and Another* 2006 (1) SA 27 (SCA) par 8.

[98] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* (n 25) par 13.

[99] *Micro Finance Regulatory Council v AAA Investments and Another* (n 97) par 23: 'The object of the company in terms of its memorandum of association is to make and to enforce rules that are to be complied with by micro-lenders that are registered with the company. That is not an unlawful object, whether under the Usury Act or otherwise, and the achievement of that object is not inconsistent with the terms upon which the Minister approved the company as a regulatory institution. On the contrary, the company was approved by the Minister precisely to assume that function.' See also paras 7, 10 & 11.

[100] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* (n 25) par 15.

[101] *Micro Finance Regulatory Council v AAA Investments and Another* (n 97) par 24: 'It is a company that conducts business as a private regulator of lenders who choose to submit to its authority by agreement. In regulating micro-lenders who agree to such regulation it does not purport to be exercising legislative or other public powers that require a constitutional or legislative source. It purports only to regulate those who are willing to submit to its regime and the source of its authority to do so is their consent.'

[102] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* (n 25) paras 12 & 14.

had to adhere to if they wished to be released from the statutory duty to comply with some of the provisions of the Usury Act, such as limitations on charges that may be recovered in terms of credit agreements.[103] This exclusion, to which certain credit providers were privy, presented financial benefits.[104] Apart from defining the exempted credit provider type (which was primarily determined by the terms of the credit agreement relating to repayment period and amount of credit granted) one of the conditions of exemption was that the micro-lender should submit, through licensing, to the jurisdiction of an approved authoritative body.[105]

Economic concerns lead to the exemption of certain lenders from the provisions of the Usury Act.[106] The situation manifested due to the need to assist impoverished consumers to obtain credit services from lenders, who thought that extending credit under the restrictions on financial gain imposed through the legislative limits was counterproductive.[107] The envisaged outcome of the imposed restrictions of the Usury Act – consumer protection from abusive lending practices – did not materialise, as it was reportedly eluded through the exemption provisions.[108]

This necessitated a reconsideration of the state of affairs.[109] In the premises, the Minister opted to manage the micro-lending market participants through the mode of a non-governmental establishment.[110] It is of importance that the creation of an institution by interested members of the lending industry was done together with the Department of Trade and Industry and the South African Reserve Bank prior to the 1999 Notice and that the institution applied for recognition as a regulatory institution prior to the 1999 Notice.[111] The Micro Finance Regulatory Council was therefore the first attempt to exercise a hold over the micro-lending market without re-extending the full scope and effect of the Usury Act to micro-lenders, and without direct governmental intervention.[112]

The decision was not taken, however, without market participation as the government entered into discussions with the regulated industry in order to obtain submissions as to the optimal way to proceed with regulatory action aimed at consumer protection.[113] The outcome was a course of action that included the micro-lending market participants in the regulatory process

[103] *Idem* at paras 12 & 14.
[104] *Ibid*.
[105] *Ibid*.
[106] *Idem* at par 6.
[107] *Idem* at par 8.
[108] *Idem* at paras 5-6 & 10-11.
[109] *Ibid*.
[110] *Idem* at par 51.
[111] *Idem* at par 13.
[112] *Ibid*.
[113] *Idem* at par 11.

through 'some say in the regulation of this industry jointly with government'.[114] In addition, the government held that 'some minimal regulation of the industry had to be made compulsory by law'.[115]

3.2. The National Credit Regulator

3.2.1. Introduction

Comprehensive consumer credit regulation was not formally effected by a statutorily generated body prior to 2006, when the National Credit Act became partially operational.[116] The National Credit Regulator was one of the first establishments strategically positioned in the regulatory sphere as part of a comprehensive government scheme of expanded consumer credit regulation within the context of consumer protection.[117] Regulatory bodies such as the South African Reserve Bank and the Financial Services Board regulated role players that were involved in the credit provision sphere, such as banks, insurance companies and financial service providers, but the respective institutions were not primarily focused on exhaustive consumer credit regulation for consumer protection purposes and involvement was, at most, incidental or ancillary.[118] The South African Reserve Bank is still predominantly concerned with monetary and fiscal policy to safeguard the worth of the

[114] *Ibid*.

[115] *Ibid*.

[116] National Treasury *Treating Customers Fairly in the Financial Sector* (n 30) 21. See Otto 'The history of consumer credit legislation in South Africa' (n 19) 271 – the author asserts that the percentage of content of the NCA devoted to elements resorting under public law, is in the region of 40 percent. Under the previous dispensation, a 'registrar' oversaw some aspects of the Usury Act (e.g. s 12, 12A, 13, 14 & 17 of this Act).

[117] DTI *Consumer Credit Law Reform* (n 1) paras 7.3-7.7; National Treasury *Treating Customers Fairly in the Financial Sector* (n 30) 21.

[118] The context in which the different regulators function, influenced primarily by their mandates, is an important factor to consider. Landie *The impact of the National Credit Act (NCA) on risk in the South African Banking System* January 2013 PhM (Economics) Department of Economics and Econometrics University of Johannesburg 33-35 explains that the NCA's provisions may also affect the well-being of credit providing banks, particularly as the protective measures implemented in respect of consumer affordability could concurrently decrease risks for banks. At 34, the author states: 'Reckless lending or over-indebtedness is harmful to the economy because increased defaults resulting from these practices increases the credit risk of banks portfolios. This in turn increases that systemic risk in the banking system.' See also National Treasury *Treating Customers Fairly in the Financial Sector* (n 30) 27: '[T]he IMF raised concerns about the uneven and uncoordinated supervision of retail credit with the Reserve Bank responsible for the deposit taking side of the balance sheet and the NCR responsible for the lending side.'

country's currency[119] whilst the mandate of the Financial Services Board was to regulate providers of financial services.[120] The National Credit Regulator regulates microfinance institutions, including those who are not also deposit-taking institutions.[121] The divided approach to regulate the respective sectors of the financial market is one of the criticisms levied and, consequently, one of the arguments forwarded, in respect of the restructuring of financial sector regulation under the regime of the Financial Sector Regulation Act.[122]

One of the unique and distinguishing features of the National Credit Act is thus the creation of a formal regulator for the consumer credit industry.[123] The Regulator's task is of significant proportions, considering the extensive scope of the regulated industry – in its 2016 Annual Report, the Regulator indicated that, for the period ended March 2016, there were 4 569 registered credit providers with 47 556 branches, 13 credit bureaux and 2 375 debt

[119] S 3 of the South African Reserve Bank Act (Act 90 of 1989): 'The primary objective of the Bank shall be to protect the value of the currency of the Republic in the interest of balanced and sustainable economic growth in the Republic.' See Mollentze 'The South African Reserve Bank' in Van Wyk *et al* (eds) *Understanding South African Financial Markets* (2012) 37-38: 'The SARB defines its primary objective as the achievement and maintenance of price stability. This means that the Bank strives to keep inflation in the South African economy, as measured by the annual increase in the consumer price index (CPI), in an acceptable range in accordance with the inflation-targeting framework….In addition to price stability, the Bank pursues financial stability, which implies that it endeavours to contribute to a South African monetary, banking and financial system that, as a whole, is highly resilient. Financial stability is not an end in itself but, like price stability, is generally regarded as an important precondition for sustainable economic growth and employment creation.' See also ss 223-225 of the Constitution of the Republic of South Africa, 1996 and the discussions of Mollentze at 38-39 & 40-55 in respect of a more comprehensive view of the functioning of the South African Reserve Bank within the South African economy as well as De Jager (n 73) 499-508. However, see also Van Niekerk & Van Heerden 'Twin Peaks: The role of the South African central bank in promoting and maintaining financial stability' 2017 *Journal for Contemporary Roman-Dutch Law* 636.

[120] Financial Advisory and Intermediary Services Act (Act 37 of 2002); Financial Services Board Act (Act 97 of 1990). See also Van Wyk (n 46) 124-125 – see also the discussion of the author in respect of the functions of the Financial Services Board at 125-132, especially 125-127 in respect of financial service providers. The Financial Services Board has now been replaced with the FSCA – see ss 293 & 294 of the FSRA, read with National Treasury *Treating Customers Fairly in the Financial Sector* (n 30) 78.

[121] Goodspeed 'Microfinance Institutions' in Van Wyk *et al* (eds) *Understanding South African Financial Markets* (2012) define 'microfinance' as follows at 83: 'Microfinance is the provision of financial services to economically active poor and low-income individuals through competing microfinance institutions, which strive to be financially self-sufficient.' In addition, she states at 84: 'The United Nations (UN) defines MFIs as organisations that provide savings, loans, money transfer services, insurance and other financial services to poor and low-income clients – clients who are generally poorer and more vulnerable than traditional banking clients. This definition assigns a broader meaning to microfinance than the traditional one because it encompasses more than just credit extension. Traditionally, microfinance was seen as lending small amounts to people who were either not credit worthy or did not have access to credit from banks or other traditional sources, and non-profit or donor-funded lending to the self-employed poor.' See also the discussion on 103-104 in respect of 'micro-lenders' or 'non-bank credit providers'.

[122] National Treasury 'TWIN PEAKS: Second draft of Financial Sector Regulation Bill and draft Market Conduct Policy Framework discussion document published for comment' Media Statement 11 December 2014; Van Wyk (n 46) 121-122 & 123.

[123] DTI (n 1) paras 7.3-7.7; *Sebola v Standard Bank of South Africa* (n 20) par 42; National Treasury *Treating Customers Fairly in the Financial Sector* (n 30) 21. See also National Treasury *A Safer Financial Sector to Serve South Africa Better: National Treasury Policy Document* 23 February 2011 33 in respect of the work of the NCR on irresponsible lending and in general Vessio 'What does the National Credit Regulator regulate?' 2007 *South African Mercantile Law Journal* 227 & Govender (n 9).

counsellors.[124] The Regulator reported, for the same period, that there were 23.88 million consumers actively involved in the industry[125] and that the gross amount of unpaid credit was valued at R 1.66 trillion.[126] Selected aspects of the regulation concerning individual role players were entrusted through legislation to the National Credit Regulator.[127]

3.2.2. General characteristics and mandate

> 'There is hereby established a body to be known as the National Credit Regulator, which –
>
> (a) has jurisdiction throughout the Republic;
>
> (b) is a juristic person;
>
> (c) is independent and subject only to the Constitution and the law;
>
> (d) must exercise its functions in accordance with this Act;
>
> (e) must be impartial; and
>
> (f) must perform its functions –
>
> (i) in as transparent a manner as is appropriate having regard to the nature of the specific function; and
>
> (ii) without fear, favour, or prejudice.'[128]

Section 12(1) of the National Credit Act brings about the National Credit Regulator in the style of a juristic person that is entitled to execute its authority on a national scope, endowed with attributes intended to promote neutrality and objectivity in its operations.[129] The aforementioned section prescribes certain traits that should qualify the manner in which the Regulator achieves its statutory aims. These include transparency of conduct limited only by the nature of the task and a disregard towards non-statutory endorsed influences intended to generate support for a specific cause or induce apprehension or bias.[130]

The Constitution, National Credit Act, and the law in general set the primary foundations for its authority[131] although the Regulator is mandated to heed provisions in other domestic statutes and to consider advancements made within the global sphere of consumer credit and

[124] NCR *Annual Report* 2015/2016 18. There is a discrepancy between the number of registered credit bureaus as the Statistics department reports 14 registered credit providers at 42 & 43.

[125] NCR *Annual Report* 2015/2016 42.

[126] *Ibid*.

[127] Various sources that set out the legal position pertaining to the National Credit Act summarise the duties, functions, powers, structure and, in some instances, the actions of the National Credit Regulator since its creation in 2006. However, for sake of completion and coherency, a similar exercise has to be undertaken in this part of the thesis. See e.g. Scholtz 'Consumer credit institutions' in Scholtz *et al Guide to the National Credit Act* (June 2017 Service Issue 9); Jones 'The National Credit Act 34 of 2005' in Schoeman (ed) *An introduction to South African Banking and Credit Law* (2013) 181-186; De Matos-Ala 'Financial institutions and stock exchanges' in The School of Law University of the Witwatersrand Johannesburg *Annual Survey of South African Law* (2006) 558-575.

[128] S 12(1) of the NCA.

[129] Ss 12(1)(a), (b), (c), (e) & (f)(ii) of the NCA.

[130] Ss 12(1)(f)(i), (c), (d) & f(ii) of the NCA.

[131] Ss 12(1)(c) & (d); 12(3)(a) & (b) of the NCA.

consumer financing.[132] In addition, the Regulator may seek counsel from individuals or other establishments when carrying out its statutory instructions.[133] The National Credit Act expends some legislative space to the interaction between the National Credit Regulator and other agencies that also enjoy some form of regulatory power.[134] Subsection 12(2) encourages support for the Regulator insofar as it obliges every organ of state to support the National Credit Regulator in its quest for autonomy, neutrality and functional efficacy.

Sections 12 to 18 detail the authority that the National Credit Regulator holds in respect of specific aims and outcomes. Sections 12 and 17 are general in nature, whilst sections 13 to 16 and 18 deal with functions that are more specific, and the powers necessarily related thereto. Section 13 deals with the '[d]evelopment of [an] accessible credit market', section 14 with the Regulator's '[r]egistration functions', section 15 with its '[e]nforcement functions', section 16 with '[r]esearch and public information', section 17 with '[r]elations with other regulatory authorities' and section 18 with the '[r]eporting requirements of [the] National Credit Regulator'.

The Regulator's primary functions are to:

- advance the South African credit market in a manner that improves the availability thereof to certain categories of consumers;[135]
- evaluate and, if approved, endow certain credit market role-players with permission to conduct commercial credit related activities;[136]
- oversee compliance with the National Credit Act;[137]
- explore the dynamics of the credit market, report, and edify the South African community with regard to credit[138] and
- keep the responsible Ministerial office informed with regard to aspects that are of relevance to the sphere of application of the Act which this office administers.[139]

However, as subsection 12(3)(b) already alludes to, other sections of the Act dealing with specific substantive matters also reference the Regulator in respect of the latter's role in meeting the Act's objectives, as and when applicable.

[132] Ss 12(3)(b) & 12(4)(a) of the NCA. See also Scholtz 'The implementation, objects and interpretation of the National Credit Act' (n 36) par 2.4.

[133] S 12(4)(b) of the NCA.

[134] Ss 12(2) & 17 of the NCA. The NCA refers to the establishment of provincial credit regulators in part D of ch 2 and item 9 of sch 3, but to date no such institution has been created.

[135] S 13 of the NCA.

[136] S 14 of the NCA. See also Goodhart *et al* (n 18) 6-7 in respect of '[c]onduct of business regulation'.

[137] S 15 of the NCA.

[138] S 16 of the NCA.

[139] S 18 of the NCA.

Reghard Brits notes the following:

> 'Courts are constitutionally mandated to interpret statutes in a manner that promotes the spirit, purport and objects of the bill of rights. In addition, the act has its own stated purposes, which is important because the act must be interpreted in a manner that gives effect to these purposes. In other words, when interpreting the NCA, there are two levels of normative guidelines: (1) the act's own purposes and (2) the spirit, purport and objects of the bill of rights. In general, the purposes of the act can be regarded as a contextualised expression of the values in the bill of rights'.[140]

The application of the aforementioned statement of Brits, in addition to the clear submission of the Credit Regulator to the provisions of the Constitution in section 12(1)(c), means that constitutional considerations will also inform the manner in which the legislative provisions of the National Credit Act pertaining to the National Credit Regulator has to be construed.

Firstly, the National Credit Regulator is a 'creature of statute',[141] and all South African statutes are subject to the Constitution.[142] Thus, in interpreting the mandate and legislative provisions pertaining to the Credit Regulator, the Constitution must automatically be kept it mind. Nevertheless, whatever the Credit Regulator does outside of the boundaries of the legislation, such as the necessary day-to-day corporate functioning of the Regulator (which in itself is a dilemma when considering the administrative law and authority of the Regulator) must also conform to constitutional principles. I deal with this aspect when I come to performance indicators under the theme of accountability. This distinguishes the South African regulators from jurisdictions without sovereign constitutions – the stipulations of the Constitution provide the first principled indicators of proper performance when it comes to the National Credit Regulator (and the Financial Sector Conduct Authority).

The purpose of the National Credit Act remains an aspect to consider for any interpretative exercise.[143] With reference to the purposes set out in section 3, Johann Scholtz remarks that '[t]he National Credit Regulator shoulders most of the burden of realising these objectives'.[144] My interpretation of Govender's overall research is that the National Credit Regulator's activities must first be viewed within the framework of the specific sections 12 *et seq*, in respect of which her discussions on the different departments of the Regulator are

[140] Brits 'The National Credit Act and the bill of rights: Towards a constitutional view of consumer credit regulation' 2017 *Journal for the South African Law* 470 483.

[141] My thanks to Prof Renke for referring me to this description. See also Govender (n 9) 18 & 33.

[142] S 2 of the Constitution of the Republic of South Africa, 1996.

[143] S 2(1) of the NCA; Govender (n 9).

[144] Scholtz 'The implementation, objects and interpretation of the National Credit Act' (n 36) par 2.3. See also Brits *Mortgage foreclosure under the Constitution: Property, Housing and the National Credit Act* 2012 LLD thesis Faculty of Law University of Stellenbosch 212 fn 479.

feasible points of departure to address some of the clear-cut functions of the organisation.[145] The second overlaying part of the research method, is to evaluate the activities through the lens of section 3 – which is the purposes of the Act as foretold by the preamble – and this is gleaned from her research question: 'Has the National Credit Regulator fulfilled its mandate in promoting a credit market as envisaged in the preamble and purposes of the National Credit Act 34 of 2005?' I think that there is merit in this method as it ensures a proper delineation of the Regulator's mandate and provides a framework that is consistently linked with the legislative delegatory act.

However, whilst this is an aspect to consider, I have three main concerns with her approach. Firstly, the Regulator's mandate should not be demarcated to such an extent that it seems as if the promotion of the credit market is the only outcome against which the Regulator's activities must be evaluated. The demarcation should be contextualised properly by taking *all* the components into account. I deal with this matter in the next paragraph. Secondly, I also take some issue with the use of the word 'fulfilled'.[146] Thirdly, an assessment of the Regulator in an objective manner primarily based on the information that the Regulator itself supplies is questionable,[147] The Regulator can further not be evaluated through interviews with only two people from the supply-side of the industry (notwithstanding that they are prominent representatives of industry bodies). I deal with this matter in more detail in chapter seven. For now, the discussion aims to deal with an interpretation of the mandate and available or obvious criticism against past actions of the National Credit Regulator.

The Regulator is further part of a broader scheme of stakeholders and role-players in the consumer credit industry.[148] It also, to echo Kelly-Louw to some extent, fulfils a very specific role in the consumer credit market.[149] Nombulelo Dilotsotlhe describes it as the 'primary administrative regulator'.[150] However, a comprehensive analysis of the Regulator's mandate together with its reported activities over the past decade, indicate that the Regulator has surpassed a mere administrative role. This phenomenon is not uncommon in the

[145] Govender (n 9) ch 4.

[146] See the comments of the CEO in Govender (n 9) Annexure C (interview with Darrell Beghin). In respect of forms of regulation (see also the discussion in par 2.2 of ch 2 *supra*), see Pearson 'A credit lens' (n 35) 2: 'Inherent in risk-based regulation is that the regulator chooses what risks it is prepared to tolerate or in other words, which failures may be acceptable. This may forestall over-intervention. But, the risk to the regulator is that regulatory choice may not align with community belief of acceptable risk, bringing the regulator into disrepute.'

[147] See e.g. the comments of Bird 'Regulating the regulators: Accountability of Australian regulators' 2011 *Melbourne University Law Review* 739 752. See also par 5.2.1 of ch 4 *supra*.

[148] Dilotsotlhe *The Effect of the National Credit Act on a Micro-lending Financial Institution* 2013 M.Com (Business Management) Dissertation Faculty of Management University of Johannesburg 3.

[149] See par 2.2 *supra* & the reference to Kelly-Louw (n 25) 201.

[150] Dilotsotlhe (n 148) 3.

contemporary South African Constitutional State as the role of administrators has had a notable effect on the practical realities of *inter alia* separation of powers and regulatory landscapes.[151] Cora Hoexter writes that

> '[l]egislative, executive and judicial powers are therefore vested in separate organs in terms of our Constitution. However, the activities performed by the administration today straddle all three of these functions, albeit at a less exalted level, and the separate functions have become increasingly blurred with the rise of the modern, developed administrative state and its enormous bureaucracy.'[152]

In the paragraphs hereafter, I discuss the specific duties of the National Credit Regulator under the headings of market improvement, information compilation and assessment, strategic direction, conduct management and authority.

The interpretative methodology of *Sebola v Standard Bank of South Africa* and Otto, in respect of section 3,[153] can be adopted when analysing sections 14, 15 and 16. These sections are structured similarly to section 3. In section 3, the purposes are set out in the first paragraph and the subsections then, according to Otto's analysis, set out the manners in which the objectives should be achieved.[154] Sections 14 to 16 also set out a function and then link the subsections with the word 'by'. As such, if the interpretation of Otto is sound, these sections would also mandate the Regulator to regulate, enforce and edify market stakeholders by taking the steps set out in the subsequent paragraphs. The other sections 13, 17 and 18 set out responsibilities or specific actions that need to be taken and do not follow the linguistic form of the aforementioned sections.

3.2.3. Market improvement

> 'The National Credit Regulator is responsible to –
>
> (a) promote and support the development, where the need exists, of a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry to serve the needs of–
>
> (i) historically disadvantaged persons;
>
> (ii) low income persons and communities; and
>
> (iii) remote, isolated or low density population and communities,

[151] Hoexter *Administrative Law in South Africa* (2012) 24-27. See her quoted reference to Drewry at 25: 'As Drewry observes, the policy/administration dichotomy is a fiction. "The comfortingly democratic idea that the 'policy' decisions that matter are taken by Ministers, accountable to citizens via the ballot box (and in the UK, Parliament), while civil servants merely play a subordinate 'administrative' role has long been recognized as a myth."'

[152] Hoexter (n 151) 24.

[153] See par 2.1; fn 36 *supra*.

[154] *Sebola v Standard Bank of South Africa* (n 20) par 36; Otto *The National Credit Act explained* (n 36) 7.

in a manner consistent with the purposes of this Act …'[155]

In effecting its mandate to cultivate the credit market in such a manner that it exceedingly becomes more accessible to prospective consumers who were initially unable to access the credit market,[156] the Regulator must assist the market to progress in line with certain set characteristics, namely fairness, transparency, competitiveness, sustainability, responsibility, efficiency, effectiveness and accessibility.[157] In particular, the improvements should work towards meeting the requirements of needy and previously deprived individuals and societies who are poor, distant, secluded or minute.[158] However, section 13(a) qualifies the above by reiterating the provisions of section 12(1)(d) in more detail – the achievement of the aforementioned should be guided by the objectives of the Act.

In essence, this is a direct reiteration of section 2(1) of the National Credit Act, which determines that '[t]his Act must be interpreted in a manner that gives effect to the purposes set out in section 3'. The repetition of the reference to section 3 in section 13(a) has to support the notion that the interpretation of the Regulator's statutory duties, specifically section 13(a), has to conform to the interpretation directives in the founding legislation. This is a very important part of the mandate as it informs the manner in which the Regulator effects its duties and the manner in which its actions are to be moderated,[159] in my opinion even before public law considerations such as administrative law determinants are called to thought. However, this particular function is wide and consists of many components.

I also get the idea, particularly from Govender's research, that this function is often equated with the purpose of the National Credit Act set out in sections 3(d) or 3(g) – '…promoting equity in the credit market by balancing the respective rights and responsibilities of credit providers and consumers …' or 'addressing and preventing over-indebtedness of consumers…' – and not underscored, effected in line with, or work towards realising the

[155] S 13(a) of the NCA.
[156] S 13 of the NCA, headed 'Development of accessible credit market'. See also DTI *Consumer Credit Law Reform* (n 1) ch 3.
[157] S 13(a) of the NCA.
[158] S 13(a)(i)-(iii) of the NCA.
[159] See also Govender (n 9) 14: 'It is of significance to note that section 3 of the Act states as one of the core purposes to protect consumers (in reference to *all* consumers) however, section 13 imposes the responsibility on the NCR to "*serve the needs of*" historically disadvantaged persons, low income persons and communities and remote, isolated and low density populations and communities. The Act does not require the consistent treatment of consumers but paradoxically, the consistent treatment of credit products and credit providers.' Original emphasis. See also the comments in *Micro Finance South Africa v Minister of Trade and Industry and the National Credit Regulator* [2016] ZAGPPHC 1155 (22 November 2016) *inter alia* par 14.

purposes of the Act as sections 2(1) and 13(a) prescribe.[160] I do not see a provision in the National Credit Act that provides that the realisation of the objectives of the National Credit Act set out in section 3 is the, or one of the, responsibility(ies) of the National Credit Regulator.[161]

In my view, section 13 is written in the context of 'development' but section 13(a) does not expect the Regulator to *create*, but to *help* with the aim of improving the credit market 'where the need exists'. The comment by Nomsa Motshegare, included as part of Govender's dissertation, that meeting objectives is a process,[162] and the following part of the conversation between Govender and Darrell Beghin, are relevant:

> '**DB:** With consumers, the clause is about preventing the over-indebtedness of consumers, how is the NCR supposed to prevent that? They can't. What is the definition of over-indebtedness? When my income does not cover my obligations or my obligations exceed my income. Right now, the majority of South Africans can be considered over-indebted because they don't earn enough to pay all their debt. They just earn too little. It is not because of too much credit necessarily, they just earn too little. How does [the] NCR fix the earnings of the consumers? They cannot.
>
> **DG:** So it is very ambitious what the Act was trying to achieve.
>
> **DB:** The word "addressing" over-indebtedness would be good but they cannot prevent it. They can address it by credit providers engaging in good practice and understanding the consumer market, finding a way to create subsidised credit for poor consumers. Ensure consumers use credit for productive and not consumptive purposes – they can address all that. But preventing? No.'[163]

In contrast with the other duties of the Regulator, the legislation does not provide the means by which the Regulator should effect the duty set out in section 13(a). It is left to the creativity, or policy choices, of the Regulator. It is also plausible that this duty can inform other duties, and *vice versa*, also featuring as an outcome through proper execution of other

[160] See Govender (n 9) Annexure B (interview with Darrell Beghin): 'DB: … The NCR possibly forgets some times that they have to balance the interest of the users of credit with the providers of credit. … DG: Yes, this is stated in section 3, to promote equity by balancing the rights and obligations of credit providers and consumers.'

[161] See *contra* Govender (n 9) Annexure A (interview with Nicky Lala-Mohan) quoted in fn 164 *infra*.

[162] Govender (n 9) Annexure C (interview with Nomsa Motshegare).

[163] *Idem* at Annexure B (interview with Darrell Beghin). To the best of my knowledge, there is not a duty on the NCR to prevent – this wording is found in s 3. See also Goodhart *et al* (n 18) 192.

responsibilities. In terms of this function, the Regulator has a clearly defined public-interest mandate aimed at specific groups, namely the poor, the disadvantaged and the segregated.[164]

3.2.4. Information compilation and dissemination

The National Credit Regulator is tasked with collecting information on the consumer credit market and the focus of this particular task is divided between two of the primary functions of the Regulator – set out in sections 13, 16 and 18 respectively.[165] Specific themes for examination, each relating to different components of the consumer credit market, are referred to in the Act, in addition to an open-ended authorisation to study additional aspects relevant to the consumer credit market.[166] The Regulator has to study the configuration of the market, its stakeholders and behaviour of role-players;[167] financial arrangements pertaining to

[164] For contextualisation, see par 2.2 in ch 3; par 3.1 of ch 4 *supra*. See also Barkow 'Insulating agencies: avoiding capture through institutional design' 2010 *Texas Law Review* 15 17: 'Rather the goal of insulation is frequently to allow an agency to protect the diffuse interests of the general public or a vulnerable segment of the public that, because of collective action problems or resource limitations, is often outgunned in the political process by well-financed and politically influential special interests.' See also the comments of Nicky Lala-Mohan in Govender (n 9) Annexure A: 'So to answer your question, yes the NCR is achieving certain functions of its mandate but they are not doing what's good for industry.' (The initial question posed by Govender was: 'We have a way in which we interpret the Act and the way we implement that interpretation. In terms of section 3, we look at what we need to achieve and adopt a method or strategy in which the goals are to be achieved. The purpose of my research is to investigate the way the NCR is achieving these goals, specifically if are the goals achievable and whether the NCR *actually* achieving them? The NCR assumes that it is achieving its purpose according to our mandate, per what is reported in the annual reports. My purpose here is to get the registrant's perspective, specifically industry's view on how the NCR operates in respect of achieving its mandate.' Original emphasis.

[165] S 13 of the NCA is concerned with the '[d]evelopment of [an] accessible credit market' whilst s 16 relates to '[r]esearch and public information'. See also s 18(1)(c): 'In addition to any other advice or reporting requirements set out in this Part, the National Credit Regulator is responsible to – (c) report to the Minister annually on – (i) the volume and cost of different types of consumer credit products, and market practices relating to those products; and (ii) the implications of consumer choice and competition in the consumer credit market.'

[166] S 13(c)(v): 'The National Credit Regulator is responsible to – (c) monitor the following matters and report to the Minister annually in respect of: (v) any other matter relating to the credit industry …'

[167] S 13(c)(ii): 'The National Credit Regulator is responsible to – (c) monitor the following matters and report to the Minister annually in respect of: (ii) market share, market conduct and competition within the consumer credit industry, the credit industry structure, including the extent of ownership, control and participation within the industry by historically disadvantaged persons'; s 16(1)(d): 'The National Credit Regulator is responsible to increase knowledge of the nature and dynamics of the consumer credit market and industry, and to promote public awareness of consumer credit matters, by – (1)(d) conducting reasonable periodic audits of registered credit providers in respect of historical data relative to credit applications and credit agreements in order to – (i) establish demographic patters of the credit market; (ii) investigate socio-economic trends in the credit market, particularly among persons contemplated in s 13(a); and (iii) detect patterns of possible discriminatory practices'; s 16(1)(f): 'The National Credit Regulator is responsible to increase knowledge of the nature and dynamics of the consumer credit market and industry, and to promote public awareness of consumer credit matters, by – (1)(f) monitoring trends in the market – (ii) for alternative dispute resolution agents, the patterns and costs of services, impartiality and neutrality of such agents, and the impact of such agents on the incidence and cost of debt enforcement and consumers' access to redress in the market.'

consumer credit extension[168] and related matters;[169] consumer financial health[170] and identified persons/entities whose interests are specifically protected under the auspices of the National Credit Act.[171] The outcomes of the monitoring activities are mostly reported to the Minister or, in some instances, aimed at assisting with knowledge enhancement and information dissemination.[172] This is a very important aspect, as Beghin notes in her interview with Govender:

> 'If we look at the NCR, there is a role for the NCR to have a consumer credit market being fair, transparent, ethical etc and part of that is creating an *informed* consumer and understanding the market well enough and putting the mechanisms in place to identify the market segments.'[173]

In respect of consumers, the section of the Act mandating policy recommendations made by the National Credit Regulator to the Minister include a section specifically aimed at increased availability of credit to certain persons and societies.[174] Apart from founding policy recommendations and assisting government in reaching positive outcomes for the consumer credit industry,[175] the accumulated information can also be used to inform industry

[168] S 13(c)(i): 'The National Credit Regulator is responsible to – (c) monitor the following matters and report to the Minister annually in respect of: (i) [c]redit availability, price and market conditions, conduct and trends'; s 18(1)(c).

[169] S 16(1)(f): 'The National Credit Regulator is responsible to increase knowledge of the nature and dynamics of the consumer credit market and industry, and to promote public awareness of consumer credit matters, by – (1)(f) monitoring trends in the market – (i) for credit insurance, patterns of sale of credit insurance, costs of credit insurance, performance of credit insurance in meeting the obligations of consumers, and loss rations of insurers in respect of credit insurance.'

[170] S 13(c)(iv): 'The National Credit Regulator is responsible to – (c) monitor the following matters and report to the Minister annually in respect of: (iv) levels of consumer indebtedness and the incidence and social effects of over-indebtedness.' In terms of s 16(1)(c), the NCR further has to track developments in respect of 'socio-economic patterns of consumer credit activity' and detect aspects relevant to 'over-indebtedness; and ... the patterns, causes and consequences of over-indebtedness'. The mandate is given in the context of the NCR's duty to create a better understanding of the relevant market, industry and aspects relating to credit. The s specifically refers to the 'public' when referring to 'awareness ... education and information measures' in ss 16(1) and 16(1)(a) as well as to the 'credit market and industry' when referring to 'its procedures ... the interpretation or application of any, however the lack of a specific target in relation to the machinery of the market and industry itself it notable. It is therefore submitted that the NCR is statutorily obliged to implement measures to enable it to remain well-informed and conversant with the workings of the industry – see the introductory part of s 16(1): 'The National Credit Regulator is responsible to increase knowledge of the nature and dynamics of the consumer credit market and industry, and to promote public awareness of consumer credit matters, by – ...'

[171] S 13(c)(ii) & (iii): 'The National Credit Regulator is responsible to – (c) monitor the following matters and report to the Minister annually in respect of: (iii) access to consumer credit by small businesses or persons contemplated in par (a) (i) to (iii)'; s 16(1)(d)(ii); s 16(1)(e): 'The National Credit Regulator is responsible to increase knowledge of the nature and dynamics of the consumer credit market and industry, and to promote public awareness of consumer credit matters, by – (1)(e) monitoring trends in the consumer credit market and industry with respect to – (i) the needs of persons contemplated in s 13(a); and (ii) the promotion of black economic empowerment and ownership within the industry.'

[172] Ss 13(c), 16(1)(c)-(f) & 18(1)(c)-(d).

[173] See Govender (n 9) Annexure B. Original emphasis.

[174] S 13(d). This section refers to consumers highlighted in s 13(a)(i-iii), which are '(i) historically disadvantaged persons; (ii) low income persons and communities; and (iii) remote, isolated or low density populations and communities'.

[175] See s 18 of the NCA.

participants as the Regulator may initiate court-guided clarification cases and provide its views on the meaning of the Act.[176] The Regulator has been involved in court cases either of its own volition or as *amicus curiae*,[177] and has issued guidance under the auspices of circulars.[178]

Specific protective measures were incorporated into the Act[179] and the legislation advances consumer empowerment through specific provisions relating to improved 'knowledge' and 'awareness' through 'education' and 'information'.[180] In terms of section 16(1)(c), the National Credit Regulator further has to track developments in respect of 'socio-economic patterns of consumer credit activity' and detect aspects relevant to 'over-indebtedness; and ... the patterns, causes and consequences of over-indebtedness'. The mandate is given in the context of the Regulator's duty to create a better understanding of the relevant market, industry and aspects relating to credit.[181] The section specifically refers to the general population when referring to 'awareness ... education and information measures' in sections 16(1) and 16(1)(a) and to the 'credit market and industry' when referring to 'its procedures ...

[176] See s 16(1)(b) of the NCA.

[177] See e.g. *National Credit Regulator v Nedbank Limited and Others* 2009 (6) SA 295 (GNP); *Nedbank Ltd and Others v The National Credit Regulator and Another* 2011 (3) SA 581 (SCA); *Sebola v Standard Bank of South Africa* (n 20).

[178] See e.g. NCR 'Guideline for the Submission of Credit Information in terms of Regulation 19(13) of the National Credit Act, 34 of 2005, as amended' Guideline 3 of 2017; NCR 'Guideline for Credit Providers and Credit Bureaux in respect of Debt that is On-Sold' Guideline 1 of 2017; NCR 'Assessment Findings on VDMS' Circular 6 of 2012; NCR 'Debt Review Task Team Agreements of 2010 Guidelines' Guideline 1 of 2015; NCR 'Proposed Process for End Balance Differences' Circular 4 of 2015; NCR 'Interpretation of Circular 04 – Proposed Process for End Balance Differences' Circular 5 of 2015; NCR 'Public Notice Proposed guidelines for the interpretation and application of section 103(5) of the National Credit Act 34 of 2005' No 54 in GG 38419 of 30 January 2015; NCR 'Assurance Engagement Report Guideline' Guideline 3 of 2010; NCR 'Compliance Report Guideline' Guideline 2 of 2010; NCR 'Communiqué: On SCA Judgments' Issue 2 September 2011.

[179] See s 3 of the NCA; Van Heerden & Renke 'Perspectives on selected aspects of the registration of credit providers in terms of the National Credit Act 34 of 2005 (1)' 2014 *Journal for Contemporary Roman-Dutch Law* 614 615; Renke 'Measures in South African consumer credit legislation aimed at the prevention of reckless lending and over-indebtedness: An overview against the background of recent developments in the European Union' 2011 *Journal for Contemporary Roman-Dutch Law* 208 209 *et seq*.

[180] S 16(1) of the NCA (specifically 16(1)(a)).

[181] S 16(1) of the NCA. An additional duty to collect and retain information is set out in s 14(c) and within the context of registrants – the NCR is tasked to draft and update a 'National record of registrations' in terms of s 53 which comprises of current, adapted or withdrawn registrations. This register is available to provincial regulators and additional persons (the latter to the extent permitted by Part B of Ch 4, which concerns '[c]onfidentiality, personal information and consumer credit records') – see s 14(c), 53(2) & 53(3). In addition, s 14(1) also refers to s 69(1), which determines that the Minister may impose on the NCR the duty to develop a 'single national register of outstanding credit agreements'. Up to date, no such register has been developed although Govender (n 2) reported in 2014 at 41 that '[t]he project is still ongoing'.

the interpretation or application of any provision of this Act' in section 16(1)(b). The lack of specific targets in relation to the machinery of the market and industry itself is notable.[182]

The Regulator established two specific departments devoted to information compilation.[183] Govender reports that research projects are often undertaken by consultants, 'for logistical and operational reasons', and that there are financial and technological restrictions that impact the '*Credit Information and Research*' division.[184] The '*Statistics*' division gathers data submitted by certain credit providers and analyses these in order to assist with decision making.[185] The reports published by this division on a quarterly basis are the Credit Bureau Monitor and Consumer Credit Market Report.[186] The Regulator is statutorily obliged to implement measures to enable it to remain well informed and conversant with the workings of the industry.[187] Although the Act does not specifically state this in all instances, it is difficult to see how the information obtained by the Regulator in executing its data collection and dissemination duties cannot inform its activities, including its reporting and legislative review functions set out in *inter alia* section 16(1)(g).[188]

Insofar as research is concerned, the Regulator has allocated a webpage as part of its website to research reports that relate to the consumer credit industry.[189] However, the site has not been updated since 2013 and not all of the reports, especially the older reports, were

[182] Govender (n 9) notes at 42 that the suggestions for research topics are provided to the executive on a yearly basis but she does not elucidate further on how the decisions are made in respect of which theme to research.

[183] Govender (n 9) 40, 42 & 47-49.

[184] *Idem* at 42. Her observations of financial and technological restrictions appear consistently throughout her dissertation. See also Govender (n 9) 43: 'It is further submitted that the research methods utilised are not in line with changing market conditions and advancements in technology. Information collected in terms of research projects might be one, three or six months old – presuming it is accurate. This leads to a detachment between what consumers and service providers experience on the ground from day to day in the current climate to what is actually happening when those reports are finalised and released, especially in the time of real time transacting. Most research conducted has been on the supply side (such as credit providers or alternative dispute resolution agents). There appears to be no reports on the demand side of the spectrum or no baseline consumer study. In order to fulfil the mandate of protecting consumers, one needs to engage with consumers to see what the demand side of the credit market needs, where the quandaries and complications exist and where time and resources can be best invested to improve the demand side of the market. One cannot be tasked with protection of consumers whilst not knowing what they really need protection from.'

[185] Govender (n 9) 47.

[186] See e.g. NCR *Annual Report* 2015/2016 42. See also at 42: 'The Statistics Department is also tasked with overseeing research projects that are undertaken by the NCR. The mandate carried out in this regard is as outlined in sections 13 & 16 of the NCA, and includes trends and developments in the credit market. The following research reports have been concluded:• Market share, market conduct and competition within the consumer credit industry. The credit industry structure including the extent of ownership, control and participation within the industry by historically disadvantaged persons • Analysis of macro-economics and households.'

[187] See the introductory part of s 16(1) of the NCA. See also Govender (n 9) 43 quoted in fn 184 *supra*.

[188] See Govender (n 9) 47.

[189] http://www.ncr.org.za/research.

commissioned by the Regulator.[190] A perusal of the website therefore gives some indication of research that has been undertaken but does not give a comprehensive view for comparative/evaluative purposes of all reports commissioned since inception including those submitted to the Minister. Furthermore, the Credit Bureau Monitors and Consumer Credit Market Reports are published on a different page,[191] which necessitates that the person who wants to undertake an evaluation of commissioned research know to look elsewhere or compare the annual reports in order to ensure that all research projects are accounted for. This is in addition to related research undertaken by other research institutions, which begs the question as to whether it warrants expenditure by the Regulator in order to undertake the same research.[192]

The Regulator is not only tasked with gathering information but also to disseminate information to others – over and above ministerial edification, the Regulator has a recognised citizen-tutor mandate in respect of awareness of the National Credit Act[193] and reports on its activities annually as part of the performance area 'Education and communication'.[194] The Regulator makes use of the media, conducts workshops and meetings, and undertakes roadshows, exhibitions and campaigns.[195] In order to evaluate its performance in this area, the Regulator commissions consultants to assess its education drives.[196]

[190] *Ibid*.

[191] http://www.ncr.org.za/credit-bureau-monitoring-cbm; http://www.ncr.org.za/consumer-credit-market-report-ccmr.

[192] See e.g. the Financial literacy studies by the Financial Services Board – https://www.fsb.co.za/Departments/consumerEducation/Pages/research.aspx.

[193] See Pearson *et al* 'Balancing responsibilities – Financial literacy' 2017 *Potchefstroom Electronic Law Journal* 18 *et seq.*

[194] See e.g. NCR *Annual Report* 2015/2016 26-27 & NCR *Annual Report* 2014/2015 19-20.

[195] *Ibid.* Govender (n 9) 43 states that '[t]he research projects, surveys and studies of the previous financial year generally determine the educational projects for the next financial year. The Complaints department and feedback from workshops as well as feedback from stakeholders and general public engagement also feed the basis for which educational campaigns are determined and formulated'.

[196] See Govender (n 9) 45. Insofar as the educational mandate is concerned, Govender's section on this unit criticises the following aspects thereof at 43-47 & 64: the lack of human resources, lack of financial resources (which culminated in the inability to print/provide electronic versions of leaflets in all official languages and in respect of the National Credit Amendment Act particularly the removal of adverse credit information, whilst credit providers have to issue documents in a minimum of two official languages), lack of social media platforms, lack of understandable communications, lack of certain themes, lack of tailored and targeted features adjusted to the needs and abilities of consumers, lack of frequency and lack of legal accuracy. However, she also notes at 44 that the reduction in financial allocation has endorsed a "more innovative" approach towards effecting the edification mandate, that there are technological advances to use the internet and cellphones in order to enable consumers to interact with the Regulator or access information and that some evaluative assessments done by consultants reported positive outcomes in respect of some 'media and educational campaigns'.

3.2.5. Strategic direction

A far-reaching duty imposed on the National Credit Regulator is the formulation (or amendment) of strategies, and various sections of the Act have pertinent applications in this regard. The broadest is section 13(d), which states that the Regulator has to

> 'conduct research and propose policies to the Minister in relation to any matter affecting the consumer credit industry, including but not limited to proposals for legislative, regulatory and policy initiatives that would improve access to credit for persons contemplated in paragraph (a)(i) to (iii).'

The recommendations would substantively concern aspects that affect the credit industry and specified protected persons, and procedurally extend to 'legislative, regulatory or policy initiatives'.[197] The data collected and analysed as well as the research undertaken are for purposes of observing and tracking market trends as well as accounting on the findings to the Minister.[198] In some instances, the Regulator would merely relate the outcomes to the Minister, however, in other instances the Regulator is expected to provide recommendations to the Minister.[199] If Otto's method of interpretation of the legislation set out in section 3 is repeated when, for example, analysing section 16, it would mean that the Regulator also has a duty to 'increase knowledge of the nature and dynamics of the consumer credit market and industry, and to promote public awareness of consumer credit matters' in respect of the ministerial office to which it is affiliated.

In respect of section 16, which revolves around 'research and public information', the Regulator is tasked with assessing the law and informing the Minister of aspects that affect consumer credit.[200] The overall duty is to improve understanding of the credit industry, specifically amongst the public, but if subsection (g) were read as a means to enhance appreciation of the market and credit issues, it would logically follow that the Regulator also has an informational duty towards the Minister.

Although the Regulator cannot ordinarily compel the Minister to effect changes, as it deems necessary, the performance of the Regulator in this respect has been criticised in the past for lack of observable outcomes.[201] In *ABSA Bank Limited v Petersen*, the court stated:

[197] S 13(d). See also s 18(1)(a), 18(1)(b) & 18(1)(c). S 18(1)(b) provides, e.g. that the NCR should 'recommend to the Minister changes to bring about uniformity in the legislation in the various provinces in relation to consumer protection in terms of this Act'.

[198] Ss 13(c), 16(1)(c)-(f) & 18(1)(c)-(d).

[199] Compare the wording of ss 13(c) & 16(1)(g) with that of ss 13(d), 18(1)(a), 18(1)(b) & 18(1)(e).

[200] S 16(1)(g) of the NCA.

[201] *ABSA Bank Limited v Petersen* [2012] 4 All SA 642 (WCC) par 10 fn 6.

> ‘Notwithstanding the courts’ repeated deprecation of the demonstrated shortcomings in the wording of many of the Act’s provisions, there is regrettably no evidence that NCR’s mandate to review the legislation (s 16(1)(g)) is being carried out in a manner to bring about the obviously desired improvements’.[202]

The National Credit Act is also not consistent in this regard. The amended section 82(2) determines that ‘[t]he Minister must, on recommendation of the National Credit Regulator, make affordability assessment regulations’. Section 82(2) can sustain an interpretation to the effect that the executive is obliged to issue delegated legislation upon advice of the Regulator.[203] In contrast, sections 13(d), 18(1)(a), 18(1)(b) and regulation 45 only require the Regulator to ‘propose’ to, ‘recommend’ to or ‘advise’ the Minister on certain aspects of the market or regulatory scheme.

The data collected, analysed and the outcomes of the analyses conducted may affect a variety of consumer credit stakeholders. In its most basic form, the Regulator would have to collect data in order to ‘monitor’ certain features of the market and analyse same in order to identify certain market tendencies.[204] It may have to report findings in relation to specific features to the Minister.[205] It is logical to assume that, where the Regulator observes and reports a troublesome trend to the Minister, the Minister has the prerogative to take the necessary steps to ameliorate the matter. Adjacent to a basic reporting function, the Regulator is also assigned an advisory function to the Minister[206] and in some instances, depending on the contents of a report, its findings must be presented to Parliament.[207] The Regulator is therefore positioned

[202] *Ibid*.

[203] See also the wording of s 48(1)(b) where reference is made to ‘affordability assessment regulations made by the Minister on the recommendation of the National Credit Regulator’. See also Portfolio Committee on Trade and Industry *National Credit Act Regulations: briefing; Update on status of Gambling Review Commission's Report*, *Implementation of amended Lotteries Act & Transformation in horseracing industry* 28 October 2014: ‘Mr MacDonald Netshitenzhe, Chief Director, Policy and Legislation, DTI, said that the NCAA was signed into law by the President on 19 May 2014. A team of legislative drafters and policy-makers had identified sections of the NCAA which needed implementation through regulations. From 30 April 2014, the DTI, the National Credit Regulatory and National Consumer Tribunal had jointly consulted with targeted stakeholders such as credit providers, payment distribution agents and financial institutions in order to test the market. The National Credit Regulator (NCR) had submitted an official communication to the Minister dated 15 July 2014, as required by the NCAA, recommending that these regulations should be issued as regulations.’

[204] Ss 13 (c), 16(1)(c)-(f) of the NCA.

[205] S 13(c), 16(1)(g), 18(1)(c) of the NCA. The NCR also publishes many of its reports on its findings on its website – see www.ncr.org.za.

[206] Ss 13(d), 18(1)(a), 18(1)(b) & 18(1)(e) of the NCA.

[207] Incidentally, reports on matters referenced in ss 13(c) and 16(1)(g) must be presented to Parliament by the Minister – see s 18(2)(a) of the NCA. In terms of s 18(2)(b), if the ‘report deals with a substantial matter relating to the purposes of this Act’, it must also be referred to Parliament (‘table[d] in Parliament’).

to affect governmental perspectives on the consumer credit industry.[208] Section 18(1)(a) is an example in this regard, as the Regulator is empowered to provide direction to the Minister in respect of the consumer credit policy considerations and benchmarks related to the safeguarding of consumer's interests.[209]

Although the Regulator is not explicitly authorised to issue directives that are visibly aimed at altering the set legal landscape,[210] the effect of the Regulator's internal policies, approaches to regulation and communicative documents may have a comparable outcome.[211] In some instances, the regulations require contemplation of the guidelines issued by the Regulator:

> 'When assessing the consumer's application in terms of section 86(6)*(a)* of the Act, the debt counsellor must refer to section 79 and further *consider* the following: Minimum living expenses are based upon a budget provided by the consumer, adjusted by the debt counsellor with reference to guidelines issued by the National Credit Regulator … In making a determination that a particular debt is reckless, as per section 86(6)*(b)* of the Act, a debt counsellor must refer to section 80 of the

[208] The impression that is gleaned from the commentary of the presiding officer in *ABSA Bank Limited v Petersen* (n 201) par 10 fn 6, is that the NCR has a responsibility to effect changes – even in respect of the legislation itself. The criticism levied against the performance of the NCR in this respect were as follows: 'The National Credit Provider [*sic*] ('the NCR'), as the organ of State immediately responsible for the administration of the statute, has even had to approach the courts for declaratory relief in respect of the meaning of a number of the Act's provisions ... Ironically, the Act, somewhat unusually, provides for one of the functions of the NCR to be 'providing guidance to the credit market and industry by – applying to a court for a declaratory order on the interpretation or application of any provision of th[e] Act' (see s 16(1)(b)(ii)). Notwithstanding the courts' repeated deprecation of the demonstrated shortcomings in the wording of many of the Act's provisions, there is regrettably no evidence that NCR's mandate to review the legislation (s 16(1)(g)) is being carried out in a manner to bring about the obviously desired improvements. Even obvious errors in the statute have been left unattended. The flawed drafting of the statute does not conform comfortably with the requirements of the rule of law which, to be properly effective, requires statutory law to be clearly worded and readily understandable to those who are expected to comply with it.' References omitted.

[209] In terms of s 18(1)(e) of the NCA, the Minister may also request counsel from the Regulator on 'any matter' directed to the Regulator.

[210] Govender has criticised the NCR for omitting to publish guidelines or directives and its nominal reliance on s 16(b)(ii) – see Govender (n 9) 26. The absence of intervention by the NCR is juxtaposed with the extensive litigation based on NCA provisions – in this regard, the author notes that 'the courts appear to have shouldered some of the responsibilities of the NCR by providing a definite application of the Act' – see Govender (n 9) 26. It is worth noting that, contrary to the wording of s 16(1)(b) which refers to 'its procedures', 'interpretation of any provision of this Act' and 'interpretation or application of any provision of this Act', the NCR has been providing guidance to the industry, specifically the debt counselling industry, in respect of issues not dealt with in the NCA – see, e.g. NCR *National Credit Regulator Debt Review Task Team Report* May 2010. The first part of 2015 has also seen the NCR issue numerous guiding documents – see e.g. NCR 'Debt Review Task Team Agreements of 2010' Guideline 1 of 2015; NCR 'Interpretation and application of s 103(5)' Public Notice 30 January 2015; NCR 'Proposed Process for End Balance Differences' Circular 4 of 2015.

[211] See e.g. Thatcher 'Delegation to independent regulatory agencies: Pressures, functions and contextual mediation' 2002 *Western European Politics* 125 140 in respect of the influences that independent organisations have in this regard.

> Act and further *consider* the following … any guidelines published by the National Credit Regulator proposing evaluative mechanisms, models and procedures in terms of section 82 of the Act.'[212]

Additional outcomes relating to the Regulator's intervention in the credit market are discussed in more detail here after, and within the context of specific documents that the Regulator has drafted and issued to the industry. In order to be concise, a brief overview of the Regulator's mandate in respect of the authority to deal with deviations from set behavioural standards is necessary.

3.2.6. Registrations

The registration function of the Regulator is set as the means of regulating the consumer credit industry.[213] All credit providers, debt counsellors, credit bureaus, payment distribution agents and alternative dispute resolution agents are statutorily obliged to register with the National Credit Regulator.[214] In executing this duty, the Regulator is comprehensively guided by the provisions of the National Credit Act in respect of each category of candidate but is also given discretion to decide whether to allow the registration or not.[215] As such, it has developed registration requirements in some instances that exceed the checklist set out in the Act to decide whether the registrant meets the threshold to execute its duties in the regulated market.[216]

Although the legislation sets out the features of a prospective registrant in order to qualify for registration, the Regulator has to determine whether these features are 'sufficient' or 'adequate' [217] or whether there are 'compelling' reasons to refuse the application for registration. [218] It has further developed registration procedures, requesting specific information as authorised in section 45(2).[219] The only statutory limitation on this section is that the information so requested has to be 'relevant' *re* the application for registration.[220]

[212] Regs 24(7)(c) & 24(8)(c) of the NCA. Reg 24 deals with the consumer's application for debt review. Own emphasis.

[213] S 14 of the NCA.

[214] Ss 40(1), 43(2), 44(2), 44A(2)(a), 134A, read with section 54(2) of the NCA.

[215] See s 45(3) of the NCA: 'If an application complies with the provisions of this Act and the applicant meets the criteria set out in this Act for registration, the National Credit Regulator, after considering the application, must register the applicant subject to section 48 unless the National Credit Regulator after subjecting the applicant to a fit and proper test or any other prescribed test, is of the view that there are other compelling grounds that disqualify the applicant from being registered in terms of this Act.'

[216] In respect of credit bureau registration as a specific example, see Boraine & Van Wyk 'Credit bureaus in South Africa and Namibia: A comparative analysis of the regulatory frameworks evaluated against the World Bank's principles for credit reporting: Part 2' 2017 *Comparative and International Law Journal of Southern Africa* 303 306.

[217] See eg ss 41(2), 43(3) (in respect of developmental credit provision and credit bureaus).

[218] S 45 (3) of the NCA.

[219] http://www.ncr.org.za/ncr-departments/registrations-compliance/credit-bureaus/cb-how-do-i-register.

[220] S 45(2)(a) of the NCA.

In addition, developmental credit is viewed as a mode through which the endorsement of the market as per section 13(a) can be achieved and the Regulator is endowed with the authority to draft the conditions in terms of which it would allow prospective developmental credit providers to acquire supplementary registration, authorising them to extend credit for developmental purposes.[221]

In terms of the amended section 45(3), the National Credit Regulator is required to register a prospective credit provider, debt counsellor, credit bureau, payment distribution agency, or alternative dispute resolution agent, if the request for registration meets the procedural and substantive requirements set out in the National Credit Act. The legislative eligibility requirements are therefore the point of departure for positive registration, but the Regulator has been granted a further discretionary mandate through the amendments to this subsection. The Regulator is now authorised to refuse registration where it 'is of the view that there are other compelling grounds that disqualify the applicant from being registered in terms of this Act'.[222] The formed opinion of the Regulator is supposedly based on the outcome of 'a fit and proper test or any other prescribed test' to which the Regulator submits the prospective registrant.[223]

In her 2007 paper on the National Credit Regulator, Monica Vessio stated the following:

> 'Interestingly enough, the NCR does not have the power to withdraw or de-register any body or person registered with it. Registrations may only be cancelled by the National Consumer Tribunal, normally upon request by the NCR, and only after the latter has conducted an investigation into

[221] See s 13(b), read with s 10 of the NCA. Developmental credit is not defined *per se* and only referred to in s 1 as 'a credit agreement that satisfies the criteria set out in section 10'. S 10(1) categorises developmental credit agreements primarily in relation to supplementary registration, the person of the consumer and credit provider and the aim of the credit extension: 'A credit agreement, irrespective of its form, type or category, is a developmental credit agreement if – (a) at the time the agreement is entered into, the credit provider holds a supplementary registration certificate issued in terms of an application contemplated in section 41; and (b) the credit agreement is – (i) between a credit co-operative as credit provider, and a member of that credit co-operative as consumer, if profit is not the dominant purpose for entering into the agreement, and the principal debt under that agreement does not exceed the prescribed maximum amount; (ii) an educational loan; or (iii) entered into for any of the following purposes – (aa) development of a small business; (bb) the acquisition, rehabilitation, building or expansion of low income housing; or (cc) any other purpose prescribed in section (2)(a).' S 2 authorises the Minister of Trade and Industry to impose additional objectives for the granting of credit (referring back to s 10(1)(b)(iii)(cc)), set the highest limit for the principal debt, exceeding which the credit agreement would not necessarily be considered as developmental credit extension (referring back to s 10(1)(b)(i) and allows the Minister to stipulate the maxims by which the NCR should exercise its opinion on 'whether a credit provider's dominant purpose for making an agreement was profit or a purpose other than profit' – see s 2(a), (b) and (c) respectively. In ss 2(a) and (c), the 'socio-economic development and welfare of persons contemplated in section 13(a)' are prime considerations that the Minister must account for. One of the pecuniary benefits that a developmental credit agreement poses is the permitted interest rate that may be charged in terms of reg 42 – this is, apart from short-term credit agreements and along with unsecured credit agreements, the second highest limit allowed in terms of the NCA.

[222] S 45(3) of the NCA.

[223] *Ibid*.

> alleged unlawful or prohibited conduct and brought a request for cancellation to the Tribunal. The NCR may request that the Tribunal cancel the registration of a registrant if it repeatedly fails to comply with any of the conditions of its registration, is in contravention of the Act, or fails to meet any of its black economic empowerment commitments in respect of combatting over indebtedness.'[224]

This is also the view that André Boraine and I followed when we discussed the licensing of credit bureaus by the National Credit Regulator.[225] However, another view can be taken on the authority of the Regulator that does allow it to retract a licence.[226] The argument turns on the authoritative nature and different wording of sections 14(a), 14(b), 46(5), 47(5) and 57.

Sections 14(a) and (b) respectively determine that

> '[t]he National Credit Regulator is responsible to regulate the consumer credit industry by registering credit providers, credit bureau and debt counsellors … [and] … suspending or cancelling any registration issued in terms of this Act, subject to section 57(2) …'

For purposes of my argument, three features of this section are important: Firstly, that the duty to register befalls the Regulator; secondly, that the duty to suspend or cancel befalls the Regulator and thirdly, that this duty is only subjected to subsection 57(2) and not the whole of section 57. We have further also seen that the duties of the Regulator are not confined to sections 12 to 18 and, although these can be seen as the overall scheme, there are sections in the rest of the Act that delineate or individualise these obligations. It is therefore quite plausible that there can be further expansion on these responsibilities as can be seen in the addition of registrants not mentioned in section 14(a) but introduced in sections 44A and 134A.

The wording of section 14(b), which pertains to the National Credit Regulator, is similar to that of section 150(g), which pertains to the orders made by the National Consumer Tribunal:

> 'In addition to its other powers in terms of this Act, the Tribunal may make an appropriate order in relation to prohibited conduct or required conduct in terms of this Act, or the Consumer Protection

[224] Vessio 'What does the National Credit Regulator regulate?' (n 123) 232-233.

[225] See Boraine & Van Wyk 'Credit bureaus in South Africa and Namibia: A comparative analysis of the regulatory frameworks evaluated against the World Bank's principles for credit reporting: Part 1' 2017 *Comparative and International Law Journal of Southern Africa* 147 181. See also the view found in Minister of Trade and Industry (n 22) paras 2.2.2.2.1-2.2.2.2.2 & 2.2.2.2.4.

[226] See Van Zyl (n 91) & Van Zyl 'The effects of non-compliance' in Scholtz *et al Guide to the National Credit Act* (June 2017 Service Issue 9) in general for the provisions of the NCA that pertain to registration and deregistration. See also *Bridge Taxi Finance (Pty) Ltd v National Credit Regulator, In Re: Ruewell Investments (Pty) Ltd v National Credit Regulator* [2015] ZANCT 4 (3 March 2015) in respect of non-registration due to a s 46 matter – see par 35. However, the NCT decided in this case, in light of s 140 of the NCA. that: 'Flowing from section 140 of the Act, the Respondent cannot out of its own accord make a finding, following an investigation, that an entity has acted with disregard for consumer rights generally. That finding has to be tested in a competent forum, such as the Tribunal.' (see par 104).

> Act, 2008, including …suspending or cancelling the registrant's registration, subject to section 57(2) and (3) …'

Section 57(1) is subject to the provisions of section 57(2) and states that

> 'a registration in terms of this Act may be cancelled by the Tribunal on request by the National Credit Regulator, if the registrant repeatedly … fails to comply with any condition of its registration … fails to meet a commitment contemplated in section 48(1) … or … contravenes this Act'.

Section 57(2), which is the section referenced in section 14(b) determines that

> '[i]n any circumstance contemplated in subsection (1) concerning a registrant that is a regulated financial institution, the National Credit Regulator may … impose conditions on the registration of that person, consistent with its license … refer the matter to the regulatory authority that licensed that regulated financial institution, with a request that the regulatory authority review that licence in the circumstances; or at the request, or with the consent, of the regulatory authority that licensed that regulated financial institution, request the Tribunal to cancel the registration'.

Furthermore, section 57(6) determines that the Regulator has to take certain administrative steps '[i]f a registration is cancelled *in terms of this section or section 58*'.[227]

The criteria set out in sections 46 and 47 disqualify natural and juristic persons from being registrants. Sections 46(5) and 47(5) determine that the Regulator 'must deregister' the person 'if the registrant becomes disqualified in terms of this section at any time after being registered'. There is no qualification of this duty, similar to the qualification set out in section 14(b), to be found in either section 46 or 47.

A number of questions therefore come to the fore. Firstly, section 14(b) is very clear in that it states that the Regulator has the function to suspend or cancel any registration. If the Regulator has the authority to register an applicant and this decision has an element of discretion, why is it not capable to retracting the registration based on set directives in sections 46 and 47?[228] Most of the disqualification criteria are easily determinable, such as an unrehabilitated insolvent (arguably upon granting of the final sequestration order),[229] mental ailment (upon granting of the court order),[230] criminal activity (upon conviction of the conduct as set out in the subsection),[231] and so forth. I have to concede, some of the aspects are not straightforward, such as sections 46(3)(e)(ii) and (iii) that respectively refer to an

[227] Own emphasis. S 58 concerns cancellation upon request of a registrant as opposed to s 57 that deals with cancellation by the NCT upon referral by the NCR.

[228] See Hoexter (n 151) 43-46 with regard to 'express and implied powers'. The author refers to certain aspects that the judiciary will consider, but notes as an example in her introductory paragraph that '[i]t is well accepted that the power to make a regulation implies the power to withdraw it' – see 44.

[229] S 46(2) of the NCA.

[230] S 46(3)(c) of the NCA.

[231] S 46(3)(f) of the NCA.

enterprise that 'brought the consumer credit industry into disrepute … or … acted with disregard for consumer rights generally …' but the latter aligns with the duty of the Regulator set out in section 13 to enhance the consumer credit industry.

Secondly, the terminology in sections 14, 46, 47, 57 and even 58 differ: suspension, cancellation and deregistration. Sections 46 and 47 refer to 'deregistration' whilst the other sections refer to 'cancellation'. In addition, the grounds in these sections differ insofar as sections 46 and 47 deal with features of prospective registrants that would prohibit the applicant's registration. Sections 46(5) and 47(5), obliging the Regulator to deregister the registrant, deal with the situation where these prohibited features realise after registration. Section 57 deals with three specific scenarios that merit cancellation of a registration, namely non-compliance with the Act, conditions of registration or assurances given. On the one hand, one could argue that registration, whilst being subject to disqualification criteria, is non-compliance with the National Credit Act. The actual act of registration and non-registration is in the hands of the Regulator and not the registrant – the Regulator registers an applicant and not the registrant itself.

One can view the application sections of 46 and 47 as instructions for the National Credit Regulator. It is therefore difficult for me to resort the materialisation of disqualification measures after registration under contraventions of the Act and the auspices of section 57(1). The grounds that lead to cancellation are seemingly different to those that lead to deregistration. The wording of section 14(b) is very clear in that it states that the *Regulator* has the function to suspend or cancel any registration but the only possible area where the Regulator has any comparable mandate to do so, is in respect of deregistration.

Perhaps the answer lies with sections 14 and 15. Section 14 deals with registration and section 15 with enforcement. Section 15(i) authorises the Regulator to approach the Tribunal as part of its duty to enforce the National Credit Act. Therefore, where *enforcement* is concerned, the Tribunal is the adjudicative body insofar as cancellation and suspension are punitive measures but where *registration* is concerned, the Regulator is the authoritative entity insofar as a potential or existing registrant complies with the formal requirements for registration. I doubt whether the National Consumer Tribunal has the authority to cancel a registration where a natural person was a registrant and a director of an entity that 'brought the consumer credit industry into disrepute' as per section 46(3)(e)(ii). If this were not also set as a condition of registration or an assurance given as per section 57(1), the Tribunal would not have jurisdiction in the first place as there is no legislative prohibition in this regard.[232]

Thirdly, the wording of sections 46 and 47 is mandatory whilst the wording in section 57(1) is optional. If a registrant becomes disqualified, it has to be deregistered whereas the Tribunal 'may' effect cancellation, but there is no stipulation that it is obliged to do so.

3.2.7. Conduct management

> 'The National Credit Regulator must enforce this Act by –
>
> (a) promoting informal resolution of disputes arising in terms of this Act between consumers on the one hand and a credit provider or credit bureau on the other, without intervening in or adjudicating any such dispute;
>
> (b) receiving complaints concerning alleged contraventions of this Act;
>
> (c) monitoring the consumer credit market and industry to ensure that prohibited conduct is prevented or detected and prosecuted;
>
> (d) investigating and ensuring that national and provincial registrants comply with this Act and their respective registrations;
>
> (e) issuing and enforcing compliance notices;
>
> (f) investigating and evaluating alleged contraventions of this Act;
>
> (g) negotiating and concluding undertakings and consent orders contemplated in sections 138(1)(b);
>
> (h) referring to the Competition Commission any concerns regarding market share, anti-competitive behaviour or conduct that may be prohibited in terms of the Competition Act, 1998 (Act 89 of 1998);
>
> (i) referring matters to the Tribunal and appearing before the Tribunal, as permitted or required by this Act; and
>
> (j) dealing with any other matter referred to it by the Tribunal.'[233]

The National Credit Regulator's authorisation in respect of its '[e]nforcement functions' has multiple features, as it does not only relate to direct enforcement of non-compliance. One of the duties imposed on the Regulator is to encourage quarrelling industry members, specifically consumers, credit providers and credit bureaus,[234] to engage in informal dispute

[232] See also par 6.3.1 of ch 7 *infra* in respect of the role of the NCT.

[233] S 15 of the NCA.

[234] Govender (n 9) 37 correctly notes that the applicable section of the NCA excludes debt counsellors and voices her doubt as to the reason for the absence – conscious absence or unintended failure to include. She report, however, that the NCR does not disregard complaints in respect of debt review. The NCR *Debt Counsellors' Code of Conduct* May 2013 par 2.1.7 specifically states that the debt counsellor assumes responsibility to '[r]efer complaints against myself or my debt counselling business to and co-operate with the NCR'. Par 2.2.4 provides that the debt counsellor resolves to '[r]efer the matter to the NCR where the consumer is not satisfied with the outcome of the resolution of a complaint under my internal process' whilst par 2.2.5 provides that the debt counsellor would make the details of the NCR available to consumers for purposes of communicating and submitting complaints to the NCR.

resolution.[235] As such, it supports the provisions of section 3(i) *re* out-of-court negotiated dispute resolution.

The Regulator is not allowed to resolve the dispute and the legislation is very specific in this regard.[236] *Contra* to the aforementioned, Govender submits that '[t]he Act prescribes that the NCR should engage in *informal* dispute resolution'.[237] I do not agree with this statement as it not only contradicts a very specific legislative provision, but also counteracts the purpose of the Regulator as an independent regulator and supervisor of the market – the Regulator should not become involved with the everyday interactions between consumer and credit provider as this scenario opens the door for regulatory capture.

The whole idea of encouraging commercial participants to find out-of-court procedures and solutions would be undermined where the Regulator attempted to resolve the dispute. I find this suggestion inappropriate and contradictory to its oversight role. The National Credit Regulator can become 'involved' in any event, for example, as authorised by section 136 or regulation 23A, but this is only in respect of certain complaints or after complaint resolution has not been effective.

Nevertheless, Govender's exposé of the '*Complaints*' department alludes to a unit that receives complaints but also attempts to resolve disputes between stakeholders:

> 'The other factor contributing to a lack of quick and effective dispute resolution is the issue of legislation, which prescribes that the process must be informal. An informal dispute resolution process results in nugatory or ineffectual findings against parties. Further it requires on-going mediation which is not a feasible option given the lack of a sufficient staff compliment in the department. The NCR cannot function as an Ombud or as an alternative dispute resolution agent as these are specifically provided for in the Act as well as other legislation. The question remains then: what exactly is the purpose of the Complaints Division within the NCR? If one draws an analogy, it would liken the NCR to a marriage counsellor trying to succour the parties rather than being a divorce judge with authority to make a binding legal decision.'[238]

[235] S 15(a) of the NCA. The NCA endeavours to support 'consensual resolution of disputes arising from credit agreements' – see s 3(h). In some instances, the consumer may be subjected to numerous procedural obstacles prior to obtaining a final decision. The consumer is firstly obliged to revert the matter to the credit provider prior to approaching the NCT for assistance – see s 134(4), which directs the consumer to approach the credit provider (s 134(4)(a)) and secondly, if unsuccessful, direct the matter to an ombud, consumer court or alternative dispute resolution agent (s 134(4)(b)(i)-(ii) respectively). The matter can then be dealt with by the NCT, but may be taken on review or appeal to the High Court (s 148(2)(b), if the consumer or credit provider does not refer the matter to 'a full panel of the Tribunal' where only one member presided over the matter and a party desires to appeal the outcome – see s 148(1)).

[236] S 15(a) – the legislation is very specific in that '[t]he National Credit Regulator must enforce this Act by promoting informal dispute resolution ... without intervening in or adjudicating any such dispute'.

[237] Govender (n 9) 36.

[238] *Idem* at 37-38.

If this observation is accurate, the National Credit Regulator is acting in direct contravention of section 15(a) and expending valuable resources in the process – which is already a cause for concern if one considers the staff-complainant *ratio*.[239] Section 15(a) determines the following:

> 'The National Credit Regulator must enforce this Act by promoting informal dispute resolution of disputes arising in terms of this Act between consumers on the one hand and a credit provider or credit bureau on the other, without intervening in or adjudicating any such dispute …'

The Regulator is specifically tasked to inspect all registrants.[240] In respect of infringements of the National Credit Act, the Regulator can either be informed of the suspected breach by another person or entity[241] or obtain knowledge of same through its own observations of the consumer credit arena[242] or inspections and assessments.[243] The focus of the Regulator is on 'prohibited conduct',[244] suspected infringements[245] and verification of adherence to the legislation and requirements for registration.[246]

The basic procedures that the Regulator can involve itself concern 'suspen[sion] or cancell[ation of] any registration' effected under the National Credit Act,[247] 'compliance notices',[248] 'undertakings' and 'consent orders'[249] as well as consigning issues to the Competition Commission or Tribunal, depending on the foundation of the concern.[250] The Tribunal is also authorised to direct matters to the Regulator for its attention.[251]

[239] *Idem* at 37.

[240] S 15(d) of the NCA.

[241] S 15(b) & 136(1) – the NCA refers to 'alleged contraventions of this Act' as opposed to the phrase 'prohibited conduct' used in s 15(c). See also s 136(2), which endows the NCR with standing to institute a grievance 'in its own name'.

[242] S 15(c) – the NCA directs that the NCR's approach to the consumer credit market and industry in terms of this s and in respect of prohibited conduct, should purport to avert or discern and indict.

[243] Ss 15(c) & (f) of the NCA. See s 139 in respect of the accepted responses by the NCR in reaction to an instigated complaint – the Regulator can either disregard the objection where same is inconsequential, malicious or lacking a factual foundation that would support remedial action under the auspices of the NCA (s 139(1)(a)); divert the resolution of the complaint to a debt counsellor, ombud, consumer court or alternative dispute resolution agent, depending on the grounds of the complaint (s 139(b)(i) & (ii)) or to an inspector 'in any other case' (s 139(c)). The NCR's capacity to investigate has been curtailed by the NCT through its approach in the matter of *National Credit Regulator v Capitec Bank Limited* [2014] ZANCT 14 (9 April 2014).

[244] S 15(b) of the NCA.

[245] Ss 15(b) & (f) of the NCA.

[246] S 15(d), see also ss 55(1) & 57(1) of the NCA.

[247] S 14(b), see also ss 55 & 57 of the NCA.

[248] S 15(e), see also ss 55- 57 of the NCA.

[249] S 15(g), see also s 138(1)(b) of the NCA.

[250] S 15(h) & (i) of the NCA respectively.

[251] S 15(j) of the NCA.

Effecting due compliance with the provisions of the National Credit Act is one of the National Credit Regulator's objectives[252] and the Regulator habitually reports on its activities in this regard.[253] It is guided by the provisions of the National Credit Act for both substantive and procedural direction, adheres to decisions by the Judiciary (primarily in respect of the

[252] S 15 of the NCA. Govender (n 9) 35-36 note that the information compiled by credit providers as part of their statutory reporting duties are not used and/or reproduced in reports. She further states that the compliance reviews conducted by personnel are 'tick-box approach[es]' as the 'statistics' indicate whether a particular registrant has provided the required information or not – see 36 and Annexure B (interview with Darrell Beghin). In respect of the '*Registrations and Compliance*' department, Govender (n 9) 36 states the following: 'The culture of the NCR indicates that there are no proactive, qualitative and substantive compliance procedures in place that form part of its mandate.' Unfortunately, she does not elaborate over and above indicating that most credit providers are not submitted to 'compliance monitoring visits' and questioning the purpose of the reports that need to be provided by the credit providers (and the manner in which the personnel deals with these reports). She also states that debt counsellors are not 'monitored annually' – see 39. She further laments the Regulator's lack of knowledge of prudential matters under this theme, arguing that 'one faction cannot exist without operational knowledge of the other … As a regulator of market conduct, one clearly needs to have knowledge and understanding of prudential services in order to understand and give context to market conduct within the credit industry' – see 34.

[253] Apart from statistics published in its annual reports, the NCR issues regular media statements. See e.g. NCR 'NCR issues a Compliance Notice to SA Taxi Securitization (Pty) Ltd' November 2013; NCR 'NCR serves Thaba Selemo Financial Services CC with a Compliance Notice' November 2013; NCR 'National Credit Regulator intensifies its fight against lenders flouting the National Credit Act in Mpumalanga' November 2013; NCR 'National Credit Regulator intensifies its fight against lenders flouting the National Credit Act in the Northern Cape' June 2013; NCR 'NCR intensifies its fight against lenders flouting the National Credit Act' May 2013; NCR 'The High Court orders Barko Financial Services (Pty) Ltd to refund consumers' service provider fees charged in excess of the prescribed maximum service fee limit' April 2013; NCR 'National Credit Regulator, SASSA and SAPS clamp down on credit providers' illegal collection tactics' August 2012; NCR 'National Credit Regulator and SAPS clamp down on credit providers' illegal collection tactics' March 2012; NCR 'Joint SAPS, NCR & SASSA operation nets illicit credit providers' October 2011; NCR 'National Credit Regulator clamps down on unfair lending practices' September 2010; NCR 'NCR slams credit providers retaining borrowers' bank cards' 30 January 2008; NCR 'NCR takes Rudco Finance to the National Consumer Tribunal' 26 November 2007; NCR 'NCR serves one of the biggest Credit Bureaus with a Compliance Notice' 20 December 2007; NCR 'National Credit Regulator issues Compliance Notice to Rudco Finance (Pty) Ltd' 23 August 2007; NCR 'National Credit Regulator takes a tough stance on non compliant micro lenders' 7 July 2006. The NCR also reports on the punitive measures taken by the NCT; e.g. NCR 'The National Consumer Tribunal imposes a fine and cancels the registration of Credit Care (Pty) Ltd, a credit provider operating in the North-West Province for various contraventions of the National Credit Act' November 2013; NCR 'The National Consumer Tribunal cancels the registration of a credit provider operating in Marikana for reckless lending and other contraventions of the National Credit Act' November 2013; NCR 'National Consumer Tribunal decision to cancel debt counsellor's registration upheld by the High Court' January 2012; NCR 'National Consumer Tribunal cancels registration of debt counsellor Barry Kotze' November 2010; NCR 'National Consumer Tribunal cancels registration of two non-compliant debt counsellors' April 2010; NCR 'National Consumer Tribunal continues to cancel registrations of non-compliant debt counsellors' November 2009; NCR 'National Consumer Tribunal shows red card to non-compliant debt counsellors' September 2009; NCR 'National Consumer Tribunal cancels credit provider's registration for retaining bank cards and pin codes' October 2008.

substantive requirements of the legislation),[254] and the Tribunal (which have been both substantive and procedural).[255]

3.3. The Financial Sector Conduct Authority

3.3.1. Introduction

The Financial Sector Conduct Authority is comparable in function and purpose to the National Credit Regulator, insofar as both are conduct regulators of specific financial sector(s).[256] It is created in terms of the Financial Sector Regulation Act[257] and is the result of a distinct policy review undertaken by the National Treasury.[258] The Authority's principled objectives are aimed at regulating the behaviour of financial institutions in respect of justifiable dealings with consumers and the proper and reliable functioning of these institutions as well as training schemes aimed at consumer financial knowledge and skills development.[259] Its jurisdiction is not limited to consumer credit and it encompasses the whole of the financial sector.[260]

The National Credit Regulator was not assimilated into the proposed Market Conduct Regulator under the style of the Financial Services Conduct Authority.[261] It retained its status as independent regulator, albeit not without criticism.[262] Although it is currently excluded from the proposed restructured regime, the National Credit Regulator is intended to operate in a parallel fashion[263] and is designated as a 'financial sector regulator' for selected portions of

[254] See e.g. the decision of the court in *Nedbank Ltd and Others v The National Credit Regulator and Another* (n 177) brought under the attention of the industry by way of NCR 'Communiqué: On SCA Judgments' September 2011.

[255] See e.g. the decisions by the NCT in respect of the requirements for a compliance notice (*Matjokana v National Credit Regulator* [2012] ZANCT 16 (30 July 2012)); referrals (*National Credit Regulator v Capitec Bank Limited* (n 243); imposition of a fine (*National Credit Regulator v Season Star Trading 333 CC t/a De Noon's Cash Loans* [2013] ZANCT 41 (21 November 2013)); interest rates (*Lindecke v Nedbank Limited and Others* [2014] ZANCT 31 (2 September 2014) & *Jones and Another v Absa Bank and Others* [2013] ZANCT 2 (17 January 2013)).

[256] Financial Stability Board *Peer Review of South Africa Review Report* 5 February 2013 5.

[257] S 56(1) of the FSRA.

[258] National Treasury *Treating Customers Fairly in the Financial Sector* (n 30); National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 123).

[259] S 57 of the FSRA.

[260] See the FSRA in respect of the definitions in ss 1-3 as well as ch 4 in respect of the mandates of the FSCA.

[261] Financial Regulatory Reform Steering Committee *Implementing a twin peaks model of financial regulation in South Africa* 1 February 2013 18. The idea is that 'the FSB [Financial Services Board] will be transformed into a focused market conduct regulator' – see 14. See Pearson A credit lens' (n 20) 3 who notes that this position differs from the Australian position and that the South African position is the result of 'institutional and political reasons'. She also notes at 3 that the NCR 'stands both outside and inside Twin Peaks.'

[262] See Kawadza 'Now is the time to end credit chaos' (n 73).

[263] See National Treasury *Treating Customers Fairly in the Financial Sector* (n 30) 15 & 34. See also Pearson 'A credit lens' (n 35) 3 in respect of licensing: 'South Africa will have three licensing regimes, located within the Prudential Authority, the FSCA, and the National Credit Regulator. It is expected that down the track there will be just one licence.'

the Financial Sector Regulation Act.[264] The jurisdictions for the development and administration of the statutes under the styles of the National Credit Act and Financial Sector Regulation Act are respectively that of the Department of Trade and Industry and National Treasury/Department of Finance.

3.3.2. General characteristics and mandate

The Financial Sector Conduct Authority[265] was created in terms of section 56(1) of the Financial Sector Regulation Act. At present, its principled objectives are aimed at regulating the behaviour of financial institutions in respect of justifiable dealings with consumers and the proper and reliable functioning of these institutions as well as training schemes aimed at consumer financial knowledge and skills development.[266] The Conduct Authority is mandated in terms of section 58(1)(a) to control and oversee financial institutions as per financial sector laws to realise its goals. In addition, the Authority is empowered to consider the boundaries and extent of financial sector regulation and manage risks that could jeopardise its mission of attaining its outcomes.[267] Sections 58(1)(b) and (c) are centred on collaboration between the Conduct Authority and the Reserve Bank, the Financial Stability Oversight Committee, the Prudential Authority, the National Credit Regulator, the Council for Medical Schemes and the Financial Intelligence Centre. Furthermore, apart from a mandate to endorse certain outcomes such as 'sustainable competition'[268] and 'financial inclusion',[269] the Authority has a research objective.[270] Finally, section 58(4) is worded in the widest sense possible, mandating the Authority to 'do anything else necessary to achieve its objectives', and the legislation sets out certain specific examples thereafter.

The Financial Conduct Authority is founded as a juristic person under the auspices of sections 56(1) and 56(2). It is specifically denoted as 'a national public entity'[271] that is of importance when considering the answerability of the Authority for purposes of oversight over the execution of its own functions.[272] It is notable that the Authority is not specifically endowed with attributes such as autonomy and independence. In respect of execution of its

[264] S 1 of the FSRA.
[265] The discussion is further limited to the Financial Sector Conduct Authority and will not include a comprehensive discussion of the Prudential Authority created in terms of ch 3 of the Act.
[266] S 57 of the FSRA.
[267] S 58(1)(i) & 58(1)(f) of the FSRA.
[268] S 58(1)(d) of the FSRA.
[269] S 58(1)(e) of the FSRA.
[270] S 58(1)(h) of the FSRA.
[271] S 56(2) of the FSRA.
[272] See ch 7 *infra*.

duties, section 58(6) of the Act stipulates that the Regulator must do so 'without fear, favour [...] or prejudice'.[273]

The Authority is responsible for the protection of consumers in the commercial financial market, upholding the veracity of the financial market and aiding financial stability.[274] Specific functions (although not limited to these)[275] are allocated through section 58(1) to the Authority as modes of achieving its targets. These are mandates structured to allow the Authority general prerogatives in relation to sector participant behaviour and interactivity, regulatory and market competency and administrative functions.[276] The duties of the Authority are to be read in constant consideration of its objectives in order to provide a contextual framework for the execution thereof. The mandate of the Authority is qualified by three ultimate targets, namely rational behaviour towards financial consumers by commercial firms, veracious and competent markets and consumer empowerment through edification.[277]

In respect of ground-level role-players, the Authority is permitted to control and oversee the behaviour of firms commercially involved with consumers in the financial sector.[278] It is also tasked with endorsing financial inclusion.[279] The Authority fulfils a partisan role in varying degrees towards the Reserve Bank, Financial Stability Oversight Committee, Prudential Authority, National Credit Regulator, Council for Medical Schemes, Financial Intelligence Centre, and the Competition Commission.[280] It is obliged to assist and/ or work with these entities, either to enable the latter to meet its own objectives or merely within the boundaries set by the Financial Sector Regulation Act.[281]

[273] The only difference between the phrases in the Bill and Act is that the National Credit Act contains a comma after the word 'favour' which the Bill does not.

[274] S 57. See also the extensive definitions in s 1 of 'financial customer', 'financial institution', 'regulated person' , 'financial product' (s 2(1)) and 'financial service' (s 3(1)) in the FSRA.

[275] See s 58(2) of the FSRA.

[276] S 58 of the FSRA.

[277] S 57(a), (b) & (c) of the FSRA.

[278] S 58(1)(a) of the FSRA: 'In order to achieve its objective, the Financial Sector Conduct Authority must regulate and supervise, in accordance with the financial sector laws, the conduct of financial institutions.'

[279] S 58(1)(e) of the FSRA. Cl 58(1)(h) of the 2015 version of the Financial Sector Regulation Bill (hereinafter 'FSRB') determined as follows: 'In order to achieve its objective, the Financial Sector Conduct Authority must support financial inclusion, with a focus on unserved and underserved persons.'

[280] Ss 58(1)(b)-(e) & (g) respectively: 'In order to achieve its objective, the Financial Sector Conduct Authority must co-operate with and support the Reserve Bank and the Financial Stability Oversight Committee in performing their functions with respect to financial stability ... co-operate and support the Prudential Authority and the National Credit Regulator in accordance with this Act ... co-operate with the Council for Medical Schemes ... co-operate with the Financial Intelligence Centre, and assist in preventing and combating financial crime ... promote, to the extent consistent with achieving the Financial Sector Conduct Authority's objective, sustainable competition in the provision of financial products and financial services, including co-operating and collaborating with the Competition Commission.'

[281] Ss 53(1)(b)-(e) & (g) respectively.

The Authority is further empowered to ‘regularly review the perimeter and scope of financial sector regulation, and take steps to mitigate risks identified to the achievement of its objective or the effective performance of its functions’.[282]

3.4. Collaborative efforts of the Financial Sector Regulation Act

The Financial Sector Regulation Act incorporates the National Credit Regulator into its activities through inclusion in various commissions. As such, the Regulator obtains additional functions and obligations in respect of regulatory domains presently outside of the scope of its jurisdiction.

3.4.1. Financial Stability Oversight Committee

The Chief Executive Officer of the Regulator is a constituent[283] of the Financial Stability Oversight Committee,[284] which is founded as part of Chapter 2 of the Act and which deals with financial stability issues. The purpose of this Committee is twofold: it is created to aid the Reserve Bank in meeting its stability outcomes and it is a communicative establishment intended to ease interaction between the Prudential Authority, the Financial Sector Conduct Authority, the National Credit Regulator, the Financial Intelligence Centre and the Reserve Bank.[285]

In executing its duties, the Committee has to be the setting where members can air their perspectives and notify each other of developments in respect of financial stability.[286] The Committee is entitled to give directions to the Governor, Minister of Finance, Reserve Bank and organs of state *re* aspects in respect of which these institutions may have an impact on

[282] S 58(1)(f) of the FSRA.
[283] S 22(1)(e) of the FSRA.
[284] Founded in terms of s 20(1) of the FSRA.
[285] Ss 20(2)(a) & 20(2)(b) read with s 1.
[286] S 21(a) of the FSRA.

financial stability.[287] The Reserve Bank has to fund, whether pecuniary or not, and logistically assist the Committee in executing its duties.[288]

3.4.2. Financial Sector Contingency Forum

The National Credit Regulator's Chief Executive Officer could be a member of the Financial Sector Contingency Forum as per section 25(3)(c), which fulfils an advisory function to the Financial Stability Oversight Committee. The Financial Stability Oversight Committee is supported in its 'crisis management and preparedness functions' by the Financial Sector Contingency Forum, whose existence is dependent on the Governor complying with the stipulation in section 25(1) to create same.[289] Membership of this Forum includes 'representatives of each of the financial sector regulators' as per section 25(3)(b) but the National Credit Regulator is not a 'financial sector regulator' for purposes of this part of chapter 5.[290]

Membership is therefore excluded unless the Regulator is eligible under section 25(3)(c) as an 'organ of state' and the Chairperson allows the inclusion.[291] The Financial Stability Oversight Committee comprises of the heads of the main regulators and government entities,

[287] In terms of s 21(b) of the FSRA, the Committee can 'make recommendations to the Governor on the designation of systemically important financial institutions' – see s 29(1)(a) (granting authority to the Governor to select institutions as such). In terms of ss 21(c)(i) and 21(c)(ii) of the FSRA, the Committee can 'advise the Minister and the Reserve Bank on … steps to be taken to promote, protect or maintain, or to manage or prevent risks to, financial stability; and … matters relating to crisis management and prevention' and in terms of s 21(d), the Committee can 'make recommendations to other organs of state regarding steps that are appropriate for them to take to assist in promoting, protecting or maintaining, or managing or preventing risks to financial stability'. See also *inter alia* s 1 (in respect of which Minister the concept 'Minister' refers to), ss 11 & 15 (in respect of the mandate of the Reserve Bank *re* financial stability), s 11(2)(a) ('When fulfilling its responsibility in terms of subsection (1), the Reserve Bank … must act within a policy framework agreed between the Minister and the Governor'), s 14 (in respect of the duties of the Reserve Bank, Governor and Minister *re* '[m]anaging systemic events and risks in relation to systemic events') and ss 26 & 28 (in respect of the duties of 'financial sector regulators' and 'other organs of state' 'in relation to financial stability'). The Minister of Finance plays a very important role in the stability of the financial sector, as the events of December 2015 showed. On 9 December 2015, President Jacob Zuma dismissed the then Finance Minister Nhlanhla Nene. The South African economy felt the backlash in the value of the Rand (particularly the Rand-Dollar exchange rate) as well as the decreased value of bank shares (which reportedly decreased by 10%) – see Mkokeli, Paton, Ndzamela & Ensor 'Rand crashes after Zuma fires Nene' BDLive 10 December 2015; Masutha, Groottes & Whittles 'Rand plummets following Nene's "redeployment"' Eyewitness News 10 December 2015; Whittles 'The Zuma effect: Nene's sacking & the markets' Eyewitness News 11 December 2015

[288] S 23(1) of the FSRA. The Bank also has to ascertain that the minutes of gatherings are noted as stipulated by the Governor – see s 23(2) of the FSRA.

[289] S 25(1) of the FSRA is worded as follows: 'The Governor must establish a forum, called the Financial Sector Contingency Forum.'

[290] See s 1 and the definition of 'financial sector regulator'. The NCR's status as a 'financial sector regulator' under the 2014 version of the Bill was much wider as it included the whole of chs 1 to 6 as well as part 1 of ch 17 – see cl 1 of the Minister of Finance *Financial Sector Regulation Bill Draft (including amendments and memorandum on the objects of the Bill)* (n 351). Thus, the NCR was explicitly included as a partner of the Financial Sector Contingency Forum under the previous version of the Bill.

[291] See s 25(3)(b) as well as the definition of 'organ of state' in s 1. The definition refers back to s 239 of the Constitution and in *ABSA Bank Limited v Petersen* (n 201) par 10 fn 6, the court referred to the National Credit Regulator as an organ of state.

namely Reserve Bank,[292] the Prudential Authority,[293] Financial Sector Conduct Authority,[294] the National Credit Regulator,[295] Financial Intelligence Centre[296] and National Treasury.[297] [298] The Financial Sector Contingency Forum comprises of a representative of the Reserve Bank, who has to be a Deputy Governor, [299] delegates from the Prudential Authority, Financial Sector Conduct Authority,[300] 'other organs of state',[301] 'financial sector industry bodies and any other relevant bodies'.[302] The Reserve Bank has to fund, whether pecuniary or not, and logistically assist the Forum in executing its duties.[303]

3.4.3. Financial System Council of Regulators

Section 79(1) of Financial Sector Regulation Act provides for the establishment of a Financial System Council of Regulators and the creation of this Council is mandated under the theme of chapter 5. The same officials who serve on the Financial Stability Oversight Committee will hold positions in the Council, in addition to seniors of government departments such as the Director-General of the Department of Trade and Industry and the Director-General of the Department of Health.[304]

[292] Ss 22(1)(a) & 22(1)(b) read with s 1 of the FSRA. Note that the specific Deputy Governor has to be the one 'responsible for financial stability matters'.

[293] S 22(1)(c) read with ss 1, 36(1) & 37 of the FSRA.

[294] S 22(1)(d) read with ss 1, 61(1) & 62 of the FSRA.

[295] S 22(1)(e) read with s 23 of the NCA, as amended.

[296] S 22(1)(g) read with s 1 of the FSRA.

[297] S 22(1)(f) read with s 1 of the FSRA & s 5 of the Public Finance Management Act (Act 1 of 1999).

[298] In terms of ss 22(1)(g) & 22(2) of the FSRA, the Governor may further include three more people in the Committee at his determination and prescribe the time and terms of their service.

[299] S 25(3)(a) is rather specific in respect of the disqualifications of membership derived from the Reserve Bank – the Chairperson is to be 'a Deputy Governor' and this does not necessarily have to be the 'Deputy Governor responsible for financial stability matters' as determined by s 22(1)(b) in respect of the Financial Stability Oversight Committee. The Governor founds the Forum and determines the Chairperson from the ranks of the institution for which he or she is responsible – see ss 4 and 6 of the South African Reserve Bank Act.

[300] S 25(3)(b) read with s 1. The latter section determines whether a particular entity is a 'financial sector regulator' and in respect of this part of the ch (part 4 of ch 2), only the Prudential and Financial Conduct Authorities are considered to be 'financial sector regulator[s]'.

[301] In terms of s 25(3)(c), these delegates are subject to confirmation by the Chairperson as this clause allows 'representatives of other organs of state, as the Chairperson may determine'.

[302] In terms of s 25(3)(d), these delegates are also subject to confirmation by the Chairperson as this clause allows 'representatives of financial sector industry bodies and any other relevant bodies, as the Chairperson may determine'.

[303] S 25(6) of the FSRA.

[304] S 79(3)(b) & (c) of the FSRA. This section falls under ch 5 and the function of the Council conforms to the purpose of that chapter in that 'the objective of the Financial System Council of Regulators is to facilitate co-operation and collaboration, and, where appropriate, consistency of action, between institutions represented on the Financial System Council of Regulators by providing a forum for senior representatives of those institutions to discuss, and inform themselves about, matters of common interest' – see s 79(2). The 2014 version also included 'strategic directions to be adopted, and understanding and meeting international and domestic regulatory challenges' in the aims of the Council under cl 79(2). The Council is further empowered to set up working groups and subcommittees to deal with the themes set out in s 81(1), such as 'enforcement and financial crime', 'policy and legislation', 'standard-setting', 'financial sector outcomes', 'financial inclusion' etc.

In addition, other entities' heads are included such as the Registrar of Medical Schemes, Director of the Financial Intelligence Centre, Commissioner of the National Consumer Commission, Commissioner of the Competition Commission and 'the head, however described, of any organ of state or other organisation that the Minister may determine'.[305] The Chief Executive Officer of the National Credit Regulator is also an associate of this Council,[306] over and above his or her obligations in terms of the Financial Stability Oversight Committee and Financial System Contingency Forum set out above.

In terms of section 82(1), the Financial Sector Conduct Authority attends to the financial and non-financial needs of the Financial System Council of Regulators and the bodies founded by the Council in order to address the themes set out in section 81(1). In addition, the Conduct Authority has to provide the logistical assistance necessitated by the Council and bodies referred to above, choose the method by which minutes of gatherings of the aforementioned should be kept and make sure that these minutes are kept in line with the chosen method.[307]

3.4.4. Financial Sector Inter-Ministerial Council

Part 3 of chapter 5 provides for the development of a Financial Sector Inter-Ministerial Council. It will consist of the Minister of Finance, presumably the Minister of Trade and Industry,[308] any other Cabinet representative tasked with consumer welfare and consumer credit affairs, the Minister of Health and the Minister of Economic Development.[309] The impact of this Council on the provisions of the National Credit Act and the National Credit Regulator is twofold and dealt with in section 85. In terms of section 85(1), the executive members tasked with consumer welfare and consumer credit affairs are able to call for the evaluation of selected legislative provisions or other stipulated legally binding provisions against the benchmark set by the National Credit Act or the Consumer Protection Act.[310]

The Council is compelled to consider the provision and, upon concluding that the norm set out in the evaluated provision does not meet the compared benchmark, propose manners or

[305] Ss 79(3)(g), 79(3)(h), 79(3)(i), 79(3)(j) & 79(3)(l) of the FSRA.

[306] S 79(3)(f) of the FSRA.

[307] Ss 82(1) & (2) of the FSRA.

[308] S 83(3)(b) refers to 'the Cabinet members responsible for consumer protection and consumer credit matters'.

[309] S 83(3) of the FSRA, which refers to 'Cabinet member[s]' tasked with specific portfolios.

[310] S 85(1) determines that '[t]he Cabinet members responsible for consumer protection and consumer credit matters may request the Inter-Ministerial Council to consider whether or not a provision in a financial sector law, or in a proposed financial sector law, Regulation or regulatory instrument, provides or would provide for a standard of protection for financial customers that is equivalent to, or higher than, the protection provided for them in terms of the National Credit Act or the Consumer Protection Act'.

proceed to align the provision with the level set by the National Credit Act or the Consumer Protection Act.[311]

3.4.5. Interaction between regulators

Chapter 5 of the Act details the efforts of the various regulators in respect of 'co-ordination and collaboration'. The provisions range from a general alliance instruction to directions that are more specific.[312] Section 76 determines that:

> '(1) The financial sector regulators and the Reserve Bank must co-operate and collaborate when performing their functions in terms of financial sector laws, the National Credit Act, and the Financial Intelligence Centre Act, and must for this purpose—
>
> (a) generally assist and support each other in pursuing their objectives in terms of financial sector laws, the National Credit Act and the Financial Intelligence Centre Act;
>
> (b) inform each other about, and share information about, matters of common interest;
>
> (c) strive to adopt consistent regulatory strategies, including addressing regulatory and supervisory challenges;
>
> (d) co-ordinate, to the extent appropriate, actions in terms of financial sector laws, the National Credit Act and the Financial Intelligence Centre Act, including in relation to—
>
> (i) standards and other regulatory instruments, including similar instruments provided for in terms of the National Credit Act and the Financial Intelligence Centre Act;
>
> (ii) licensing;
>
> (iii) supervisory on-site inspections and investigations;
>
> (iv) actions to enforce financial sector laws, the National Credit Act and the Financial Intelligence Centre Act;
>
> (v) information sharing;
>
> (vi) recovery and resolution; and
>
> (vii) reporting by financial institutions, including statutory reporting and data collection measures;
>
> (e) minimise the duplication of effort and expense, including by establishing and using, where appropriate, common or shared databases and other facilities;
>
> (f) agree on attendance at relevant international forums; and
>
> (g) develop, to the extent that is appropriate, consistent policy positions, including for the purpose of presentation and negotiation at relevant South African and international forums.
>
> (2) The financial sector regulators and the Reserve Bank must, at least annually as part of their annual reports, or on request, report to the Minister, the Cabinet member responsible for

[311] S 85(2) of the FSRA. See also the discussion of Pearson 'A credit lens' (n 35) 6 – she notes at 6 that 'the duty to collaborate is different from a culture of collaboration and cooperation. A formal MOU [memorandum of agreement] is different from informatiol and effective cooperation.'

[312] S 76 of the FSRA. Memoranda of understanding must also be drafted in terms of s 77 for the purposes set out in s 76 and must, in terms of s 77(5), be made available to 'the Minister and the Cabinet member responsible for administering the National Credit Act'.

> administering the National Credit Act and the National Assembly on measures taken to co-operate and collaborate with each other.'

Under the 2014 draft version of the Act, the National Credit Regulator was considered a 'financial sector regulator' for purposes of selected portions of the Bill, specifically chapters 1 to 6 and Part 1 of Chapter 17.[313] However, under the final version, the Regulator is only deemed as such for purposes of chapter 2 parts 2, 3 and 5 and chapter 5 parts 1, 2 and 3.[314]

3.5. Jurisdiction in respect of consumer credit

3.5.1. Financial products

In respect of consumer credit regulation, the Act provides for some jurisdiction over this sector of the financial market. The 2014, 2015 and final versions of the Act differ to a notable extent. In the 2014 version, clause 1 provided a definition of a 'credit agreement', which was subsequently removed in the 2015 version and not replaced with a corresponding definition.[315] The importance of this definition is found in a reading of section (then clause) 2(1), which remains the defining section for the concept of 'financial product'. Reference in this section to credit-related matters shows a change in focus of the legislature, from 'credit agreement' in 2014 to 'credit' in 2015. Clause 1 of the 2015 version did not include any definition in respect of 'credit agreement' or 'credit' whereas the final section 1 defines both 'credit agreement' and 'credit'. I deal with the implications of this later, but I am of the

[313] Cl 1 of the 2014 version of the FSRB. Chs 1 to 6 respectively dealt with the following matters: 'Interpretation, object and administration of Act'; 'Financial stability'; 'Prudential authority'; 'Financial sector conduct authority'; 'Systemically important financial institutions' and 'Co-ordination, co-operation, collaboration, consultation and consistency'. Part 1 of ch 17 dealt with 'Information sharing, complaints and reporting'. The definition of 'financial sector regulator' in relation to the applicability of chs of the Bill to the National Credit Regulator does not include a reference to the parts of the Bill that deals with 'enforcement powers' (ch 12) which includes 'Interpretation rulings' (part 1); 'Regulators' directives' (part 2); 'Declaration of certain practices as irregular or undesirable' (part 3); 'Enforceable undertakings' (part 4); 'Leniency agreements' (part 5); 'Applications to court and court orders' (part 6) and 'Debarment' (part 7). It also does not refer to the chs dealing with 'Licencing' (ch 8); 'Information gathering, on-site inspections and investigations' (ch 9); 'Administrative actions' (ch 13); 'Administrative penalties and related orders' (ch 14); 'Financial Services Ombud Schemes' (ch 16) or 'Offences and specified contraventions ... general matters [e.g.] compensation for contraventions of financial sector laws) ... Financial sector information register' (parts 2, 3 & 4 respectively of ch 17).

[314] S 1 of the FSRA. Ch 2 deals with 'Financial Stability'; part 2 with '[m]anaging systemic events and risks in relation to systemic events'; part 3 with the 'Financial Stability Oversight Committee' and part 5 with the '[r]oles of financial sector regulators and other organs of state in maintaining financial stability'. Ch 5 overall and part 1 specifically deals with '[c]o-operation and [c]ollaboration'; part 2 with the 'Financial System Council of Regulators' and part 3 with the 'Financial Sector Inter-Ministerial Council'. See paras 5.2 & 5.3 of ch 7 *infra*.

[315] The definition in cl 1 of the 2014 version of the FSRB read as follows: '"credit agreement" includes, but is not limited to, a credit agreement referred to in section 1 of the National Credit Act.' However, see Pearson 'A credit lens' (n 35) 1: 'Credit is an ambiguous word. It conjures provision, making available, acquiring, lending, borrowing, and debt; but also attribute, belief, and trust. The first set concerns particular types of transactions, the second set is about attitude linked to cultural understandings and norms of conduct. We produce data about transactions and use this to evaluate matters from efficiency to competition. The latter set, which inform communities of practice, is central to confidence in both firms and a regulatory system.'

opinion that the inclusion and exclusion of these concepts could not have occurred without some deliberation or underlying motive.

A 'credit agreement' was deemed to be a 'financial product' in terms of clause 2(1)(g) without further description, thus necessitating reference to clause 1 of the 2014 version of the Act.[316] This version also included an enhanced perspective of credit agreements as it included agreements that did not conform to the definition of 'credit agreement' as per section 1, and thus by necessary reference section 8, of the National Credit Act.[317]

However, in the 2015 version, 'credit' was considered a 'financial product' in terms of clause 2(1)(g), but the concept was not distinctively defined in either clause 1 or clause 2(1)(g) of the Bill.[318] Instead, reference was made in clause 2(1)(g) to the definition of 'credit' as per section 1 of the National Credit Act. In addition, only 'credit' granted in respect of 'a credit agreement as defined in that section' fell under the scope of clause 2(1)(g). The focus had shifted from 'credit agreement' in 2014 to 'credit' in 2015, although the 'credit' referred to in the 2015 version was linked to the concept of 'a credit agreement' in clause 2(1)(g). Presumably, 'that section' referred to section 1 of the National Credit Act, which in turn referred to section 8 of the National Credit Act. Any configuration of a transaction that, hypothetically speaking, does not conform to the Credit Act's description of 'credit' in section 1 read with the understanding of 'credit agreement' in section 8, may therefore not have fallen under the scope of the jurisdiction of the Financial Sector Regulator bestowed in terms of clause 2(1)(g).[319]

The final Act retained some of the initial concepts of the preceding Bills, but is unique in its own way. Section 1 determines that the concepts of 'credit' and 'credit agreement' found in the Financial Sector Regulation Act will denote the same as under the National Credit Act. Section 2(1)(g) includes 'the provision of credit provided in terms of a credit agreement regulated in terms of the National Credit Act', subject to a caveat that I discuss hereafter, under the auspices of a 'financial product'.

The regulatory scope of the Act insofar as credit was concerned, was quite expanded under the 2014 version of clause 2(1)(g). The 2014 Bill endeavoured, by virtue of its use of the

[316] Cl 2(1)(g) of the 2014 version of the FSRB read as follows: 'In this Act, 'financial product' means … a credit agreement.'

[317] Cl 1 of the 2014 version of the FSRB.

[318] Cl 2(1)(g) of the FSRB read as follows: 'In this Act 'financial product' means … credit, as defined in section 1 of the National Credit Act, provided in terms of a credit agreement as defined in that section.'

[319] The importance of the concept 'financial product' is also found in the correlation with the definition of 'financial institution' as the Conduct Authority, by virtue of cl 58(1)(a) is responsible for the conduct of 'financial institutions' defined in cl 1 and referring to *inter alia* 'financial product' and 'financial service provider[s]'.

phrase 'but is not limited to', to extend its regulatory reach to agreements that would not fall within the scope set out in section 8 of the National Credit Act.[320] However, it is important to note that section 1 of the National Credit Act only defines 'credit' and section 8 of the National Credit Act only sets out the possible forms and styles of 'credit agreement[s]', without reference to the scope of application of the National Credit Act. Section 8 also contains those agreements or aspects that do not constitute 'a credit agreement'. These considerations apply irrespective of whether the National Credit Act is applicable as the application of the Act is the domain of section 4.

Likewise, the jurisdiction of the National Credit Regulator is not correlated with or limited to institutions and agreements to which the National Credit Act applies, although many of its functions are related to specific provisions in the Act, such as section 15 relating to mandating compliance with the provisions of the National Credit Act. The application of the National Credit Act determines the rights and responsibilities of selected market participants but the Regulator is not prevented, for example, from recommending legislative changes or policies to the Minister in respect of persons outside of the regulatory scope of the National Credit Act.[321]

In addition, general responsibilities in respect of consumer credit market welfare as set out in, for example, sections 13(a) and 13(c) are not reliant on whether the National Credit Act is applicable or not.

The Act itself makes a distinction between credit extended under the protective scope of the National Credit Act and other 'lending'-related transactions. In the latter case, the door has been left open for the primary regulators under the Financial Sector Regulation Act to vest jurisdiction through ministerial determination – section 2(2)(b)(i) empowers the Minister of Finance, through secondary legislation, to

[320] Cl 1 of the 2014 version of the FSRB. S 1 of the NCA defines a 'credit agreement' as 'an agreement that meets all the criteria set out in s 8'. S 8, in turn, characterises a 'credit facility', 'credit transaction' and 'credit guarantee'. S 8(2) specifically excludes certain agreements from the ambit of the meaning of 'credit agreement' for purposes of the NCA and these may be examples of agreements to which the 2014 version of the FSRB alludes when extending its scope to include non-NCA agreements as well. At this stage, a generic understanding of 'credit' would probably be the point of departure (of course, if embodied in an agreement) – see the definition of Grové & Otto (n 22) 1: 'Credit has been defined as a trade practice according to which goods or services are supplied to a receiver and where the parties agree that the receiver is entitled to pay for the goods or services at a future date. The parties may agree (although not necessarily) that the receiver of the goods or services should pay an additional amount (in the form of interest) to the grantor for the right to settle payment at a future date.'

[321] See ss 13(d) & 16(1)(g). The Regulator's authority is not all-encompassing – see e.g. *National Credit Regulator v Finbond Mutual Bank and Another* [2016] ZANCT 43 (19 September 2016).

> 'designate as a financial product any facility or arrangement that is no regulated in terms of a specific financial sector law if … the facility or arrangement is one through which, or through the acquisition of which, a person conducts one or more of the following activities: …Lending'.

The 2014 version of the Bill provided for regulation of 'a credit agreement' by both the Financial Sector Conduct Authority and the National Credit Regulator. No institutional hierarchy was specified. However, the revised 2015 version of the Bill includes the following instrumental and significant stipulations in clauses 58(2) and 58(5)(a) respectively:

> 'The Financial Sector Conduct Authority may not regulate and supervise credit agreements except with the concurrence of the National Credit Regulator, but may regulate and supervise financial services provided in relation to a credit agreement … When performing its functions, the Financial Sector Conduct Authority must – … take into account the National Credit Act and regulatory requirements for financial institutions that are authorised and regulated under that Act.'

The Bill expressly extended its application to 'credit' in clause 2(1)(g) but limits the jurisdiction of the Financial Sector Conduct Authority in respect of 'credit agreements' in clause 58(2) of the 2015 version.

Under the published Act, the definition of a financial product in relation to credit is subject to the following caveat: '*except for the purposes of Chapter 4 and section 106*, the provision of credit provided in terms of a credit agreement regulated in terms of the National Credit Act'.[322] Chapter 4 relates to the Financial Sector Conduct Authority and section 106 to conduct standards that this Authority may determine. However, section 58(2) in the final version determines the following:

> 'In relation to a financial institution that is a credit provider regulated in terms of the National Credit Act, the Financial Sector Conduct Authority may, in addition to regulating and supervising the financial institution in respect of the financial services that the financial institution provides, and notwithstanding section 2(1)(g), regulate and supervise the financial institution's conduct in relation to the provision of credit under a credit agreement only in respect of those matters referred to in section 108.'

The Financial Sector Conduct Authority is therefore prohibited from making conduct standards on the affairs listed in section 106 but not from making standards about the issues listed in section 108. Section 106(5)(a) specifically notes that these behavioural benchmarks prescribed by the Authority must be 'in relation to a financial service provided in relation to a credit agreement and matters provided for in section 108'. In addition, the Authority is

[322] S 2(1)(g) of the FSRA. Own emphasis. See Pearson 'A credit lens' (n 35) 2-3 to argues that the NCR will authorise registrations but that the FSCA is empowered to 'set conduct standards for licensees'.

required to consult with the National Credit Regulator prior to issuing these standards,[323] but the Regulator's consent or authority is seemingly not needed.[324]

In light of the definite discrepancies between the 2014, 2015 and final versions, the omissions and insertions have to be deliberate and the question thus revolves around the impact of the changed wording. Credit in general terms and specifically with reference to section 1 of the National Credit Act, is therefore brought under the auspices of the term 'financial product' defined in section 2 of the Financial Sector Regulation Act. Clause 58 initially limited the jurisdiction of the Conduct Authority, but only insofar as 'credit agreements' is concerned. The clear removal of the concept of 'credit agreement' and replacement with 'credit' raised the question whether the Conduct Authority retains unfettered jurisdiction of credit matters where a credit agreement *per se* is not involved. This would include considerations of pre-agreement negotiations, pre-agreement disclosure, post-agreement enforcement to name but a few examples. However, now that the Conduct Authority is authorised to make conduct standard that relates to credit extension, there are various aspects may be dealt with and I deal with this authority in more detail in chapter 6. Suffice to say that there are areas of overlap where cordiality between regulators will be valuable.[325]

In the next two paragraphs, I show that the Conduct Authority is also limited in many instances by the definition of a 'financial sector law' defined in section 1 and listed in schedule 1 of the Act. I deal with this aspect in the upcoming part of the thesis because I foresee that omissions in this list of statutes may be the source of regulatory fragmentation and fissures in the regulatory framework, which was one of the negative outcomes that the new regime attempted to eradicate.[326]

3.5.2. Financial services

The concept 'financial service' was defined in clause 3 and again, the 2014 and 2015 versions differed. Clause 3(1)(a)(v) extended this term to 'services provided in relation to credit agreements, including legal services' under the 2014 version.[327] The 2015 version omitted this reference but two other clauses are of interest, especially in light of the differentiation between 'credit' and 'credit agreement' alluded to above. Clause 3(1)(a)(i) classified the 'offering, promoting, marketing or distributing' *re* 'a financial product' as a 'financial

[323] S 106(5)(b) of the FSRA.

[324] See par 5.2 of ch 7 *infra*.

[325] See paras 5.2 & 5.3 of ch 7 *infra*. See also Pearson (n 35) 4 & 5.

[326] See par 2.3 of ch 1 *supra*.

[327] Cl 3(1)(a)(v) read as follows: 'In this Act 'financial service' means … in relation to a financial product, foreign financial product, securities, market *infra*structure or the payment system as applicable … services provided in relation to credit agreements, including legal services.'

service’. Clause 3(1)(e) referred to ‘debt collection service[s]’ as a ‘financial service’ as long as it was ‘a service provided in relation to the provision by a financial institution of a financial product’.[328] In terms of clause 58, under the 2015 version of the Bill, unrestricted jurisdiction was retained in respect of ‘financial services’, but again the reference to ‘financial sector laws’ in clause 58(1)(a) could have been an obstacle to regulate these services. The current relevant parts of section 3(1) of the Act determine the following:

> ‘In this Act ‘financial service’ means – … (g) a service related to the provision of credit, including a debt collection service, but excluding the services of – (i) a debt counsellor registered in terms of section 44 of the National Credit Act who provides the services of a debt counsellor as contemplated in that Act; (ii) a payment distribution agent as defined in section 1 of the National Credit Act; or (iii) an alternative dispute resolution agent, as defined in section 1 of the National Credit Act …’

3.5.3. Financial sector laws

The definition of ‘[f]inancial sector law’ in section 1 of the Act includes the list of statutes set out in Schedule 1 to the Act. Under the 2014 version of the Act, the National Credit Act was clearly referenced and in terms of Schedule 2, the National Credit Regulator was the assigned

[328] Cl 3(1)(e) read as follows: ‘In this Act ‘financial service’ means … a service, including debt collection service, provided to a financial institution through an outsourcing arrangement, being a service provided in relation to the provision by a financial institution of a financial product, a foreign financial product, a financial instrument or a financial service.’

'licensing authority' for purposes of the National Credit Act.[329] However, under the 2015 version, the reference to the National Credit Act had been removed from Schedule 1, granting the Regulator undivided autonomy of the consumer credit market. Likewise, Schedule 2 had been renamed 'Responsible Authorities' and omitted the National Credit Regulator. This consistent omission was retained in the final Act.

The relevance of the above consideration is non-negligible. It seems as if the inclination of the current government in respect of financial regulation, notwithstanding the initial considerations to include consumer credit in the mandate of the Financial Sector Conduct Authority is clearly to retain the current approach to credit market conduct as an exclusive

[329] This is relevant for *inter alia* ch 8, which deals with '[l]icensing' requirements and implements the term 'responsible authority' defined in section 5 and referenced by schedule 2 of the FSRA. The FSRA now states in section 111(1)(a) that '[a] person may not provide, as a business or part of a business, a financial product, financial service or market *infra*structure except … in accordance with a licence in terms of a specific financial sector law or the National Credit Act or the National Payment System Act'. Unfortunately, this clause is ambiguous and the impact of an incorrect interpretation grave – see par 3.5.3 *infra*. The NCA has specific provisions, which are dependent on stipulations by the Minister of Trade and Industry, that determine whether a credit provider has to register as such with the NCR – see ss 40 & 42 of the NCA. One needs to be a credit provider in order to qualify for registration as such – see *inter alia Opperman v Boonzaaier and Others* [2012] ZAWCHC 27 (17 April 2012) & *Friend v Sendal* 2015 (1) SA 395 (GP). The NCA does not distinguish between 'private' and 'commercial' credit provision, in that once-off credit extension where the credit provider is not concerned with the business of credit extension as a commercial concern may still require registration with the NCR for purposes of avoiding the sanction of unlawful credit provision as provided for in s 89 of the Act. See the criticism levied against this extensive scope of the NCA and the interpretation thereof in *inter alia Friend v Sendal* and *Opperman v Boonzaaier*. See also the recommendation in Minister of Trade and Industry (n 22) par 2.2.5.3.1. In *Friend v Sendal* par 24 the court decided that a single transaction did not signify that the credit grantor was 'participating in the credit market' and that the relevant s 40 was aimed at persons 'who are in [*sic*] credit market and or industry or at those who intend to participate in the credit market and or industry'. The credit grantor was not obliged to register in this case. *Contra* the above, in *Opperman v Boonzaaier* paras 27, 29, 36 the court concluded that the credit grantor was obliged to register with the NCR although the court criticised the scope of the NCA. See Van Heerden & Renke 'Perspectives on selected aspects of the registration of credit providers in terms of the National Credit Act 34 of 2005 (2)' 2015 *Journal for Contemporary Roman-Dutch Law* 80 88-96 & 100-103. See also Minister of Trade and Industry (n 22) par 2.2.5.3.1: 'In this regard, it is suggested that all credit providers should be registered save for those who provide credit on an *ad hoc basis* i.e. not in the ordinary course of business'.). The NCA's wording refers to 'registration' and not 'licencing'. However, if section 111 is read to mean 'in accordance with a licence in terms of … the National Credit Act' instead of 'in accordance with the National Credit Act', it would mean that all extenders of 'credit' will need to register with the NCR in order to meet the necessary 'licensing' obligations of the FSRA, whether or not this is required by the NCA. However, section 111 seems to make a distinction between commercial and non-commercial transactions as it specifically states that the requirement to obtain a licence is for products or services 'provide[d], as a business or part of a business'. Likewise, section 111(2), for whatever reason, reiterates that '[a] person may not provide, as a business or part of a business, a financial product designated in terms of section 2, or a financial service designated in terms of section 3, except in accordance with a licence in terms of this Chapter'.

regulatory sector, separated from other sectors in the financial market.[330] This indicates a relaxed approached compared to the trend observed in the 2014 draft of the Financial Sector Regulation Bill[331] as well as records documenting the government's transformative steps towards an amalgamated structure of state sanctioned financial regulation:

> 'Common threads across these jurisdictions are a significant role of the central bank in systemic and prudential regulation; and a strong, integrated market conduct regulator with oversight of all aspects of financial sector market conduct, including banking and credit extension.'[332]

However, whilst the ability of the Financial Conduct Authority is limited in some respects to the stipulations of 'financial sector laws'[333] which excludes the National Credit Act, the law-

[330] As indicated above, the role of the NCR is envisaged (in both these documents) as subsisting parallel to the financial sector/ services regulatory framework and thus excluded from the true frame of the 'twin-peaks' structure envisaged for South Africa – see, e.g., National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 123) 6; National Treasury *Treating Customers Fairly in the Financial Sector* (n 30) 24. The NCR would therefore be an additional market conduct regulator over and above the single regulator intended for market conduct under the twin-peaks model – National Treasury *Treating Customers Fairly in the Financial Sector* (n 30) 31. The NCA is also envisaged to operate in conjunction with specific 'financial sector laws' highlighted in the National Treasury's *Draft Market Conduct Policy Framework* – see National Treasury *Treating Customers Fairly in the Financial Sector* (n 30) 34. See also National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 123) 5 & 6. However, this approach has been met with mixed enthusiasm – see Logan (n 74) (concurring with the approach) and Kawadza 'Now is the time to end credit chaos' (n 73) (criticising the approach). The Financial Stability Board in its peer review of South Africa proposed the assimilation of the NCR into the market conduct regulator – see Financial Stability Board (n 256) 7-8.

[331] The 2014 version caused the following dilemma: the inclusion of the NCA into the list in schedule 1 allowed the Financial Conduct Authority to regulate role-players based on the prescriptions of the NCA – see cl 53(1)(a) read with cl 1 of the 2014 version of the FSRB. If one considers the scope of debt counselling services, it is plausible that a debt counsellor would be engaged in rendering a 'financial service' and resort under the definition of 'financial service provider'. 'Debt counselling' is defined in reg 1 to the National Credit Act as 'performing the functions contemplated in s 86 of the Act'. The regulation of debt counsellors is currently the exclusive domain of the National Credit Regulator. S 86 mandates the counsellor to assess the desirability of credit that was granted *vis-a-vis* the consumer's understanding of the credit agreement and his or her ability to settle the debt in accordance with the agreed terms. Furthermore, in terms of this section, the counsellor evaluates the financial position of the consumer in respect of his or her ability to reimburse the credited amount as and when payment becomes due to the credit provider – see s 86(6) read with ss 79 & 80 of the NCA. The input from the counsellor is not purely evaluative in nature, as the counsellor is empowered to restructure the consumer's credit obligations and commend acceptance thereof from a court of law – see s 86(7)(c) of the NCA. Therefore, where a credit agreement was a financial product under the 2014 version of the FSRB and the debt relief services rendered by the debt counsellor in respect of debt review is only available in respect of credit agreements, one cannot but infer that the debt counsellor provides a financial service as contemplated in cl 3 of the FSRB 2014. If so, the provisions of the Bill would then have been applicable to debt counsellors and the practice of debt counselling.

[332] Financial Regulatory Reform Steering Committee (n 261) 23.

[333] The statues listed in schedule 1 are the: Pension Funds Act (Act 24 of 1956), Friendly Societies Act (Act 25 of 1956), Banks Act (Act 94 of 1990), Financial Services Board Act (Act 97 of 1990), Financial Supervision of the Road Accident Fund Act (Act 8 of 1993), Mutual Banks Act (Act 124 of 1993), Long-term Insurance Act (Act 52 of 1998), Short-term Insurance Act (Act 53 of 1998), Financial Institutions (Protection of Funds) Act (Act 28 of 2001), Financial Advisory and Intermediary Services Act (Act 37 of 2002), Collective Investment Schemes Control Act (Act 45 of 2002), Co-operative Banks Act (Act 40 of 2007), Financial Markets Act (Act 19 of 2012); Credit Rating Services Act (Act 24 of 2012). This is the final version and omits the Medical Schemes Act (Act 131 of 1998) and the National Credit Act (Act 34 of 2005) as found in the 2014 version of sch 1 of the FSRB.

making authority of this regulatory body is not limited to this extent.[334] Thus, 'regulatory instruments' made in terms of chapter 7 may impact the consumer credit industry and the Financial Sector Conduct Authority is the 'Responsible Authorit[y]' for these instruments effected by this entity.[335]

In addition, sections 2 and 3 contain back-up provisions that empower the Minister of Finance to categorise products and services unregulated for purposes of this Act in order to bring these under the scope of one or more regulatory bodies.[336] In sections 2(2)[337] and 3(3)[338] reference is made to innovations 'that [are] not regulated in terms of a specific financial sector law'. A 'specific financial sector law' is 'a financial sector law, other than this Act, regulating a specific type of financial product, financial service or market *infra*structure'.[339] The definition of 'financial sector law' in section 1, which is a separate definition, refers to those statutes listed in schedule 1 and those decrees effected in terms of chapter 7. Therefore, product and services regulated under the auspices of the National Credit Act would be privy to the Ministers discretion under sections 2(2) and 3(3) if it would 'further the object of this Act set out in section 7' being the Financial Sector Regulation Act.

3.6. Additional comments on the South African consumer credit market

The South African consumer credit regulatory regime was characterised by flawed legislation incapable of proficiently addressing the challenges and developments of the market.[340] This necessitated a review of the legislative framework and the introduction of modern holistic legislation in 2006 with equality, progress and safety at its core.[341] However, some challenges

[334] See s 1 of the FSRA, where the definition of 'financial sector law' includes 'a regulatory instrument made in terms of this Act'.

[335] See ch 7 *infra*.

[336] The Minister is, by virtue of section 288, entitled to effect regulations pertaining to the FSRA. See cls 2(5) and 3(5), which empower the Minister to prescribe the regulatory jurisdiction of these 'designated' products and services. In addition, the 'financial sector regulator[s]' for purposes of these clauses exclude the National Credit Regulator as the latter is not deemed such for purposes of ch 1 of the Bill.

[337] S 2(2) reads as follows: 'The Regulations may designate as a financial product any facility or arrangement that is not regulated in terms of a specific financial sector law if – (a) doing so will further the object of this Act set out in section 7; and (b) the facility or arrangement is one through which, or through the acquisition of which, a person conducts one or more of the following activities: (i) Lending; (ii) making a financial investment; and (iii) managing financial risk.'

[338] S 3(3) reads as follows: 'If doing so will further the object of this Act set out in section 7, the Regulations may designate as a financial service – (a) any service that is not regulated in terms of a specific financial sector law if the service, that is provided in the Republic, relates to – (i) a financial product, a foreign financial product, a financial instrument or a foreign financial instrument; (ii) an arrangement that is in substance an arrangement for lending, making a financial investment or managing financial risk, all as contemplated in section 2(2) to (4); or (iii) the provision of a benchmark or index; or (b) a service provided by a market *infra*structure.'

[339] S 1 of the FSRA.

[340] See par 2.1 *supra*.

[341] See par 2.2 *supra*.

remained and the framework was re-evaluated, resulting in amendments to the legislation in 2015.[342] Independent from, albeit relevant to, consumer credit, the regulation of the South African financial sector was reviewed and policies developed in 2011 to transform the prevailing regime in order to address issues pertaining to unaligned laws, unregulated areas and international developments.[343]

The discussion above highlighted the introduction of institutions to effect government regulation of consumer credit.[344] The initial structure was an existing private entity that was recognised as a regulatory body and subordinated to oversight of the Minister of Trade and Industry.[345] The review of the consumer credit legislative framework envisaged the introduction of a formal regulatory body:

> 'To ensure enforcement and promote access to redress, it is necessary that a suitably empowered statutory regulator be created to regulate the credit industry and to provide consumers with effective recourse. The establishment of a National Credit Regulator is envisaged.'[346]

In lieu of the reformation actions proposed under the constitution of a Twin Peaks financial sector management structure, the establishment of the Financial Sector Conduct Authority was envisaged:

> 'A dedicated regulator for market conduct, the Financial Sector Conduct Authority (FSCA), will supervise financial institutions more intensively and intrusively to prevent poor conduct practises from arising, and ensure that the sector is delivering fair consumer outcomes across the product cycle.'[347]

South Africa has not been privy to a solitary regulator that regulates a variety of market stakeholders[348] as South African regulators usually have very specific jurisdiction.[349] This has resulted in a regime that is not amenable to dealing with instances where a role-player's

[342] *Ibid*.
[343] See par 2.3 *supra*. See also par 2.4 of ch 1 *supra*.
[344] See paras 3.1 & 3.2 *supra*.
[345] See par 2.1 *supra*.
[346] DTI *Consumer Credit Law Reform* (n 1) par 7.3.
[347] National Treasury *Treating Customers Fairly in the Financial Sector* (n 30) 8.
[348] Swart & Lawack-Davids 'Understanding the South African Financial Markets: An overview of the Regulators' 2010 *Obiter* 619 622.
[349] *Idem* at 622-623; National Treasury *Treating Customers Fairly in the Financial Sector* (n 30) 15-16.

behaviour is iniquitous but where no clear disregard for the law could be ascertained.[350] Scenarios where the person or product under consideration falls within the fringes of the regulator's jurisdiction or where uncertainty exists as to whether a regulator has jurisdiction at all, are further causes for concern.[351]

The Cambist incidence is an example[352] as the financial product offered by the entity was perceptively risqué and there was doubt as to whether any of the financial regulators had the statutory authority to regulate and/or supervise the entity.[353] The Financial Services Board, South African Reserve Bank and National Credit Regulator interceded in order to address the matter and it later transcribed that the entity was neither 'deposit-taking' nor did its activities conform to the style of a 'financial product' under the auspices of the Financial Advisory and Intermediary Act.[354] The challenge lied in establishing the jurisdiction of at least one of the financial regulators in order to coordinate a valid investigation and the National Credit Regulator was ultimately tasked with same.[355]

Various concerns were raised by market partakers, such as that the entity was behaviourally compatible with that of a financial product, yet did not align with the description of such a product set out in the relevant legislation.[356] The inefficiency and time-constraining process of including the innovative invention by Cambist under the auspices of the relevant financial services and products law, allowed for a frustrating option.[357] The financial regulators were

[350] See e.g. the position with regard to emolument attachment orders, where the view was taken by the Credit Ombud that '[i]t could be legal, but it's not moral' – see 'Statement by Manie van Schalkwyk, Credit Ombud, on task team established to investigate garnishee orders in credit industry' Polity.org.za 17 February 2013. In reference to the definition of 'unfair business practice' in the Consumer Affairs (Unfair Business Practices) Act (Act 71 of 1988), Woker indicated that one of the benefits of an expansive meaning attributed to the concept is the induced ability of the regulatory body to inspect conduct that comply with the boundaries set by the law, but nontheless has 'the effect of prejudicing consumers' – see Woker 'Why the need for consumer protection legislation? A look at some of the reasons behind the promulgation of the National Credit Act and the Consumer Protection Act' 2010 *Obiter* 217 220 (it must be noted that the author clearly notes at 220 that the definition was met with disapproval from some, stating e.g. that '[a] business did not know when it planned its operations that the Committee might one day find that its practices were harmful to consumers. As the Committee reacted to complaints, a business with a substantial investment of time and money could be destroyed overnight'.)

[351] Cairns 'Cambist: Where are the regulators?' Moneyweb Special Investigations 17 December 2014 quoting Geordin Hill-Lewis describes the Cambist product as 'an investment platform to retail investors'.

[352] Cairns (n 351).

[353] *Ibid*.

[354] *Ibid*.

[355] *Ibid*.

[356] *Ibid* – 'Cambist clearly operates like a financial product, but it has cleverly positioned itself outside of the definition contained in the Financial Advisory and Intermediary Services (FAIS) Act'.

[357] Cairns (n 351): '[T]he FAIS Act does contain a catch-all provision which states that 'any other product similar in nature to any financial product' can be deemed a financial product if it is declared so 'by the registrar by notice in the Gazette' … declaring something like Cambist to be a financial product would be a formidable process, that actually requires amending the legislation. That takes a lot of time and is hardly an effective way of managing such an issue.'

unable to deal with the reality of Cambist[358] and the neglect of the regulators to act in a timely manner as well as the lack of feedback was a cause for concern.[359] Furthermore, the efficacy of the regulatory authorities and ability to pre-empt economic losses were dependent on their ability to intervene[360] and inadequate resource allocation when compared with the scope of challenges and obligations imposed on the National Credit Regulator resulted in diminished capabilities.[361]

4. CONCLUSION

I dealt with the histories and mandates of the statutory regulatory bodies that regulate the consumer credit industry in South Africa. Although I analysed activities, specifically in respect of the National Credit Regulator's activities because it has existed since 2007, the purpose of this thesis is not to conduct an evaluation of the regulators but to set a framework for evaluation insofar as accountability mechanisms are concerned. A number of aspects are important in respect of the proper delineation of the National Credit Regulator's mandate and substantive matters need to be taken into account when the formal measures – discussed in chapters six and seven – are applied in practice.

One of the unique and distinguishing features of the National Credit Act is the creation of a formal regulator for the consumer credit industry.[362] The National Credit Regulator was not assimilated into the Financial Services Conduct Authority. [363] Although it is currently excluded from the proposed restructured regime, the National Credit Regulator is intended to operate in a parallel fashion and is designated as a 'financial sector regulator' for selected portions of the Financial Sector Regulation Act.[364] As such, the National Credit Regulator has new and additional functions pertaining to collaboration with other regulators and contribution to regulatory forums. [365] The Regulator is part of a broader scheme of

[358] Cairns (n 351) : '[T]he regulator should be in a position to call it what it is and act on it.'

[359] Cairns (n 351): '[T]he time it takes for regulators to act in a case like this. It took two years for the matter to be formally referred to the NCR for it to conduct a full investigation, and another nine months later there is still no final report.'

[360] Cairns (n 351): 'For regulators to be effective, they have to able to step in as quickly as possible to prevent investors losing money before it is too late.'

[361] Cairns (n 351): 'There is capacity constraint, in that it [NCR] is underfunded given the size of the problem and the size of its mandate.'

[362] See par 3.2.1 *supra*.

[363] See par 3.3.1 *supra*.

[364] *Ibid*.

[365] See par 3.4 *supra*.

stakeholders and role-players in the consumer credit industry.[366] It fulfils a very specific role in the consumer credit market.[367]

The National Credit Regulator retains its original mandate – which must be correctly interpreted for accountability purposes. The reason for this is three-fold: the Regulator cannot be held accountable for something that does not fall within its mandate; the positive learning effect of answerability mechanisms will be inapplicable when a regulator is held to standards based on false interpretation of its mandate and the execution of duties can have far-reaching consequences.[368] I referred to the dictum in *ABSA Bank Limited v Petersen* to illustrate an expectation that is not founded in legislation.[369] The data collected, analysed and the outcomes of the analyses conducted by the Regulator may affect a variety of consumer credit stakeholders.[370] In its most basic form, the Regulator would have to collect data in order to 'monitor' certain features of the market and analyse it in order to identify certain market tendencies.[371] It may have to report findings in relation to specific features to the Minister and adjacent to a basic reporting function, the Regulator is also assigned an advisory function to the Minister and in some instances, depending on the contents of a report, its findings must be presented to Parliament.[372]

I mentioned a number of matters in response to Govender's interpretation of the National Credit Regulator's mandate and two are relevant here.[373] The Regulator's mandate should not be demarcated to such an extent that it seems as if the promotion of the credit market is the only outcome against which the Regulator's activities must be evaluated.[374] The demarcation should be properly contextualised by taking *all* components into account.[375] Secondly, it cannot be said that a mandate can be 'fulfilled',[376] especially in continuous circumstances such as section 13(a) where it is not expected that the Regulator *create*, but *help* with the aim of improving the credit market 'where the need exists'.[377]

Legislative guidelines exist in respect of some duties: The National Credit Regulator has to adhere to the National Credit Act, other applicable legislation and all South African statutes

[366] See par 3.2.2 *supra*.
[367] *Ibid*.
[368] See paras 2.2 & 7 of ch 4 *supra*.
[369] See par 3.2.5 *supra*.
[370] *Ibid*.
[371] *Ibid*.
[372] *Ibid*.
[373] See par 3.2.2 *supra*.
[374] *Ibid*.
[375] *Ibid*.
[376] *Ibid*.
[377] See par 3.2.2 *supra*.

are subject to the Constitution.[378] In interpreting the mandate and legislative provisions pertaining to the Credit Regulator, the Constitution must automatically be kept it mind.[379] If the Credit Regulator functions outside of the boundaries of specific legislative stipulations, such as the necessary day-to-day corporate functioning of the Regulator, it must also conform to constitutional principles.[380] In some instances, legislative guidance regarding performance is not given. The National Credit Act does not provide the means by which the Regulator should effect the duty set out in section 13(a).[381] It is left to the creativity, or policy choices, of the Regulator.[382]Although the legislation sets out the features of a prospective registrant in order to qualify for registration, the Regulator has to determine whether these features are 'sufficient' or 'adequate' or whether there are 'compelling' reasons to refuse the application for registration.[383]

A number of aspects are important in respect of proper delineation of the Financial Sector Conduct Authority and National Credit Regulator's mandates and are substantive matters that need to be taken into account when the formal measures – discussed in chapters six and seven – are applied in practice.

The Financial Sector Conduct Authority is comparable in function and purpose to the National Credit Regulator, insofar as both are conduct regulators of specific financial sector(s).[384] It is created in terms of the Financial Sector Regulation Act[385] and is the result of a distinct policy review undertaken by the National Treasury.[386] The Authority's principled objectives are aimed at regulating the behaviour of financial institutions in respect of justifiable dealings with consumers and the proper and reliable functioning of these institutions as well as training schemes aimed at consumer financial knowledge and skills development.[387] Its jurisdiction is not limited to consumer credit and it encompasses the whole of the financial sector.[388]

[378] *Ibid*.
[379] *Ibid*.
[380] *Ibid*.
[381] See par 3.2.3 *supra*.
[382] *Ibid*.
[383] See par 3.2.6 *supra*.
[384] See Financial Stability Board *Peer Review of South Africa Review Report* 5 February 2013 5.
[385] S 56(1) of the FSRA.
[386] National Treasury *Treating Customers Fairly in the Financial Sector* (n 30); National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 123). See also paras 2.3 & 2.4 of ch 1; par 3.3 *supra*.
[387] S 57 of the FSRA.
[388] See the FSRA in respect of the definitions in ss 1-3 as well as ch 4 in respect of the mandates of the FSCA. See also par 3.3.1 *supra*.

Credit in general terms and specifically with reference to section 1 of the National Credit Act, falls under the auspices of the term 'financial product' defined in section 2 of the Financial Sector Regulation Act. The Conduct Authority is authorised to make conduct standards that relate to credit extension, which will overlap with the jurisdiction of the National Credit Regulator. Suffice to say that there are areas of overlap where cordiality between regulators will be valuable.[389] This approach shows the inclination of the current government, notwithstanding the initial considerations to include consumer credit in the mandate of the Financial Sector Conduct Authority, to retain the current approach to credit market conduct as an exclusive regulatory sector, separated from other sectors in the financial market.[390]

The frameworks set out in this chapter provide important background that is imperative in order to understand the milieus within which each regulator functions individually and in tandem with other regulators. I rely on this information in order to analyse the independence and accountability of the National Credit Regulator and the Financial Sector Conduct Authority in the next chapters.

[389] See par 3.5.1 *supra*.
[390] See par 3.5.3 *supra*.

CHAPTER 6: INDEPENDENCE

> 'To ensure enforcement and promote access to redress, it is necessary that a suitably empowered statutory regulator be created to regulate the credit industry and to provide consumers with effective recourse. The establishment of a National Credit Regulator is envisaged.'[1]

1. INTRODUCTION

1.1. Outline of the chapter

In previous chapters, I discussed the fundamental aspects that can enhance the autonomy and answerability of a regulator.[2] I also dealt with the mandate of the regulators in chapter five of this thesis. Chapter six is aimed at dealing with the independence of the South African market conduct regulators of the consumer credit industry and focuses on the National Credit Regulator and the Financial Sector Conduct Authority.

The pattern that I followed in the previous chapters did not deviate from the order or categories in which independence-enhancing factors were discussed by other authors. Thus, an analysis of the autonomy of the South African regulators requires that I consider the institutional configuration of the entity, therefore its positioning in the overall regulatory scheme as well as its internal governing structure and those external pressures present within the structure.[3] My analyses of the Regulators will begin with what other authors have termed 'regulatory' and 'supervisory' autonomy.[4] Thereafter I find that discussing the resourcing of the entity, or what was termed 'budgetary independence', is a logical extension of the first discussion as it sets out the available means of the organisation to effect its mandate.[5] The other aspects categorised under 'institutional independence' and miscellaneous aspects will be dealt with last.[6] The more nuanced features of independence are interwoven in my discussion and the reader can refer to paragraph four of chapter three for a summary of these features.

Furthermore, the reader will find that I have inserted preliminary analyses at intervals throughout this chapter. It is a lengthy chapter but the issues are so interwoven that a division of themes would result in unnecessary repetition over various chapters. I also rely on the contents of these paragraphs to guide towards a conclusion on the underlying challenges

[1] Department of Trade and Industry (hereinafter 'DTI') *Consumer Credit Law Reform – Policy Framework for Consumer Credit* August 2004 par 7.3.
[2] *Ibid*; chs 2-4 *supra*.
[3] Par 4 of ch 3 *supra*.
[4] Par 4 of ch 3 *supra*.
[5] *Ibid*.
[6] *Ibid*.

brought about by juxtaposed principles, such as autonomy and accountability or accountability and efficacy. This is done in chapter eight.

1.2. Orientation

There are various specific elements to deal with, but as a point of departure a brief review of the most important features of independence and, by necessity, some basic elements pertaining to accountability.

Independence and accountability are imperative characteristics of financial regulators[7] and the South African authorities have not neglected to endow its market conduct regulators with independence and answerability in the relevant policy documents and founding statutes.[8] However, views on the principal-agent theory have shown that extending authority and autonomy through delegation invites a careful balancing act with appropriate measures to ensure that the authorised entity can still be called to account and undesirable behaviour restricted.[9]

Regulators' mandates are essential aspects when we talk about independence and accountability.[10] The modern independent regulator's duties cannot be simplified into a basic implementation role (as opposed to effecting regulatory changes to the regulatory sphere) anymore.[11] As my reference to Joanna Bird showed, a proper appraisal of regulatory operations is challenging, specifically where indicators to measure incidences of successes and failures in the execution of duties are wanting.[12] My research showed that 'accountability requires an evaluation of the performance of the regulator, thus necessitating performance parameters'.[13] As such, the first aspect that I considered within the South African context, was the statutory mandates, and activities where possible, of the National Credit Regulator and the Financial Sector Conduct Authority.

Ultimately, this chapter analyses the measures that inform the autonomy of the two regulators and provides recommendations for reform as informed by foreign (specific extraterritorial or transcontinental) and international (interterritorial) examples and benchmarks. The aim of the recommendations is to enhance the regulatory scheme in a manner that achieves a

[7] Par 2.1 of ch 3; par 2.1 of ch 4 *supra*.
[8] Par 1 of ch 3 *supra*.
[9] Par 3.2.2 of ch 2 *supra*.
[10] Par 1 of ch 2 *supra*.
[11] Par 3.1 of ch 2 *supra*.
[12] Par 3.2.2 of ch 2 *supra*.
[13] Par 3.3 of ch 2 *supra*.

satisfactory level of autonomy for the relevant South African consumer credit market conduct regulators.

2. INDEPENDENCE

I discussed the fundamental elements that enhance the independence of a regulator sought to be autonomous in chapter three. The reasons for an independent agency are compelling, but I have also referred to the work of Lisa Bressman and Robert Thompson, who showed that the differentiation between the 'independent agency' and 'executive-branch agency' is not as prominent as some academic writings have indicated.[14] In fact, many of the sources that I have referred to did not even compare autonomy to executive and focused on the characteristics of independent authorities in the stead. That said, some of the primary indicators of an autonomous entity as per numerous authors are the following:

> 'The quality that most distinguishes independent agencies from the executive variety is the notion of independence itself. This characteristic is based largely upon three statutory arrangements: the bipartisan appointment requirement; the fixed term requirement; and the requirement that removal be limited to express causes.'[15]

Expertise is *inter alia* a compelling factor for the creation of such an organisation:

> 'The classic explanation for agency independence is the need to for expert decision making … The idea is that an agency could be created that would be insulated from short-term political pressures so that it could adopt public policies based on expertise that would yield better public policy over the long term. Thus, the New Dealers hoped to create apolitical agencies that would be guided by information and not politics. Of course, it is impossible to remove politics and political judgments from agencies, particularly given the discretionary authority afforded to them. But it is possible to make politics *relatively* less pronounced and expertise *relatively* more of a basis for decision making.'[16]

As a point of departure it was acknowledged that autonomy is a core factor to safeguard interventions from interested parties – politicians, market role-players and/or consumers.[17] The concerns about regulatory capture have inspired development in the field of 'insulation' of regulatory entities from undue influences.[18]

[14] Bressman & Thompson 'The future of agency independence' 2010 *Vanderbilt Law Review* 599 603.

[15] Verkuil 'The purposes and limits of independent agencies' 1988 *Duke Law Journal* 257 259. See also Morrison 'How independent are independent regulatory agencies?' 1988 *Duke Law Journal* 252 252; Miller 'Introduction: The debate over independent agencies in the light of empirical evidence' 1988 *Duke Law Journal* 215 216; Barkow 'Insulating agencies: avoiding capture through institutional design' 2010 *Texas Law Review* 15 16.

[16] Barkow (n 15) 19 & 20.

[17] See par 2.1 of ch 3 *supra*.

[18] See e.g. Barkow (n 15) 21-24 & 79.

However, to bestow authority on an autonomous entity presupposes reduction of control and the South African Constitutional Court has noted that the validity of delegation acts within the South African constitutional dispensation is dependent on the quantity of delegated authority.[19]

3. INDEPENDENCE AND THE SOUTH AFRICAN REGULATORS

Section 12(1)(c) of the National Credit Act is very clear: The National Credit Regulator 'is independent' and, if there is any doubt as to the extent or nature of its autonomy, 'subject only to the Constitution and the law'. Section 12(1)(f)(ii) further determines that the Regulator should conduct itself in a fearless and unbiased manner. Gretchen Carpenter elucidates as follows on the difference between autonomy and acting in an unbiased fashion, albeit in the context of the judiciary:

> 'Independence and impartiality are mentioned in the same breath, as it were, but are quite different concepts, even though they are interdependent — impartiality implies independence of mind on the part of the individual (hence the constitutional importance of dissenting judgments). Independence is primarily based on structure, while impartiality is personal and subjective. However, the need for judicial officers to act impartially and without conscious bias (in other words, fairly and in good faith) is so self-evident that it needs no further discussion, except to say that judicial officers whose functional — and personal — independence is compromised, cannot conceivably act "impartially and without fear, favour or prejudice".'[20]

The determinations that pertain to the National Credit Regulator were legislated, as the 2004 policy document formulating the establishment of the Regulator did not allude to autonomy *per se*. However, the 2003 review preceding the policy document suggested, as part of the anticipated scheme of regulation, the creation of '[a] Consumer Credit Regulator … as an independent regulatory body directly accountable to Parliament, to license credit providers, monitor compliance and enforce the Consumer Credit Act' and the 2013 policy review document restated the sentiment on autonomy.[21]

In contrast to the above, the Financial Sector Regulation Act does not stipulate that the Financial Sector Conduct Authority should be independent but independence features strongly in the policy framework supporting the establishment of the Authority, in lieu of

[19] Par 2.1 of ch 3 *supra*.

[20] Carpenter 'Without fear or favour — ensuring the independence and credibility of the "weakest and least dangerous branch of Government"' 2005 *Journal for the South African Law* 499 500.

[21] DTI *Credit law review – Summary of the findings of the technical committee* August 2003 27; Minister of Trade and Industry *Draft National Credit Act Policy Review Framework, 2013* GN 559 of 2013 GG 36504 29 May 2013 par 2.2.2.1.1.

enhanced market veracity.[22] In addition, the Act highlights that the Conduct Authority should 'perform its functions without fear, favour or prejudice'.[23]

Independence is a recognised trait of both the South African market conduct regulators under discussion.[24] In the paragraphs hereafter, I aim to establish whether the regulators have indeed been endowed with the necessary characteristics in order to be truly independent. I do so by identifying and analysing the features that enhance independence, and those that minimise it.[25]

As a point of departure I refer to selected extracts from policy documents on the financial market and some of the aspects highlighted should be familiar in light of the aspects that I discussed in chapter three. It shows that independence is important to the South African government. The 2014 *Treating Customers Fairly in the Financial Sector: A Draft Market Conduct Policy Framework for South Africa Discussion Document* drafted by the National Treasury indicated that financial market integrity should be underpinned by '[a]n independent regulator which is not prone to political interference in the carrying out of its mandate'.[26] The 2011 *A Safer Financial Sector to Serve South Africa Better* policy document drafted by the National Treasury determined the following:

> '**The heads of supervisory or regulatory agencies should be appointed for a fixed term of at least five years.** Once appointed, regulators should appoint their own staff, within the framework determined by their governance board or the minister of finance, *eventually approved by Parliament*. Regulators should not be dismissed without good causes shown, and which are transparent and *reported to Parliament*.'[27]
>
> 'Heads of supervisory or regulatory agencies must be fair and seen to be fair, and be protected from undue pressure and interference. Regulators should have mechanisms to protect them from political and other interference when acting within their mandate. *The procedures to hire and fire regulators must be transparent and subject to clear rules*.'[28]
>
> '**Current legislation will have to be amended.** … Despite the recent financial sector assessment programme noting that there do not appear to be any indications that the possibility of staff termination has affected operational independence, the assessors recommended amending the laws

[22] National Treasury *Treating Customers Fairly in the Financial Sector: A Draft Market Conduct Policy Framework for South Africa Discussion Document* December 2014 72: 'An independent regulator which is not prone to political interference in the carrying out of its mandate.'
[23] S 58(6) of the Financial Sector Regulation Act (Act 9 of 2017) (hereinafter 'FSRA').
[24] See par 2.4 of ch 1; par 4.1 of ch 3; par 3.2.2 of ch 5 *supra*.
[25] See Barkow (n 15) 79.
[26] National Treasury *Treating Customers Fairly in the Financial Sector* (n 22) 72.
[27] National Treasury *A Safer Financial Sector to Serve South Africa Better: National Treasury Policy Document* 23 February 2011 30. Own emphasis.
[28] *Ibid*.

> to remove this potential power of intervention by the executive. The first issue could be resolved by adding a simple requirement that the Minister of Finance or Reserve Bank Governor may dismiss board members, registrars or other senior officials only for good cause, *with the reasons to be made public and tabled in Parliament*.'[29]

I indicated in chapter one that the point of departure of the thesis is the following: The National Credit Regulator and the Financial Sector Conduct Authority are sufficiently independent. This hypothetical view is based on the expressions of independence in the South African policy documents and legislation that I refer to on numerous occasions in this thesis.[30] In order to prove or disprove the policy- and legislation-based hypothesis, I identified the features of a regulator that would render it independent in chapter three. Against this background, I now assess the South African regime in order to determine which features affect the independence of the National Credit Regulator and the Financial Sector Conduct Authority as statutory market conduct regulators of the consumer credit industry. Based on the evaluation, the research disproves the hypothesis by finding that the National Credit Regulator and Financial Sector Conduct Authority are not adequately independent by virtue of the notations in policy documents and legislation to this effect.

4. REGULATORY AUTHORITY

> 'In respect of "regulatory independence", this aspect is concerned with the binding prescriptions effected by the regulator and which necessitates conformation by the regulated industry … In addition, the ability of these entities to modify standards in accordance with industry developments is unconstrained by political courses of action that may be extensive and arduous.'[31]

4.1. The National Credit Regulator

4.1.1. Introduction

The National Credit Regulator is responsible for the promotion and regulation of the credit industry.[32] In effecting its mandate of industry regulation and setting the scene for further action against deviant behaviour, the Regulator has been active in shaping the credit regulatory landscape and compelling compliance notwithstanding its 'softer' authority when

[29] *Idem* at 30-31.
[30] See e.g. par 2.4 of ch 1 *supra*.
[31] See par 2.4 of ch 3.
[32] See par 3.2 of ch 5 *supra*.

compared to that of regulators created by other government departments' statutes.[33] The Regulator does not have the direct authority to modify the legislative or regulatory landscape – it is empowered to monitor and take action, but not to effect immediate change unilaterally without recourse to higher authorities.[34]

4.1.2. Guidance

Insofar as activities that relate to the theme of regulatory autonomy are concerned, the Regulator has focused on addressing practical issues as the scant provisions in the National Credit Act proved to be difficult to implement and necessitated intervention in order to align industry behaviour and practices with legislative provisions. The debt counselling procedure is probably the clearest illustrative case study in this regard.[35] The National Credit Act sets the foundational procedure in section 86 and regulations 24 through to 27. However, the actual (and ultimately successful) implementation of the procedure has primarily been effected through case law and initiatives by the National Credit Regulator and the industry.[36] The National Credit Regulator's financial statements as published in its annual reports, indicate that the actual expenses towards 'debt counselling initiatives' for the financial years

[33] The discrepancy between the authority granted to regulators shaped by legislation governed by the Department of Finance and Department of Justice and Constitutional Development as opposed to that of the Department of Trade and Industry is noteworthy – see e.g. the differences between the National Credit Regulator (hereinafter 'NCR') (established by the National Credit Act (Act 34 of 2005) (hereinafter 'NCA') & administered by the DTI) and the Information Regulator (established by the Protection of Personal Information Act (Act 4 of 2013)), administered by the Department of Justice and Constitutional Development (see Boraine & Van Wyk 'Credit bureaus in South Africa and Namibia: A comparative analysis of the regulatory frameworks evaluated against the World Bank's principles for credit reporting: Part 1' 2017 *Comparative and International Law Journal of Southern Africa* 147 174-178) or the NCR and the Financial Sector Conduct Authority (hereinafter 'FSCA') (see par 6 *infra*).

[34] See par 3.2 of ch 5 *supra.*

[35] Roestoff *et al* 'The debt counselling process – closing the loopholes in the National Credit Act 34 of 2005' 2009 *Potchefstroom Electronic Law Journal* 247 249. The debt review industry provides a multiplicity of examples in this regard – refer to the reports commissioned and rationale for guidelines issued by the Business Enterprises *The Debt Counselling Process – Challenges to Consumers and the Credit Industry in General* 2009; Business Enterprises *An Assessment of Debt Counselling: December 2011 – April 2012* 2012; NCR 'Debt Review Task Team Agreements of 2010' Guideline 1 of 2015 in respect of the challenges to and developments in the debt counselling sphere. De Villiers *A Workable Debt Review Process for South Africa: At last?* May 2010 LLM Dissertation Faculty of Law University of Pretoria can be consulted in respect of earlier industry developments. An important report for further consideration, not just within the scope of debt review, but regarding the practical state and construction of the credit industry as a whole, see Devnomics *Literature Review on the Impact of the National Credit Act (NCA) has had on South Africa's Credit Market – Final report* June 2012. This report identifies the relevant role players and their involvement in the credit industry as at June 2012.

[36] The formulation and codification of behavioural guidance through industry rules, development software to produce repayment plans, standardisation of documentation for purposes of conformity when communicating the necessary information between debt counsellors and credit providers and industry guidelines initiated by the National Debt Mediation Joint Debt Review Forum (and later by the NCR's Credit Industry Forum) are examples in this regard – see Roestoff *et al* (n 35) 249; NCR 'Update from the Credit Industry Forum' Circular 8 of 2014; NCR 'The Credit Industry Forum' Circular 11 of 2013.

2013 and 2014, are calculated at approximately 9 million rand.[37] In the 2014-2015 financial year, the expenses were calculated at 3 245 072 rand.[38]

In respect of the consumer credit legislative framework, resource input by the industry into the regulatory sphere is noteworthy.[39] This is especially true when contemplating the cumulative industry funds invested to address and streamline some of the practical challenges experienced by the industry due to the new regulatory regime.[40] In December 2014, the Banking Association of South Africa claimed that the industry (presumably role players involved in credit extension for benefit) had invested over 120 million rand since 2010 towards the section 86 debt review procedure and that this amount did not take financial commitments by individual members into account.[41]

The Regulator is mandated to issue 'explanatory notices' and 'opinions' on its understanding of the National Credit Act, however the 'opinion' so issued is not considered binding.[42] The wording of section 16(1)(b) is also limited – the 'explanatory notices' pertain to the Regulator's internal processes and the 'non-binding opinion' is in respect of the

[37] See NCR *Annual Report* 2012/2013 ('year ended 31 March 2013') 61: R4 885 153 ('actual amounts on comparable basis'). The 'approved budget' amount was R4 827 372, no 'adjustments' were made and the 'final budget' was therefore calculated at R4 827 372. See also NCR *Annual Report* 2014 ('year ended 31 March 2014') 60: R4 236 489 ('actual amounts on comparable basis'). The 'approved budget' amount was R4 117 014, 'adjustments' to the amount of R321 000 were made and the 'final budget' was calculated at R3 796 014. Note that the format of the *Annual Report* was adjusted between the 2011-2012 report and the 2012-2013 report and therefore only the last two years' calculations are included.

[38] See NCR *Annual Report* 2014/2015 ('year ended 31 March 2015') 67: R3 245 072 ('actual amounts on comparable basis'). The 'approved budget' amount was R4 237 595, 'adjustments' made were reflected as R1 000 000 and the 'final budget' was therefore calculated at R3 273 595.

[39] See e.g. (and in respect of efforts made by the industry, with and without the assistance of the NCR to deal with practical challenges) Govender *Has the National Credit Regulator fulfilled its mandate in promoting a credit market as envisaged in the preamble and purposes of the National Credit Act 34 of 2005?* November 2014 LLM Dissertation Faculty of Law University of Johannesburg 54; NCR 'Update from the Credit Industry Forum' Circular 8 of 2014; NCR 'The Credit Industry Forum' Circular 11 of 2013; Business Enterprises *An Assessment of Debt Counselling* (n 35) par 3.4 p 18; Roestoff *et al* (n 35) 247; NCR 'NCR Debt Counselling Circular' Circular 1 of 2007.

[40] Banking Association of South Africa 'Press Release on behalf of NISC' 17 December 2014; see also Devnomics (n 35) 33-34 in respect of the effect that the NCA has had on credit providers. Grové & Otto *Basic Principles of Consumer Credit Law* (2002) 3-4 highlighted that '… it is important to remember that consumer-credit legislation costs money. The capacity of the credit industry to continually absorb new credit legislation is not inexhaustible. Additional costs for additional services are usually "down-loaded" on all consumers of credit services. If it is impossible to recover the cost of additional services from the consumers of credit services, the costs will be recovered by way of cross-subsidisation. Investors with financial institutions may receive lower interest rates on deposits or cash buyers may pay higher cash prices. It is therefore important that legislation of this kind should be cost-effective. The rationale for the existence of consumer-credit legislation is very often situated in its social attractiveness and economic considerations are not duly taken into account.'

[41] Banking Association of South Africa (n 40). Landie *The impact of the National Credit Act (NCA) on risk in the South African Banking System* January 2013 PhM (Economics) Department of Economics and Econometrics University of Johannesburg refers to an expense estimation by Standard Bank in giving effect to the NCA (the assumption is made that this is general implementation), which reportedly amounted to R150 million.

[42] S 16(1)(b) of the NCA. See the discussion in par 4.1.2 *infra*.

'interpretation' of a 'provision' in the National Credit Act. In order to deal with 'interpretation or application', the matter can be referred to the judiciary in terms of section 16(1)(c).

The scope and effect of some of the contents of the documents published by the National Credit Regulator to this effect, albeit that some documents would by necessity fall under the provision made in subsection 16(1)(b)(i) in respect of 'non-binding guidelines',[43] were far-reaching as many of the provisions operated in a sphere that was structurally shaped by the relevant laws, but which was not substantially regulated through legislative provisions.[44]

The National Credit Regulator utilises circulars as a formal channel of communication to keep registrants informed of developments in the industry, decisions by the Regulator and other aspects that are of importance.[45] The circulars are written documents that contain information or instructions that the targeted registrant group is expected to note and, where applicable, comply with the contents thereof.[46]

Apart from reminding registrants of their duties in terms of the National Credit Act, such as compliance with statutory reporting duties[47] and payment of fees for the yearly renewal of a registrant's registration with the Regulator,[48] the circulars are utilised to communicate the availability of guidance on complying with the relevant legislative provisions.[49] In this regard, guidelines issued by the Regulator are usually accompanied by a circular creating awareness among registrants of the availability of explanatory documents, as well as the

[43] See e.g. NCR 'Interpretation and application of s 103(5)' Public Notice 30 January 2015. The Competition Commission has engaged with the industry under its authority in the style of 'advisory opinions', by way of which an industry member may provide the Commission with the necessary information and request, against payment of a set fee, an indication of whether the conduct in relation to the information would meet regulatory scrutiny – Sutherland & Kemp *Competition Law of South Africa* (2014) p 11-7 par 11.3.2.

[44] See Roestoff *et al* (n 35) 249; Business Enterprises *An Assessment of Debt Counselling* (n 35) Executive Summary.

[45] The circulars are sent directly to registrants and published on the website of the NCR at http://www.ncr.org.za/publ ications.

[46] See e.g. the wording of NCR 'Debt Review Task Team Agreements of 2010' Circular 2 of 2015; NCR 'Voluntary Debt Mediation' Circular 13 of 2014; NCR 'Assessment Findings on Voluntary Debt Mediation Solution' Circular 6 of 2012.

[47] NCR 'Annual Compliance Report' Circular 4 of 2014.

[48] NCR 'Debt Counsellor's Annual Registration Renewal Fees' Circular 10 of 2012.

[49] See e.g. NCR 'Debt Review Task Team Agreements of 2010' Circular 2 of 2015; NCR 'Credit Providers Circular on Submission of the Assurance Engagement Report for Non-Audited Credit Providers' Credit Providers Circular 2 of 2010; NCR 'Credit Providers Circular on Submission of the Compliance Report' Credit Providers Circular 1 of 2010.

behaviour expected from role-players in response to the content.[50] The following extract from the circular accompanying the document containing the re-assessed and applicable version of the Task Team Agreements of 2010 in the form of guidelines, is self-explanatory:

> 'In October 2013, the National Credit Regulator (the "NCR") through the Credit Industry Forum (CIF) initiated a review process of the Task Team Agreements of 2010 (TTA) to align them with the current debt review processes. TTAs are voluntary non statutory measures put in place aimed at addressing operational and process weaknesses that come with implementation of debt review provisions of the National Credit Act ("the NCA"). Further to this, they promote a uniform and consistent approach in dealing with debt review matters amongst all debt review stakeholders. Following an intensive review process with industry stakeholders, the NCR is pleased to announce that TTA has been signed off and are issued as guidelines to be applied by all industry participants effective immediately. Please take note that amendments to the NCA, its regulations or case law supersede provisions made in these guidelines and will when necessary be amended…Credit Providers, Credit Bureau, Payment Distribution Agents and Debt Counsellors are requested to comply by applying these TTA on debt review matters. Non-compliance with these guidelines should be reported to the NCR.'[51]

Unfortunately, the source of the National Credit Regulator's mandate to compel compliance in terms of these circulars is unclear – and especially where the contents are not directly linked to the National Credit Act. I discuss the legal status of the endorsed documents at this stage and the contents at a later stage. The reason for this is that the circulars have been instructive with regard to clarification and management of the practical difficulties pertaining to compliance and other challenges, for example, in respect of the debt review process. However, I do entertain some doubts as to whether the Regulator has the necessary legal

[50] The documents referenced in the previous fn refer to NCR 'Debt Review Task Team Agreements of 2010' Guideline 1 of 2015; NCR 'Proposed Process for End Balance Differences' Circular 4 of 2015; NCR 'Interpretation of Circular 04 – Proposed Process for End Balance Differences' Circular 5 of 2015. See also recent guidelines published such as NCR 'Guideline for the Submission of Credit Information in terms of Regulation 19(13) of the National Credit Act, 34 of 2005, as amended' Guideline 3 of 2017 3 November 2017; NCR 'Guideline for Credit Providers and Credit Bureaux in respect of Debt that is On-Sold' Guideline 1 of 2017 4 April 2017.

[51] NCR 'Debt Review Task Team Agreements of 2010' Circular 2 of 2015.

foundation to enforce compliance and submit that this discrepancy has been cleverly concealed through other clearly mandated regulatory mechanisms.[52]

Some guidelines may require the registrant to behave in a manner that is not sanctioned by the legislation and, in the absence of court intervention confirming or clarifying the matter, the registrant is at risk of penalty by the Regulator in the case of non-compliance.[53] Ambiguous provisions may exacerbate uncertainties as to the expected behaviour where the circular and the contents of guidelines do not correlate.[54] The Task Team Agreement Guidelines in respect of the body responsible to deal with non-compliance serves as a recent example as it is unclear whether the Credit Industry Forum or the National Credit Regulator is the first point of contact to report non-compliance with the Guidelines.[55] In terms of the Circular, incidences of non-compliance should be referred to the Regulator,[56] whilst the Guidelines indicate that the Credit Industry Forum would be the primary point of reference.[57] The Forum is not founded in statute and is designated in the Guidelines as the monitoring body.[58] In the case where the non-complying entity does not conform its behaviour to the guidelines, the Guidelines stipulate that 'the matter will be referreed by the NCR'.[59] It would be logical to assume, when considering the 'voluntary' nature of the Guideline,[60] as if the Forum would first entice voluntary compliance and thereafter the matter would be transferred to the Regulator to compel compliance through the threat or actual institution of sanctions

[52] NCR *Conditions of Registration* 17 October 2011 3 & version of *Debt Counsellor's Code of Conduct for Debt Review* applicable when *Conditions of Registration* were signed, which forms an annexure to the *Conditions*, at 2. The applicable paragraphs read as follows – in respect of par B.2 p 3 (specific conditions) of the *Conditions of Registration*: 'The Debt Counsellor will comply and conduct its business in accordance with Debt Counsellor's Code of Conduct for Debt Review as approved by the National Credit Regulator and as it may be amended from time to time' and in respect of par 1 p 2 of the Code: 'Further, we acknowledge that it is necessary to implement a range of voluntary measures that are complimentary to the provisions of the NCA, in order to ensure as many debt review cases as possible are brought to a successful conclusion. We commit ourselves to implementing the provisions of this Code and any processes adopted as rules under it as rules to give effect to these objectives. We commit ourselves to accept this Code as binding on us in respect of the statutory Debt Review process and voluntary enhancements identified in the Task Team recommendations (as contained in their final 2010 report) and any agreements which may be reached in future with the National debt [*sic*] Review Committee (NDRC) of the NCR once established.'

[53] See e.g. NCR 'Debt Review Task Team Agreements of 2010' Guideline 1 of 2015 Annexure A ('Proposed Debt Review Process Enhancements and Conduct Provisions'), which provides *inter alia* that the debt counsellor should refer a repayment plan to the credit providers prior to approaching the Magistrates' Court – see par 2.3.5.

[54] NCR 'Debt Review Task Team Agreements of 2010' Circular 2 of 2015; NCR 'Debt Review Task Team Agreements of 2010' Guideline 1 of 2015 Covering Report paras 4.2 & 4.3.

[55] NCR 'Debt Review Task Team Agreements of 2010' Guideline 1 of 2015 Covering Report par 4.2.

[56] NCR 'Debt Review Task Team Agreements of 2010' Circular 2 of 2015.

[57] NCR 'Debt Review Task Team Agreements of 2010' Guideline 1 of 2015 Covering Report par 4.2.

[58] *Idem* at par 4.3.

[59] *Ibid*.

[60] NCR 'Debt Review Task Team Agreements of 2010' Circular 2 of 2015; NCR 'Debt Review Task Team Agreements of 2010' Guideline 1 of 2015 Covering Report par 4.1.

against the non-conforming entity.[61] However, what the basis for the demand of compliance will be, is unclear.

> 'The Task Team Agreements are largely directed at voluntary, non statutory measures being put in place. The Task Team Agreement is issued by the NCR as guideline for implementation by all Credit Industry stakeholders. Compliance to the Task Team Agreement will be monitored. Non-compliance should be reported to CIF for intervention. Should the CIF intervention not realise the required co-operation the matter will be referreed to the NCR'.[62]

Section 16(1)(b)(i) allows the Regulator to release its non-binding opinion as guidelines.[63] In addition, the content of the guidelines are a peculiar mixture of principles and proposed rules. When the broader scheme of endorsed documents is considered, it seems further as if the contents of the documents may overlap in order to endorse compliance. This may have the effect of exposing a non-complying registrant to a case of 'double jeopardy' as the prohibited act or omission may be referenced as such in various documents, causing the registrant to be liable for multiple transgressions based on a single act. The Guidelines, for example, propose that some of its guidelines be incorporated into Codes of Conduct,[64] and these Codes may be referenced in a registrant's conditions of registration.[65] Non-compliance with the latter can result in de-registration as per section 57 of the Act. I find that the registration function of the Regulator is therefore a means through which the Regulator has exercised some regulatory authority, as will be shown below.

4.1.3. Registration

Conditions of registration do not assume the position of legislation within the hierarchy of rules that role-players need to abide by, nor can it exceed the allowed boundaries of the legislation or counter the provisions of the Act (or any other Act of Parliament for that

[61] NCR 'Debt Review Task Team Agreements of 2010' Guideline 1 of 2015 Covering Report par 4.3.

[62] *Idem* at paras 4.1-4.3.

[63] Compare the following statements by Govender (n 39) Annexure B during her interview with Darrell Beghin: 'From my experience in Investigations and Enforcement, credit providers especially want to comply and they want to know how best I can give them my interpretation but I cannot provide a formal response. Where ordinarily, we should be saying – as the NCR, we suggest this or we recommend you try this … Yes, consider these options. The issue I find is that the public is not given that information in advance. Everything is done 'as and when' it occurs. No proactive thinking. So I may be asked by a colleague or friend, what is the NCR's standpoint on this issue? And my response is – there is no formal view on this, however if this matter had to come before me, I would interpret or apply it this way. I personally find it an issue that there are no guidance notes or practice notes not only for external parties but for the staff as well. It is very different to the FSB approach. Those notes are not regulation but give people an idea as to which side of the line they need to be on.'

[64] NCR 'Debt Review Task Team Agreements of 2010' Guideline 1 of 2015 Covering Report par 3.3.

[65] See par 4.1.3 *infra*.

matter).[66] However, the imposition of conditions of registration upon a prospective registrant, as well as the contents thereof, is within the discretion of the Regulator, even though the applicable section is worded in a manner that suggests that the incorporation of conditions of registration into the registration process is one of negotiation between Regulator and registrant.[67] The applicable section allows the Regulator to set forward 'any conditions' pertaining to the prospective registrant's successful registration.[68] In addition, the Regulator is deemed to 'propose' the conditions to the prospective registrant.[69] This discretion is primarily limited only by the aims and prospects of the Act and the extent to which the Regulator is able to formulate a rationale for the conditions.[70]

Generally, section 48(3) highlights four aspects that the Regulator should consider when contemplating conditions of registration in respect of a particular application. These can be broadly classified as the outcomes and rationales of the National Credit Act, the context of the specific application, rationalisation of the imposition of conditions of registration, and a selection of three statutory provisions.[71] Additional factors are to be contemplated where the prospective registration is in respect of a debt counsellor and the Regulator has to view the application within the context of 'the applicant's education, experience and competence relative to any prescribed standards'.[72] Considerations of reasonability and justifiability are only expressly made applicable to conditions in terms of which the scope of application would potentially expand to include 'an associated person'.[73] Upon non-acceptance by the prospective registrant, the Regulator may change the conditions alternatively impress the conditions against the registrant's positive registration.[74] Non-compliance with a guideline

[66] Non-compliance with conditions of registration do, however, have severe consequences as it is a ground for de-registration of the registrant – see s 57(1)(a) of the NCA. However, the section is worded in such a manner that de-registration only becomes a possibility after the non-complying entity has 'repeatedly' ommitted to align its behaviour. The registrant may receive notice from the NCR that it's behaviour is objectionable prior to referral to the NCT – see s 55(1)(b) read with 55(6). See the internal procedure of the NCR reiterated in Govender (n 39) 49.

[67] S 48(3) of the NCA – the section reads as follows: 'The National Credit Regulator, having regard to the objects and purposes of this Act, the circumstances of the application and the applicable criteria set out in subss (1) and (2), may propose any conditions on the registration of an applicant by delivering a written notice in the prescribed manner and form setting out the proposed conditions, and the reasons for them'.

[68] S 48(3) of the NCA.

[69] *Ibid*.

[70] *Ibid*, see also ss 12(1)(d) & 12(1)(f)(i) of the NCA.

[71] S 48(3) of the NCA. The section refers to ss 48(1) and 48(2). S 48(1)(a) to (c) references the Broad-based Black Economic Empowerment Act (Act 53 of 2003) (adherence to the vision and outcomes of black economic empowerment), measures taken to deal with over-indebtedness (probably referencing the NCA, which is purported to pre-empt over-indebtedness – see the Long Title of the Act and s 3(c)) and 'registration with the South African Revenue Services'. S 48(2) is referred to below.

[72] S 48(2) of the NCA.

[73] S 48(4)(a) of the NCA. See also the discussion of the applicability of just administrative action in ch 7 *infra*.

[74] S 48(6)(b) of the NCA.

could, therefore, also cause the registrant to disobey its codes of conduct and conditions of registration. The applicable paragraphs, read together as follows, illustrate the matter. The conditions include the following reference to the codes:

> 'The Debt Counsellor will comply and conduct its business in accordance with the Debt Counsellor's Code of Conduct for Debt Review as approved by the National Credit Regulator and as it may be amended from time to time'.[75]

The Codes of Conduct further included the following reference to the Task Team commendations:

> 'Further, we acknowledge that it is necessary to implement a range of voluntary measures that are complimentary to the provisions of the NCA, in order to ensure as many debt review cases as possible are brought to a successful conclusion. We commit ourselves to implementing the provisions of this Code and any processes adopted as rules under it as rules to give effect to these objectives. We commit ourselves to accept this Code as binding on us in respect of the statutory Debt Review process and voluntary enhancements identified in the Task Team recommendations (as contained in their final 2010 report) and any agreements which may be reached in future with the National debt [*sic*] Review Committee (NDRC) of the NCR once established'.[76]

I submit that the practical effect of the Regulator's course of action results in the modification of the regulatory landscape. However, I submit that this is a 'false' enhancement of its autonomy as the authority is not clearly founded in legislation. As such, the Regulator does not have direct regulatory autonomy. The guidelines, which are in effect binding on registrants by virtue of their conditions of registration, have not been acknowledged by the civil courts, resulting in a difficult situation for some registrants.[77] *Firstrand Bank Limited and Another v Barnard and Another*[78] and *Rougier v Nedbank Ltd*[79] are specific examples.

[75] NCR *Conditions of Registration* (n 52) par B.2 p 3 (specific conditions).

[76] NCR *Conditions of Registration* (n 52) par 1 p 2 (*Debt Counsellor's Code of Conduct for Debt Review)*. The revised 2013 version of the NCR *Debt Counsellors' Code of Conduct* May 2013 paras 1.2 & 1.3 read as follows: 'I acknowledge that it is necessary to support the implementation of measures introduced by the National Credit Regulator (NCR) to ensure that as many debt review cases as possible are brought to a successful conclusion. I commit myself to implement the provisions of this Code and any processes adopted as guidelines of the NCR to give effect to these objectives.' In addition, par 2.1.1 (in respect of debt review procedures) determine that the debt counsellor 'adopt[s] and implement[s] such processes and other arrangements between the stakeholders as approved by the NCR from time to time in order to improve the efficiency and effectiveness of the debt review process'.

[77] See *Open letter to National Credit Regulator* by Michelle Barnardt (published 12 April 2016) https://www.linked in.com/pulse/open-letter-national-credit-regulator-michelle-barnardt.

[78] (A801/2014) [2015] ZAGPPHC 1109 (11 August 2015).

[79] [2013] ZAGPJHC 119 (28 May 2013).

4.1.4. Case studies

In *Firstrand Bank Limited v Barnard*,[80] the court took issue with the provision in the debt restructuring order that sought to have the debt counsellor's fees, together with the legal fees, paid first and prior to payment in terms of the restructured debt payments to creditors.[81] The court found that the prioritisation of the counsellor and attorney's fees over that of the creditors was legally unsanctioned.[82] However, no reference was made to the Regulator's Fee Guidelines for Debt Counsellors, which mandated debt counsellors to structure repayments in this manner.[83]

In the matter of *Rougier v Nedbank Ltd* it was decided that the National Credit Act does not provide for a debt counsellor to 'withdraw' from debt review.[84] The court noted that the debt counsellor's role is of a 'statutory' nature and, in the absence of a procedure set out in the legislation that mandates the debt counsellor to fulfil this role, the debt counsellor cannot 'withdraw' from debt review.[85] The debt counsellor would be exceeding the boundaries set by the legislation in doing so.[86] However, the National Credit Regulator had been training prospective debt counsellors on a process titled 'transfers and withdrawals', which allowed a debt counsellor to withdraw from the debt review process under certain circumstances.[87] The court made no mention of these industry developments in deciding the matter.

An untenable situation arises in respect of the conduct of debt counsellors, exacerbated by the Regulator's stance on the *Rougier* and *Barnard* judgments, and the value and trust that can be placed in the outcomes of the Consumer Industry Forum created by the National Credit Regulator to address practical challenges caused by the provisions of the National Credit Act.[88]

[80] See also the discussion of this case by Van Heerden & O'Reilly 'Debt restructuring, partisan debt counsellors, costs and other important debt counselling issues. An appraisal of the legal position in view of *Firstrand Bank v Barnard* 2015 JDR 1614 (GP)' 2016 *Journal for Contemporary Roman-Dutch Law* 632.

[81] *Firstrand Bank Limited v Barnard* (n 78) par 31. See also the discussion of *Phaladi v Lamara* 2018 JDR 0001 (WCC) in par 6.4.1 of ch 7 *infra*.

[82] *Firstrand Bank Limited v Barnard* (n 78) par 32.

[83] See NCR *Debt Counselling Fee Guidelines* 2011; NCR 'Payment of Debt Counsellor Fees' Circular 6 of 2016.

[84] *Rougier v Nedbank Ltd* (n 79) par 12.

[85] *Idem* at par 12.

[86] *Idem* at paras 12 & 13.

[87] See NCR *Debt Counsellor's Training Learner's Guide Book 2* (2011) 96-97.

[88] See NCR 'The Credit Industry Forum' Circular 11 of 2013: The forum consists of NCR delegates, Micro Finance South Africa, the Banking Association of South Africa, the Consumer Goods Council of South Africa, the National Motor Financing Association, the National Clothing Retail Federation of South Africa, the Large Non-Bank Lender Association, the Debt Counselling Association of South Africa, the Black Debt Counsellors' Forum, the Alliance of Professional Debt Counsellors, the Credit Bureaus' Association, the Payment Distribution Agencies' Association and the National Consumer Forum, and individuals may submit contributions to this forum.

In respect of *Firstrand Bank Limited v Barnard*, the National Credit Regulator opined the following:

> 'It is therefore the considered view of the NCR, as the custodian of the credit industry, that all debt counsellors are required to comply with the Fee Guidelines for Debt Counsellors, which were issued by the NCR in 2011 so as to ensure that the industry-agreed payment process is implemented uniformly throughout the debt counselling industry.'[89]

The circular ends with the following paragraph:

> 'Disclaimer: While the NCR has taken reasonable care to ensure the factual accuracy of this Circular, it cannot guarantee such accuracy especially with regards to future events. Accordingly, the NCR does not accept any liability for damages incurred by any party as a result of decisions or actions taken on the basis of information supplied in this Circular.'[90]

The Regulator has instructed the industry to disregard the court's judgment in favour of industry harmonisation.[91] The debt counsellor runs the risk of not finalising debt review matters through court because of non-compliance with a high court judgment (which is binding on all lower courts irrespective of jurisdiction). Alternatively, the debt counsellor risks the cancellation of his or her registration due to non-adherence to the conditions of registration.

Subsequent to the judgment in *Rougier v Nedbank Ltd*, the Regulator amended its processes to align the 'withdrawal' processes with those circumstances allowed by the National Credit Act – more specifically setting out the process to follow when section 71(1) of the Act becomes applicable. The Regulator has also indicated that the debt review process can be 'withdraw[n]' or 'terminate[d]' prior to the issuing of a Form 17.2.[92] The situation has further resulted in quite an artificial attempt to circumvent a statutory *lacuna* that is a practical

[89] NCR 'Payment of Debt Counsellor Fees' Circular 6 of 2016 1. In my opinion, the Barnard-case was decided incorrectly as debt review, and thus the debt repayment plan, can only pertain to credit agreements and debt counsellor's and attorney's fees are payments for services rendered, not credit agreements. Including these debts in the restructuring plan is *ultra vires*. See also ch 7 and the theme of reconsideration of the expert-regulator's decisions by a non-expert forum.

[90] NCR 'Payment of Debt Counsellor Fees' Circular 6 of 2016 1.

[91] *Ibid*: 'The Court reasoned that a debt counsellor "may make provision" for the payment of the debt counselling fees in instalments, thereby not creating a peremptory requirement in this regard. Furthermore, the consequence of the judgment – which the NCR believes to be unintended in nature – is that the industry-agreed process, which culminated in the issuing of the Fee Guidelines by the NCR in 2011, has been subverted. As a final consideration, in the event that a High Court in a different division disagrees with the North Gauteng High Court's reasoning in the *FirstRand Bank and Nedbank v Coetzee* case, a further unintended consequence would be that the debt counsellors who refer their applications to the Magistrates Courts falling within the jurisdiction of that High Court would be subject to a different fee payment process. The NCR is of the view that it could not have been the intention of the North Gauteng High Court to create such inconsistency.'

[92] NCR 'Explanatory note to the withdrawal guidelines' 2, https://www.ncr.org.za/documents/Withdrawal_guidelines/Explanatory%20Note%20to%20the%20Withdrawal%20Guidelines.pdf.

nightmare, such as the 'suspension' of the debt counsellor's services where the consumer does not cooperate but where the debt counsellor remains the counsellor of record.[93] One cannot but wonder at the lost opportunities in *Firstrand Bank Limited v Barnard* and *Rougier v Nedbank Ltd* to either fill that *lacuna* or pronounce clearly on the legal status of the Regulator's directives. Ideally, the National Credit Regulator should have been joined in the proceedings, or given the opportunity to intervene, because its procedures were one of the underlying causes of the complaints in both *Rougier* and *Barnard.*[94]

Secondly, the Barnard case was brought to court by two of the largest banks in South Africa, FirstRand and Nedbank. These credit providers also form part of the Banking Association of South Africa,[95] which is a member of the Consumer Industry Forum.[96] The Consumer Industry Forum re-evaluated the Task Team Agreements, which includes the standardised drafting of debt review applications. These re-evaluated industry rules were subsequently adopted and published by the National Credit Regulator as 'voluntary measures' which should be implemented by the industry but non-compliance should, ironically, be reported to the National Credit Regulator.[97] In light of the above, the guidance rendered is deemed 'voluntary' but cannot be ignored by regulatees. The industry members are seeking solutions and these solutions, confirmed and issued by the Regulator, are aimed at addressing practical solutions but will not necessarily entice compliance from all parties agreeing to the process. Finally, the Regulator's authority to deal with these outcomes is dubious at most.

4.2. The Financial Sector Conduct Authority

4.2.1. Introduction

The 2014 market conduct policy document envisaged a regulator with '[f]lexible and broad subordinate regulatory powers'.[98] The Financial Sector Conduct Authority is primarily

[93] *Idem* at 3: 'Where a consumer is not cooperating with the debt counsellor, a debt counsellor can suspend provision of his/her service to the consumer … The debt counsellor remains the debt counsellor on record for the consumer and is responsible for the issuance of a Form 17.7 should the consumer wish to transfer to another debt counsellor.'

[94] See Theophilopoulos *et al Fundamental Principles of Civil Procedure* (2015) 126 in respect of the common law rules pertaining to 'Joinder of necessity'. In respect of the NCT's research in respect of joinder (albeit for purposes of determining an application for intervention), see *Information Technology Consultants (Pty) Ltd v National Credit Regulator and Others; In Re: National Credit Regulator v Du Plessis N.O. and Another* [2014] ZANCT 29 (7 August 2014) par 43: 'It is evident from the above that joinder applications require a legal interest in the subject-matter of the action, which renders the party necessary to the proceedings in that his or her personal rights may be infringed or affected.' Original underlining omitted.

[95] http://www.banking.org.za/about-us/member-banks.

[96] NCR 'The Credit Industry Forum' Circular 11 of 2013.

[97] NCR 'Debt Review Task Team Agreements of 2010' Circular 2 of 2015.

[98] National Treasury *Treating Customers Fairly in the Financial Sector* (n 22) 34.

mandated to protect the veracity of the South African financial market and consumers.[99] It has a supportive role insofar as financial stability is concerned.[100] In doing so, it has been endowed with regulatory independence insofar as it can issue behaviour-changing conduct standards enforceable in a court of law: 'The responsible authority for a financial sector law may commence proceedings against a person in the High Court for an order to ensure compliance with the financial sector law.'[101] This means that those financial sector laws that the Financial Sector Conduct Authority is responsible for, is binding even where these laws were generated by the Conduct authority. Section 1 of the Financial Sector Regulation Act determines that 'financial sector law' includes 'a regulatory instrument made in terms of this Act' and 'regulatory instrument' includes 'a conduct standard'. In terms of section 106(1), the Conduct Authority is enabled to create these norms within the substantive boundaries set by the Regulation Act. It can retract or modify its own standards.[102]

4.2.2. Guidance

The provisions pertaining to conduct standards[103] are divided into four categories and these are interrelated to some extent. Firstly, the Act provides for a target to whom the standard will apply.[104] Secondly, provision is made for the standard to meet a specific objective.[105]

[99] Ss 57(a) & (b) of the FSRA.

[100] Ss 57(c) of the FSRA.

[101] S 152(1) of the FSRA.

[102] S 108(3) of the FSRA.

[103] National Treasury *Treating Customers Fairly in the Financial Sector* (n 22) 37: 'In effect, conduct standards are the rule-making instrument created through the FSR Bill to give effect to legislative powers delegated to the FSCA i.e. they will apply generally to the industry, sub-sector or category of financial institution or regulated activity concerned. The power to issue conduct standards will over time effectively replace existing FSB powers to issue Notices, Board Notices and Rules, and are to be consolidated into a single handbook, similar to that published in the UK.'

[104] S 106(1) of the FSRA: 'The Financial Sector Conduct Authority may make conduct standards for or in respect of—*(a)* financial institutions; *(b)* representatives of financial institutions; *(c)* key persons of financial institutions; and *(d)* contractors.'

[105] S 106(2) of the FSRA: 'A conduct standard must be aimed at one or more of the following: *(a)* Ensuring the efficiency and integrity of financial markets; *(b)* ensuring that financial institutions and representatives treat financial customers fairly; *(c)* ensuring that financial education programs, or other activities promoting financial literacy are appropriate; *(d)* reducing the risk that financial institutions, representatives, key persons and contractors engage in conduct that is or contributes to financial crime; and *(e)* assisting in maintaining financial stability.'

Thirdly, the standard may have bearing on a specific subject matter.[106] Fourthly, the standard may prohibit particular behaviour:

> 'A conduct standard may declare specific conduct in connection with a financial product or a financial service to be unfair business conduct if the conduct—*(a)* is or is likely to be materially inconsistent with the fair treatment of financial customers; *(b)* is deceiving, misleading or is likely to deceive or mislead financial customers; *(c)* is unfairly prejudicing or is likely to unfairly prejudice financial customers or a category of financial customers; or *(d)* impedes in any other way the achievement of any of the objectives of a financial sector law.'[107]

In terms of section 108, the Financial Sector Conduct Authority has authority in respect of standards for a number of matters. These provisions set a fifth category for standards: measures that will enable the Conduct Authority to reach the regulatory objectives determined by section 57.[108] In addition, section 108(2) provides that

[106] S 106(3) of the FSRA: 'Without limiting subsections (1) and (2), a conduct standard may be made on any of the following matters: *(a)* Efficiency and integrity requirements forfor financial markets; *(b)* measures to combat abusive practices; *(c)* requirements for the fair treatment of financial customers, including in relation to—(i) the design and suitability of financial products and financial services; (ii) the promotion, marketing and distribution of, and advice in relation to, those products and services; (iii) the resolution of complaints and disputes concerning those products and services, including redress; (iv) the disclosure of information to financial customers; and (v) principles, guiding processes and procedures for the refusal, withdrawal or closure of a financial product or a financial service by a financial institution in respect of one or more financial customers, taking into consideration relevant international standards and practices, and subject to the requirements of any other financial sector law or the Financial Intelligence Centre Act, including—*(aa)* disclosures to be made to the financial customer; and *(bb)* reporting of any refusal, withdrawal or closure to a financial sector regulator; *(d)* the design, suitability, implementation, monitoring and evaluation of financial education programs, or other initiatives promoting financial literacy; *(e)* matters on which a regulatory instrument may be made by the Financial Sector Conduct Authority in terms of a specific financial sector law; *(f)* matters that may in terms of any other provision of this Act be regulated by conduct standards; and *(g)* any other matter that is appropriate and necessary for achieving any of the aims set out in subsection (2).'

[107] S 106(4) of the FSRA.

[108] S 108(2) of the FSRA: '*(a)* Fit and proper person requirements, including in relation to—(i) personal character qualities of honesty and integrity; (ii) competence, including experience, qualifications and knowledge; and (iii) financial standing; *(b)* governance, including in relation to—(i) the composition, membership and operation of governing bodies and of substructures of governing bodies; and (ii) the roles and responsibilities of governing bodies and their substructures; *(c)* the appointment, duties, responsibilities, remuneration, reward, incentive schemes and, subject to applicable labour legislation, the suspension and dismissal of, members of governing bodies and of their substructures; *(d)* the appointment, duties, responsibilities, remuneration, reward, incentive schemes and, subject to applicable labour legislation, the suspension and dismissal of, key persons; *(e)* the operation of, and operational requirements for, financial institutions; *(f)* financial management, including—(i) accounting, actuarial and auditing requirements; (ii) asset, debt, transaction, acquisition and disposal management; and (iii) financial statements, updates on financial position, and public reporting and disclosures; *(g)* risk management and internal control requirements; *(h)* the control functions of financial institutions, including the outsourcing of control functions; *(i)* record-keeping and data management by financial institutions and representatives; *(j)* reporting by financial institutions and representatives to a financial sector regulator; *(k)* outsourcing by financial institutions; *(l)* insurance arrangements, including reinsurance, of financial institutions; *(m)* the amalgamation, merger, acquisition, disposal and dissolution of financial institutions; *(n)* recovery, resolution and business continuity of financial institutions; *(o)* requirements for identifying and managing conflicts of interest; *(p)* requirements for the safekeeping of assets, including requirements pertaining to the approval and supervision of nominees and custodians.'

> '[a] standard may—*(a)* provide for a financial sector regulator or the Reserve Bank to make determinations, in accordance with procedures defined in a standard, for the purposes of the standard; and *(b)* impose requirements for approval by a financial sector regulator in respect of specified matters'.

My interpretation of this particular subsection is that the Conduct Authority may develop processes and evaluative indicators, publish same as conduct standards and then, following the published processes or based on the set evaluative criteria, conduct appraisals and come to attested conclusions. As such, this may very well mean that the Conduct Authority may issue conduct standards for itself.

The Conduct Authority is further able to issue 'guidance notices', which pertains to the application of relevant legislation but are only informative and not compliance-driven.[109] In contrast, the Regulator is mandated to provide the industry with 'interpretation ruling[s]'[110] which retain its authority until the legislature modifies the law or the judiciary decides differently from the interpretation in part or in whole.[111] The interpretation ruling is publicised as a statement, which statement must also designate the conditions under which the construction or relevance of the interpreted provision would function.[112] The ruling aims to effect clarity, uniformity and sureness in understanding and applying financial sector laws,[113] and it binds the Conduct Authority.[114]

4.3. Preliminary analysis of the regulatory authority of the National Credit Regulator and the Financial Sector Conduct Authority

The National Regulator has some indirect authority to amend the consumer credit landscape through other means, such as the Tribunal, judiciary and the legislature. An undeniable authority-enhancing provision is that of section 82(2), inserted by the National Credit

[109] Ss 141(1) & (2) of the FSRA.

[110] S 142(1) of the FSRA: 'The responsible authority for a financial sector law may publish a statement (an "interpretation ruling") regarding the interpretation or application of a specified provision of that law, in circumstances specified in the statement.'

[111] S 142 (4) of the FSRA: 'An interpretation ruling ceases to be effective if – (a) a provision of the financial sector law that was the subject of the interpretation ruling is repealed or amended in a manner that materially affects the interpretation ruling, in which case the interpretation ruling will cease to be effective from the date that the repeal or amendment is effective; or (b) a court overturns or modifies an interpretation of the financial sector law on which the interpretation ruling is based, in which case the interpretation ruling will cease to be effective from the date of judgment unless- (i) the decision is under appeal; (ii) the decision is fact-specific and the general interpretation upon which the interpretation ruling was based is unaffected; or (iii) the reference to the interpretation upon which the interpretation ruling was based did not form a part of the reasoning on which the judgment of the court was based.'

[112] S 142(1) of the FSRA.

[113] S 142(2) of the FSRA: 'The purpose of an interpretation ruling is to promote clarity, consistency and certainty in the interpretation and application of financial sector laws.'

[114] S 142(3) of the FSRA: 'The responsible authority must interpret and apply the provision of the financial sector law to which the interpretation ruling relates in accordance with the interpretation ruling.'

Amendment Act of 2014: 'The Minister must, on recommendation of the National Credit Regulator, make affordability assessment regulations.'

Another example is the new section 48A of the National Credit Act. Section 48A has been inserted into the National Credit Act to deal with the matter of uniform adherence to a statutory code of conduct.[115] The Minister has been empowered to set a code to combat over-indebtedness after certain procedural steps had been taken by the National Credit Regulator, such as issuing a draft version of the code, deliberating on submissions received from the public in this regard and adjusting the draft as necessary.[116]

The Regulator is tasked to confer with role-players and qualified persons.[117] The contents of the codes must conform to the objectives of the National Credit Act.[118] Section 48A(4) prohibits registrants from breaching the commitments made under the code although specific reference is made to behaviour associated with 'the ordinary course of business'.

In addition, the National Credit Regulator is tasked with continuous observance, data collection and efficacy evaluation in respect of the Minister's codes.[119] The duties imposed on the National Credit Regulator in respect of the codes indicate that the Regulator has an influential role to play in the finalised version of any code that is imposed on the consumer credit industry. Whilst the Minister may plausibly draft the first version of any prospective code,[120] the reformulation and assessment of same is effected by the Regulator as guided by industry deliberations.[121] Notwithstanding the above, the Minister's authority is limited to the type of code envisaged, namely those aimed at the preclusion of financial overextension by consumers. However, as indicated earlier, regulatory autonomy refers to the *Regulator's* ability to effect change *without* recourse to arduous political processes.[122]

In contrast to the National Credit Regulator, the Financial Sector Conduct Authority is authorised to issue determinations that have the force of law and which can change the legal landscape insofar as behaviour of market participants is concerned. The mandating legislation is very broad and it is difficult to fathom an aspect that cannot be brought under the auspices of sections 106 or 108 of the Financial Sector Regulation Act. As such, it is clearly endowed

[115] See Business Enterprises *An Assessment of Debt Counselling* (n 35) 199 in respect of non-adherence to codes of conduct.

[116] S 48A(1)(a), (b) & (d) of the NCA.

[117] S 48A(1)(c)(i) & (ii) of the NCA.

[118] S 48A(2) of the NCA.

[119] S 48A(3) of the NCA.

[120] As the credit industry is privy to codes of conduct for inter alia debt counsellors and credit providers, of which two had been redrafted in 2013, it is doubtful whether the Minister would draft a new code without considering the existing codes.

[121] See s 48A(1) & (3) of the NCA.

[122] See par 4 *supra*.

with independence insofar as regulatory authority is concerned. But, the stronger powers of the Conduct Authority may affect the independence, and efficacy, of the National Credit Regulator.[123] The impact can either be positive or negative. On the one hand, the Financial Sector Regulation Act instructs in section 76(1) that

> '[t]he financial sector regulators and the Reserve Bank must co-operate and collaborate when performing their functions in terms of financial sector laws [and] the National Credit Act … and must for this purpose–
>
> (a) generally assist and support each other in pursuing their objectives in terms of financial sector laws [and] the National Credit Act … (c) strive to adopt consistent regulatory strategies, including addressing regulatory and supervisory challenges … (d) co-ordinate, to the extent appropriate, actions in terms of financial sector laws [and] the National Credit Act …'

On the other hand, section 57(1)(b) determines that the Conduct Authority 'must … co-operate with, and assist, … the National Credit Regulator'. This mandate is qualified by the preceding introductory text of subsection (1): 'In order to achieve its objective …' As such, I would interpret the section as mandating a supportive role only in instances where it would further the Conduct Authority's interests in meeting its statutory obligations. In addition, section 58(5)(a) determines that the Authority has to consider the National Credit Act and the provisions applicable to regulatees by virtue of the National Credit Act.

I dealt with the jurisdictional issues in chapter five but for sake of clarity, a brief reiteration. My approach in the subsequent discussion is also a neutral one, as I would imagine the ideal world to be and not accounting, for now, the realities of incompetence and under-resourced regulatory institutions. The consumer credit regulatory arena is the domain of the National Credit Regulator.

The financial products and services arena is the domain of the Financial Sector Conduct Authority. Whilst the focus of the National Credit Regulator is the welfare and sustainability of the consumer credit market and the protection of credit consumers, the focus of the Conduct Authority is the proficiency and veracity of the financial market and the protection of financial customers.

The National Credit Regulator is designed to be a highly specialised regulator within a broader generalised scheme of financial regulation. Although the Financial Sector Conduct Authority is to be well-versed in meeting its mandate, it has a general mandate and not a focused and delineated one in the same line as the Credit Regulator. However, I am not

[123] See par 4.6 of ch 3; par 4.7 of ch 4 *supra*. See also Freeman & Rossi 'Agency coordination in shared regulatory space' 2012 *Harvard Law Review* 1131 in general and discussed in par 5 of ch 7 *infra*.

convinced that the jurisdictional boundaries set by the Financial Sector Conduct Authority are very clear or does not invite some form of policy trade-off.[124] The relevant parts of the Act read as follows:

> '**"credit"** has the same meaning ascribed to it in section 1 of the National Credit Act …'[125]
>
> 'In this Act **"financial product"** means … except for purposes of Chapter 4 and section 106, the provision of credit provided in terms of a credit agreement in terms of the National Credit Act …'[126]
>
> 'In this Act **"financial service"** means … a service related to the provision of credit …'[127]
>
> 'In relation to a financial institution that is a credit provider regulated in terms of the National Credit Act, the Financial Sector Conduct Authority may, in addition to regulating and supervising the financial institution in respect of the financial services that the financial institution provides, and notwithstanding section 2(1)(g), regulate and supervise the financial institution's conduct in relation to the provision of credit under a credit agreement only in respect of those matters referred to in section 108.'[128]

Section 108 lists aspects, over and above those mentioned in section 106, which may inspire the drafting of conduct standards by the Financial Sector Conduct Authority. The list is broad, ranging from character attributes of natural persons to enterprise policies and procedures.[129] All of these matters speak to the ordinary business practices of regulatees and will necessarily affect those involved in credit extension. In addition, the policy document proposed that the Treating Customers Fairly approach would be endorsed by the new market conduct regulator[130] and this would also affect institutions that provide credit.

As this approach is founded in institutional mores,[131] a true change would have the effect that credit providing institutions regulated for financial services and products would in any event

[124] See e.g. par 3.4 of ch 2 *supra.*

[125] S 1 of the FSRA.

[126] S 2(1)(g) of the FSRA.

[127] S 3(1)(g) of the FSRA.

[128] S 58(2) of the FSRA.

[129] S 106(1) of the FSRA.

[130] National Treasury *Treating Customers Fairly in the Financial Sector* (n 22) 37: 'It is proposed that that the FSCA's powers to develop conduct standards are underpinned by a statement of binding conduct principles that regulated entities are obliged to adhere to, over and above any specific rules-based conduct standards that may apply to them i.e. the conduct principles set out in the CoFI Act would align to the six TCF outcomes …. The CoFI Act would specify these conduct principles – and, if necessary, additional principles relating to specific categories of authorisations – so laying the foundation for outcomes-focused regulation and supervision. It follows that that the legislation should be flexible enough to allow for a finding of non-compliance with the principles without a finding that one or more specific conduct standards have been breached; in other words the law must support judgement-based decision making by the regulator.'

[131] Millard & Maholo 'Treating customers fairly: A new name for existing principles?' 2016 *Journal for Contemporary Roman-Dutch Law* 594 596.

endorse these principles.[132] This could also have an effect on the regulatory approach of the National Credit Regulator because the firm being supervised must ideally have integrated the Treating Customers Fairly approach into its 'DNA'.[133]

5. SUPERVISORY AUTHORITY

> '"Supervisory independence" relates to the management and evaluation of regulated entities as well as the reproach of non-conforming industry members … Firstly, legislative safeguards to prevent personal liability for actions taken in the course of executing duties are put into place ... Secondly, sufficient pecuniary resources must be allocated to retain and remunerate capable staff members and prevent members from being paid off. Thirdly, specified regulatory powers relating to punitive and intrusive authority reduce the need for value judgments and limit the scope of manipulation by either the state or the market. This is an important consideration as, fourthly, it is preferable that the autonomous supervisory body is responsible to bestow and revoke permits as this function does not only speak to the expert knowledge of the configuration of the financial market but it is also a necessary authority to compel appropriate behaviour from regulated firms.'[134]

5.1. The National Credit Regulator

5.1.1. Introduction

As a point of departure for the subsequent discussion, it is of value to differentiate the options available to the Regulator to coerce compliance with the relevant consumer credit statute.[135] I do not surmise that the colloquial understanding of the abilities of the National Credit Regulator can correctly support the view that it is an enforcement body,[136] notwithstanding its designation to this effect.[137] It is primarily an observation organisation with the capacity to initiate evaluative processes, accumulate evidentiary information and commend proper behaviour to regulated entities. The Regulator may guide the industry in respect of acceptable

[132] *Idem* at 597: 'Because the TCF approach suggests a shift towards a culture of flexibility and adaptability by requiring firms to actively work out, of their own accord, what practices constitute fair treatment of customers, firms are required to monitor and measure for themselves whether they are treating customers fairly and whether they have embedded TCF in their organisational culture.'

[133] See Financial Services Board *Treating Customers Fairly The Roadmap* 31 March 2011 20.

[134] See ch 3 par 2.4 *supra*.

[135] For a theoretical background to the concept of coercing compliance, see Grabosky 'Discussion paper: Inside the pyramid: Towards a conceptual framework for the analysis of regulatory systems' 1997 *International Journal of the Sociology of Law* 195.

[136] See Cairns 'Cambist: Where are the regulators?' Moneyweb Special Investigations 17 December 2014, where the Regulator is viewed as 'a guard dog' devoid of 'teeth'.

[137] See e.g. s 15 of the NCA headed '[e]nforcement functions of National Credit Regulator'.

behaviour and has done so in numerous and varied instances.[138] Apart from clarification in respect of its administrative processes[139] and the application of sections of the Act,[140] the Regulator has also approached the judiciary to ascertain the correctness of the interpretation of some of the provisions of the National Credit Act or to address *lacunae* in the legislation.[141] Even so, the Regulator's arguments are only of persuasive value as the court hears not only the instigating party, but also those opposing, and seeking different interpretations.[142]

The Regulator is endowed with certain powers and functions, ranging from granting, and monitoring, access to the market for role-players in line with statutory provisions, to ensuring compliance through supervision and enforcement action.[143] However, from the outset it is important to understand the scope of the Regulator's authority as per the National Credit Act and as implemented in practical terms. The Regulator has very limited direct punitive authority towards non-compliant industry members. The stronger of the Regulator's abilities are found in its initial evaluative function of potential role-players as candidate registrants and its authority to grant, and refuse, access to the industry for anticipant credit providers, debt counsellors, credit bureaus, payment distribution agents and alternative dispute resolution agents. However, where a person or entity has been properly registered, the Regulator has at most persuasive authority to compel compliance with the necessary legislative framework, backed by the threat of further referrals to authoritative bodies. De-registration, administrative fines and criminal sanctions can only be effected by the National Consumer Tribunal, civil and criminal courts after action against non-compliant entities have been instigated or referred by the Regulator.[144]

[138] These instances also related to areas not regulated by the NCA, such as the practical implementation of the debt counselling process – see e.g. NCR 'Fraud or Unethical Behaviour' Circular 1 of 2015; NCR 'Proposed Process for End Balance Differences' Circular 4 of 2015; NCR 'Debt Review Task Team Agreements of 2010' Circular 2 of 2015; NCR 'Unallocated PDA Payments' Circular 7 of 2013; NCR 'Assessment Findings on Voluntary Debt Mediation Solution' Circular 6 of 2012.

[139] S 16(1)(b)(i) of the NCA; NCR 'Assurance Engagement Report Guideline' Guideline 3 of 2010; NCR 'Compliance Report Guideline' Guideline 2 of 2010.

[140] NCR 'Interpretation and application of s 103(5)' Public Notice 30 January 2015.

[141] S 16(1)(b)(ii). See *National Credit Regulator v Nedbank Limited and Others* 2009 (6) SA 295 (GNP) & *African Bank Limited v Additional Magistrate Myambo NO and Others* 2010 (6) SA 298 (GNP) for initiatives by the Regulator and *National Credit Regulator v Nedbank Limited* (n 141) & *Sebola and Another v Standard Bank of South Africa and Others* 2012 (5) SA 142 (CC) for examples of matters where the NCR was either joined as an interested party in the proceedings or as amicus curiae.

[142] See e.g. *National Credit Regulator v Nedbank Limited* (n 141); *Sebola v Standard Bank of South Africa* (n 141).

[143] See par 3.2 of ch 5 *supra*.

[144] See e.g. ss 57, 140, 150, 151 & 161 of the NCA.

5.1.2. Registration

The registration function of the Regulator is set as the means of regulating the consumer credit industry.[145] All credit providers, debt counsellors, credit bureaus, payment distribution agents and alternative dispute resolution agents are statutorily obliged to register with the National Credit Regulator.[146] In executing this duty, the Regulator is comprehensively guided by the provisions of the National Credit Act in respect of each category of candidate but is also given some discretion to decide whether to allow the registration or not. As such, it has developed registration requirements that exceed the checklist set out in the Act to decide whether the registrant is suited to enter the market.[147]

Although the legislation sets out the features of a prospective registrant in order to qualify for registration, the Regulator has to determine whether these features are 'sufficient' or 'adequate' [148] or whether there are 'compelling' reasons to refuse the application for registration. [149] It has further developed registration procedures, requesting specific information as authorised in section 45(2).[150] The only statutory limitation on this section is that the information so requested has to be 'relevant' *re* the application for registration.[151] In addition, developmental credit is viewed as a mode through which the endorsement of the market as per section 13(a) can be achieved and the Regulator is endowed with the authority to draft the conditions in terms of which it would allow prospective developmental credit

[145] S 14 of the NCA.
[146] Ss 40(1), 43(2), 44(2), 44A(2)(a), 134A, read with section 54(2) of the NCA.
[147] See Boraine & Van Wyk 'Credit bureaus in South Africa and Namibia: A comparative analysis of the regulatory frameworks evaluated against the World Bank's principles for credit reporting: Part 2' 2017 *Comparative and International Law Journal of Southern Africa* 303 306. See also par 3.2.6 of ch 5 *supra.*
[148] See e.g. ss 41(2) & 43(3) of the NCA (in respect of developmental credit provision and credit bureaus).
[149] S 45 (3) of the NCA.
[150] E.g. http://www.ncr.org.za/ncr-departments/registrations-compliance/credit-bureaus/cb-how-do-i-register.
[151] S 45(2)(a) of the NCA.

providers to acquire supplementary registration, authorising them to extend credit for developmental purposes.[152]

In terms of the amended section 45(3), the National Credit Regulator is required to register a prospective credit provider, debt counsellor, credit bureau, payment distribution agency or alternative dispute resolution agent, if the request for registration meets the procedural and substantive requirements set out in the National Credit Act. The legislative eligibility requirements are therefore the point of departure for a successful registration application, but the Regulator has been granted a further discretionary mandate through the amendments to this subsection. The Regulator is now authorised to refuse registration where it 'is of the view that there are other compelling grounds that disqualify the applicant from being registered in terms of this Act'.[153] The formed opinion of the Regulator is supposedly based on the outcome of 'a fit and proper test or any other prescribed test' to which the Regulator submits the prospective registrant.[154] In some instances, the Regulator is also authorised to accept a 'credible plan' where a prospective registrant does not have all the required features in place, but can assure the Regulator that it will be able to effect same.[155]

In terms of section 48(3), read with section 14(a) and section 45, the Regulator has the opportunity to suggest conditions of registration to a prospective registrant. The conditions have to be provided in writing to the prospective registrant, accompanied by the motivation

[152] See s 13(b), read with s 10 of the NCA. Developmental credit is not defined *per se* and only referred to in s 1 as 'a credit agreement that satisfies the criteria set out in section 10'. S 10(1) categorises developmental credit agreements primarily in relation to supplementary registration, the person of the consumer and credit provider and the aim of the credit extension: 'A credit agreement, irrespective of its form, type or category, is a developmental credit agreement if – (a) at the time the agreement is entered into, the credit provider holds a supplementary registration certificate issued in terms of an application contemplated in section 41; and (b) the credit agreement is – (i) between a credit co-operative as credit provider, and a member of that credit co-operative as consumer, if profit is not the dominant purpose for entering into the agreement, and the principal debt under that agreement does not exceed the prescribed maximum amount; (ii) an educational loan; or (iii) entered into for any of the following purposes – (aa) development of a small business; (bb) the acquisition, rehabilitation, building or expansion of low income housing; or (cc) any other purpose prescribed in section (2)(a).' S 2 authorises the Minister of Trade and Industry to impose additional objectives for the granting of credit (referring back to s 10(1)(b)(iii)(cc), set the highest limit for the principal debt, exceeding which the credit agreement would not necessarily be considered as developmental credit extension (referring back to s 10(1)(b)(i) and allows the Minister to stipulate the maxims by which the NCR should exercise its opinion on 'whether a credit provider's dominant purpose for making an agreement was profit or a purpose other than profit' – see s 2(a), (b) and (c) respectively. In ss 2(a) and (c), the 'socio-economic development and welfare of persons contemplated in section 13(a)' are prime considerations that the Minister must account for. One of the pecuniary benefits that a developmental credit agreement poses is the permitted interest rate that may be charged in terms of reg 42 – this is, apart from short-term credit agreements and along with unsecured credit agreements, the second highest limit allowed in terms of the NCA.

[153] S 45(3) of the NCA.

[154] S 45(3) of the NCA.

[155] See e.g. ss 43(3)(b) & (c) of the NCA. See also s 44(3)(b) of the NCA.

behind the imposition of the conditions sought to be imposed.[156] The prospective registrant may dispute the conditions and upon consideration of the point(s) of dispute, the Regulator is empowered to coerce consent to the conditions at the applicant's risk of non-registration.[157] Section 14(a) directs the Regulator to register three categories of credit functionaries, namely credit providers, credit bureaux and debt counsellors. The amendment to the Act provides for two more categories to be added to the list, namely Payment Distribution Agencies and Alternative Dispute Resolution Agents.[158]

The Regulator has not hesitated to employ the conditions attached to registrations as a mode of managing the behaviour of registrants, particularly debt counsellors.[159] A future analysis of the grounds for enforcement action by the Regulator would be valuable. The analysis can determine whether enforcement is based on direct violation of statute or prescriptions that were imposed by the Regulator through the conditions assented to, even though it is not directly founded in the National Credit Act, Regulations or another applicable statute.[160]

A Task Team, comprising of industry role-players (individuals), was founded by the Regulator to ascertain the details of obstructions to the debt review process and to present solutions to counter the detected impediments.[161] The solutions were *inter alia* presented in the form of 'enhanced debt review process guidelines'[162] and industry role-players were encouraged to follow the presented procedure to facilitate and expedite the debt review process.[163] Conforming to the propositions of the Task Team would necessitate some effort from the conformist, including the adaptation of existing forms and procedures to align with the 'standardized' versions of similar documents and processes.[164] The Task Team also

[156] S 48(3) of the NCA.

[157] S 48(6)(b) of the NCA.

[158] Ss 44A & 134A of the NCA respectively.

[159] See e.g. NCR 'Debt Counselling Circular' Circular 9 of 2009 where the NCR urged compliance with conditions of registration in respect of a database where debt counsellors were obliged to upload information about their clients

[160] A research project undertaken in this regard would render valuable insights as to whether this is a mechanisms actually employed by the Regulator as opposed to a mere tool used for deterrence.

[161] NCR *National Credit Regulator Debt Review Task Team Report* May 2010 Summary par 1.1 p 2.

[162] NCR *Debt Review Task Team Report* (n 161) par 3.3 p 4; Covering Report par 5.3 p 9; Annexure B (Proposed Debt Review Process Enhancements and Code of Conduct Provisions) par 1 p 3.

[163] NCR *Debt Review Task Team Report* (n 161) par 4.1 p 4; Covering Report par 6.1 p 11; Annexure B (Proposed Debt Review Process Enhancements and Code of Conduct Provisions) par 1 p 3.

[164] NCR *Debt Review Task Team Report* (n 161) Annexure B (Proposed Debt Review Process Enhancements and Code of Conduct Provisions) par 1 p 3 – see as specific examples the use of uniform precedents for certificates of balance (par 2.2.1 p 3) and repayment plans (par 2.3.5 p 4), additional steps in the debt review process such as presenting the credit provider with a repayment proposal for consideration, comment and confirmation (par 2.3.5.& 2.3.6 p 4) and following the guidelines for evaluating a consumer's financial circumstances for purposes of ascertaining whether the consumer is over-indebted and for purposes of drafting a debt review repayment proposal (Annexure C – Proposed Debt Review Assessment Guidelines).

advised the development of codes of conduct for debt counsellors, credit providers and payment distribution agencies.[165]

As indicated above, the Regulator is empowered to propose and impose conditions of registration. In some instances, the conditions of registration for debt counsellors contain a reference to the voluntary measures set out in the Task Team Report and are submitted for signature by the prospective registrant together with a version of the Debt Counsellor's Codes of Conduct, which may form an annexure to the Conditions.[166]

In this manner, the Regulator can coerce compliance with the voluntary measures set by the Task Team in terms of section 55(1)(b) the section mandates the Regulator to reproach a registrant for non-compliance with conditions of registration. The sanction for repeated non-compliance with conditions of registration is de-registration by the National Consumer Tribunal in terms of section 57(1)(a).

5.1.3. Enforcement

The Regulator's formal enforcement procedure begins with the issuing of a compliance notice in terms of section 55 which must *inter alia* set out the conduct that it deems unacceptable[167] but the prevalent view in literature is that the Regulator may not deregister a registrant as this is a prerogative reserved for the Tribunal in terms of section 150.[168] Only an institution with an authoritative mandate that exceeds that of the National Credit Regulator, such as the National Consumer Tribunal or National Prosecuting Agency, will be able to coerce actual compliance because it can impose punitive measures where there have been improper behaviour.[169] The Tribunal may, for example, impose administrative penalties in terms of section 151 and deregister a registrant in terms of section 150(g), prerogatives that the Regulator does not enjoy. However, the Regulator is responsible for monitoring compliance, finding transgressors and acting in a suitable manner to ensure that the undesirable behaviour is addressed. The Tribunal has no authority to seek out and deal with breaches of law on its own accord – it is a responsive entity that can only act when it is approached by persons with *locus standi* and called upon to effect its mandate.

[165] NCR *Debt Review Task Team Report* (n 161) (Proposed Debt Review Process Enhancements and Code of Conduct Provisions) par 1 p 3; par 3 pp 8-10.

[166] NCR *Conditions of Registration* (n 52) 3 & annexed *Debt Counsellor's Code of Conduct for Debt Review* 2.

[167] See the discussion of *Matjokana v National Credit Regulator* [2012] ZANCT 16 *infra*.

[168] Incidentally, the first draft of the National Credit Amendment Act published on 29 May 2013 made provision for enhanced regulatory powers – see *Draft National Credit Amendment Bill, 2013*: *Invitation for public to comment on the Draft National Credit Amendment Bill, 2013* General Notice 560 Vol 575 GG 36505 29 May 2013 cl 7 proposing amendments to s 57 of the NCA.

[169] See e.g. ss 55(6) & 140(1) of the NCA.

The first official statutory step to address undesirable behaviour is a compliance notice.[170] A compliance notice is conveyed to a person allegedly engaging in unlawful conduct or undesirable consumer credit practices including disregard for legislation or conditions of registration – the latter is permitted by virtue of section 48 of the National Credit Act.[171] This notice, and potential consequences, is valid and can only be voided by the Tribunal or by compliance with the contents to the satisfaction of the Regulator.[172] The National Credit Act, read with the provisions of the Promotion of Administrative Justice Act,[173] allows the alleged contravener to contest the notice in the Tribunal and to have the Tribunal decision reviewed or appealed in a civil court of law.[174] The Regulator can also refer the matter to the Tribunal, or National Prosecuting Authority where relevant, for punitive action upon non-compliance by a delinquent.[175]

Undesirable conduct may also be dealt with by the Regulator where it is brought to its attention or instigated by own initiative through a 'complaint'.[176] It must inspect and relegate the matter to the necessary authority, such as the National Consumer Tribunal or the National Prosecuting Authority, where it is found that there is merit in the matter.[177]

Some industry role-players seem to view the Regulator as a facilitator to improved compliance with the required behaviour or expect supportive behaviour from the Regulator.[178] In the matter of *Matjokana v National Credit Regulator*, Matjokana was a debt counsellor whose activities had twice been the subject of compliance notices.[179] The first

[170] S 55(1) of the NCA. However, the NCR initially indicated that it would first send a 'formal instructional letter' prior to taking legislative steps such as notice and referral to the Tribunal – see NCR 'Debt Counselling Circular' Circular 9 of 2009 2.

[171] S 55(1) of the NCA. The effect of the wording of this section, as can be seen from *National Credit Regulator v Lightning Cash Loans CC* [2013] ZANCT 22 is that a registrant that has not adhered to a statutory provision can also be charged with disregarding its conditions of registration where the conditions stipulate that the registrant will adhere to relevant statutory provisions – see par 3. See also paras 10 & 11 of *National Credit Regulator v Season Star Trading 333 CC t/a De Noon's Cash Loans* [2013] ZANCT 41 (21 November 2013) where reference is made to s 57(1) and the NCT states that '…a registrant's registration may be cancelled by the Tribunal upon application by the Regulator (Applicant in this matter) if the registrant (Respondent in this matter) repeatedly fails to comply with any condition of registration and contravenes the Act. The meaning of repeated contraventions have been considered by the Tribunal on a number of occasions, most prominently in the cases of *NCR v Petrus Martinus Ferreira* and *NCR v JW Van Zyl* wherein the Tribunal held that the registrant had repeatedly contravened the Act, Regulations and Conditions of Registration where it engaged in similar contraventions in respect of multiple consumers.'

[172] Ss 55(4) & 55(5) of the NCA.

[173] As was seen in the matter of *Matjokana v National Credit Regulator* (n 167).

[174] See s 55(3)(a), 56, 59(1), 59(3) and 148.

[175] S 55(6) of the NCA.

[176] Ss 136, 137, 139 & 140.

[177] *Ibid*.

[178] Julia Black wrote an insightful article about 'Regulation as Facilitation', which imparted this view in me – see Black 1998 *Mod. L. Rev.*.

[179] *Matjokana v National Credit Regulator* (n 167) paras 5 & 8.

notice did not meet the legislative requirements and the Tribunal dismissed the notice.[180] In respect of the second notice, the written decisions of the Tribunal indicate that Matjokana and the Regulator engaged with each other in order to deal with the matter.[181] The matter was referred by application to the Tribunal due to the inability of the parties to determine the matter in a consensual manner.[182] Matjokana opined that the National Credit Regulator should provide him with the chance to 'show good cause' and rationalise the contentious conduct.[183] *Contra* to this view, the Regulator argued that Matjokana enjoyed 'ample opportunity to discuss the compliance notice and to show that he was indeed compliant'.[184]

In *National Credit Regulator v Capitec Bank Limited*, Capitec informed the Tribunal of its dedication to achieve due observance of the National Credit Act.[185] Although the submissions were presented as part of the hearing and reiterated in the Tribunal's written decisions, it is unknown to which extent, if any, these contentions were taken into account or influenced the ultimate decision by the Tribunal. This was done through, *inter* alia, reference to its membership with the Banking Council, efforts to communicate with the Regulator on issues concerning adherence to the legislation[186] and internal measures to achieve conformity.[187] In addition, the Bank stated that the legislation is intricate, occasionally unclear and conflicting.[188] In concluding the submission, it was stated that

[180] *Idem* at par 5.

[181] *Idem* at par 8: 'Resulting from this investigation the Respondent proceeded to have a compliance notice issued against the Applicant on 08 July 2011 ("second compliance notice"). Subsequent to the issuance of the second compliance notice the Applicant addressed correspondence to the Respondent to resolve the issues he identified with the compliance notice. Copies of the correspondence and the responses thereto are annexed to the Founding Affidavit. The parties also eventually met on 04 August 2011 in an attempt to have the matter resolved.'

[182] *Matjokana v National Credit Regulator* (n 167) par 9.

[183] *Idem* at par 13.

[184] *Idem* at par 16.4.v. In the matter of *National Credit Regulator v Season Star Trading 333 CC t/a De Noon's Cash Loans* (n 171), the NCT dismissed the submission by the credit provider that it did not purport to disregard the provisions of the legislation and should therefor not be held to account. The NCR's contention that the sole evidentiary requisite is 'to prove that conduct took place to establish prohibited conduct' was accepted by the NCT – see paras 29 & 39. The NCT further held, at par 40, that '[i]ntention ("mens rea"), is not a requirement to establish a contravention of the NCA once the Regulator proved that the conduct took place, nor is the lack of intention or motive ("mens rea"), a defence. This could however be a factor to take into account when determining the appropriate sanction.'

[185] *National Credit Regulator v Capitec Bank Limited* [2014] ZANCT 14 paras 25-30.

[186] *Idem* at par 25.

[187] *Idem* at paras 26-28.

[188] *Idem* at par 29.

> '...mistakes are inevitable. However, when errors are brought to the Respondent's attention, they are immediately rectified. The Applicant failed to afford the Respondent such opportunity and rushed to the Tribunal. The Respondent is of the view that such an approach is unfair and entirely inappropriate.'[189]

The National Credit Regulator has been affected by industry developments and has endorsed or assumed some innovations created by industry members.[190] Likewise, some of the practices and perceptions of the Regulator have been challenged or fashioned by decisions of the National Consumer Tribunal or the Judiciary.[191] The matters of *National Credit Regulator v Capitec Bank Limited*[192] and *Matjokana v National Credit Regulator*[193] serve as examples.

5.1.4. Case studies

The National Consumer Tribunal interpreted the legislative provisions pertaining to the ability of the National Credit Regulator to act proactively in investigating and enforcing compliance with the National Credit Act, restrictively. On the one hand, the decision supports a perception of the Tribunal as a restraining factor for an authoritative body with considerable

[189] *Idem* at par 30.

[190] See par 6 *infra*.

[191] The Constitutional Court has recognized that it also has a duty to shape the mercantile market – see *Kubyana v Standard Bank of South Africa Ltd* 2014 (3) SA 56 (CC) par 17: 'This case concerns the proper interpretation of a statute that regulates commercial activity undertaken by many people and institutions on a daily basis. The issues at stake are therefore of fundamental importance to many South Africans. Furthermore, this matter requires us to clarify the scope and application of Sebola. As is apparent from the law reports, there are a number of conflicting superior court decisions dealing with the meaning of section 129 of the Act and the interpretation of that provision by this Court in Sebola. It is imperative for purposes of certainty and the proper functioning of the marketplace that we identify the rights and obligations of both credit providers and consumers under the Act and specifically under section 129. In sum, this matter implicates constitutional issues that the interests of justice require us to determine. Leave to appeal is therefore granted.' For examples of the impact of the judiciary on the Regulator's regulatory actions, see par 4.1.4 *supra*.

[192] (n 185). See also Govender (n 39) 27-28.

[193] (n 167).

power over industry members.[194] On the other hand, the approach highlights the constraints levied upon regulators by legislation as impediments to limitless exercise of power.[195]

Capitec Bank Limited was subjected to a forensic assessment by contractors commissioned by the National Credit Regulator.[196] The assessment was undertaken on the initiative of the Regulator and not in response to an explicit problem brought to the attention of the Regulator.[197] The National Credit Act specifically prescribes the procedures to be followed and the foundations upon which a matter may be relegated to the National Consumer Tribunal. Upon consideration of the wording of the relevant sections of the National Credit Act and, according to the Tribunal, comparable case law, it was found that 'the Applicant's investigation and subsequent referral to the Tribunal was invalid'.[198] The finding was primarily founded upon the absence of 'any reasonable basis for initiating the complaint or lodging the investigation into the Respondent's activities as a credit provider'.[199]

The investigating firm's mandate was set in broad terms, revolving around the modus operandi of Capitec and observance of statutory prescriptions.[200] The enquiry into the activities of the Bank resulted in the alleged discovery and subsequent reporting of multiple transgressions to the Regulator.[201] Alleged contraventions included deviations from the prescriptions relating to the contents of credit agreements, the provision of pre-contractual

[194] See s 59(1) of the NCA: 'A person affected by a decision of the National Credit Regulator under this Chapter may apply to the Tribunal to review that decision, and the Tribunal may make an order confirming or setting aside the decision in whole or in part.' The chapter referred to is ch 3, which deals with 'consumer credit industry regulation'.

[195] This provides, although unrelated, a rationale for a statement made in support of the introduction of the Financial Sector Regulation Bill in relation to proposed '[o]utcome based supervision' for the envisioned regulatory authority – National Treasury *Treating Customers Fairly in the Financial Sector* (n 22) 92: 'Until recently, market conduct regulators concentrated on setting conduct rules, periodically assessing financial institutions for compliance with these, and issuing fines for non-compliance. Rules were made in response to poor practices observed, which inevitably meant the regulator responded to poor conduct practices only after their relative prevalence. Moreover, institutions were only held to account once a rule was contravened, meaning that many customers had already suffered by the time of remedial regulatory action.' See fn 283 *infra*. See also Cairns (n 136): 'Which leads to the second big worry, which is the time for regulators to act in a case like this. It took two years for the matter to be formally referred to the NCR for it to conduct a full investigation, and another nine months later there is still no final report. For regulators to be effective, they have to be able to step in as quickly as possible to prevent investors from losing money before its too late'. Cairns references sources that criticise both the ability of the NCR to achieve its founding aims and the statutory framework, in effect stating 'that this delay is symptomatic of the systemic weakness at the NCR. [I]t is clear that the NCR is not fully capable of fulfilling its mandate ... [t]here is a capacity constraint, in that it is underfunded given the size of the problem and the size of its mandate' and, referencing another source, 'that it is also important to bear in mind that the regulator can only be as good as the legislation behind it'.

[196] *National Credit Regulator v Capitec Bank Limited* (n 185) paras 9-13.

[197] *Idem* at par 33.

[198] *Idem* at paras 31-37 & 79.

[199] *Idem* at par 78.

[200] *Idem* at par 33.

[201] *Idem* at paras 13-14.

information, payment of interest and fees as well as pre-contractual assessment of the affordability of the credit for the consumer.[202]

Capitec opposed the Regulator's application to the Tribunal based on the Regulator's lack of observance of the protocol set out in the National Credit Act as well as in the Promotion of Administrative Justice Act.[203] Firstly, the mandate and actions of the investigating auditors were viewed as 'a fishing expedition'[204] which subsequently resulted in a referral to the Tribunal that had not been founded through a complaint sanctioned by the legislature and not examined by a person duly authorised in terms of the National Credit Act to do so.[205] The submission was that there should be a connection between enforcement action by the Regulator and suspected infringement of a specific statutory provision of the National Credit Act.[206] The absence of this relation invalidated any subsequent procedural steps to remit the matter to the Tribunal.[207] Furthermore, due compliance with the provisions of the National Credit Act was not sufficient and the Regulator should also have complied with the relevant requirements of administrative law.[208]

The National Consumer Tribunal agreed with the arguments presented by Capitec in respect of the correct protocol for investigation and enforcement set out in the National Credit Act.[209] The deviation by the Regulator from the set procedure, ostensibly removed from the merits of the matter, resulted in the dismissal of the application for numerous reasons. Firstly, the motivation for the investigation into the affairs of Capitec was not preceded by an awareness of a discernible infringement of the National Credit Act.[210] The Regulator did not apply its mind in considering whether there were any merits in an investigation into Capitec's affairs and in this regard, the Tribunal noted that

[202] *Idem* at paras 14.1-14.5.
[203] *Idem* at paras 31-37.
[204] *Idem* at par 18.
[205] *Idem* at paras 31-37.
[206] *Idem* at par 32.
[207] *Idem* at par 37.
[208] *Idem* at paras 38-43.
[209] *Idem* at paras 71, 77-79. The Tribunal relied on case law that considered, in its opinion, comparable provisions in respect of the Competition Commission – see par 61 *et seq*.
[210] *National Credit Regulator v Capitec Bank Limited* (n 185) par 78.

> 'the Applicant must have had a reasonable basis for believing a complaint against the Respondent was justified before it lodged an investigation. The Applicant could further not have initiated a complaint and lodged an investigation purely as a fishing expedition as such, to establish whether the Respondent complied with the Act.'[211]

The unsubstantiated instigation of the enquiry nullified the subsequent evaluation and remittance to the Tribunal.[212]

The procedural approach that the Tribunal took whilst considering the issues at hand raises the question whether the decision on the preliminary issues was truly unaffected by the merits of the matter. The issues were respectively seceded between the legitimacy of the assignment to the Tribunal and the significance of the allegations of contravention.[213] Ordinarily, and ironically in terms of the wording of the Tribunal's own judgment, a preliminary matter would be finalised prior to proceeding to the main issue and, in this case the logical flow of proceedings would be to decide that matter regarding the authenticity of the referral to the Tribunal prior to dealing with the reason for the referral, namely the proscribed behaviour.[214] In this matter, the Tribunal heeded argument on the legality of the investigation and proceeded to allow argument on the merits of the matter without attending to the preliminary matter.[215] As the Tribunal found the reference of the Regulator to be illicit, the matter of statutory non-compliance was not decided.[216]

The matter of *Matjokana v National Credit Regulator* was determined before *National Credit Regulator v Capitec Bank Limited* and related to compliance notices as opposed to matters referred by virtue of a 'complaint', but the approach of the Tribunal in respect of its requirement of proper and comprehensive information is similar. Matjokana opposed the validity of the compliance notice on the grounds that it 'is ambiguous, vague, and embarrassing in that the Regulator failed to set out the nature and extent of non-compliance, the steps to be taken by the Applicant to become compliant and the penalty that may be

[211] *Idem* at par 69.
[212] *Idem* at par 79. Unfortunately, the Tribunal did not make a discernable decision on whether the investigation itself was faulty or not, as Capitec argued that it had been conducted by an unauthorised person (see paras 34-36).
[213] *National Credit Regulator v Capitec Bank Limited* (n 185) par 49 – the issues were respectively 'the validity of the investigation and referral' and 'the alleged prohibited conduct'.
[214] *National Credit Regulator v Capitec Bank Limited* (n 185) paras 51-52: 'The Respondent raised a number of points in limine. Points in limine must be addressed and answered first before the main allegations regarding the prohibited conduct can be considered. For purposes of this judgment the Tribunal will confine itself to considering the circumstances under which the Applicant initiated the investigation and whether the referral to the Tribunal was lawful.'
[215] *National Credit Regulator v Capitec Bank Limited* (n 185) par 50.
[216] *Idem* at par 80: 'As the investigation and referral was invalid the Tribunal is unable to consider the merits of the allegations against the Respondent regarding prohibited conduct.'

imposed'.[217] In particular, the Tribunal highlighted the administrative nature of the Regulator's performance, which compels processes that support 'lawful, reasonable and procedurally fair' imparting of compliance notices.[218] Apart from adequately informing the contravener of its non-compliance, another requirement is the proper substantiation of the notion of contravention.[219] The approach in Matjokana was referenced and expanded upon in *National Credit Regulator v Season Star Trading 333 CC t/a De Noon's Cash Loans*:

> '...[R]egistrants can never be held liable on the basis of a broad and vague allegation such as "contraventions of the Act". The Regulator will have to be much more specific to enable the registrant to answer to the allegation. Not doing so would render the Regulator vulnerable to a charge of infringing the right of the registrant to know and answer to the specific charge against him and the factual basis thereof. This is not possible in a broadly formulated charge that the registrant contravened the provisions of the Act, regulations and/or its conditions of registration.'[220]

5.2. The Financial Sector Conduct Authority

5.2.1. Introduction

In contrast with the scheme under the National Credit Act, where the substantive regulatory regime is set out together with the supervisory framework, the Financial Sector Regulation Act sets out the regulatory framework for the financial sector to be implemented in accordance with the different substantive statutes. The idea is to harmonise the substantive framework at a later stage through a Conduct of Financial Institutions Act.[221]

5.2.2. Licensing

The Financial Sector Conduct Authority is the responsible authority referred to in chapter 8 of the Financial Sector Regulation Act, which deals with licensing. In terms of schedule 2 of the Act, it is the responsible authority for matters related to the Pension Funds Act (Act 24 of 1956); the Friendly Societies Act (Act 25 of 1956); the Financial Advisory and Intermediary Services Act (Act 37 of 2002); the Collective Investments Schemes Control Act (Act 45 of 2002); the Financial Markets Act (Act 19 of 2012); the Credit Rating Services Act (Act 24 of 2012); the Long-term Insurance Act (Act 52 of 1998) (for matters connected to the aims of

[217] *Matjokana v National Credit Regulator* (n 167) par 11.

[218] *Idem* at par 19.

[219] *Idem* at par 21.1: '[T]he Regulator has reasonable grounds for its view that the registrant is non-compliant with the provisions of the Act, or acting in a manner that is inconsistent with this Act; or did not comply with his conditions of registration.' See also paras 21.2 & 22, referring to s 55(3) which lists the contents of any compliance notice.

[220] (n 171) par 18.

[221] National Treasury *Treating Customers Fairly in the Financial Sector* (n 22) 33-34. See also Millard 'COFI and T(CF): Further along the road to Twin Peaks' in Hugo & Du Toit (eds) *Annual Banking Law Update 2017 Recent legal developments of special interest to banks* 113 113, 129-130.

the Financial Sector Conduct Authority); the Short-term Insurance Act (Act 53 of 1998) (for matters connected to the aims of the Financial Sector Conduct Authority); and any Financial Sector Conduct Authority-designed regulatory instrument and joint standard connected to the aims of the Financial Sector Conduct Authority. Licensing matters pertaining to these statutes are the responsibility of the Conduct Authority.

The Financial Sector Conduct Authority is empowered to grant, change, defer and retract a licence.[222]

> ‘The FSR Bill proposes an activity-based system of authorisations for regulated entities with tough fit and proper standards for authorised activities. Irrespective of the scope or size of a financial institution’s business, that entity must be authorised to carry out the regulated activities concerned…It is proposed that the FSCA will issue each provider with a single licence that authorises them to: … Perform one or more specified financial services … In respect of one or more specified classes of financial products … To one or more specified types of customers … The initial authorisation categories will provide for all known types of financial services, financial products and customers. Classes of customers will need to be clearly defined. The new licensing model will be function- and activity-based, replacing the current institution- or sector-based model.’[223]

The Financial Sector Conduct Authority as Regulator is mandated to give permission for regulatees to participate in the financial market to the extent that the participant is sanctioned to do so.[224] As such, a regulatee is prohibited by law to act without the required registration or registrations, depending on whether the context of the policy document referred to above is considered when projecting a future interpretation of section 111 of the Financial Sector Regulation Act. The policy document is very restrictive insofar as the details of a person’s license and may encompass a system of registrations as opposed to registration.[225] By this I mean that the conduct of the prospective regulatee is but one of the ‘activities-based’ features of the registration as licensing will stipulate the customers that the regulatee will be mandated to interact with, the product or service to be provided as well as the functional element of regulation proposed in the document.[226] I foresee two obvious issues with this attempt at intrusive and pro-active regulation. Firstly, it may very well stifle innovation as moving out

[222] Ss 113(1), 119(1), 120(1) & 121(1) of the FSRA.

[223] National Treasury *Treating Customers Fairly in the Financial Sector* (n 22) 35 (bold typing omitted). See also National Treasury *Treating Customers Fairly in the Financial Sector* (n 22) 36: ‘To the extent possible broad, cross-cutting authorisation criteria will be applied, for example more consistent, cross-sectoral fit-and-proper criteria for management and control functions. However the legislation should also empower the FSCA to apply tailored authorisation criteria for the various authorisation categories, and develop additional authorisation categories or sub-categories as informed by evolving national policy objectives, supervisory experience, emerging conduct risks, product and business model innovation and international standards.’

[224] S 113 read with sch 2 of the FSRA.

[225] National Treasury *Treating Customers Fairly in the Financial Sector* (n 22) 35.

[226] *Ibid*.

of the protective circle of allowed activities drawn by the registration would by implication become unlawful. Secondly, if an attempt is made at avoiding pages of activities required by necessary implication to conduct the licensed activities, a paragraph incorporating these last mentioned activities in a neutral fashion would be necessitated, which could very well become a fertile ground for litigation.

The matter is not yet decided as, on the other hand, the legislative provisions determining substantive licensing is broadly stated and thus dependent on the Regulator's regulatory policy in this regard.[227] At this stage, sections 115 and 116 provide the core aspects that the Regulator has to consider in deciding whether to grant a licence or not. Section 115 require that the Regulator be mindful of its own primary statutory obligations, the resources, relevant 'fit and proper person requirements' and 'governance and risk management arrangements' of the candidate as well as honesty in applying for the license.

Section 116(2) bestows both an obligation to decline a request for licensing and discretion on the Regulator: a successful application is dependent on meeting certain norms to the liking of the Regulator. In terms of section 116(2)(a), the Regulator has to be 'satisfied' that the candidate holds or has access to 'sufficient' pecuniary and other, presumably human, resources to 'ensure' that it is able to meet the demands set by the relevant legislative provisions applicable by virtue of being licensed. In addition, section 116(2)(b) states that the Regulator has to be content that 'issuing the licence to the applicant will not be contrary to the interests of financial customers, the financial sector or the public interest'.

The Regulator has the ability to prescribe the processes for and obligations on participants in the course of applying for licences.[228]Specific categorical statutory examples of procedural determinations include prescriptions pertaining to certain legal business forms, enterprise activities, financial affairs, suitability requirements and internal processes.[229] The Act requires that the Regulator's prescriptions be in writing and published.[230] Licences, terms, and conditions of licences are also to be published as per section 128(1) and schedule 3 of the Act.

[227] S 111(1) of the FSRA: 'A person may not provide, as a business or part of a business, a financial product designated in terms of section 2, or a financial service designated in terms of section 3, except in accordance with a licence in terms of this Chapter.'

[228] S 124(1) of the FSRA.

[229] S 124(2) of the FSRA: 'Requirements determined in terms of subsection (1) may include requirements with respect to – (a) the institutional form of an applicant; (b) an applicant's business activities; (c) an applicant's financial capacity; (d) fit an proper person requirements; and (e) an applicant's operational, management, governance and risk management arrangements.'

[230] S 124(1) & (4) of the FSRA.

The remainder of the chapter proceeds to deal with the authority of the Regulator to determine process, variation, violation and retraction of licenses, in addition to related matters. I do not deal with each and every matter, only those pertaining to supervision. Just as the ability to grant a licence is important, so is the ability to modify or retract a licence and I proceed to deal with the latter as well.

The Financial Sector Conduct Authority has a wide discretion to modify a licence and needs only justify an amendment by associating the change with meeting any of its objectives determined by section 57.[231] The change can be anything from deleting a condition of licensing, modifying such a condition, inserting another condition to amending the permitted scope of participation by the licensee in the market.[232] It may further defer the permission granted by a licence through suspension in four broad cases: upon request by a licensee; where there has been serious non-compliance with licensing conditions, legislation, standards, directives, enforceable undertakings, a pronouncement by the judiciary or tribunal, extraterritorial legislation equal to South African financial laws or disregard for fees, levies, penalties or interest due and payable; where a licensing application contained incorrect or incomplete information that caused the application to be seriously misconstrued or deceitful; and where the suspension is required to avert severe non-compliance with relevant legislation or to protect financial customers from serious adverse consequences.[233]

Insofar as complete retraction of a licence is concerned, this may be effected in terms of section 121(1) under the same circumstances that apply under the conditions where a licence is suspended in terms of section 120(1) and, in addition, where a licensee has discontinued its participation in the market for which it required the licence.

In both instances – suspension and revocation – the Regulator has the option of refusing it where the financial consumer's interests would not be upheld, or the aim of a financial sector law pertaining to the licence would be undermined.[234] The Regulator further has to follow the process set out in section 123 to amend, defer or retract a licence. The process endeavours to inform the licensee of the intended regulatory intervention and explain the motivation thereof to it.[235] The licensee is further given the opportunity to answer on the notification and the

[231] S 119(1) of the FSRA.

[232] S 119(2) of the FSRA: 'A variation of a licence may include – (a) removing or varying a condition of the licence, or adding a condition; and (b) changing the categories of financial products, financial services or financial customers to which the licence relates.'

[233] S 119(1) of the FSRA. See also s 151(4) of the FSRA.

[234] Ss 120(2) & 121(2) of the FSRA.

[235] S 123(1)(a)(i) of the FSRA.

Regulator has to consider all responses received within the allocated time.[236] However, where there is urgency in effecting the intended regulatory interventions, the Regulator may proceed without informing the licensee or considering its responses.[237] The rationale for proceeding as such must be made known in writing and the responses received thereafter considered.[238]

Any changes, deferments, retractions and connected conditions of licences should be published as per section 128(2) and schedule 3 of the Act.

5.2.3. Enforcement

Chapter 10 of the Financial Sector Regulation Act deals with 'Enforcement'. Under this Chapter, the legislation regulates 'Guidance notices', 'Interpretation rulings', 'Directives', 'Enforceable undertakings', 'Court orders', 'Debarment' and 'Leniency agreements'. I have already dealt with guidance notices and interpretation rulings under regulatory authority as these aspects alter the legal landscape and as such, resort better under regulatory independence that supervisory independence.

The directives are similar to the compliance notices issued by the National Credit Regulator, and the Financial Sector Conduct Authority can inform a regulatee of non-compliant, or even potentially non-compliant, conduct via a directive.[239] The main rationales for issuing a section 144 directive is worded similarly, but in a negative context, to section 57 and mandates the Financial Sector Conduct Authority directly to act where the conduct of an entity threatens an outcome set in section 57, or some mentioned in section 7 such as pre-emption of financial crime, or a pledge by an institution to conduct itself in a certain manner:[240]

> 'The Financial Sector Conduct Authority may issue to a financial institution a written directive requiring the financial institution to take action specified in the directive if — *(a)* the financial institution is conducting its business in a way that poses a material risk to the efficiency and integrity of financial markets; *(b)* the financial institution's treatment of its financial customers is such that the institution will not be able to comply with its obligations in relation to the fair treatment of financial customers; *(c)* the financial institution is providing financial education in a

[236] Ss 123(1)(a)(ii) & 123(2) of the FSRA. If the intervention was initiated by the licensee, the latter need not be informed or given the opportunity to submit a response to the Regulator – see s 123(1)(c) of the FSRA. The time allowed for retorts by the licensee has to equal or exceed thirty days – see s 123(1)(b) of the FSRA.

[237] S 123(3) of the FSRA: 'If the delay involved in complying, or complying fully, with subsection 1(a) in respect of a proposed action is likely to prejudice financial customers, prejudicially affect financial stability or defeat the object of the action, the responsible authority may take the action without having complied, or complied fully, with that subsection.'

[238] S 123(4) of the FSRA.

[239] S 144(1) of the FSRA.

[240] See s 7(1)(e) of the FSRA.

> manner that is not in accordance with relevant conduct standards; *(d)* the financial institution or a key person, representative or contractor of the financial institution — (i) has contravened or is likely to contravene a financial sector law for which the Financial Sector Conduct Authority is the responsible authority; (ii) has not complied with an enforceable undertaking accepted by the Financial Sector Conduct Authority; (iii) is involved or is likely to be involved in financial crime; or (iv) is causing or contributing to instability in the financial system, or is likely to do so.'[241]

The directive can further be issued to a specific person in the regulated institution.[242] The motivation for a directive must be intended to advance (or protect) an element stated in section 57 of the Financial Sector Regulation Act:

> 'A directive in terms of subsection (1) or (2) must be aimed at achieving the objective of the Financial Sector Conduct Authority set out in section 57 and— *(a)* stopping the financial institution or the directed person from contravening applicable financial sector laws, or reducing the risk of such contraventions; (b) ensuring that the financial institution or the directed person complies with the enforceable undertaking that was accepted by the Financial Sector Conduct Authority; (c) stopping the financial institution or the directed person from being involved in financial crime, and reducing the risk that it may be so involved; (d) reducing\ the risk that a systemic event may occur; or (e) remedying the effects of a contravention of a financial sector law or the person's involvement in financial crime.'[243]

The directive has to refer to remedial action such as prohibition, cessation or transformation of activities related to the provision of financial products or services or unlawful conduct, reallocating a post to another individual, restricting monetary performance pay-outs and requiring rectification of outcomes of unlawful conduct.[244] It must further provide the recipient with the period within which adherence to the contents of the directive must be effected and this period must be realistic.[245] A directive may only be directed at a regulatee that is also of systemic significance or who may adversely affect financial stability where the permission of the Prudential Authority or Reserve Bank respectively, has been provided.[246]

[241] *Ibid*.

[242] S 144(2) of the FSRA: 'The Financial Sector Conduct Authority may issue to a key person, a representative or a contractor of a financial institution (in this section, a **'directed person'**) a written directive requiring the directed person to take action specified in the directive if the financial institution or the directed person— *(a)* has contravened or is likely to contravene a financial sector law for which the Financial Sector Conduct Authority is the responsible authority; *(b)* has not complied with an enforceable undertaking accepted by the Financial Sector Conduct Authority; *(c)* is involved or is likely to be involved in financial crime; or *(d)* is causing or contributing to instability in the financial system, or is likely to do so.'

[243] S 144(3) of the FSRA.

[244] Ss 144(5) & 144(8) of the FSRA.

[245] S 147 of the FSRA – the period must be 'reasonable'.

[246] Ss 144(6) & 144(4) of the FSRA.

The Financial Sector Conduct Authority is able to retract its own directives by informing the recipient of the directive accordingly.[247]

In terms of section 145, the Conduct Authority is allowed to direct, as part of its Directives authority, that a regulatee divest an appointee from a post or assignment where that person has engaged in financial unlawful conduct, was tasked with pre-empting such conduct or failed to pre-empt such conduct in relation to the regulatee, or does not meet the criteria of a suitable person anymore. The Regulator has to engage with the regulatee or affected person prior to releasing the directive unless the engagement would have adverse outcomes for consumers, financial stability or the purpose of the directive.[248]

As part of its enforcement powers, the Financial Sector Conduct Authority may demand that certain information or documents be provided to it, conduct 'mystery shopping' and analogous expeditions, as well as 'supervisory on-site inspections'.[249] The demand for information or documents, or inspections, have to be connected with an attempt of the Regulator to meet its obligations in terms of a financial sector law, or to determine whether a regulatee is compliant (in respect of a financial sector law for which the Conduct Authority is the responsible authority in terms of schedule 2), regulator's directives or an enforceable undertaking or poses a risk in this regard.[250] The request for information or documents must be given in writing and adherence to the request by the regulatee is obligatory.[251] An inspection is also done with advance notice to the visited regulatee.[252]

During an inspection on the premises of a regulatee, statutory authority is granted to immediately view and duplicate enterprise documents or to direct that the document be

[247] S 148 of the FSRA.

[248] S 146(1)-(4) of the FSRA: '146. (1) Before issuing a regulator's directive in terms of this Part, the financial sector regulator must — (a) give the financial institution or person to whom it is proposed to issue the directive a draft of the proposed directive and a statement of the reasons why it is proposed to issue it, including a statement of the relevant facts and circumstances; and (b) invite the financial institution or person to make submissions on the matter, and give it a specified period, which must be reasonable, to do so. (2) If the directive requires removing a person from a specified position or function in or in relation to the financial institution, the financial sector regulator must also — (a) give the person a draft of the proposed directive and a statement of the reasons why it is proposed to issue it, including a statement of the relevant facts and circumstances; and (b) invite the person to make submissions on the matter within the period specified in terms of subsection (1)(b). (3) In deciding whether to issue the directive, the financial sector regulator must take into account all submissions received by the end of the period referred to in subsection (1)(b) or (2)(b). (4) If the delay involved in complying, or complying fully, with subsections (1) and (2) in respect of a proposed directive is likely to lead to prejudice to financial customers, prejudicially affect financial stability or defeat the object of the directive, the financial sector regulator may issue the directive without having complied, or complied fully, with those subsections.'

[249] Ss 131 & 132 of the FSRA.

[250] S 131 & 132(2) of the FSRA. The other expeditions must be aimed at obtaining information linked to its functions – see s 131(3) of the FSRA.

[251] Ss 131(1)(a), 131(1)(b), 131(2)(a) & 131(2)(c) of the FSRA.

[252] S 132(1) of the FSRA.

viewed and duplicated at another time; question anyone present on location; seize and confiscate an enterprise document or prohibit removal or destruction of such a document.[253]

Investigations are undertaken by specially authorised persons acting on instruction from the Financial Sector Conduct Authority in relation to suspected past, present or imminent non-compliance with a financial sector law that the Conduct Authority is mandated to supervise.[254] The investigator is authorised to require the presence of anyone who may, upon the reasonable belief of the investigator, be able to answer questions that are significant to the investigation or demand the delivery of documents of significance to the investigation.[255] He or she is further able to review or duplicate the relevant documents or items, or parts thereof, seize and keep the document or item subject to stipulations governing the terms of its return.[256]

The investigator may go into premises in order to effect his or her investigation in terms of section 137 and is authorised to act in line with subsections 137(3) and 137(6) when executing the search. An investigator requires the permission of the person seemingly in charge of a business premise or the business itself where the premises entered and searched is a private dwelling or, in the case of the last mentioned dwelling, the person occupying the abode.[257] This is done after the person so assenting has admitted the investigator with full knowledge of the result of the admission and the fact that the person has the right to refuse entrance unless the investigator has a warrant to enter and search the premises.[258]

The Conduct Authority is endowed to sanction an investigator with the following power in terms of section 137(1)(a)(ii):

[253] S 132(4)(a) of the FSRA.

[254] S 135(1)(a) of the FSRA. An investigation can also be undertaken where it would meet the requirements set by ss 135(1)(b) and 135(2) of the FSRA.

[255] S 136(1)(a) of the FSRA.

[256] S 136(1)(a), (c) & (d) of the FSRA.

[257] S 137(1)(i)(aa) & (bb) of the FSRA.

[258] S 137(1)(i)(AA) & (BB) of the FSRA.

> ‘An investigator may, for the purposes of conducting an investigation, do any of the following: *(a)* Enter any premises … (ii) without prior consent and without prior notice to any person — *(aa)* if the entry is authorised by a warrant; or *(bb)* with the prior authority of the head of a financial sector regulator or a senior staff member of the financial sector regulator delegated to perform the function, if the head of a financial sector regulator or senior staff member on reasonable grounds believes that — (AA) a warrant will be issued under section 138(1) if applied for; (BB) the delay in obtaining the warrant is likely to defeat the purpose for which entry of the premises is sought; and (CC) it is necessary to enter the premises to conduct the investigation and search the premises as referred to in paragraph *(b)* or *(c)*, and to do anything contemplated in subsection (6)…’

The Financial Sector Regulation Act makes provision in section 138 for warrants to be issued for two purposes: an investigation into unlawful conduct as per section 135(1)(a)[259] or for the outcomes contemplated in section 251(3)(e).[260] This is done upon request by an investigator, who requires a warrant to enter premises where the investigator does so without consent or notice and under circumstances where section 137(1)(a)(ii)(bb) does not find application.[261] The warrant can be authorised under circumstances where there is a reasonable presumption of unlawful conduct, whether past, present or imminent, or access to the property would likely result in obtaining information related to the unlawful conduct and entering the grounds is reasonably required for investigative purposes.[262]

The aforementioned powers of the Financial Sector Conduct Authority enable it to obtain the necessary information or items in order to execute its functions. The directives allow the Authority to bring unwanted behaviour to the attention of the regulatee and inform it of the actions required by the Authority. However, the legislation makes provision for tougher action by the Regulator. I do not discuss the issue of licence retraction or modification as I have already done so. I proceed to deal with debarment, enforceable undertakings and recourse to the judiciary.

[259] S 135(1)(a) of the FSRA determines as follows: ‘A financial sector regulator may instruct an investigator appointed by it to conduct an investigation in terms of this Part in respect of any person, if the financial sector regulator … reasonably suspects that a person may have contravened, may be contravening or may be about to contravene, a financial sector law for which the financial sector regulator is the responsible authority …’

[260] S 135(1)(b) of the FSRA (‘[a] financial sector regulator may instruct an investigator appointed by it to conduct an investigation in terms of this Part in respect of any person, if the financial sector regulator reasonably believes that an investigation is necessary to achieve the objects referred to in section 251(3)*(e)* pursuant to a request by a designated authority in terms of a bilateral or multilateral agreement or memorandum of understanding contemplated in that section’) referring to s 251(3)(e) (s 251 relates to ‘information sharing’ and subs (3)(e) determines the obligations pertaining to collaboration and synchronization).

[261] S 137(1)(a) of the FSRA.

[262] S 138(1)(b)(ii) of the FSRA.

Debarment echoes some of the elements associated with the suspension of a licence, but there are some notable differences.[263] Both actions have the effect that the person subjected to the regulatory sanction is prohibited from participating in the financial market as an active licence is required before regulated activities may be undertaken and debarment has the effect of banning a person from engaging in certain actions.[264] Both sanctions are also in response to malpractices by the sanctioned person.[265] However, a debarment order has bearing on a natural person[266] but has consequences for a regulated organisation for which the barred individual is an appointee.[267] The Regulator can decide on the period of debarment[268] and is required to converse with the affected person prior to executing the order.[269]

The mechanism of the enforceable undertaking allows the regulatee to propose future means of remedying undesirable behaviour to the Regulator, including reparations to consumers.[270] Where the proposal is accepted by the Regulator, adherence to the terms of the proposal becomes compulsory and non-compliance therewith authorises the Regulator to retract or suspend the regulatee's licence.[271] The Regulator is further empowered to refer the matter to the Financial Services Tribunal upon non-compliance and the Tribunal, after having determined the validity of the Regulator's claim of non-adherence, may order specific performance or require that the regulatee take certain steps or omit to behave in a certain manner in order to correct the effects of the non-compliance or to prevent future non-compliance.[272] The Financial Sector Regulation Act is silent as to the enforcement status of the Financial Services Tribunal's order to this effect and the Regulator has to 'file with the registrar of a competent court a certified copy of the order' in order to enforce the Tribunal's order as if it was a civil judgment.[273]

[263] See ss 111 (specifically s 111(6)) & 153 of the FSRA.

[264] See ss 111(6), 120 & 153(2) of the FSRA.

[265] See ss 120 & 153(1) of the FSRA.

[266] S 153(1) of the FSRA.

[267] S 153(5) of the FSRA – the regulatee also has to act in a manner that facilitates compliance with the debarment order.

[268] Ss 153(2), 153(3) & 153(6) of the FSRA.

[269] S 154 of the FSRA.

[270] Ss 151(1) & 151(2) of the FSRA.

[271] S 151(4) of the FSRA.

[272] S 151(6) of the FSRA – this section also allows, as a third option, 'any other incidental or relevant order'.

[273] Ss 151(7) & 151(8) of the FSRA: '(7) The responsible authority may file with the registrar of a competent court a certified copy of an order in terms of subsection (6), if—*(a)* the order has not been complied with; and *(b)* either—(i) no proceedings in a court in relation to the making of the order have been commenced by the end of the period for lodging such appeals; or (ii) if such proceedings have been commenced, they have been finally disposed of. (8) The order, on being filed, has the effect of a civil judgment, and may be enforced as if lawfully given in that court.'

The High Court has jurisdiction to hear matters instigated by the Financial Sector Conduct Authority in order to make sure that there is adherence to financial sector laws.[274] The litigation can be reactive or proactive as the court is authorised in terms of section 152(2) to give an order (which logically entails that the court must hear the matter) that addresses the following matters:

> 'The High Court may make an order in terms of subsection (1) — (a) if it appears to the High Court that the person is engaging, or proposes to engage, in conduct contravening a financial sector law; (b) if the person has previously engaged in such conduct; (c) if there is a danger of substantial or irreparable damage, prejudice or harm if the person engages in conduct contravening a financial sector law; or (d) even if another remedy is available.'

5.3. Preliminary analysis of the supervisory authority of the National Credit Regulator and the Financial Sector Conduct Authority

The National Credit Act provides for some basic provisions to form part of every condition of registration.[275] Registrants are obligated to allow access for 'reasonable enquiries for compliance purposes' and also for purposes of gathering information for which a warrant in terms of section 153 would normally be required.[276] The Regulator has developed a 'monitoring visit' scheme for debt counsellors during which it reviews adherence to legislation and conditions of registration.[277] Insofar as debt counsellors are concerned, it is intended to be remedial in nature.[278] These visits are related to the Regulator's section 15(c) monitoring function and a specific condition of registration, being that

> '[t]he Debt Counsellor must permit the NCR or any person authorised by the NCR to enter any premises from which the Debt Counsellor provides debt counselling services or engages with consumers in respect of debt counselling. The Debt Counsellor must satisfy all requests and enquiries related to monitoring compliance with these conditions and the requirements of the Act.'[279]

[274] S 152(1) of the FSRA.

[275] S 50 of the NCA.

[276] S 50(2)(a) of the NCA: 'It is a condition of every registration issued in terms of this Act that the registrant must … permit the National Credit Regulator or any person authorised by the National Credit Regulator to enter any premises at or from which the registrant conducts the registered activities during normal business hours, and to conduct reasonable inquiries for compliance purposes, including any act contemplated in section 154(1)(d) to (h).'

[277] NCR 'Debt Counselling Circular' Circular 9 of 2009 2; NCR 'Debt Counselling Compliance Monitoring Visits Circular' Circular 1 of 2013; NCR 'Debt Counselling Compliance Monitoring Visits' Circular 14 of 2015 1.

[278] NCR 'Debt Counselling Compliance Monitoring Visits' Circular 14 of 2015 1.

[279] NCR 'Debt Counselling Compliance Monitoring Visits Circular' Circular 1 of 2013 1. S 15(c) of the NCA determines that the NCR has the duty to 'enforce [the] Act by … monitoring the consumer credit market and industry to ensure that prohibited conduct is prevented or detected and prosecuted'.

In terms of section 136(2), the National Credit Regulator may decide to raise a grievance against a non-compliant person out of its own accord – it does not have to do so in response to an external claim of unlawful action. The Tribunal decision of *National Credit Regulator v Capitec* implanted the notion of reasonableness into the process. However, whilst I do not think that the underlying notion of a 'reasonable basis'[280] insofar as section 136(2) is concerned, is problematic *per se*, this decision has a couple of repercussions for proactive monitoring by the Regulator. In order to highlight the issue, it is necessary to restate four specific mandates of the Regulator and note that these are not cumulative requirements:

> '15 Enforcement functions of National Credit Regulator
>
> The National Credit Regulator must enforce this Act by- …
>
> (b) receiving complaints concerning alleged contraventions of this Act;
>
> (c) monitoring the conusmer credit market and industry to ensure that prohibited conduct is prevented or detected and prosecuted;
>
> (d) investigating and ensuring that national and provincial registrants comply with this Act and their respective registrations; …
>
> (f) investigating and evaluating alleged contraventions of this Act …'

In addition, section 50(2) requires that the registrant allow the Regulator 'or any person authorised by the National Credit Regulator' to access its place of business in order to undertake 'reasonable enquiries for compliance purposes'. The explicit monitoring function and ability to conduct visits to the registrant's premises is, in my opinion, clear authorisation for pre-emptive action relating to credit-related compliance issues in respect of which the Regulator has supervisory authority. I find it difficult to grasp why Govender recommends that the Regulator be allowed to 'look at the complaint and not only investigate that aspect but the whole business or the entity in general'.[281] Perhaps she intends to propose that the mandate of the Regulator should be extended to authorise it to assess any aspect of a business that remotely affects credit extension. This would be similar to the authority of the Financial Sector Conduct Authority under sections 106 and 108 of the Financial Sector Regulation Act. However, in light of the lack of authorisation similar to sections 106 and 108, and the lack of

[280] *National Credit Regulator v Capitec Bank Limited* (n 185) par 78.
[281] Govender (n 39) 51.

statutory guidance in respect of business aspects of entities, it would be difficult to determine exactly what the Regulator is supposed to assess.[282]

The need for preventative regulation has been identified by the National Treasury under the auspices of 'outcomes-based supervision':

> 'Until recently, market conduct regulators concentrated on setting conduct rules, periodically assessing financial institutions for compliance with these, and issuing fines for non-compliance. Rules were made in response to poor practices observed, which inevitably meant the regulator responded to poor conduct practices only after their relative prevalence. Moreover, institutions were only held to account once a rule was contravened, meaning that many customers had already suffered by the time of remedial regulatory action.
>
> To remedy this weakness in the regulatory and supervisory approach, some jurisdictions have prioritised monitoring conduct risks on a continual basis, with closer scrutiny of those entities and sub-sectors that can pose the most harm to customers, in order to respond proactively to customer abuse before bad practices become endemic. These countries have also increased their attention to internal governance and risk management mechanisms of financial institutions, placing increased responsibility on the most senior leadership structure of an entity to set up the right customer centric processes for the organisation as a whole. Lastly, structural reform is increasingly being looked at as a remedial solution to mitigate conduct risk where it is observed.'[283]

Section 138 provides for 'consent orders' to be granted by the National Consumer Tribunal.[284] This section determines that the National Credit Regulator and the regulatee inspected by the former, may mutually agree to stipulations that will form the content of an order by the Tribunal.[285] The draft may be endorsed as a consent order by either the Tribunal or a court and this can be done without recourse to evidence.[286] It may also incorporate damages due to a complainant.[287] Section 160(1) criminalises non-compliance with an order of the Tribunal, which contravention is punishable with a fine and/or imprisonment limited to a decade.[288]

[282] The logical solution would be to for the Legislature to provide the NCR with guidance in this regard – this would be an ex ante control measure to ensure that the NCR's conduct meets the approval of the delegator. In addition, see the comments of some of the interviews and statements made by Govender (n 39) that show some discrepancies – on the one hand, the lack of proactive actions by the Regulator is criticised, but on the other hand, there seems to be some contestation as to whether pro-active activities that are not 'normal routine to check and advise and pre-planned' will be met without resistance – see 36 & Annexure A (interview with Nicky Lala-Mohan).

[283] National Treasury *Treating Customers Fairly in the Financial Sector* (n 22) 92.

[284] It would be valuable to compare these orders with the Australian (and Financial Sector Conduct Authority's) phenomenon of 'enforceable undertakings'. This is perhaps a viable theme for future research.

[285] S 138(1)(b) of the NCA.

[286] S 138(1) of the NCA.

[287] S 138(2) of the NCA – but in this case the complainant has to assent to the damages conferred in terms of the negotiated terms.

[288] S 161(a) of the NCA.

Search and seizure warrants may also be issued where there is a reasonable belief that the National Credit Act is being contravened.[289] This mechanism enables the Regulator[290] to uncover misconduct and obtain the necessary proofs thereof.[291] This section is independent, and allows for more extensive authority to be bestowed upon the person mandated by the warrant, than the allowances provided by section 50 in respect of conditions of registration. Section 50 only allows for certain subsections of section 154 to be incorporated automatically as conditions of registration. However, in order to access the authority set out in section 154, the warrant needs to be issued by a High or Magistrates' Court judge or magistrate upon conviction of a particular standard under oath.[292] It is unlawful and punishable with a fine and/or one year imprisonment to disregard the stipulations of a warrant or, if an unauthorised person imitates that he or she has the required permissions under section 153 and acts in a manner contemplated by section 154.[293]

Section 160(2) criminalises certain conduct regarding the National Credit Regulator: irregular manipulation of the Regulator in relation to an investigation; forestalment of an investigation in a manner that affects the investigation or outcome thereof; conduct that would amount to contempt of court if the event had been judicial dealings and intentionally fabricating information imparted to the Regulator.[294]

The Financial Sector Conduct Authority has the ability to supervise and coerce desired behaviour from regulated entities without recourse to other organisations – the most prominent being the broad legislative grounds upon which a licence may be suspended or retracted by the Authority itself.

[289] Ss 153 and 154 read with the definition of 'prohibited conduct' in s 1 of the NCA.

[290] S 153(2)(b) read with s 25 of the NCA.

[291] S 153(1) ('…there [must] be reasonable grounds to believe that … prohibited conduct has taken place, is taking place or is likely to take place on or in those premises; or … anything connected with an investigation into possible prohibited conduct is in the possession of, or under the control of, a person who is on or in those premises' – this must be attested to under oath in order to convince the judicial officer of the rationality of the grounds referred to in this subsection) & s 154(1)(d), (f), (h) & (i) (e.g. '[a] person who is authorised under section 153 to enter and search premises may … examine any article or document on or in those premises that has a bearing on the investigation … take extracts from, or make copies of, any book or document on or in the premises that has a bearing on the investigation … seize any output from that computer for examination and copying … attach, and if necessary remove, from the premises for examination and safekeeping anything that has a bearing on the investigation') of the NCA.

[292] S 153(1)(a) of the NCA.

[293] Ss 160(2)(g) & (h) ('[a] person commits an offence who … acts contrary to a warrant to enter and search; or … without authority, but claiming to have authority in terms of section 153 … enters or searches premises; or … attaches or removes an article or document') read with s 161(b) ('[a]ny person convicted of an offence in terms of this Act, is liable … to a fine or to imprisonment for a period not exceeding 12 months, or to both a fine and imprisonment').

[294] Ss 160(2)(a)-(d) of the NCA.

The discretion bestowed upon the Authority is also broad, not only to determine whether there has been contravention of rules relating to expected conduct from a regulatee, but also in respect of contraventions that have not yet occurred but where there is a good possibility that it will occur.[295] The pro-active and invasive nature intended for the Authority[296] is therefore well provided for in the legislation although the execution thereof can be assessed in future. The policy documents are cryptic insofar as they only set out the principled expectations for and intended powers of the Authority. In this regard, there is merit to look at some of the reports issued by the Financial Services Board in respect of supervising the Treating Customers Fairly campaign.[297] The reason therefore is twofold: Firstly, the policy document setting the framework for market conduct regulation in South Africa clearly refers to the concept of treating customers fairly,[298] and secondly, the current Financial Services Board will set the resource foundation for the Financial Sector Conduct Authority, including transfer of human and other resources.[299] As such, the approach may well be similar under the Authority as it was under the Board. In addition, the document refers to the National Treasury's *A Safer Financial Sector to Serve South Africa Better: National Treasury Policy Document*, which was also published in 2011.

The Roadmap, published in 2011, devotes a whole chapter[300] to the supervisory approach of the Financial Services Board and many of the underlying principles and basic enforcement powers of the Financial Sector Conduct Authority show some correlation to the statements

[295] See par 5.2.3 *supra*.

[296] National Treasury *Treating Customers Fairly in the Financial Sector* (n 22) 8: 'A dedicated regulator for market conduct, the Financial Sector Conduct Authority (FSCA), will supervise financial institutions more intensely and intrusively to prevent poor conduct practises from arising, and ensure that the sector is delivering fair customer outcomes across the product cycle.'

[297] Specifically Financial Services Board (n 133). See also National Treasury *Treating Customers Fairly in the Financial Sector* (n 22) 7: 'The policy approach proposed in this document introduces Phase 2 in the reform process, explaining the policy framework within which the FSCA could operate. It builds on the policy proposals outlined in the 2011 policy document, and *Implementing a Twin Peaks model of financial regulation in South Africa* (2013), which together led to the FSR Bill. The TCF initiative, as reflected in the *Treating Customers Fairly Roadmap* (2011), further informs the approach.' See also National Treasury *Treating Customers Fairly in the Financial Sector* (n 22) 50.

[298] See National Treasury *Treating Customers Fairly in the Financial Sector* (n 22) ch 5.

[299] See s 293(1) ('At the date on which this section comes into effect, the assets and liabilities of the Financial Services Board cease to be assets and liabilities of the Board and become assets and liabilities of the Financial Sector Conduct Authority without any conveyance, transfer or assignment.') & s 294(1)(a) ('At the date on which this section comes into effect, the staff of the Financial Services Board must be transferred to the Financial Sector Conduct Authority and the Reserve Bank, respectively, in accordance with section 197 of the Labour Relations Act, 1995 …') of the FSRA.

[300] Financial Services Board (n 133) 25: 'Chapter 5 has explained that the FSB's supervisory approach will be broadened to proactively identify emerging conduct risks, with a view to pre-empting negative consumer outcomes. This proactive approach will need to cover both risks within specific firms (micro conduct risks), as well as concerns at an industry, sector or business model level (macro conduct risks). Where such risks are identified, the FSB will need to take action to mitigate these risks to prevent or minimise harm to consumers. Where the macro industry- or sector-wide risks are concerned, the regulatory response will need to be appropriate to ensure consistent, sector-wide behavioural change.'

made in this regard. The perusal thereof has also shed some light on the differentials applicable to the various guiding and enforcement tools available to the Authority to execute its duties and meet its statutory obligations.

There does seem to be a different approach and application when it comes to conduct standards and directives. At first glance, it seemed to me as if the conduct standards are instructive in nature and the directives punitive, as the themes of the chapters under which the relevant sections appear to support such an interpretation. However, if one considers the information set out in the 2011 document on the Board's 'macro' and 'micro' management of the industry,[301] a further distinction is apparent – that the conduct standards, aimed at regulating a specific segment of the market, are instructive as well as enforcing in nature, and the directives, aimed at individual participants, can be edifying as well as enforcing even though it is categorised as an enforcement action under Chapter 10.

A strict statutory categorisation of the methods employed can therefore not be accurate. The drafted classification of the means of supervision automatically infers punitive measures that can have a psychological impact on the recipient. This can adversely affect the relationship with the Regulator in instances where the communication is intended to be instructive and remedial in nature, as opposed to strictly enforcing. However, the Roadmap alludes to informal, as opposed to formal, sanctioning activities where this is suited to the specific situation:

> 'Unless the FSB believes that the risk is sufficiently serious to require immediate formal regulatory action, the FSB's likely initial response will be to **engage with the senior management concerned to reach agreement** on one or more of the following, as applicable:
>
> - A course of action to ensure that the identified unfair treatment stops. This could include changes in business processes, or changes in product design or withdrawal of products or promotional material.
> - Redress for customer prejudice already caused. This could include tracing and communicating with affected or potentially affected customers.
> - Disciplinary or other appropriate action to be taken by the firm against those responsible for the unfair treatment.
> - Training interventions.'[302]

[301] Financial Services Board (n 133) 25.

[302] Financial Services Board (n 133) 27. This heading is titled 'Pre-emptive intervention for firm-specific conduct risks'.

Insofar as the Financial Sector Conduct Authority's abilities to monitor the market and detect flaws are enhanced, the gathering of data from market participants is set as a core mechanism.[303]

6. COMPARATIVE ANALYSIS OF THE REGULATORY AND SUPERVISORY AUTHORITY OF THE NATIONAL CREDIT REGULATOR AND THE FINANCIAL SECTOR CONDUCT AUTHORITY

In chapter three, I highlighted the importance of a clearly delineated mandate to limit capture by a particular interest group.[304] Where there are provisions that determine that the regulator requires the permission of a political player or other entity prior to initiating investigations or enforcements, the independent nature of its actions can be compromised.[305]

The National Credit Act does not make provision for the National Credit Regulator to obtain the permission of the Minister of Trade and Industry prior to effecting its duties. There is no legislative foundation to impede the autonomy to decide which investigative, enforcement and other regulatory activities to undertake, is impeded. In particular, the Minister does not fall within the boundaries set by section 12(1)(c) of the Act. However, a cursory appraisal of the minutes of some committee meetings alerted me to the possibility of a measure of capture by politicians insofar as strategies are concerned. There is an alignment of the Regulator's strategies with that of the Department of Trade and Industry's strategic objectives (and in some instances, the focused formulation of its mandate in line with the Department's

[303] National Treasury *Treating Customers Fairly in the Financial Sector* (n 22) 93.
[304] See par 4.4 of ch 3 *supra.*
[305] *Ibid*.

aims).[306] Whilst there is no statutory requirement that the Minister may set the priorities of the Regulator, the deliberate strategic alignment may have an analogous effect.[307] This may not necessarily cause the Regulator to deviate from its mandate, but to prioritise its activities in line with the President and/or Minister's prerogatives (which may be short-range outlooks as opposed to long-term solutions).[308]

Insofar as regulatory and supervisory independence is concerned, the National Credit Regulator does not have the direct authority to change the legal landscape.[309] Nevertheless, the Regulator has been instrumental in shaping the consumer credit industry insofar as it has not neglected to address severe challenges, such as debt counselling by implementing voluntary 'obligatory' measures strengthened through indirect statutory authority.[310] The problem is that many of these interventions require a very specific interpretation of legislation[311] and the judiciary has strengthened the non-binding nature of some of these interventions by omission.[312]

As such, it is imperative that the Regulator be endowed with some binding guiding powers or that the courts be compelled to consider the instructions by the Regulator to the industry, as well as industry commitments, when dealing with a matter where these instructions have been

[306] See e.g. NCR *Annual Report* 2015/2016 8; Portfolio Committee on Trade and Industry *Budgetary Review and Recommendation Report of the Portfolio Committee on Trade and Industry* 24 October 2014: 'The National Credit Regulator (NCR) is an entity of the Department of Trade and Industry which is aligned to two of the Department's strategic objectives of: *Facilitating broad-based economic participation*. In this regard the NCR is tasked with promoting increased access to credit through responsible credit granting and continually enhancing a consumer credit market regulatory framework. *Creating a fair regulatory environment that enables investment, trade and enterprise development in an equitable and socially responsible manner*. In this respect the NCR is responsible for protecting consumers from abuse and unfair practices in the consumer credit market and address over-indebtedness. The NCR's mandate of promoting increased access to credit through responsible credit granting and continually enhancing a consumer credit market regulatory framework and protecting consumers from abuse and unfair practices in the consumer credit market and address[ing] over-indebtedness is implemented through the following activities … The NCR's work is presented in the entity's four strategic objectives. These are: The promotion of increased access to credit through responsible credit granting; The protection of consumers from abuse and unfair practices in the consumer credit market and address over-indebtedness; The continuous enhancing [of] a consumer credit market regulatory framework; and Monitoring and improving [the] NCR's effectiveness in fulfilling its mandate.' My emphasis, and this was an assessment of the Department of Trade and Industry. See also Portfolio Committee on Trade and Industry *Budgetary Review and Recommendation Report of the Portfolio Committee on Trade and Industry* 21 October 2016: '[A] number of the DTI's strategic objectives are implemented through these entities.'

[307] Compare par 4.4 of ch 3 *supra*. See Govender (n 39) Annexure B (interview with Darrell Beghin): 'So what is the NCR doing, besides making changes to the Act? I understand that some of the changes are being driven by the Dti but the NCR needs to be strong enough to fight back to their reporting parties. The bulk of the economy is consumer credit related. And if this fails, the economy will collapse and this is happening.'

[308] See chs 2 & 3 *supra*. The Consumer Credit Amnesty of 2014 may serve as an example – see NCR *Annual Report* 2014/2015 17; Govender (n 39) 21-22.

[309] See par 4 *supra*.

[310] See paras 4.1.2-4.1.3 & 5.1.2-5.1.3 *supra*.

[311] See *contra* Govender (n 39) 38 (*contra* in my opinion when considering ss 14 & 15 of the NCA and the provisions of s 48(3) read with the provisions of s 3 of the NCA).

[312] See par 4.1.4 *supra*.

issued to the involved parties. The disregard shown in the *Barnard*-matter has effected some problems after the fact and has largely nullified almost a decade of progress in the consumer credit sphere due to drafting of legislation that was too meek in endowing the created Regulator with proper authority. This is also necessary, as I will explain later, for the Regulator as the consumer credit specialist regulator, to be able to hold its own against other financial sector regulators within the scheme of regulators envisaged by the Financial Sector Regulation Act.

The supervisory authority of the National Credit Regulator is standard insofar as monitoring powers are concerned. The Regulator cannot retract or suspend a licence (in any event, suspension is not provided for in the National Credit Act) but it can initiate processes to effect deregistration.[313] I do believe that the suggested limited enhancement of the Regulator's authority set out in the 2013 policy document should be realised.[314] A clear mandate in this regard, coupled with consultation duties similar to the ones provided for in the Financial Sector Regulation Act, would further its independence.

The Financial Sector Regulation Act bestows prominence in respect of regulatory and supervisory independence on the Financial Sector Conduct Authority, especially when compared with the National Credit Regulator. Whilst the abilities of the Conduct Authority are only constrained insofar as broad outcomes are concerned, I am not convinced that the autonomy of the Conduct Authority is well protected as the legislation is so broad that it will be difficult to detect political interference. The Authority can act on a 'reasonable' suspicion, it can authorise warrantless searches and act in respect of conduct yet to constitute a

[313] See par 5.1.2 *supra*.

[314] Minister of Trade and Industry (n 21) par 2.2.2.2.4: 'It was noted that the NCR should have the ability to de-register registrants such as credit providers and debt counsellors under circumstances that can be easily and objectively ascertained, such as a debt counsellor that no longer meets the statutory requirements for registration.' See also Renke *An evaluation of debt prevention measures in terms of the National Credit Act 34 of 2005* November 2012 LLD Thesis Faculty of Law University of Pretoria 642-643, who proposes a similar amendment but on different terms: 'Further, the submission is made that the powers of the National Credit Regulator in respect of registration should be revised and improved. Included should be the Regulator's ability to monitor the fitness to be registered as a credit provider on a continuous basis. Also, in accordance with the Consumer Credit Act 1974, the Regulator should be statutorily authorised and compelled to publish guidance to credit providers in relation to how it determines, or how it proposes to determine, whether an applicant is fit to be registered as a credit provider under the Act. The Regulator must also be empowered to have regard to its own guidance when it carries out its registration functions. Finally, although the submission was made that the instruments by means of which the National Credit Regulator is empowered to enforce compliance with the Act's registration requirements, or with a registrant's conditions of registration, should be endorsed, it was seen that a registration may only be cancelled by the Tribunal on request by the Regulator. In the latter respect the submission is made that, in accordance with the position in the United Kingdom, the National Credit Regulator should be empowered to cancel a credit provider's registration itself.' Note that the fit and proper requirements were introduced by the National Credit Amendment Act (see the new s 45(3) of the NCA).

contravention.[315] I believe that this is one practical example where the accountability measures will actually inform and strengthen the autonomy of this Regulator. The Financial Sector Regulation Act authorises warrantless searches if the Financial Sector Conduct Authority deems it necessary on the grounds set out in the legislation.[316]

The Conduct Regulator is also endowed with flexibility, a feature that is not quite provided for in a workable manner in the National Credit Act. Registration as a developmental credit provider will allow some differential treatment by the National Credit Regulator, but this differential treatment is wholly sanctioned by the Act.[317] The Regulator's only role is to allow the additional registration as a developmental credit provider or to endorse certain proposed behaviour.[318] In respect of the Financial Sector Conduct Authority, two specific examples speak for itself: the leniency agreements allowed in terms of section 156 allow the Regulator to defer civil penalties in exchange for collaboration in matters where there has been a contravention in the market, and the exemption measures allowed for in section 281:

> 'The responsible authority for a financial sector law may, in writing and with the concurrence of the other financial sector regulator, exempt any person or class of persons from a specified provision of the finacial sector law, unless it considers that granting the exemption- (a) will be contrary to the public interest; or (b) may prejudice the achievement of the objectives of a financial sector law.'

The Minister of Finance also has limited statutory authority to direct the activities of the Authority. In terms of sections 70(4)(a) and 70(5), the Minister has to be given a draft version of the strategy and his comments has to be considered. There is no legislative provision that states that the Authority's regulatory strategy has to be confirmed or approved by the Minister of Finance. The Act does not require approval by the Minister of norms that the Authority wishes to establish, remedial action that it wishes to take or licence applications that it wants to approve or reject. However, this does not prevent unofficial directives or an individual decision to adhere to the preferences of the Minister, as informed by the President.[319]

[315] See par 5.2.3 *supra*.
[316] *Ibid*.
[317] See e.g. s 76(6) of the NCA.
[318] See e.g. ss 13(b), 41 & 76(6) of the NCA.
[319] See par 3.4.3 of ch 4 *supra*.

7. INSTITUTIONAL AND OPERATIONAL AUTONOMY

7.1. Introduction

I discuss three main aspects under this heading – financial and human resources, and the institutional framework within which the regulator functions. For sake of being comprehensive and limiting duplication, I have included all aspects that relate to the regulator's budget,[320] its personnel, and operations[321] under this heading. These were discussed under separate headings in chapter 3.

Indicators of autonomy, insofar as the regulator's finances are concerned, primarily concern the ability of the regulator to determine its own budget (within reason), set fees, and obtain the necessary resources needed to function properly.[322] The resources identified are mostly applied in the context of personnel appointments, and I investigate the extent to which the ideal circumstances that limit undue influence of senior personnel by political forces, are present in the South African scheme.[323]

Human resourcing can enhance the independence of a regulator when the following safeguards are in place: measures that enable the regulator to select its own workforce, the funding to appoint those with the needed capabilities, and remunerate appointees on a competitive scale.[324] In addition, the precautions to protect senior personnel from undue removal from office, the internal governance structure, the aspect of post-employment restrictions, and litigation against personnel, can be contentious issues.[325]

The institutional setting within which the regulator functions does affect its independence, as the two reports that I deal with, tend to show. I have chosen to discuss the setting together with finances and personnel as both the Ministry of Trade and Industry and that of Finance, have been the subjects of, or linked to, investigations by the Public Protector of South

[320] See par 3 of ch 3 *supra*: '[B]udgetary independence … is concerned with the financial sourcing, application of funds and pecuniary well-being of the regulator.'
[321] See par 3 of ch 3 *supra*: '[I]nstitutional … independence … relates to the positioning of the regulatory body within the institutional regulatory framework, thus whether it is assimilated into government or exists autonomously.'
[322] See par 4.3 of ch 3 *supra*.
[323] *Ibid*.
[324] See paras 4.2 & 4.3 of ch 3 *supra*.
[325] See paras 4.2, 4.3 & 4.7 of ch 3 *supra*.

Africa.[326] These reports touched on improper conduct in respect of personnel and finances, either in respect of an independent entity or in respect of senior personnel in the Ministry itself.[327]

7.2. The National Credit Regulator

7.2.1. Financial resources

The National Credit Regulator is funded by various means.[328] The funding received from the Department of Trade and Industry consistently constitutes the larger part of its income, but a substantial amount is also received from industry members via statutory endorsed fees.[329]

The Regulator is responsible to draft its own budget[330] and receives an amount from the Department of Trade and Industry, which, in turn, receives an allocated amount that it disperses between the programs that it runs.[331] As the Regulator is a schedule 3 national public entity in terms of the Public Finance Management Act,[332] section 53(1) of the last-mentioned Act determines that the Minister of Trade and Industry has to approve the budget. Nonetheless, there are funding challenges, [333] although these have been attributed to projected income that did not realise.[334] The Portfolio Committee on Trade and Industry advised that

[326] These are: Public Protector *There are no heroes – Report of the Public Protector on an investigation into alleged abuse of power by the Director-General of the Department of Trade and Industry towards the former Commissioner of the National Consumer Commission* Report No: 1 of 2013/14 April 2013 & Public Protector *State of Capture – Report on an investigation into alleged improper and unethical conduct by the President and other state functionaries relating to alleged improper relations and involvement of the Gupta family in the removal and appointment of Ministers and Directors of State-Owned Enterprises resulting in improper and possibly corrupt award of state contracts and benefits to the Gupta family's businesses* Report No: 6 of 2016/17 14 October 2016.

[327] See paras 7.2.3 & 7.3.3 *infra*.

[328] S 35(1) of the NCA.

[329] NCR *Annual Report* 2015/2016 10: 'For the 2015/16 financial year, the NCR had a final approved budget of R 123 778 554 (2015: R117 632 691). The NCR received R66 899 044 (2015: R68 845 000) in funding from the dti; this constituted 54% of the NCR's funding. The balance of R40 499 230 (2015: R33 946 821) was from registrants' fees.' Also compare the respective sources of income (DTI and Industry) in the 2016/2015 (p 53), 2015/2014 (p 34), 2014/2013 (p 57) & 2013/2012 (p 49) respective annual reports of the NCR.

[330] See e.g. NCR *Annual Report* 2015/2016 86.

[331] See e.g. Portfolio Committee on Trade and Industry *Budgetary Review and Recommendation Report of the Portfolio Committee on Trade and Industry* 21 October 2016.

[332] Act 1 of 1999.

[333] NCR *Annual Report* 2015/2016 18; Govender (n 39) e.g. 42.

[334] See NCR *Annual Report* 2015/2016 86 in respect of the belated implementation of the National Credit Amendment Act (Act 19 of 2014), which resulted in the projected income from additional registrants not realising: 'The negative variance of R23,1 million is due to the significant under collection of fees from registrants as a result of a delay in the implementation of the NCAA. The NCR had optimistically budgeted for revenue in anticipation of more new registrants such as Payment Distribution Agencies (PDAs), Alternative Dispute Resolution agencies (ADRs) as well as small credit providers previously not registered with the NCR because of the new registration thresholds. The new registration of credit providers were published in the month of May 2016.'

supplemented funding was needed in light of the Regulator's enhanced duties under the amended credit legislation.[335]

The solutions proposed by the Regulator to address the funding challenges are largely dependent on the Minister as an increase in statutorily endorsed fees would require Ministerial promulgation via regulations: section 51 authorises the Minister to stipulate all the fees due and payable to the Regulator. Thus the 'application fee' due upon a request for registration, the 'initial registration fee' due when registering, the 'annual registration renewal fee' as well as the 'penalty' fee payable where a registrant does not timely effect payment of the annual fee are subject to the amounts prescribed by the Minister at his or her leisure.[336]

The Act does not limit or guide the Minister in his or her discretion. Firstly, the section is phrased in discretionary terms ('may'). Secondly, the Act does not require mandatory review on a timely basis in a similar fashion as the review of fees and interest rates determined by section 105. Thirdly, the legislation only stipulates that the Minister may differentiate between classes of prospective registrants and registrants.[337] There is no obligation to consult with the Regulator or industry prior to setting the fees.

7.2.2. Human resources

The appointment of staff is dependent on the available resources and the total staff complement reported in the 2015/2016 annual report was 155 (with 13 vacancies).[338] The Regulator appoints its own staff members[339] as the Act only provides for the appointment of the Chief Executive Officer and Deputy Chief Executive Officer.[340] The Chief Executive Officer is specifically mandated by section 25 to designate 'inspectors and investigators' or delegate this function. There is a clear disproportion in this regard, without even considering

[335] Portfolio Committee on Trade and Industry *Budgetary Review and Recommendation Report of the Portfolio Committee on Trade and Industry* 20 October 2015: ' … increasing the financial resources to the NCR over the MTEF period, given their additional functions and the critical role it plays in our socio-economic environment.'

[336] S 51(1)(a)-(d) of the FSRA.

[337] S 51(2) of the FSRA.

[338] NCR *Annual Report* 2015/2016 71. In Portfolio Committee on Trade and Industry *Budgetary Review and Recommendation Report of the Portfolio Committee on Trade and Industry* 18 October 2017, the NCR noted that 148 out of a possible 189 positions were filled – see 29.

[339] See NCR *Annual Report* 2015/2016 63: 'The success of regulatory work is heavily dependent upon the quality of the regulator's human resources. Securing and retaining staff of the necessary calibre is a challenge and is heightened by the fact that the NCR's core functions – compliance, complaints, investigation and enforcement require a unique mix of knowledge that spans the legal and financial fields, along with well-developed human relations skills. Appropriate staff recruitment, development and retention initiatives are therefore an integral part of the NCR's infrastructure.'

[340] Ss 23(1) & 23(5) of the NCA.

the responsibilities towards consumers and partnerships that the Regulator has forged:[341] the same report indicated 4 569 registered credit providers with 47 556 branches, 2 375 reported debt counsellors, 13 registered credit bureaus as well as prospective registrations for payment distribution agencies and alternative dispute resolution agents.[342] The Regulator specifically noted:

> 'Many of the challenges during the period arose from funding constraints. The NCR was very proactive and introduced various innovations and cost-cutting measures. As a result, it was able to deliver against its strategic plan … The NCR's workload has increased over the years. However, due to funding constraints, the NCR has not been able to hire more staff or relocate to bigger premises.'[343]

There seems to be an awareness of the value of good staff.[344] The Regulator devotes a section of its annual plan to report on its employment strategies, which seems to be aimed at attaining some of the sentiments expressed in chapter 3.[345] The type of research that I have undertaken does not lean itself towards determining the extent to which the Minister is involved in the operational activities of the National Credit Regulator insofar as human resourcing is concerned. I now turn to refer to some observations that can be made from perusing the latest annual reports and an extract from the minutes of a certain committee meeting posted by the Parliamentary Monitoring Group.

The Regulator recognises the need to find prospective employees of a high-calibre insofar as work ethics and skills are concerned.[346] It contracts with expert recruiting organisations to find suitable personnel.[347] Once recruited, there are specific programs to monitor performance and to encourage, and acknowledge, quality performance.[348] These include structured engagement on execution of duties, opportunities for professional progress, and attention to employees' wellbeing.[349] South African labour laws apply.[350] There is

[341] *Idem* at 8. See also Govender (n 39) e.g. 36.
[342] NCR *Annual Report* 2015/2016 19.
[343] *Idem* at 18.
[344] *Idem* at 63 & 65. See also at 65: 'The NCR recognises that its employees are its greatest asset. Strategies are in place to attract, retain and develop employees. Career Development and Succession Policies are also in place.'
[345] See e.g. NCR *Annual Report* 2015/2016 Part D.
[346] NCR *Annual Report* 2015/2016 65.
[347] *Ibid:* 'Critical positions are filled through a combination of internal and external recruitment methods, which include the use of specialised recruitment agencies and referrals to recruit scarce and critical skills.'
[348] NCR *Annual Report* 2015/2016 65. See also at 65: 'The NCR pursues a strategy of reviewing and, where necessary, amending HR policies to ensure that policies remain relevant. These Include the implementation of the revised performance management policy. This further cultivates a high performance culture within the NCR.'
[349] NCR *Annual Report* 2015/2016 65.
[350] NCR *Annual Report* 2014/2015 48.

furthermore a recognition that appropriate remuneration must exist,[351] particularly as it 'competes with other regulators and the private sector for skilled employees'.[352] It seems that the Minister has some influence, although it is not clear to which level in the organisation this refers:

> 'The Chairperson agreed and remarked that the NCR administration was established in terms of the NCR Amendment Act which was not yet in operation. On issues of dismissal, an employee can resign provided that he or she served a month notice or was removed by the Minister – the NCR should follow the formal process.'[353]

The Chief Executive Officer and Deputy Chief Executive Officer of the Credit Regulator are appointed by the Minister of Trade and Industry.[354] To say that the statutory provisions relating to the Chief Executive Officer of the National Credit Regulator are scant, is an overstatement. The Act only makes provision for the appointment of the Officer and the prerequisites thereto are minimal:

> 'The Minister must appoint a suitably qualified and experienced person as Chief Executive Officer of the National Credit Regulator, who must be responsible for all matters pertaining to the functions of the National Credit Regulator.'[355]

No further provisions are found, such as stipulations pertaining to the removal of the Officer from office and remuneration, to name but a few examples. There are no provisions relating to 'for cause' removal restrictions, fixed terms of office or multimember governing structures.[356] However, as I did not review employment contracts, it can also not be said whether there are any contractual removal restrictions. The Chief Executive Officer is not appointed on a permanent basis although it seems as if the head is appointed on a five year term, and that renewal is possible.[357]

[351] NCR *Annual Report* 2013/2014 85.

[352] NCR *Annual Report* 2014/2015 50. In this regard, see also the comments of Barkow (n 15) 48 regarding the need for 'competitive' remuneration.

[353] Portfolio Committee on Trade and Industry *National Consumer Commission & National Credit Regulator on their 1st Quarter Performance for 2014/15* 16 September 2014.

[354] Ss 23(1) & 23(5) of the NCA.

[355] S 23(1) of the NCA. See the similarly phrased s 23(5) of the NCA.

[356] See ch 3 *supra*.

[357] See Question NW3314 to the Minister of Trade and Industry 01 November 2017 – NW3314 Ms EN Ntlangwini to ask the Minister of Trade and Industry & NCR *Annual Report* 2012/2013 8. From these documents, read together, it seems as if the Chief Executive Officer (hereinafter 'CEO') (specifically Nomsa Motshegare) is appointed on five-year fixed term contracts as the Question to the Minister indicated that she is not appointed permanently (now, from 2017-2022) and the annual report shows that she has been the CEO since 2012 (even though the Board was then still in place and in terms of the NCR Annual Report 2011/2012 7-8, she was the Acting CEO as the first CEO Gabriel Davel stepped down from 1 January 2011).

The aforementioned position has only been applicable for the past two years as the National Credit Amendment Act changed the governing structure from a Board to a single Chief Executive Officer.[358] Facilitated decision-making and direct lines of accountability informed the change.[359] The Chief Executive Officer was established as the individual who is accountable for the performance of the National Credit Regulator, including responsibility for all aspects of the finances of the Regulator.[360]

The board members used to be appointed from executive nominations from different cabinet portfolios, including finance, housing, social development and trade and industry.[361] The majority of members were appointed by the Minister of Trade and Industry, who is the minister responsible for consumer credit matters, including the chair- and deputy chairpersons.[362] The three members serving on the board from external portfolios were appointed and removed at the leisure of the cabinet member who assigned the task to these persons.[363] A maximum of six additional members could be delegated to the board by the Minister of Trade and Industry, amounting to eight out of the total eleven designations made by this cabinet portfolio.[364] Decision making was effected through majority voting.[365]

Only the persons selected by the Minister of Trade and Industry were by law required to 'have applicable knowledge or experience of matters connected with the purpose of' the National Credit Act.[366] No board members could have formal affiliations with opposing political parties; a financial interest in a credit provider, debt counsellor or credit bureau; or an interest in commerce that could affect or effect discord in the execution of the responsibilities as a board member.[367] In addition, some standard exclusionary features

[358] See Portfolio Committee on Trade and Industry *National Consumer Commission & National Credit Regulator on their 1st Quarter Performance for 2014/15* 16 September 2014: 'Mr Macpherson referred to the report and noted that Ms Zihle, Mr Khumalo, Mr Gwenye did not attend any single meeting. He asked the CEO to comment on those glaring absenteeism relating to her board. These individuals were government officials. If they were not attending her meetings, the Committee should make a request to appoint individuals who were more interested. … The CEO responded that the executive were represented in the NCR board. However, in terms of the National Credit Amendment Act 19 of 2014, the NCR governing structure had changed in the sense that NCR would no longer have a board. It would rather have a Committee and the NCR was in the process of establishing that Committee. The board would no longer be in existence.'

[359] Ensor 'Regulatory bodies face restructuring' BDLive 19 January 2015.

[360] Ss 23(1) & (3) of the NCA after amendment by ss 3 & 4 of the National Credit Amendment Act. See also Scholtz 'Consumer Credit Institutions' in Scholtz *et al Guide to the National Credit Act* (June 2017 SI 9) par 3.2.5 in general.

[361] Repealed s 19.

[362] Repealed s 19 and existing s 1. See also NCR *Annual Report* 2014/2015 38.

[363] Repealed s 19(1(a), (b) and (c).

[364] Repealed s 19(1).

[365] Repealed s 21(5).

[366] Repealed s 19(3) read with s 19(2) and 19(1).

[367] Repealed s 20(2)(a)-(b).

applied that limited the Ministers' selection choices, such as a person with the status of unrehabilitated insolvent, official mental ailment or a person found guilty of certain convictions or other undesirable conduct.[368]

Behavioural restrictions were further placed through the repealed section 21 on the conduct of board members, which required some loyalty to the office held. Section 21(2)(a) and 21(2)(b)(ii) are of particular interest to me as it precluded a board member from 'engag[ing] in any activity that may undermine the integrity of the National Credit Regulator' and from 'attend[ing], participat[ing] in or influenc[ing] the proceedings during a meeting of the Board, if, in relation to the matter before the Board, that member has an interest that precludes that member from performing the functions of a member of the Board in a fair, unbiased and proper manner'.

Members appointed by the Minister of Trade and Industry were appointed for a maximum of five years[369] and could only be appointed as such for a maximum of two terms.[370] These appointees, being the chairperson, deputy chairperson and six additional members, could only be removed by the Minister upon contravention of the qualification provisions or conduct specifications of the Act or where the person 'neglected to properly perform the functions of [his/her] office'.[371]

The Board was responsible to

> 'guide the strategic development of the National Credit Regulator … oversee and ensure the efficient and effective use of the resources of the National Credit Regulator … ensure that the National Credit Regulator is in compliance with all its legal requirements and reporting and financial accountability obligations … and … provide advice to the Chief Executive Officer concerning the exercise of the functions and powers of the National Credit Regulator.'[372]

In addition, the Minister also appointed the Chief Executive Officer, who was a non-voting member of the Board by virtue of his or her official status as Executive Officer. The Board rendered advisory and supervisory services to the Chief Executive Officer in the execution of his or her duties related to the obligations of the Regulator.[373]

[368] Repealed s 20(2)(c)-(g).
[369] Repealed s 19(2).
[370] Repealed s 22(6).
[371] Repealed s 22(3).
[372] Repealed s 19(4)(a)-(d).
[373] Pre-amendment version of s 23(1).

Contrary to the position under the Board, whose role was of a supervisory and directory nature,[374] the role of the Chief Executive Officer is still worded in terms of responsibility and accountability.[375] The role of the Chief Executive Officer has not been adjusted, however, the supervisory support and accountability towards the Board has been extracted.[376]

The Chief Executive Officer has not been specifically empowered to fulfil some of the Board's mandates including those that were not directly involved with the proficiency of the Regulator's performance or observance of internal legislative requisites such as reporting and appropriate fiscal governance.[377] It may be argued that this duty has been transferred by implication because it is no longer directly attributed to the Board, and is necessary for the proper administration of the entity.[378]

7.2.3. Institutional framework

When one considers the wording of the National Credit Act, it seems as if the Regulator should be an autonomous entity that does not form part of the executive structure insofar as it is subjected to constant conduct-related oversight. The primary reason for this observation is that it has statutorily granted independence and is subjected solely to the provisions of the Constitution and the law,[379] and not executive persons' directives not founded in legislation. However, this does not mean that the Regulator is not subjected to oversight for accountability purposes and those matters for which the Department of Trade and Industry bears responsibility, such as the use and distribution of funds received from the National

[374] S 19 (4) originally provided as follows: 'The Board must – (a) guide the strategic development of the National Credit Regulator; (b) oversee and ensure the efficient and effective use of the resources of the National Credit Regulator; (c) ensure that the National Credit Regulator is in compliance with all its legal requirements and reporting and financial accountability obligations; and (d) provide advice to the Chief Executive Officer concerning the exercise of the functions and powers of the National Credit Regulator.' In addition, s 19(5) empowered the Board to direct any aspect of the performance of the Regulator in respect of its duties and mandate to the Minister.

[375] S 23(1) of the NCA: 'The Minister must appoint a suitably qualified and experienced person as Chief Executive Officer of the National Credit Regulator, who must be responsible for all matters pertaining to the functions of the National Credit Regulator.' S 23(3): 'The Chief Executive Officer is the accounting authority for the National Credit Regulator, and as such is responsible for – (a) all income and expenditure of the National Credit Regulator; (b) all revenue collected by the National Credit Regulator; (c) all assets, and the discharge of all duties and liabilities of the National Credit Regulator; and (d) proper and diligent implementation of this Act in order to achieve the objects stipulated in this Act.'

[376] S 23(1) originally provided as follows: 'The Minister must appoint a suitably qualified and experienced person as Chief Executive Officer of the National Credit Regulator, who – (a) with the advice, and subject to the oversight, of the Board, is responsible for all responsibilities pertaining to the functions of the National Credit Regulator; and (b) is accountable to the Board.'

[377] See s 19(4) predating the amendment, specifically the references in ss 19(4)(b)(-d).

[378] See the reasoning of the Constitutional Court in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC) par 54.

[379] S 12(1)(c) of the NCA.

Treasury.[380] The National Credit Regulator falls under the administration of the Department of Trade and Industry,[381] which is also the executive authority for purposes of the Public Finance Management Act.[382]

The question that should ideally be answered under this heading, over and above an analysis of what the legislation determines, is whether the National Credit Regulator is, for all practical purposes, really independent to the extent determined by the National Credit Act. Unfortunately, the desk research that I conducted for purposes of this thesis, was not sufficient for or conducive to answering the question. I will therefore not attempt to do so and submit that this could be a viable topic for further research – which should include other research methods, such as field and empirical research, and consist of an analysis of interagency agreements and internal documents.

In the interim, the following discussion aims to show that the Department of Trade and Industry is not above improperly intruding on the independence of entities under its watch and to extract aspects that could form part of a further study as indicated above.

In 2013, the Public Protector[383] published the outcomes of an investigation into the conduct of the Director-General of the Department of Trade and Industry.[384] The investigation was initiated as a result of a complaint by the Commissioner of the National Consumer Commission, which is an independent entity established in terms of section 85 of the Consumer Protection Act[385] and which functions under the auspices of the Department of Trade and Industry.[386] The Commission was created to enhance consumer protection by *inter*

[380] See e.g. Portfolio Committee on Trade and Industry *Budgetary Review and Recommendation Report of the Portfolio Committee on Trade and Industry* 18 October 2017.

[381] *Idem* at 5-6. See also s 1 of the NCA – the responsible Minister is the one 'responsible for consumer credit matters'. The Acts, Regulations and Amendments are published by the Minister of Trade and Industry, who is not mentioned by name in the NCA.

[382] See s 36(2) of the NCA: 'In addition to any other reporting requirements set out int his Act, the National Credit Regulator and the Tribunal must each report to the Minister annually on its activities, as required by the Public Finance Management Act, 1999 (Act 1 of 1999).' See also s 1 & ch 5 of the Public Finance Management Act (hereinafter 'PFMA').

[383] I discuss the office of the Public Protector in par 6.2 of ch 7 *infra* but offer, for sake of comprehension, a brief explanation of its role and purpose. The Protector has its foundations in the Constitution of the Republic of South Africa, 1996 (ss 181-183 of ch 9) and is further empowered by the Public Protector Act (Act 23 of 1994). Its purpose is to investigate malpractices by the State – in particular inappropriate behaviour that resulted in injustice – and report on the outcomes of its investigation together with proposed steps to rectify the situation – see e.g. the Preamble of the Public Protector Act; Madonsela 'The role of the Public Protector in protecting human rights and deepening democracy' 2012 *Stellenbosch Law Review* 4 6-8.

[384] Public Protector *There are no heroes* (n 326).

[385] Act 68 of 2008.

[386] Portfolio Committee on Trade and Industry *Budgetary Review and Recommendation Report of the Portfolio Committee on Trade and Industry* 18 October 2017 5-6.

alia dealing with consumer complaints[387] and receives funding from the Department of Trade and Industry.[388] The Public Protector regarded the Commission as 'South Africa's cardinal consumer watchdog' – an autonomous entity established by legislation under the administration of the Department of Trade and Industry.[389]

The complaint directed to the Protector's office by the Commissioner was founded on the allegation that the Director-General of the Department of Trade and Industry misused his authority and, in doing so, detrimentally affected the workings of the Commission.[390] Firstly, the Commissioner noted that there were aspects in respect of which she had specific authorisation to deal with exclusively,[391] and others where she had statutory duties to comply with in line with legislative provisions.[392] The conduct of the Director directly, and indirectly, undermined her ability to do so.[393]

Insofar as the human resources of the Commission were concerned, a workforce was gathered from existing personnel of the Department and assigned to the Commission.[394] The Commissioner was not a signatory to the agreement in terms of which employees became

[387] Woker 'Consumer protection and alternative dispute resolution' 2016 *South African Mercantile Law Journal* 21 21-22. In her introduction, Woker refers to the National Consumer Commission, NCR and National Consumer Tribunal in the same overall context – see 21-22: 'It is internationally recognised that consumer protection legislation and access to justice are closely linked and the improvement of access to justice is one of the "over-arching [sic] goals of consumer protection legislation". The NCA and CPA [Consumer Protection Act – inserted by author (JVW)] have introduced new avenues for consumers to access redress as they can now refer their complaints to the National Credit Regulator (Regulator), the Consumer Commission (Commission) and the National Consumer Tribunal (Tribunal).'

[388] Portfolio Committee on Trade and Industry *Budgetary Review and Recommendation Report of the Portfolio Committee on Trade and Industry* 18 October 2017 12.

[389] Public Protector *There are no heroes* (n 326) 3 par II.

[390] *Idem* at 3 & 17-18.

[391] *Idem* at 48 par 10.1.1.4.

[392] *Idem* at 24 par 6.1.3.

[393] *Idem* at 3 & 4 paras III & IV: 'III The Commissioner approached the Public Protector on 28 March 2012 making allegations of abuse of power against the DG [Director-General – inserted by author (JVW)] of the DTI. The complaint included various allegations of abuse of power, interference in NCC [National Consumer Commission – inserted by author (JVW)] operations and harassment in retaliation to her resistance. The main allegations related to the DG's alleged co-management of staff of the NCC transferred from the DTI, the main grievance being the DG's alleged withdrawal of some of these without notice causing disruptions to the NCC's operations. A related allegation was that the transfer of the staff was not handled properly by the DTI and the transfer agreement was never presented to or signed by the Commissioner. IV The Commissioner further alleged that DTI had procured goods and services for the NCC without her consent and made certain payments without her knowledge or authorisation when she was already on board. She further alleged the the DG was interfering in her operational independence by questioning her decisions on motor industry matters on behalf of that industry. She alleged that her resistance to DTI's interference in her operations had been met with retaliatory action, including withdrawal of needed support, particularly in regard to the procurement of financial systems. She further alleged that she was placed under virtual financial administration and ultimately subjected to multiple investigations and audits, facing at one stage 5 concurrent processes of that nature. The Commissioner also alleged that she had no signed performance agreement.'

[394] Public Protector *There are no heroes* (n 326) 48 par 10.1.1.4.

part of her workforce.[395] Furthermore, the staff so transferred were subsequently extracted from the Commission and reinstituted in the Department without knowing the Commissioner in the matter.[396] The Commissioner also complained that personnel originally from the Department, were privy to performance bonuses that she as Commissioner (being the official employer and accounting officer) had neither permitted nor authorised.[397] The Public Protector found that the Commissioner had been granted the authority to deal with the human resourcing of the Commission.[398] Even though the Commissioner had not partaken in the agreement that allocated members of the Department to the Commission, the retraction of the workforce thereafter did not adhere to the provisions of section 33 of the Constitution, which determines that administrative action may not be unjust or irrational.[399]

Insofar as financial aspects of the Commission were concerned, the funds that were due from the Department of Trade and Industry were retained pending written declaration by the Commissioner that the Commission met the standards set out in the Public Finance Management Act.[400] In the absence of a satisfactory reply, the funds may be released,

> 'subject to conditions and remedial measures requiring the entity to establish and implement effective, efficient and transparent financial management and internal control systems'.[401]

However, the Director-General was not satisfied that the necessary standards were met and only provided the funds in September 2011, whilst the letter to the Commissioner with the conditions that had to be complied with were dated 29 March 2011.[402]

The Public Protector had two main issues in this regard – the first being the assistance rendered to the Commission to meet the required standards and the second being the fairness

[395] *Idem* at 48 par 10.1.1.3: 'The Transfer Agreement of staff indicates that the Commissioner should have been requested to sign the document as the employer department, but she was never requested to sign the agreement and as such she never became a party to the agreement. The DTI ignored the Commissioner and expected her to adhere to the conditions even though she was not given an opportunity to be a signatory to the Transfer Agreement.'

[396] Public Protector *There are no heroes* (n 326) 48 par 10.1.1.5: 'When the DG became aware of complaints by the NCC staff regarding working conditions at the NCC he unilaterally decided to transfer them back to DTI via internal memoranda. There is no indication that the Commissioner was consulted to inform her that her staff would be removed with immediate effect. The DG clearly abused his authority in this regard.'

[397] Public Protector *There are no heroes* (n 326) 24 par 6.1.7.

[398] *Idem* at 41 par 9.1.1.3. In addition, the report states at 50 paras 10.1.1.7 & 10.1.1.8: 'My finding is that the DG of the DTI, Mr Lionel October, had multiple direct interactions with the NCC staff and eventually authorised the withdrawal of some staff arbitrarily without the Commissioner's knowledge or approval causing major operational disruptions. … The conduct of the DTI constitutes a violation of the Commissioner's operational independence, an unfair labour practice, an act of abuse or power and maladministration.'

[399] Public Protector *There are no heroes* (n 326) 41 & 42 paras 9.1.1.3, 9.1.1.4 & 9.1.1.6.

[400] *Idem* at 42-43 par 9.1.2.

[401] *Idem* at 42 par 9.1.2.

[402] *Idem* at 43 par 9.1.2.1.

of the decision to retain the funds, even though this was legally justified.[403] The Commissioner was informed of the expectations of the Director-General that had to be met prior to receiving funding, and also given the option of utilising the Department's financial systems or securing a scheme of her choice.[404] The Protector noted with apprehension that funds were again retained the following year.[405] There was some concern about the apparent lack of support after the Commissioner elected to acquire her own financial system as opposed to integrating the Department's scheme.[406] The Public Protector was adamant that there was a denial of assistance by the Department of Trade and Industry upon the selection by the Commission 'to do things independently', such as the failure to fund the independently sourced financial system, and that this amounted to irregular and abusive behaviour.[407]

Insofar as interference with the execution of duties was concerned, the Commissioner complained of inappropriate interference by the Director-General because he directed queries at the Commissioner after regulated industry members and the Chairperson of the Portfolio Committee on Trade and Industry contacted him.[408]

The issue in dispute was whether the Director-General attempted to assist with matters where he had no official role to play.[409] The Public Protector found that, in the absence of instructions commanding the Commissioner to act in a certain manner, the behaviour of the Director-General could not be classified as 'interference with the mandate of the Commissioner'.[410] Meeting with stakeholders, conversing about the Commissioner's activities and requiring information on on-going matters (such as accreditation requests) and questions from the Portfolio Committee did not warrant a finding of malpractice.[411]

Nevertheless, the report expresses the following sentiment earlier in the report (and separately from the findings):

> 'The question of interference cannot be dealt with without going into the nature of the NCC [National Consumer Commission]. The NCC is an important national consumer watchdog whose

[403] *Idem* at 43-44 paras 9.1.2.1-9.1.2.3. See also 49 par 10.1.2.4: 'The manner, in which the authority was exercised, however, fails to meet the test of good administration. Although lawful, the DTI's conduct was unfair, unreasonable and constitutes maladministration.'

[404] Public Protector *There are no heroes* (n 326) 32 par 7.2.1.

[405] *Idem* at 43 par 9.1.2.2. See also 31 par 7.1.4, in respect of securing funds per an individual project: 'It is common cause that the NCC's funds were released into the NCC's bank account in September 2011 but lated the DTI withdrew authority from the NCC retaining funds in its confers and requiring the NCC to request funds on a case by case basis.'

[406] Public Protector *There are no heroes* (n 326) 43 par 9.1.2.1.

[407] *Idem* at 50-51 par 10.4.1.

[408] *Idem* at 33-34 par 7.2.7-7.2.8.

[409] *Ibid*.

[410] *Idem* at 50 par 10.2.1.

[411] *Ibid*.

> perceived and real independence is critical for credibility and legitimacy. The arm's length required between the DTI and the NCC is clearly more of an issue than the trading entities attached to the DTI. But did the conduct of the DG [Director-General] threaten independence in any way? Legally there was no law against it. However, it is important that the need for avoiding perceptions of lack of independence need to be borne in mind in all DTI actions in relation to the NCC *and other DTI attached watchdogs.*'[412]

The last matter is self-explanatory:

> 'Harassment through multiple investigations … It is correct that the NCC was indeed subjected to multiple enquiries and audit investigations at the same time. While the Auditor-General was conducting its audit, the Minister also requested an Independent Forensic Audit to be conducted by Grant Thornton as well as an internal audit. The Public Protector investigation was also taking place around the same time, a fact known to the DTI. At a stage when the DG had already withdrawn staff members from the NCC, these audits stretched the NCC staff unduly. This meant that the NCC was unable to execute its functions properly because of being subjected to multiple investigations. While there is nothing wrong with auditing, *per se*, the pressure placed on the Commissioner does amount to abuse of power.'[413]

When considering the findings in the report, it is quite clear that the outcomes speak to interference in many of the aspects that concern independent spheres of interest of an autonomous entity, as alluded to earlier in this thesis. I have not dealt with each and every aspect but the report provides practical examples of undue intrusion onto the domain of the independent agency.

The report refers to specific documents that are internal agreements to regulate the relationship and interactions between the entity and the Department[414] – the Stakeholder Compact, [415] an employment contract with the Commissioner [416] and performance agreements.[417] As such, it is imperative to determine whether, and which, similar documents exist in relation to the National Credit Regulator. These documents must be perused at some

[412] *Idem* at 45 par 9.2.4. Own emphasis.

[413] *Idem* at 50 par 10.3.1. See also 14 par XV (a): 'There seems ot have been different interpretations of the independence of the NCC in the context of the DTI's responsibility as a "shareholder". The law is very specific that the NCC is independent yet the PFMA has certain requirements. The relationship between the Minister and the Commissioner also was defined in one way in principle yet different expectations informed the situation. The notion of shareholder appears to have contributed to the distortion.' As such, the Public Protector recommends at 54 par 11.1.1 that the relations between the respective senior officials (Commissioner, Minister and Director-General) be set.

[414] See e.g. Public Protector *There are no heroes* (n 326) 6 paras X & XI.

[415] Public Protector *There are no heroes* (n 326) 6 par XI.

[416] *Idem* at 12 par XIV (e)(aa).

[417] These were particular sources of contention as the Commissioner's draft agreement was claimed to be 'satisfactory' but a final document was never signed (see 12 par XIV(e) (aa) & (bb)) and the Commissioner never entered into performance agreements with the staff at the National Consumer Commission (see 13 par XIV(f) (bb) – this was a counter-complaint against the Commissioner).

time to analyse its impact on the independence of an entity such as the National Credit Regulator. The references to the documents applicable to the National Consumer Commission actually seem to strengthen the notion of independence,[418] but this may be a marginalised view as only certain paragraphs were quoted, or referred to, by the Public Protector. As such, I am unable to express an informed opinion on this matter.

The Public Protector's report adds two further dimensions to interaction between state entities – behaviour that is aligned with constitutional principles[419] and labour laws.[420] There seems to be a definite focus on, and measuring of actions against, the provisions of section 41 of the Constitution:

> 'In the search for the ideal relationship between the DTI and the NCC, consideration was also given to the broader regulatory framework, including the principles of co-operative governance as envisaged by Section 41(1)(h) of the Consitution which states that all spheres of government and all organs of state must co-operate with one another in mutual trust and good faith by fostering friendly relations and assisting and supporting one another.'[421]

Insofar as the labour relations between the head of the regulator and the responsible department are concerned and if the position of the Commissioner represents standard protocol, it seems as if official contracts of employment are concluded.[422] As such, the Labour Relations Act[423] will apply and section 185 of this Act determines that 'every employee has the right not to be unfairly dismissed or subjected to unfair labour practice'. An unfair dismissal, in terms of section 188, constitutes the following:

> 'A dismissal that is not automatically unfair, is unfair if the employer fails to prove …that the reason for dismissal is a fair reason … related to the employee's conduct or capacity; or … based on

[418] See 39 & 40 paras 8.5.1 & 8.5.3: 'The Shareholder Compact is based on the underlying principles of the Protocol, which require sufficient freedom of the Commissioner to manage the affairs of the NCC balanced against the responsibility to exercise such freedom within the agreed mandate as outlined in the relevant legislation and the framework of effective accountability. … That the DTI will not restrict or impede in any way the discretion of the NCC regarding matters falling within the NCC authority, as provided in the Shareholder Compact and the Act; The NCC to inter alia maintain effective governance and the highest standards of ethics and principles of the PFMA, establish an Audit and Risk Management Committee and not enter into any transactions outside the Supply Chain Management Policy of the NCC and Procurement delegations.'

[419] Public Protector *There are no heroes* (n 326) 7 par XIII. See also s 41(1)(h) of the Constitution of the Republic of South Africa, 1996 & 37-38 par 8.1.

[420] Public Protector *There are no heroes* (n 326) 50 par 10.1.1.8.

[421] *Idem* at 7 par XIII.

[422] *Idem* at 32 par 7.2.1.

[423] Act 66 of 1995.

> the employer‘s operational requirements; and … that the dismissal was effected in accordance with a fair procedure.'[424]

This provision echoes the 'for cause' requirement referred to in chapter 3. As such, one has to contemplate the value of an additional statutory requirement that protects senior officials against politically motivated dismissals, particularly where the Labour Relations Act determines in section 187 that a dismissal motivated by differences of conscience or political opinion may by design constitute an unfair dismissal. Perhaps the answer lies in the consequences where there are irregularities involved in removing an official from office. In terms of section 193(1) of the Labour Relations Act, the dismissed employee is entitled to re-instatement, re-employment or compensation. However, if a senior employee is not dismissed within the allowed boundaries of the legislative provisions, I doubt whether there is an official removal from office and the official continues in his or her position. Any actions taken by interim appointees will then be null and void.

7.3. The Financial Sector Conduct Authority

7.3.1. Financial resources

When I looked at Mwenda's independence-enhancing features earlier in the discussion, I briefly referred to autonomy in respect of the forthcoming Prudential Authority of South Africa.[425] In the clarification document pertaining to the 2014 draft of the Financial Sector Regulation Bill, the National Treasury clearly set out to show that control over financial aspects of the organisation is an important factor that supports autonomy.[426]

Insofar as the Financial Sector Regulation Act deals with the financial aspects of the Conduct Authority, provision is made for the Authority to be funded by way of fees and levies, interest on amounts due, and 'funds accruing ... from any other source'.[427] 'Fees' pertain to the execution of 'specific' legislative duties and 'Levies' are charged in order to meet the

[424] S 187, which deals with dismissals that are 'automatically unfair', includes incidences where 'the employer unfairly discriminated against an employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, *conscience*, belief, *political opinion,* culture, language, marital status or family responsibility' – see s187(1)(f) of the Labour Relations Act. Own emphasis. Of particular interest to the topic under discussion is section 186(e), which states that 'dismissal' occurs where 'an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee'.

[425] See par 2.4 *supra.*

[426] National Treasury *Twin peaks in South Africa: Response and Explanatory Document Accompanying the Second Draft of the Financial Sector Regulation Bill 2014* 29: 'The PA [Prudential Authority] will be responsible for determining its own resource requirements, and funding them through industry levies. More generally, resources such as facilities, accommodation, and seconded staff will be provided by the Reserve Bank. This is a deliberate design feature of the South African model and is arguably no less independent than the current arrangements for banking prudential supervision.'

[427] S 247(1) of the FSRA.

financial needs of the Regulator in respect of its 'operations'.[428] Section 238 sets non-payment as a cause of action for judicial debt collection and the Financial Sector Conduct Authority has *locus standi* to enforce the debt.

No legislative provision is made for financial support from the Department of Finance. Although a contribution of this nature is not excluded (i.e. being another 'source'), the provisions in section 239 pertaining to the formula for determining charges due to the industry, and the lack of any statutory obligation on the Department to contribute to the financial well-being of the Regulator, theoretically establishes the Conduct Authority as self-funding. It is, however, difficult to imagine that the Authority would not receive some assistance from the government.

Section 239 requires that the Conduct Authority sets the contributions of industry but it has to consider the input received from industry when it first proposes the amounts due for each financial year.[429] The same provision applies to the budget drafted by the Authority.[430] Insofar as the Minister is concerned, the budget, fees and levies are to be provided to him or her for comment.[431] There is no provision in the Financial Sector Regulation Act that requires the Minister to consent to the budget, but there is such a requirement set in section 53 of the Public Finance Management Act. The relevant sections of the Financial Sector Regulation Act and the Public Finance Management Act determine the following:

> 'The financial sector body must submit the finalised budget, together with the fees and levies proposals, to the Minister … The Minster must be allowed a period of at least 30 days to consider the proposals for all the financial sector bodies … In respect of the fees and levies proposals for the first financial year following the commencement of this section, the Minister must approve the proposals for all the financial sector bodies.'[432]

> 'The Financial Sector Conduct Authority … must … prepare an annual budget in accordance with section 53 of the Public Finance Management Act and section 239 of this Act.'[433]

> 'The accounting authority for a public entity listed in Schedule 3 which is not a government business enterprise must submit to the executive authority responsible for that public entity, at least six months before the start of the financial year of the department designated in terms of subsection (2) or another period agreed to between the executive authority and the public entity, a budget of

[428] S 237(1) of the FSRA.
[429] S 239(4) of the FSRA.
[430] *Ibid*.
[431] S 239(5) & 239(6) of the FSRA.
[432] S 239(5)-(7) of the FSRA.
[433] S 248(4)(a)(i) of the FSRA.

> estimated revenue and expenditure for that financial year, *for approval by the executive authority*.'[434]

As such, it does seem as if the Minister must commend the budget of the Authority. However, the Minister of Finance only has to consent to the fees and levies applicable to the first year of the Authority's existence.[435] Thereafter, the Financial Sector Conduct Authority is entitled to amounts that comply with the formula set out in section 239(9) and only requires the consent of the Minister where the amounts exceed the amount to which the formula solves.[436] However, as the Minister has some say in the budget and the formula is based on the previous years' expenditures, the Minister does have some influence over the fees and levies as well. Nonetheless, it will require some long-term strategic manipulation in order to affect the fees and levies once the first set of charges have been approved in line with section 239.

The use of the funds is regulated by legislation which provides a set of general categories of application: expenses in the day-to-day course of conducting the Authority's business and funds directed towards executing the affairs for which, and in the manner provided for, the Authority was established in the first place.[437] The allocation of financial resources within this framework are within the discretion of the Authority as it has to consider the following when executing its duties: '…the need for a primarily pre-emptive, outcomes focused and risk-based approach, and prioritise the use of its resources in accordance with the significance of risks to the achievement of its objective …'[438]

The fact that the financial resources may only be used for the categories established by section 247 is a first barrier to limit the possibility of improper use. However, as the Minister has to approve the budget and, in terms of section 53(4) of the Public Finance Management Act,[439] expenses may only be covered in line with the budget, there is some room for capture, especially where the Minister desires more, or less, attention to a specific issue.

7.3.2. Human resources

The Financial Sector Regulation Act determines that the Conduct Authority is entitled to contract a workforce, whether as employees, contractors or seconded persons.[440] The

[434] S 53(1) of the PFMA. Own emphasis.
[435] S 239(7) of the FSRA.
[436] S 239(9) of the FSRA.
[437] S 247(2) of the FSRA.
[438] S 58(5)(b) of the FSRA.
[439] S 53(4) determines as follows: 'The accounting authority for such a public entity is responsible for ensuring that expenditure of that public entity is in accordance with the approved budget.'
[440] S 73(1) of the FSRA.

legislation does not prescribe any limitations on this prerogative and I assume that the Authority is therefore enabled to decide, and meet, its labour needs as it deems fit. As all core decisions pertaining to the Authority are made by the Executive Commission,[441] decisions on contracting persons would be broadly constrained by the conduct demands placed on the Commission: primarily the overreaching governance goal set by section 59. Section 59 determines that

> '[t]he Financial Sector Conduct Authority must manage its affairs in an efficient and effective way, and establish and implement appropriate and effective governance systems and processes, having regard, among other things, to internationally accepted standards in these matters'.

As such, the human resource section of the Authority will also need to integrate these norms.

The Minister of Finance's involvement in the set-up of the Financial Sector Conduct Authority is notable.[442] He is solely responsible for the selection of the Commissioner and Deputy-Commissioners of the Financial Sector Conduct Authority who will constitute the Executive Committee of the Authority.[443] The Executive Committee is the essential driving force and decision-making body within the Authority and is compelled to execute certain core functions itself as the ability to delegate is explicitly disallowed under specific circumstances.[444] The pool of potential candidates to head the commission is limited by the requirements that the appointee has to be 'fit and proper and [have] appropriate expertise in the financial sector'.[445] The Deputy Commissioners only need to be suitable financial sector experts in order to serve on the Commission.[446] The Minister determines the recruitment procedure, performance management parameters, the period appointed,[447] retention of the appointed person for a further term and service provisions[448] applicable to the Commissioner and Deputy Commissioners.[449]

Once appointed, there are two possibilities for dismissing a Commissioner or Deputy-Commissioner and in this regard, the powers of the Minister are limited. In terms of subsections 65(1) and (2), the Minister has no choice but to dismiss a Commissioner or Deputy Commissioner where such a person becomes a 'disqualified person' as per section 1

[441] S 60(3) of the FSRA.
[442] See ss 1 & 8 of the FSRA in respect of the responsible cabinet member.
[443] S 61 of the FSRA.
[444] Ss 60 & 71(1)(a) of the FSRA.
[445] S 61(1) of the FSRA.
[446] S 61(2) of the FSRA.
[447] In this regard, the FSRA determines a maximum period of five years – see s 63(1)(a).
[448] In this regard, the FSRA determines that the agreed provisions may not be limited in the period that the person is appointed.
[449] See ss 61(1), 61(2), 61(4), 61(7), 63 & 64 of the FSRA.

of the Financial Sector Regulation Act. This means that the appointee has a vested interest that could cause a conflict of interest (such as serious business, financial or political ties) or is a person of questionable integrity, financial skill or unsound mental state.[450] The second possibility is where 'an independent inquiry' commissioned by the Minister finds the following: the Head or Deputy cannot function in the position held because of health or other causes; the subject of the enquiry did not meet the substantial performance parameters set upon taking office; there had been substantial non-performance of duties; or the person conducted him- or herself in such a manner that remaining in the position would be untenable.[451] The National Assembly must be informed of the outcomes of the investigation in terms of section 65 as the Minister is obliged to provide Parliament with the report and findings of the inquiry. There are no provisions in the Financial Sector Regulation Act that determines the form and terms of reference of the 'independent inquiry'. The only specification is where the senior official becomes a 'disqualified person', in which case the correct procedures must be followed.[452]

7.3.3. Institutional framework

The Financial Sector Conduct Authority falls under the Department of Finance, and the Minister of Finance is the administrating cabinet member.[453] The Financial Sector Regulation Act does not specify that the Authority is endowed with independence *per se*, but that it has to function in a manner that is unbiased.[454] If one applies Carpenter's explanation of the difference between independence and impartiality,[455] it would mean that the Authority does not necessarily have statutorily endorsed institutional autonomy but that the officials that constitute the Authority have to be self-directed .[456] As such, the need to remain uninfluenced is of paramount importance and I consider the office of the Minister of Finance as the case

[450] S 1 of the FSRA.

[451] S 65(3)(a)-(d) of the FSRA: 'The Minister may remove the Commissioner from office if an independent inquiry established by the Minister has found that the Commissioner … is unable to perform the duties of office for health or other reasons … has failed in a material way to achieve the level of performance against the performance measures agreed to in terms of section 61 (7) … has failed in a material way to discharge any of the responsibilities of office, including any responsibilities entrusted in terms of legislation … or … has acted in a way that is inconsistent with continuing to hold the office.' These provisions are echoed in respect of the office of the Deputy Commissioner, with the exception that the inquiry is initiated by the Commissioner and not the Minister of Finance. The Minister must nevertheless agree with the dismissal and the inquiry so established – see s 65(5): 'The Commissioner may, with the concurrence of the Minister, remove a Deputy Commissioner from office if an independent inquiry established by the Commissioner, with the concurrence of the Minister, has found that the Deputy Commissioner …'

[452] See s 65(1) & (2) of the FSRA.

[453] Ss 1 & 8 of the FSRA.

[454] S 57(6) of the FSRA.

[455] See par 3 *supra*; Carpenter (n 20) 500.

[456] See Carpenter (n 20) 500 regarding 'independence of mind on the part of the individual'.

study for this part. I do so by referring to the Public Protector's report on state capture[457] and highlight the need for this specific Regulator to be endowed with proper 'insulating' factors.[458]

The Public Protector's report highlights factors that are a cause for concern, without coming to final conclusions[459] – in this regard, her recommendation is that a sufficiently resourced commission must undertake a full investigation.[460] The various Ministers of Finance, or at least the position of Minister of Finance, features prominently in the Public Protector's report as irregularities in respect of the appointment of officials in this position were the foundational allegations for one of the core complaints to the Protector.[461] As such, I reiterate some of the evidence-based 'observations' reflected in the report and made after the investigation:

> 'Regarding whether President Zuma improperly and in violation of the Executive Ethics Code, allowed members of the Gupta family and his son, to be involved in the process of removal and appointment of the Minister of Finance in December 2015: … President Zuma was required to select and appoint Ministers lawfully and in compliance with the Executive Ethics Code. … It is worrying that the Gupta family was aware or may have been aware that Minister Nene was removed 6 weeks after Deputy Minister Jonas advised him that he had been allegedly offered a job by the Gupta family in exchange for extending favours to their family business. … Equally worrying is that Minister Van Rooyen who replaced Minister Nene can be placed at the Saxonwold area on at least seven occations including on the day before he was announced as Minister. This looks anomalous given that at the time he was a Member of Parliament based in Cape Town. … Another worrying coincidence is that Minister Nene was removed after Mr Jonas advised him that he was going to be removed.'[462]

In chapter 3, I referred to government malpractices, which supports the contention that independence is increasingly important in a country where factors within the government are subject to deceitful practices.[463] The Ministry of Finance has in recent years been subject to questionable practices, ranging from implications that it was involved in state capture practices[464] to the multiple changes to the position of Minister of Finance[465] for speculated

[457] Public Protector *State of Capture* (n 326).
[458] See Barkow (n 15) 25: 'A policy maker concerned with the agency's long-term success must create insulating measures that will work even as the presidency and Congress undergo shifts in party leadership.'
[459] Public Protector *State of Capture* (n 326) e.g. 14-15.
[460] *Idem* at 24-25.
[461] *Idem* at 29-30.
[462] *Idem* at 343.
[463] See par 4.6 of ch 3 *supra*.
[464] Public Protector *State of Capture* (n 326) 343.
[465] See Areff 'TIMELINE: How South Africa got three finance ministers in four days' News24 14 December 2015; Staff writer 'SA presidents vs finance ministers: 1994 – 2015' BusinessTech 10 December 2015.

reasons.[466] Apart from the potentially detrimental effect on the country's economy where a dismissal of a Finance Minister occurs,[467] the fact that multiple changes are effected to a position held by a highly empowered person insofar as the Financial Sector Conduct Authority is concerned, requires a renewed reflection on the benefits of autonomy, *inter alia* as a policy-stability enhancer or limiting political capture.[468]

8. COMPARATIVE ANALYSIS OF THE AUTONOMY OF THE NATIONAL CREDIT REGULATOR AND THE FINANCIAL SECTOR CONDUCT AUTHORITY

The evaluation of a regulator's independence in South Africa is a study characterised by multiple analytical layers. It is no longer just a question of independence of the institution, but also of impartiality.[469] The latter is recognised as a theme that denotes cognitive autonomy according to Carpenter.[470] The regulatory framework of the enabling legislation provides the first investigative basis,[471] and informs the being of the regulator through statutory prescriptions that denote its form, purpose and functions. In this case, the primary statutes would be the National Credit Act, for the National Credit Regulator, and the Financial Sector Regulation Act, for the Financial Sector Conduct Authority. These statutes are the foundations, where the need to consider notions of autonomy and neutrality is firmly set.

In respect of the independence and impartiality of the National Credit Regulator, subsections 12(1)(c) and (e) of the National Credit Act refer to these two terms *verbatim.* Section 12(1)(f)(ii) determines that the Regulator must execute its duties 'without fear, favour, or

[466] See Cohen & Vollgraaff 'SA Finance Minister: From Trevor, Pravin and Nene to David Who? What next?' BizNews 10 December 2015: ' "In my view, Nene was clearly axed because he failed to do Zuma's bidding when it came to managing SAA and funding for proposed new nuclear plants," said Peter Attard Montalto, an economist at Nomura International Plc, from London. Van Rooyen is "a pure political appointment. We are worried about the fact he has no central or provincial government experience."'; Graham 'South African currency plunges after Jacob Zuma fires finance minister in cabinet purge' The Telegraph 31 March 2017: 'Mr Gordhan is highly respected by investors and had been seen as a stabilising force in the government. He had frequently annoyed Mr Zuma by blocking suspicious tenders and calling for government departments to cut spending. Mr Gigaba, 45, who was criticised for introducing draconian visa rules that crippled that South Africa's tourism industry, is a loyal defender of Mr Zuma, frequently praising him in Parliament and blasting his critics.'

[467] See Graham 'South African currency plunges after Jacob Zuma fires finance minister in cabinet purge' The Telegraph 31 March 2017; Cohen & Vollgraaff 'SA Finance Minister: From Trevor, Pravin and Nene to David Who? What next?' BizNews 10 December 2015; Masutha, Groottes & Whittles 'Rand plummets following Nene's 'redeployment'' Eyewitness News 10 December 2015; Mkokeli, Paton, Ndzamela & Ensor 'Rand crashes after Zuma fires Nene' BDLive 10 December 2015.

[468] See ch 3 *supra*. See also Barkow (n 15) 21-25.

[469] See par 3 *supra*.

[470] Carpenter (n 20) 500.

[471] See Public Protector *There are no heroes* (n 326) 6 & 38-39 paras X & 8.2-8.3.

prejudice'. The Financial Sector Regulation Act does not refer to independence or impartiality in respect of the Financial Sector Conduct Authority *per se*, but section 58(6) of the Financial Sector Regulation Act echoes the wording of section 12(1)(f)(ii) of the National Credit Act, in respect of the Financial Sector Conduct Authority. I am curious as to whether there is a difference between conduct oneself in a manner that is without favour and impartiality as both these concepts denote a lack of bias.[472] As the Financial Sector Regulation Act was drafted by a different ministerial office than the one that drafted the National Credit Act, one cannot say with certainty that impartiality was intentionally omitted or whether the neutrality-requirement of section 58 is intended to be all-encompassing. I do not think that one can act in an unbiased manner without having Carpenter's impartiality of mind.

The second layer is found in the same laws, and is based in the overall purpose and envisaged outcomes set out in the statute. This consideration is recognised by Reghard Brits, who also refers to the third layer, albeit in a more substantive as opposed to institutional context.[473] This third analytical base is informed by an evaluation of those determinants in the Constitution, specifically applicable to the particular context of interactions between role-players in the public domain.[474] The respective laws may also add to the gist of mature collaboration between public players – specifically the stipulations of section 12(2) of the National Credit Act:[475]

> 'Each organ of state must assist the National Credit Regulator to maintain its independence and impartiality, and to perform its functions effectively.'

I support an interpretation of section 12(1)(c) of the National Credit Act that creates an organisation that is 'independent' in the truest sense of the word. My view is supported by the full text of the aforementioned subsection, which does not only require autonomy but also reads that the Regulator is 'subject only to the Constitution and the law'. In addition, sections 12(1)(e) and 12(1)(f)(ii) require that the Regulator 'must be impartial' and 'must perform its functions without fear, favour, or prejudice'. As such, I doubt that the intention was to merely create a separate entity, but also to create a free-thinking entity as per Carpenter's interpretation of 'independence' and 'impartiality'.[476]

[472] See Hornby *Oxford Advanced Learner's Dictionary of Current English* (2010) 540 & 751 for explanations of the terms 'favour' and 'impartial'.

[473] Brits 'The National Credit Act and the bill of rights: towards a constitutional view of consumer credit regulation' 2017 *Journal for the South African Law* 470 483.

[474] See Public Protector *There are no heroes* (n 326) 37-38 par 8.1.

[475] See also the provisions relating to collaboration and co-operation in ch 5 of the FSRA.

[476] Carpenter (n 20) 500.

Notwithstanding this intention, I have strong doubts as to whether the National Credit Regulator is indeed an independent agency. In fact, I would go so far as to argue that the recent legislative amendments have transformed the Regulator into an executive-branch agency, subjected to the political will of the Cabinet Minister responsible for consumer credit matters. The legislation reflects neither the standard, nor the more specialised measures, that protect the autonomy of the institution. That said, some of these aspects may be built into the formal documents that exist to stipulate the terms of interaction between the executive department and the independent agency as alluded to by the Public Protector in her report on the investigation into the complaints by the Commissioner of the National Consumer Commission in respect of the Minister and Director-General of the Department of Trade and Industry.[477] I would strongly recommend an evaluation of the contents of these documents, if they exist in the context of the National Credit Regulator, in order to analyse the impact thereof on the independence of the National Credit Regulator.[478] It can also be possible that an absence of documents such as those that exist in the milieu of the National Consumer Commission, may have a detrimental effect on the ability of the National Credit Regulator to ensure recognition and take ownership of its independent status.

As a last thought on the matter, it may also be of value to ensure that the documents are drafted by an independent consultant to ensure that it reflects some degree of contractual neutrality. For example, one can consider the role that South African labour legislation plays in strengthening the position of the Head of the regulator, which necessitates that the contract of employment concluded with this person is drafted in manner that reflects the milieu, and enables the person to meet the demands of the position, within the autonomy-capture conversation.[479]

In chapter three, I noted the following:

> ‘Thus, the history, abilities and nature of the person has to align with the crucial position and assist with the proper execution of responsibilities. In the absence thereof, any adverse selection should rather be referred to the forum of the judiciary for adjudication afterwards. The court also found that

[477] See Public Protector *There are no heroes* (n 326) 12 & 39 paras XIV (e) & 8.5.

[478] The International Organisation of Securities Commissions (hereinafter ‘IOSCO’) *Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation* May 2017 recommends at 28 that ‘the actual operation of the relationship between the regulator and any governmental overseer should be considered. If possible, the effect of such inter-relationship should be reviewed in specific cases’.

[479] See the reference to an unfair labour practice in Public Protector *There are no heroes* (n 326) 37 par 7.3.5.

> the requirements for selection were "objectively ascertainable" and easily understandable by the decision-makers.'[480]

The above comment was made in respect of the discussion in *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* and in this case, the court also held as follows:

> 'The overarching requirement for suitability is "fit and proper" which, broadly speaking, means that the candidate must have the capacity to do the job well and the character to match the importance of the office. Experience, integrity and conscientiousness are all intended to help determine a possible appointee's suitability "to be entrusted with the responsibilities of the office concerned". Similarly, laziness, dishonesty and general disorderliness must of necessity disqualify a candidate … The kind of experience, work ethic and disposition to the truth that the potential appointee has must point to the decision that she is the right person "to be entrusted with the responsibilities of the office concerned". Since inconsequential experience and character flaws could not have enhanced the prospects of her appointment to that office, if she was nevertheless appointed, then a successful challenge may be mounted against that appointment.'[481]

Although this may assist in ensuring that an able person is appointed, in respect of independence Rachel Barkow warns as follows:

> 'What can be done about these pressures? First consider the problem of partisan appointments. One way to create greater independence is to specify qualifications for appointees so that the pool of potential candidates from which the President picks is more limited and he or she cannot select solely on the basis of partisan leanings.'[482]

The National Credit Regulator is led by a Chief Executive Officer, who has neither statutory security of tenure nor a legislated fixed term appointment.[483] Although one may argue that there is some protection afforded by the South African labour law regime, it is not possible to determine the value and extent of this protection without considering the contents of the employment contract. It is also possible that, in the absence of a contractual fixed term, the Chief Executive Officer could be employed on a permanent basis, which would result in her continuing in office even in the event of a change of political regime.

The rationale for removing the governing structure of a Board was reportedly to facilitate decision-making and enhance accountability.[484] The Board members were also subjected to

[480] See par 4.4 of ch 3 *supra*.
[481] [2014] ZACC 32 paras 63 & 64.
[482] Barkow (n 15) 47. However, Barkow notes at 49: 'Even with this kind of attention to circumstance, appointment and postemployment restrictions are no panacea. Even when the list of appointees is narrowed by expertise, the President is likely to find individuals who share his or her vision for the agency.'
[483] See par 4.2 of ch 3; par 7.2 of ch 6 *supra*.
[484] Ensor (n 359).

criticism pertaining to their lack of involvement in Board-related activities.[485] However, as Barkow argued, it is easier to capture a single person than a whole Board – especially where the Board representatives are ideologically varied and appointed for set periods that overlap.[486] As such, the problem with the Board may very well have been the enthusiasm of the individuals, as opposed to the governing structure itself.[487]

I favour the re-instatement of a board- or commission-like governing structure consisting of experts, for various reasons: Firstly, multiple role-players deflect attempts at political or industry capture easier;[488] secondly, a variety of experts increase the probability of proper consideration of different perspectives when decisions are made,[489] which adds to the third aspect, which is the development of technical expertise in the regulated field.[490]

Insofar as the suggestion that multiple persons should be involved in the selection of the senior officers of the regulator is concerned,[491] I would not recommend this for the National Credit Regulator where the Board consists of persons with varied skills and knowledge, fitted to the various components of the Regulator's mandate. The requirements for the original Board were good indications of the required variety and requisites to protect the security of members' appointments on the Board, although I would specifically include another delegatee that is concerned with industry welfare and growth, as the positions where original statutory specifications were given for the composition of the Board were construed to protect various consumer interests.[492]

[485] See Portfolio Committee on Trade and Industry *National Consumer Commission & National Credit Regulator on their 1st Quarter Performance for 2014/15* 16 September 2014.

[486] Barkow (n 15) 38; par 4.2 of ch 3 *supra*.

[487] See also NCR *Annual Report* 2013/2014 44 – the report reflects that there was only a 66.25% attendance during the period April 2013 to March 2014. There is also no similar provision in the NCA to s 65(7) of the FSRA, although this also does not guarantee proper or consistent involvement, especially where permission is ordinarily granted: 'Without limiting subsection (3)(c) or (5)(c), the Commissioner or a Deputy Commissioner, as the case may be, must be taken to have failed in a material way to discharge the responsibilities of office if he or she is absent from two consecutive meetings of the Executive Committee without the leave of the Executive Committee.' The FSCA's Executive Committee are appointed on a 'full-time executive capacity'.

[488] NCR *Annual Report* 2013/2014 44.

[489] Barkow (n 15) 52; par 4.2 of ch 3 *supra*.

[490] See par 3.3 of ch 2 *supra*.

[491] Quintyn & Taylor *Should financial sector regulators be independent?* 2004 *International Monetary Fund Economic Issues* No 32; Quintyn *et al The Fear of Freedom: Politicians and the Independence and Accountability of Financial Sector Supervisors* (IMF Working Paper WP/07/25) 2007 8; Mwenda *Legal aspects of financial services regulation and the concept of a unified regulator* (2006) 25; par 4.2 of ch 3 *supra*.

[492] See par 7.2.3 *supra*. It is also important to note the following statement of Quintyn *et al* (n 491) 13: 'Some countries have tried to establish accountability to the executive branch by appointing government representatives on internal oversight bodies. However, representation of government or ministries should be *limited to nonexecutive members in an oversight board without operational or policy functions*. Once they are involved in policy matters, compliance with "operational independence," as defined in Basel Core Principle 1, is debatable.' Own emphasis.

However, whether or not the National Credit Regulator is indeed assimilated into the Financial Sector Conduct Authority, I would recommend that at least one of the possible four Deputy Commissioners that may be appointed to serve as the Financial Sector Conduct Authority's Executive Committee in terms of section 61 of the Financial Sector Regulation Act, be a joint Minister of Finance-Minister of Trade and Industry appointment to ensure proper consumer protection. The Financial Sector Conduct Authority may also benefit from a consumer advocate's office as proposed by Barkow[493] or at least a consumer credit advocate's office. The reason for this is that there is an inherent conflict in the mandates of the Financial Sector Conduct Authority, being customer welfare and a supporting role insofar as financial stability is concerned.[494] The milieu in which the Authority has to function further complicates the matter: Firstly, the Financial Sector Conduct Authority partially retains prudential duties for collective investment schemes, pension funds and friendly societies as a transitional measure[495] and, secondly, the Authority functions under the auspices of the Department of Finance, whose Minister is involved with the Reserve Bank (via the financial stability provisions) and the Prudential Authority.[496]

As for the proposition that Board members consist of representatives from different political parties,[497] I would not make a suggestion in this regard without specialist research into the mechanisms of interaction between South African political parties, especially in light of the disruptive nature of some parties.[498] It will be a fatal flaw if Board members representing minority parties cause disarray in order to show failure and incompetency on the side of the reigning regime. Even where the majority of Board members are from the reigning political party, participation by minority representatives that is not aimed at encouraging optimal functioning of the regulatory body would not serve any functional purpose. As such, I doubt whether this characteristic is a feasible option for South Africa.

The Financial Sector Conduct Authority is apparently statutorily designed in an independent fashion but I have to question the 'mental' independence of the Authority based on the exclusivity of the Minister's authority when selecting the Executive Committee in terms of

[493] See par 4.7 of ch *3 supra*.
[494] See s 57 of the FSRA. Se also Barkow (n 15) 52 in respect of conflicting mandates.
[495] See s 292 of the FSRA.
[496] See e.g. ss 8, 11 & 36 of the FSRA.
[497] See par 4.2 of ch 3 *supra*.
[498] See e.g. Sapa 'DA, EFF disrupt Parliament' 13 November 2014 IOL News Politics; Pillay 'Most violent removal yet of EFF MPs in Parliament's scenes of horror' 16 February 2017 Huffington Post.

section 61. Renewal of position is statutorily recognised,[499] and candidates are mostly restricted to an 'appropriate expertise in the financial sector'-requirement.[500] Even the advisory committees are established and members selected by either the Director-General of Finance[501] or the Executive Committee,[502] and without substantive requirements such as expertise or experience.

The National Credit Regulator is funded, roughly to a minimum of 50% of its expenditure, by the Department of Trade and Industry.[503] The rest of its income is based on fees charged and other income-streams.[504] As indicated above, the sufficient funding affects the ability of the Regulator to execute its duties and impacts its autonomy, and therefore, while many of the autonomy enhancing factors are present, such as independent litigation authority,[505] this takes a toll on its budget.[506]

I have not been able to determine how the amount is set or receipt anticipated as this is not legislated, but there does seem to be some involvement or instruction from the National Treasury.[507] The resource determinants guiding the Financial Sector Conduct Authority are legislated in much more detail than in the National Credit Act, and clearly legislated boundaries limit undue interference, as noted on various occasions.

[499] See s 63(1)(b) of the FSRA. Contrary to re-election, however, there does not seem to be a statutory ban on post-regulatory employment (thus, employment in the private sector after holding a senior position – see par 4.2 of ch 3 *supra*) in the FSRA and the NCA. It is an open question as to whether this would be allowed in South Africa – the field of law that have developed in the context of restraints of trade may be of value to consider as most legislative restrictions apply whilst a person is employed in a specific position – see e.g. s 61(6)(a) of the FSRA that disallows a person who is a 'disqualified person' from being a Commissioner or Deputy Commissioner.

[500] See s 61(1)-(2) of the FSRA.

[501] Ss 68(1) & 68(3)(a) of the FSRA.

[502] Ss 68(2) & 68(3)(c) of the FSRA.

[503] See par 7.2.1 *supra*. For the 2015/2016 financial year, the fee revenue versus transfer payments for 2016 and 2015 were roughly a ratio of 1 : 2 (being fees of R32 900 685 for 2016 and R31 202 448 for 2015) : (being transfer payment of R66 899 044 for 2016 and R68 845 000 for 2015) – see NCR *Annual Report* 2015/2016 82.

[504] See e.g. NCR *Annual Report* 2015/2016 82 & 85.

[505] See Barkow (n 15) 77. See also Portfolio Committee on Trade and Industry *National Consumer Commission & National Credit Regulator on their 1st Quarter Performance for 2014/15* 16 September 2014: 'The main challenge that the NCR encountered when the enforcement regulations kicked in was that the industry that was well-resourced resolved to take on the NCR. The NCR was taken to court due to some definitions which were ambiguous. … the de‹cit was so high due to the ICT Projects and professionals fees, which mainly included legal fees. There were matters that were taken to court and attorneys were hired and paid.'

[506] See Portfolio Committee on Trade and Industry *Briefing on the budget and strategic plans: Export Credit Insurance Corporation (ECIC) and the National Credit Regulator (NCR)* 11 March 2008: 'Mr Gabriel stated that certain cases were highly technical and the NCR hired forensic investigators and chartered accountants to perform the investigations. The hiring of law firms to present the investigations and evidence also contributed to high professional fees.'

[507] See Portfolio Committee on Trade and Industry *National Credit Regulator 3rd quarter performance & 2016 Annual Performance Plan; Remote Gambling Bill process* 15 March 2016.

There is no set formula similar to the provisions made in respect of the United States' Consumer Financial Protection Bureau.[508] There is also no provision that allows input by the National Credit Regulator insofar as the amounts of fees and charges due to it are determined and adjusted by the Minister, and furthermore no formula that provides it with a set minimum amount similar to section 239(9) of the Financial Sector Conduct Authority. I would propose that the Minister be statutorily obliged to consider the input from the National Credit Regulator insofar as determination of fees and charges are concerned, coupled with an obligation on the Regulator to conduct its own impact assessment, and consider input from interested parties, in respect of the impact that increased fees will have on the regulated industry.[509] As the conduct of the Minister would constitute administrative action, the decision to raise or lower the fees would be reviewable in terms of the Promotion of Administrative Justice Act.[510]

The National Credit Act does not safeguard the personnel of the National Credit Regulator against litigation based on duties fulfilled in good faith.[511] The National Credit Regulator is aware of the potential of legal liability towards registrants, as the circulars issued by the National Credit Regulator seem to contain the following statement as a matter of course:

> 'Disclaimer: While the NCR has taken reasonable care to ensure the factual accuracy of this circular, it cannot guarantee such accuracy especially with regards to future events. Accordingly, NCR does not accept any liability to damages incurred by any party as a result of decisions or actions taken on the basis of information supplied in this Circular.'[512]

This contrasts with the position set out in section 285 of the Financial Sector Regulation Act:

> 'The State, the Minister, the Reserve Bank, the Governor and Deputy Governors, a financial sector regulator, a member of the Executive Committee, the Prudential Committee, a member of the subcommittee of the Prudential Authority or the Financial Sector Conduct Authority, a member of the Tribunal, the Ombud Council, a member of the Ombud Board, an employee of the State, a board

[508] See par 4.3 of ch 3 *supra*. See also Barkow (n 15) 77.

[509] See the consultation procedure determined by s 240 of the FSRA. Coupled with the provision in s 245 that authorises the FSCA to release the a person liable to pay a fee from the statutory obligation to do so, this may be a point of departure to construct a sound procedure to allow input by the NCR in respect of fees due to it but also providing recourse to affected parties. See also par 4.3 in ch 3 *supra*, where it was stated that one has to consider the economic realities of industry members as well as they are also affect by hard times.

[510] Act 3 of 2000. See also ch 7 *infra* where I discuss the notion of review in the context of accountability – however, as was seen from the discussion in par 7.2.3 pertaining to the Public Protector's report *There are no heroes* (n 326), regulators can also rely on the protection offered by administrative laws and s 33 of the Constitution of the Republic of South Africa.

[511] See par 4.7 of ch 3 *supra*. See also Quintyn *et al* (n 491) 39 – this can relate to 'senior management' or 'all staff' and the latter option increases independence the most.

[512] See e.g. NCR 'Proposed Process for End Balance Differences' Circular 4 of 2015; NCR 'Digital Solutions Group (DSG) Queries' Circular 9 of 2014; NCR 'Review of the Credit Industry Codes of Conduct' Circular 8 of 2012.

> member or officer of the Reserve Bank, a staff member of a financial sector regulator, a staff member of the Reserve Bank, a person appointed by a financial sector regulator or the Reserve Bank to exercise a power or perform a function or duty in terms of a financial sector law is not liable for, or in respect of, any loss or damage suffered or incurred by any person arising from a decision taken or action performed in good faith in the exercise of a function, power or duty in terms of a financial sector law.'

This is a matter that needs to be rectified and a similar provision needs to be inserted into the National Credit Act.[513]

The level of independence of the National Credit Regulator is not adequate. On the one hand, the Regulator is given a clear independent legislative character, can govern its human resources, and is not required by statute to obtain ministerial permission to register, investigate, enforce, litigate or otherwise execute its duties.[514] The Minister does not have the statutory authority to overturn decisions of the Regulator or consent to the policies adopted.[515] On the other hand, the single-person governance model employed, lack of legislated causa for removal of the most senior official, dependency on the Department for its main income stream, the lack of input on the amount of licence fees due to it, reported lack of proper funding, dependency on the Minister to address market conduct regulatory needs via legislative or regulation-related amendments,[516] inability to effect behavioural changes directly through disciplinary measures, judicial ignorance of its measures, and undermining of its authority through tribunal and judicial decisions, all work towards eradicating the autonomy of the Regulator.[517]

[513] See also s 23 of the Financial Services Board Act (Act 97 of 1990) in respect of the Financial Services Board: 'No person shall be liable for any loss sustained by, or damage caused to, any other person as a result of anything done or omitted by that person in the bona fide exercise of any power or the carrying out of any duty or the performance of any function under or in terms of this Act, the Acts referred to in the definition of "financial institution", the Inspection of Financial Institutions Act, 1998 (Act No. 80 of 1998), or the Financial Institutions (Protection of Funds) Act, 2001 (Act No. 28 of 2001)' & s 43(2) of the Competition Act (Act 89 of 1998) in respect of the Competition Commission: 'No Competition Tribunal member, Competition Appeal Court member, Commissioner, staff person or contractor is liable for any report, finding, point of view or recommendation that is given in good faith and is submitted to Parliament, or made known, under the Constitution or this Act'.

[514] See also Quintyn *et al* (n 491) 39-40. Also consider the implications of s 171(2) of the NCA: 'The Minister … in consultation with the National Credit Regulator, may make regulations for matters relating to the functions of the National Credit Regulator, including – (i) forms; (ii) time periods; (iii) information required; (iv) additional definitions applicable to those regulations; (v) filing fees; (vi) access to confidential information; and (vii) manner and form of participation in National Credit Regulator procedures ...' On the one hand, the interaction is documented (see the recommendation of IOSCO (n 478) 26 & 28) but, on the other hand, this may adversely affect independence. See also the discussion in ch 7 *infra*.

[515] See also Quintyn *et al* (491) 26 & 35.

[516] The fact that the Regulator can provide 'non-binding' guidance (as opposed to none at all) increases its independence-factor (although not as much as would be under circumstances where it would be mandatory for regulatees to follow the guidance so given) – see the questionnaire prepared by Quintyn *et al* (n 491) 39.

[517] See also Quintyn *et al* (n 491) 39-40.

The Financial Sector Regulation Act provides many of the necessary legislative protections in respect of the autonomy of the Financial Sector Conduct Authority: measures that determine the selection and dismissal criteria for the Executive Commission,[518] measures that determine that the process for appointment must be set through regulations,[519] an independent inquiry that precede dismissals,[520] provisions that allow for joint decision-making on performance parameters of the Commission members,[521] budgetary freedom including the freedom to set levies subject to a legislated formula,[522] and limited, if any, ministerial intervention in the decisions and activities of the Authority.[523] It also has vast regulatory and supervisory powers as it is *inter alia* able to issue conduct standards, provide (presumably binding) interpretation rulings, grant, and retract licences.[524]

However, the Minister of Finance is solely responsible for the appointment of the members of the Executive Committee, and the Director-General for committees tasked with advising the Financial Sector Conduct Authority on core matters, such as employee compensation.[525] This is a worrying position as the recent developments in the United States of America confirms the influence that a particular politician can have over an entity when he or she has the ability to instate someone who shares his or her ideals.[526]

I address a last issue prior to stating my recommendations. There is a need to enhance the supervisory and regulatory authority of the National Credit Regulator. I am not the first to mention this.[527] In 2012, Stéfan Renke proposed the following in the context of his study on debt prevention in South Africa:

> 'The powers of the National Credit Regulator must be revised and extended, not only authorising the Regulator to prescribe guidelines to credit providers in respect of evaluative mechanisms, etcetera which are binding on the latter, but also empowering the Regulator to directly take action

[518] Ss 61 & 65 of the FSRA.

[519] S 61(3) of the FSRA.

[520] Ss 65(3) & 65(5) of the FSRA.

[521] S 239 of the FSRA.

[522] S 70 of the FSRA.

[523] See ss 61-65 & 67-68 of the FSRA.

[524] See ss 106, 107, 142, 113 & 121 of the FSRA.

[525] See ss 60(1), 60(2), 65, 68(1) & 68(3) of the FSRA.

[526] See par 4.2 of ch 3 *supra*. However, again, when one considers the wording regarding appointments, the Director is selected by the President, but the Senate has a lot of authority in respect of the ultimate appointee (see s 1011(b)(2) of the Consumer Financial Protection Act of 2010) and the Director is the person who appoints his or her Deputy, not the President (see s 1011(b)(5) of the Consumer Financial Protection Act of 2010).

[527] Minister of Trade and Industry (n 21) paras 2.2.2.1.2, 2.2.2.2.1, 2.2.2.2.2, 2.2.2.2.4 & 2.2.2.3.1. See also Quintyn *et al*'s questionnaire (n 491) 39 – the independence factor increases because the regulator has the ability to grant licences but decreases because it does not have/ have sole authority to retract a licence.

> against a credit provider who does not comply with such guidelines. A proactive instead of reactive approach to non-compliance must in other words be followed.'[528]

In the context of my study, which pertains to independence, the overall recommendation remains relevant. This is over and above the substantive reasons in respect of effective regulation of particular subject-fields, such as the context of over-indebtedness that prompted Renke's recommendations, or the value of proper regulatory and supervisory authority for the independence of a regulator as referred to in chapter three or the need to protect regulatees against a disconnected regulatory structure.[529] The new financial regulatory structure and the formal structured arena of regulators that the National Credit Regulator is now expected to enter, demand a suitably empowered Regulator. Barkow's study of the interaction, and resultant impact, of agencies with varying loyalties and authorities, has become even more relevant in this context.[530]

The Financial Sector Regulation Act is aimed at providing a holistic regulatory scheme for the financial sector, and does so by creating an interactive structure to promote interaction between regulators.[531] It creates two new regulators but does not affect the construction of those remaining in existence, including the National Credit Regulator. The National Credit Regulator has been given new duties and is now also on the receiving end of benefits, being part and parcel of *inter alia* the partnering and liaising structure designed by chapter 5 of the Financial Sector Regulation Act. The Regulator is also represented on the Financial Stability Oversight Committee[532] and the Financial System Council of Regulators.[533] This is over and above the collaboration and information duties endorsed in terms of the National Credit Act, such as section 17(4):

[528] Renke (n 314) 625-626. See also his recommendation at 642-643 insofar as deregistration of credit providers are concerned and contrast this with the recommendation in Minister of Trade and Industry (n 21) e.g. par 2.2.2.2.4.

[529] See par 4.1 *supra*.

[530] Barkow (n 15) 51-53.

[531] See paras 2.3 & 3.4 of ch 5 *supra*.

[532] See s 22 of the FSRA. This arrangement is aimed at 'support[ing] the Reserve Bank when the Reserve Bank performs its functions in relation to financial stability; and … facilitate[ing] co-operation and collaboration between, and co-ordination of action among, the financial sector regulators and the Reserve Bank in respect of matters relating to financial stability' – see s 21(2) of the FSRA.

[533] See s 79(3) of the FSRA. This arrangement is aimed at 'facilitat[ing] co-operation and collaboration, and, where appropriate, consistency of action, between the institutions represented on the Financial System Council of Regulators by providing a forum for senior representatives of those institutions to discuss, and inform themselves about, matters of common interest' – see s 79(2) of the FSRA.

> ‘The National Credit Regulator must –
>
> (a) liaise with any regulatory authority on matters of common interest;
>
> (b) enter into a valid agreement with any regulatory authority to –
>
> (i) co-ordinate and harmonise the exercise of jurisdiction over consumer credit matters within the relevant industry or sector; and
>
> (ii) ensure the consistent application of the principles of this Act;
>
> (c) participate in the proceedings of any regulatory authority;
>
> (d) advise, or receive advice from, any regulatory authority; and
>
> (e) notify the Registrar of Banks designated in terms of the Banks Act, 1990 (Act 94 of 1990), within the agreed time frame of its intention to investigate a bank as defined in the Banks Act, 1990.’[534]

The interaction between the various regulators and the convening arrangements that the Chief Executive Officer of the National Credit Regulator is bound to attend, and participate in, require that the Regulator be enabled to hold its own. It will not be able to make regulatory commitments or approve certain strategies if it is not sufficiently empowered, or released from its reliance on Parliament and the executive. Two examples serve to illustrate this point. The ‘Treating Customers Fairly’ approach that is heavily referenced in National Treasury’s *Treating Customers Fairly in the Financial Sector: A Draft Market Conduct Policy Framework for South Africa Discussion Document* affects institutional culture and, if correctly implemented, should consequentially affect consumer credit.[535] The National Credit Regulator will benefit from being able to adjust its strategies to accord for an institutionally-embedded approach to consumers, and, if and as it deems fit, be able to render the necessary support without being too dependent on authority from the Department of Trade and Industry or Parliament. In addition, it is also important that the National Credit Regulator be statutorily mandated to prioritise its resource expenditures independently. A point of departure could be to consider a risk-based approach, similar to the provision in section 58(5)(b) the Financial Sector Regulation Act:

> ‘When performing its functions, the Financial Sector Conduct Authority must … take into account the need for a primarily pre-emptive, outcomes focused and risk-based approach, and prioritise the use of its resources in accordance with the significance of risks to the achievement of its objectives.’

The National Credit Regulator needs an independent voice in order to contribute meaningfully to the new structure, which would include being able to commit to initiating

[534] The NCR already collaborates with a variety of stakeholders in strategic partnership arrangements and reports annually thereof – see e.g. NCR *Annual Report* 2015/2016 8-9.

[535] See (n 22) & par 4.3.

certain behavioural changes in the conduct of those subjected to its authority. This would further legitimise the existence of the Regulator within the upcoming regulatory landscape and establish its role as a meaningful regulatory authority amongst financial regulators. In addition, it would probably be subject to inter-agency pressures to show competency in regulation and the results of its implemented strategies.[536] However, where there are differentials in regulatory capability, the potential of another, stronger authority having been captured and an overlap of mandates, could have the adverse effects advocated by Barkow.[537] A matter that could contribute to clearly set out the interactions between the regulators is the memoranda of understanding that they need to enter into as a matter of law.[538]

9. RECOMMENDATIONS AND CONCLUSION

In light of the research findings, I propose the following for the National Credit Regulator:[539]

Recommendation 1: The National Credit Act must be amended to enable the National Credit Regulator to issue binding rules in respect of conduct required from market participants.[540] There also needs to be clear and appropriate recourse to effective remedial action for affected parties.[541]

Recommendation 2: Section 16(1)(b)(i) must be enhanced to add the option of an interpretation ruling on interpretation and application of the provisions of the National Credit Act, similar to the provisions and safeguards set out in section 142 of the Financial Sector Regulation Act. This would be in addition to the ability to issue non-binding interpretations of a section of the National Credit Act, or the ability to approach the court for a declaratory

[536] See e.g. Jones 'Back to basics: Why financial regulatory overhaul is overrated' 2009-2010 *Entrepreneurial Business Law Journal* 391 393-394 & 401. I deal with regulatory performance in more detail in ch 7, but in the interim, the following reference to the Australian Government *Regulator Performance Framework* 2014 10 (although this is in the context of the reviews of regulators): 'The inclusion of a comparable regulator is an important feature of the make-up of the review panel. Peer review is expected to assist the exchange of ideas and practices across regulators from the same sector. It may also facilitate the introduction of a more coordinated approach to monitoring and compliance within a sector.'

[537] See Barkow (n 15) 49-58; par 4.7 of ch 3 *supra*. See par 3.3 of ch 2 *supra* in respect of 'shirk[ing]' by a regulator.

[538] See s 77 of the FSRA. See also s 17(5) of the NCA: A regulatory authority that, in terms of any public regulation, exercises jurisdiction over consumer credit matters within a particular industry or sector - (a) must enter into a valid agreement with the National Credit Regulator, as anticipated in subsection 4 (b); and (b) may exercise its jurisdiction by way of such an agreement in respect of a particular matter within its jurisdiction.'

[539] These recommendations are made in light of the research conducted and sources referred to in this thesis and specifically with reference to the questionnaires drafted by Quintyn *et al* (n 491) 39-40 (although these were written in the context of financial/prudential supervision) & IOSCO (n 478) 25-26 (written in the context of securities regulation, although the regulation focuses on financial stability risk management as well as investor protection – see 10).

[540] See Quintyn *et al* (491) 9 in respect of 'Regulatory independence'.

[541] This flows from the 'fear' expressed in respect of an 'improper discretion' – see Minister of Trade and Industry (n 21) paras 2.2.2.2.6 & 2.2.2.3.4.

order on the interpretation or application of the Act. The feasibility of including a pre-issue impact assessment should also be considered. This should enable the Regulator to take the views of, and impact on, interested parties into account. The legislation should further provide for a clear right to approach the court to challenge the interpretation and create precedent for further interpretations. Provision should be made for all-encompassing *locus standi* requirements to prevent inaccessibility due to, for example, funding restrictions.

Recommendation 3: The National Credit Regulator must be joined in litigious actions where a rule or guideline or official arrangement is a source of contention. Alternatively, it has to be given the opportunity to intervene. Matters such as *Firstrand Bank Limited v Barnard* and *Rougier v Nedbank Ltd* serve as examples in this regard.

Recommendation 4: The National Credit Regulator should be able to deregister registrants in line with the recommendation set out in *Draft National Credit Act Policy Review Framework, 2013*. I do not support a clear mandate for deregistration as some issues will require wide, unlegislated discretion[542] – such as the provision in section 46(3)(e)(ii) that refers to a person who 'brought the consumer credit industry into disrepute' – and this can become a fertile ground for capture-related actions. In this regard, I support the recommendation by Renke, although his recommendation was made in line with fit and proper registration requirements, in respect of clear internal policies that need to be published and followed by the Regulator when executing its deregistration duty.[543]

Recommendation 5: A section that comprehensively limits the personal liability of a person acting in his or her professional capacity and in the course of his or her duties specified by the National Credit Regulator must be inserted into the National Credit Act. Section 285 of the Financial Sector Regulation Act can be used as a point of departure.

Recommendation 6: Consideration should be given to develop a formula for a minimum annual amount of funding that can be expected from the Department of Trade and Industry,

[542] See par 3.1 of ch 3 *supra* in respect of a clear mandate to limit unwanted influence. See also IOSCO (n 478) 21. See also Quintyn *et al* (491) 10: 'Other tools to strengthen supervisory independence include appropriate salary levels for supervisors—as a way of attracting better-qualified individuals who have more confidence in their own judgment and who may be less prone to bribery—and the use of a rules-based system of sanctions and interventions that removes the scope for discretion in individual cases. Providing for appeals against supervisory actions to be heard only in specialist tribunals may also help to guard against excessive appeals by supervised entities or the bringing in of deliberately vexatious cases.'

[543] See also IOSCO (n 478) 33-36.

taking into account the amount allocated to the Department from the National Treasury.[544] In this regard, the position of the Consumer Financial Protection Bureau can be considered as a point of departure.

Recommendation 7: A statutory provision must be inserted into the National Credit Act that obligates the Minister of Trade and Industry to review the fees due and payable to the National Credit Regulator upon request by the Regulator, alternatively that the fees are 'determined jointly'.[545] The fees must further be subject to an automatic minimum base amount similar to the provision made in section 239 of the Financial Sector Regulation Act to ensure that the amount is not reduced upon reconsideration.[546] The Regulator can also be given the authority to conduct an impact analysis, with the necessary intrusive investigative powers to obtain the necessary information to ensure that the suggestions are 'reasonable', such as due regard for reigning market conditions for regulatees.[547]

Recommendation 8: The Board of the National Credit Regulator (or a commission-like structure) should be re-introduced as its governing structure and construed of a diverse group of experts.[548] The executive should not have members on the Board in an executive, operational or policy-affecting capacity.[549] I discuss the matter of Parliamentary, as opposed to executive, appointments of senior members[550] in chapter seven when I deal with the doctrine of separation of powers in South Africa.

[544] Although the independence rating of a regulator would increase where there are multiple income streams (as opposed to the only stream being provided by the state), the greatest increase is where no government funds are relied upon – see Quintyn *et al* (n 491) 39. See also Quintyn *et al* (n 491) 10 (albeit in the context of prudential regulation): 'Moreover, its budget might be cut at times of fiscal austerity—and those times often coincide with mounting problems in the banking system—needing greater supervisory attention. If, for whatever reason, there is a consensus that funding needs to come from the government budget, the supervisory budget should be proposed and justified by the agency, based on objective criteria related to developments in the markets. However, in light of the reported financial statements, it does not seem as if the NCR would be able to function without the Department of Trade and Industry's funding and it seems from the Budget Reviews conducted by the Portfolio Committee of Trade and Industry, that there is an awareness that the NCR has to be properly funded – see Portfolio Committee of Trade and Industry *Budgetary Review and Recommendation Report of the Portfolio Committee on Trade and Industry* 18 October 2013.

[545] See Quintyn *et al* (n 491) 10: 'To avoid industry capture and ensure that the fees are reasonable, in some countries, their level is determined jointly by the supervisory agency and the government. Fee-based funding is also vulnerable to the risk that the supervisor's resources will be most limited when the industry is under strain. Allowing the agency to build up reserve funds for such periods seems the best solution.' See s 171(1)(b) of the NCA, which only provides for the Minister to determine regulations 'relating to the functions of the National Credit Regulator' 'in consultation with the National Credit Regulator'.

[546] Quintyn *et al* (n 491) 10.

[547] *Ibid*.

[548] See par 4.2 of ch 3 *supra*. See also Quintyn *et al* (n 491) 8: 'Multi-member commissions help ensure consistency and continuity of decision-making over time and are less likely to be influenced by the views of any one individual.' See also the criticism against a corporate board-like structure – Bird 'Regulating the regulators: Accountability of Australian regulators' 2011 *Melbourne University Law Review* 739 770-771.

[549] See Quintyn *et al* (n 491) 13.

[550] *Ibid*.

Recommendation 9: The sources consulted for purposes of this thesis have referred, in the main, to fixed-term appointments and not dealt with permanent appointments. Further research should be undertaken in respect of the issue of a permanent versus a fixed-term appointment for a single-headed regulatory model. It is also of particular importance that the issue of renewability or re-appointment be considered, especially in light of the impression that the Chief Executive Officer of the National Credit Regulator is appointed on a fixed-term basis but that the position is held over numerous terms. As indicated above, the possibility of renewal can negatively affect the independence of the Regulator.[551] However, if the Board is reinstated, the Board members' individual terms should be set for a determined period and executed in such a manner that they overlap, as per the recommendations of the authors referred to in chapter 3.

Recommendation 10: I did not suggest any recommendations in respect of 'post-employment restrictions' as found in other jurisdictions.[552] In light of the specific socio-economic circumstances and labour-related values of the South African legal framework, I do not think that this is a proposal that can be supported or rejected without further in-depth research. The matter of public-private personnel interchange is, however, a very real issue.[553]

Recommendation 11: The National Credit Regulator needs to take ownership of its mandate and interpret it holistically – not just in line with the selected outcomes and priorities envisaged by the Department of Trade and Industry.[554] There is a strong focus on consumer protection, but seemingly limited attention to the promotion of a market with the characteristics set out by section 13 of the National Credit Act. In addition, the Regulator should be actively aware of the potential of capture by politicians or the industry (the latter, for example, through the Credit Industry Forum through unscreened reliance on its recommendations).

[551] See *inter alia* par 4.2 of ch 3 *supra*.

[552] *Ibid*.

[553] See Portfolio Committee of Trade and Industry *Budgetary Review and Recommendation Report of the Portfolio Committee on Trade and Industry* 18 October 2017: '*Vacancy rate*: The Committee requested an update on the current vacancy rate within the NCR. The NCR informed the Committee that the vacancy rate currently stands at 18.4%. Four of these vacancies were in critical positions. The NCR alluded to the fact that many of its senior staff had been poached by banks and therefore it had lowered the level at which officials were appointed.' See also NCR *Annual Report* 2016/2017 72: 'The most prominent reason for employees leaving the organisation is related to compensation and benefits. Employees join other competing organisations, who offer them higher packages and benefits, which the NCR is unable to match.'

[554] See e.g. National Treasury *Annual Report Guide for Schedule 3A and 3C Public Entities* Updated April 2017 15: 'The narrative must also provide a synopsis on how the achievement of targets has contributed towards achieving the entity's strategic outcome orientated goals, which will invariably impact on the strategic priorities of government.' The concern is not that the NCR works toward achieving government priorities, but that government priorities are pursued in such a manner that some aspects of the NCR's mandate are neglected. This may even constitute a usurpation of legislative authority as the expressed will of the Legislature is implemented, and achieved, selectively.

Recommendation 12: The National Credit Regulator needs to take ownership of its independence.[555] There are various questionnaires that have been developed to give an indication of the level on independence, or in respect of specific independence-enhancing measures. In this regard, the *Key Questions* developed by the International Organisation of Securities Commissions[556] and Quintyn *et al*'s *Criteria for the Index on Independence and Accountability for Financial Sector Supervisors*,[557] with the necessary changes, can be used as a point of departure. The above can be followed by a capability review, similar to the one conducted in respect of the Australian Securities and Investments Commission,[558] but with an awareness of the weaknesses discussed in this regard in chapter four. It is plausible that the National Credit Act already provides for a review of this nature in section 36(1) and, if so, the Australian review can be used as a comparative example, including aspects that are not covered by the wording of the National Credit Act.[559] I discuss this in more detail in chapter seven hereafter.

Recommendation 13: The internal documents that govern the interaction between the executive and the National Credit Regulator should be perused to determine the effect thereof on the independence of the Regulator. These documents should ideally be drafted by independent experts. The policies and processes should be clear in order to limit manipulation.

Recommendation 14: The presence of the aforementioned internal documents should not be a substitute for legislating the core mechanisms that protect and enhance the independence of the National Credit Regulator, such as clear statutory 'for cause' dismissal requirements.[560]

Recommendation 15: An in-depth evaluation should be undertaken of the impact of labour law provisions on the issue of dismissal of senior members of staff, particularly to ascertain

[555] See Bird (n 548) 744.

[556] IOSCO (n 478) 25 & 26.

[557] Quintyn *et al* (n 491) 39-41.

[558] *Fit for the Future A capability review of the Australian Securities and Investments Commission A report to Government* December 2015 – see e.g. the type of recommendations made in respect of the use of resources at 96-97 (and the independent nuance thereof when one considers par 4.3 of ch 3 *supra*) that can flow from such a review: '[T]he Panel recommends the following specific changes: … ASIC to ensure that it has a transparent, flexible and dynamic approach to resource allocation across the organisation. This would entail more assertively challenging the status quo resourcing levels across the organisation and being willing to make significant changes and reallocations where merited. … ASIC respond to future core funding adjustments more strategically in future by prioritising these impacts across teams in light of strategic priorities and de-prioritising activities non-critical to achieving their strategic priorities. … ASIC challenge activity requests by Government that do not fit clearly with its mandate, supported by proposed changes to SoE [Statement of Expectations] and SoI [Statement of Intent] in Chapter 2.'

[559] S 36(1) of the NCA determines the following: 'At least once every five years, the Minister must conduct an audit review of the exercise of the functions and powers of the National Credit Regulator, and the Tribunal.'

[560] Quintyn *et al* (n 491) 39-40.

whether, and under which circumstances, the generic South African labour regime offers suitable protection in this context. Memoranda of understanding between regulators should be carefully drafted not to encroach on parties' independence.

I also propose the following in respect of the Financial Sector Conduct Authority:

Recommendation 1: The need for independence must be formally recognised by the legislature,[561] particularly as the Financial Sector Conduct Authority functions within a ministerial department that has been subjected to rapid political changes in the past. At the very least, acknowledged independence can alleviate some concerns about policy stability.[562]

Recommendation 2: The Executive Committee of the Financial Sector Conduct Authority is solely appointed by the Minister of Finance. At least one of the four possible deputy members should be appointed by, or in consultation with, or on recommendation of, another department, such as the Department of Trade and Industry (due to the blurred jurisdiction of the Financial Sector Conduct Authority and National Credit Regulator in respect of credit related matters). This would be particularly important where the National Credit Regulator is assimilated into the Financial Sector Conduct Authority. The expertise-requirements for committee members should be reconsidered to ensure that the committee has the necessary expert knowledge to regulate a sector as diverse as the financial sector of South Africa. A 'contemporary best practice merit based recruitment process' as recommended to the Australian Securities and Investments Commission in the 2015 capability review, may be considered as well.[563]

Recommendation 3: The Commissioner should be appointed by the Minister of Finance but the appointment must be approved by the National Assembly.[564] I deal with the issue of separation of powers in chapter seven but submit in the interim that the developments in the United States may point towards an inability of the executive to properly execute the provisions of the legislation, favouring its own political agenda.[565] In this light, I submit that the fact that the legislature delegates authority to the independent agency warrants involvement in the appointment of its head.

[561] See Quintyn *et al* (n 491) 39.
[562] See Barkow (n 15) 24-25.
[563] *Fit for the Future* (n 558) 19.
[564] The involvement of the Portfolio Committee on Trade and Industry in recommending a head is not unknown in South Africa – see Portfolio Committee on Trade and Industry *Report of the Portfolio Committee on Trade and Industry on the appointment of the chairperson of the board for the National Lotteries Commission* 19 May 2017.
[565] See the media reports referred in fn 224 par 4.2 of ch 3.

Recommendation 4: Section 63(1) (b) should be repealed and the term of office fixed at five years. I deal with the accountability-related aspects of statutorily determined grounds for removal in chapter seven but submit in the interim, that the provision of section 65(3) provides sufficient protection against malpractice.

Recommendation 5: Provision must be made for staggered terms of office for the Deputy Commissioners.

Recommendation 6: In light of recent developments in the United States of America, section 61 has to be amended to ensure that a Commissioner who resigns or leaves office prior to the end of his or her term, can appoint an interim person as to act as successor until the expiration of the original term, as opposed to the Minister of Finance.[566] At present, the legislation only provides for an interim appointment until a new Commissioner is selected, which means that the Minister will be responsible for the appointment of the new Commissioner in the absence of a provision that states otherwise.

Recommendation 7: The internal documents and contracts of employment should be drafted by an independent expert with due regard for independence, and protective measures that can be incorporated into the documents to enhance independence.

Recommendation 8: It is important for the Financial Sector Conduct Authority to obtain the services of a consumer advocate, especially in light of its supportive prudential duties.[567]

I identified the features of a regulator that would render it independent from international scholarship in chapter three. Against this background, I assessed the South African regime in order to determine which features affect the independence of the National Credit Regulator and the Financial Sector Conduct Authority as statutory market conduct regulators of the consumer credit industry. Based on the aforementioned evaluation, the research disproves the hypothesis by finding that the National Credit Regulator and Financial Sector Conduct Authority are not adequately independent. The thesis recommends changes in order to ameliorate the *status quo* and these recommendations must be incorporated into the institution deliberately in order to enhance the independence of the South African regulators.[568]

[566] See Smith 'CFPB director battle: Elizabeth Warren, Trump battle on future' 26 November 2017 Business Insider, quoting Barney Frank: '"This was for protecting the agency," he continued. "Look, if you give the director a five-year term and he can't be fired, to complete that arrangement, you have to take care of what happens if someone leaves in less than five years."'

[567] See par 3.4.2 of ch 2 *supra* in respect of the prejudices of transferred personnel.

[568] See par 3.1 of ch 1 *supra*.

CHAPTER 7: MECHANISMS OF ACCOUNTABILITY

> 'An altogether different exercise is the assessment of the adequacy of a particular accountability arrangement or of a complete accountability regime to which a particular agency or sector is subject. Here we leave the realm of empirical description and enter the world of evaluation and, ultimately, prescription. This is much more a matter of degree and these assessments follow the logic of more-or-less. The key question is obviously what the actual effects are of the various types of accountability and how to judge these effects. At this level, inadequacies can either take the form of accountability deficits – a lack of accountability arrangements – or of accountability excesses – a dysfunctional accumulation of a range of accountability mechanisms.'[1]

1. INTRODUCTION

1.1. Outline of the chapter

In chapter four, I dealt with various means through which a regulatory authority can be held accountable. The following part evaluates the accountability frameworks within which the South African National Credit Regulator and Financial Sector Conduct Authority function. The reader can refer to chapter four for a discussion and summary of accountability mechanisms categorised in accordance to the 'to whom' feature of answerability or, if personally so preferred, the features of each mechanism. I have utilised both categorisation methods in chapter four but my discussion of the South African regime in this chapter leans towards the first mentioned method.

Accountability mechanisms are not as passably classified under a few broad categories as indicators of independence are, although specific measures were discussed in this manner in chapter four. In this chapter, I deal with the measures themselves from a South African perspective and, as such, the aspects that feature in this part and that relate to accountability, are quite individualised. The desktop research conducted for purposes of this thesis is further not conducive to providing meaningful input into all answerability measures and in this regard, I have focused on statutory mechanisms. I have also not dealt with performance indicators in detail.

1.2. Orientation

I begin the specific discussion on answerability with those mechanisms that relate to the State, as this links closely with the aforementioned remarks: the documented interaction of the various branches of government. I also view this information as the logical starting point

[1] Bovens 'Analysing and assessing accountability: A conceptual framework' 2007 *European Law Journal* 447 462.

as it sets out distinguishable performance indicators for the National Credit Act. As of yet, none exist for the Financial Sector Conduct Authority of which I am aware. As oversight and accountability feature strongly in the South African constitutional regime,[2] I have found that Hüpkes *et al*'s categorisation of measures in accordance with the person 'to whom' accountability is owed enables my discussion of specific features to align naturally.[3] The last aspect of state answerability that I deal with is judicial answerability in the form of court oversight, and this links with the activities of the Regulator that call into consideration accountability towards the regulated industry – features such as administrative justice that also have an adjudicative character. I also consider the regulated industry, consumers and other entities that function within the regulatory framework. Lastly, I deal with any remaining miscellaneous aspects.

It is further important to canvass the constitutional context within which the regulators function, specifically the doctrine of separation of powers as it manifests in South Africa, prior to actually discussing and evaluation the answerability mechanisms found in the domestic framework. The discussion is important for a number of reasons. It aims to prevent remedial action recommended in respect of independence (such as appointment of senior personnel)[4] or accountability from being ascribed to the wrong branch of government. In the discussion, I consider the constitutional grounds, and boundaries, of the special authority bestowed on independent agencies, particularly the Financial Sector Conduct Authority. It also underscores a further understanding of political realities in South Africa, and serves to show that the criticisms raised against certain features of the independent agency in the United States, based on constitutional considerations, may not be viable in the South African regime.[5] These interposing remarks, which include some comparative references to the United States, again show that there is a connection between independence and accountability

[2] O'Regan 'The doctrine of separation of powers under the South African Constitution' F W De Klerk Memorial Lecture Delivered at Potchefstroom 10 October 2005 2005 *Potchefstroom Electronic Law Journal* 12 124-125.

[3] Paras 4 & 7 of ch 4 *supra*.

[4] See e.g. the comment added to recommendation 3 (in respect of the Financial Sector Conduct Authority (hereinafter 'FSCA')) in par 9 of ch 6 *supra*.

[5] O'Regan (n 2) 125: 'A brief review of the South African Constitution makes it plain that the various branches of government are not hermetically sealed from one another. In particular, our Constitution opted for a model of the relationship between the legislature and executive, modelled more closely on the Westminster system, than on the presidential system found in France and the United States.'

as referenced in earlier chapters.[6] This connection is noticeable insofar as the same mechanism can have elements that support, or detract from, independence or answerability in varying degrees.[7]

The point of departure of the thesis is the following: The National Credit Regulator and the Financial Sector Conduct Authority are sufficiently accountable. This hypothetical view is based on the expressions of accountability in the South African policy documents and legislation referred to above.[8] This chapter analyses the measures that inform answerability of the two regulators and provides recommendations for reform as informed by extraterritorial and international examples and benchmarks. Based on the aforementioned evaluation, the research disproves the hypothesis by finding that the National Credit Regulator and Financial Sector Conduct Authority are not adequately accountable by virtue of the notations in policy documents and legislation to this effect. The aim of the recommendations is to enhance the regulatory scheme in a manner that achieves a satisfactory level of accountability for the relevant South African consumer credit market conduct regulators.[9]

2. THE CONSTITUTIONAL CONTEXT INFORMED BY *TRIAS POLITICA*

2.1. Introduction

South Africa is one of many constitutional dispensations that endorse the doctrine of separation of powers.[10] In terms of this long-standing doctrine, the *trias politica*, the authority of those elected to represent and govern ordinary nationals, are dispensed into three sections: legislative, executive and judicial.[11] The aim of this parting is to pre-empt the concentration

[6] See e.g. Quintyn *et al The Fear of Freedom: Politicians and the Independence and Accountability of Financial Sector Supervisors* (IMF Working Paper WP/07/25) 2007 24: 'From the above findings, it can now be inferred that accountability ratings have increased faster than independence in a number of cases because measures that were introduced as accountability, but which are actually control measures (e.g., the minister as chairman of the board, parliamentarians as members of the board, or an explicit oversight role for the minister), suppress the independence ratings in our rating system. The presence of such arrangements and the confusion they create in the independence-accountability debate show that the thin line between accountability and control is not always well-understood, or, stronger, is proof of the politicians' distrust of independence rather than their confidence in accountability.'

[7] *Ibid*.

[8] See par 3.1 of ch 1 *supra.*

[9] See Scott 'Accountability in the regulatory state' 2000 *Journal of Law and Society* 38 57: 'The logic of the argument presented here is that conflict and tension are inevitable within the complex accountability webs within any particular domain, and that the objective should not be to iron out conflict, but to exploit it to hold regimes in appropriate tension.'

[10] *Certification of the Constitution of the Republic of South Africa, 1996* 1996 (4) SA 744 (CC) par 107 & 108; Malan 'Reassessing judicial independence and impartiality against the backdrop of judicial appointments in South Africa 2014 *Potchefstroom Electronic Law Journal* 1965; Mathebula & Munzhedzi 'Trias Politica for Ethical Leadership and Good Governance: Praxis of Checks and Balances in the South African Context' 2017 *Bangladesh e-Journal of Sociology* 7.

[11] *Certification of the Constitution of the Republic of South Africa, 1996* (n 10) par 110; Mathebula & Munzhedzi (n 10) 7-8.

of authority and it provides for an organised method to assess state actors' conduct through structured restraints and equalising factors – the so-called 'checks and balances'.[12] In addition,

> '[i]t seems clear that while, perhaps the guiding principles underlying the philosophical development of the doctrine relate to the importance of preventing the abuse of power, the doctrine has come to serve other roles in many democracies. In particular, it has ensured the functional specialisation of the arms of government, not entirely, but to some significant extent. Moreover, in at least some systems, including ours, it plays a role enhancing of human rights, and of a particular vision of democracy, based on the key democratic founding values of our Constitution – accountability, responsiveness and openness.'[13]

The basic structure in South Africa is as follows: the national legislative authority vests in Parliament,[14] which consists of the National Assembly and the National Council of Provinces.[15] The executive authority vests in the President of the Republic of South Africa[16] and the judicial authority in the courts.[17] The National Assembly is primarily mandated to hold the executive to account,[18] and the apex courts are to ensure that the conduct of the legislature and executive is lawful and constitutional.[19] However, the South African system cannot be regarded as an example of exact adherence to the separation dogma.[20] The National

[12] *Certification of the Constitution of the Republic of South Africa, 1996* (n 10) paras 45 & 108.

[13] O'Regan (n 2) 124-125.

[14] Ss 43 & 44 of the Constitution, 1996. See also s 55 of the Constitution, 1996.

[15] Ss 42(1) of the Constitution, 1996. I only deal with national matters in this thesis.

[16] S 85(1) of the Constitution, 1996. See also s 84(1) of the Constitution, 1996: 'The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.'

[17] S 165(1) of the Constitution, 1996

[18] See s 42(3) of the Constitution, 1996: 'The National Assembly is elected to represent the people and to ensure government by the people under the Constitution. It does this by choosing the President, by providing a national forum for public consideration of issues, by passing legislation and by scrutinizing and overseeing executive action.'

[19] Ss 167(4)(e) & 172(c) of the Constitution, 1996; *Certification of the Constitution of the Republic of South Africa* (n 10) par 123. It is noteworthy that these two branches of government are grouped together when discussing separation of powers or, specifically, the independence of the judiciary – there is an acknowledgement of the level of integration between these two sections (even though members of the judiciary are appointed by the President as recommended by a Commission that consists of a majority of members appointed by the President), and the relationship between the judiciary and the executive is particularly challenging – see O'Regan (n 2) 125,126,128, 129, 137; Malan (n 10) 1968-1969; Davis 'The relationship between courts and the other arms of government in promoting and protecting socio-economic rights in South Africa: What about separation of powers?' 2012 *Potchefstroom Electronic Law Journal* 2 4; Hulme & Peté '*Vox populi? Vox humbug!* – Rising tension between the South African executive and judiciary considered in historical context – part one' 2012 (15) *Potchefstroom Electronic Law Journal* 16 & Hulme & Peté '*Vox populi? Vox humbug!* – Rising tension between the South African executive and judiciary considered in historical context – part two' 2012 (15) *Potchefstroom Electronic Law Journal* 45.

[20] *Certification of the Constitution of the Republic of South Africa, 1996* (n 10) paras 105-113. See also O'Regan (n 2) 121 & 125.

Assembly appoints, and removes, the President.[21] The President chooses his Cabinet members primarily from members of the National Assembly and members of Cabinet continue to be members of the National Assembly.[22] The members chosen by the President are purported to aid him with executing his executive functions,[23] described in section 85(2) of the Constitution.[24] The President is also authorised to appoint, dismiss and instruct members of the chosen Cabinet as he deems fit.[25] Members of the executive are therefore also members of the legislature, save for the allowed two members of the Cabinet that may be chosen from outside of the National Assembly.[26]

New legislation and proposals for the modification or repeal of legislation are presented to the Assembly by a member of the Presidential cabinet or a member of the National Assembly.[27] The proposition can be accepted by Parliament, following the procedures set out in the Constitution, but has to be approved by the President – who may refuse to do so if he is concerned about the constitutionality of the draft legislation.[28] In addition, the executive is tasked with implementing legislation and Parliament often delegates the authority to create

[21] Ss 86(1) & 89(1) of the Constitution, 1996. See the wording of s 42(3) of the Constitution, 1996 quoted in fn 18 *supra*. See also Hulme & Peté *Vox populi? Vox humbug!* Part two (n 19) 55-56: 'Claims to authority from "the people" are more persuasive in the modern world, but upon further examination it may be argued that such claims are also based on a fiction. In the first place, it is clear that the executive does not derive its authority directly from the people but from the National Assembly. The president has no direct mandate from the electorate, but is dependent on the National Assembly for democratic legitimacy. Even his indirect democratic mandate, derived from his election by the National Assembly, is open to question. Members of Parliament are not given *carte blanche* in choosing who to elect as President, but have to follow instructions from their political parties. In reality today, the South African presidential "candidate" is chosen by the 4500 odd members of the elective conference of the African National Congress. Furthermore, it may even be argued that the members of the National Assembly do not have direct electoral support, since they are appointed by parties which assign them to the seats each party is allotted in proportion to its share of the popular vote. Add to this the relatively low number of citizens who actually vote as a percentage of the total citizenry, and it becomes clear that the National Assembly can be said to reflect the will of "the people" in an indirect sense only.'

[22] Ss 91(3) & 47(1)(a)(i) of the Constitution, 1996. See also *Certification of the Constitution of the Republic of South Africa, 1996* (n 10) paras 105-113 in respect of the arguments against this construction, especially in light of foreign jurisdictions, and the Court's explanation that the separation exercise need not be absolute.

[23] S 92(1) of the Constitution, 1996: 'The Deputy President and Ministers are responsible for the powers and functions of the executive assigned to them by the President.' Only s 91(5) of the Constitution, 1996 uses the term 'assist': 'The Deputy President must assist the President in the execution of the functions of government.'

[24] This section determines as follows: 'The President exercises the executive authority, together with the other members of the Cabinet, by a. implementing national legislation except where the Constitution or an Act of Parliament provides otherwise; b. developing and implementing national policy; c. co-ordinating the functions of state departments and administrations; d. preparing and initiating legislation; and e. performing any other executive function provided for in the Constitution or in national legislation.'

[25] S 91(2) & 92(1) of the Constitution, 1996.

[26] See s 91(3) of the Constitution, 1996.

[27] S 73(2) of the Constitution, 1996.

[28] S 79(1) of the Constitution, 1996. See also the procedure in s 79(2)-(5) of the Constitution, 1996, where the procedure to deal with bills not approved by the President even after he has referred it to the Assembly with his concerns – as such, the Constitutional Court has the final say.

subordinate legislation to a particular Minister through statutory authorisation in an enabling Act.[29]

Apart from a law-based understanding, there are also practical considerations that affect the doctrine of separation of power in reality.[30] Koos Malan's exposé of the political aura of the judiciary highlights this in some detail.[31] He argues that

> '... the separation of powers is superseded by a more profound reality, namely the unity of powers. The ideological unity of the three (separate) branches of governmental power acknowledges the fact that the three powers are separate (sets of) bodies, each with its own personnel and functions, yet unified in a single power elite system, informed by the same ideological assumptions, committed to achieving the same goals, and yet organised on the basis of a division of labour pertaining to each of the respective branches. The insights into the regime-relativity and ideological relativity of judicial impartiality and the pragmatic instead of objective and principled – solely legally based – foundation of legal reasoning underscore the political role of the judiciary, which plays its part, as pointed out in the previous section, in close conformity with the rest of the power elite of which it forms an integral part.'[32]

The first question that needs to be asked is whether independent agencies encroach upon any of the branches established by the Constitution. In other words, whether there are concerns in light of the separation of powers doctrine as endorsed by the Constitution. These agencies are not unknown within the constitutional regime as provision is made in the Constitution's chapter 9 for independent agencies created in order to enhance constitutional democracy,[33] and it can be observed that these entities are headed by individuals or by multi-member governance structures,[34] negating a preference for a specific format. The question is whether the agency remains an administrator accepted within the governmental structure and in the ordinary sense of the word[35] or whether there are concerns that arise where an agency is clothed with independency, yet not underscored by a specific constitutional provision.

[29] See the discussion in par 2.2 *infra*.
[30] See Malan (n 10); Mathebula & Munzhedzi (n 10).
[31] Malan (n 10).
[32] *Idem* at 2006-2007.
[33] S 181 of the Constitution, 1996.
[34] See ss 182-192 & 193 of the Constitution, 1996.
[35] See Hoexter *Administrative Law in South Africa* (2012) 2-3: 'Administrative law has been described broadly as a branch of public law that regulates the legal relations of public authorities, whether with private individuals and organisations or with other public authorities. In South Africa today, however, it is more accurate to regard administrative law as regulating the activities of bodies that *exercise public powers or perform public functions*, irrespective of whether those bodies are public authorities in a strict sense. The Constitutional Court has described administrative law as "an incident of the separation of powers under which the courts regulate and control the exercise of public power by the other branches of government".'

2.2. Delegation

Section 44(1) of the Constitution of the Republic of South Africa, 1996 determines that the ability to create valid and binding legislation resides in Parliament, which subsequently enables the National Assembly to permit laws in respect of any theme, and subject to few substantive limitations.[36] The concept of 'national legislation' is defined in section 239 as being inclusive of 'subordinate legislation made in terms of an Act of Parliament'.[37] Section 44(1)(a)(iii) also mandates the National Assembly to allocate its authority to legislate to another 'legislative body' insofar as that entity is 'in another sphere of government'. In concurrence with the boundaries set by the separation of powers principle, [38] the Constitutional Court has provided some guidance with regard to the acceptable authorisation of a member of the executive by the legislature to enact legislative provisions. In this line, the lawful delegation of legislative power or, put differently, the validity of mandating a person who is not part and partial to the legislature in order to enable that person to determine legislative provisions in a manner that creates valid and binding rules and regulations, is discussed.[39]

In *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others*, [40] authority still quoted in literature concerning constitutional matters,[41] the Court found that the Constitution permitted the legislative authority to confer upon the executive authority the ability to generate rules with commanding status, necessary

[36] See s 44(1)(ii) for the limitations imposed in respect of 'a functional area listed in Schedule 5', the latter constraint ameliorated in the instances set out in s 44(2) which mandates intercession by Parliament in some cases (such as e.g. 'to maintain economic unity'); De Vos *et al* (eds) *South African Constitutional Law in Context* (2014) 151; *Executive Council of the Province of the Western Cape v Minister for Provincial Affairs and Constitutional Development and Another, Executive Council of KwaZulu-Natal v President of the Republic of South Africa and Others* [1999] ZACC 13 par 26.

[37] 'Subordinate legislation' is also referred to as 'delegated legislation' – see Botha *Interpretation of Statutes* (2005) 16-17.

[38] De Vos *et al* (n 36) 164-165: 'We must keep in mind that the primary reason for delegation is to ensure that the legislature is not overwhelmed by the need to determine minor regulatory details. Delegation relieves Parliament from dealing with detailed provisions that are often required for the purpose of implementing and regulating laws and is necessary for effective law making. However, we must draw a distinction between delegation to make subordinate legislation within the framework of an empowering statute and "assigning plenary legislative powers to another body". Where the doctrine of parliamentary sovereignty governs, Parliament may delegate as much power as it chooses. In a constitutional democracy, however, such as that operating in South Africa, Parliament may not ordinarily delegate its "essential legislative functions" to the Executive. This means that Parliament can delegate some of its powers to the Executive, most notably through delegating the power to make regulations in terms of legislation passed by Parliament to individual Ministers or to the President. However, Parliament may not delegate its plenary legislative power, that is the power to make original legislation, to an executive authority such as the President or a Cabinet Minister as such a delegation will breach the separation of powers doctrine. It may only delegate the power to make subordinate legislation such as proclamations and regulations.'

[39] See Woolman & Bishop *Constitutional Law of South Africa* (2013) 17-45 – 17-56.

[40] 1995 (4) SA 867 877 (CC).

[41] Woolman & Bishop (n 39) 17-45 – 17-47.

for the proper implementation of principal laws.[42] The restrictions to this ability are imposed by the nature of the authority so bestowed, namely whether the person to whom the authority was delegated is able to supplement the principal law.[43] The logical measure that comes to mind is enabling regulations, which are aimed at assisting the execution of the provisions already set out in the principal law, and a consideration as to whether the given authority enables changes to the contents of the principal law.[44] Whilst the former is within constitutional boundaries, the latter is not.[45] The reason for this is that the Constitution sets out the structure for the distribution of obligations between the three divisions of government and any diversion from this structure would mean a disregard of Constitutional provisions.[46] Therefore, only the National Assembly may create law in the sense of primary legislative provisions, but may delegate its authority to, for example a Minister in the Cabinet, to regulate aspects necessary for the laws to function in practice.[47] The source of and guiding principles in respect of the delegated authority therefore remains the primary legislation, of which the legislature bears the ultimate responsibility as noted earlier.

In formulating delegated authority, the guidelines were set out in *Affordable Medicines Trust and Others v Minister of Health and Others.*[48] The conferred ability should be stated in terms that are clear and concise enough to enable the person purported to act on the delegated power to distinguish the features of and limitations to the power to be exercised.[49] In particular, the framework should proscribe 'the arbitrary exercise of the delegated power' through ascertainable perimeters to the authority.[50] The ability to gauge the confines of the authority so conferred is also of importance to the persons on whom any measures devolving

[42] *Executive Council, Western Cape Legislature v President of the Republic of South Africa* (n 36) par 51: 'In a modern State detailed provisions are often required for the purpose of implementing and regulating laws and Parliament cannot be expected to deal with all such matters itself. There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law-making.' See also De Vos *et al* (n 36) 163-164.

[43] *Executive Council, Western Cape Legislature v President of the Republic of South Africa* (n 36) par 51.

[44] *Ibid*.

[45] *Idem* at paras 51 ('There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary legislative power to another body, including ... the power to amend the Act under which the assignment is made') & 62; Woolman & Bishop (n 39) 17-47.

[46] Executive Council, Western Cape Legislature v President of the Republic of South Africa (n 35) par 62; Woolman & Bishop (n 38) 17-47.

[47] *Ibid*; De Vos *et al* (n 36) 153-164.

[48] 2006 (3) SA 247 (CC). See also the reference to this case in *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* [2014] ZACC 32 par 183.

[49] *Affordable Medicines Trust v Minister of Health* (n 48) par 34.

[50] *Ibid*. See also Henrico 'Re-visiting the rule of law and principle of legality: judicial nuisance or licence?' 2014 *Tydskrif vir die Suid-Afrikaanse Reg* 742 748, 750 *et seq*. See also the reference in context of the European Union by Curtin 'Holding (quasi-) autonomous EU administrative actors to public account' 2007 *European Law Journal* 523 527.

from the exercised authority will have an impact.[51] This would enable challenges to undesirable measures to be brought when and where necessary.[52] The Court stated that limitations are constructed through a consideration of the purpose, principles and contents of the authorising legislation.[53]

The matter of *Executive Council, Western Cape Legislature v President of the Republic of South Africa* referred to above was concerned with the delegation of authority to the President of the Republic of South Africa. *Affordable Medicines Trust v Minister of Health* was concerned with the execution by the Minister of Health of authority delegated to it by the legislature. The practical implication of the Financial Sector Regulation Act's sections 106 and 108 will be similar to a delegation of legislative power directly from the legislature to another body.[54] Similarly, if some of the recommendations proposed in chapter 6 in respect of the National Credit Regulator are adopted, these considerations may become applicable in respect of the latter as well.

Nevertheless, the Financial Sector Conduct Authority is not another tributary of the government and as such, reference needs to be made to the decisions in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* in respect of delegation of authority to a regulatory, albeit private, body.[55] In this context, some of the considerations raised by Stephen Bottomley become applicable as he discusses the ability conferred upon regulatory bodies to influence the legislative sphere.[56] The author states that the standards developed by regulatory bodies are imperative to bridge the divide between the commands set in statutes and the entity that is affected by these commands.[57] He also highlights that the ability of regulatory bodies to exempt entities from compliance with certain statutory requirements is in

[51] *Affordable Medicines Trust v Minister of Health* (n 48) par 34.

[52] *Ibid*.

[53] *Ibid*.

[54] 9 of 2017 ('FSRA').

[55] 2007 (1) SA 343 (CC).

[56] Bottomley 'The notional legislator: The Australian Securities and Investments Commission's role as law-maker' 2011 *Federal Law Review* 1 e.g. 19-24. He explains the dilemma at 19 in this manner: 'The legal literature is said to approach the study of rules from a different perspective that the sociological or regulatory literature … Legal scholars who study regulation, they suggest, are likely to be concerned with issues such as the openness, accountability, consistency and predictability of rules. These, of course, are values that are commonly associated with lawyers' depictions of the rule of law … Equally, from this perspective it might appear to be problematic that, via Class Orders, ASIC [Australian Securities and Investments Commission] can readily change the primary statute as it applies to an open-ended class of people for an indefinite period of time.'

[57] Bottomley (n 56) 22 appropriately quotes Edward Rubin in the following manner: '[A]gency rulemaking is necessary to translate the legislature's directives into rules governing the ultimate subject of the statute.'

fact an alteration of the implementation of the legislation and, whilst not being legislation, amounts to the adjustment of same.[58]

The underlying rationales for state delegation are echoed in the argument for delegation to regulatory authorities.[59] Pragmatism is the primary consideration as it is not practically viable for Parliament to legislate each detailed prescription for each possible scenario in which the statute is actually applied.[60] As such, the executive exercises delegated authority in order to render statutory provisions implementable in a feasible manner and arguably the regulatory agency's prescriptions would have the same outcome.[61] However, there may be some added complexity in the light of statements made by Bottomley insofar as he analyses the available Australian case law and finds that these do not consider the true nature of the authorised agency:

> '… *Dignan* was concerned with the now common case of a power given to the executive to make delegated legislation in the form of regulations that are not inconsistent with the parent statute – not with the power of an executive agency to make rules which effect changes to the operation and application of the parent statutes.'[62]

In *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council*, the matter under consideration was the sub-delegation of authority granted to the Minister of Trade and Industry. I find this case of particular contextual importance as it relates to a regulatory body. Some background information is necessary at this point.

The Micro Finance Regulatory Council had applied for formal recognition as a regulatory authority and in 1999 the Minister recognised it as such.[63] Section 15A of the Usury Act[64]

[58] Bottomley (n 56) 19, 22 & 24. At 19 fn 96 the author refers to exemptions by stating that '[s]imilar concerns apply to Class Orders that do not change the legislation but which change the way in which it operates, for example by granting wide-ranging exemptions' and at 24, the author succinctly states the following: 'In short, modifications made by Class Order appear to be a hybrid. They are not primary legislation, although they are expressed to operate as if they were, but unlike "ordinary" agency rules, they do more than simply affect the operation of the Act – they modify the Act itself as it applies to a specified class of persons. For those in the defined class, the *Corporations Act* says what ASIC declares it to say'. Ss 271(1) & (2) of the FSRA empowers certain financial regulators to grant exemptions: '(1) The responsible authority for a financial sector law may, in writing and with the concurrence of the other financial sector regulator, exempt any person or class of persons from a specified provision of the financial sector law, unless it considers that granting the exemption – *(a)* will be contrary to the public interest; or (*b)* may prejudice the achievement of the objects of a financial sector law. (2) Subsection (1) applies to the granting of exemptions if a financial sector law does not provide a power to grant exemptions.'

[59] De Vos *et al* (n 36) 164-165; Bottomley (n 56) 19.

[60] *Ibid*.

[61] *Ibid*. Bottomley (n 56) at 19 states that 'these concerns can be at odds with the complex and fast-changing nature of modern finance and corporate operations. The risk with strict adherence to the ideas that laws should be stable, predictable and not be subject to frequent change is that rules which do not respond to changing circumstances … can result in regulatory gaps, unfairness and unnecessary costs'.

[62] Bottomley (n 56) 22.

[63] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* (n 55) par 13.

[64] Act 73 of 1968.

empowered the Minister of Trade and Industry to set conditions that micro-lenders had to adhere to if they wished to be released from the statutory duty to comply with some of the provisions of the Usury Act, such as limitations on charges that may be recovered in terms of credit agreements.[65] This exclusion to which certain credit providers were privy presented pecuniary benefits.[66] Apart from defining the exempted credit provider type – which was primarily determined by the terms of the credit agreement relating to repayment period and amount of credit granted – one of the conditions of exemption was that the micro-lender should submit, through licensing, to the oversight of an approved authoritative body.[67]

The regulatory actions of the Council were the subject of a judicial dispute in which a regulated institution (and micro-lenders) challenged the legitimacy of some of the regulatory activities of the Council, specifically the issuing of compulsory rules of conduct for regulated institutions.[68] The case progressed from the, then Transvaal High Court, to the Constitutional Court.[69] Each of the courts delivered different motivations for their respective decisions but for purposes of this discussion only the majority and minority judgments of the Constitutional Court will be discussed.[70] These judgments are of importance to note as it provides guidance on two additional aspects pertaining to financial regulation that are relevant to this study. Firstly, the authenticity of actions taken within the course and scope of delegated authority and, secondly, the validity of the outcome of exercised authority in tangible form, such as binding industry rules.[71]

The Micro Finance Regulatory Council was established in 1998 by the micro-lending industry for various purposes, incidentally prior to its recognition as a regulatory body.[72] The Council sourced its ability to control micro-lenders, who were registered with the Council albeit at that stage without government support, from its memorandum of association.[73] Upon

[65] *Idem* at paras 12 & 14.
[66] *Ibid*.
[67] *Ibid*.
[68] *Idem* at par 3.
[69] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another* 2004 (6) SA 557 (TPD); *Micro Finance Regulatory Council v AAA Investments and Another* 2006 (1) SA 27 (SCA); *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* (n 55) par 4. The High Courts of South Africa had, in the interim, been renamed – see Renaming of the High Courts Act (Act 30 of 2008) as repealed by s 55 read with sch 1 of the Superior Courts Act (Act 10 of 2013).
[70] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* (n 55) par 4.
[71] *Idem* at paras 1, 25-27; *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* (n 69) 561.
[72] *Micro Finance Regulatory Council v AAA Investments* (n 69) par 8.
[73] *Idem* at par 23: 'The object of the company in terms of its memorandum of association is to make and to enforce rules that are to be complied with by micro-lenders that are registered with the company. That is not an unlawful object, whether under the Usury Act or otherwise, and the achievement of that object is not inconsistent with the terms upon which the Minister approved the company as a regulatory institution. On the contrary, the company was approved by the Minister precisely to assume that function.' See also paras 7, 10 & 11.

its recognition by the Minister of Trade and Industry in 1999 as a recognised authority, a set of obligations and responsibilities were conferred on the Council.[74] The Supreme Court of Appeal perceived the Council as a 'private regulator' and viewed the acquiescence by a lender to the authority of the Council as the foundation of its entitlement to demand compliance with its rules.[75] It was noted, however, that lenders were compelled to register with the Council in order to be released from certain statutory obligations – and in doing so would submit to its authority – but that the obligation to register was founded in the Minister's exemption notice.[76] The Court continued to rely on the notion of voluntary compliance through agreement and was able to validate the rules imposed by the Council on its members without having to consider the rules within the context of statutory or constitutional imperatives.[77]

The Constitutional Court took a different approach to the matter and viewed the Council as an organ of state within the meaning of section 239 of the Constitution.[78] This meant that the Court considered the tasks, actions and features of the Council holistically instead of viewing the legal form of the Council in isolation.[79] The Court considered the rationale for the endorsement of the Council by the Minister as well as the level of oversight by, and guidance from, the Minister in meeting its objectives.[80] In conclusion, it decided that the Council's *raisons d'être* and actions were entirely dependent on the Exemption Notice and charges of the Minister.[81] It actions were the execution of 'a public duty', exercised 'in the public interest'.[82] The Council's performance had to comply with constitutional prescriptions and the notion of 'legality'.[83]

The source of discontent was the rules issued by the Council, which imposed obligations on registered lenders, in addition to the legislative demands set by the Exemption Notice that

[74] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* (n 55) par 15.

[75] *Micro Finance Regulatory Council v AAA Investments* (n 69) par 24: 'It is a company that conducts business as a private regulator of lenders who choose to submit to its authority by agreement. In regulating micro-lenders who agree to such regulation it does not purport to be exercising legislative or other public powers that require a constitutional or legislative source. It purports only to regulate those who are willing to submit to its regime and the source of its authority to do so is their consent.'

[76] *Micro Finance Regulatory Council v AAA Investments* (n 69) par 25.

[77] *Idem* at paras 24 & 26.

[78] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* (n 55) par 30.

[79] *Idem* at par 45, see also paras 43 & 44.

[80] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* (n 55) par 43-45. In par 45, the court stated that there was 'almost absolute ministerial control over the Council's functions' in contrast with a true company, which 'decides what its objectives and functions are and how it fulfils them'.

[81] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* (n 55) par 44.

[82] *Idem* at par 45.

[83] *Ibid*.

incorporated rules issued by the Minister.[84] Whilst the Court *a quo* recognised the public nature of the Council's actions, it ruled that the imposition of its own rules unlawfully assumed legislative functions and disallowed the rules.[85] The Constitutional Court, on the other hand, resolved the matter based on the delegation of authority by the Minister to the Council and linked the formation of the rules to the legitimate purpose of achieving the outcomes set in the Minister's exemption notice.[86]

Of particular interest to this discussion are the characteristics attributed to these rules by the majority decision of the Constitutional Court. The Court viewed the rules as an enabling 'mechanism' to accomplish the tasks of the Council and ensure that the Council could take remedial steps against non-compliant regulated subjects.[87] The Court therefore concluded that

> '[t]he Exemption Notice must be interpreted so as to empower the Council to do everything necessary to fulfil the responsibility imposed on it. The Rules apply to a limited category of lenders and are tightly designed for the task at hand. The micro-lending industry cannot be regulated without them. The Rules are within the authority of the Council. It is true that the authority to make Rules is not expressly conferred on the Council but is conferred by necessary implication.'[88]

In the premises, the value of the Constitutional Court's majority judgment can be summarised as follows: Firstly, an entity tasked with a regulatory duty is entitled to construct mechanisms specifically suited to achieve the outcomes for which it has been mandated and the methods are only constrained by legality standards and constitutional values.[89] The mechanisms do not equate legislation or attain the hierarchical status of legislation as set out in the Constitution.[90] However, it may attain the 'force of law' for purposes of enforcing compliance.[91]

The minority judgment by Langa CJ evaluated the situation in stricter compliance with constitutional provisions.[92] The judge held that the central theme of the dilemma before the

[84] *Idem* at paras 25, 51 & 53.
[85] *Idem* at paras 46 & 49.
[86] *Idem* at paras 49, 51-52.
[87] *Idem* at paras 52-53.
[88] *Idem* at par 54. See also paras 137, 138 & 143 of the minority judgement written by O'Regan J supporting the contention that the Notice allowed for delegation to the Council to determine and modify rules.
[89] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* (n 55) paras 52 & 54.
[90] *Idem* at par 49.
[91] *Ibid*. The Court stated the rationale for the rules concisely in par 52: 'Now the Council, after it had been approved as a regulatory institution, became obliged to perform these functions. The obligation was consistent with the purpose of the legislation. But it could do nothing to compel compliance. It had been entrusted with a series of important tasks; tasks which could be performed only if a mechanism or set of rules was put in place to enable it to exercise its regulatory function over moneylenders and to exact compliance by sanction should this prove to be necessary.'
[92] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* (n 55) paras 71 & 93.

court concerned the legitimacy of the delegation of authority to the Council.[93] Firstly, the Court considered the act of delegation by looking at the source expressing same, namely section 15A of the Usury Act in respect of the authority granted to the Minister[94] and the Notice in respect of the authority granted to the Council.[95] This exercise served two purposes. The first was to ascertain whether the delegation had in fact occurred and the second, to determine the boundaries if the delegation had been legitimately effected.[96] As the statutory provision lacked a clear indication of delegation to the Minister of the authority to delegate further, the actual delegation by the Minister would have to meet the requirement of being essential to enable implementation of the statutory provisions.[97] The same standard was upheld upon reflecting on the legitimacy of specific rules made by the Council when the minority of the court held that the value added by a specific mechanism does not meet the requirement of being 'reasonably necessary to give effect to the Minister's rules'.[98]

The court further considered whether other parts of the statute clearly provided for sub-delegation, which would be an indication that the legislature was disinclined to allow the Minister further delegation powers.[99] The practicalities of delegation may demand same, but Langa CJ was of the opinion that delegation in these instances would be to 'officials in the Minister's department, not to a Council which is a private body'.[100] The judge was adamant that the Minister's 'policy-driven powers' or those that incur 'the exercise of a political discretion' should remain with him due to his official public and answerable status.[101] The court was also careful to allow for 'an unfettered administrative discretion' insofar as it disallowed the Council to include a general stipulation into its rules in respect of which it could determine other registration requirements.[102] Whilst rules in respect of applications for registration were tolerated, as registration was deemed required to give effect to the determination by the Minister that credit providers had to register with a specific entity, the same was not done in respect of a non-descriptive stipulation stating that the Council 'may

[93] *Idem* at par 71.
[94] *Idem* at par 81. See *contra* par 124, the minority judgement written by O'Regan J, where she finds that the wording of s 15A is capable of being interpreted in a manner that allows for delegation.
[95] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* (n 55) par 75.
[96] *Ibid*.
[97] *Idem* at paras 82 & 83.
[98] *Idem* at par 98.
[99] *Idem* at par 83.
[100] *Idem* at par 84.
[101] *Idem* at paras 83 & 84.
[102] *Idem* at par 103.

impose further conditions'.[103] The court found that the lack of clarity on the contents of the requirements was in reality generating unrestricted discretion.[104]

The distinctions between the types of authority and the discretions necessary to realise the powers are to be considered[105] as well as the extent of the delegation insofar as it allows for complete or fractioned delegation of certain powers.[106] An aspect dealt with earlier on – the matter of retention of some managerial authority to counteract the effect of delegation – also finds application.[107] Langa CJ was sceptical about the ability of the Minister to control the Council.[108] The reporting requirements and authority of the Ministers to disavow the Council as a regulatory agency was perceived as 'indirect control'.[109] The relevance of this feature for the discussion under way is that the court related the issue of acceptable delegation with that of management:

> '[T]he total delegation of a power is less likely to be permitted than its partial delegation. In this regard the level of control maintained by the original functionary over the delegated power is very important – the greater the control, the lesser the extent of the delegation.'[110]

Furthermore, Langa CJ highlighted that accountability is a core feature of the constitutional dispensation of South Africa, necessitating an approach that is critical of the delegation of authority to persons who are removed from the direct political accountability mechanisms:

> '… the nature and importance of the delegator and that of the delegatee are also relevant. Before I turn directly to that matter, it is as well to note that accountability is a central value of our Constitution. This means that our law must be developed and interpreted in a manner that ensures that all bodies exercising public power are held accountable. However, to my mind, it also means that courts should be slow to infer the delegation of power to bodies that cannot be held directly accountable through ordinary political processes. … The Minister is a very important member of government. His holds a public position and his interests are solely those of government and the people. He is directly accountable both to the National Assembly and to the electorate. These considerations, together with his knowledge and experience, seem to be the reason why section 15A assigns this important discretion to him. On the other hand, although the Council exercises public powers and may be classified as an organ of state, it remains a private company. Admittedly, as a section 21 company, the Council is not motivated by profit. In addition, it was created and is

[103] *Idem* at paras 102 & 103.
[104] *Idem* at par 103.
[105] *Idem* at par 86.
[106] *Ibid*.
[107] See par 3.2.3 of ch 2 *supra*.
[108] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* (n 55) par 87. See *contra* par 130, the minority judgement written by O'Regan J, where she finds that the ability to reconsider whether the Council should be an approved institution is sufficient managerial supervisory powers.
[109] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* (n 55) par 87.
[110] *Ibid*.

> structured and governed with the regulation of the moneylending industry in mind. However, although the interests and goals of the Council may regularly coincide with governmental and public interests, the two should not be equated. The Council is not elected nor is it directly accountable to the public. It is only accountable through the very limited control exercised by the Minister. These are differences which should, in my view, not lightly be overlooked.'[111]

The court discussed two further aspects, namely whether the Council was empowered to enact its own criteria for exemption or whether the extended authority was restricted to the validation of actions by the Council as it employed and enforced the criteria of the Minister.[112] The phrases 'administrative' as opposed to 'creative' are used.[113] The Council's ability to act within the boundaries of its given authority is restricted to administrative mechanisms designed to enable it to effect its mandate and not extended to prescribing additional norms and standards that affect the substance of that which the Council is mandated to regulate and enforce.[114] Therefore, the minority judgment found that the Council is enabled to determine certain rules in order to achieve the outcomes pertaining to enforcement stipulated by the Minister.[115] These determinations may not amount, by virtue of the content, to additional requirements that regulated entities have to comply with in order to be said to comply with the provisions of the Usury Act.[116] If the Council determines that the substantive law requires additional criteria, the matter ought to be taken up with the Minister and the legislation supplemented.[117]

The actual outcomes of the use of the power are important in the context of whether the authority can be delegated for practical reasons or whether delegation is superfluous.[118] The determination of norms and directives imposable on the general regulated population does not require delegation in order to be adequately effected.[119] In contrast, it is not a viable option to compel compliance from the general population through the style of the ministerial office.[120]

The Minister was the responsible official when it came to determining the directives and the Council was the responsible entity when it came to enforcing the directives.[121] The authorities

[111] *Idem* at paras 89 & 90.
[112] *Idem* at par 76.
[113] *Idem* at par 78.
[114] *Idem* at paras 78 & 93. See also par 79: 'The Council remains a central role-player in the regulation of the micro-finance industry, but that role does not extend to the determination of what a lender must do to qualify for exemption'.
[115] *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* (n 55) par 94.
[116] *Idem* at paras 93 & 94.
[117] *Idem* at par 79.
[118] *Idem* at par 88.
[119] *Ibid*.
[120] *Ibid*.
[121] *Ibid*.

of these bodies were limited to achieving the separate outcomes of determination and enforcement.[122] Failure to achieve the set outcomes should be dealt with statutorily instead of by way of delegation.[123]

Langa CJ found that an enquiry into the acceptability of the delegation involves some aspects that have to be considered.[124] These are the features of the authority sought to be delegated further, the ambit of the further delegation, the degree of oversight retained by the first receiver of the authority, the demands for delegation from feasibility and viability perspectives, and the individuals that the delegation is concerned with.[125]

2.3. The place of independent regulators

In light of the above, it does seem that delegation can be an acceptable theory to justify empowerment of an agency within the South African framework.[126] The context of the Financial Sector Conduct Authority differs to some extent as it derives its authority directly from the principal statute, which is a 'primary' act of delegation, as opposed to a sub-delegation as was done in respect of the Micro Finance Regulatory Council. The rationales for delegation remain the same as noted above.[127] It further seems as if the applicable answerability mechanisms are core considerations – as opposed to whether the agency or entity is deemed independent or not.[128] Perhaps the correct approach in South Africa is to consider the elements that render the entity true to its mandate and purpose, protect it from undue influence and assist with holding it sufficiently accountable to justify its existence within a constitutional dispensation that values accountability as a core constitutional principle.[129]

[122] *Ibid*.

[123] *Ibid*.

[124] *Idem* at par 85.

[125] *Ibid*. See also par 127 – O'Regan paraphrases these requirements in her judgment as well.

[126] See also ss 44(1)(iii) & 238 of the Constitution, 1996 (although it is in a different context, the notion is known within the South African constitutional realm): 'The national legislative authority as vested in Parliament … confers on the National Assembly the power … to assign any of its legislative powers, except the power to amend the Constitution, to any legislative body in another sphere of government …' & 'Agency and delegation … An executive organ of state in any sphere of government may a. delegate any power or function that is to be exercised or performed in terms of legislation to any other executive organ of state, provided the delegation is consistent with the legislation in terms of which the power is exercised or the function is performed; or b. exercise any power or perform any function for any other executive organ of state on an agency or delegation basis.'

[127] See also Hoexter (n 35) 25-27.

[128] This is in respect of entities without a constitutional endorsement – the matter in *Helen Suzman Foundation* (n 48), discussed in ch 3 *supra*, concerned an organisation which had constitutional patronage (see par 2). Although independence was at the forefront, the court still referred to political answerability (see paras 17 & 18).

[129] See e.g. s 1 of the Constitution, 1996; Malan (n 10) 1971-1972 (particularly fn 20). See also Davis (n 19) 2, 3 & 10.

I am not aware of any constitutional challenge that has been raised against the notion of independent regulators, that were created by Parliament and that did not have a constitutional basis or mandate, based on the South African Constitution's version of separation of powers. In the United States, the criticism levied against the Consumer Financial Protection Bureau in the matter of *PHH Corporation, et al v Consumer Financial Protection Bureau* was aimed at its structure in lieu of the constitutional executive duty bestowed upon the President.[130] The provisions in the legislation that prevented the President from dismissing the Director of the Bureau as he deems fit, was viewed as an encroachment upon the ability of the President to function in his executive capacity.[131] The concentration of authority in a single Director, as opposed to a multi-member governing structure, was further condemned for lack of protective measures that enhance rational decision-making.[132] In this particular case, the majority decided that the structuring of the Bureau was unconstitutional due to the lack of multiplicity in the governance structure and the inability of the President to effect direct control through dismissal of the Director.[133] The Court severed the 'for cause removal

[130] *PHH Corporation, Et Al.*, Petitioners, *v. Consumer Financial Protection Bureau*, Respondent No. 15-1177 (Argued April 12, 2016. Decided October 11, 2016.) United States Court of Appeals, District of Columbia Circuit.

[131] *PHH Corporation v Consumer Financial Protection Bureau* (n 130).

[132] *PHH Corporation v Consumer Financial Protection Bureau* (n 130): 'So the single-Director independent agency — which, as we have explained, is a structure that departs from settled historical practice and threatens individual liberty far more than a multi-member independent agency does — poses a constitutional problem even if it does not occasion any *additional* diminishment of Presidential power beyond the significant diminishment already caused by *Humphrey's Executor* itself.' Original emphasis.

[133] *PHH Corporation v Consumer Financial Protection Bureau* (n 130): 'To sum up so far: In order to preserve individual liberty and ensure accountability, Article II of the Constitution assigns the executive power to the President. The President operates with the assistance of subordinates, but the President acts as a critical check on those subordinates. That check provides accountability and protects against arbitrary decision-making by executive agencies, thereby helping to safeguard individual liberty. Article II has been interpreted by the Supreme Court to allow independent agencies in certain circumstances. Independent agencies lack the ordinary constitutional checks and balances that come from Presidential supervision and direction. But to ensure some check against arbitrary decision-making and to help preserve individual liberty, independent agencies have traditionally been structured as multi-member bodies where the commissioners or board members can check one another. The check from other commissioners or board members substitutes for the check by the President. As an independent agency with just a single Director, the CFPB represents a sharp break from historical practice, lacks the critical internal check on arbitrary decision-making, and poses a far greater threat to individual liberty than does a multi-member independent agency. All of that raises grave constitutional doubts about the CFPB's single-Director structure.' See also *PHH Corporation v Consumer Financial Protection Bureau* (n 130): 'In sum, the CFPB departs from settled historical practice regarding the structure of independent agencies. And that departure makes a significant difference for the individual liberty protected by the Constitution's separation of powers. Applying the Supreme Court's separation of powers precedents, we therefore conclude that the CFPB is unconstitutionally structured because it is an independent agency headed by a single Director.'

restrictions', effectively rendering the Director subject to 'at will removal'.[134] The matter has since been remitted for an *en banc* rehearing[135] and at time of writing the thesis, the court had not yet made its decision public.

There are a number of differences between the United States and the South African Constitutions and I mention this because some of the criticisms that were levelled at independent institutions in respect of the administrative law framework of the United States will be inapplicable when considering the South African context.[136] Whilst both documents vest the executive authority in the President, the South African separation of powers structure is not as strict, or presidentially inclined, as the United States' constitution.[137] The President of South Africa is also not the chosen representative of the people,[138] but the National Assembly is.[139] In particular, the executive authority of the President to implement the law is constitutionally constrained by the will of Parliament:

> 'Powers and functions of President … The President has the powers entrusted by the Constitution and legislation, including those necessary to perform the functions of Head of State and head of the national executive.
>
> Executive authority of the Republic … The executive authority of the Republic is vested in the President. … The President exercises the executive authority, together with the other members of

[134] *PHH Corporation v Consumer Financial Protection Bureau* (n 130): 'In light of Congress's clear textual expression of its intent regarding severability, and because the Dodd-Frank Act and the CFPB may function without the CFPB's for-cause removal provision, we remedy the constitutional violation here by severing the for-cause removal provision from the statute. As a result, the CFPB now will operate as an executive agency. The President of the United States now has the power to supervise and direct the Director of the CFPB, and may remove the Director at will at any time.'

[135] See *John Doe Company v. Consumer Financial Protection Bureau and Richard Cordray, in his official capacity as Director of the Consumer Financial Protection Bureau* 849 F.3d 1129 (2017) 1131-1132.

[136] See e.g. *PHH Corporation v Consumer Financial Protection Bureau* (n 130): 'The CFPB's departure from historical practice matters. A long line of Supreme Court precedent tells us that history and tradition are important guides in separation of powers cases that, like this one, are not resolved by the constitutional text alone.' In South Africa, the Constitution is the apex of the legal system – see s 2 of the Constitution of the Republic of South Africa, 1996.

[137] O'Regan (n 2) 125: 'A brief review of the South African Constitution makes it plain that the various branches of government are not hermetically sealed from one another. In particular, our Constitution opted for a model of the relationship between the legislature and executive, modelled more closely on the Westminster system, than on the presidential system found in France and the United States.'

[138] *PHH Corporation v Consumer Financial Protection Bureau* (n 130): 'At the same time, the Framers certainly recognized the risk that a single President could lead to tyranny or arbitrary decisionmaking. To mitigate the risk to liberty from a single President, the Framers ensured that the President had "a due dependence on the people." *Id*. The President is nationally elected by the people. In choosing the President, "the whole Nation has a part, making him the focus of public hopes and expectations." Youngstown, 343 U.S. at 653 (Jackson, J., concurring). Presidential candidates are put through the wringer precisely because of the power they may someday wield. In other words, the Framers concentrated executive power in a single President on the condition that the President would be nationally elected and nationally accountable.'

[139] S 42(3) of the Constitution, 1996.

> the Cabinet, by … implementing national legislation *except where* the Constitution or *an Act of Parliament provides otherwise.*'[140]

Independent agencies are not new and the chapter nine institutions bear witness to the acknowledgement that undesirable political activities are real and that oversight over government is necessary.[141] In addition, the separation of powers doctrine serves more than just a pre-emptive purpose in South Africa – it aims to allow the different structural parts of the State to develop superiority and become proficient at executing their respective roles in government.[142] As such, and particularly in light of the rationales for expertise discussed earlier in chapter two, the role of independent regulatory bodies does not conflict with this notion nor does the need to hold these entities accountable.

The second aspect that may be considered when viewing independent regulators in South Africa, is the notion that these organisations will, functionally speaking, not fit in with one particular branch. Hoexter, writing from the perspective of administrative agencies, notes the following relevant point:

> 'Administrators actually undertake all of the main governmental functions: they make a far greater number of laws than the legislature itself, they constantly adjudicate disputes and they engage unashamedly in policy-making.'[143]

The Public Finance Management Act considers the National Credit Regulator a 'national public entity'[144] and defines this concept as in section 1 as:

> '*(a)* a national government business enterprise; or *(b)* a board, commission, company, corporation, fund or other entity (other than a national government business enterprise) which is- (i) established in terms of national legislation; (ii) fully or substantially funded either from the National Revenue Fund, or by way of a tax, levy or other money imposed in terms of national legislation; and (iii) accountable to Parliament …'[145]

However, the National Credit Regulator is categorised as a schedule 3A national public entity.[146] In terms of the National Treasury's guidelines on drafting annual reports, the categorisation is effected in relation to the 'nature and level of autonomy', and schedule 3 A institutions

[140] Ss 84(1), 85(1) & 85(2)(a) of the Constitution, 1996. Own emphasis.

[141] See par 7.1 *infra.*

[142] See par 2.1 *supra.*

[143] Hoexter (n 35) 25.

[144] Sch 3 of the Public Finance Management Act (Act 1 of 1999) (hereinafter 'PFMA').

[145] See also s 1 of the PFMA, which states the following: '"executive authority" … (c) in relation to a national public entity, means the Cabinet member who is accountable to Parliament for that public entity *or in whose portfolio it falls* ….' Own emphasis.

[146] National Treasury *Public institutions listed in PFMA schedule 1, 2, 3a, 3b, 3c and 3d as at 24 February 2017* 2017 4; see also s 48 of the PFMA.

> '…are normally extensions of a public entity with the mandate to fulfil a specific economic or social responsibility of government. They rely on government funding and public money, either by means of a transfer from the Revenue Fund or through statutory money. As such, these entities have the least autonomy.'[147]

Because of the measures in place to prevent capture by politicians, there may be a need for accountability towards all three existing branches and the relevant cross-checks found within the framework of separation of powers will naturally have an overarching role to play. I show hereafter that this is indeed the case in South Africa. As a last thought on the issue of political realities within the branches of government, the following statement by Malan:

> 'Especially in view of the South African courts' broad review powers relating to legislation and executive acts, the judiciary has become a potentially important political actor which the other branches of government should heed. That fact, together with the justiciable Bill of Rights in the Constitution, has rendered the South African Constitution a splendid example of liberal constitutionalism. The constitutionally endowed strength of the courts underscores the crucial importance of judicial appointments, which is a particularly sensitive and often controversial issue in which all political actors and notably the ruling party and political branches of government have an important stake. Government (that is the ruling party in the legislature and the executive) would evidently prefer a politically sympathetic judiciary which defers to governmental decisions. … Transformation is the master concept of the ANC's ideological project and of the present South African politico-constitutional order. In terms of this project, at times also referred to as the national democratic revolution, all structures of power, including the army, the police, the public service, intelligence structures, parastatal institutions, agencies such as regulatory bodies, the public broadcaster and the central bank, must be placed under control of the ruling party. The transformation drive also expands to the judiciary. In that context (as explained in more detail in 4.1) it entails that, firstly, the composition of the judiciary must reflect the national population profile (that is, in typical present-day South African parlance, it must satisfy the representivity principle), and, secondly, that individual judges must subscribe to and pursue the same ideological goals as the ruling party. The liberals include the critics of the (majority of the) JSC [Judicial Service Commission]. They cannot subscribe to this definition of transformation as that would obviously amount to a full-scale contradiction of the notion of a powerful (independent and impartial) judiciary. They argue, among other points, that the professional competence of candidates for judicial appointment must be the deciding factor in judicial appointments. The liberals reproach the JSC for its alleged preference for recommending less competent but pliant pro-government candidates. They have misgivings about the JSC's propensity against liberal and independent-minded candidates, who are regarded as the foremost subscribers to the values underpinning the

[147] National Treasury *Annual Report Guide for Schedule 3A and 3C Public Entities* Updated April 2017 5.

> South African Constitution but who are at the same time prepared to make rulings against government and in so doing to uphold these values.'[148]

3. ACCOUNTABILITY

The policy document that envisaged the National Credit Regulator determined that the entity would be characterised by a multi-member governing structure, of which the incumbents would be designated by ministers from two different departments together with experts in consumer credit.[149] In addition, the idea was that the institution would be held accountable by Parliament, via the Department of Trade and Industry.[150]

The policy document that envisaged the details surrounding the Financial Sector Conduct Authority recognised the need for proper answerability mechanisms in light of the enhanced authority bestowed upon the new regulator of financial sector market conduct. [151] The policy document also provided for measures that would endorse parliamentary oversight and further characterised the overall measures based on the principles that it would embrace.[152]

In chapter four, I set out a number of aspects that an analyst would have to consider when looking at an answerability regime. [153] I briefly restate the specifics that pertain to each accountability structure in the introductory parts of the upcoming paragraphs. However, as these structures are discussed in order to assess whether, and to which extent, they are capable of evaluating the aforementioned regulators, the following are brief notes on the relevant substantive aspects to be assessed:[154]

The idea is that the regime should evaluate results, and the manner in which the goals and related results are determined and ranked according to importance.[155] The assessors should

[148] Malan (n 10) 1966 & 1971-1972.

[149] Department of Trade and Industry (hereinafter 'DTI') *Consumer Credit Law Reform – Policy Framework for Consumer Credit* August 2004 par 7.6: 'The National Credit Regulator will be governed by a Board of Directors, consisting of members nominated by the Ministers of Finance and Social Development, as well as individuals with specific expertise in the area of credit extension and consumer protection. The regulator will be accountable to Parliament through the offices of the dti.'

[150] *Ibid*.

[151] National Treasury *Treating Customers Fairly in the Financial Sector: A Draft Market Conduct Policy Framework for South Africa Discussion Document* December 2014 37: 'The new regulatory powers proposed in the FSR Bill are an important development towards enabling the FSCA to achieve the comprehensive consumer protection framework described in this document. To complement these strengthened regulatory powers, the various accountability measures proposed for the FSCA in the FSR Bill – including measures relating to Parliamentary and National Treasury reporting, transparency and consultation, and appeals and reviews - provide important checks and balances.'

[152] *Ibid*.

[153] See e.g. paras 4 & 5 of ch 4 *supra*.

[154] These notes are extracts from the discussions under paras 2.2, 3.1, 3.2, 3.3, 3.4.1, 3.4.2, 3.4.3, 4 & 5 of ch 4 *supra* and the footnotes/contents of these paragraphs can be viewed for the original sources referred to therein.

[155] See paras 3.3 & 4.1 of ch 4 *supra*.

determine whether goals are met and how the regulators use their authority to meet their goals.[156] The regulators have to rationalise their actions and omissions, and this has to be evaluated by the external party.[157] In order to do so, the authority, role and duties of the regulators must be unambiguous and accurately demarcated. [158] The ambit of their responsibilities must be properly set so that there is certainty about their obligations.[159] There should be a definite law-based foundation for these mandate-related aspects mentioned.[160]

The assessors should determine how the regulators employ their authority to change the behaviour of the regulated industry. [161] The outcomes of the regulators' actions and satisfaction with these outcomes, including whether the actions are effective and how resources are consumed, must be assessed. [162] The regulator's actions when executing internal, operational, and official duties must be assessed for lawfulness.[163] It is therefore important to assess how decisions are made, the processes and practices employed, the rule and norm design and data collection. [164] A sophisticated regulatory assessment regime evaluates not only what is done, but also whether it is competent, effective and proportionate – it links expertise with technical evaluations as forwarded by Colin Scott.[165]

The manner in which the executive's policies are implemented should be assessed.[166] This would also include proper delineation of policies, setting out the grounds for liaising with government, legislative and executive guidance, and those circumstances where the autonomy of the regulators may be countered.[167]

It is also important to note that the resources available to the regulators must be taken into account when evaluating their performances.[168] The responsibilities of other stakeholders in the market must be determined and articulated alongside those of the regulators.[169]

In the upcoming parts of this chapter, I therefore also consider that which should be assessed in South Africa – in the context of whether the particular scheme under examination can meet the requirements set.

[156] See par 4.1 of ch 4 *supra*.
[157] See par 2.3 of ch 4 *supra*.
[158] See paras 3.1.1, 3.1.3 & 4.1 of ch 4 *supra*.
[159] See par 3.1.1 of ch 4 *supra*.
[160] See paras 3.1.3 & 4.1 of ch 4 *supra*.
[161] See par 4.1 of ch 4 *supra*.
[162] See par 4.1 of ch 4 *supra*.
[163] See paras 3.3.3 & 3.4.4 of ch 4 *supra*.
[164] See par 4.1 of ch 4 *supra*.
[165] See paras 3.3, 4.1 & 5.3 of ch 4 *supra*.
[166] See par 4.1 of ch 4 *supra*.
[167] See paras 3.1.3, 4.1 & 5.2.2 of ch 4 *supra*.
[168] See par 3.1.2 of ch 4 *supra*.
[169] See paras 3.1.3 & 5.3 of ch 4 *supra*.

4. GOVERNMENT

4.1. Introduction

In chapter four I dealt with the features of a system that provides for answerability towards politically elected officials and the aspects of the system that need to be taken into account when evaluating whether this system added value to the overall accountability scheme.[170] In short, these aspects that should be considered revolved around six features.[171] Firstly, one has to ascertain whether the legislative, executive and/or judicial branches can hold the regulators accountable.[172] Secondly, there needs to be a reason for choosing these particular means and a consideration of the mechanisms that can result in answerability to officers of state.[173] Thirdly, the analyst has to find out what the aim of governmental accountability of regulators is, hence whether it is compliance-driven (legislative branch) or information- and monitoring-driven (executive branch).[174] Fourth, it is important to formulise the foundations for these officials to demand that a regulator account for its actions.[175] Fifth, there needs to be an awareness of any motivation for capturing the regulator to safeguard certain interests and sixth, one must consider whether this forum has the ability to add to a scheme of answerability for those affected by the Regulator through public participation.[176]

My earlier research also highlighted characteristics that must be canvassed in respect of the specific branches of government. In this part of chapter seven, I deal only with the legislative and executive branches, and the additional duties of these branches, where relevant, that the Constitution provides for. I deal with the judiciary in the next part in order to include all available adjudicative forums, including the tribunal-systems, under one heading.

4.1.1. The executive branch

The features of answerability to the executive branch relate to the ministerial office, public announcements, regulatory impact assessments, removal from office, internal governance and budgetary authority.[177]

Insofar as the ministerial office is concerned, the aspects that relate to answerability *vis-à-vis* the Minister concern the ability of the Minister to determine the course of the Regulator, the way in which the determination is to be effected, and the substantive issues in respect of

[170] See par 5.4 of ch 4 *supra*.
[171] *Ibid*.
[172] *Ibid*.
[173] *Ibid*.
[174] *Ibid*.
[175] *Ibid*.
[176] *Ibid*.
[177] See par 5.6 of ch 4 *supra*.

which the Minister may make these determinations.[178] In addition, the analysis must look at the interaction between accountability and other desirable features such as independence and expertise, and the impact on regulatory independence.[179] Lastly, informal accountability mechanisms and the implementation of publicised admonitions as a means of conveying ministerial desires to a Regulator must be considered.[180]

There may be provisions that allow for formal non-legislative expression of the Regulator's duties and one has to consider the intended recipient, contents and review arrangements that pertain to this mechanism.[181] Public announcements can also be a means of effecting answerability: first, it needs to be determined if there are stipulations that pertain to official dissemination of duties; second, the target audience of the announcements; third, the content and fourth, guidelines pertaining to reconsideration and republication of publicly announced duties and obligations.[182]

The features to consider for purposes of accountability via authority over the appointment and internal matters of the Regulator concern the determinants, and the foundations thereof, that allow the Minister to remove an official from office, and the level of seniority of employees to which this allowance pertains. In addition, the specific circumstances under which discharge may occur, the impact thereof on the independence of the entity and the presence of safety measures to prevent exploitation via this particular statutory-based answerability mechanism.[183]

The influence that the executive can have on the Regulator via the budgeting process necessitates consideration of the following: first and second, the existence and basis for a scheme that govern pecuniary determinations to regulators; third, any notable funding tendencies; fourth, substantiation of financial requests and bequeaths and fifth, the effect that this prerogative has on the independence of the regulatory entity.[184]

4.1.2. The legislative branch

The features of a scheme of answerability to Parliament were divided into three categories: Parliamentary commissions and enquiries, reports and legislation.[185]

[178] See par 5.6.1 of ch 4 *supra*.
[179] *Ibid*.
[180] *Ibid*.
[181] See par 5.6.2 of ch 4 *supra*.
[182] See par 5.6.2 of ch 4 *supra*.
[183] Par 5.6.4 of ch 4; paras 7.2.2 & 7.3.2 of ch 6 *supra*.
[184] Par 5.6.5 of ch 4; paras 7.2.1 & 7.3.1 of ch 6 *supra*.
[185] See par 5.5 of ch 4 *supra*.

Insofar as answerability to Parliament through reporting requirements is concerned, attention needs to be given to the following: first, how often reports are required; second, the information contained in the reports; third, the authoritative basis for demanding certain content and the ability to deviate from the stipulations; fourth, the regulatory strategy when reporting to Parliament and whether reporting is done in a neutral fashion; fifth, subsequent steps that can be taken as a result of the contents of the reports and sixth, the resources expended to account in this manner.[186]

The aspects pertaining to commissions and enquiries comprise of an analysis of the following: The proficiency of commission members, and the relation of this proficiency *vis-à-vis* that of the Regulator; the *modus operandi* of these commissions; the obligations of the Regulator towards these commissions; the jurisdictional authority of the commission to deal with certain matters and the authorised manners to do so; the resources expended to account in this manner; and the ability to add meaningfully to a scheme of answerability.[187]

4.2. The National Credit Regulator

4.2.1. The Public Finance Management Act (Act 1 of 1999)

The Regulator is a schedule 3A national public entity[188] in terms of the Public Finance Management Act and the Chief Executive Officer is the Accounting Officer in terms of section 23(3) of the National Credit Act and section 49(2)(b) of the Public Finance Management Act. The latter Act was designed to ensure that state funds are expended efficaciously. [189] It provides for a framework of responsibilities and corresponding answerability schemes,[190] that have a bearing on the relationship between the National Credit Regulator, through the office of the Chief Executive Officer, and the Minister of Trade and Industry, as the Responsible Executive.[191]

The Act determines that there has to be a specific governing factor – the accounting authority – that is held responsible for executing the obligations prescribed by the Act.[192] The person or body so indicated is held to certain standards and norms insofar as the finances of the entity are concerned.[193] These include the highest duty of care practically necessary to safeguard the

[186] See par 5.5.2 of ch 4 *supra*.
[187] See par 5.5.1 of ch 4 *supra*.
[188] See National Treasury *Public institutions listed in PFMA* (n 146). See also sch 3 and the definition of 'national public entity' in s 1 of the PFMA.
[189] Long title of the PFMA.
[190] See ch 6 of the PFMA.
[191] See s 1 of the PFMA.
[192] S 49(1) of the PFMA.
[193] S 50 of the PFMA.

property and records of the institution, conduct that meets the standards of veracity, truthfulness and commitment when it comes to the finances of the institution, acting in a manner that brings only the welfare of the entity to the fore and limiting adverse pecuniary outcomes for it, and transparency, as and where required to inform the conduct or determinations made by the Minister or legislature, or in respect of personal vested interests.[194]

Furthermore, the Act prescribes specific duties that the designated accounting authority is tasked with,[195] and prohibits behaviour that conflicts with these duties.[196] It consigns these duties to the Chief Executive Officer but it does not determine that these should form part of the employee's contract of employment and performance management framework, similar to the provisions that pertain to accounting officers of departments and constitutional entities.[197]

The accounting authority has a number of special duties and is tasked with making sure that the entity has the necessary schemes and protocols in place to administer its finances, manage its risks, make certain significant decisions, and obtain goods and services, all in a manner that meets the statutory norms as prescribed.[198] Section 51(1)(b) of the Public Finance Management Act also places the duty on the accounting officer to take proper and necessary action to retrieve the monies due to the entity, pre-empt unsanctioned or undesirable disbursements, and control the funds at its disposal in a resourceful manner.[199] In terms of section 51(1)(c), the Public Finance Management Act authorises the accounting authority to take 'effective and appropriate disciplinary steps', should an employee disregard the provisions of the Act or conduct himself in a manner that has a prejudicial effect on the

[194] *Ibid*.

[195] S 51 of the PFMA.

[196] S 50(2)(a) of the PFMA.

[197] See s 36(5) of ch 5 of the PFMA. The NCR's annual report reflects that it complies with the '2009 King III Code of Governance Principles for South Africa (King III Code) in as far as the Code can be applied to the NCR' – see NCR *Annual Report* 2016/2017 55. See also Quintyn *et al* (n 6) 6 in respect of the importance of proper 'governance practices' for independent oversight agencies.

[198] S 51(1)(a) of the PFMA determines the following: '(1) An accounting authority for a public entity – (a) must ensure that that public entity has and maintains – (i) effective, efficient and transparent systems of financial and risk management and internal control; (ii) a system of internal audit under the control and direction of an audit committee complying with and operating in accordance with regulations and instructions prescribed in terms of sections 76 and 77; and (iii) an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost-effective; (iv) a system for properly evaluating all major capital projects prior to a final decision on the project …'

[199] In terms of s 51(1)(b) of the PFMA, read with s 23(3) of the National Credit Act (Act 34 of 2005) (hereinafter 'NCA'), the Chief Executive Officer (hereinafter 'CEO') of the National Credit Regulator (hereinafter 'NCR') 'must take effective and appropriate steps to – (i) collect all revenue due to the public entity concerned; and (ii) prevent irregular expenditure, fruitless and wasteful expenditure, losses resulting from criminal conduct, and expenditure not complying with the operational policies of the public entity; and (iii) manage available working capital efficiently and economically…' See also s 51(1)(c) of the PFMA.

available finances, the financial administration or oversight scheme.[200] The accounting authority, in this context the National Credit Regulator's Chief Executive Officer, is further tasked with adherence – and institution-wide adherence – to the Public Finance Management Act as well as the provisions of all the other statutes within whose scope of application the National Credit Regulator falls.[201] As the Act provides the Accounting Authority with the power to take action against a delinquent employee, this is a robust answerability mechanism insofar as it provides for a sanction.[202]

Intentional non-compliance with sections 50 or 51, or non-compliance with these aforementioned sections as a result of negligence, constitutes 'financial misconduct' and intentional or grossly negligent failure is a criminal offence.[203] This is a strong answerability mechanism that will affect the regulator as it could result in the official no longer holding the position where imprisonment is ordered.

4.2.2. The executive branch: general

The National Credit Regulator falls under the Department of Trade and Industry, which is headed by the Minister of Trade and Industry. The relationship between the Department and the Regulator is complex – the Department sustains the Regulator financially, appoints (and renews the contract of) the Chief Executive Officer, the Regulator's activities promote or meets some of the obligations in the Department's portfolio,[204] the Department oversees, and is ultimately responsible for, the Regulator and the Minister can issue regulations in terms of the National Credit Act that affect the operations of the Regulator. The supervisory interactions between the National Credit Regulator and the officials of the Department of Trade and Industry are formal as well as informal, and there is limited legislative alignment of the latter type of interactions.[205]

[200] See s 51(1)(e) of the PFMA, which determines that the authority 'must take effective and appropriate disciplinary steps against any employee of the public entity who – (i) contravenes or fails to comply with a provision of this Act; (ii) commits an act which undermines the financial management and internal control system of the public entity; or (iii) makes or permits an irregular expenditure or a fruitless and wasteful expenditure …'

[201] See s 51(1)(h) of the PFMA which determines that the authority 'must comply, and ensure compliance by the public entity, with the provisions of this Act and any other legislation applicable to the public entity.' See also s 51(1)(d) of this Act.

[202] See par 3.4.1 of ch 4 *supra.*

[203] Ss 83(1) & 86(2) of the PFMA. The criminal penalty in terms of s 86(2) is a fine or a prison sentence capped at five years.

[204] Portfolio Committee on Trade and Industry *Report of the Portfolio Committee on Trade and Industry on Budget Vote 34: Trade and Industry* 19 May 2017 8.

[205] See par 3.4.3 of ch 4 *supra.*

The Regulator reported that it interacts with the Department on a monthly basis.[206] It has to issue statutory reports required in terms of the legislation discussed hereafter and also draft annual performance and strategic plans. The Regulator has two primary reporting duties in terms of the National Credit Act: Firstly, it has to submit annual reports to the Minister of Trade and Industry, which is pre-set in terms of the Public Finance Management Act;[207] and secondly, it has to report on specific substantive market-related issues prescribed in the National Credit Act, also to the Minister.[208] The last-mentioned reporting function of the Regulator is often intertwined with its ministerial advisory role[209] and, as such, the reporting repertoires cumulatively serve to function as mechanisms of oversight, information accumulation and market monitoring.[210]

4.2.3. The executive branch: the Minister

The executive authority, in this context, the Minister of Trade and Industry as per an application of section 1, is held answerable for the compliance of an entity with the provisions of the Public Finance Management Act:

> 'The executive authority responsible for a public entity under the ownership control of the national or a provincial executive must exercise that executive's ownership control powers to ensure that that public entity complies with this Act and the financial policies of that executive.'[211]

In practical terms, it would mean that the Minister has a vested interest in the careful supervision of the National Credit Regulator's Chief Executive Officer, who is the official tasked with ensuring institutional compliance.[212] In fact, statutory recognition can be seen from perusing section 1 of the Public Finance Management Act that, when applied to the present context, the governance structure's features allow the executive to retain a measure of control over the pecuniary interests and operational protocols of the National Credit Regulator:

[206] NCOP Trade and International Relations *National Credit Regulator on its Annual Report* 2015/16 8 March 2017 – 'Ms Motshegare stated that there were meetings every month with the DTI. The regularity of meetings depended on whether meetings were with the Director General or with heads of branches.'

[207] S 36(2) of the NCA.

[208] Ss 13(c), 13(d), 16(1)(g) & 18(1) of the NCA.

[209] See e.g. ss 13(c)-(d) & 18(1) of the NCA.

[210] See par 4.1 *supra*.

[211] S 63(2), read with the reporting duties of the authority in terms of s 65, of the PFMA.

[212] S 51(1)(h) of the PFMA.

> ' "ownership control", in relation to an entity, means the ability to exercise any of the following powers to govern the financial and operating policies of the entity in order to obtain benefits from its activities … (b) to appoint or remove that entity's chief executive officer …'[213]

As I indicated in the introductory paragraphs to this part, one has to consider the authority that the Minister has to control the National Credit Regulator's course and conduct, and the manner in which the Minister executes this authority.[214] I also addressed some features of relevance in chapter 6 when I indicated that the National Credit Act does not require the permission of the Minister to perform its basic statutorily-endorsed regulatory duties, nor can its decisions formally be overturned by the Minister. Section 55 compliance notices are examples. In terms of this provision of the National Credit Act, the National Credit Regulator informs a non-compliant person of his unlawful behaviour and instructs the person in the conduct required in order to remedy the situation.[215] The notice is effective until the Tribunal – or subsequently the court – has dismissed it, or the Regulator has certified that the person met the remedial stipulations set out in the notice.[216]

The Regulator can therefore not decide to retract the notice, whether on its own accord or due to pressure from the ministerial office, or industry itself.[217] On the one side, it affects the flexibility of the Regulator to adjust to changing circumstances or reach an agreement with the violator, but on the other side, these arrangements protect the Regulator against capture from various fronts. In addition, the affected person is afforded a direct right of recourse to the Tribunal and the Regulator is directly held accountable to the Tribunal for improper execution of its duties in this regard.[218]

The Minister can enable and facilitate the performance of the Regulator in a manner that he finds acceptable, through intervention by means of section 171 regulations. Section 171(2) specifically authorises the Minister to 'make regulations for matters relating to the functions of the National Credit Regulator' and this is done 'in consultation with the National Credit

[213] Similar provisions apply to a multimember governance structure – see s 1 of the PFMA: '"ownership control", in relation to an entity, means the ability to exercise any of the following powers to govern the financial and operating policies of the entity in order to obtain benefits from its activities: (a) To appoint or remove all, or the majority of, the members of that entity's board of directors or equivalent governing body; (b) to appoint or remove that entity's chief executive officer; (c) to cast all, or the majority of, the votes at meetings of that board of directors or equivalent governing body; or (d) to control all, or the majority of, the voting rights at a general meeting of that entity …'

[214] Par 4.1.1 *supra*.

[215] S 55(1) & (3) of the NCA.

[216] S 55(4) of the NCA.

[217] Vessio 'What does the National Credit Regulator regulate?' 2007 *South African Mercantile Law Journal* 227 232-233. See also Boraine & Van Wyk 'Credit bureaus in South Africa and Namibia: A comparative analysis of the regulatory frameworks evaluated against the World Bank's principles for credit reporting: Part 1' 2017 *Comparative and International Law Journal of Southern Africa* 147 193.

[218] See par 6.2 *infra*.

Regulator'. Section 171(2) lists a number of aspects in respect of which these regulations may be made but it does not seem as if this list is exhaustive as the section specifically states that the regulations that may be made 'include' those listed. As such, the Minister can exercise control in order to ensure that he is content with the manner in which the Regulator effects its functions. I also discuss the jurisdiction of the civil courts to ensure fair administrative action, and the basic principles remain the same for a minister-regulator relationship as for the regulator-regulatee relationship that I deal with, and as the Public Protector's report *There are no heroes*, which I discussed in chapter 6 shows.[219]

The Minister is also statutorily enabled to request advice from the Regulator on 'any matter' that he should desire.[220] Notwithstanding this provision of the National Credit Act, the Regulator is tasked with advising the Minister on, or informing him of, a number of other matters specifically identified by the Act.[221] The advisory duties are usually coupled with a research or monitoring function.[222] These are not specific reporting duties that have direct accountability implications for the Regulator, but it does provide some indication of the level of expertise of the Regulator *vis-à-vis* the Minister, and complexity of the regulated market.[223]

As I indicated earlier, independent agencies are created as specialists and this would logically entail that there is some discrepancy between the regulator and its supervisor that could result in some of the detrimental outcomes projected by an application of delegation and delegation game theory.[224] However, as the South African legislation shows, the research and reporting requirements imposed on the National Credit Regulator is largely aimed at keeping the ministerial office informed of contentious developments or issues that affect government policies in the marketplace, such as the availability of credit for people who were subjected to past discriminatory practices that impede their ability to access affordable credit from mainstream credit providers.[225]

If the ministerial office earnestly engages with these reports (especially those provided on an annual basis as required by law) and provided that the research and reporting methods are sound, it should remain in the know with the state of the market to such an extent that it can form an opinion as to whether its policies are sound, effectively implemented and where

[219] Par 7.2.3 of ch 6 *supra*.
[220] S 18(1)(e) of NCA.
[221] Ss 13(c), 13(d), 16(1)(g), 18(1)(a)-(d) of the NCA.
[222] See e.g. ss 13(c) & 16(1)(g) of the NCA.
[223] See also the discussion in paras 4.2.2, 5.2. & 5.3 *infra*.
[224] See par 3.3. of ch 2; par 2.2 of ch 3 *supra*.
[225] See e.g. s 13(c)(iii) of the NCA read with par (1) p 8 of DTI *Consumer Credit Law Reform* (n 149).

change is needed.[226] It should also be able to hold the Regulator to account on substantive matters.

4.2.4. The executive branch: reporting

In terms of section 36(2) of the National Credit Act, the reports required by the Public Finance Management Act are to be provided to the Minister of Trade and Industry on an annual basis. This subsection specifically states that these reports relate to 'the activities' of the Regulator, but the report also includes the findings of the Auditor-General on the Regulator's financial statements.[227] Most of the information required for dissemination in terms of the Public Finance Management Act are finance-orientated but section 55(1)(d)(i) refers to an annual report that sets out the activities of the entity for the past financial year.

The annual reports of the National Credit Regulator are activity-orientated and informed by the National Treasury's 2017 version of the *Annual Report Guide for Schedule 3A and 3C Public Entities.*[228] The guideline issued explains that the objectives of a proper report are to set out the accomplishments and failures of the reporting institution in a manner that is even-handed and true.[229] Such a report should include reliable information on the prospects and resources of the entity, and relies on the realised goals as embodied in the formal strategic and planning documents.[230] The importance of proper reporting on performance and financial resources is found in the informative and prospective role that it has to show proper execution by the state of its service-delivery duties and to allow for answerable and transparent conduct.[231] As such, a good annual report meets legislative and policy demands and provides relevant favourable and non-favourable information comprehensibly.[232] This guideline thus requires that the report contain specified information, and allows for a discretionary as-deemed-fit inclusion of other information.[233] Concept tables, graphs and document formats are also provided.[234]

[226] See e.g. the provisions of ss 13(c)(iv) ('monitor the following matters and report to the Minister annually in respect of ... levels of consumer indebtedness and the incidence and social effects of over-indebtedness'), 16(1)(g) ('over time, reviewing legislation and public regulations, and reporting to the Minister concerning matters relating to consumer credit') & 18(1)(d) ('enquire into and report to the Minister on any matter concerning the purposes of this Act') of the NCA.

[227] See e.g. NCR *Annual Report* 2016/2017 79-83.

[228] See the reference to the National Treasury's directions in NCR *Annual Report* 2016/2017 16.

[229] National Treasury *Annual Report Guide* (n 147) 4.

[230] *Ibid*. See also National Treasury *Annual Report Guide* (n 147) 6 for the list of documents from which information is sourced: 'Strategic Plan … Annual Performance Plan … Risk management plan … Human Resource Plan … Organisational structure … Audited annual financial statements …'

[231] National Treasury *Annual Report Guide* (n 147) 4.

[232] *Ibid*.

[233] *Idem* at 5 & 9-35.

[234] *Idem* at 16-19, 22-23 & 26-35.

The minimum information that should be included is divided into 'parts' dedicated categories of information, and specifically tasked to individuals within the organisation.[235] As such, it is a clear example of answerability assigned to a specific high-placed official as opposed to institution-wide accountability.[236]

The guide focuses on 'non-financial performance'[237] and dictates the format of the reported information, for example that it should be presented as a 'narrative'.[238] Part A consists of overall, entity-specific explanatory information and includes overviews by the two officials that arguably bear the most responsibility in respect of the organisation: the Chairman of the Board or Accounting Authority and the Chief Executive Officer.[239] The narrated overviews, especially when considering the pointers in the Treasury's *Guide* together with the incorporation thereof in National Credit Regulator's Annual Reports,[240] are concisely stated and comprise of a couple of paragraphs at most under each applicable heading.[241] One gets the idea that the fundamental aspects of importance to the entity Heads – regarding the given headings – are highlighted in this part. It is also stated in a basic fashion without elaboration, for example, the strategic relationships are noted without adding an input or output value, although some aspects may be elaborated upon elsewhere in the report.[242] This part of the report further sets out the strategic outcomes set for the entity, its mandate and sources thereof, and the organisational construction of the institution.[243]

[235] *Idem* at 6.

[236] See Bovens (n 1) 458-459 - this could reflect elements of '[h]ierarchial [a]ccountability' and '[i]ndividual accountability' as the most senior official is held accountable for the mishaps of the Regulator but certain individuals are also held to account based on their 'actual contribution in stead of on the basis of his formal position'.

[237] National Treasury *Annual Report Guide* (n 147) 4.

[238] *Idem* at e.g. 11.

[239] *Idem* at 10-11.

[240] See e.g. NCR *Annual Report* 2016/2017 11-13.

[241] See National Treasury *Annual Report Guide* (n 147) 10-11 in respect of the information in the Chairperson's/Accounting Authority's statement ('High level overview of the public entity's strategy and the performance of the public entity in its respective sector … Strategic Relationships … Challenges faced by Board … Medium to long term goals of the entity … Acknowledgements /Appreciation') and CEO's statement ('General financial review of the public entity … Spending trends of the public entity … Capacity constraints and challenges facing the public entity … Discontinued activities / activities to be discontinued … New or proposed activities … Requests for roll over of funds … Supply chain management … All concluded unsolicited bid proposals for the year under review … Whether SCM processes and systems are in place … Challenges experienced and how they will be resolved … Audit report matters in the previous year and how they would be addressed … Outlook/ Plans for the future to address financial challenges … Events after the reporting date … Economic Viability … Acknowledgement/s or Appreciation … Other (information that needs to be communicated to users of AFS)'. Compare National Treasury *Annual Report Guide* (n 147) 10-11 with NCR *Annual Report* 2016/2017 11-15 for the heading not discussed.

[242] See e.g. the parts in the report that deal with the financial statements, which logically provides more information on the economic viability of the entity.

[243] National Treasury *Annual Report Guide* (n 147) 12.

Part B deals with the execution of the entity of its duties:[244]

> 'Measuring performance: … ensures that policy, planning, budgeting and reporting are aligned in order to achieve improved service delivery … indicates how well an institution is meeting its aims and objectives, and which policies and processes are working. Making the best use of available data and knowledge to track and report on performance is crucial for improving the execution of government's mandate … facilitates effective accountability, enabling relevant legislatures, members of the public and other interested parties to track progress of government activities, identify the scope for improvement and hold government to account.'[245]

This focus on 'service delivery' adds a valuable layer to the regulatory performance dialogue, notwithstanding that the Treasury's *Guide* is not written for the regulator *per se*, but for the class Schedule 3A public entity. As such, a regulatory adaptation is needed and as a point of departure, a clear understanding of the concept of 'service delivery' within the context of the Regulator.[246]

In the performance repertoire, the entity has to compare the strategic and planning documents as well as the budget with reality.[247] As a point of departure, this part of the report has to include an explanation of those positive and negative features that potentially influenced the entity's performance through an exposé of the milieu within which the institution functioned during the period under.[248] It is stressed that this is not an opportunity to rationalise poor performance but is intended to provide a neutral oversight to offer perspective.[249] Some information must be given in respect of the external milieu within which the entity effects service delivery and the internal institutional setting of the organisation.[250] The latter has to include factors that enhanced or impeded proper performance from within the institution, and where it is the latter, the remedial steps taken where possible.[251] In addition, significant statutory or policy modifications ought to be included as well where these had an impact on, or may impact, its past or future activities.[252] This is one instance where a lack of change should also be recorded.[253]

[244] *Idem* at 13.
[245] *Ibid*.
[246] Compare this with the discussion of a clear and present mandate in ch 4 *supra*.
[247] National Treasury *Annual Report Guide* (n 147) 13.
[248] *Idem* at 14.
[249] *Ibid*. This is done by expressing a opinion on the general performance of the entity, focusing on services to the public, difficulties in rendering the services and correlating remedial actions as well as 'a description of any significant developments, external to the public entity, that may have impacted either on the demand for the public entity's services or on the public entity's ability to deliver those services' – see 14.
[250] National Treasury *Annual Report Guide* (n 147) 14.
[251] *Ibid*.
[252] *Idem* at 15.
[253] *Ibid*.

In the latest annual report of the National Credit Regulator, the Regulator mentioned the changing nature of the credit industry as well as the negative impact of the economy on growth, pricing and consumer indebtedness.[254] The Regulator does not elaborate in these paragraphs but merely states the salient issues in a very concise manner.[255] The same can be said for the part that pertains to the institutional scheme of the Regulator,[256] which has remained much the same for the past couple of years.[257] A consistent complaint for the past three reporting periods was funding constraints.[258]

Reporting on specific activities on a program-by-program basis follows the above:

> 'The general purpose of programme/activity/objective assessments and reviews are to evaluate each programme's/activity/objective quality and effectiveness, to support me [*sic*] planning and improvement, and to encourage programmes to develop directions and manage in ways that reflect the public entity's strategic goals.'[259]

Treasury requires that the actual comparisons be reflected in table form under headings after describing the specific program in narrative form.[260] The tables require information that can be compared[261] and are mostly completed using quantitative data insofar as the National Credit Regulator is concerned.[262] There are basically three performance-related tables: one on 'strategic objectives' and corresponding end-results set and achieved (including an explanation on over- or underachievement and a comparison of results for the year under review and the one immediately preceding the year under review); one on 'performance' rated against the realisation of set 'indicators' for the year under review (evaluated against a three-year past performance pattern and the goals set and realised for the year under review); and one where the budget for a particular endeavour compared with the real expenses under the heading 'Programme/activity/objective' for two subsequent financial years (the year under review and the one immediately preceding the year under review), and a numerical indication of differences insofar as the budget related to real payment outflows is

[254] NCR *Annual Report* 2016/2017 23. See also National Credit Regulator *Annual Report* 2014/2015 17 where the Regulator highlighted the lack of consistent interpretation of the NCA and the numerous consumer in need of aid.

[255] NCR *Annual Report* 2016/2017 23. See also NCR *Annual Report* 2015/2016 17 & NCR *Annual Report* 2014/2015 17.

[256] NCR *Annual Report* 2016/2017 23; NCR *Annual Report* 2015/2016 18; NCR *Annual Report* 2014/2015 17.

[257] *Ibid*.

[258] *Ibid*.

[259] National Treasury *Annual Report Guide* (n 147) 15.

[260] *Idem* at 15.

[261] *Idem* at 16.

[262] See e.g. NCR *Annual Report* 2016/2017 45 & 46; NCR *Annual Report* 2015/2016 46-49; NCR *Annual Report* 2014/2015 29-32.

concerned.[263] In some instances, the tables are preceded or followed by explanations on the value added to the end results or strategic goals set.[264]

Notwithstanding the clear focus on comparable data, I do not see how the information required can lean itself towards a qualitative or efficacy evaluation – in fact, it is quantitative in nature and the required narratives are of such a nature that only highlights are reflected. On the one hand, the inclusion of case-studies is valuable but difficult to use when undertaking a comparative evaluation of regulatory performance – specifically due to the lack of consistency or comparable content.[265] On the other hand, a lack of case-related context in every report makes it difficult to see whether this can result in meaningful assessments in time but is necessary in order to contextualise quantitative reports.[266] I do not think that the specific cases referred to in the Regulator's annual reports (which are often newspaper extracts of successes published by the popular media) are comprehensive or ordered enough to be of comparative value.

The tabled expressions note, at most, whether the quantitative goals were met or not. In some instances, assessments outsourced to researchers are used to determine the value of particular endeavours.[267] It is not stated whether external or internal performance or impact assessments reports generated are presented to the executive. I understand that the annual report cannot include too much detail, but the problem is that this report is the leading assessment tool and quarterly performances aim to achieve goals reported on in the annual report. The qualitative performance evaluation missing in this reporting mechanism is not incorporated elsewhere.

The Treasury's *Guide* also provides insight as to the authorities that play a role in the finalisation of the annual report and specifies the dates upon which the report needs to be presented.[268] In terms of the Treasury's guide, the draft version and final proofs of the annual

[263] National Treasury *Annual Report Guide* (n 147) 16-17.

[264] *Idem* at 15 & 17.

[265] See Gilligan *et al* 'Regulating by numbers: the trend towards increasing empiricism in enforcement reporting by financial regulators' 2015 *Law & Financial Markets Review* 260 263 & 265.

[266] Par 6.2.1 of ch 4 *supra*; *Fit for the Future A capability review of the Australian Securities and Investments Commission A report to Government* December 2015 58-59 & see 59: 'Enhancing the use of performance narrative: In the absence of specific measures at the tier 1 level, it is important that ASIC develop a narrative to demonstrate how its actions have contributed to achieving its strategic objectives. Moreover, greater reliance on tier 3 metrics requires greater use of accompanying narrative to avoid the potential for perverse risk incentives (a high litigation success rate could suggest risk averse case selection), and outputs (number of financial literacy tools) misconstrued as effective outcomes.'

[267] See NCR *Terms of Reference to conduct an Impact Assessment of the educational and investigation activities* May 2017 RFQ Number: NCR429/05/17; NCR *Terms of Reference for the appointment of a Service Provider to provide Media Monitoring Services* July 2016 RFP Number: NCR368/07/16; Topline Research Solutions *Outcomes evaluation of Educational Workshops and Media Campaigns of the NCR* January 2013.

[268] National Treasury *Annual Report Guide* (n 147) 6-7.

reports need to be submitted to the Auditor-General (for consistency checks relating to financial statements) and final versions to the executive authority, legislature (national and/or provincial) and the National Treasury.[269]

The National Credit Act determines the reports that need to be drafted and disseminated to the authorities to whom the Regulator is answerable,[270] and provides that the accounting authority bears the responsibility to ensure that this is effected in the proper manner.[271] Although the Act deals with finances, it is a wide concept and includes assets, validation of expenditures, and many more – incorporating by necessity financial- and non-financial assessments.[272] As indicated above, the responsibilities pertaining to these reports are serious, and as can be seen from the report of a review committee, the leadership of the entity will be reprimanded at the very least, for being careless when signing off on audit-related reports.[273]

I deal with the contents of reports that include sections on performance without reference to finance-related performance first, and do so in light of the principles extracted from international and extraterritorial works in chapter four.[274] In this chapter, the extracted features found in, or suggested for, annual reports included the following: reporting on specific cases dealt with, the principles that underlie the Regulator's actions, the goals that the entity set for itself – overall and specifically – and the ranking of these goals according to importance,[275] the mechanisms and resources allocated to the pursuit of each goal, a depiction of accomplishments, including quantification thereof against the set goals, the reliability and assessment of the data that formed the basis of the quantification report,[276] reported complaints against regulatees, and an exposé of the internal and external aspects that affect the Regulator's functionality.[277] The last-mentioned category include information on regulatees, the specific duties of the regulator and the personnel allocated to each duty, and a breakdown of the regulatory activities undertaken – the type of activity, number of actions,

[269] *Ibid*.
[270] S 53 of the PFMA.
[271] S 51(1)(f) of the PFMA.
[272] See s 55 of the PFMA.
[273] See NCR Annual Report 2016/2017 81-82. See also Portfolio Committee on Trade and Industry *Report of the Portfolio Committee on Trade and Industry on Budget Vote 34: Trade and Industry* 19 May 2017 33-34.
[274] See par 6.2.1 of ch 4 *supra*.
[275] Par 6.2.1 of ch 4 *supra*; Gilligan *et al* (n 265) 265: 'The SEC's Annual Performance Reports (APRs) contain a detailed performance indicator framework, including: broad "strategic goals" of the SEC and the resources allocated to each goal; the narrower "strategic objectives" involved in achieving each strategic goal; and then the even narrower "performance goals" and "performance indicators" involved in achieving each strategic objective.'
[276] Gilligan *et al* (n 265) 265 state that it is significant that the statistics are accurate, especially where the quantification scheme is intended to produce dependable answers used to influence compliance implementation strategies.
[277] Par 6.2.1 of ch 4 *supra*.

against whom the actions were taken, how often this specific action is taken, resources spent in taking each action and the outcomes of actions.[278]

The structure of the guideline unfortunately confirms the following observation made by Deirdre Curtin:

> ‘The provision of information is clearly an element of accountability, although it cannot be regarded, without more, as synonymous with accountability. Yet without the provision of (full and complete) information, it will not be possible to hold actors to account for their actions and inactions. In other words, we can best view the provision of information in general terms as an essential pre-requisite enabling actors to be held to account by accountability forums in various ways. The most basic form of providing information is quite simply the act of reporting. In a principal–agent relationship, this involves the provision of information by an agent in a form, time and place that is preset by a principal (traditionally in the constitutive document or institutional design). The role of the account-giver in the account-giving relationship (defined in advance in the contract design) is to provide information or feedback to the principal. The point, however, is that very often the form, content and delivery by a designated agent is pre-established by the principal who requires nothing more from the reporting agent than formal compliance with the reporting requirements.’[279]

In the South African regime, the strategic plans, annual performance plans, and annual and quarterly performance reports form the basis for the evaluations by, and findings of, the Portfolio Committee for Trade and Industry[280] and the National Council of Provinces’ Select Committee on Trade and International Relations.[281] The findings of other bodies, in effect, the Auditor-General as reported in the annual report, form the basis of findings by these Committees as well.[282]

4.2.5. The executive branch: performance

The National Credit Regulator’s annual reports and government assessment of its activities provide some insight into its actual endeavours. The reports consist of statistics, ad hoc occurrences deemed noteworthy and an indication of whether certain objectives set have been achieved. On substantial issues, I will refer mostly to the latest available report, which is the

[278] *Ibid*.

[279] Curtin (n 50) 532.

[280] Portfolio Committee on Trade and Industry *Budgetary Review and Recommendation Report of the Portfolio Committee on Trade and Industry* 18 October 2017 59; Portfolio Committee on Trade and Industry *Debt Relief Committee Bill; National Consumer Commission; National Credit Regulator Annual Report; SABS & NRCS follow-up* 3 October 2017.

[281] NCOP Trade and International Relations *National Credit Regulator on its Annual Report* 2015/16 8 March 2017; National Council of Provinces Trade and International Relations *National Credit Regulator on its 2016 Annual Performance Plan* 6 April 2016.

[282] Portfolio Committee on Trade and Industry *Budgetary Review and Recommendation Report of the Portfolio Committee on Trade and Industry* 18 October 2017 33-34.

annual report for the 2016/2017 financial year. However, this thesis is not aimed at evaluating the performance of the Regulator but I have to consider evaluations undertaken in order to draw the necessary conclusions. As such, I provide my opinion on some performances from time to time. The evaluation of the annual reports has also brought additional aspects that impact independence to the fore.

Four of the strategic objectives have not changed since the introduction thereof and a fifth was added when the National Credit Amendment Act became operational. The reporting style of the Regulator changed to some extent around 2012. From 2012/2013 onwards, the Regulator reported on strategic objectives together with its performance areas. Before this time, the performance of the National Credit Regulator was only evaluated against set activities.[283] These activities ultimately became the 'performance areas' or 'main functional areas of the NCR'.[284] The type of activities reflected hereafter has remained the same, with some changes effected insofar as some activities were grouped differently or renamed. The performance indicators were grouped under 'Registration and Compliance Monitoring', 'Complaints',[285] 'Investigations and Prosecution',[286]'Education, Communication and Debt Counselling', 'Research and Statistics',[287] 'Credit Information',[288] 'Finance and IT'[289] and 'Human Resources'.[290] The primary activities were further delineated into specific activities that had bearing on the primary activity.

Ultimately, sections 13 to 17 of the Act were largely reflected in the activity base for the Regulator published as performance indicators over and above a general exposé of the successes and challenges of the year under review. In some instances, the reported activities personified the neutrality of the written statute, such as the aims to limit the turn-over times for registrations. Later on, the performance of the Regulator was set against four to five

[283] See e.g. NCR *Annual Report* 2011/2012; NCR *Annual Report* 2012/2013.
[284] See e.g. NCR *Annual Report* 2012/2013 1; NCR *Annual Report* 2013/2014 1.
[285] Changed to 'Complaints and Redress' in 2010/2011.
[286] Changed to 'Investigation and Enforcement' in 2010/2011.
[287] Changed to 'Statistics' in 2010/2011.
[288] Changed to 'Credit Information and Research' in 2010/2011.
[289] Changed to 'Finance and Information Technology' in 2010/2011.
[290] NCR *Annual Report* 2009/2010 Annexure A; NCR *Annual Report* 2010/2011 Annexure A; NCR *Annual Report* 2011/2012 Annexure A.

strategic objectives from 2012/2013 to 2015/2016.[291] These were objectives to 'promote increased access through responsible credit granting', 'protect consumers from abuse and unfair practices in the consumer credit market and address over-indebtedness', 'continually enhance a consumer credit market regulatory framework', 'monitor and improve the NCR's effectiveness in fulfilling its mandate',[292] and 'monitor and improve the NCR's operational effectiveness'.[293] [294]

Two deviations from the above were made: to 'enhance the quality and accuracy of credit bureau information' (2015/2016) and 'ensure effective implementation of the National Credit Amendment Act' (2014/2015 – 2015/2016).[295] Thus, where the actions of the Regulator comparable to its statutory mandate were initially reported on in respect of 'Activity', 'Targets/Output to be delivered by 31 March 20[…]', 'Performance Indicators', 'Quarterly Milestones', 'Actual Performance', 'Targets Far Exceeded/ Not Achieved' and 'Target Not Achieved: Plan going forward',[296] similar performance measures are now utilised to report on performance *re* the statutory objectives and no longer in respect of specific performance of activities. As such, the detail in respect of what was intended and what was achieved, have been lessened when comparing earlier reports.

The objectives are selected reconstructions of some of the Regulator's statutory functions and the manners stated to achieve the objectives are the various powers endowed by the National Credit Act.[297] It is of further interest to note the deliberate alignment of the Regulator's

[291] NCR *Annual Report* 2012/2013 14; NCR *Annual Report* 2014/2015 13; NCR *Annual Report* 2015/2016 13. See also 13: 'The NCR delivers against these strategic objectives by: • Registering credit providers, credit bureaus, debt counsellors, Payment Distribution Agencies (PDAs), and Alternative Dispute Resolution Agents (ADRs) and monitoring their conduct;• Educating and creating awareness around the protection that the NCA, offers consumers; • Researching the credit market and its trends, monitoring access to credit and the cost of credit to identify factors that may undermine access to credit, competitiveness in the credit market and consumer protection; • Advising government on policy and legislation; • Receiving and investigating complaints and ensure that consumer rights are protected; and • Enforcing the NCA and taking action where contraventions are identified.'

[292] 2012/2013 – 2013/2014; NCR *Annual Report* 2012/2013 14; NCR *Annual Report* 2014/2015 13.

[293] 2014/2015 – 2015/2016; NCR *Annual Report* 2014/2015 13; NCR *Annual Report* 2015/2016 13.

[294] NCR *Annual Report* 2012/2013 14; NCR *Annual Report* 2014/2015 13; NCR *Annual Report* 2015/2016 13.

[295] *Ibid*. See also NCR *Annual Report* 2015/2016 13: 'The NCR delivers against these strategic objectives by: • Registering credit providers, credit bureaus, debt counsellors, Payment Distribution Agencies (PDAs), and Alternative Dispute Resolution Agents (ADRs) and monitoring their conduct;• Educating and creating awareness around the protection that the NCA, offers consumers; • Researching the credit market and its trends, monitoring access to credit and the cost of credit to identify factors that may undermine access to credit, competitiveness in the credit market and consumer protection; • Advising government on policy and legislation; • Receiving and investigating complaints and ensure that consumer rights are protected; and • Enforcing the NCA and taking action where contraventions are identified.'

[296] See e.g. Annexure A of the reports mentioned in the previous fns 292 & 293.

[297] NCR *Annual Report* 2016/2017 17.

objectives with that of the Department of Trade and Industry's strategic objectives[298] (and in some instances, the focused formulation of its mandate in line with the Department's aims) when the performance of the Regulator is evaluated by the Portfolio Committee for Trade and Industry as part of the Department's reviews.[299]

Unfortunately, the evaluation is done as part of the Department of Trade and Industry's evaluation and as such, the Regulator is presented in this context. I am of the opinion that this also influences the manner in which the Regulator is viewed by the committee but an analysis of these reports is still insightful as it shows the Department's perspective of the Regulator: a consumer protector of the first instance. It also seems as if this vision is strengthened by the Portfolio Committee on Trade and Industry when one considers the different remarks of the members on the conduct of the Regulator:

> 'Mr Hill-Lewis asked for an update on the big cases that NCR was dealing with, especially the Capfin matter. He said that the settlement amount of R2 million was low for a company as big as Capfin, and for what Capfin had done. He was concerned that the NCR was achieving small settlements for very serious transgressions. The targets which Ms Motshegare has set herself were too generous, and not stretch targets. He welcomed the 11 raids, but this was a drop in the ocean given the scale of the illegal credit market in SA. He appreciated that resources were a problem. …
>
> Mr Hill-Lewis provided details of the Capfin settlement. 25 loans had been identified by NCR as constituting illegal loans or reckless lending, and these had been referred to the Tribunal. It had been agreed between the NCR and Capfin that those loans would be written off, the credit listing of those lenders would be deleted and Capfin would pay the administrative fine of R2 million. …
>
> Ms Mantashe said she wanted the NCR to convince her that it was justifiable to let the people who had conducted irregular deductions on consumers, not to reimburse the people they had ripped off. The NCR took money into the coffers, but what about those poor people who had been ripped off? ...
>
> Mr Macpherson asked if the NCR was not compelled to criminally charge someone who purported to be someone they were not. For as long as people were allowed to get away with things such as reckless lending and fraud, they would continue to do so if the penalty was not harsh enough. The NCR needed to start being tougher with people that were ripping of ordinary South Africans. …
>
> Mr Obed Tongwane, Deputy CEO, NCR, expanded on the Capfin matter. He said that the NCR was very passionate about discharging its mandate, which was consumer protection.'[300]

[298] *Idem* at 11: 'The NCR has aligned its key performance areas with the strategic objectives and core themes of the dti.'

[299] See e.g. Portfolio Committee on Trade and Industry *Companies and Intellectual Property Commission (CIPC) & National Credit Regulator (NCR) on their Strategic & Annual Performance Plans* 14 April 2015.

[300] Portfolio Committee on Trade and Industry *National Regulator for Compulsory Specifications & National Credit Regulator on their 4th quarter 2015/16 performance* 31 August 2016.

The measures pertaining to ministerial authority over internal matters of the Regulator, specifically removal from office, correlate largely with the discussion of institutional configuration under independence above. As such, I will only refer to the aspects set out in chapter four that relate to this theme and briefly summarise the earlier discussion. The matter will be discussed further in the observations and recommendations section as well as the part on comparative challenges pertaining to independence and accountability later on in this chapter.

A definite concern in this regard is the consistency of the Regulator's strategy – in order to meet its targets within the financial constraints applicable, the determination of the Regulator's targets will have to be conservatively done.[301] The reformation period in respect of consumer credit regulatory authorities is also notably short. The Micro Finance Regulatory Council was recognised as such in 1999[302] and in 2004, the Department of Trade and Industry published the policy structure for consumer credit containing the foundation for the National Credit Regulator and the dissolution of the Council.[303] The Regulator was founded in 2006[304] and the Council's regulatory period ended after seven years. Likewise, the National Treasury published its primary policy framework for the 'twin-peaks' structure in 2011,[305] which presents a new regulatory regime that could potentially affect a Regulator that had been active for only five years at that time.

The Minister has a peremptory supervisory duty in terms of section 36(1) to examine the performance of the Regulator in respect of the implementation of its authority and execution of its tasks. This examination must culminate in a report.[306] However, the minimum time-frame to which the Minister must submit himself is one assessment every five years.[307] This does not mean that the Minister is not kept abreast of the activities of the Regulator in the interim. As I indicated above, the Regulator is obliged to provide the Minister with a report

[301] In some instances, the outcomes set for the NCR have been questioned – in *National Credit Regulator on its 2016 Annual Performance Plan* before the NCOP Trade and International Relations on 06 April 2016, the NCR was questioned as to whether the 'targets set were too high' and the representative noted 'that the Portfolio Committee on Trade and Industry felt that the NCR's targets were too low. There was a serious balancing act for the NCR when it came to targets. There was only so much budget and capacity. It was also expensive to prosecute cases. The NCR at times also had to employ audit firms. The NCR believed its targets to be reasonable and would review them when necessary.'

[302] See par 2.2 *supra*.

[303] DTI *Consumer Credit Law Review* (n 149) par 7.3-7.7.

[304] See *Commencement of the National Credit Act 34 of 2005* Proclamation 22 in GG 28824 of 11 May 2006.

[305] See National Treasury *A Safer Financial Sector to Serve South Africa Better: National Treasury Policy Document* 23 February 2011; Financial Reform Steering Committee *Implementing a twin peaks model of financial regulation in South Africa Published for public comment* 1 February 2013 2.

[306] S 36(3) of the NCA.

[307] S 36(1) of the NCA – the Minister is specifically tasked to 'conduct an audit review' concerning 'the exercise of the functions and powers of the National Credit Regulator'.

on its activities on an annual basis and within the context of the Public Finance Management Act.[308] Both the section 36(1) and (2) reports must be made available to all the provincial Premiers and to Parliament.[309]

4.2.6. The legislative branch

The National Credit Act provides for the following reports to the Minister of Trade and Industry:

> '(1) At least once every five years, the Minister must conduct an audit review of the exercise of the functions and powers of the National Credit Regulator, and the Tribunal. (2) In addition to any other reporting requirement set out in this Act, the National Credit Regulator and the Tribunal must each report to the Minister annually on its activities, as required by the Public Finance Management Act, 1999 (Act 1 of 1999).'[310]

These reports must be sent to every provincial Premier and tabled in Parliament.[311] The Rules of the National Assembly defines 'tabling' as 'the official presentation of the document or paper in the House, or, if not presented in the House, the publication in the ATC of the document or paper after it has been officially submitted to the Speaker'.[312] In terms of the Rules of the National Assembly and the Rules of the National Council of Provinces respectively, the Speaker and Chairperson of the respective institutions also have to forward the report to one or more committees that he or she decides has the relevant interest in the document.[313] As the legislation only refers to Parliament, I assume that both Houses are privy to receipt of the reports tabled,[314] although the National Council of Provinces' Rules do not define the concept of tabling, nor do the Rules have the equivalent directive to the Chairperson of the National Council of Provinces to table the report in the Council.[315] This

[308] S 36(2) of the NCA.
[309] S 36(3) of the NCA.
[310] S 36(1) & (2) of the NCA
[311] S 36(3)(a) & (b) of the NCA.
[312] Part 1 of the Parliament of the Republic of South Africa *Rules of the National Assembly* (9th ed) 26 May 2016. 'ATC' is defined in this part as 'the document entitled Announcements, Tablings and Committee Reports, which supplements the Minutes of Proceedings of the National Assembly'.
[313] Rule 338(1)(a) & (3) of Parliament of the Republic of South Africa *Rules of the National Assembly* (n 312); Rule 101(1)(b) & (3) of the Parliament of the Republic of South Africa NCOP National Council of Provinces *Rules of the National Council of Provinces* (9^{th} ed) March 2008.
[314] See par 2.1 *supra*.
[315] See Rule 337(1)(a) of the Parliament of the Republic of South Africa *Rules of the National Assembly* (n 312): 'The Speaker must table the following instruments without delay, or if the Assembly is in recess, on its first day when the Assembly resumes its sittings: (a) all reports and other written instruments submitted by a member of the national executive or in terms of legislation for tabling in the Assembly …'

may nevertheless be incorporated into a reading of Rule 101(1)(b).[316] However, the practical implication of the rule is that the matter is tabled in the respective Houses and it is brought to the specific attention of specialist committees with potential directives on dealing with the report.[317] The committee may be asked to report on the matter, although these committees may issue reports in any event – if not specifically requested but they wish to do so.[318]

I have already indicated that Parliament generally has the constitutional duty to hold the executive branch to account,[319] but there was also a line of accountability envisaged for the National Credit Regulator.[320] In terms of section 36(2) of the National Credit Act, the reports required in terms of the Public Finance Management Act must be forwarded to the provincial Premiers and tabled in Parliament. In addition, the reports on substantive issues referenced in Reports on matters referenced in sections 13(c) and 16(1)(g) must be presented to Parliament by the Minister.[321]

The Regulator appears before the Portfolio Committee for Trade and Industry and the National Council of Provinces Trade and International Relations Committee.[322] I have perused some of the meeting and other reports of these committees as part of the research conducted in order to undertake the discussion in this part. These two committees receive presentations on the Regulator's annual performance plans, strategic plans and annual reports, over and above ad hoc presentations pertaining to problem areas such as debt

[316] See Rule 101(1)(b) of the Parliament of the Republic of South Africa *Rules of the National Council of Provinces* (n 313), which refers to 'all reports and other written instruments tabled in the Council by the Chairperson of the Council or submitted for tabling in the Council by a member of the national or a provincial executive or in terms of legislation'.

[317] Rule 340(2) & (3) of Parliament of the Republic of South Africa *Rules of the National Assembly* (n 312); Rule 101(4) of Parliament of the Republic of South Africa *Rules of the National Council of Provinces* (n 313).

[318] Rule 340(2) & (3) of Parliament of the Republic of South Africa *Rules of the National Assembly* (n 312); Rule 101(4) of Parliament of the Republic of South Africa *Rules of the National Council of Provinces* (n 313).

[319] See par 2.1 *supra*.

[320] See par 3 *supra*.

[321] See s 18(2)(a) of the NCA. In terms of s 18(2)(b), if the 'report deals with a substantial matter relating to the purposes of this Act', it must also be referred to Parliament ('table[d] in Parliament'). S 16(1)(g) of the NCA relates to statutory issues ('legislation and public regulations') and 'matters relating to consumer credit' and s 13(c) of the NCA relates to reports generated in response to the monitoring function regarding the consumer credit landscape ('credit availability', 'price and market conditions', 'market conduct', ' levels of consumer indebtedness').

[322] See Doyle *The South African Parliamentary Committee System and Institutional Capacity* February 2016 M.Phil (Public Policy and Administration) Dissertation Department of Political Science Humanities Faculty University of Cape Town 25-26 for a discussion on the constitutional foundation for, and authority of, committees.

relief.[323] It is therefore of value to note that the reports submitted to the Department of Trade and Industry, or in respect of which the Department of Trade and Industry has some input, form the basis of the assessments by the Parliamentary committees. It is also valuable to see that there is reliance on the contents of these reports (such as the Auditor-General's report that is included in the Regulator's Annual Report) to inform the views, concerns and issues raised by the committee members.[324] Therefore, the committees do not undertake their own investigations but work from briefings on reports from other investigators or the Regulator itself. A perusal of meeting reports also shows that the interrogations are based on the information submitted, and aspects raised outside of the briefings are usually colloquial problems or observances by individual committee members.[325]

A number of aspects can be observed from the perusal. On the one side, the committees are supportive in nature and recognises proper performance,[326] recognises challenges that affect performance and indicate a willingness to assist where possible – such as in respect of legislative amendments that may be required or assistance with awareness campaigns.[327] The committees require specific answers on diverse matters – ranging from requests on clarity on the budget, controversial issues such as 'loan sharks', 'cyber sharks', how educational

[323] See e.g. Portfolio Committee on Trade and Industry *Over-Indebtedness: National Treasury & National Credit Regulator* 14 June 2017; Portfolio Committee on Trade and Industry *Public procurement and localisation & consumer credit regulation: dti briefing; Preferential Procurement Policy Framework: National Treasury briefing; National Credit Regulator on African Bank crisis, with Minister* 22 August 2014; Portfolio Committee on Trade and Industry *National Credit Regulator 3rd quarter performance & 2016 Annual Performance Plan; Remote Gambling Bill process* 15 March 2016.

[324] See Portfolio Committee on Trade and Industry *Budgetary Review and Recommendation Report of the Portfolio Committee on Trade and Industry* 18 October 2017 18 & 19.

[325] See e.g. Portfolio Committee on Trade and Industry *National Regulator for Compulsory Specifications & National Credit Regulator on their 4th quarter 2015/16 performance* 31 August 2016.

[326] Portfolio Committee on Trade and Industry *3rd Quarterly Reports for National Credit Regulator, National Lotteries Board & Companies and Intellectual Property Commission* 24 March 2015.

[327] See e.g. National Council of Provinces Trade and International Relations *National Credit Regulator on its 2013/14 Annual Report* 19 November 2014 ('In closing, he remarked that the Committee has a profound concern about the exploitation of those vulnerable to credit providers and micro lenders. The NCR should know that the Committee is prepared to disseminate any NCR educational material to their constituents via their constituency offices. The NCR should feel free to consult with the Committee and to share what they have so that the Committee can assess the usefulness of the information. Do not hold back in terms of communicating with the Committee. The Committee is committed to being activists and to ensure that the people that the MPs serve are able to benefit from the NCR's services. The Committee really appreciated the NCR presentation today.'); National Council of Provinces Trade and International Relations *National Credit Regulator on its Annual Report 2015/16* 8 March 2017 ('Mr Y Vawda (EFF, Mpumalanga) understood the limitations that the NCR faced and said that perhaps the National Council of Provinces (NCOP) could be of assistance. The NCR was asked what laws needed to be amended in order to make their regulating job much easier. He noted that the NCR needed to make proposals in this regard so that facilitation could take place.'); Portfolio Committee on Trade and Industry *National Credit Regulator 3rd quarter performance & 2016 Annual Performance Plan; Remote Gambling Bill process* 15 March 2016 ('The Chairperson thanked Ms Motshegare and her team from the National Credit Regulator. She reminded everyone that during an oversight visit Ms Motshegare had said that there was so much to be done and so many issues to iron out and that the Committee needed to work more closely with the NCR on these.')

campaigns are evaluated, to an indication of who is classed as 'poor'.[328] Criticism on the performance of the Regulator often include suggestions for improvement – such as ideas to increase awareness or specific problems that have come to the committee member's attention.[329] On the other side, there seems to be a lack of basic knowledge on the features and mandate of the Regulator and of the National Credit Act, a lack of cognitive comprehension – as opposed to say-so recognition – regarding limited resources and a lack of proper preparation on the side of the legislature when interrogating the Regulator.[330] The following extracts serve as examples:[331]

> 'He was concerned about the repossession of assets, especially cars and houses. In some cases people's houses were repossessed and they ended up having to sleep in their cars, until eventually those too were repossessed. He asked if the NCR came across such cases. The banks repossessed those houses and cars and sold them for a profit while the owner still had to continue paying off those debts.' [332]

> 'He asked if the tendency of credit lenders of taking bank cards, SASSA cards or IDs of clients is legal. If it is not legal, he asked what the NCR did when it came across this practice.'[333]

> 'He proposed that the Committee write to the NCT and ask them to come and brief the Committee on what progress they were making on such cases and on the criminal prosecution of such people.' [334]

> 'He wished to point out that big retailers had mark-ups of at least 40% on their products. This was besides the profit that they made on the financing of the product. It was the poorest of the poor that frequented these retailers as they had 24 months within which to pay off the purchase. The poor

[328] See e.g. National Council of Provinces Trade and International Relations *National Credit Regulator on its 2013/14 Annual Report* 19 November 2014; National Council of Provinces Trade and International Relations *National Credit Regulator on its Annual Report 2015/16* 8 March 2017; Portfolio Committee on Trade and Industry *Debt Relief Committee Bill; National Consumer Commission; National Credit Regulator Annual Report; SABS & NRCS follow-up* 3 October 2017.

[329] See e.g. National Council of Provinces Trade and International Relations *National Credit Regulator on its Annual Report 2015/16* 8 March 2017.

[330] *Ibid*. This is problematic when considering Hüpkes *et al The Accountability of Financial Sector Supervisors: Principles and Practice* (IMF Working Paper WP/05/51) 2005 20 – that Parliament is ideally suited to require answers in respect of adherence and performance in terms of the regulatory mandate.

[331] It is noteworthy that this was also one of the aspects raised by a chairperson during Monique Doyle's interviews for purposes of her dissertation – see Doyle (n 322) 78. As she reported the specifics of interviews in an anonymous manner, one cannot pinpoint the committee that this specific comment related to. The specific subcategories that can be identified from her discussion are the following: 'lack [of] content knowledge', lack of sector-specific 'experience or … educational background' and 'lack of continuity of committee membership' (see Doyle (n 322) 78-79). See also Doyle (n 322) 78, where the author acknowledges the party-political dimension of committee membership allocation: 'It is not known what determinants parties use to make these allocations and if they take into account members' knowledge and experience of particular sectors. Being unable to determine this, it could imply that sector knowledge is not sufficiently taken into account.'

[332] Portfolio Committee on Trade and Industry *National Credit Regulator 3rd quarter performance & 2016 Annual Performance Plan; Remote Gambling Bill process* 15 March 2016.

[333] *Ibid*.

[334] *Ibid*.

> were being taken to the cleaners by these types of retail stores. It was all good and well that the NCR regulated the credit part but the profit part remained unregulated.'[335]

> 'He also asked why SASSA payouts had been moved from the use of banks to the use of retail stores. He was concerned about citizens of Lesotho claiming South African social grants.'[336]

There is a clear political agenda, which creates the impression that the evaluation of the Regulator is based on the Regulator's actions for the priorities of the political sphere: [337]

> 'He remarked that Members are worried about the exploitation of the most vulnerable in society. We know that you cannot inform us about your intended raids, however if you could alert us the morning of a possible raid so we can communicate with the provincial legislatures to encourage them to be there to witness the work of the NCR.'[338]

> 'He referred to what Mr Hill-Lewis had said in the Committee's last meeting that the Committee needed a big case, a big example, to show that the NCR is following through with action in terms of the NCAA.'[339]

> 'Loan sharks are bad and as politicians, members often run into problems when constituents do not have identification cards for voting because the loan sharks have taken them and not returned them due to unpaid loans.'[340]

[335] National Council of Provinces Trade and International Relations *National Credit Regulator on its Annual Report 2015/16* 8 March 2017.

[336] *Ibid.* See also National Council of Provinces Trade and International Relations *National Credit Regulator on its Annual Report 2013/14* 19 November 2014: 'She asked about how the illegal deductions taken from SASSA grant cards works because the law says that third parties cannot deduct anything off of the SASSA card, but then cell phone airtime and funeral burial policies go onto the SASSA card. She does not believe that this is legally correct because the SASSA card was implemented for people to get free access to their grants. The Minister also promised special negotiations with the banks for reduced bank charges so that people could hold their own regional bank cards rather than taking a SASSA card. She proposed that a proper assessment is done on SASSA because it is not going well and there is the possibility of a court case regarding SASSA.'

[337] National Council of Provinces Trade and International Relations *National Credit Regulator on its Annual Report 2015/16* 8 March 2017: 'The Chairperson said that the difference between the Portfolio Committee of Trade and Industry and the Committee was that the Committee had their provinces interests at heart. The NCR was asked to provide the Committee with a breakdown of its interventions as per province with detail on the actual places where interventions took place. He asked the NCR to provide the information within seven days to the Committee.' Individual members of the Council of Provinces Committee express their disappointed when the province that they represent is not visited and will ask when the province will be visited – the problem in this regard is that the presentation on the report is done in the next financial year and at that time, some aspects would have been addressed – 'Mr B Nthebe (ANC, North West) noted that the NCR in its previous meeting with the Committee had committed to giving the Committee provincial dynamics. He asked that the NCR provide such provincial dynamics in its next meeting with the Committee. He wished to know what had been done in the provinces' (see National Council of Provinces Trade and International Relations *National Credit Regulator on its 2016 Annual Performance Plan* 6 April 2016).

[338] National Council of Provinces Trade and International Relations *National Credit Regulator on its 2015/16 Annual Performance & Strategic Plans* 10 June 2015.

[339] Portfolio Committee on Trade and Industry National Credit Regulator 3rd quarter performance & 2016 Annual Performance Plan; Remote Gambling Bill process 15 March 2016.

[340] National Council of Provinces Trade and International Relations *National Credit Regulator on its 2013/14 Annual Report* 19 November 2014.

The Portfolio Committee's meeting reports are reminiscent of a pro-poor, pro-consumer approach. As such, the meetings sometimes include the expression of solution-seeking comments that are often not on matters that fall within the ambit of the Regulator's authority or ability – a specific example on bank risk will necessarily have a prudential aspect to consider.[341] There seems to be different portfolio interests that become apparent during the meetings, which raises the issue as to whether reporting on performance or answering questions on pressing issues and policy aspects of political significance is the primary objective of these meetings. Issues that have a bearing on improper performance are not addressed in a systematic, comparable and verifiable manner that accounts for, and interrogates, the decision-making and resource-constraints of the Regulator – it is an all or nothing approach.[342] It is questionable whether a risk-based approach adopted by the Regulator, particularly to deal with inadequate resourcing effectively, will be received favourably.

However, without proper information on the internal processes, resources, decision-making protocols and whether these are effective and suited to the requirements of the credit market, the sole evaluation of the outcomes against set targets and standalone market realities as raised by committee members are but one part of the larger scheme of regulatory performance, which is not properly contextualised at this stage. The initial question raised by Colin Scott becomes relevant again:

> 'The core question, and one of intense interest to market and governmental actors, is how do we know whether regulators are doing a good job or not?'[343]

[341] See Portfolio Committee on Trade and Industry *3rd Quarterly Reports for National Credit Regulator, National Lotteries Board & Companies and Intellectual Property Commission* 24 March 2015: 'Mr N Koornhof (ANC) said it was mentioned at the last visit to the NCR that when a bank repossessed a car or a house, the outstanding debt was still pursued. He asked if the NCR did any investigations to see if the banks could take more of the risk…. Mr Obed Tongwane, Chief Operating Officer, NCR, replied that the investigations into the shortfalls after bank repossession had been mandated and was approximately 60% concluded.'

[342] See e.g. Portfolio Committee on Trade and Industry *3rd Quarterly Reports for National Credit Regulator, National Lotteries Board & Companies and Intellectual Property Commission* 24 March 2015 ('Mr Hill-Lewis said in terms of African Bank, just because a loan was on the "good book", i.e. performing well, it did not mean it was not also reckless and it was not good enough to simply separate good and bad loans. It was important that all the loans be investigated to identify every single reckless loan.'); Portfolio Committee on Trade and Industry *Companies and Intellectual Property Commission (CIPC) & National Credit Regulator (NCR) on their Strategic & Annual Performance Plans* 14 April 2015 ('Mr Macpherson suggested that no more deals should be made with reckless lenders like the African Bank scenario that took place.').

[343] Scott 'Evaluating the performance and accountability of regulators' 2014 *Seattle University Law Review* 353 362. In addition, the value for the NCR is also diminished – see Bovens (n 1) 464: 'Accountability is a crucial link in this approach as it offers a regular mechanism to confront administrators with information about their own functioning and forces them to reflect on the successes and failures of their past policy.'

It is not clear whether substantive issues raised are indeed incorporated into future conduct plans for three practical reasons.[344] Firstly, the issues raised are rarely news to the Regulator[345] and it seems as if the committee members rely mainly on summarised documents as opposed to the whole report.[346] Secondly, reporting on quarterly and annual performance is done in line with existing three-year performance plans and five-year strategic plans that would necessitate change to whole performance and strategic approaches. Thirdly, there is no requirement that issues raised should be incorporated into the annual report or, unless specifically requested, addressed and reported on to the committee again. Where specific requests are made, a plan on feedback or dealing with the information is not provided.[347]

Another contentious point is the matter of conflicting feedback from committees which may arise from different vested interests – on one occasion, a member of the National Council of Provinces Trade and International Relations expressed concern on goals that were possibly 'too high', whereas a member of the Portfolio Committee on Trade and Industry expressed the opinion that the aims were inappropriately low.[348]

The above problems resonate with the findings of a study conducted by Monique Doyle on parliamentary committees generally.[349] She found that the indiscriminate allocation of resources to parliamentary committees, unaligned with the workload or intricacies of the

[344] I did come across one instance where the NCR addressed a proposed change to report on investigative and enforcement activities separately – see National Council of Provinces Trade and International Relations *National Credit Regulator on its Annual Report 2015/16* 8 March 2017 and compare NCR *Annual Report* 2015/2016 e.g. 47 & 48 with NCR *Annual Report* 2016/2017 e.g. 46 & 48.

[345] See e.g. Portfolio Committee on Trade and Industry *Companies and Intellectual Property Commission (CIPC) & National Credit Regulator (NCR) on their Strategic & Annual Performance Plans* 14 April 2015.

[346] See e.g. National Council of Provinces Trade and International Relations *National Credit Regulator on its Annual Report 2015/16* 08 March 2017.

[347] See e.g. Portfolio Committee on Trade and Industry *Debt Relief Committee Bill; National Consumer Commission; National Credit Regulator Annual Report; SABS & NRCS follow-up* 3 October 2017.

[348] National Council of Provinces Trade and International Relations *National Credit Regulator on its 2016 Annual Performance Plan* 6 April 2016; Portfolio Committee on Trade and Industry *National Credit Regulator 3rd quarter performance & 2016 Annual Performance Plan; Remote Gambling Bill process* 15 March 2016. See also Portfolio Committee on Trade and Industry *National Regulator for Compulsory Specifications & National Credit Regulator on their 4th quarter 2015/16 performance* 31 August 2016.

[349] Doyle (n 322).

committee, caused capacity constraints that impede the performance of the committee.[350] She also noted that the limited interaction between the supervised entity and the committee can be a constraining factor due to the lack of involvement from the initial planning process to the realisation of goals – ultimately 'an effective government department is very much a reflection on the quality of committee oversight should the common objective of service delivery and quality of government be kept in mind'.[351] Doyle adds to a point that was illustrated earlier within the context of the National Credit Act:

> 'One of the points elucidated in this study [Doyle study] was that the function of oversight was an on-going, continuous and cyclical exercise that had no real definitive limit or *by simply engaging one or a few documents could it be said the exercise was complete*. Much of the literature echoed this and thus highlighted the need for committee capacity to be able to *systematically track department and entity performance and progress constantly*.'[352]

Doyle's study was limited to the National Assembly, but it is of value to note that the National Council of Provinces' Rules make provision for the office of the House Chairperson Oversight and Institutional Support.[353] Rule 14B(1)(d) enables this officer to 'monitor compliance by the executive with respect to recommendations set out in reports of Select Committees through the Office of the Chairperson of the National Council of Provinces'.

There seems to be a disparate proportioning of resources between the executive and legislature – the executive has the necessary structures and resources in place to ensure that

[350] *Idem* at 50-51 & 54-55. See also Doyle (n 322) 25: 'Institutional capacity is the foundation of the legislature and its committees so then it could be argued that where this capacity is lacking, the adequate execution of the institution's mandated functions is compromised.' See also Doyle (n 322) 32: 'This complements the firm assumption that while legislatures are grounded in formal statutes, rules and constitutional frameworks (where the symbolic power comes from), it is in fact the executive that enjoys access to a far wider range of resources and budget and this is where the authentic power lies in the relationship.' See also Doyle (n 322) 55 & 56: 'If this point could be made for the budget then this study argues it could be made for the staff complement as well. It has already been stated that one of the committees in the sample, trade and industry, has two committee secretaries because of a high workload, while the other committees only have one. In the sample, all the committees only have one researcher and one content adviser except for the police committee who have two researchers because of increased workload due to the large size of the department it oversees. Surely for those committees which have an increased workload, more entities to oversee and bigger departments to hold accountable, this complement of staff should be increased or at least for it to be considered on an individual committee basis as opposed to uniformly. As one content adviser outlined, the uniform approach in terms of committee research support and budget allocations, might not be the best option. The suggestion is that these allocations should be made based on the strategic plans of each committee which would provide an indication of what the committee aims to achieve and work through for the five-year term….The committee on trade and industry, however, held a whopping 74 meetings for the year under review. It could strongly be argued that such considerations should account for how resources are allocated to committees but this dissertation has come to show this is not the case.'

[351] Doyle (n 322) 87-88.

[352] *Idem* at 87. Own emphasis.

[353] Rule 9(1) of the Parliament of the Republic of South Africa *Rules of the National Council of Provinces* (n 313).

the needed time-input and substantive quality output is achieved.[354] The same cannot be said for the parliamentary committees.[355] Two aspects are quite important in this regard – firstly, committees rely heavily upon the information submitted by the executive being overseen[356] and secondly, lack the necessary ability to obtain independent input.[357] Some committees do not have strong ties with independent organisations that can provide specialist input in matters before the committee.[358] There were also challenges posed by matters that had 'cross-cutting' elements and which required input from multiple committees in order to be examined proficiently.[359]

An observable manifestation of miscommunication in linear accountability in South Africa is the matter that related to the diminishment of the R300 million fine that the National Credit Regulator proposed for African Bank's non-compliance with the National Credit Act.[360] The fine was altered into a R20 million settlement,[361] a change that was initially not challenged, but later not received well by the oversight committee.[362] The committee reviews the activities of the National Credit Regulator as part of their responsibilities to oversee the Department of Trade and Industry and took the stance, when interacting with the Regulator,

[354] Doyle (n 322) 56-58.

[355] *Ibid*.

[356] See Doyle (n 322) 58: 'The same chairperson also highlighted a pertinent point where, because of this glaring resource capacity inequality between the legislature and executive, committees often have no choice but to simply rely on the information provided to them by entities or the department because there is no time or human resource capacity for the committee to 'look beyond what the department presented or provided'.'

[357] Doyle (n 322) 58-59. The overall misalignment impacts meaningful oversight – see Doyle (n 322) 57: 'One chairperson pinpointed this imbalance of resources, and effectively power, between the legislative and executive branches to the executive having access to more resources. This asymmetry of resources between the executive and the legislature applies to all areas of structural resources. It could then be argued that the legislature has the theoretical power of oversight and accountability, embodied through the Constitution and Rules of Parliament, yet in terms of structural capacity to physically wield this power, the legislature falls short in comparison.'

[358] Doyle (n 322) 49-50 & 59. See also Doyle (n 322) 49: 'The report goes on further to say the committee found the interactions useful because it allowed for a 'broad spectrum of commentators' which also served to supplement internal committee research. The police committee also made special mention of the fact that in the method of work of the committee, it involved many partners in civil society and academics to present evidence in preparation for engaging with the department and/or entities usually before hearings on the annual reports and budget.'

[359] Doyle (n 322) 60.

[360] See Ziady 'How African Bank's R300m fine became a R20m settlement' Moneyweb 7 June 2016; Ensor 'Rob Davies denies intervening to have African Bank's fine reduced' Business Live 6 March 2018; Ensor 'Reserve Bank and Treasury pushed for smaller African Bank fine' Business Live 26 February 2018.

[361] *Ibid*.

[362] See Portfolio Committee on Trade and Industry *Companies and Intellectual Property Commission (CIPC) & National Credit Regulator (NCR) on their Strategic & Annual Performance Plans* 14 April 2015. See also the response to the Capfin fine – Portfolio Committee on Trade and Industry *National Regulator for Compulsory Specifications & National Credit Regulator on their 4th quarter 2015/16 performance* 31 August 2016.

that financial punitive measures should not be reduced.[363] Of specific interest are the claims in the media that the Minister of Trade and Industry, the South African Reserve Bank and the National Treasury played a role in the acceptance of the settlement that effectively constituted 6.6% of the original fine,[364] although nothing to this extent was raised during the earlier committee meetings when the Regulator was questioned about African Bank.[365] If the Minister of Trade and Industry's recent contention that he was not involved is true,[366] the question is why he was not subjected to questioning on his actions after the fact.

The question is whether there is anything significant about this. I am of the opinion that, in this particular case, the executive answerability regime presents as a robust control and account mechanism, whereas the committee structure presents as a weaker mechanism when it comes to the National Credit Regulator. The Department of Trade and Industry may very well have the necessary resources and in-depth insights to oversee the Regulator, but not the legislature.[367] The subsequent question is therefore whether the answerability role of the legislature is clearly differentiated from that of the executive, and if it should be. I could not find determinants that distinguished the oversight role of parliamentary committees in respect of different entities.

I found that the reports by the Portfolio Committee on Trade and Industry and the Select Committee on International Trade and Relations have a different approach when compared to that of the Department of Trade and Industry. As an example of a specific comparison, I refer to scenarios where the Department is evaluated for purposes of a Budget Review and Recommendation Report, and when its performance is evaluated in a more direct fashion. In both instances, the targets set and achieved are interrogated, but when the senior officers of the Regulator appears in person before the committee, the questions often surround matters of policy (such as poverty and exploitation) or political/provincial interests.[368] As such, the committee often addresses the 'what should be dealt with' question as opposed to a mere

[363] Portfolio Committee on Trade and Industry *National Credit Regulator & National Gambling Board: 4th quarter 2014 performance* 7 August 2015.

[364] Ensor 'Reserve Bank and Treasury pushed for smaller African Bank fine' (n 360).

[365] See e.g. Portfolio Committee on Trade and Industry *Companies and Intellectual Property Commission (CIPC) & National Credit Regulator (NCR) on their Strategic & Annual Performance Plans* 14 April 2015; Portfolio Committee on Trade and Industry *National Credit Regulator & National Gambling Board: 4th quarter 2014 performance* 7 August 2015; Portfolio Committee on Trade and Industry *National Credit Regulator 3rd quarter performance & 2016 Annual Performance Plan; Remote Gambling Bill process* 15 March 2016.

[366] Ensor 'Rob Davies denies intervening to have African Bank's fine reduced' (n 360).

[367] See Doyle (n 322) 56-57.

[368] See e.g. National Council of Provinces Trade and International Relations *National Credit Regulator on its Annual Report 2015/16* 8 March 2017; Portfolio Committee on Trade and Industry *National Consumer Commission; National Regulator for Compulsory Specifications & National Credit Regulator on their 2014/15 Annual Reports; NCR 1st Quarter 2015/6 performance* 12 October 2015.

marking of targets set and achieved.[369] However, the interrogations are often *ad hoc* and although the committee stated in its 2014 performance report that it followed trends of institutions, it is difficult to find a pattern in the reports and manner of interrogation. There is also no reference to the prior substantive outcomes of committee meetings in the Regulator's reports (such as in the annual report, where reference to issues raised in the previous year could be made, the validity thereof and steps taken to address valid matters dealt with). Parliamentary committees deal with documents that are already drafted and approved, and in the absence of a system that requires a visible consideration of past interrogations when contemplating future conduct, this particular mechanism is quite weak and reactive.

If the Department of Trade and Industry is responsible to ensure that the National Credit Regulator meets its set targets, and honouring of this responsibility is overseen by the parliamentary committees as part of its general and ordinary oversight duties over the executive,[370] then the direct interaction between the committee members and the National Credit Regulator should not be a reiteration of this. In this regard, the Auditor-General's review of the truthfulness of the non-performance data assists to some extent to address the challenge of department- or entity-exclusivity when it comes to providing information.[371]

The legislature's direct oversight should add a layer: on whether the targets set and outcomes achieve indeed speak to the legislated mandate of the Regulator and the regulatory needs that it was created to meet. In this regard, the following can be deemed a point of departure, although the recommendation of legislating does not adequately grasp the duality of the South African Parliament's equally important duties to legislate and oversee:

> 'Since the principles of regulatory regimes are normally promulgated by parliament, the latter should be a primary actor charged with holding the financial supervisor accountable for meeting the stated objectives in its mandate. To ensure that these objectives are met, there should be regular institutionalized contacts between the RSA [regulatory and supervisory agency] and parliament. Nonetheless, the latter should not exercise immediate powers over the agency or interfere directly in its supervisory activities by issuing concrete guidance. Instead, parliament's influence on the

[369] See e.g. Portfolio Committee on Trade and Industry *National Credit Regulator & National Gambling Board: 4th quarter 2014 performance* 7 August 2015 where the members required continued performance after outcomes set had been achieved.

[370] See e.g. the Budget Review and Recommendation Reports, specifically Portfolio Committee on Trade and Industry *Budgetary Review and Recommendation Report of the Portfolio Committee on Trade and Industry* 24 October 2014 paras 1 & 5.2; Portfolio Committee on Trade and Industry *Budgetary Review and Recommendation Report of the Portfolio Committee on Trade and Industry* 18 October 2017 paras 1 & 6.

[371] See Doyle (n 322) 58.

> supervisory activities ought to be exerted primarily through its law-making powers, i.e., by making changes to the legal framework when needed.'[372]

This would also assist to protect the independence of the Regulator against undue interference by the executive when setting targets or evaluating performance.

4.3. The Financial Sector Conduct Authority

4.3.1. The Public Finance Management Act (Act 1 of 1999)

Section 56(2) of the Financial Sector Regulation Act determines:

> 'The Authority is a national public entity for the purposes of the Public Finance Management Act, and despite section 49(2) of the Public Finance Management Act, the Commissioner is the accounting authority of the Financial Sector Conduct Authority for the purposes of the Act.'

The positions of the National Credit Regulator and the Financial Sector Conduct Authority are similar under the Public Finance Management Act and I shall therefore not repeat what was discussed earlier. The same applies to the National Treasury *Annual Report Guide for Schedule 3A and 3C Public Entities*. I doubt whether the Financial Sector Conduct Authority will be viewed as anything other than a Schedule 3A national public entity when considering the classes and latest designation of entities by the National Treasury.[373] It is not a 'Constitutional Entit[y]' for purposes of schedule 1, and not described as a 'Major Public Entit[y]', a 'National Government Business Enterprise …', a 'Provincial Public Entit[y]' or a 'Provincial Government Business Enterprise …' for purposes of schedules 2, 3B, 3C and 3D.[374] Although I refrained from referring to the Financial Services Board, the predecessor of the Financial Sector Conduct Authority for the purposes stated in chapter one of this thesis, it can be noted that the Board is listed as a schedule 3A entity.[375]

There are other specific references to the Public Finance Management Act in the Financial Sector Regulation Act. Sections 69 and 72(4) make certain additional provisions relating to conduct standards of the latter Act applicable to bodies constituted by virtue of section 51(1)(a)(ii) of the Public Finance Management Act for the Financial Sector Conduct Authority. Where section 51(1)(a)(ii) determines that an audit committee must be constituted and given the responsibilities relating to internal audit matters, the sections of the Regulation Act prescribe the expectations on members of the committee to effect 'disclosure of

[372] Quintyn *et al* (n 6) 12.
[373] National Treasury *Public institutions listed in PFMA* (n 146).
[374] *Idem* at 1, 2, 6, 7 & 9.
[375] *Idem* at 2-3.

interests'[376] and to act with integrity. In respect of the requirement of integrity, section 69 determines that these persons:

> '(1) … must—
>
> (a) act honestly in all matters relating to the Financial Sector Conduct Authority; and
>
> (b) perform the functions of office as a member—
>
> (i) in good faith;
>
> (ii) for a proper purpose; and
>
> (iii) with the degree of care and diligence that a reasonable person in that person's position would exercise.
>
> (2) … must not use the position, or any information obtained because of the position, to—
>
> (a) improperly benefit himself or herself or another person;
>
> (b) impede the Financial Sector Conduct Authority's ability to perform its functions; or
>
> (c) cause improper detriment to another person.
>
> (3) For the purposes of this section, **"benefit"** and **"detriment"** are not limited to financial benefit or detriment.'

4.3.2. The executive branch

The Minister of Finance is responsible for selecting and appointing the governing faction of the Financial Sector Conduct Authority.[377] The Financial Sector Regulation Act provides for the mutual development of performance parameters against which the Commissioner and Deputy Commissioners will respectively be evaluated.[378] The parties also need to decide what would constitute proper performance as per the parameters.[379]

A noteworthy difference between the Financial Sector Conduct Authority and the National Credit Regulator is the autonomy that the Executive Committee has in respect of designing and modifying its regulatory strategy in terms of section 70(1) and 70(3). The Financial Sector Regulation Act provides that the Minister of Finance, Prudential Authority and National Credit Regulator may provide input on the draft version of the regulatory strategy or amendment thereof, which input must be taken into account by the Conduct Authority.[380]

However, there is no provision that determines that the executive has to consent to or approve the strategy. The National Credit Act does not require consent to the strategic objectives of

[376] S 72(4) of the FSRA determines: 'A member of a subcommittee of the Financial Sector Conduct Authority established as contemplated in section 51(1)(a)(ii) of the Public Finance Management Act or section 68(1) of this Act must disclose, at a meeting of the subcommittee, or in writing to each of the other members of that subcommittee, any interest in a matter that is being or is intended to be considered by that subcommittee, being an interest that—(a) the member has; or (b) a person who is a related party to the person has.'

[377] S 61(1) & (2) of the FSRA.

[378] S 61(7)(a) of the FSRA.

[379] S 61(7)(b) of the FSRA.

[380] S 70(4) & 70(5) of the FSRA. See also s 60(30(b)(iii) of the FSRA.

the National Credit Regulator, but is seems as if changes to outcomes are approved by the Minister of Trade and Industry.[381] Instead of a basic outcome answerability regime where the Regulator is held responsible for the path chosen and outcomes achieved or not (such as in the case of the Conduct Authority), the process in the Ministry of Trade and Industry is of such a nature that the Minister takes on some responsibility, and thus accountability, for issues that actually fall within the domain of an autonomous regulator. The anticipatory control[382] exercised by the Minister will necessitate that he will have to justify his approval of the change to *inter alia* Parliament, especially where it was not the correct decision.[383]

A testament to the collaborative agenda of the Financial Sector Regulation Act is the Financial Sector Inter-Ministerial Council.[384] This is a high-level design at the political level[385] with communication, understanding and unity in mind.[386] However, it is a measure accessed at the leisure of the Minister of Finance or a member of the Council as the legislation does not specify how often the Council needs to convene.[387] It is to be expected that the Ministers would have to report as to their activities in this regard to the respective Parliamentary committees responsible for oversight over the respective departments. At this stage, one begins to consider whether a Standing Committee on Financial Regulation might not be appropriate.

4.3.3. The legislative branch

Apart from the general reporting duties that are encompassed by ordinary parliamentary scrutiny as discussed in the context of the National Credit Regulator, the Financial Sector Conduct Authority requires that Parliament be known in a number of matters. I have already dealt with the Rules of the National Assembly and those of the National Council of Provinces insofar as tabling in Parliament by a Minister is concerned and I will not repeat the discussion on parliamentary procedure again. However, the Financial Sector Regulation Act has some specific protocols in place for legislative instruments. As such, it seems that the same dual oversight mechanisms in place for the National Credit Regulator also find application insofar

[381] See par 4.2.2 *supra*.
[382] See par 3.4.2 of ch 4 *supra*.
[383] See par 3.3 of ch 2 *supra*. See also Mwenda *Legal aspects of financial services regulation and the concept of a unified regulator* (2006) 26: 'In many countries, politicians define regulatory and supervisory goals in the same way that they set a country's targets for monetary policy, but it is the regulators, like the central bank as is customary in the case of monetary policy, that determine how to achieve these goals. Thus, where regulators fail, they should be held accountable, since they determine how to achieve regulatory goals.'
[384] See the Long Title & part 3 of ch 5 of the FSRA.
[385] See par 3.4.2 of ch 2 *supra*.
[386] S 83(2) of the FSRA.
[387] Ss 84(1) & (3) of the FSRA.

as the Financial Sector Conduct Authority is concerned, albeit in a slightly different manner. The parliamentary committees have oversight privileges by virtue of its constitutional executive oversight role and, in the particular case of the Conduct Authority, also direct insight into the actions of the Conduct Authority. There is some anticipatory oversight, as opposed to the reactive nature of the oversight mechanisms vis-à-vis the National Credit Regulator.

The protocol stipulated by the Act requires the involvement of Parliament where either the Financial Sector Conduct Authority or the Minister enacts rules or regulations. Chapter 7 of the Financial Sector Regulation Act deals with the development and enactment of regulatory instruments and requires that a regulatory instrument be forwarded to Parliament once comments on the draft version together with an explanatory memorandum and regulatory impact assessment have been taken into account.[388] Parliament must ordinarily be given a minimum time-frame of thirty days to consider the instrument and accompanying documents such as the memorandum, impact assessment and the report detailing comments and replies to comments received in the course of consulting on the proposed instrument.[389] The value of informing Parliament of regulatory instruments is found in section 102(1), which directs the authority intending to establish the instrument to consider the deliberations of Parliament. As such, Parliamentary involvement is not just a meaningless step, but requires that the input so provided is properly considered.

The Minister is also required by statute to provide Parliament with the opportunity to consider any regulations issued in terms of the Financial Sector Regulation Act.[390] Ordinarily, Parliament has to be given a minimum of thirty days in order to properly consider the draft version of the regulation and written explanations setting out why the regulation was drafted, how it is supposed to work, the effect that it is expected to have, and how, when and where commentary on the regulations will be received.[391]

Parliament should also be provided with a report that provides an overview of the concerns that came to the fore during the consultation process and sets out replies to these concerns.[392]

[388] S 98(1)(b) of the FSRA. See also s 100(1), which authorises deviation from the process set out in s 98 due to possible adverse consequences ‘Urgent regulatory instruments’, but where ss 100(1)(b) & 100(3)(a) still requires submission of the instrument and a later report, on comments received and replies thereto, to Parliament.

[389] S 103 of the FSRA. See also s 103(2), which deals with a reduced period where the matter is one of urgency as contemplated in s 100 and requires submission whether or not Parliament is in session – as opposed to a s 103(1) scenario where the submission is made whilst Parliament is in session.

[390] S 288 of the FSRA.

[391] S 288(4)(b)(i) of the FSRA.

[392] S 288(4)(b)(ii) of the FSRA.

Where there is a matter of urgency, the time for consideration by Parliament, together with the time provided for public input is lessened, and may further elapse concurrently.[393] However, the Minister has to explain not only the need for, and effect of, the regulation, but also motivate why the ordinary consultation process would probably have an adverse effect on consumers, the financial system or undermine the purpose of the intended regulation.[394]

In the last mentioned case, Parliament is still entitled to a post-regulation report setting out the concerns noted and the responses thereto.[395] Parliament's comments provided within the allocated reduced period must be considered.[396] Although the legislation does not prescribe the remedy for non-compliance, I am of the opinion that the basic principles of administrative law may apply here but due to the restrictive nature thereof, I do not think that Parliament has the authority to prevent the Regulator from issuing the intended rules and standards. I discuss this matter later in this chapter when I deal with the courts.

Over and above the provisions of the Financial Sector Conduct Authority, and the reporting requirements from the Authority where it issues the aforementioned regulatory instruments, the National Council of Provinces Rules' provides for its own internal protocols for reporting on matters referred to its committees. Rule 253, titled 'Advice, recommendation or approval of the Council or a committee of the Council to the executive', provides as follows:

> '(1) When the Chairperson of the Council receives a request for the advice, recommendation or approval, in terms of an Act of Parliament, of the Council or of a Council committee mentioned in the request on or of a matter so mentioned, the Chairperson must refer it to the relevant committee for consideration and report or to a committee established for the purpose of such consideration and report, as the circumstances may require.
>
> (2) The Secretary must supply to each member of the committee a copy of the request together with a notification of the referral.
>
> (3) The committee must adopt a report and submit it to the Chairperson for tabling.
>
> (4) In the case of a request for the advice, recommendation or approval of a committee, the Secretary must supply a copy of the report to the authority that made the request.'

It can be argued that the provisions in the Financial Sector Regulation Act that requires Parliament to consider the proposed rules of a financial sector regulator or the Minister, as the case may be, can be brought under the auspices of Rule 253, which would necessitate that the report of the committee be tabled in the Council and provided to the Regulator or Minister, as

[393] S 288(8) of the FSRA.
[394] S 288(7) of the FSRA.
[395] S 288(9) of the FSRA.
[396] S 288(11) of the FSRA.

the case may be. There does not seem to be a similar provision in the National Assembly, but Rule 116 of the National Assembly's Rules requires that any committee report to the Assembly on specific matters referred to it.[397] In the premises, the Rules of the Council and Assembly would necessitate that the input by Parliament as per the provisions of the Financial Sector Regulation Act would culminate in official reports.

Another directive is found in section 76(2), which forms part of the co-operation and collaboration initiatives of the Act. In terms of this section, the annual reports of the financial sector regulators, in this case the National Credit Regulator and the Financial Sector Conduct Authority, need to contain reference to the steps taken in order to meet the mandates set out in section 76. The section does not require a qualitative evaluation by the reporting authority:

> 'The financial sector regulators and the Reserve Bank must, at least annually as part of their annual reports, or on request, report to the Minister, the Cabinet member responsible for administering the National Credit Act and the National Assembly on measures taken to co-operate and collaborate with each other.'[398]

Nevertheless, section 86 enables the Inter-Ministerial Council to initiate an independent review of the steps taken by the regulators in order to meet the obligations set by section 76. The subsections determine the specific times when this assessment needs to be undertaken and distinguishes between a preliminary review of established measures and a bi-annual assessment that will contemplate the effectiveness of the measures.[399] The outcome must be tabled in Parliament together with the Council's own report of the substance matter of the assessment.[400]

[397] See Rule 116 of the Parliament of the Republic of South Africa *Rules of the National Assembly* (n 312): '(1) A committee must report to the Assembly on a matter referred to the committee — (a) when the Assembly is to decide the matter in terms of these rules, the Joint Rules, a resolution of the Assembly or legislation; (b) if the committee has taken a decision on the matter, whether or not the Assembly is to decide the matter as contemplated in Paragraph (a); or (c) if the committee is unable to decide a matter referred to it for report. (2) A committee must report to the Assembly on — (a) all other decisions taken by it, except those decisions concerning its internal business; and (b) its activities at least once per year. (3) A report of a committee — (a) must be formally adopted by the committee; (b) must be submitted to the Assembly by the chairperson or another member of the committee designated by the committee; and (c) may request that the chairperson or another member of the committee designated by the committee introduces or explains the report in the Assembly. (4) (a) A committee may not submit a minority report. (b) If a report is not a unanimous report, it must — (i) specify in which respects there was not consensus, and (ii) in addition to the views representative of the majority in the committee, express any views of a minority in the committee. (5) If a committee reports on a matter other than a matter mentioned in Subrule (1)(a) and is of the view that its report, or a specific matter mentioned in the report, should be considered by the Assembly, it may make a request to that effect in the report.'

[398] S 76(2) of the FSRA.

[399] S 86(1) of the FSRA.

[400] S 86(5) of the FSRA.

4.4. The Auditor-General

The Auditor-General is a constitutional institution[401] designed to evaluate and report on the financial records and financial administration of state funded departments and organisations. [402] It is an independent organisation specifically intended to promote democracy in the 1996 constitutional dispensation.[403] The Constitution further specifically provides that the findings of the Auditor-General should be provided to 'any legislature that has a direct interest in the audit'.[404]

The office assures the truthfulness of reports in respect of non-financial performance[405] and audits financial reports as indicated above. In respect of the National Credit Regulator, the report from the Auditor-General is incorporated into the annual report.[406] There are a couple of applications of the Auditor-General's work following a perusal of the Credit Regulator's 2016/2017 report.

The Auditor-General's ultimate report is directed at Parliament and not the executive or the regulator itself.[407] However, this does not mean that there is no interaction between the audited institution and office of the Auditor-General as the professional who audits the institution brings discrepancies to the attention of the audited institution with the request to rectify mistakes such as misstatements.[408] Although the misstatements are rectified, the mistakes are still incorporated into the report of the Auditor-General, but the Auditor-General can, as an example, indicate that

> 'the financial statements present fairly, in all material respects, the financial position of the National Credit Regulator as at 31 March 2017, its financial performance and cash flows for the year then ended in accordance with the South African Standards of Generally Recognised Accounting Practise (SA Standards of GRAP), the requirements of the Public Finance Management Act of South Africa, 1999 (Act No. 1 of 1999) (PFMA), the National Credit Act (Act No. 34 of 2005), and the National Credit Amendment Act (Act No. 19 of 2014).'[409]

[401] S 181(1) of the Constitution, 1996. See also Hoexter (n 35) 93-94.

[402] S 188 of the Constitution, 1996. See also the definition of 'audit' in Hornby *Oxford Advanced Learner's Dictionary of Current English* (2010) 82: '… 1 an official examination of business and financial records to see that they are true and correct … 2 an official examination of the quality or standard of [something] …'

[403] S 181(1) & (2) of the Constitution, 1996. See also the preamble of the Public Audit Act (Act 25 of 2004).

[404] S 181(3) of the Constitution, 1996.

[405] National Treasury *Annual Report Guide* (n 147) 13.

[406] See e.g. NCR *Annual Report* 2016/2017 79-82.

[407] NCR *Annual Report* 2016/2017 79.

[408] Public Accounts (SCOPA) *National and Provincial Departments 2015/16 audit outcomes: briefing by Auditor-General* 2 November 2016.

[409] NCR *Annual Report* 2016/2017 79.

This practice has been criticised by the parliamentary committee that oversees the Auditor-General and based on the need for answerability or consequences for non-compliant organisations.[410] Neither the Department of Trade and Industry, nor the Department of Finance was, as far as I could ascertain, one of the departments that triggered these responses and posed challenges to the authority of the Auditor-General, but these developments need to be considered.[411] There was a fear that the remedial approach of the Auditor-General reflected an advisory as opposed to an investigative role, and that this resulted in more favourable final outcomes that what would otherwise have been the case.[412] The Auditor-General's representatives responded that the 'primary owner' of the Annual Financial Statements resided in the accounting officer or the auditee.[413] Substantive inaccuracies are determined and only brought to the attention of the auditee, not automatically corrected or corrected via assistance rendered to the entity.[414]

These inaccuracies need to be corrected and the corrections noted – firstly, because it signifies poor performance for parliamentary oversight purposes insofar as past and future financial administration is concerned, and secondly, as it reflects truthfulness for reliance-related purposes where choices made are dependent, or cognitive of, the content of the

[410] Public Accounts (SCOPA) *National and Provincial Departments 2015/16 audit outcomes: briefing by Auditor-General* 2 November 2016.

[411] During this briefing (Public Accounts (SCOPA) *National and Provincial Departments 2015/16 audit outcomes: briefing by Auditor-General* 2 November 2016) the four adversities specifically experienced by the office of the Auditor-General were: '… Contestations and pushback on audit outcomes without substance – threatening legal actions or to not table reports [and] Slow response by accounting officers and senior management to our recommendations …'

[412] Public Accounts (SCOPA) *National and Provincial Departments 2015/16 audit outcomes: briefing by Auditor-General* 2 November 2016: 'Mr V Smith (ANC) shared some heartfelt comments about the need for a total and unrelenting onslaught on corruption persisting in government entities. The practices of the AG [Auditor-General] need to be re-looked at, because the AG identifies material misstatements, and then affords the department an opportunity to correct these and then give the particular department an unqualified audit opinion. He wondered whether the AG is not crossing over the thin line between consulting and auditing. The departments receive unqualified audit opinions because of the interventions of AG, this cannot be an acceptable practice… Lastly, the AG is a chapter nine institution and it has come to light that its recommendations are not taken seriously by some departments, which brings into question the real powers of the AG. Perhaps, there should be an open discussion on whether the AG's mandate should merely end at recommendation level. How far can the AG push the envelope – this practice of providing unqualified audit opinion amidst significant irregular and wasteful expenditure cannot continue, it is a major concern. … He [the Chairperson] agreed with Mr Smith that the accounting officer takes the entire year to compile the AFS [Annual Financial Statements] but the AG picks up significant mistakes in the AFS yet allows the department to correct them. How does that assist the Committee as it needs to see the material misstatements and scrutinise how they occur. If the AG assists departments in this way, they become complacent and it encourages them to continue making the same mistakes.' Another member stated the following during the same briefing: 'There should be a stricter move against corruption and tightening the consequences of accounting officers who contravene Public Finance Management Act.'

[413] Public Accounts (SCOPA) *National and Provincial Departments 2015/16 audit outcomes: briefing by Auditor-General* 2 November 2016.

[414] *Ibid*.

financial statements.[415] Under those circumstances where mistakes are left in the statements as is, the auditor signifies this with a qualified audit outlook and rationalising the qualification by exposing the reason therefore.[416] Three scenarios are presented here: inaccurate statements are of no use, corrected statements can be used as is, but ideally, the corrections should be disclosed in order to ensure transparency and enable meaningful oversight for future improvement.[417] As such, the office was adamant that its work was not 'managerial' in nature, but retained its autonomous auditing function.[418]

A further point of contention was the fact that findings were contested by audited institutions.[419] It seems as if the Auditor-General would entertain arbitration and court proceedings in respect of its audition functions,[420] but this does not mean that the office is empowered to take action against misdemeanours. It can, at most, refer matters to the relevant oversight bodies and insofar as the parliamentary committee members alluded to neglecting punitive measures where non-compliance was concerned, the following statement was made:

> 'Mr Wheeler responded to the Chairperson's assertion that the questions about taking steps against offenders had not been sufficiently answered. He explained that National Treasury regulations (Section 14) covered misconduct and that it was the accounting officer who must ensure that disciplinary hearings took place, as he or she bore primary responsibility for financial oversight.

[415] *Ibid*.
[416] *Ibid*.
[417] *Ibid*.
[418] *Ibid*.
[419] *Ibid*: 'Ms T Chiloane (ANC) asked what is being done about the resistance by some departments to comply with the AG, because these engagements should not result in lawsuits launched by a department against the AG - this could not be accepted. Usually, they do not comply and when the AG makes an unfavourable audit opinion against them, they threaten legal action.'
[420] Public Accounts (SCOPA) *National and Provincial Departments 2015/16 audit outcomes: briefing by Auditor-General* 2 November 2016: 'On legal threats and Home Affairs, it is not only this year that Home Affairs did not sign off on its AFS [Annual Financial Statements], it also refused to sign last year. There were four contracts that were contentious and were contested. The AG [Auditor-General] then subjected itself to the process of trying to resolve differences, even through an independent evaluation process. The AG has stretched itself with Home Affairs, it went right up to an independent arbitrator after which two issues were resolved (two in our favour, and two in their favour) but Home Affairs still went on to take the matter on appeal, which now brings in unnecessary legal costs. The AG is worried about this because it is starting to go beyond reasonable levels of contestation, and the effect of this is not only costly to Home Affairs but also to the AG who has to engage qualified senior counsel for representation. The outcome of all this, it is very simple, and the AG is starting to wonder about the intention behind it. This explains why Home Affairs has not yet tabled an annual report in parliament, because the annual report must include the audited AFS. In the absence of anylegislation, this will roll over to the following year; it is a mixed bag of things that is not our responsibility ultimately. Ours is to put things on the table and let people who must deal with the problems deal with them.'

> The AG could do no more than report clear cases of fraud and corruption to the MEC concerned. In his experience, however, 85% of problems were detected by internal controls.'[421]

There was also a concern that the internal workings and connections within a department could impede the Auditor-General's execution of its function.[422]

An aspect that is relevant to the answerability regime for a regulator is the matter of proficiency. The Auditor-General's mandate as it relates to the finances of an institution, is limited to determining whether there have been proper reporting and adherence to acceptable standards and legislative provisions.[423] Insofar as non-financial performance on targets and achievements is concerned, the work of the Auditor-General is limited to determining whether the reported achievements are valid variables that relate to the stated objectives and whether the data so reported is indeed true and correct.[424] My understanding is, for example, that in the context of the National Credit Regulator, a target of 15 workshops held for a given year should be countered with the number of workshops factually held, and the truth of the number of workshops held should be verified by the Auditor-General. As such, there can be reliance on the quantitative data reported. However, the office of the Auditor-General does not determine the qualitative value of the workshop[425] and, as such, bears tribute to the following sentiment expressed by a member of a parliamentary committee – albeit in a different context:

> 'It is all well and good to deal with financial accountability, but if you look at provinces like Limpopo and the money spent by government there, one sees a lot of money is being spent but there is no improvement. Therefore, there is an increasing need to look at the impact of the money being spent as government. In that way government will be able to track and follow the money to hold people accountable.'[426]

[421] Public Accounts (SCOPA) *Auditor-General South Africa: functions; SCOPA's oversight role & method of operation* 22 June 2009: 'Ms M Nyanda (ANC) raised her concern that Directors General often had cosy relationships with their respective Ministers and that this frustrated the work of the AG.'

[422] Public Accounts (SCOPA) *Auditor-General South Africa: functions; SCOPA's oversight role & method of operation* 22 June 2009.

[423] S 8 of the Public Audit Act; NCR *Annual Report* 2016/2017 80; Auditor-General of South Africa Audit information (https://www.agsa.co.za/Auditinformation.aspx)/Audit terminology (https://www.agsa.co.za/Auditinformation/Audit terminology.aspx).

[424] S 20(2)(c) of the Public Audit Act; NCR *Annual Report* 2016/2017 80-81; Auditor-General of South Africa Audit information (https://www.agsa.co.za/Auditinformation.aspx)/Audit process (https://www.agsa.co.za/Auditinformation/Auditprocess.aspx). The proficiency referred to in s 20(3) of the Public Audit Act refers to obtaining, and utilising, resources in an efficacious manner.

[425] See e.g. Auditor-General of South Africa Audit information (https://www.agsa.co.za/Audit information.aspx)/Audit process (https://www.agsa.co.za/Auditinformation/Auditprocess.aspx): 'The audit does not provide assurance that service delivery has been achieved, only that the annual performance report is useful and reliable.'

[426] Public Accounts (SCOPA) *National and Provincial Departments 2015/16 audit outcomes: briefing by Auditor-General* 2 November 2016.

4.5. Analysis of the role of government as an accountability mechanism in South Africa

The aforementioned mechanisms that are founded in constitutional law do not transcend to measurements that are regulator-performance specific and which address the expectations-part of regulators. It goes a long way towards clarifying what the regulators are doing as generic spenders of public money tasked with public duties, but there are definite fissures that need to be filled in order to ensure that the answerability mechanisms duly account for the fact that the entity under consideration is a regulator of a particular market.

Colin Scott categorised ‘select committee structures’ under ‘extended forms of accountability’.[427] In South Africa, the use of specialised parliamentary committees has become common-place,[428] and I support the recommendations of Doyle in respect of enhancing the oversight abilities of these committees through increased resourcing and collaboration with role-players that can add to the understanding, and identification of, challenges and threats to the proper functioning of a regulator.[429] The committees receive the basic financial and non-financial assurances from the Auditor-General – a type of groundwork verification of the accuracy of the financial and non-financial data in front of the committee – thus, not forcing sole reliance on the veracity of information provided by the Department.[430] However, I find that the ability of the members to look beyond what was stated in the reports and interrogate the institution on contentious and pressing matters of which they are aware, is a step in the right direction towards answering the question as to

[427] Scott ‘Accountability in the regulatory state’ (n 9) 41.

[428] See paras 4.2.3 & 4.3.3 *supra*. See also Doyle (n 322) in general.

[429] *Ibid.* See also Doyle (n 322) 59: ‘It should be a point for committees to review relations with civil society organisations to augment their capacity particularly in terms of analysing departmental information.’

[430] See the comments of Doyle in par 4.2.6 *supra*.

whether a regulator is engaged in what it should be engaged in.[431] It has been noted that the personal appearance of individuals in front of a committee to answer questions is a useful measure to conduct oversight.[432] Nevertheless, there is a lack of further independent information to verify the substantive value and propriety of the regulators' actions.

I would imagine, based on the response to the African Bank fine and Capfin,[433] that reports setting out quantitative, qualitative and explanatory data on undertakings, settlements and leniency agreements as per sections 151 and 156 of the Financial Sector Regulation Act (for the Financial Sector Conduct Authority) and section 138(1)(b) of the National Credit Act (in respect of the National Credit Regulator) would be a valuable addition to the oversight repertoire of parliamentary committees. This could also play a role in ensuring independence of regulators as executive interference may be discerned when the regulator is unable to justify its allowances or a concerning trend is observed.

[431] See Schmulow 'Retail Market Conduct Reforms in South Africa Under Twin Peaks' 2018 *Law and Financial Markets Review* 1 5-6: 'That said, Parliamentary and Ministerial oversight and the production of annual reports failed dismally in the UK prior to the GFC [Global Financial Crisis]. "…the FSA [Financial Services Authority] was not so much the dog that did not bark as a dog barking up the wrong tree.…contributed to the appalling supervisory neglect of asset quality. The FSA's attempts to raise concerns on these other fronts from late 2007 onwards proved to be a case of too little, too late …The regulatory approach encouraged a focus on boxticking which detracted from consideration of the fundamental issues with the potential to bring the bank down. The FSA's approach also encouraged the Board of HBOS to believe that they could treat the regulator as a source of interference to be pushed back, rather than an independent source of guidance and, latterly, a necessary constraint upon the company's mistaken courses of action." In his foreword to the FSA report on the ruinous RBS-ABN Amro takeover, Lord Turner, FSA Chairman, stated that RBS had procured two lever-arch folders and a CD as the sum total of their due diligence, to which Hosking responded: "His suggestion is clear: if only RBS had garnered more information, if only there had been more lever-arch files …This is the philosophy of the deluded bureaucrat. If only there had been more reports, more meetings; if only more boxes had been ticked, more forms filled in. On the Origin of Species, the Bible and the collected works of Shakespeare could be contained in two leverarch folders and a CD. How much more information does Lord Turner think RBS needed?…It's not volume of information that matters. It's quality." Hosking points out that in respect of the claim that in the three and a half years prior to RBS's collapse, the FSA met with RBS 511 times: "It's typical that there is someone to count them, but no one to explain what on earth went on in them…would [it] have been better had there been a thousand? The FSA tells us that 0.5 of an FSA manager and 4.5 team members were assigned to RBS as it was mounting the bid. The clipboard-hugging precision of those decimals speaks volumes…The report is a blizzard of acronyms and bogus science: RBS was scored as a 'medium high minus' risk, whatever that is …".'

[432] Doyle (n 322) 30: 'In terms of an analysis of the findings of the most effective techniques of oversight as rated by senior public service officials, the method which allows for departmental officials to appear directly before the legislative committee is deemed highly effective because of the direct line of oversight and accountability it is perceived to carry … This is due to the nature of such in-house meetings where senior officials and the executive appear directly before the committee, are obligated to answer questions there and then and submit reports and required information for the committee to use to fulfil its mandate of oversight.'

[433] See Portfolio Committee on Trade and Industry *National Regulator for Compulsory Specifications & National Credit Regulator on their 4th quarter 2015/16 performance* 31 August 2016; Portfolio Committee on Trade and Industry *Companies and Intellectual Property Commission (CIPC) & National Credit Regulator (NCR) on their Strategic & Annual Performance Plans* 14 April 2015.

The research conducted by Christopher Peterson[434] and George Gilligan *et al*[435] in respect of the information-based reporting side of regulatory activities presents viable suggestions for reform in South Africa. Peterson analysed the enforcement performance of the United States' Consumer Financial Protection Bureau empirically and the conclusions drawn from the study show not only the focus areas of the Regulator, but also its use of punitive measures, success rates and consumer relief obtained.[436] In addition, the research provides valuable input as to the type of credit providers and products that are the subject of enforcement actions and the type of activities addressed under the various statutes administered by the Bureau.[437] The number of variables used in the study, and the outcomes generated by the study, reflect the invaluable information that can be gathered[438] and reflect on the mediocrity of the performance reporting by the National Credit Regulator – and the low expectations of oversight structures in this regard.

The following points serve as examples and show the aspects researched by Peterson and the specific matters reported by foreign regulators as dealt with in chapter four, compared with the requirements set by the National Treasury's *Annual Report Guide*, the information generally found in the National Credit Regulator's annual reports, annual performance plans and strategy plans, and the reported data that seemingly satisfies the oversight committees.[439]

Peterson's data pool for purposes of his research was accumulated from publicly available documents that were not only based on numbers provided by the Regulator in its plans and reports, but on also included actual court documents.[440]

The enforcement activities, and results quantified as consumer relief in US dollars, were correlated with the number of employees stationed in the enforcement division, as well as the

[434] Peterson 'Consumer Financial Protection Bureau law enforcement: An empirical review' 2016 *Tulane Law Review* 1057. See also Bird *et al* 'Strategic regulation and ASIC enforcement patterns: Results of an empirical study' 2005 *Journal of Corporate Law Studies* 191.

[435] Gilligan *et al* (n 265) 260. See also the summary which concluded this research paper's findings in par 5.2.1 of ch 4 *supra*.

[436] Peterson (n 434) 1073-1076 *et seq*.

[437] *Idem* at 1068, 1074-1075 & 1085-1090.

[438] *Idem* at 1074-1076 & 1093-1102.

[439] See par 4 *supra*.

[440] Peterson (n 434) 1073-1074 & 1104: 'Every public enforcement case from the inception of the Bureau through the end of the 2015 calendar year was identified and classified. … Cases were identified through reviewing the Bureau's press releases, annual reports to Congress, and administrative adjudication docket, as well as searching the Bureau's unsealed federal court pleadings. … Drawing upon pleadings, consent orders, settlement agreements, press releases, and other publicly available documents, this study classified every public enforcement action announced through 2015 based on over 70 variables.' See e.g. National Treasury *Annual Report Guide* (n 147) 6 in respect of the plans to be used for the annual report which is primarily used by parliament to determine performance: 'To compile the public entity's annual report the documents detailed below should be utilised: ● Strategic Plan ● Annual Performance Plan ● Risk management plan ● Human Resource Plan ● Organisational structure ● Audited annual ● financial statements.'

increase in productivity of each employee tracked as US dollars in consumer relief per employee.[441] This is a particularly important analysis when one considers the National Credit Regulator's projected plans for the upcoming years and when one correlates the increase in personnel costs with the increase in projected investigations and enforcement actions.[442] There is no indication whether the increase in projected investigation and enforcement capacity is due to personnel appointments, or outstanding personnel performances, or whether the Regulator is overestimating that which is realistically possible in respect of investigation and enforcement – perhaps in light of increased pressure for quantitative performance from politicians as was seen above.[443]

The research includes information on success rates,[444] settlements and litigious activities – thus quantifies the incidences where the actions and reasons of the Regulator were acknowledged or accepted, and those where these were opposed.[445] Peterson also highlights the monetary awards of settled versus disputed cases in respect of consumer relief generated.[446]

A matter of particular importance, and an aspect that I deal with in the next part of this chapter, is collaborative initiatives.[447] The South African regime only requires that a basic reference be made to strategic relationships with limited detail on the value or outcomes of the relationships.[448] In this regard, Peterson's research quantitatively considers the contributions of partnerships notwithstanding the challenging nature thereof and he draws certain conclusions from the tendency to collaborate:

[441] Peterson (n 434) 1076-1078, 1101-1103.

[442] See e.g. NCR *Three year annual performance plan 2016/17 – 2018/19 Five year strategy plan 2016/17 – 2020/2021* 21 & 60 and compare the increasing medium term targets for most programs – see e.g. reckless lending (60, 70, 80) – with the 5% increase in total personnel costs project for the years dealt with in the strategy plan.

[443] See also par 6.2.1 of ch 4 *supra*.

[444] Peterson (n 434) 1093-1095.

[445] *Idem* at 1080. The research also culminated two more findings at 1080 that I find of interest: 'Although the total number of announced CFPB cases increased substantially in 2015, the number of cases with defendants who were unable or unwilling to settle on terms acceptable to the Bureau actually declined slightly …' & 'defendants may be less likely to accept settlement offers when the Bureau is determined to require that individuals pay some portion of restitution, disgorgement, or penalties for illegal activity out of their own pockets.'

[446] Peterson (n 434) 1082.

[447] See paras 5.3 & 5.5 *infra*.

[448] National Treasury *Annual Report Guide* (n 147) 10; NCR *Annual Report* 2016/2017 12; NCR *Annual Report* 2015/2016 8-9. An exception to this is the various reports on raids executed in collaboration with the South African Police Service and the South African Social Security Agency – see NCR 'Joint SAPS, NCR & SASSA operation nets illicit credit providers' October 2011; NCR 'Joint SAPS, NCR, & SASSA operation bears fruit' March 2012; NCR 'National Credit Regulator and SAPS clamp down on credit providers' illegal collection tactics' March 2012; NCR 'National Credit Regulator, SASSA and SAPS clamp down on credit providers' illegal collection tactics' August 2012; NCR 'National Credit Regulator intensifies its fight against lenders flouting the National Credit Act in the Northern Cape' June 2013.

> 'Pursuing enforcement actions with multiple agencies in collaboration can be resource-intensive and subject to redundant management structures. But law enforcement partnerships can also provide an important check on the judgment and tactics of both agencies. Empirical assessment of the Bureau's track record reflects a consistent institutional commitment to investing enforcement resources in intergovernmental collaboration. Claims that the Bureau acts in a rogue capacity or with an insular focus should be carefully evaluated in light of the CFPB's collaborative track record.'[449]

Analyses such as the one undertaken by Peterson can highlight areas where the most enforcement action is being undertaken – whether in respect of provider, product, activity or statute,[450] and track tendencies to settle or dispute cases amongst defendants.[451] It also highlights areas of regulatory inactivity that may be of concern and points out areas where the Regulator may be experiencing difficulty in exercising its functions.[452]

A further contribution, as shown by Peterson's research, is the usefulness of the findings to challenge controversial (and sometimes sensational) statements about the performance of the Regulator, coupled with attempts to modify the institution or its legal framework.[453] As such, he asks:

> 'The public has a right to expect that the CFPB has created an agency that will protect Americans from the all-too-real financial, mental health and physical harms associated with illegal consumer financial practices. To this end, this study gathers quantitative and qualitative information in hopes of providing an answer to a simple, but critically important, question: Has the United States succeeded in creating an effective consumer financial civil law enforcement agency?'[454]

I do not think that this type of analysis is the prerogative of the academics and in-depth review studies such as Peterson's should be conducted by the agency itself or oversight structures.[455] A baseline study such as this can also be used to track and evaluate future performance.[456] The above comparison was primarily focused on the National Credit Regulator, but the Financial Sector Conduct Authority is in a prime position to begin accumulating the necessary information for the baseline study when it reaches a future point in time where trends can be meaningfully observed. Although the above only relates to

[449] Peterson (n 434) 1082-1083 & 1096.

[450] *Idem* at 1095-1096. See also Peterson (n 434) 1098-1099 where the author draws conclusions on the 'willingness' and 'ability' of the CFPB to take certain steps against non-compliant persons based on the research findings. See also fn 445 *supra*.

[451] *Idem* at 1097.

[452] *Idem* at 1104-1105.

[453] *Idem* at 1061-1063 & 1093-1104.

[454] *Idem* at 1063.

[455] Peterson (n 434) 1063-1064 states that the research is valuable to a number of people, including policy makers, and adds a detailed list of the considered enforcement activities at the end of his paper.

[456] See Peterson (n 434) 1104.

enforcement activities, similar information should also be provided and contextualised for other departments.[457]

Parliamentary committees are endowed with numerous powers to execute their functions[458] and are protected from interference through the provisions of the Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act.[459]

Notwithstanding the aforementioned, I am concerned about the ability of the committees to provide long-term oversight, even though this is a stated objective.[460] The following observation is true of the South African regime, exacerbated by the fact that the parliamentary committees have tough workloads and do not effect long-term reviews:[461]

> 'The main problem with the current arrangements is Government lacks a regular mechanism to assess the overall performance of its financial regulators. Parliament has mechanisms to do this, including review of annual reports. However, parliamentary scrutiny tends to be episodic and focus on particular issues or decisions. The complexity of regulator mandates presents a challenge to effective monitoring, especially as Parliament is not supported in this role through regular independent assessments of annual reports.'[462]

The meeting reports that I have perused highlight, and sometimes duplicate, contentious issues but the instances where a committee member would refer to previous engagements are scarce. I have further not been able to ascertain whether the committee-measure has any long-term effect on the National Credit Regulator. The interactions between the Regulator and the Portfolio Committee on Trade and Industry and the Select National Council of Provinces Committee on Trade and International Relations are often on past performances, drafted (and approved) performance plans implementable over numerous years and reports already finalised. As such, major input by the committee would be challenging to implement,

[457] See par 5.2.1 of ch 4 *supra*.

[458] See s 56 of the Constitution, 1996: 'The National Assembly or any of its committees may a. summon any person to appear before it to give evidence on oath or affirmation, or to produce documents; b. require any person or institution to report to it; c. compel, in terms of national legislation or the rules and orders, any person or institution to comply with a summons or requirement in terms of paragraph (a) or (b); and d. receive petitions, representations or submissions from any interested persons or institutions.' See also ch 5 of Powers, Privileges and Immunities of Parliament and Provincial Legislatures Act (Act 4 of 2004). See also Parliament of the Republic of South Africa *Oversight and Accountability Model* (date not indicated on document) par 2.3.

[459] Ss 7 & 8.

[460] See Parliament of the Republic of South Africa (n 458) par 6.3.

[461] See the comments of Doyle (n 322) in par 4.2.3. *supra*. See also Portfolio Committee on Trade and Industry *Consumer Credit Insurance abuses / interventions, Debt Relief, African Bank; Remote Gambling Private Members Bill [PMB3-15]* 13 May 2016 in respect of the variety of matters that relate to the financial sector and the inability of a single committee to deal with everything.

[462] *Financial System Inquiry Final Report* November 2014 241.

especially where the budgets have been drafted and submitted.[463] In this regard, it would be beneficial if the annual report could contain a section on the substantive contents of interactions with Parliament (not just an indication of the meetings and the logistics of these meetings),[464] and its views on important, or consistent, matters raised during these encounters. This would be an important aspect to individualise oversight over the National Credit Regulator and not just as part of the Department of Trade and Industry's portfolio, which encompasses regulatory as well as non-regulatory institutions. It can also provide input for future performance plans and have a role when objectives are set.

A last aspect that ties in with the upcoming part on regulatory forums introduced by the Financial Sector Regulation Act is the Inter-Ministerial Council established in terms of section 83(1). I indicated that there is a need for informed political structures when it comes to oversight on parliamentary level,[465] as well as a need to enable intersecting matters to be dealt with by all those that have an interest in the outcome – especially where different committees and departments are involved.[466] At the executive level, there is now an official mechanism to encourage members of Cabinet to remain up to date with controversial matters that relate to their portfolios.[467] Over and above the general mandate and assessment of inter-regulatory co-operative and collaborative measures dealt with above, the Inter-Ministerial Council is also the forum to evaluate whether the degree of consumer protection brought about by the different applicable statutes and instruments are of a satisfactory level when weighed against each other.[468] The portfolios for Finance, Consumer Credit (Trade and Industry), Health and Economic Development will be represented on this forum[469] and, as indicated above, the Council is ideally suited to address legislative shortcomings as it is made up of executive representatives entitled to introduce legislation and amendments into Parliament based on executive policy.[470] However, the Financial Sector Regulation Act does not determine specifics as to when the Council should meet – this is left to the discretion of the Minister of Finance or dependent on requests for assessment of consumer protection

[463] See in this regard, Doyle's research in par 4.2.3 on continuous interaction between the supervising committee and the supervised entity or department.

[464] See NCR *Annual Report* 2016/2017 58.

[465] See Doyle (n 322) 78-79; par 4.2.3 *supra*.

[466] See Doyle (n 322) 37 & 60.

[467] See s 83(2) of the FSRA: 'The objective of the Inter-Ministerial Council is to facilitate co-operation and collaboration between Cabinet members responsible for administering legislation relevant to the regulation and supervision of the financial sector by providing a forum for discussion and consideration of matters of common interest.'

[468] S 85 of the FSRA.

[469] S 83(3) of the FSRA.

[470] See par 2 *supra*.

norms by the Minister of Trade and Industry.[471] The only set times are found in section 86 and relate to the assessment of co-operation and collaboration means determined by the intersecting regulators.[472]

All of the above remarks do not have a clear line of answerability to one or more specific regulators. However, my earlier research highlighted two aspects: Firstly, it is very important to delineate the responsibilities of the regulators and recognise the responsibilities of other players in the regulatory field[473] and secondly:

> 'A second extended accountability model is that of redundancy, in which overlapping (and ostensibly superfluous) accountability mechanisms reduce the centrality of any one of them. In common parlance, redundancy is represented by the "belt and braces; [*sic*] approach, within which two overlapping mechanisms are deployed to ensure that the system does not fail, both of which are capable of working on their own. Where one fails the other will prevent disaster.'[474]

When it comes to consumer protection, the Inter-Ministerial Council empowers the Minister of Trade and Industry to evaluate the standard of protective provisions in a statute, and by a regulator, over which he technically does not have any jurisdiction. The Council is also, in my opinion, a clever mechanism to debate the policy issues of consumer protection and other financial policies on an executive level.[475] However, I would prefer that the authority of the Minister to initiate a review and require recommendations to remedy the situation be extended to include scenarios where issued instruments under the Financial Sector Regulation Act can have a detrimental effect on consumer protection measures in terms of the National Credit Act or the Consumer Protection Act. At present, the provision only allows for the evaluation of norms against each other in order to establish the degree of protection and does not extend to the determination of adverse effects on existing protective measures by mechanisms that are not consumer protection related. As adjustments to laws are not a given – this measure only initiates debate and requests (not requires) that avenues of recourse be considered – and will at the very least require that policy trade-offs are considered by those responsible for policy in the first place. I also think that the deliberate inclusion of this matter, as opposed to reading it into the general mandate of section 83(2), would clearly set the availability of this measure.

[471] S 84(1) & 85 of the FSRA.

[472] See s 86 of the FSRA.

[473] See *Fit for the future* (n 266) . See also par 4.7 of ch 3 *supra.*

[474] Scott 'Accountability in the regulatory state' (n 9) 52-53. See also paras 5.4 & 5.5 *infra.*

[475] See Goodhart *et al Financial Regulation: Why, how and where now?* (1998) 157.

5. REGULATORS, REGULATORY FORUMS AND REGULATEES

5.1. Introduction

In chapter four, I dealt with the public and regulated market players together when I evaluated the value that mechanisms related to these two role-players added to an accountability scheme.[476] For purposes of this chapter, I separate categories of stakeholders and role-players due to the different duties and remedies available *vis-à-vis* the National Credit Regulator. I also deal with the Public Protector in the next part under the theme of adjudication structures.

The aspects to consider are the following: first, the presence of entities designated as accountability authorities over the Regulator; second, the abilities that these entities have been endowed with to effect answerability; third, the jurisdiction of the entities; fourth, the means of effecting accountability; fifth, the outcomes of the answerability measures implemented and sixth, the whether this forum has the ability to add to a scheme of answerability for those affected through participation by stakeholders.[477]

I begin with an assessment of the regulatory structures that have been brought about by the Financial Sector Regulation Act. These structures will have an impact on the accountability regime to which the National Credit Regulator and the Financial Sector Conduct Authority will be subjected under the Twin Peaks model. This is particularly relevant when one keeps Scott's 'Interdependence model' in mind.[478] His model is based on the premises that

> '[i]nterdependent actors are dependent on each other in their actions because of the dispersal of key resources of authority (formal and informal), information, expertise, and capacity to bestow legitimacy such that each of the principal actors has constantly to account for at least some of its actions to others within the space, as a precondition to action.'[479]

Andrew Godwin, Timothy Howse and Ian Ramsay have also commented on the supervisory structures created by the last version of the Regulation Bill, but they view this not from an interdependency point of view, but from a government-related/independency perspective supported by the wording of the policy documents that introduced the characters of the respective twin peaks regulators.[480] I prefer Scott's view as it adds a deeper dimension and the government and independence issues have already been canvassed earlier in this thesis.

[476] See par 4.8 of ch 4 *supra*.
[477] See par 5.7 of ch 4 *supra*.
[478] Scott 'Accountability in the regulatory state' (n 9) 50-52.
[479] *Idem* at 50.
[480] Godwin *et al* 'Twin Peaks: South Africa's financial sector regulatory framework' 2017 *South African Law Journal* 665 *et seq* eg 670-672.

5.2. Regulators

The Financial Sector Regulation Act aims

> 'to provide for co-ordination, co-operation, collaboration and consultation among the Reserve Bank, the Prudential Authority, the Financial Sector Conduct Authority, the National Credit Regulator, the Financial Intelligence Centre and other organs of state in relation to financial stability and the functions of these entities'.[481]

The regulatory framework envisages an alliance-type of interaction between the Financial Sector Conduct Authority and the National Credit Regulator insofar as the statute directs these two institutions to partner in some matters.[482] I deal only with some relevant factors here.[483]

Firstly, the institutions need to partner in the exchange of useful information.[484] Secondly, the institutions need to develop and avail each other of beneficial databases and resources so that there can be singularity of action and expenditure of resources as and when possible.[485] Thirdly, there should be a conscious effort to follow harmonised regulatory strategies, policies and approaches to regulatory and supervisory difficulties.[486] There is also a general espousal-type of interaction insofar as the statute directs that these two institutions should offer assistance to aid each other in meeting their respective aims and outcomes.[487] Lastly, section 76(1)(d) determines the following:

> 'The financial sector regulators and the Reserve Bank must co-operate and collaborate when performing their functions in terms of financial sector laws, the National Credit Act, and the Financial Intelligence Centre Act, and must for this purpose —
>
> (d) co-ordinate, to the extent appropriate, actions in terms of financial sector laws, the National Credit Act and the Financial Intelligence Centre Act, including in relation to —
>
> (i) standards and other regulatory instruments, including similar instruments provided for in terms of the National Credit Act and the Financial Intelligence Centre Act;
>
> (ii) licensing;
>
> (iii) supervisory on-site inspections and investigations;
>
> (iv) actions to enforce financial sector laws, the National Credit Act and the Financial Intelligence Centre Act;
>
> (v) information sharing;

[481] Long Title of the FSRA.
[482] S 76(1) of the FSRA.
[483] See e.g. s 76(1)(f) on collaboration for international representational purposes.
[484] S 76(1)(b) of the FSRA. See also Pearson 'A credit lens: implementing twin peaks' 2017 *Law and Financial Markets Review* 1 4.
[485] S 76(1)(e) of the FSRA.
[486] Ss 76(1)(c) & 76(1)(g) of the FSRA.
[487] S 76(1)(a) of the FSRA.

(vi) recovery and resolution; and

(vii) reporting by financial institutions, including statutory reporting and data collection measures…'

Section 76 addresses many of the concerns raised by Charles Goodhart and his co-authors in respect of mega regulators.[488] The Twin Peaks model in its purest form consists of two regulators – a prudential and a market conduct regulator – with the aim of delineating the responsibilities of the respective regulators in line with an objective-based approach to regulation.[489] Although South Africa is not a perfect example of the Twin Peaks model,[490] there is a particular line of thought that supports a clearer move towards singularity of market conduct regulators.[491] Perhaps one can go so far as to consider a 'mega regulator' for market conduct, to use Goodhart *et al*'s categorisation, even though these authors consider a 'mega regulator' as having all the authorities necessary to regulate all aspects, prudential and otherwise, of the financial sector.[492] I discussed the various forms in chapter two, but briefly state the most salient points that respectively support and oppose the creation of a mega regulator, and in particular when one considers the features applicable to market conduct.

The resource factor and misalignment argument are the basic foundations for arguments to support the creation of one regulator in respect of market conduct.[493] Amalgamating funds and expertise, and introducing an uncomplicated structure for interacting with consumers and regulatees relate to the resource factor.[494] Unifying regulatory responsibility should, in theory, result in unified and harmonised approaches to regulation and regulatees and assist with clarifying answerability lanes.[495] In respect of the Financial Sector Conduct Authority and the National Credit Regulator, Andy Schmulow's analysis of the credit market within the Twin Peaks structure of South Africa shows that there may be convincing applications of fact to retain the separation.[496] He highlights that the rationale for the retention of the National Credit Regulator was the fact that it was already in existence when the Financial Sector

[488] See par 3.4.2 of ch 2 *supra*.
[489] Goodhart *et al* (n 475) 156-159;
[490] See Schmulow (n 431) 4; Godwin *et al* (n 480) 701.
[491] See par 2.3 of ch 5 *supra*.
[492] Goodhart *et al* (n 475) 151. These authors therefore do not specifically consider the amalgamation of various regulatory agencies responsible for market conduct regulation into one agency as the creation of a mega regulator where there is also a separate prudential regulator. This falls within the ambit of the Twin Peaks model. However, I do think that some of the arguments would remain in respect of the amalgamated market conduct regulator for South Africa. See paras 3.4 & 4 of ch 2 *supra*.
[493] Goodhart *et al* (n 475) 152-154.
[494] *Idem* at 152.
[495] *Ibid*.
[496] Schmulow (n 431) 4-5.

Conduct Authority was shaped.[497] Schmulow refers to two substantive aspects around which the separation issue revolves: credit and credit consumers.[498] He states that credit, especially in the current economic circumstances, requires specialised treatment.[499]

The type of person who is a credit consumer, especially because of the past dispensation and current social climate, is often poor, untaught and reliant on credit for consumption purposes.[500] The objectives of consumer credit regulation in South Africa would require in-depth attention that a 'generalist consumer protection peak' would not be able to deliver.[501] In more practical terms, the type of customer that the Financial Services Board ordinarily deals with, will not easily include the extremely poor – these type of consumers do not take out asset insurance,[502] have medical aid, provide for disability cover or contribute to pension schemes or other investment funds. These consumers do make use of credit, often to make ends meet,[503] credit life insurance,[504] funeral cover,[505] and may contribute to a stokvel.

Eric Pan also discusses the merits of different regulatory structures but he highlights that the cooperative mechanisms and means of information exchange is actually of greater significance than the structure itself.[506] The author extends this notion to interagency relations

[497] *Idem* at 4.
[498] *Idem* at 4-5.
[499] *Ibid*.
[500] *Ibid*.
[501] *Idem* at 5.
[502] See FinMark Trust *FinScope Consumer Survey South Africa* November 2016 3.
[503] *Idem* at 1 & 2.
[504] See FinMark Trust http://www.finmark.org.za/microinsurance/ in respect of microinsurance.
[505] According to FinMark Trust *FinScope* (n 502) 3 '[o]nly 8.2 million adults have any type of non-funeral insurance'.
[506] Pan 'Structural Reform of financial regulation' 2011 *Transnational Law & Contemporary Problems* 796 817-822. The author actually refers to the choice of regulatory structure as 'false' when recommending reformative action for Canada – see Pan (n 506) 804: '…Canada should not allow itself to be trapped in a false choice between a "single regulator" model and "twin peaks" model. What is most important is that Canada's regulators have clear lines of responsibility, share information freely and continuously, and coordinate regulatory actions.' See also Freeman & Rossi 'Agency coordination in shared regulatory space' 2012 *Harvard Law Review* 1131 1138, who state that 'we view the problem in terms of managing shared regulatory space, rather than the alternative of consolidating agencies, which can create as many problems as it solves.' Freeman & Rossi (n 506) 1138-1145 also set out a number of reasons why institutions with overlapping jurisdictions, or who have to work in the same arena, would be created by politicians – these include that a scheme of 'interagency "fire alarms"' are developed; creating constructive 'interagency competition'; allocating additional authority to themselves; enable opportunists 'to claim credit and deflect blame' (see par 3.3 of ch 2 *supra*); limit capture by multiplying those organisations that need to be captured; as a concession (or 'bargain') between legislatures with varying preferences; as a deliberate move to deal with technical and specialised fields or simply due to efflux of time and the path of history. As the latter is relevant in the South African context of the NCR and the FSRA, see Freeman & Rossi (n 506) 1144: 'Even where these delegations are accidental rather than intentional, they may nevertheless prove hard to dislodge because of path dependency and bureaucratic entrenchment.' See also par 3.2.4 of ch 2 *supra* & Schmulow (n 430) 4.

as well as intra-agency departmental synchronisation.[507] Section 76 seeks to address concerns such as 'economies of scale' and 'economies of scope'[508] through the authorised development of measures to 'minimise the duplication of effort and expense'.[509] This section deals with inter-regulatory activities and these principles are not authority to deal with intra-regulatory disharmony that is not dealt with elsewhere in the Financial Sector Regulation Act:

> 'In practice, different aspects of functional regulation will be conducted by different divisions within a single agency, and problems of co-ordination will still arise … Even if the different regulatory requirements of different types of firms were managed within specialist divisions of a mega regulator, it is not self-evident that supervisors within the same organisation but responsible for different types of business would necessarily communicate and co-ordinate more efficiently and closely that they would within different, specialist regulatory agencies.'[510]

Whilst the line of accountability may therefore be simplified externally, one cannot but wonder about internal accountability lanes, which has been hailed as an important mechanism for some institutions.[511] I am particularly concerned about this matter in light of the history of the Financial Services Board and the claims of fragmentation when the institutional structure of the financial services sector was criticised.

The subject-specific legislation, pre-section 290 of the Financial Sector Regulation Act referenced the same official as the regulator for that sector: Financial Advisors and Intermediaries,[512]Short-term Insurers,[513] Long-term Insurers,[514] Friendly Societies,[515] Pension

[507] Pan (n 506) 822. At 820, the author notes: 'It is unclear whether a single regulator that is assuming the responsibilities of several formal agencies will be able to organize itself in a more effective manner to eliminate the turf battles and blind spots associated with the older regulatory system.' Pan also criticises the previous regulator in the United Kingdom, the Financial Services Authority, based on its organisational scheme because 'the internal regulatory teams are organized by financial sector rather than by objectives' – see 861.

[508] Goodhart *et al* (n 4754) 152.

[509] S 76(1)(e) of the FSRA.

[510] Goodhart *et al* (n 475) 152 & 153. See also Freeman & Rossi (n 506) 1153 & 1154.

[511] See Pan (n 506) 819-820; Public Accounts (SCOPA) *National and Provincial Departments 2015/16 audit outcomes: briefing by Auditor-General* 2 November 2016.

[512] S 2(1) of the Financial Advisory and Intermediary Services Act (Act 37 of 2002): 'The executive officer referred to in section 1 of the Financial Services Board Act, 1990 (Act 97 of 1990), is the registrar of financial services providers and has the powers and duties provided for by or under this Act and any other law.'

[513] S 2(1) of the Short-term Insurance Act (Act 53 of 1998): 'The person appointed as executive officer in terms of section 13 of the Financial Services Board Act is the Registrar of Short-term Insurance and has the powers and duties provided for by or under this Act or any other law.'

[514] S 2(1) of the Long-term Insurance Act (Act 52 of 1998): 'The person appointed as executive officer in terms of section 13 of the Financial Services Board Act is the Registrar of Long-term Insurance and has the powers and duties provided for by or under this Act or any other law.'

[515] S 4 of the Friendly Societies Act (Act 25 of 1956): 'The executive officer and a deputy executive officer mentioned in section 1 of the Financial Services Board Act, 1990 (Act 97 of 1990), shall also be the Registrar and the Deputy Registrar of Friendly Societies, respectively.'

Funds,[516] Collective Investment Schemes[517] and Credit Rating Services.[518] The Registrar of the Financial Services Board was endowed with various powers related to the regulation of the aforementioned persons and institutions which are governed by the laws set out in schedule 1 to the Financial Sector Regulation Act (the 'Financial Sector Laws') with the exception of statutes that regulated banks and fell under the authority of the Reserve Bank. Yet, the market conduct policy noted the following:

> 'Financial institutions find this structure cumbersome and costly, requiring multiple licenses and *being subject to multiple Registrars which typically each operate in a different way*, with different and at times competing objectives. A siloed approach to financial sector regulation – with each sub-sector governed by a separate and distinct piece of legislation – has naturally led to siloed supervision. With this level of legal complexity, full harmonisation of regulatory and supervisory standards remains compromised, impeding the FSB's best efforts to strengthen conduct holistically across the sector.'[519]

My concern is that the regulatory fragmentation was not solely due to the legislative framework, but also due to practical manifestations.[520] Under circumstances where the appointed Registrar delegated his or her functions and powers under different laws to different people or divisions within the Financial Services Board, this may very well have caused fragmentation as understood by Goodhart *et al.*[521] No amount of restructuring or consolidation will reduce inconsistencies and fragmentation if there is not cognitive awareness of this development, or a version of section 76 of the Financial Sector Regulation Act applicable to internal co-ordination. Internal collaboration and co-operation should ideally be a factor that should be taken into account when determining whether the required

[516] S 3 of the Pension Funds Act (Act 24 of 1965): 'The person appointed as executive officer in terms of section 1 of the Financial Services Board Act, 1990 (Act 97 of 1990), is the Registrar of Pension Funds and has the powers and duties provided for by or under this Act or any other law.'

[517] S 7 of the Collective Investment Schemes Control Act (Act 45 of 2002): 'The executive officer referred to in section 1 of the Financial Services Board Act, 1990 (Act 97 of 1990), is the registrar of collective investment schemes and has the powers and duties provided for by or under this Act or any other law.'

[518] S 21 of the Credit Rating Services Act (Act 24 of 2012): 'The executive officer and deputy executive officer contemplated in section 1 of the Financial Services Board Act are the registrar and deputy registrar of credit rating agencies, respectively, and have the powers and functions provided for under this Act or any other applicable law.' See also Pugsley *et al* 'Financial Services Appeal Board' in *Law of South Africa* vol 10(3ed) 515.

[519] National Treasury *Draft Market Conduct Policy Framework* (n 151) 15. My emphasis.

[520] See *Fit for the Future* (n 266) 6. See Portfolio Committee on Trade and Industry *Consumer Credit Insurance abuses /interventions, Debt Relief, African Bank; Remote Gambling Private Members Bill [PMB3-15]* 13 May 2016: 'In terms of challenges, the regulatory system currently was fragmented. The more regulators you had, the greater the scope for arbitrage. There was SARB, FSB and NCR all doing different things. Even within the institutions, there may be different Deputy Registrars, and did they talk to each other? So the system was extremely fragmented in South Africa.'

[521] Apart from the general comments by Goodhart *et al*, see also the quoted reference to the Deputy Governor of the Bank of England's commentary on Twin Peaks – Goodhart *et al* (n 475) 158.

level of consistency of action is achieved by the Financial Sector Conduct Authority – it must first present a united perspective prior to interacting with other regulators.

This matter is also of importance when it comes to collaboration with the National Credit Regulator. Insofar as consumer credit is concerned, I explained in chapter five that the Regulator's authority remains the same insofar as the National Credit Act is concerned. The Financial Sector Conduct Authority may ordinarily not regulate 'the provision of credit' as it is not viewed as a financial product as far as the Authority is concerned, and also for purposes of section 106 which relates to conduct standards developed by the Financial Sector Conduct Authority.

However, the Conduct Authority has the authority to deal with financial services in an unconstrained manner as long as the service is 'related to the provision of credit', with the exception of debt counsellors, payment distribution agencies and alternative dispute resolution agents as defined in the National Credit Act.[522] In terms of section 58(2) of the Financial Sector Regulation Act, the 'conduct in relation to the provision of credit under a credit agreement' may be regulated by the Conduct Authority as long as the conduct relates to a theme set out in section 108.[523] Section 108 of the Regulation Act does not really speak to conduct insofar as the consumer-provider relationship is concerned, but relates more to the business aspects of the institution – governance, payment and employment features of senior staff, internal management schemes, dissolution of businesses, *et cetera*. My interpretation of section 58(2), supported by the use of the phrase 'in addition to', is that the reference to section 108 counters only the wording of section 2(1)(g) and does not restrain the authority in respect of financial services.

In terms of section 58(3), the Conduct Authority is directed to consider the regulatory framework under the National Credit Act when it deals with regulatees, and it has to consult with the National Credit Regulator prior to developing the conduct standards in terms of section 108 that would apply to credit providers to which the National Credit Act applies. An example in this regard would be fit and proper requirements, which can be set as a conduct standard under section 108(1)(a) of the Financial Sector Regulation Act. Section 45(3) of the National Credit Act allows the Regulator to apply a fit and proper test to prospective registrants, which would include credit providers. Furthermore, the Minister of Trade and

[522] S 2(1)(g) read with s 3(1)(g) and 58(2) of the FSRA.

[523] See also s 106(5) of the FSRA: '(a) In relation to a credit provider regulated in terms of the National Credit Act, a conduct standard may only be made in relation to a financial service provided in relation to a credit agreement and matters provided for in section 108. (b) A conduct standard referred to in paragraph (a) may only be made after consultation with the National Credit Regulator.'

Industry is also allowed to decide which features have to be considered when the fit and proper test is undertaken.[524]

Another issue that would no doubt affect the manner in which the Regulator undertakes its regulatory activities – and which could be problematic for the regulated industry if there is no proper collaboration or understanding,[525] or even where there is regulatory competition borne out of the need to meet individual objectives – is the distinction as it relates to credit, found in sections 2 and 3 between a financial product and a financial service. The Financial Sector Conduct Authority may regulate all related services rendered, but not the provision of credit itself – including the governing structure of the organisation, the fit and proper requirements (such as 'competence … experience, qualifications and knowledge') and dealing with conflicts of interest.[526] Although section 106(5)(b) of the Financial Sector Regulation Act requires the Conduct Authority to consult with the National Credit Regulator prior to developing a conduct standard, there is no provision that requires the consent of the Regulator.

On the one side, this presents a potential dilemma for the National Credit Regulator and, in particular, low income consumers and credit providers to these communities. Whilst the Financial Sector Conduct Authority's mandate does not extend to a particular vulnerable group, the National Credit Regulator is tasked with furthering the particular section of the consumer credit industry that extends, or has the potential to extend credit, to three specific groups – historically disadvantaged people, the poor and secluded (probably rural) communities.[527] I can therefore imagine that a point of contention between the regulators, borne out of different goals, could be those micro-lending credit providers that serve the underserved communities and cannot meet the section 108 demands.

The distinction between the provision of credit as a financial product and a service related to the provision of credit as a financial service, is problematic. The Financial Sector Regulation

[524] S 45(4) of the NCA.

[525] See also Schmulow (n 431) 5: 'So, while Twin Peaks jurisdictions such as Australia have carved out a separate set of structures for dealing with problems associated with the extension of credit, the South African arrangement is, by comparison, both more sophisticated and complex. The degree of difference between the two dedicated credit regimes is sufficient to present the South African Twin Peaks model with additional challenges: the NCR is a fully-fledged agency, and relationships with the two peaks will have to be managed with the same care, deference and cooperative spirit with which the relationship between the two peaks will have to be managed. Consequently, success will depend upon the degree to which these two entities – the FSCA and the NCR – coordinate, communicate and cooperate. In particular, there are areas where the National Credit Act (NCA) and the FSCA will overlap: where credit is bundled with other types of accounts, both regulators would be involved. Without close coordination this could lead to confusion and contradiction.'

[526] See ss 2(1)(g), 3(1)(g), 58(2) and 108(1)(a), (b) and (o) of the FSRA.

[527] S 13(a) of the NCA.

Act does not make a distinction based on whether a particular matter is regulated by the National Credit Act or not (in fact, the legislature seems to have considered the possibility of dual regulation when one considers the wording of section 58(2) and 58(5)(a)). As such, the question is when a particular act is the act of providing credit (for example, does this include pre-contractual disclosures and reckless credit analyses) and when is it a service relating to the provision of credit (for example, section 3(1)(a)(i) of the Regulation Act specifically refers to 'providing …guidance' in respect of 'a financial product').[528] In relation to the latter, the Conduct Authority is duly authorised to issue conduct standards that affect substantive matters in the credit extension process, for example 'fair treatment' in respect of 'the design and suitability of financial products and financial services' [529] or 'the disclosure of information to financial customers'.[530] A successful integration of the 'culture' of 'treating customers fairly' will, if truly institutionalised,[531] also affect credit provision – especially if the institution is diversified in the products and services that it renders. In this regard, one wonders how double jeopardy in respect of non-compliance would be avoided and how this matter would be dealt with, especially where answerability structures demand enforcement statistics.

The National Credit Regulator's mandate for evaluating and directing the behaviour of credit providers is restricted by the provisions of the National Credit Act, which does not allow mandatory behaviour-modifying rules to be made as and where necessary. The Regulator is dependent on the Minister of Trade and Industry to effect these changes, or has to be able to justify a change to the conditions of registration under section 49(1)(e) of the National Credit Act:

> 'The National Credit Regulator may review, and propose new conditions on, any registration … if the National Credit Regulator, on compelling grounds, deems it necessary for the attainment of the purposes of this Act and efficient enforcement of its functions.'

In addition, the Regulator's mandate is restricted to matters related to credit and governed by the National Credit Act – when one considers the factors taken into account to register credit providers, there is a distinct difference in legislative guidance when comparing the factors

[528] See Portfolio Committee on Trade and Industry *Consumer Credit Insurance abuses / interventions, Debt Relief, African Bank; Remote Gambling Private Members Bill [PMB3-15]* 13 May 2016: 'Mr Dixon replied that National Treasury was responsible for legislation. He understood that it would continue to be that the credit agreement itself would continue to be the sole mandate of the NCR. However, there were sometimes services done for credit agreements, like intermediaries who give advice on credit or selling. That, the FSB believed, was the an area that should be subject to the same requirements as any other product that was sold or advised on, so there needed to be alignment there.'

[529] See s 106(3)(c)(i) of the FSRA.

[530] See s 106(3)(c)(iv) of the FSRA.

[531] See par 4.3 of ch 6.

taken into account when an application for registration as a debt counsellor, credit bureau or payment distribution agent is considered.[532] In contrast, the Conduct Authority's mandate to issue conduct standards that may apply to credit providers is diffused through all aspects of the business.

In this regard, a similar discrepancy arises as was found in research relating to credit bureaus under the National Credit Act and the Protection of Personal Information Act.[533] A credit bureau would need to be registered with the National Credit Regulator prior to conducting business as a bureau, but would need the permission of the Information Regulator before it could process personal information.[534] The uncomfortable situation would arise where a bureau could be registered, but due to inconsistent standards, not be able to conduct its business as the Information Regulator could withhold permission.[535] Under circumstances where the National Credit Regulator would register the credit provider to extend credit, the credit provider would also have to obtain a license from the Financial Sector Conduct Authority to, for example, market its product or explain the credit contract to the prospective client for purposes of meeting the reckless credit arrangements of the National Credit Act.[536] Should the provider then not be able to meet the governance requirements set by the Conduct Authority, it may very well find it difficult to conduct business successfully even though it is registered to do so under the National Credit Act. It may therefore comply with the provisions of the National Credit Act but the same action may fail to meet the criteria of the Financial Sector Conduct Authority. This could be costly for regulated institutions[537] and could be problematic for consumers when it comes to raising complaints or exercising their rights.

In particular, this blurs the answerability lanes for two reasons: Firstly, where two regulators are responsible for the same activities, it is difficult to determine who is at fault if the regulation is not effective, or turn out to be inappropriate. Secondly, where two regulators are responsible for the same activities and the activities are successfully regulated, it is difficult to determine whether either or both of the regulatory interventions accomplished the task.

[532] Ss 40 – 44A of the NCA.

[533] See Boraine & Van Wyk (n 217), specifically 'Supervisory frameworks: South Africa' & 'Supervisory frameworks: Comparison and Evaluation'.

[534] *Idem* at 189-190.

[535] *Idem* at 190.

[536] The matter of multiple licences was discussed during the Colloquium on 'Twin Peaks' hosted by the Barclays ABSA Chair in Banking Law in Africa of the University of Pretoria on 28 September 2017. See also Pearson 'A credit lens' (n 484) 3 in respect of licensing: 'South Africa will have three licensing regimes, located within the Prudential Authority, the FSCA, and the National Credit Regulator. It is expected that down the track there will be just one licence.'

[537] See Goodhart *et al* (n 475) 152: '[I]nstitutional costs are a comparatively small proportion of the total costs of regulation, and other costs of regulation (compliance and structural) rise if inappropriate regulation is adopted.'

One regulator may have put in a lot of effort and resources, but the inefficiency of its approach was masked by the other regulator's actions.

I do not think that this is an aspect that should be dealt with by the regulators under section 76. It is a matter that relates to the duplication of regulation of singular acts – marketing, disclosure, debt collection, *et cetera*. Determining which regulator is the lead regulator, and clearly allocating responsibility and risk to this regulator, should be a legislative decision as it weighs different statutes forwarded by different government departments against each other.[538] I also do not know if this is an aspect that will be dealt with in the Conduct of Financial Institutions Bill.[539]

On the other side, this construction can be an ideal peer-to-peer answerability scheme that evaluates efficacy,[540] if handled correctly and with the necessary forbearance on the side of both regulators. Whilst the National Credit Regulator is a specialist regulator, it does not have exclusive specialist jurisdiction over many steps in the credit extension process. The current position introduces a new feature in the answerability scheme, as it demands that the National Credit Regulator is perceived as the specialist regulator insofar as credit is concerned, and delivers on its mandate and authority in a manner that is acceptable to its peer conduct Regulator. It can be expected that the performance of the National Credit Regulator, and what it brings to the regulatory table, will be scrutinised for value, and not just process.[541] Section 76 requires that the Conduct Authority and Credit Regulator assist each other in meeting respective objectives and work together to present a unified front. It is difficult to see how the Conduct Authority will defer to the views of the Regulator if it is an area for which the Conduct Authority also bears responsibility and where there is no confidence in the ability of the Regulator to bear its weight.

5.3. Regulatory forums

The assemblies in which the National Credit Regulator and/or the Financial Sector Conduct Authority partake, include the Financial Stability Oversight Committee,[542] the Financial Sector Contingency Forum and the Financial System Council of Regulators.[543] Each of these forums is created with a specific task and even though many include the same representatives, the substantial issues to be discussed differ. Although the Financial Sector

[538] See Goodhart *et al* (n 475) 157.
[539] National Treasury *Treating Customers Fairly in the Financial Sector* (n 151) 8.
[540] See par 3.2 of ch 4 *supra*.
[541] *Ibid*.
[542] S 22(1)(e) of the FSRA.
[543] See par 3.4 of ch 5 *supra*.

Regulation Act describes these forums as discussion and collaboration assemblies – for pressing and current issues – they may very well include consideration of steps taken by individual regulators and their accomplishments in the areas under consideration.[544]

The National Credit Regulator and the Financial Sector Conduct Authority are parties to the Financial Stability Oversight Council through the offices of their most senior officials.[545] The basic *raisons d'être* of the Committee are to assist the Reserve Bank with its financial stability mandate and to promote beneficial interaction and harmonisation of actions regarding financial stability.[546] Section 21(a), which relates to the Financial Stability Oversight Council, promotes not only information sessions about the actions of the Reserve Bank and financial sector regulators (which includes the National Credit Regulator as per section 1) in respect of financial stability, but also a forum where the members can air their respective opinions regarding these activities. The Committee is therefore a means to distribute information and supports peer-evaluation on a performance-based level. It also has an advisory function for those responsible for macro-prudential regulation.[547]

The realisation that market conduct is important for financial stability,[548] is perhaps the rationale for the inclusion of the National Credit Regulator in the membership of the Committee. It does not have a clear supportive financial stability mandate comparable to that of the Financial Sector Conduct Authority.[549] However, there are two compelling reasons for including the Regulator,[550] together with the Conduct Authority. First, section 13 of the National Credit Act speaks to the welfare of a specific segment of the supply side of the consumer credit market:

[544] See par 5.1 and Scott's interdependency model *supra*. See also par 4.7 of ch 3 *supra* & 5.7 of ch 4 *supra*.

[545] S 22(1)(d) & (e) of the FSRA.

[546] S 20(2) of the FSRA.

[547] S 21(b)-(d) of the FSRA. See National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 305) 31.

[548] See National Treasury *Treating Customers Fairly in the Financial Sector* (n 151) 24: 'Establishing a dedicated market conduct authority will underpin a stronger and more effective consumer protection framework for the financial services sector. The FSR Bill sets out primary objectives for a newly-created FSCA to best ensure that market conduct regulation works together with prudential regulation to support financial stability and protect financial customers.' See also National Treasury *Draft Market Conduct Policy Framework* (n 151) 29 fn 15: 'These laws combine to instil market confidence and support financial stability; this means that either prudential or conduct weakness can compromise customer confidence and threaten financial stability, and by implication the broader economy.'

[549] S 57(c) of the FSRA.

[550] See National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 305) 32: 'While the mandate of financial stability lies with the Reserve Bank, other regulators (market conduct regulators, as well as the National Credit Regulator) must also take into account the financial stability implications of their activities, and assess all systemic risks potentially arising from any institutions that they may be supervising. It is proposed to establish a Financial Stability Oversight Committee, jointly chaired by the Governor and the Minister of Finance. This body will enable government to oversee financial stability from a systemic perspective and to have a central role in crisis management and resolution.'

> 'The National Credit Regulator is responsible to promote and support the development, where the need exists, of a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry to serve the needs of historically disadvantaged persons; low income persons and communities; and remote, isolated or low density populations and communities, in a manner consistent with the purposes of this Act.'[551]

The extract from Fanie Jansen van Vuuren's research on microfinance institutions enhances the context of section 13(a):

> 'There are two extreme approaches to microfinance, namely the poverty approach and the self-sustainability approach … The poverty approach relates to the welfare of the poor, while the self-sustainability approach relates to the welfare of the micro lender. To find a balance between the two approaches would probably be the ideal situation.
>
> Poor people tend to use micro loans to meet basic needs such as food and shelter rather than to invest it in income generating activities … Credit to the poor serves a dual purpose as it is used for investing in small enterprises, but also results in a significant short term increase in household expenditure and welfare … This indicates the important role that MFIs plays in the economy of a country.'[552]

I do not agree with Schmulow that the National Credit Regulator has a microprudential task, and that the Financial Sector Conduct Authority has a macroprudential task.[553] Microprudential regulation refers to the financial welfare, in the context of financial stability/health of individual firms whilst macroprudential regulation refers to the financial welfare of a nation, in the context of financial stability/health of the domestic financial system.[554] The whole idea of the Twin Peaks system of regulation is to separate prudential and market conduct regulation.[555] I do, however, think that the National Credit Regulator has

[551] S 13(a) of the NCA.

[552] Jansen van Vuuren *Risk Management for Microfinance Institutions in South Africa* May 2011 M. Com (Financial Management) Faculty of Economic and Management Science University of Pretoria 22.

[553] Although the idea behind this paragraph is constructive, I doubt that the use of the terminology even in this context, is sound – see Schmulow (n 431) 4: 'The regulator's roles: if the Australian experience proves instructive, then the consumer protection peak FSCA will take a macro-prudential view, while the NCR will continue to fulfil a micro-prudential role. This plugs a gap between regulator's interventions that are in the country's best interests (macro-prudential), but where the regulator declines to act, even in the best interests of individual consumers because their particular plight is inadequately wide-spread, versus (micro-prudential) interventions on behalf of consumers whose plight, whilst not wide-spread, is nonetheless urgent for them …' *Cf* National Treasury *Treating Customers Fairly in the Financial Sector* (n 151) 93: 'Regulators increasingly need to find the appropriate balance between assessing micro conduct risks (risks arising from the conduct of specific regulated entities) and macro conduct risks (risks arising from broader market practices). This requires a mix of tools such as institution-specific supervision; thematic reviews and investigations; product review and approval processes and individual case reviews and complaint investigations …'

[554] See National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 305) 12.

[555] See Goodhart *et al* (n 475) 157-159 & Van Niekerk & Van Heerden 'Twin Peaks: The role of the South African central bank in promoting and maintaining financial stability' 2017 *Journal for Contemporary Roman-Dutch Law* 636 639-640.

a similar supportive financial stability responsibility to the section 57(c) supportive duty of the Financial Sector Conduct Authority.[556] This approach is supported by the following extracts from submissions by the applicant in *Micro Finance South Africa v Minister of Trade and Industry and Another* (the National Credit Regulator),[557] and later supported by the court:

> 'In the founding affidavit in the urgent application it is stated that prior to the promulgation of the new regulations, a period of no less than nine years had passed without them being renewed. This, the applicant states, gave rise to an untenable situation. As a result of inflation and certain other additional expenses (such as payment streams), the members of the applicant found it increasingly difficult to conduct business. When the new regulations were finally promulgated the entire industry was of the hope that the new regulations would remedy the situation and provide a new lease of life in the micro finance industry. However, upon closer scrutiny it became apparent that in issuing the new regulations the respondents had failed to take into account the effect that the new fees and interest rates would have on the providers of micro loans; failed to conduct proper market research in order to determine if the new fees and interest rates would be beneficial to the market as a whole; and failed to consider the views of the members of the applicant or any of the micro financiers in the industry. The net effect of the new regulations, the applicant states, is effectively to bring the entire micro loan industry to its knees and make it impossible to conduct business, let alone a profitable business.
>
> … The applicant further states that the new regulations do not only affect its members personally, but that there will be an enormous knock on effect on the South African public as a whole. Some 5 to 6 million people make use of micro financiers for funding. It is a niche market which is not served by the traditional banks. By taking a substantial portion of the members of the applicant out of the market, those members of the public that require credit will not be able to obtain credit from legitimate sources and an enormous increase of unregistered credit providers is a real possibility.
>
> … Having regard to the above and to the opinions of three experts which the applicant has presented, the applicant contends that the respondents have failed to promote equity in the credit market as required by s 3(d) of the NCA by balancing the respective rights and responsibilities of credit providers and consumers. The applicant states that no account has been taken of the rights, interests and obligations of its members and that, ironically, the individuals who will be most

[556] S 57(c) of the FSRA determines that '[t]he objective of the Financial Sector Conduct Authority is to assist in maintaining financial stability'. See the collaborative directive to support financial stability in e.g. s 26 of the FSRA. See also Van Niekerk & Van Heerden (n 555) 650-651. In addition, see Pan (n 506) 847-848: 'Public response in the United States to the Treasury Blueprint was mixed. State regulators have criticized those Blueprint proposals that diminish the role of state authorities in the financial system. Banking associations have criticized the Blueprint's plan to consolidate all banking regulation in the hands of a single prudential regulator. They feel that such a regulator would be insensitive to the interests of smaller and more specialized depository institutions, such as thrifts and community banks.' See Pearson 'A credit lens' (n 484) 4 in respect of the stability issues to which credit can contribute – refer to par 3.2 of ch 1 *supra*.' See also Davel 'Regulatory options to curb debt stress' CGAP Focus Note 83 March 2013 6 in respect of 'sectoral' challenges related to over-indebtedness.

[557] (16746/2016) [2016] ZAGPPHC 1155 (22 November 2016) paras 10-12 & 20.

> affected are the members of the general public who will be forced to obtain finance from unregulated and unregistered sources, thereby increasing the prospects of them being exploited.
>
> … I have referred above to the requirements of s 105(2) and regulation 45(2) with which the Minister and the regulator have to comply. These include the need to make credit available to historically disadvantaged persons and low income persons and communities, the impact of access to finance for such persons, and the conditions prevailing in the credit market, including the cost of providing credit. Apart from the regulator stating in general terms that research was done, no evidence has been provided of how these matters were investigated or considered. The Minister and the regulator have not addressed in any meaningful way the applicant's contention that the amended fees and interest rates will lead to closures of the businesses of many of the applicant's members and will impair access to credit by those members of the population who require short term credit provided by the applicant's members.'

The Financial Sector Conduct Authority's overall duties are broader in nature – the market conduct regulation should be conducive to a sound financial system.[558] Apart from the general support and collaboration directives set out by the Financial Sector Regulation Act, the National Credit Regulator has a basic duty set in section 13(a), underscored by section 3 of the National Credit Act, and a specialist duty in respect of a specific niche of the market – the market conduct regulation of the credit industry that serves the underprivileged and the historically displaced must be conducive to advancing a sustainable 'sound' credit-providing system.[559] Although this may not necessarily be viewed as a direct stability,[560] the National

[558] National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 305) 13: 'The importance of regulating market conduct to support prudential regulation. The crisis has proven that it is poor policy to force banks to lend to consumers who cannot afford to repay their loans. Inappropriate lending practices in the US and the resultant fall-out of the subprime mortgage crisis demonstrated the need to balance the socio-economic objectives of increased access to credit and homeownership with the imperative of financial stability. The regulation of market conduct must eliminate lending malpractices in order to both protect consumers and reduce systemic risk.'

[559] See par of ch 3.2.2 of ch 5 *supra.*

[560] See Van Niekerk & Van Heerden (n 555) 640 – the prudential part is concerned with systemic aspects: 'The traditional Twin Peaks model of regulation proposed by Taylor thus has only two 'peaks', that of a systemic risk regulator which is integrated in the central bank and that of a market conduct regulator. In this model the systemic risk regulator is accountable for prudential regulation of all potentially systemic financial institutions and oversight of systemically important payment and settlement systems and the maintenance of financial safety, soundness and solvency of the financial sector. The market conduct regulator is accountable for the conduct of business regulation across all sectors of financial services, like banking, insurance and securities and focuses on the behaviour of financial institutions toward customers in the market.' However, there is a difference between macro- and micro-prudential regulation as is found in the South African system (see National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 305) 12, 26 & 31). See also Goodhart *et al* (n 475) 164.

Credit Regulator can add to the discussion in the prudential context from the supply-side that serves the underprivileged consumer.[561]

The interaction in this context and in respect of section 76(1)(a), which requires regulators to 'generally assist and support each other in pursuing their objectives in terms of financial sector laws, the National Credit Act and the Financial Intelligence Centre Act', should be assessed. I have already alluded to the principle articulated by Goodhart *et al*, that policy trade-offs should be dealt with on ministerial level. Van Niekerk and Van Heerden note that the original Twin Peaks structure envisaged that the prudential regulator and the market conduct regulator revert to the authority of the Minister of Finance to resolve disputes.[562]

In South Africa, the position is more complicated as there are not only more regulators involved in the overall scheme, but these regulatory bodies are administratively overseen by different ministerial departments. Aspects that affect the welfare of a microfinance institution, are not aspects that the National Credit Regulator can address as easily as the Financial Sector Conduct Authority – aspects such as governance and training[563] will have to be brought under the fit and proper requirements of the National Credit Act[564] as there is no provision made for conduct standards pertaining to business elements similar to section 108 of the Financial Sector Regulation Act.

I am doubtful as to whether this extension was the intended outcome for section 13(a) and as such, I favour an interpretation that limits the authority of the National Credit Regulator to ensuring that the sustainability, competitiveness, *et cetera*, of the microfinance industry that serves the segments of the populace highlighted in section 13 is taken into account when the Reserve Bank, Prudential Authority and Financial Sector Conduct Authority exercise their authorities. This view is aimed at avoiding unintended or inadvertent application of rules and standards made without these particular credit providers in mind.

Secondly, the African Bank and unsecured lending scenario highlighted the importance of collaboration, even where there is not agreement, between market conduct and financial

[561] See also Jansen van Vuuren (n 552) 13, 17, 19 & 21 in respect of the role that microfinance plays in the lives of the poor. See further Pearson 'A credit lens' (n 484) 4. See also Devnomics *Literature Review on the Impact of the National Credit Act (NCA) has had on South Africa's Credit Market – Final report* June 2012 147 (an aspect also touched on by Pearson at 5): 'The role of the NCR in the financial stability of the system does get acknowledged in this work, which is a good recognition and it may provide for a better platform for engagement. Currently, we clearly see the concerns of the NCR around the growth of unsecured lending not really meeting minds with the SARB"s focus on systemic risk; closer alignment may benefit these debates.'

[562] Van Niekerk & Van Heerden (n 555) 639.

[563] See Jansen van Vuuren (n 552) 27, 30, 57 & 65. See also Van Niekerk & Van Heerden (n 555) 639.

[564] S 45(3) of the NCA.

stability regulators in South Africa.[565] This aspect leads me to the Financial Sector Contingency Forum:[566] the Financial Sector Conduct Authority is automatically part of this Forum, but not the National Credit Regulator.[567] The latter may be able to form part of the Forum upon allowance by the Chairperson.[568]

This particular forum is a problem-identifying and planning scheme created to aid the Financial Stability Oversight Council.[569] As the Regulator is already part of the Oversight Council, the Contingency Forum has an advisory and managing as opposed to a directive role,[570] and section 76 requires positive collaboration between regulators in respect of each other's mandates, the automatic exclusion should not detrimentally affect the Regulator when executing its mandate. It is also quite plausible that the Forum will be dependent on the information and statistics gathered by the National Credit Regulator on credit consumption

[565] Portfolio Committee on Trade and Industry *Consumer Credit Insurance abuses / interventions, Debt Relief, African Bank; Remote Gambling Private Members Bill [PMB3-15]* 13 May 2016. See also Portfolio Committee on Trade and Industry *Report of the Portfolio Committee on Trade and Industry on Budget Vote 36: Trade and Industry* 16 May 2012 par 5: 'A concern for the NCR is the sharp rise in unsecured lending and that the total value of unsecured loans by the third quarter of 2011 rose by 53 per cent to R 101.1 billion from the previous year. This represents 8 per cent of all lending in South Africa, and is up from 5.7 per cent in 2010. A further concern is that secured credit accounts dropped by one per cent, and unsecured accounts rose 31 per cent in the twelve months up to September 2011. Almost 75 per cent of unsecured credit consisted of loans of more than R 15 000, and more than 60 per cent of those loans went to people earning less than R 10 000 a month. … The rise in unsecured lending to finance consumption and its inflationary impact is a concern as it could jeopardise the recovery of the economy and be a threat to financial stability. The education of consumers about the dangers of unsecured lending is key to addressing this trend. Financial literacy is crucial so as to avoid the debt-trap and the role of the education authorities should not be underestimated in this regard. Access to credit remains targeted to the well-resourced and the high cost associated with loans for higher risk groups means that the historically disadvantaged group are further marginalised. The continued advancement of the consumer credit market regulatory system and the promotion of access to credit through responsible credit granting are essential for the maintenance of financial stability. In this regard, the Committee held a further meeting on unsecured lending to determine the severity of the trend with the major stakeholders, namely the NCR, the Banking Association and the SA Reserve Bank. None of the stakeholders regarded the growth in unsecured lending as a threat to the stability of our banking system, nor considered it likely to create a "bubble". However, the NCR confirmed that the trend would be continuously monitored to ensure that this remained the case.'

[566] S 25(1) of the FSRA.

[567] See s 1 read with s 25(3) of the FSRA.

[568] S 25(3)(c) or (d) of the FSRA.

[569] S 25(2) of the FSRA: '(2) The primary objective of the Financial Sector Contingency Forum is to assist the Financial Stability Oversight Committee with — (a) the identification of potential risks that systemic events will occur; and (b) the co-ordination of appropriate plans, mechanisms and structures to mitigate those risks.' See also Van Niekerk & Van Heerden (n 555) 652: 'From the aforementioned it is clear that the FSOC will be the forum where the main decisions regarding the exercise of the SARB's financial stability mandate will be made and that the Governor will be acting largely in accordance with decisions taken by this Committee, which in turn will rely on information provided to it by the Financial Sector Contingency Forum, discussed below.'

[570] Van Niekerk & Van Heerden (n 555) 652: 'It thus appears that the FSCF will be the forum where the actual detection of risk that may impede or threaten financial stability and strategising upon how to address and contain or mitigate those risks will be undertaken. This information will then be fed through to the FSOC, which will take pivotal decisions that will eventually inform the SARB's actions relating to addressing the identified risks and promoting and maintaining financial stability.'

and extension – necessitating that the Regulator's data be accurate, reliable and usable.[571] Section 26 of the Financial Sector Regulation Act adds a further illustration in respect of the financial stability input from other regulators (including the National Credit Regulator) and highlights that the interdependency model in this regard would review the quality of regulatory performance – particularly as the regulators may rely on each other to meet their own objectives or inform their own opinion:[572]

> '26 Co-operation among Reserve Bank and financial sector regulators in relation to financial stability
>
> (1) The financial sector regulators must—
>
> (a) co-operate and collaborate with the Reserve Bank, and with each other, to maintain, protect and enhance financial stability;
>
> (b) provide such assistance and information to the Reserve Bank and the Financial Stability Oversight Committee to maintain or restore financial stability as the Reserve Bank or the Financial Stability Oversight Committee may reasonably request;
>
> (c) promptly report to the Reserve Bank any matter of which the financial sector regulator becomes aware that poses or may pose a risk to financial stability; and
>
> (d) gather information from, or about, financial institutions that concerns financial stability.
>
> (2) The Reserve Bank must, when exercising its powers in terms of this Chapter, take into account—
>
> (a) any views expressed and any information reported by the financial sector regulators; and
>
> (b) any recommendations of the Financial Stability Oversight Committee.'

The co-operation part is important and the formalisation of the collaboration efforts through the memoranda of agreement was raised on numerous occasions by the National Treasury during its responses to comments received on the drafts of the Financial Sector Regulation

[571] See Scott 'Accountability in the regulatory state' (n 9) 50 – the author includes information as a substantive component of interdependency. See also s 16(1) of the NCA: 'The National Credit Regulator is responsible to increase knowledge of the nature and dynamics of the consumer credit market and industry …'. This is done through various specific monitoring, review and research endeavours – see ss 16(1)(c)-(g). Although the information target for some of these activities is the Minister of Trade and Industry (see e.g. s 16(1)(g) & 18 of the NCA), it is plausible that the research conducted could be disseminated to other regulators or to other regulators via structured forums. See also the collaboration provisions of s 17 of the NCA (specifically s 17(3)(d): 'The National Credit Regulator must advise, or receive advice from, any regulatory authority') & ss 76(1)(d)(v) & 76(1)(e) of the FSRA *re* 'information sharing' and 'common or shared databases').

[572] See Scott 'Accountability in the regulatory state' (n 9) 50-52 & the comments on the different orientations when it comes to accountability in paras 3 & 6 of ch 4 *supra*.

Act.[573] Many of the comments related to the interaction between the Financial Sector Conduct Authority and the National Credit Regulator.[574] Sections 27 and 77 respectively relate to the memoranda of understanding in respect of collaboration in the context of financial stability and meeting the directives of section 76. In both sections, provision is made for a mandatory three year revision, and a copy of the memoranda or modified versions must be submitted to the ministers of Finance and Trade and Industry (or otherwise responsible for the National Credit Act).[575] The executive does not have to approve these arrangements, but have to be notified thereof. In addition, the Financial Sector Regulation Act, in section 77(6), requires that any memoranda or modification thereof in terms of that section be published – a provision that does not appear in respect of the financial stability memoranda. In addition, any delegation agreement must be included, or concluded, in the style of a memorandum of agreement.[576] It would be valuable to assess the status of the section 17(4) agreements mandated in terms of the National Credit Act in future. Such an assessment, viewed in light of the status of the memoranda as informed by Financial Sector Regulation Act would have to consider the provisions in sections 27(4) and 77(3) that determine that action taken in contravention of the memorandum is not automatically invalid

The last forum that the Financial Sector Conduct Authority and National Credit Regulator are part of, is the Financial System Council of Regulators.[577] This Council has to

> ‘facilitate co-operation and collaboration, and, where appropriate, consistency of action, between the institutions represented on the Financial System Council of Regulators by providing a forum for senior representatives of those institutions to discuss, and inform themselves about, matters of common interest’.[578]

The Act does not prescribe a specific theme other than ‘matters of common interest’, but the Council members widely represent finance, trade and industry, health, financial crimes, and competition.[579] The widely represented interest groups would make for thought-provoking informal peer-review on numerous aspects that affect the financial sector, although I would

[573] See e.g. National Treasury Financial *Sector Regulation Bill Comments received on the first draft bill published by National Treasury for comments in December 2013 (comment period from 13 December 2013 – 07 March 2014)* 2014 98 (this particular response also specified that ‘the MoUs that should also outline how they will comply with their duties and collaborate with each other, including on matters relating to making standards, licensing, inspections and investigations, and any regulatory and supervisory action’) & 147; National Treasury *Financial Sector Regulation Bill Comments received on the second draft bill published by National Treasury for comments on 11 December 2014 (comment period from 11 December 2014 – 02 March 2015)* 2015 134–135.

[574] *Ibid*.

[575] Ss 27(3) & 77(5) of the FSRA.

[576] S 77(2) of the FSRA.

[577] Ss 79(1) & (3) of the FSRA.

[578] S 79(2) of the FSRA.

[579] S 79(3) of the FSRA.

have preferred to see some similar representatives as was found on the National Credit Regulator's Board here – specifically a representative of the ministry responsible for housing matters. The Council is also the first point of departure for research and problem-solving groups.[580]

5.4. Regulatees

The regulated industry also has a role to play in respect of a regulator's answerability. Bovens distinguishes between measures in respect of which consequences ensure and those in respect of which the process ends after the regulator gave an account of its actions or the oversight body responded to the regulator's representations:

> 'In this article, I will not define the concept in such a broad, evaluative sense, but in a much more narrow, sociological sense. 'Accountability' is not just another political catchword; it also refers to concrete practices of account giving. The most concise description of accountability would be: 'the obligation to explain and justify conduct'. This implies a relationship between an actor, the accountor, and a forum, the accountholder or accountee. I will therefore stay close to its etymological and historical roots and define accountability as a specific social relation. Accountability is *a relationship between an actor and a forum, in which the actor has an obligation to explain and to justify his or her conduct, the forum can pose questions and pass judgement, and the actor may face consequences*.'[581]

The South African regime does not have an institution similar to the Australian Office of Best Practice Regulation, or the United Kingdom's National Audit Office which also deals with regulatory audits.[582] The Financial Sector Regulation Act refers to a type of regulatory impact statement. At first glance, this is reminiscent of public participation schemes but section 98, for example, adds a number of features to the ordinary process of publication and invitation of comments.[583] A draft version regulatory instrument by the Financial Sector Conduct Authority[584] under part 1 of Chapter 7 has to be published, together with an invitation to the public and a copied version sent to other regulators, for comment.[585] The draft must be accompanied by an explanatory document or documents setting out the necessity and the

[580] S 81 of the FSRA.

[581] Bovens (n 1) 450. Original emphasis.

[582] See par 6.2.3 of ch 4 *supra*.

[583] See Hoexter (n 35) 84-86.

[584] This part does not relate solely to the FSCA, but as this regulator is the subject of the thesis, I discuss this within the context of the FSCA.

[585] S 98(1)(a)(i) & (iv) read with s 98(3) of the FSRA.

proposed function of the instrument, and the anticipated impact thereof.[586] Parliament must also be informed of the developments and provided with an opportunity to debate the issue.[587]

After the necessary steps have been taken, all input must be considered prior to publishing the final version that ultimately becomes effective upon publication.[588] The maker is then required in terms of section 104 to issue a report on the consultation activities undertaken, which must include a summary of the aspects brought to its attention during the process and its responses thereto. Section 100 allows for the consultation process and times to be adjusted under exceptional circumstances, but require that these must be justified. First, when the draft is first published for a shorter submission-seeking period together with the explanation of the requirement for, and anticipated function of, the instrument, then the reasons for deviating from the set procedures must be given; and second, in terms of section 104(3), the consultation outcomes in a report similar to the report required under ordinary circumstances, must again set out the reasons why a deviation was necessary.[589] After the instrument comes into effect, section 100(3) determines that the maker has a month to provide Parliament with a consultation report and other regulators with a copy of the instrument. This is over and above the stipulation in section 103(2) that the section 100(1)(a) documents must nevertheless be provided to Parliament for the shorter period determined in the first-mentioned section and irrespective of whether Parliament is in session or not. The Act does not require that the maker of the instrument provide viable alternatives to making the instrument, or the contents thereof, and justify its choice.[590] It also does not require a cost-benefit analysis over and above the qualitative requirement, and expected functionality and effect of the instrument.

Section 96 is not per se an accountability mechanism when one considers Bovens's approach to answerability in the work quoted above, but in the South African context it amounts to conduct by the regulator that enables access to three specific 'forums',[591] one which is not ordinarily available as a matter of course.[592] The publication and consultation process is the

[586] S 98(1)(a)(ii) & 98(3) of the FSRA.
[587] S 103 of the FSRA.
[588] S 102 of the FSRA.
[589] See ss 101(1) & 104(3) of the FSRA – these circumstances relate to urgency, adversity regarding consumers or the financial system, or 'defeat [of] the object of the regulatory instrument'.
[590] See par 5.2.3 of ch 4 *supra*.
[591] See Bovens (n 1) 450.
[592] This ties in with Bovens' view (at least in the particular article that I refer to) (n 1) 450 that '[s]ome dimensions, such as transparency, are instrumental for accountability, but not constitutive of accountability; others, such as responsiveness, are more evaluative instead of analytical dimensions. Accountability in this very broad sense is basically an evaluative, not an analytical, concept. It is used to qualify positively a state of affairs or the performance of an actor.'

formalisation of conduct that involves regulators, parliament, and regulatees (and through regulatees, the courts via administrative justice provisions).

Bovens highlights that aspects such as transparency and control are features of accountability, but not accountability per se.[593] Section 96 is the transparency measure for rule-making, but without the specific process and outcomes related thereto, one cannot assess whether a regulator is transparent when making regulatory instruments and has been effective in doing so.[594]

The first answerability forum to which the section 96 process grants access if not properly executed by the Financial Sector Conduct Authority, is the Financial System Council of Regulators.[595] As this particular Council is established as a knowledge- and information exchange together with a discussion forum, and in light of the earlier discussion on the influence, albeit in some instances informal pressure, of the regulators on this Council on each other, I am of the opinion that a regulator can be held to account for making a particular regulatory instrument. This view is further supported by the section 76 provisions, although the lack of formal statutory sanctions for non-compliance with memoranda of understanding would resort to informal dispute resolution or pressures to solve the matter.

Nevertheless, improper behaviour in this regard would probably come to the attention of the executive via the ministerial departmental members on the Council, if the matter cannot be resolved at Council level. This could also become a section 85 Inter-Ministerial Council

[593] Bovens (n 1) 467. See also Bovens (n 1) 449 & 450: ‘In contemporary political and scholarly discourse “accountability” often serves as a conceptual umbrella that covers various other distinct concepts, such as transparency, equity, democracy, efficiency, responsiveness, responsibility and integrity … Koppell distinguishes no less than five different dimensions of accountability—transparency, liability, controllability, responsibility, responsiveness—that are each icons and umbrella concepts themselves. Such very broad conceptualisations of the concept make it very difficult to establish empirically whether an official or organisation is subject to accountability, because each of the various elements needs extensive operationalisation itself and because the various elements cannot be measured along the same scale.’ See also Bovens (n 1) 453-454: ‘Similarly, there is a fine line between accountability and control. Some would equate accountability with controllability. Lupia, for example, adopts a control definition of accountability: “An agent is accountable to a principal if the principal can exercise control over the agent”. Accountability mechanisms are indeed important ways of controlling the conduct of public organisations. However, “control”, used in the Anglo-Saxon sense, is broader than accountability and can include both ex ante and ex post mechanisms of directing behaviour. Control means “having power over” and it can involve very proactive means of directing conduct, for example through straight orders, directives, financial incentives or laws and regulations. But these mechanisms are not mechanisms of accountability per se, because they do not in themselves operate through procedures in which actors are to explain and justify their conduct to forums. Accountability is a form of control, but not all forms of control are accountability mechanisms.’

[594] See e.g. par 4 of ch 4 *supra*.

[595] It is also plausible that similar considerations would apply to the Financial Stability Oversight Council, if the measures affect financial stability.

matter – especially if the recommendation in respect of the authority of ministers to deal with conflicting standards is accepted.[596]

The second answerability forum is the judiciary and I discuss the court-based process in the next part of this chapter. The third forum is the legislature, incorporated via the provisions of section 103 and discussed at the beginning of this chapter.[597]

5.5. Analysis of the role of regulators, regulatory forums and regulatees as accountability mechanisms in South Africa

In earlier chapters, I discussed the value of properly delineated and clearly expressible mandates within the organised scheme of a multiple-regulator arena.[598] This accords with the need for unambiguous allocation of responsibility within the accountability framework.[599] In the Twin Peaks structure, different regulators are allocated the tasks of market stability, prudential and market conduct regulation.[600] However, the differentiation necessitates management of the interaction between the various regulators in order to ensure that the same challenges brought about by disparate and unaligned sectoral regulation does not manifest.[601]

Although the Financial Sector Regulation Act[602] provides for independent review of collaboration strategies in section 86, the regulators must nevertheless realise that the duty to comply sufficiently with the provisions of section 76 rests on them:

[596] See par 4.5 *supra.*

[597] See also National Treasury Financial Sector Regulation Bill National Treasury's responses to issues raised during the public consultation period on the tabled draft FSR Bill [B 34-2015] (comment period: November 2015 – May 2016) 21 July 2016 4: 'Concerns were raised about the process of making standards, and the status of such instruments as subordinate legislation. The intention of such instruments is that they are subordinate legislation that the regulators are empowered to issue within a defined framework. Proposed amendments have been made to chapter 7 to refine the role of Parliament in the making of such instruments.'

[598] See par 4.7 of ch 3; par 4 ch 4 *supra.* See also Godwin *et al* (n 480) 678.

[599] Pan (n 506) 804, 808 & 809.

[600] See par 3.4 of ch 2 *supra;* Pan (n 506) 820-821 (this author is cognisant of the fact that the Twin Peaks model is based on the different regulatory tactics employed by prudential as opposed to market conduct regulators (see 820-821). The prudential regulators would follow a 'work with the financial institution and find a solution' strategem whereas the market conduct regulator would follow a 'stronger enforcement approach' which is more 'adversarial' (see 820).). See also Taylor 'Regulatory reform in the U.K.' 2013-2014 *North Carolina Banking Institute* 227 228-229.

[601] Pan (n 506) 817-819.

[602] It must be kept in mind that South Africa does not have a traditional Twin Peaks structure and the coordination and collaboration includes a variety of regulators – for discussions on the South African version see e.g. Schmulow (n 431); Godwin *et al* (n 480); Pearson 'A credit lens' (n 484); Godwin 'Australia's Trek towards Twin Peaks – Comparisons with South Africa' 2018 *Law and Financial Markets Review* 1.

> ‘The regulator should be able to demonstrate the gateways or channels through which required information can be made available and that those channels work when needed.’[603]

The National Treasury placed a great deal of emphasis on co-ordination and collaboration between the various regulators in its responses to submissions on the different draft versions of the Financial Sector Regulation Bill.[604] The provisions in the Financial Sector Regulation Act relate to substantive matters to be dealt with via memoranda of agreement, but there is no clarity in respect of non-compliance in this regard. The only reference to possible non-compliance with the provisions of the sections or the memoranda is to state that it does not nullify regulatory acts. In one of National Treasury’s response documents, it was noted that the protocol for disagreements must be set out in the memoranda, but there is no statutory equivalent of this prescription.[605] There is a need to conduct further research to establish not only prudent and internationally accepted clauses found in these types of agreements, but also the status and effect of these agreements.[606] Generally regarded as ‘informal’ and ‘unenforceable’, Jodi Freeman and Jim Rossi nevertheless note that memoranda of agreement extract responsibility for certain obligations in respect of which regulators can be held to.[607] In this regard, a couple of concerns have been noted by various authors when it comes to cross-jurisdictional tasks and formalising or institutionalising collaborative efforts and I discuss these hereafter.

Coordination can be challenging but it is a very important aspect that has distinct advantages if effected properly – these advantages include drawing on specialist knowledge and skills as well as ‘unique strengths and perspectives’.[608] A particular insightful addition brought forward by Freeman and Rossi is the potential of proper agency interaction to retain the positive aspects brought about by multiple regulators in one regulatory arena (disparity and duplication) whilst reducing the adversarial effects on efficacy and accountability.[609] A proper understanding by South African authorities of the benefits and challenges brought

[603] International Organization of Securities Commissions (hereinafter ‘IOSCO’) *Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation* May 2017 81.

[604] See par 5.4 *supra.*

[605] See National Treasury *Financial Sector Regulation Bill (comment period from 11 December 2014 – 02 March 2015)* (n 573) 134–135.

[606] Brief reference can be made to Freeman & Rossi (n 506) 1161-1162: These two authors note that memoranda of agreement can, generally speaking, neither be enforced nor be subjected to judicial review and can be used to set outcomes, tasks, the boundaries for jurisdictional overlaps, regulate the processes for generating data or exchanging information, consent to joint tasks and to coordinate activities in substantive matters or policy.

[607] Freeman & Rossi (n 506) 1161 & 1188.

[608] *Idem* at 1135; Pan (n 506) 799.

[609] Freeman & Rossi (n 506) 1137. See also Metzger ‘Through the looking glass to a shared reflection: The evolving relationship between administrative law and financial regulation’ 2015 *Law and Contemporary Problems* 129 138.

about by a system that necessitates cooperation should assist with ensuring that benefits are reaped and challenges addressed.[610]

Another important distinction made by Freeman and Rossi is their differentiation and categorisation of the different forms of jurisdictional interaction between regulators.[611] In respect of the National Credit Regulator and the Financial Sector Conduct Authority, the suitable classifications would probably be '*overlapping agency functions*', '*related jurisdictional assignments*' and '*interacting jurisdictional assignments*'.[612] The former refers to the situation where multiple agencies have jurisdiction over the same matter or function[613] – in the South African milieu, aspects such as disclosure, advertising and consumer rights that are regulated by the National Credit Regulator may fall under the definition of a financial service in terms of section 3 of the Financial Sector Regulation Act.

Although the National Credit Act is not a financial sector law for purposes of the Financial Sector Regulation Act,[614] the explicit inclusion of 'a service related to the provision of credit' under the definition of a 'financial service' whilst credit is only excluded as a *financial product* for purposes of the Financial Sector Conduct Authority's jurisdiction in chapter 4 and section 106 of the Financial Sector Regulation Act, alludes to the jurisdiction of the Conduct Authority in some credit-related matters. Insofar as relatedness of tasks is concerned, this refers to scenarios where the duties of the regulators differ but are nevertheless 'closely related'[615] – in the South African situation, the Credit Regulator's market conduct regulatory jurisdiction over credit and the incorporation of the Conduct Authority into the financial sector for purposes of regulating conduct matters for financial products and services. The latter aspect refers to differing but intersecting matters where coordination and cooperation are specifically required by the legislature[616] – section 76 of the Financial Sector Regulation Act is but one distinct example in this regard.

[610] See the arguments forward by Freeman & Rossi (n 506) 1134-1138 & 1209-1211 as to why their research is important.

[611] Freeman & Rossi (n 506) 1145.

[612] *Ibid.* Original emphasis. I do not think that the last scenario of '*delegations requiring concurrence*' (see Freeman & Rossi (n 506) 1145) is relevant in the NCR-FSCA context as neither regulator has a so-called 'veto right' over the other (the NCR and the Information Regulator established in terms of the Protection of Personal Information Act (Act 4 of 2013) may have a similar practical outcome – see Boraine & Van Wyk (n 217) 'Supervisory frameworks: South Africa' & Supervisory frameworks: Comparison and Evaluation'). See also par 3.5 of ch 5; par 5.2 of this ch *supra*.

[613] Freeman & Rossi (n 506) 1145.

[614] See s 1 read with sch 1 of the FSRA.

[615] Freeman & Rossi (n 506) 1145. See the further explanation at 1146 – where '*related jurisdictional assignments*' are concerned, 'Congress gives each of several agencies authority to regulate a different product or activity, but for the same purpose'.

[616] Freeman & Rossi (n 506) 1145. The purpose, as at 1146, here is to create 'situational interdependence among agencies that have different and potentially incompatible primary missions'.

Collaboration and cooperation are challenges in all these scenarios[617] and the South African regulators would do well to take note of these pitfalls. Likewise, where the difficulties arise from legislative provisions, as I will indicate shortly, the legislature could benefit from the experiences of extraterritorial jurisdictions such as the United States, in Freeman and Rossi's case.

In the scenario where the same matter is dealt with by separate institutions – for example credit advertising or debt collection in respect of a credit agreement as South African examples – Freeman and Rossi warn that the regulatory approaches and means, such as 'policymaking' and 'enforcement systems', used can be developed independently by each regulator where harmonisation or collaboration could have been sufficient and more efficient.[618] They note that the qualities that make each agency unique, such as 'expertise, resources, and remedial tools', can result in so-called 'redundancy' whilst not being 'literally duplicative'.[619] In this case, the institutions are responsible for clarifying their respective roles and

> '[t]he challenge, when faced with such delegations, is to enable the agencies to bring their relative competencies to bear while ensuring they do not pursue conflicting or incompatible policies, which would undermine the larger shared mission under the relevant statutes. Effective administration thus requires the agencies to coordinate to some extent on matters of both process and substance – for example, deciding who will take the lead on what and how aggressive to be against which potential violations of law using which standards of proof.'[620]

Matters that are distinct but regulated with the same outcome in mind – such as consumer safety and in adherence to proper market conduct norms – may also be wrought by disharmonised policies, supervisory variations and inefficiencies when it comes to resource expenditure.[621]

The above becomes particularly important when one considers the role of oversight structures in this regard. I have already discussed the interagency oversight role but the proficiency and integrity with which the Credit Regulator and Conduct Authority cooperate and collaborate[622] is definitely something that has to be taken into account when the performances, or failures, of these institutions are evaluated, or addressed.

[617] Freeman & Rossi (n 506) 1146-1149.
[618] *Idem* at 1146.
[619] *Ibid*.
[620] *Ibid*.
[621] *Idem* at 1146-1147.
[622] See Ting 'A strategic theory of bureaucratic redundancy' 2003 *American Journal of Political Science* 274 286 & 287 in respect of the optimal circumstances under which redundancy would render positive outcomes.

Discord amongst regulators should ideally not be referred to political office holders as it may 'politicize the regulatory process'.[623] Pan argues against so-called 'contact committees' where political and other regulators come together but which has no stable place in the overall structure.[624] In this sense, he argues for formal coordination structures such as 'permanent coordinating bod[ies]' that enjoy 'independent legal authority' and against systems that found the enforceability of cooperative measures on agreements entered into between agencies.[625]

In addition to the above, there is also the reality that collaborative arrangements can be effected informally, and whilst this is not necessarily to the detriment of the system or the regulators, there is some difficulty involved in ascertaining these agreements and evaluating same from an answerability point of view.[626] It is further possible that informal and formal arrangements can be supportive of one another.[627]

The intense collaboration necessary between the Financial Sector Conduct Authority and National Credit Regulator in respect of credit, its regulation and enforcement may even necessitate that a lead regulator be decided on insofar as credit is concerned.[628] This was proposed, albeit in the context of enforcement and independence, by Rachel Barkow.[629] Barkow specifically noted that uncertainty in this regard can lead to undesirable neglect of action – a type of regulatory lethargy where a particular duty is neglected under the assumption that the other regulator will fulfil it.[630] This matter brings about fundamental

[623] Pan (n 506) 821.

[624] *Idem* at 861: 'Whether Canada chooses the single regulator model or the twin peaks model, it must ensure that there is a legal mechanism that will promote coordination of regulatory policy, sharing of real-time information , and cooperation on enforcement matters. To this end, Canada should avoid contact committees, such as the President's Working Group in the United States or the board of financial authorities in France, which consists of representatives from the finance ministry, central bank, and lead regulators, but has no independent legal authority.'

[625] *Ibid.* Pan argues at 861 that 'Canada should also avoid relying on interagency agreements to provide the legal framework for the sharing of information or the coordination of rulemaking'.

[626] Freeman & Rossi (n 506) 1156-1157.

[627] *Idem* at 1156.

[628] There is no clear obligation in this regard – see the initial proposal in 2011 in National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 305) 26: 'Principle 7: The legislative framework should allow for a lead regulator for every financial institution that is regulated by a multiple set of financial regulators. All regulators involved must strive to coordinate their supervisory activities. Financial institutions are generally regulated or supervised by more than one regulator, often falling under different Ministries. Regulators should be obliged to coordinate their activities, formalised through legislation or Memoranda of Understanding. The lead regulator must ensure that effective consultation takes place between regulators, and should not inadvertently undermine other regulators.'

[629] Barkow 'Insulating agencies: Avoiding capture through institutional design' 2010 *Texas Law Review* 15 56.

[630] *Ibid.* See also the work of Ting (n 622) where the author deals with bureaucratic redundancy theory and creates a model that accounts for strategy in the context of game theory, specifically delegation games. One specific aspect that Ting deals with is the 'collective action problem, where individual agents free ride of the efforts of others' – see 275.

considerations in the context of delegation and regulatory 'drift' or 'shirking'.[631] Multiple regulators 'backstop' each other, as noted by Renee Jones,[632] and this would be undermined by the aforementioned adverse behaviours. Another solution would be to create a 'joint working group' with the mandate to ascertain whether there are areas of dual jurisdiction, propose solutions to address jurisdictional issues, and interchange information.[633]

The forums introduced by the Financial Sector Regulation Act add to the answerability scheme in respect of substantive performance.[634] Although each participant is an expert in its own way, the participants on the forums have contextual knowledge about the financial sector that may be lacking in other accountability forums, such as parliamentary committees that have to oversee a number of diverse entities.[635] The above is reminiscent of Scott's distinction between answerability mechanisms that evaluate performance and those that evaluate procedural aspects.[636] It is the first scheme that collectively meets, albeit indirectly, the following requirements set by Goodhart *et al*:

> 'Regulators should be accountable for the *way they set their objectives*, for *how they go about achieving these objectives* through *specific aspects* of regulation, and for the *efficiency* of their operation. Regulation is not a free good, and accountability for the use of resources is necessary. To what extent, and to whom, should regulatory agencies be required to *explain and to justify their policies* and be made accountable for their decisions?'[637]

If the regulatory forum is the place where interdependency requires that regulators perform in a manner that does not just satisfy the procedural, policy and political desires of the executive and legislative branches, but also bring about positive, intended and relevant outcomes in respect of its individual mandate – an aspect that, due to the interrelation of the different objectives and regulators' mandates, has a direct effect on the performance of other regulators

[631] See par 3.3 of ch 2 *supra*.

[632] Jones 'Back to basics: Why financial regulatory overhaul is overrated' 2009-2010 *Entrepreneurial Business Law Journal* 391 401. See also Freeman & Rossi (n 506) 1138.

[633] Pan (n 506) 836.

[634] See Freeman & Rossi (n 506) 1188: 'Coordination instruments can control shirking (loosely defined to mean inaction) … by facilitating interagency monitoring as a supplement to direct congressional oversight. …the more robust consultation provisions ... allow agencies to 'lobby' each other to make sure important statutory goals are not ignored … Likewise, interagency agreements can serve as proxy monitoring mechanisms for Congress.'

[635] See the Portfolio Committee on Trade and Industry *Budgetary Review and Recommendation Report of the Portfolio Committee on Trade and Industry* 18 October 2017; Portfolio Committee on Trade and Industry *Report of the Portfolio Committee on Trade and Industry on Budget Vote 34: Trade and Industry* 19 April 2016. See also paras 4.2.3 & 4.5 *supra*.

[636] Scott 'Evaluating the performance and accountability of regulators' (n 332) 354: 'Conceiving of accountability as embracing both technical and political requirements draws us towards a parallel world in which the efficiency and effectiveness of regulation is a core part of oversight concerns, alongside the issue of democratic concern with procedures.' See also par 2.2 of ch 4 *supra*.

[637] Goodhart *et al* (n 475) 68. Own emphasis.

and will, from a self-sustainability perspective invite an evaluation of the performance of the regulator upon which the other regulator is reliant – the question is whether the rationale for political designations in the forums have changed when compared with ordinary executive-legislative constitutional roles.

Matters of common interest, discussed at these forums,[638] are affected by the roles and actions of the individual regulators whereas political interests, being good governance and public spending, that are affected by these regulators,[639] necessitate different approaches and focuses when holding regulators to account. Godwin *et al* question the effect on the independency of the regulators as a result of analysing the political presences in forums such as the Financial Stability Oversight Council and the Financial System Council of Regulators.[640] I deal with this aspect in more detail when I compare the different components of the South African accountability scheme for consumer credit regulators.

6. ADJUDICATION STRUCTURES

6.1. Introduction

In chapter four I dealt with the features of a tribunal system that need to be taken into account when evaluating the value added to an accountability scheme.[641] In short, these features revolved around nine aspects.[642] First, the independence of the tribunal scheme; second, the persons to whom *locus standi* is afforded; third, the jurisdictional authority of the tribunal to deal with certain matters; fourth, the foundations for approaching the tribunal; fifth, the jurisdictional authority to grant forms of relief; sixth, the proficiency of the tribunal members; seventh, the differentiated approach to resolve the matter, if any, of the Tribunal as opposed to the Regulator; eight, the resources expended to approach the Tribunal and ninth, the ability

[638] See par 5.3 *supra*.

[639] See par 2 *supra*.

[640] Godwin *et al* (n 480) 681-683 & 688-693. See also Godwin *et al* (n 480) 699: 'In other respects, however, the experience reveals the need to accommodate South African characteristics and challenges that are unique to South Africa. Two areas are particularly noteworthy in this regard. First, the proposed regulatory framework attempts to achieve a balance between the need to ensure operational independence on the part of the regulators and the need to recognise the role and involvement of the executive government. Although the executive government does not have any explicit powers to veto a decision of a regulator, determine a 'lead regulator' or direct that government policy be followed, the executive government has structural involvement with the regulators through its representation on committees of the FSCA, and also its extensive role in the key coordinating body between the regulators, namely the Financial System Council of Regulators. The extent to which government is embedded within the structure of the regulatory framework raises questions about the operational independence of the regulators and whether in practice they will be able fully to perform their functions 'without fear, favour or prejudice', as the legislation requires.'

[641] See par 4.3 of ch 4 *supra*.

[642] *Ibid*.

to add to a scheme of answerability for those affected.[643] Under this heading, I have chosen to deal with the principles of administrative justice comprehensively, and even though these principles also have a bearing on the courts[644] and Public Protector,[645] I will not be duplicating the discussion elsewhere.

I further dealt with the features of a court system that need to be taken into account when evaluating the value added to an accountability scheme.[646] In short, these features revolved around ten aspects.[647] First, the persons to whom *locus standi* is afforded; second, the jurisdictional authority of the court to deal with certain matters; third, the nature of matters that the judiciary can deal with; fourth, the foundations for approaching the judiciary; fifth, the jurisdictional authority to grant forms of relief; sixth, the proficiency of the judiciary's presiding officers; seventh, the ability to add to a scheme of answerability for those affected; eighth, limitations on civil liability pursuant to regulatory actions; ninth, the effect of judicial intervention on the future conduct of the Regulator and tenth, prescription periods to prevent exploitation of court referral.[648]

The regulatory scheme introduced by the Financial Sector Regulation Act was discussed in chapter five and I dealt with the analysis of the interaction between the National Credit Regulator and the Financial Sector Conduct Authority as well as the Credit Regulator and the other organisational bodies created by the Act in the preceding paragraphs. In this part, I will only deal with the constitutional office of the Public Protector. Although the Public Protector is often referred to as a type of 'ombudsman', its commendations has persuasive value.[649] I therefore deal with this office as a regulatory authority as it has a very real authoritative power over those subjected to its jurisdiction.[650]

I will also not be dealing with ordinary private law matters such as delictual and contractual claims adjudicated by the courts and in respect of which the Regulator is a party. The reason for this is that it relies mostly on private law principles – for example, where the Regulator is party to a civil contract for services rendered, it is primarily viewed as a contracting party

[643] *Ibid*.
[644] See e.g. s 148(2) of the NCA; s 235 of the FSRA.
[645] See *Minister of Home Affairs and Another v Public Protector and Another* 2017 (2) SA 597 (GP) par 47; *Public Protector v Mail & Guardian Ltd and Others* 2011 (4) SA 420 (SCA) par 21.
[646] See par 4.2 of ch 4 *supra*.
[647] *Ibid*.
[648] *Ibid*.
[649] See Woolman & Bishop (n 39) 24A-1 & fn 3.
[650] See par 6.4 *infra*.

subject to the laws of contract irrespective of its nature as Regulator.[651] In a similar fashion, the South African principles of delict prescribe the approach to hold a Regulator liable in delict and although the courts have, in some respects, expanded the law to provide for a 'norm of accountability' when it comes to state action,[652] a useful discussion would necessitate an in-depth evaluation of the law of delict and consequential developments in this regard. The aspects that I discuss in this thesis are already broad and I will focus on regulator-specific measures. This does not purport to state that delictual and contractual aspects of the law do not have a place within the answerability scheme.[653] As an enterprise with contractual and labour responsibilities, the judiciary may be approached in respect of ordinary compliance in this regard.

In an earlier paragraph I already dealt with the criminal sanctions that may lie against the Chief Executive Officer of the National Credit Regulator or the Commissioner of the Financial Sector Conduct Authority as per section 86 of the Public Finance Management Act. I will also not deal with the criminal sanctions that may lie against employees of the Regulators.

6.2. The Public Protector

Insofar as the Public Protector is concerned,[654] this office is established by virtue of section 181 of the Constitution as a body responsible for oversight over the public administration.[655] It has to inspect, and give account of such an inspection, 'any' government behaviour that could be inappropriate or detrimental.[656] Section 182(1)(c) makes this a 'strong' accountability measure as the Protector is empowered to implement ameliorating measures[657] and the judiciary has confirmed that the proposed remedies are binding on the involved

[651] For some examples in this regard, see National Credit Regulator *Three year annual performance plan 2016/17 – 2018/19 Five year strategy plan 2016/17 – 2020/2021* 11.

[652] See Price 'State liability and accountability' 2015 *Acta Juridica* 313.

[653] See Price (n 652) 316-317: 'These "public-law wrongs" – crimes, breaches of administrative law, and breaches of the Constitution – must be distinguished from 'private-law wrongs' such as delicts and breaches of contract. The differences between delicts, breaches of contract, and crimes is well known. More importantly, our courts have repeatedly drawn an explicit distinction between breaches of duty based on constitutional rights and delicts, holding that the former do not necessarily constitute the latter. The same is true of breaches of administrative law: such public-law wrongs do not necessarily constitute delicts … Nonetheless, the state is also bound by the private or civil law of delict.'

[654] See Bishop & Woolman 'Public Protector' in Woolman & Bishop *Constitutional Law of South Africa* (Revision Service 6 2014); Hoexter (n 35) 88-92.

[655] S 182(1)(a) & (b) of the Constitution, 1996. See also Madonsela 'The role of the Public Protector in protecting human rights and deepening democracy' 2012 *Stellenbosch Law Review* 4 6-7.

[656] *Ibid*.

[657] S 182(1)(c) of the Constitution, 1996 – 'take appropriate remedial action'. See Venter 'The executive, the public protector and the legislature: "The lion, the witch and the wardrobe"?' 2017 *Journal for the South African Law* 176 177 where the author noted that the legislation did not stipulate whether these proposed actions were binding and that the judiciary had to clarify the position.

parties.[658] The scope of this authority is cast in very wide terms, limited only by the notion of suitability – the prescribed corrective conduct has to be 'appropriate' according to section 182(1)(c).[659] Many of these notions are reiterated in the Public Protector Act.[660] I hold the view that the office of the Public Protector is a valuable and flexible cog in the accountability wheel, particularly as it can spin both ways, to take the metaphor further. As the Protector is authorised to investigate every form of conduct related to government, save judgments and other judicial pronouncements,[661] it can inspect the conduct of the National Credit Regulator as well as conduct that affects the National Credit Regulator in turn.[662] It is therefore a medium that can both support the independence of the Regulator and hold it accountable for its actions or omissions.

The Public Protector is enabled by the Public Protector Act to investigate a myriad of matters concerning mismanagement and misconduct by state officials and includes inappropriate behaviour by persons 'performing a public function'.[663] The courts in *Minister of Home Affairs and Another v Public Protector and Another*[664] and *Public Protector v Mail & Guardian Ltd and Others*[665] have referred to the statutorily endorsed ability of the Protector to decide on the best method and course for investigating each matter.[666] In *Minister of Home Affairs*, Prinsloo J referred and applied the contention of Nugent JA that the investigation undertaken by the Protector has to be 'conducted with an open and enquiring mind'.[667]

However, the value of outcomes for answerability purposes is dependent on the ability of the office to determine remedial action that is suitable to hold an entity to account and ameliorate

[658] *Minister of Home Affairs v Public Protector* (n 645) paras 24-30. See also *Economic Freedom Fighters v Speaker, National Assembly and Others* [2016] ZACC 11; Venter (n 657). Venter does note at 183 that the conclusions of the Protector 'might not always be binding' and that 'advice' can also be 'appropriate remedial action'.

[659] See also *Minister of Home Affairs v Public Protector* (n 644) par 57 in respect of the broad investigative authority that the Public Protector enjoys. There are, however, limitations on the remedial actions proposed – see the opinion of Pierre Vos in a media report on the Public Protector's contention in a matter that the Constitution ought to be modified – Smith 'Why it is not for Public Protector to make economic policy' Fin24 19 June 2017.

[660] Act 23 of 1994.

[661] S 182(3) of the Constitution, 1996.

[662] See the analogous investigation in Public Protector *There are no heroes – Report of the Public Protector on an investigation into alleged abuse of power by the Director-General of the Department of Trade and Industry towards the former Commissioner of the National Consumer Commission* Report No: 1 of 2013/14 April 2013. See also par 6.3.1 *infra* in respect of the evaluative value of comparisons with the National Consumer Commission.

[663] S 6(4) & 6(5).

[664] (n 645) paras 23 & 52.

[665] (n 645) par 20. However, the courts will scrutinise the propriety of the investigation – in this particular case against the Mail & Guardian and Others, the court found at 141 that 'the investigation was so scant as not to be an investigation at all'.

[666] See also s 7(1)(b)(i) of the Public Protector Act.

[667] *Minister of Home Affairs v Public Protector* (n 645) par 49. In doing so, the court in *Minister of Home Affairs* evaluated the 'quality of the reports and other aspects of the investigation' – see par 49.

the situation – especially for future references.[668] The matter of the investigation into the interactions between the National Consumer Commission and the Department of Trade and Industry, which culminated in the *There are no heroes* report, is an example.[669]

In this matter, the Commissioner of the National Consumer Commission lodged a complaint with the Public Protector against the Director-General of the Department of Trade and Industry based on abusive behaviour that curtailed and interrupted the independent workings of the National Consumer Commission.[670] There were also allegations of persecution for not adhering to the demands of the Director.[671] The core issues between the parties were the undue involvement of the Department of Trade and Industry in the spheres of human, financial and operational resources, multiple inspections into the Commission and the lack of adequate support from the Department.[672] Apart from the complaints brought by the Commissioner, the Director also submitted counter-complaints, and countered the original complaints based on non-compliance with financial standards, procurement procedures and staff management.[673] The findings that there was indeed inadequate financial management systems – but that this was to a large extent attributable to the delayed transfer of resources from the Department for purposes of obtaining the necessary systems; that the Auditor-General noted errors in the financial statements; and that these constituted mismanagement, are of particular interest for a reason that I will elaborate on shortly.[674]

In addition, the following sentiments could very well have influenced the future interactions between the institutions:

> 'The relationship between the DG [Director-General] (as accounting officer of DTI) and the Commissioner (as Accounting Authority of NCC) broke down largely because of improperly defined functions and powers. In the end, the broken down relationship was to the detriment of the NCC. The DTI admitted that it allowed the NCC to choose between creating its own systems and leaning on departmental support. But it would appear that as soon as the choice to go for [its] own systems, the attitude of the DTI hardened. The offer to choose reminds me of … Henry Ford's curious offer to the Americans when he said: '*Americans can have any car they want in any colour they want as long as its black.*' …The NCC wanted to walk independently whilst it was still learning to crawl, while the DTI wanted a full parental relationship. The reality is that the DTI has vast experience in the establishment of public entities and knew what was required to set up the

[668] See the discussion in par 8 *infra* in respect of the effect of answerability mechanisms on regulators.
[669] Public Protector (n 662).
[670] *Idem* at 23-25. See par 7.2.3 of ch 6 *supra* for more details on this particular investigation.
[671] Public Protector (n 662) 25.
[672] *Idem* at 47-51.
[673] *Idem* at 51-53.
[674] *Idem* at 51-52. In one instance, the Public Protector also referred to the early stages of the Commission's existence as a mitigating circumstance – see 52.

> NCC to ensure it became a well-functioning public entity. Unfortunately, in its efforts to assist the NCC with its establishment it took the role of a parent unwilling to allow a maturing child to stand on its own feet.'[675]

In light of the Protector's findings, she recommended that the roles and procedures must be explicated and that the National Consumer Commission must proceed with the steps underway to strengthen the financial accounting and procurement administration procedures.[676] The Protector further required implementation and progress plans for her recommendations and noted that the steps taken would be observed.[677]

Although the aforementioned challenges with the National Consumer Commission had been identified as early as 2013, some issues have seemly persisted and new financial issues originated. The review reports for 2014, 2015 and 2017 by the Portfolio Committee for Trade and Industry have consistently indicated issues with financial management at the National Consumer Commission – ranging from non-compliance with Treasury regulations, irregular expenditures, fruitless and wasteful expenditure to issues with proper financial statements.[678]

[675] Public Protector (n 662) 53-54.

[676] *Idem* at 54.

[677] *Idem* at 55.

[678] Portfolio Committee on Trade and Industry *Budgetary Review and Recommendation Report of the Portfolio Committee on Trade and Industry* 24 October 2014; Portfolio Committee on Trade and Industry *Budgetary Review and Recommendation Report of the Portfolio Committee on Trade and Industry* 20 October 2015; Portfolio Committee on Trade and Industry *Budgetary Review and Recommendation Report of the Portfolio Committee on Trade and Industry* 18 October 2017. In all these aforementioned reports it was noted that the Commission received an 'unqualified audit with findings' from the Auditor-General. In Portfolio Committee on Trade and Industry *Budgetary Review and Recommendation Report of the Portfolio Committee on Trade and Industry* 18 October 2017, it was stated in paras 5.1.4 & 5.3.1: 'The NCC received an unqualified audit with findings. The Auditor-General highlighted the following: ● Two areas were identified that required interventions, namely (i) regular, complete and accurate financial statements and performance reports and (ii) review and monitoring of compliance. ● Six areas of concern, namely (i) oversight responsibility; (ii) policies and procedures; (iii) audit action plans; (iv) proper record keeping; (v) daily and monthly controls of financial records; and (vi) design and implementation of Information Technology (IT) controls. … Furthermore, the Auditor-General noted that the NCC had incurred irregular expenditure of over R7 million during the financial year due to proper supply chain regulations not being followed. The NCC reported that 76% of the irregular expenditure amounting to R5.4 million related to irregular expenditure incurred in the prior financial years, whereas, 24% amounting to R1.7 million related to irregular expenditure incurred in the 2016/17 financial year. … Key control measures and the need for intervention: The Committee noted with concern that a number of key control measures had been compromised. These control measures are critical for the NCC in terms of meeting good governance principles and to receive an unqualified audit with no findings. The Committee enquired to the measures being implemented to address these shortcomings with respect to the NCC's financial and performance management. The NCC acknowledged the challenges identified by the Auditor-General but informed the Committee that the audit action plan had been developed to address the shortcomings to improve its internal control systems. They informed the Committee that progress had been made in relation to the Auditor-General's findings with respect to the quality of financial information and supply chain management.'

6.3. The Tribunal

6.3.1. The National Consumer Tribunal

Sections 26 to 36 of the National Credit Act formulate the arrangements for the National Consumer Tribunal. The Tribunal is an adjudicative forum for consumer-registrant disputes,[679] with or without complaint-initiation to the National Credit Regulator,[680] regulator-registrant disputes[681] and regulator-registrant sanctioning.[682] Cora Hoexter explains in respect of 'administrative appeals':

> 'Like judicial review, administrative appeals allow for the reconsideration of administrative decisions by a higher authority. Unlike judicial review, such appeals are established specifically to challenge the merits of a particular decision. The person or body to whom the appeal is made will step into the shoes of the original decision-maker, as it were, and decide the matter anew. Judicial review, on the other hand, focuses on the way in which the decision was reached, and not on the justice or correctness of the decision itself. At least in theory, review tests the legality and not the merits of the decision. Another major distinction is that judicial review is an external safeguard against maladministration, whereas administrative appeals constitute an internal or "domestic" check.'[683]

The Tribunal is a formal forum that parties may approach after personal negotiations between disputers and alternative dispute resolution have been unsuccessful.[684] In some instances, credit providers and consumers have direct access to the Tribunal, but in these instances and absent a complaint on the same facts, the Regulator is not involved in the dispute between the

[679] Such as ss 128(1) & (2) of the NCA: 'A consumer who has unsuccessfully attempted to resolve a disputed sale of goods in terms of s 127 directly with the credit provider, or through alternative dispute resolution under Part A of Chapter 7, may apply to the Tribunal to review the sale … It the Tribunal considering an application in terms of this s is not satisfied that the credit provider sold the goods as soon as reasonably practicable, or for the best price reasonably obtainable, the Tribunal may order the credit provider to credit an pay to the consumer an additional amount exceeding the net proceeds of sale.' See also s 114 of the NCA: 'If a statement is not offered or delivered within the time required by this Part, the Tribunal, on application by the consumer, may – (a) order the credit provider to provide the statement; or (b) determine the amounts in relation to which the statement was sought.' See also ss 113(4) & 115 of the NCA.

[680] S 140 of the NCA.

[681] Such as s 59(1) & (2) of the NCA: 'A person affected by a decision of the National Credit Regulator under this Chapter may apply to the Tribunal to review that decision, and the Tribunal may make an order confirming or setting aside the decision in whole or in part … An order contemplated in subs (1) may include an order setting aside any condition attached to a registration if the Tribunal is not satisfied that the condition is reasonable and justifiable, having regard to the objects and purposes of this Act, the circumstances of the application or review, as the case may be, and the provisions of s 48.'

[682] Such as s 57(1) of the NCA: 'Subject to subs (2), a registration in terms of this Act may be cancelled by the Tribunal on request by the National Credit Regulator, if the registrant repeatedly – (a) fails to comply with any condition of its registration; (b) fails to meet a commitment contemplated in s 48(1); or (c) contravenes this Act.'

[683] Hoexter (n 35) 65. See also Hyland 'Who is watching the watchdog?: a critical appraisal of ASIC's administrative powers' 2009 *Journal of Australasian Law Teachers Association* 29 in respect of 'internal and external merits review' applicable to the Australian Securities and Investments Commission (hereinafter 'ASIC').

[684] S 134(4) of the NCA.

parties.[685] As such, I will not be dealing with the authority of the Tribunal in matters where the National Credit Regulator is not involved. What is of importance, though, is that the Credit Act explicitly precludes the Regulator from intervening in certain matters before the Tribunal.[686] As an example, section 135(2) determines that the National Credit Regulator is precluded from becoming involved where a matter is referred to the Tribunal for purposes of obtaining a consent order after dispute resolution.

Sections 59(1), 140(1)(c) and 140(2)[687] are comprehensively indicative of the oversight role that the National Consumer Tribunal fulfils in relation to the National Credit Regulator:

> ‘A person affected by a decision of the National Credit Regulator under this Chapter [Chapter 3 – consumer credit industry regulation] may apply to the Tribunal to review that decision, and the Tribunal may make an order confirming or setting aside the decision in whole or in part …
>
> After completing an investigation into a complaint, the National Credit Regulator may make an application to the Tribunal if the complaint concerns a matter that the Tribunal may consider on application in terms of any provision of this Act …
>
> In the circumstances contemplated in subsection (1)(b) [After completing an investigation into a complaint, the National Credit Regulator may make a referral in accordance with subsection (2), if the National Credit Regulator believes that the person has engaged in prohibited conduct], the National Credit Regulator may refer the matter to the Tribunal.’

The National Consumer Tribunal plays a role where the Regulator refuses registration or demands commitment to conditions of registration that the prospective registrant disputes – it deals with the decision not to license a person or the decision to request the person to submit to certain conditions of registration.[688] In this regard, the Tribunal can apply the provisions of the Promotion of Administrative Justice Act due to the specific referral to ‘review’ in section 59 and can refer the matter back to the National Credit Regulator if it’s behaviour is found

[685] See ss 128 & 113-115 of the NCA.

[686] See s 135(2) of the NCA (where the National Consumer Tribunal (hereinafter ‘NCT’) is approached to effect a consent order where parties have agreed to the contents).

[687] S 140(2) referred to in s 140(1)(b) determines the following: ‘In the circumstances contemplated in subsection (1)(b), the National Credit Regulator may refer the matter – (a) to the consumer court of the province in which the consumer resides, or the consumer court of the province in which the credit provider has its principal place of business in the Republic, if there is a consumer court in such a province and if the National Credit Regulator believes that the issues raised by the complaint can be dealt with expeditiously and fully by such a referral; or (b) to the Tribunal.’

[688] S 59 of the NCA.

wanting.[689] In *Bridge Taxi Finance (Pty) Ltd v National Credit Regulator, In Re: Ruewell Investments (Pty) Ltd v National Credit Regulator*, the National Consumer Tribunal referred to the wording of section 6 of the Promotion of Administrative Justice Act to substantiate its jurisdiction to hear the matter in a similar manner as a judicial review.[690]

The Act further makes provision for the Tribunal to decide on the validity of the Regulator's enforcement actions upon request for an enforceable order on the terms stipulated in the application[691] or where an alleged contravener disputes the steps taken by the Regulator to enforce the Act – whether this is in terms of a non-registrant conducting or advertising business endeavours that lawfully necessitates registration in terms of the National Credit Act; [692] or dissatisfaction with a notification that alleges misconduct and require the recalcitrant person to take remedial steps;[693] or whether there is general discontent with a decision by the Regulator within the context of chapter 3.[694] The Regulator therefore refers matters to the Tribunal where a registrant transgresses the National Credit Act or its conditions of registration and does not act upon receipt of a compliance notice to either comply with the provisions thereof or to dispute same in front of the Tribunal in terms of section 56.[695] Referral to the Tribunal can sometimes be made in lieu of referral to the National Prosecution Authority as non-compliance with a compliance notice may be an offence.[696]

Apart from formal regulatory actions where the dispute is between the Regulator and the registrant or non-registrant,[697] the National Consumer Tribunal is the forum to which the

[689] See *Bridge Taxi Finance (Pty) Ltd v National Credit Regulator, In Re: Ruewell Investments (Pty) Ltd v National Credit Regulator* [2015] ZANCT 4 (3 March 2015). Van Eeden & Barnard *Consumer Protection Law in South Africa* (2017) 468 state that '[t]he NCT consequently has no power of review in relation to the NCC' – it may be plausible that this position exists in terms of the Consumer Protection Act as the National Consumer Commission does not license market participants and deals primarily with contraventions of the Act through investigations and compliance notices (see *National Credit Regulator v Moneyline Financial Services (Pty) Ltd* [2016] ZANCT 14 (11 March 2016) par 83 in respect of a similar observation regarding the Competition Commission). See also the wording of s 59(2) as per Van Zyl 'Registration and the consequences of non-registration' in Scholtz *et al Guide to the National Credit Act* (June 2017 Service Issue 9) par 5.4.3: 'If the Tribunal is not satisfied that a condition of registration imposed by the Regulator is reasonable and justifiable, having regard to the objects and purposes of the Act and the factors the Regulator should have considered in proposing such a conditions, it may order the setting aside of that condition.' These words are reminiscent of administrative considerations – see the discussion in par 6.3.1 *infra*.

[690] *Bridge Taxi Finance (Pty) Ltd v National Credit Regulator* (n 689) par 8, read with the provisions in the NCA set out in paras 5-7. See par 6.3.3 *infra.*

[691] S 55(6)(b) of the NCA.

[692] See ss 54(4)(b) & 56 of the NCA.

[693] See s 55(4) & 56 of the NCA.

[694] See s 59 of the NCA.

[695] S 55(1) read with s 55(6) of the NCA. See also s 54(1) of the NCA.

[696] S 55(6) read with e.g. s 71(7) of the NCA. See also s 54(5) of the NCA.

[697] See s 59 of the NCA & ch 3 *supra*.

National Credit Regulator refers matters that has been the subject of a compliant and that the Regulator deems enforcement-worthy under the auspices of section 140. After investigation, the matter can be referred to the Tribunal as the Regulator does not have the authority to directly effect consumer redress or sanction misconduct because section 140 determines that an investigation can either culminate in a 'non-referral'[698] or a 'referral' to the Tribunal or a consumer court in some instances.[699] The proceedings take the form of a 'hearing' in which the Tribunal takes on the role of the deciding forum *a quo*.[700] This is over and above the same steps that can be taken in terms of section 139(1) on different grounds and to different persons or institutions upon initiation or receipt of a complaint – such as referral of a matter that apparently involves reckless lending to a debt counsellor.

The Tribunal decides[701] – independently from, but based on, information provided and arguments posed by the parties, including its own inquisitions, evaluation (and interpretation)

[698] S 140(1)(a) of the NCA.

[699] See also the wording of s 55(6) in respect of compliance notices: 'If a person fails to comply with a compliance notice as contemplated in this section without raising an objection in terms of section 56, the National Credit Regulator may refer the matter – (a) to the National Prosecuting Authority, if the failure to comply constitutes an offence in terms of this Act; or (b) otherwise, to the Tribunal for an appropriate order.'

[700] See Van Eeden & Barnard (n 689) 450.

[701] The consumer protection scheme has been compared with the competition regulation scheme in South Africa (established by the Competition Act (Act 89 of 1998)) and writers such as Van Eeden and Barnard refer to the Competition Commission and Tribunal in order to address contentious issues about the National Consumer Commission (established in terms of the Consumer Protection Act Act 68 of 2008) and NCT – see Van Eeden & Barnard (n 689) 404. The NCT has also referred to findings in relation to the regulatory scheme for competition in order to make its own determinations – see *National Credit Regulator v Capitec Bank Limited* [2014] ZANCT 14 paras 68 (where the NCR was found to share similarities with the Competition Commission and the NCT applied findings in case law on the Commission's actions to that of the NCR). As such, Van Eeden & Barnard's discussion on the National Consumer Commission and NCT can be applied to the discussion on the NCR and the NCT, specifically as the NCT's jurisdiction to deal with matters arising from the Consumer Protection Act and NCA is founded in the same legislation, being the NCA – see s 27 of the NCA. See Van Eeden & Barnard (n 689) 470-472 (in respect of the 'relationship' between the NCT and the NCC) & 471: 'Both the Competition Commission and the NCC have an investigative function supported by extensive powers of search and interrogation; both the NCT and the Competition Tribunal have adjudicative functions combined with inquisitorial powers.' See also *Information Technology Consultants (Pty) Ltd v National Credit Regulator and Others; In Re: National Credit Regulator v Du Plessis N.O. and Another* [2014] ZANCT 29 (7 August 2014) e.g. par 54. See also Scholtz 'Consumer Credit Institutions' in Scholtz *et al Guide to the National Credit Act* (June 2017 Service Issue 9) par 3.3 for a general discussion on the NCT.

of the legal position against the facts[702] – whether the respondent has indeed contravened the National Credit Act through its own and, for example, requires cessation of contravening activities.[703] In respect of its inquisitorial approach, the Tribunal has indicated that it

> ‘had to consider whether it would compromise its impartiality or affect either of the parties unfairly in being actively engaged in the matter as moved for by the Applicant ... The active engagement the Tribunal is speaking to; and considering; is not its role and responsibility to the management of the proceedings. This Tribunal has to always drive forward actively. It is rather about getting involved; in the sense of ensuring that; the appropriate facts; and evidence in support; thereof are placed before the Tribunal.’[704]

Although it is described as an adjudicative forum in section 27(1) of the Act, the Tribunal fulfils an oversight role as its decisions evaluate the National Credit Regulator’s actions, policies and views from a substantive as well as procedural perspective. In terms of section 56(1), a person who has been informed of unlawful action and requested to remedy the situation by way of a section 54 or 55 notice, may refer the matter to the National Consumer

[702] See *National Credit Regulator v Standard Bank of South Africa Limited* [2017] ZANCT 118 (11 October 2017). The interpretation of the law (with reference to foreign jurisdictions) and different approaches argued by the NCR and Standard Bank respectively, undertaken in *National Credit Regulator v Standard Bank of South Africa Limited* was evaluated by the NCT to decide whether the NCA had been contravened or not. However the NCT also relied on case law provisions pertaining to the general elements of vicarious liability and delictual liability to determine whether the Respondent could be held liable for the actions of its agent, who did not comply with the provisions of the NCA – see paras 49-53: ‘... Within the context and the framework of the NCA, the provisions of section 163 and the Dealership agreement between the Respondent and Satinsky, the Tribunal finds that the accredited agents under the dealership agreement as set out in Annexure A are Respondent’s agents. ... It follows that the Respondent cannot lightly distance itself from the actions or omissions of those/their agents. Accordingly, if the failure to obtain the information required for the proper assessment of affordability of credit by consumers is as a result of the actions or omission of the F&I agents, the Respondent could be held vicariously liable. Moreover in relation to the credit agreements entered into at the Satinsky dealerships, the actions of the agents resulted in a direct benefit for the Respondent. … In these circumstances the Tribunal agrees with the submissions made by Counsel for the Applicant that the Respondent has a responsibility to take precautions to prevent harm on the part of the consumer when engaging with the consumer through an agent. ... Vicarious liability however only follows on the commission of a delict. To establish whether liability can be ascribed to the Respondent, an inquiry has to be made into whether the F&I agents or the Respondent’s employees contravened the provisions of the NCA in performing their functions, based on the evidence before the Tribunal.’ See also *National Credit Regulator v Standard Bank of South Africa Limited* (n 702) paras 64-77 in respect of the inquisitorial approach as per s 142 of the NCA.

[703] S 150(a), (b) & (f) of the NCA. In *Simelane NO and Others v Seven-Eleven Corporation SA (Pty) Ltd and Another* [2003] 1 All SA 82 (SCA) par 11 (in respect of the Competition Commission and Competition Tribunal) the court held: ‘The main underlying legal dispute is whether the Act providers for a dichotomous procedure for the resolution of a complaint. The appellants say that there are two distinct stages. The role of the Commission is investigative, whereas that of the Tribunal is adjudicative. The Commission receives a complaint, investigates it and then determines whether it should be referred to the Tribunal. If it does refer it, then it appears before the Tribunal as prosecutor. The Tribunal, on the other hand, conducts a trial in order to determine whether the complaint is well-founded, and if it is found to be so, it decides what steps are to be taken.’

[704] *National Credit Regulator v Standard Bank of South Africa Limited* (n 702) 69-70. The NCT also considered the specific circumstances in the matter before it – see par 68. See also Van Eeden & Barnard (n 689) 450 – they refer to the description of the Competition Tribunal as a ‘fact seeking authority, entitled to play an active role in its conduct of the hearings before it’ by the Competition Appeal Court.

Tribunal for 'review' of the notice. However, section 56(2) stipulates that the Tribunal is authorised to 'confirm, modify or cancel all or part of the notice'. In reaching its conclusion, the Tribunal does not always refer to the provisions of administrative justice, electing to decide the matter on the validity of the merits – the claim against the applicant in light of the averred recalcitrant behaviour.[705] In these instances, and notwithstanding the reference to 'review' in the first mentioned scenario under section 56, the reasoned decisions of the Tribunal show that the validity of the matter is decided on its merits.[706] This accords with the extract from Hoexter quoted above.[707]

The statutory provision for matters to be referred to the National Consumer Tribunal after an investigation brought about through a complaint submitted to the Regulator or upon the Regulator's own initiative[708] differs from the registration and direct regulator-registrant enforcement process in substance and form as it is governed by a different part of the Act and the implications on the rights of affected persons differ from the registrant-enforcement-type of actions taken.[709]

In this investigative role, the Regulator applies as the 'prosecutor', presenting a case for sanctioning before the Consumer Tribunal.[710] Evert van Eeden and Jacolien Barnard highlight the interactive roles of the National Consumer Commission and the National Consumer Tribunal when it comes to investigations of complaints.[711] Some of their comments are just as viable for the Regulator-Tribunal interaction in this specific context as the fundamental

[705] See *Southern African Fraud Prevention Service Ltd v National Credit Regulator* [2009] ZANCT 6 (6 March 2009) where a 'notice to cease' in terms of s 54 was opposed. See also *National Credit Regulator v Southern African Fraud Prevention Services* [2016] ZANCT 32 (29 July 2016) in respect of a s 140(1)(b) investigated matter (par 7), where the NCT noted in par 21: The following must be decided by the Tribunal: 'The Tribunal must consider whether the Respondent is in contravention of the Act and the Regulations, by retaining consumers' record for a period of ten years … The Tribunal must also consider whether the conduct of the Respondent constitutes prohibited conduct and … The Tribunal must further consider whether the contraventions of the Act warrant the relief sought by the Applicant.'

[706] *Ibid*.

[707] See also Theophilopoulos *et al Fundamental Principles of Civil Procedure* (2015) 375 fn 8: 'A review may also be brought when a public body has a duty imposed on it by statute and disregards important provisions of the statute or is guilty of a gross irregularity or clear illegality in the performance of its duty. In such a case the superior courts may review the proceedings complained of and set them aside or correct them. This is the courts' common-law review power. When the legislature confers upon a court the power to review a decision, review may, depending on the context of the legislation, mean review in a wider sense than of either of the above review procedures. In such a context, the word 'review' means 'examine' or 'take into consideration'. When a court is charged with a duty to review in this broad sense and no restrictions are placed upon it, the court not only possesses the powers of a court to review in the legal sense but also functions as a court of appeal.'

[708] S 136 of the NCA.

[709] See the discussions of Van Eeden & Barnard (n 689) 433 & 437 on the nature of investigations and compliance notices and the right to administrative justice in each of these scenarios.

[710] See Van Eeden & Barnard (n 689) 437; *Simelane NO and Others v Seven-Eleven Corporation SA (Pty) Ltd and Another* (n 703) paras 11 & 16.

[711] Van Eeden & Barnard (n 689) 404.

considerations are based on case law pertaining to the Competition Commission and Competition Tribunal[712] – a relationship that has been noted for its relevant bearings on that of the National Consumer Tribunal:

> 'The NCT is an administrative tribunal that is located in status between the NCC and the High Court. Although the NCC and the NCT are nominally and organisationally separate bodies, they are nevertheless closely linked and must, in fact, operate as a team, the one member of the team being largely powerless without the other. The NCC receives or initiates and investigates complaints. Adjudication of such complaints and the granting of remedies is carried out by the NCT, which does not have the power to receive complaints other than by way of "referral" in terms of the CPA [Consumer Protection Act] … The NCC has an array of monitoring, advisory, investigative and enforcement functions, while powers to adjudicate complaints and to issue various orders are vested in the NCT.'[713]

The team analysis is somewhat problematic if the Tribunal is viewed as an oversight mechanism,[714] a matter that was not the focus of the authors' discussion of consumer rights enforcement. Freeman and Rossi distinguish between agencies that '[share] regulatory space' and those where the division between institutions was deliberate:

> 'This split enforcement regime appears to be the quintessential example of a situation in which coordination is not desirable. In this type of scheme, Congress seeks to divide a regulatory or policymaking function from an essentially adjudicatory or judicial function, often to promote values such as independence and impartiality in decisionmaking, though both roles stem from the same statute. If anything, the challenge posed by such delegations is keeping the functions separate.'[715]

The Tribunal can order the respondent to pay an administrative fine, retract a licence, and give a directive to reimburse a consumer to the extent that the consumer had been unlawfully required to pay illicit moneys.[716] It has more discretionary authority insofar as it can make 'any other appropriate order required to give effect to a right, as contemplated in this Act …'.[717]

The National Consumer Tribunal has a noteworthy impact on the conduct of the National Credit Regulator.[718] Not only does it confirm or disallow proceedings brought against

[712] *Ibid*.
[713] *Idem* at 403.
[714] See Hoexter (n 35) 53-54.
[715] Freeman & Rossi (n 506) 1145 & 1150. See also Scholtz (n 701) par 3.3.1.
[716] S 150(c), (g) and (h) of the NCA.
[717] S 150(i) of the NCA.
[718] The NCT has also been instrumental for the NCR to effect its enforcement mandate: Van Zyl 'The effects of non-compliance' in Scholtz *et al Guide to the National Credit Act* (June 2017 Service Issue 9) par 17.3: 'In fact, it appears that to date, the National Credit Regulator's preferred and most successful enforcement mechanism lies in approaching the Tribunal for an order declaring conduct, prohibited conduct and imposing administrative fines.'

delinquent or alleged delinquent registrants, it has also shaped the manner in which the Regulator conducts itself in the course of effecting its regulatory duties.[719] In addition, it has placed restrictions on the exercise of power by the Regulator where the actions of the Regulator did not align with the authorising provisions of the National Credit Act.[720] The Tribunal is therefore not an administrative review body that is limited in the same manner as a court that is always bound by the principles of judicial review when considering the activities of an administrative decision maker.[721]

Another important aspect that is a concern for those writing about the viability of accounting measures for an expert body, is the evaluation of the Regulator's decisions by an outside organisation that may not be privy to all the considerations made and information available to the Regulator in reaching its decision.[722] The National Consumer Tribunal may sometimes substitute its decision for that of the Regulator by reconsidering the matter as opposed to following the administrative law approach of a review that honours the decision of the original decision-maker as long as it meets the standards of fair administrative process.[723] As an 'administrative appeal' body, Hoexter notes that these entities 'are often the very best judges of decisions made by other administrative agencies: they are more likely to have the necessary specialist expertise and to have a thorough grasp of the relevant policy decisions'.[724] Indeed, section 28 of the National Credit Act requires of Tribunal members to 'have suitable qualifications and experience in economics, law, commerce, industry or

[719] See *National Credit Regulator v Capitec Bank Limited* (n 701); par 5.1.4 of ch 6 *supra*; Van Zyl 'The effects of non-compliance' (n 718) par 17.3 fn 16: 'In *National Credit Regulator v Capitec Bank Ltd and Another* [2016] ZAGPPHC 125 (23 March 2016) the court held (at par 9 ev) that the Regulator must have a reasonable suspicion of a prohibited practice taking place in order for it to validly initiate and thereafter investigate a complaint.' See also *National Credit Regulator v Standard Bank of South Africa Limited* (n 702).

[720] See e.g. *National Credit Regulator v Lourens Vosloo and Pieter Jacobus Britz Trading in partnership t/a Central Cash Loans* [2017] ZANCT 99 (21 August 2017).

[721] See Hoexter (n 35) 65-68.

[722] See Bird (n 434) 748. However, compare this with Hoexter (n 35) 54: 'However, in apparent contravention of the separation of powers doctrine, adjudication is becoming an increasingly prevalent form of administrative activity. Many commentators have pointed to the fact that just as administrative bodies make more legislation than the legislature, so too they resolve more disputes that the judges. Courts are unable to adjudicate effectively on many specialist matters, while administrative bodies are able to do this more informally, quickly, cheaply and expertly – and not necessarily any less just. Administrative adjudication can be undertaken not only by specialist bodies, usually known as administrative tribunals, but also by a range of other public authorities and individual administrative officials.' See also Van Eeden & Barnard (n 689) 450 in respect of the classification of the NCT as a 'specialised administrative tribunal[…]'.

[723] See Hoexter (n 35) 60-61. This is notwithstanding the use of words such as 'review' – see s 56(2) of the NCA as an example, which specifically authorises the NCT to 'modify' a notice given by the NCR in terms of ss 54 of 55 where the applicant approaches the NCT in terms of s 56(1) to review the notice.

[724] Hoexter (n 35) 66.

consumer affairs; and ... be committed to the purposes of this Act'. In every panel, a minimum of one person has to have 'suitable legal qualifications and experience'.[725]

The interaction between the National Consumer Tribunal and the National Credit Regulator is procedurally and substantively structured in terms of the National Credit Act. The categories provided for encompass a wide range of substantive foundations for submission of a matter to the Tribunal.[726] A decision by the Regulator to refer a matter to the Tribunal, or to bring an application to the Tribunal, is primarily motivated by incidences of non-compliance,[727] as the prerogative to obtain clarity on interpretational issues relating to the National Credit Act, is reserved for the court.[728] The enabling provisions of the National Credit Act do not frame the National Consumer Tribunal as a precedent-setting entity, but only as 'a tribunal of record'.[729] '[O]f record' does not imply that the entity is entitled to set precedent, as the provisions relating to the nature of Magistrates' Courts are similarly worded,[730] and these courts do not set precedent.[731] However, considering that the Tribunal is solitary in its functioning, deviations from previous decisions will probably not occur ordinarily.[732] This

[725] S 31(2)(a) of the NCA.

[726] See *Regulations re: National Consumer Tribunal Rules* Table 1A; the various sections mentioned in the table such as 55(6), 56(1), 57(1) & 82(4). Also, in terms of s 137(1): 'The National Credit Regulator may apply to the Tribunal in the prescribed manner and form - (b) for an order compelling the delivery of a statement of account or a review of a statement in terms of Part D of Chapter 5; (c) to review the conduct of a sale of goods in terms of section 127 or the distribution of proceeds from such a sale; (d) for leave to bring a complaint directly before the Tribunal; or (e) for an order condoning late filing'. It is questionable whether the Tribunal can make an order not requested by the applicant or, viewed from another perspective, whether it can grant an order that does not fall within the boundaries of the grounds permitted by the legislation in terms of which an applicant may approach the Tribunal.

[727] In *Woodlands Dairy (Pty) Ltd and Another v Competition Commission* 2010 (6) SA 108 (SCA) par 10, the Court held the administrative conduct of the Competition Commission to the standards of the Constitution as it argued that '[t]he so-called 'administrative penalties' (more appropriately referred to as 'fines' in s 59(2)) bear a close resemblance to criminal penalties'. Subsequently, it was decided that '[t]his means that its procedural powers must be interpreted in a manner that least impinges on these values and rights'. The general principle that can therefore be deduced from the mindset of the Supreme Court of Appeal, is that administrative bodies that have been empowered to impose sanctions on others, are bound to act within the procedural value-based boundaries set by the Constitution in respect of criminal affairs. Also consider the following statement by the court in par 11: 'I accordingly disagree with the view of the CAC that because it is difficult to establish the existence of prohibited practices, a generous interpretation of the commission's procedural rights would be justified. This approach would imply that the more difficult it is to prove a crime (such as corruption), the fewer procedural rights an accused would have'. Similar considerations would then apply to the National Consumer Tribunal as, in terms of section 150 & 151, it is empowered to set administrative fines. Although this case (2010) was cited with approval by the NCT in the matter of *National Credit Regulator v Capitec Bank Limited* (n 701), the NCT did not elaborate on the procedural rights of the Respondent.

[728] S 16(1)(b)(ii) of the NCA.

[729] S 26(1)(c) of the NCA.

[730] S 4(1) of the Magistrates' Courts Act (Act 32 of 1944), which states that 'every court shall be a court of record'.

[731] *S v Guild Painters and Decorators (Pty) Ltd and Others* 1990 (1) SA 760 (C) 766.

[732] See the approach in *National Credit Regulator v Wilbers* [2014] ZANCT 11 par 39.

may result in the development of a practice similar to the doctrine of precedent – a doctrine that has been criticised for its adverse effect on contributions of knowledge to law:

> ‘If many participants in the development of the custom or tradition or line of precedent act as Burke recommended, then the informational value of the custom or tradition or line of precedent is lower to that very extent, because there are fewer independent minds contributing to the collective wisdom … A strategy that is individually rational for judges at any given time – following custom or tradition or precedent – is harmful to all if followed by all, because it drains custom or tradition or precedent of any epistemic value. The best contributions to the stream of custom or tradition or precedent occur when individuals exercise their unaided reason.’[733]

Section 152 of the National Credit Act is headed ‘[s]tatus and enforcement of orders’ and section 152(1)(a) obliges the Regulator to submit itself to the contents of ‘any decision, judgment or order of the Tribunal’ as the ruling is considered ‘binding’ on the Regulator. The wording in respect of the list of additional persons and entities upon whom a ruling is ‘binding’ is noteworthy as, in the context of the principle of *stare decisis*, it is unclear as to whether the outcome of a matter before the Tribunal sets a general precedent or only in respect of compliance with the specific matter and parties with an interest in that matter.[734]

The National Credit Regulator, National Consumer Commission, ‘provincial regulators’ or ‘provincial consumer protection authority’ are worded by name or in the plural form.[735] However, reference is made to ‘a consumer court’, ‘an alternative dispute resolution agent’, ‘the ombud with jurisdiction’, ‘a debt counsellor’ and ‘a Magistrate’s Court’.[736] It is therefore plausible that these entities are only bound where they have a direct interest in the matter, such as a specific debt counsellor who has been fined on application by the NCR. Similar provisions in the National Credit Act specify the subject of an order – see, for example, the provisions of section 164(2)(ii) relating to ‘any action in a civil court, other than a High Court’ and determining that the court ‘must apply the determination of the Tribunal with respect to the issue’. The provision goes so far as to require that the court ‘may not consider the merits of that issue’, where it has been decided by the Tribunal.[737]

The Tribunal has taken to interpreting the provisions of the National Credit Act and the Regulator adjusted its processes accordingly and in order to comply generally with the

[733] Vermeule ‘Many-minds arguments in legal theory’ 2009 *Journal of Legal Analysis* 1 29. The ‘many-minds’ theory that he refers to has many components, but the basic assumption is that decisions taken by a group will tend to exceed the propriety of an individual choice – see Vermeule (n 733) 2 & 4. See also par 3.2.4 of ch 2 *supra* in respect of path dependency – as aspect also referred to by Vermeule at 14.

[734] S 152(1) of the NCA. See Van Eeden & Barnard (n 689) 467 who opine that the NCT does not set precedent but states that ‘the NCT’s decisions must satisfy the requirements of rationality’.

[735] Ss 152(1)(a) & (b) of the NCA.

[736] Ss 152(1)(c)-(d) of the NCA.

[737] S 164(2)(i) of the NCA. See also ss 164(3)(b) & 164(4) of the NCA.

outcomes of single hearings. The approach of some Tribunal members seems to be adherence to previous decisions in the absence of 'very clear reasons' to deviate from same.[738] In *National Credit Regulator v Dioka*,[739] the Tribunal members were specifically referred to the concept of *stare decisis* and, whilst not specifically commenting on the referral to this doctrine by the Applicant, took previous decisions into account when determining the matter at hand.[740] The matter of *National Credit Regulator v Lightning Cash Loans CC* is a further example.[741] In this matter, the Tribunal adjudicated on the effect of non-compliance with section 52 in respect of timely settlement of amounts payable as registration renewal fees.[742] The Tribunal regarded the provisions of section 52(4)(b) of the National Credit Act, which stated (in its pre-amended form) that 'a registration [is] subject to timely payment of the prescribed registration renewal fee'.[743] This provision has now been amended to read *inter alia* that '[a] registration remains in effect until it has lapsed on the last day upon which the prescribed renewal fee should have been paid in accordance with section 51(1)(c)'.[744] It was concluded that, as the registrant had failed to settle the fees for the years 2008-2011, the registrants' 'registration did not remain in effect'.[745] The omission by the registrant to effect timely payment affected its status as registrant in the sense that the absence of payment on the due date resulted in the 'laps[ing]' of the registration.[746]

In the premises, the entity which was the subject of the Regulator's request for cancellation of registration, could not be de-registered as the latter was not considered registered at the time of the application.[747] The ruling further determined that the registrant was not liable for registration fees after lapsing of the registration.[748]

Although the exact amount is not mentioned in the financial statements of the National Credit Regulator for the period ending March 2014, the general adherence to the decision of the

[738] *National Credit Regulator v Wilbers* (n 732) par 39.
[739] [2013] ZANCT 49 (23 October 2013).
[740] See paras 62 & 73-74.
[741] [2013] ZANCT 22.
[742] S 52(5) read with s 51(1)(c) of the NCA.
[743] *National Credit Regulator v Lightning Cash Loans CC* (n 740) par 24.
[744] See the newly inserted s 54(2)(b)(iii) of the NCA.
[745] *National Credit Regulator v Lightning Cash Loans CC* (n 740) paras 3 & 25.
[746] *Idem* at par 49.1.
[747] *Idem* at paras 32 & 56.1.
[748] *Idem* at par 51.

Tribunal prior to the amendment of the Act had a financial impact on the Regulator.[749] It is of further importance to note that the National Consumer Tribunal does not refer to any submissions made by the National Credit Regulator in respect of the correctness of its approach.[750] The National Consumer Tribunal does not have general jurisdiction to deal with discontent with the Regulator's actions where these do not specifically relate to a decision or enforcement action taken.[751]

6.3.2. The Financial Services Tribunal

The Financial Sector Regulation Act establishes the Financial Services Tribunal to reassess the decisions by the Financial Sector Conduct Authority that pertain to 'a financial sector law in relation to a specific person'.[752] Section 218 further includes, in the definition of 'decision'

> 'an omission to take such a decision within the period prescribed or specified in a financial sector law, rules, or other requirements pertaining to the decision-maker … an omission to take such a decision within a reasonable period, if the applicable financial sector law, or rules of, or other requirements pertaining to, the decision-maker require the decision to be taken but without

[749] See the explanatory notes to its financial statements as a result of annual payments that could not be collected and were 'written-off' – see NCR *Annual Report* 2013/2014 61: 'The variance of R10.2 million (over-spending) in bad debts relates to the provision for bad debts and bad debts written-off as a result of the interpretation of section 52(a) of the National Credit Act by the National Consumer Tribunal. This has resulted in the lapsing of registrants' registration with the NCR and the write-off of the related renewal fees due outstanding' & 82: 'During the current financial year, the NCR received a ruling from the National Consumer Tribunal relating to the lapsing, with immediate effect of the registration of registrants who fail to pay their renewal fees in line with section 52(4)(b) of the National Credit Act. The impact of the ruling is that the NCR is required to revise the basis utilised to provide for the recoverability of debtors due from registrants. The ruling was regarded as a change in accounting estimate for accounting purposes and its impact was accounted for prospectively. All registrants with fees outstanding at year end were fully provided for and their registration with the NCR lapsed. In future, only registrants with active fees owing for not longer than 30 days will be reflected as receivables.' The NCR has also informed the industry of the effect of non-payment in accordance with the decision of the NCT – see NCR 'Lapse of Registration' Circular 11 of 2014 read with *National Credit Regulator v Lightning Cash Loans CC* (n 740) par 37 *et seq*.

[750] In a similar manner as the joinder of the Regulator for purposes of and in court cases that concern the interpretation or validity of sections of the NCA – see for example *Sebola and Another v Standard Bank of South Africa and Others* 2012 (5) SA 142 (CC) paras 25-28 & 35; *Opperman v Boonzaaier and Others* [2012] ZAWCHC 27 paras 2 & 20. See *contra* the submissions made by a representative from the NCR in *National Credit Regulator v Wilbers* (n 732) paras 23-26 (initially disputing the decision in *National Credit Regulator v Lightning Cash Loans CC* (n 740) and 'submitting that th[e] Tribunal was not bound by the previous judgment and could depart from it. The NCT put it to the representative to attain instructions from the NCR as well as Heads of Argument, but the matter did not proceed as the NCR informed the NCT in writing that the submissions of the representative was not supported and no Heads of Argument was filed' – see *National Credit Regulator v Wilbers* (n 732) paras 25-26).

[751] See *Swuhana v National Credit Regulator* [2018] ZANCT 20 (28 February 2018); Van Eeden & Barnard (n 689) 449.

[752] S 219(1) of the FSRA. This section determines that '[t]he Financial Services Tribunal is hereby established to reconsider, in terms of this Chapter, decisions as defined in section 218 and to perform the other functions conferred on it by this Act and specific financial sector laws.' S 218 consists of a number of scenarios that would constitute 'decisions' but I have only reflected upon those that have a direct bearing on the FSCA – an institution that is by no means the only institution subjected to the Tribunal. S 218(a) also specifically refers to a 'decision-maker' as 'in relation to a decision by a financial sector regulator, the financial sector regulator'. When read with s 1 and the definition of a financial sector regulator, this includes the FSCA but excludes the NCR.

> prescribing or specifying a period …an action taken as a result of such a decision … and .. an omission to take action as a result of such a decision within the prescribed or a reasonable period, if the applicable financial sector law requires the action to be taken but does not prescribe a period'.[753]

A distinct difference between the National Consumer Tribunal and the Financial Services Tribunal is that the latter is primarily a forum of reconsideration,[754] as the Financial Sector Conduct Authority already has the ability to impose penalties directly on recalcitrant industry participants.[755] These penalties obtain the status of a civil judgment upon filing of same with the Registrar of 'a competent' court and in the absence of an 'application for reconsideration' with the prescribed period.[756] As such, it has the option to establish an administrative action committee in terms of section 87(1) as an internal process for determining penalties.

Furthermore, the Financial Sector Regulation Act specifically precludes the Financial Services Tribunal from substituting its own preferred outcome for that of the Financial Sector Conduct Authority and directs the Tribunal to remit the matter to the Conduct Authority for re-determination where the matter does not fall under section 234(1)(b)(ii) or the Tribunal chooses not to dismiss the matter as per section 234(1)(c).[757] The Tribunal is mandated to replace the decision by the decision-maker with one of its own if the matter falls under section 234(1)(b)(ii) – chapter 13 matters, which relate to administrative penalties; section 218(b) and (c) matters, which relate to decisions by decision-makers other than a financial sector regulator; and decisions that are specifically regulated to resort under section 234(1)(b).

Section 91 of the Financial Sector Regulation Act makes the provisions of the Promotion of Administrative Justice Act applicable to 'any administrative action' that might be taken by the Financial Sector Conduct Authority and authorised by the Regulation Act itself or another statute that qualifies as a financial sector law in terms of the Regulation Act. In addition, parts 3 and 4 of chapter 15 respectively determine that a person who is statutorily entitled to notification of a decision taken by the Financial Sector Conduct Authority is further entitled to demand reasons for the decision and may refer the matter to the Tribunal for reassessment. The above rights exist over and above the right to be informed thereof in terms of section 228 of the Financial Sector Regulation Act.

[753] S 218(f)-(i). S 218(j)-(m) excludes certain actions, such as 'a decision to conduct a supervisory on-site inspection or an investigation'.
[754] S 219(1) of the FSRA.
[755] S 167(1) of the FSRA.
[756] S 170 of the FSRA.
[757] S 234 of the FSRA.

6.3.3. Analysis of the role of the Tribunals as accountability mechanisms in South Africa

A difference between the Financial Services Tribunal and the National Consumer Tribunal is that the reconsideration of any matter by the Financial Services Tribunal cannot proceed before one Tribunal member alone, but at least three.[758] In addition, the appointment requirements for persons to be appointed to the respective Tribunals differ. The President selects all National Consumer Tribunal members to office for fixed terms that can be renewed once if the person wishes to serve one term after the other[759] and can only be removed under specified conditions.[760] As such, it meets the most pertinent requirements for independence, which is a factor that ought to be taken into account when assessing this particular means of answerability[761] – this is notwithstanding that the Tribunal is not specifically stated to have the attributes of independence.[762] The Tribunal consists of a minimum of eleven members and the competency requirements for appointment as members stipulate that the members must be properly qualified and experienced in at least one of the following fields: ‘economics, law, commerce, industry or consumer affairs’.[763] Every panel has to include a legal expert.[764]

In contrast, the Minister of Finance, who also appoints the Commissioner and Deputy Commissioners of the Financial Sector Conduct Authority, appoints the members of the Financial Services Tribunal.[765] The members of the Financial Services Tribunal are appointed for a fixed term, which can be renewed, and there are no statutory limitations on the number of re-appointment terms that can be allowed.[766] The Tribunal consists of a minimum of four members of which two have to be retired judges or experts in law and two experts in ‘financial products, financial services, financial instruments, market *infra*structures or the financial system’.[767]

[758] S 224(4) of the FSRA. S 31(1) of the NCA makes provision for some cases to be heard by a single Tribunal member if the legislation specifically states this and all other matters must be heard by three members.

[759] The NCA limits renewal to one additional term as it prohibits a person from serving for ‘more than two consecutive terms’ – see s 29(2) of the NCA.

[760] Ss 26(3), 29(1), 29(2) & 29(5) of the NCA.

[761] See par 4.3 of ch 4 *supra*.

[762] It is nevertheless an offence to ‘improperly influence the Tribunal’ – see s 160(2)(a) of the NCA. See also *National Credit Regulator v Standard Bank of South Africa Limited* (n 702) paras 69 & 77, where the NCT stated that it had to be impartial. See also Scholtz (n 701) par 3.3.1, who refers to the NCT as ‘independent’.

[763] Ss 26(2) & 28(2)(b) of the NCA.

[764] S 31(2)(a) of the NCA.

[765] Ss 220(1) & 62(1)-(2) of the FSRA.

[766] S 221(1) & 221(2) of the FSRA.

[767] S 220(2) of the FSRA.

Both Tribunals are tribunals of record.[768] An order of the National Consumer Tribunal may be reviewed by the High Court or the outcome may be the subject of an appeal.[769] In contrast, the decision of the Financial Services Tribunal is only subject to review in terms of the provisions of administrative law.[770]

Two aspects deserve mention at this point. Firstly, the different approaches to regulation – specifically the Regulators' capabilities and the respective focuses of the laws – of the National Credit Act and the Financial Sector Regulation Act may become obstacles if not managed properly. There can be challenges when it comes to collaborative functions, agreements negotiated and entered into between regulators in terms of the Financial Sector Regulation Act,[771] and actions taken based on the agreements. The extent to which the Tribunals will take cognisance of, or even make pronouncements on, these agreements is unknown at this stage unless the agreement is indirectly considered because it

> 'will improve the quality of the resulting decision and thus will be more likely to survive arbitrary and capricious review … a policy choice that harmonizes potential inconsistencies, reduces duplications, and reflects a careful consideration of multiple agency perspectives should have a better chance of being upheld'.[772]

As a point of departure, the National Credit Regulator can take steps to investigate and/or enforce non-compliance but cannot take action that have direct punitive value and is enforceable as such.[773] As such, the Regulator has to defend its decision and actions before the Tribunal prior to obtaining an enforceable order in the terms that it sought.[774] Van Eeden and Barnard note, by reference to the competition regime, that investigations concluded and referred to the Tribunal 'do[…] not constitute administrative action' as it is 'of an investigative and not an administrative nature'.[775]As such, the Promotion of Administrative

[768] S 26(1)(c) of the NCA; s 219(2)(c) of the FSRA.
[769] S 148(2) of the NCA.
[770] S 235 of the FSRA.
[771] S 77 of the FSRA.
[772] Freeman & Rossi (n 506) 1205. See also ss 54(2) & 55(2) of the NCA, which compels the NCR to 'consult with the regulatory agency that issued a licence to [a] regulated financial institution' prior to delivering a notice in terms of s 54 (engaging in restricted activities whilst not being registered) or s 55 (not adhering to the NCA). Van Eeden & Barnard (n 689) 436 refers to the view of the NCT in this regard when they state that the consultation should include 'some form of communication'; interaction that shares proposals and recommendations; the communicative interaction can take any form as long as it is gives each participant ample time to propose and explain their opinions and situations in a manner that is receptive; and the consultation must be undertaken in 'good faith'. The last and particularly important aspect stated at 436 is that 'the consulting empowered authority does not have to give effect to the wishes of the consulted party and is the sole decision-maker regarding the authorised discretion'.
[773] See par 3.2.7 of ch 5 & paras 4.1, 4.3, 5.1, 5.3 & 6 of ch 6 *supra.*
[774] *Ibid*.
[775] Van Eeden & Barnard (n 689) 432, 433 & 437. This was stated in the context of whether the affected person had certain rights ('administrative justice') 'at that stage' – see 437.

Justice Act is not applicable.[776] On the contrary, it is their own argument that the aforementioned Act applies in the case of a compliance notice, as distributing same results in 'a determination' as opposed to engaging in 'a purely investigative role'.[777] The Tribunal then decides the matter as indicated in a previous paragraph – in a manner that is not restricted to the boundaries of either appeal or review.[778] It is the decision of the National Consumer Tribunal that is subjected to a specific judicial appeal or review in terms of section 148 of the National Credit Act.

On the other hand, the Financial Sector Conduct Authority can decide and impose the penalty that it deems fit and this decision is enforceable as a court order upon filing the administrative penalty order in the relevant court of law.[779] As such, it already performs some of the functions of the National Consumer Tribunal. Chapter 6 of the Financial Sector Regulation Act makes specific provision for the procedures to determine the administrative processes of the Financial Sector Conduct Authority, which includes establishing an administrative advisory committee to guide the Authority in respect of certain decisions that it needs to take and setting the procedure to develop its own administrative procedures. The latter may deviate from the precise provisions of the Promotion of Administrative Justice Act and must be preceded by a notice-and-comment process.[780]

The Authority's decision is also *reconsidered* by the Financial Services Tribunal – mention is not made of 'review' or 'appeal' – and the legislation prescribes specific remedial action that can be taken by the Financial Services Tribunal in terms of section 234. This Tribunal's decisions are subsequently only reviewable based on administrative law principles.[781]

Secondly, accessing the tribunal system may also be challenging for the regulated community as infractions in terms of the National Credit Act have to be dealt with in the National Consumer Tribunal whereas infractions in terms of the Financial Sector Regulation Act will

[776] Van Eeden & Barnard (n 689) 432, 433 & 437. Van Eeden & Barnard do note at 433 that the decision to refer has to be lawful and unbiased, the matter must not have prescribed, and the Commission has to have the jurisdiction to take such as decision to refer.

[777] Van Eeden & Barnard (n 689) 436 ('a compliance notice must be lawful, reasonable and procedurally fair') & 437.

[778] See Van Eeden & Barnard (n 689) 437 where they argue that, in the context of a compliance notice, the merits of the matter will be deciphered – whether there is a referral made to the National Prosecuting Agency or the National Consumer Tribunal ('the validity of the compliance notice' or 'whether the conduct complained of constitutes prohibited conduct to the NCT'). See fn 773 *supra* and the matter that relates to a s 56 application to the NCT based on a person's discontent with a decision in terms of ch 3 (such as a refusal to register or imposition of conditions of registration deemed unacceptable) of the NCA.

[779] S 167(1) read with s s 170(1) & 170(2) of the FSRA.

[780] Ss 92 & 93 of the FSRA.

[781] S 235 of the FSRA.

have to be dealt with in the Financial Services Tribunal. There is fragmentation.[782] The same action can initiate two different procedures where a matter is regulated by the National Credit Act and may fall under the jurisdiction of the Financial Sector Conduct Authority to issue conduct standards. The Financial Sector Regulation Act provides for this possibility in section 106(5):

> 'In relation to a credit provider regulated in terms of the National Credit Act, a conduct standard may only be made in relation to a financial service provided in relation to a credit agreement and matters provided for in section 108. … A conduct standard referred to in paragraph (a) may only be made after consultation with the National Credit Regulator.'

The definition of 'decision' will include enforcement action based on the provisions of a section 106 or 108 conduct standard, which enables substitution of the decision by the decision of the Tribunal.[783] The section 106 conduct standard does not have to relate to a specific financial sector law,[784] and can be for the purpose of meeting the objectives of the Conduct Authority, such as fair treatment of customers.[785] In addition, section 108 conduct standards pertain to general internal business practices.[786]

As such, it would be prudent to insert a mechanism in the system to ensure that the respective tribunals take note of other enforcement actions taking place – or that the National Consumer Tribunal takes note, or is informed of, enforcement action taken by the Financial Sector Conduct Authority where the matter is dealt with without involving the Financial Services Tribunal.[787] In this regard, the Regulators would have to decide on the most effective (and fair) enforcement strategies to ensure that would enable them to meet their mandates but that the unaligned structure would not unduly prejudice regulatees. The respective Tribunals should be compelled to take note of the agreed strategies and adhere to same insofar as the regulatee does not challenge same.

[782] See Hoexter (n 35) 70-72 with regard to recommendations based on the lack of a 'coherent system of administrative appeals in this country' and her references to the position in Australia.

[783] S 218(a) read with ss 1, 167(1)(a) & 234(1)(b)(i) of the FSRA.

[784] The NCA is in any event not deemed a financial sector law for purposes of the FSRA or the jurisdiction of the FSCA.

[785] S 57(b)(i) read with s 106(2)(b) of the FSRA.

[786] S 108(1)(a) of the FSRA.

[787] See Van Zyl (n 689) par 5.4.4 fn 142h: 'It is apparent from the Act, particularly the provisions dealing with conditions of registration, compliance with the Act and dispute resolution, that it is possible for several regulatory bodies to regulate the activities of a credit provider. The Regulator will by no means assume the functions of other applicable regulators. However, compliance by registrants with other legislation, regulations and rules falling under the jurisdiction of other regulators will be taken into account by the Regulator in exercising a function under the Act. See also s 17, as amended, which provides that the Regulator must enter into a valid agreement with any other regulatory authority to coordinate jurisdiction and ensure the consistent application of the Act.'

I submit that the National Consumer Tribunal would in any event not have the jurisdiction to deal with interagency agreements *per se* (although these may affect enforcement strategy or policy) to which the National Credit Regulator is party as the agreement itself is not catered for in the Credit Act: sections 76 and 77 are founded in the Financial Sector Regulation Act and whilst section 17(4) in Chapter 2 obliges the National Credit Regulator to 'liaise' and 'enter into a valid agreement' 'with any regulatory authority', the scenarios of enforcement and investigation set out in the National Credit Act focus on actions taken by the Regulator in terms of Chapter 3 or complaints that relate to reckless credit or contraventions of the National Credit Act.[788] Section 136 complaints are initiated through submissions to, or self-initiation by, the National Credit Regulator and I doubt whether one can argue that the Regulator can investigate a matter where it is a party to the contested matter prior to deciding on a referral or non-referral in terms of section 139.

Neither would the Financial Services Tribunal be able to do so as this would not meet the requirements of a 'decision' in terms of section 218 of the Financial Sector Regulation Act. In this regard, the ministerial oversight discussed above and the courts discussed below, would be instrumental unless the regulatory agreements are reviewed indirectly through application to specific matters in terms of which the Tribunals do enjoy jurisdiction. Related to this, Freeman and Rossi argue as follows:

> 'As a general matter, judicial review can help to ensure that decisions produced through interagency coordination stay within legal bounds. By reviewing agency legal interpretations and policy decisions, courts can help to guard against the risk that agencies will "coordinate" their way to statutory violations.'[789]

On the other hand, and in light of the unrestricted manner in which the Tribunals can adjudicate matters, the extent to which the Tribunals will take cognisance of – or even make pronouncements on – these agreements is unknown at this stage.

The impact may have unintended consequences for actions taken after negotiated agreement between regulators:

> '[T]he superior epistemic judgments of many minds may simply be unusable by the legal system. The problem is that those judgments will at some point have to be funnelled or refracted through the judgments of a much smaller group, perhaps a single mind, and this will result in a kind of *epistemic bottleneck* or chokepoint. The judgments of many minds may be the input to a decision-making process, but if the structure of that process requires or allows a few minds to accept or reject the

[788] Ss 56, 59, 136 & 139 of the NCA.
[789] Freeman & Rossi (n 506) 1203.

> many-minded judgment, or even just to interpret it, then the resulting decision may be little better than if the one mind had simply decided for itself, right from the start'.[790]

A last aspect to consider, which also relates to the judiciary, is the matter of review based on principles of administrative law. In those instances where the National Consumer Tribunal applies the provisions of the Promotion of Administrative Justice Act, the aspects that it considers echoes those that an ordinary court of law will take into account.[791] The latter is especially true where the National Credit Act or Financial Sector Regulation Act does not bestow jurisdiction on the Tribunal to deal with a particular matter. Two separate occurrences can be referred to: discontentment with an administrative action and discontentment with non-administrative action.[792]

The purpose of judicial review is to verify whether the decision is administratively just – in the sense that the correct process was followed with due regard for the right to just administrative action as embodied in section 33 of the Constitution and furthered by the Promotion of Administrative Justice Act.[793] The restrictions inherent to this form of review purport to prevent a judicial officer from essentially taking the decision that was lawfully entrusted to an administrator – who is part of the executive branch of government.[794] Under circumstances where the activities meet the requirements for administrative action as per section 1 of the Promotion of Administrative Justice Act, the presiding officer has to ensure that the administrator executed his or her authority in a manner that was lawful, reasonable and procedurally fair.[795] In *Telsek Investments 1043 CC T/A Telsek People Society v National*

[790] Vermeule (n 733) 33.

[791] Compare e.g. *Bridge Taxi Finance (Pty) Ltd v National Credit Regulator* (n 689) & *Micro Finance South Africa v Minister of Trade and Industry and the National Credit Regulator* [2016] ZAGPPHC 1155 (22 November 2016).

[792] Hoexter (n 35) 166.

[793] *Idem* at 118. See also Hoexter (n 35) 113.

[794] Hoexter (n 35) 151 & 167. See also the discussion in Hoexter (n 35) 148-150 on 'separation of powers and competence' where she notes that there are shortcomings to the judiciary insofar as expertise is concerned and that the individualistic nature of court processes are not conducive to dealing with matters that are systemic, interrelated with matters in respect of which the court does not take account ('that are not before the court') or may have 'multiple repercussions'. She also discusses arguments that does not forward an extremist view of the 'separation of powers doctrine' and which highlights the benefits of a judiciary that does play a role in this regard.

[795] Hoexter (n 35) 197 (for a breakdown of the facets of the concept 'administrative action' under s 1), ch 5(for a discussion of the concept of lawfulness, which includes proper legal authorisation to act in the manner that the administrator acted (see 253 & 255), keeping within the boundaries of the allocated authority (see 281 & 282) and incorrectly interpreting the law ('error of law') or facts ('jurisdictional facts') (see 282 & 290), 'abuse of discretion' which includes 'ulterior purpose or motive', 'bad faith' and 'failure to apply the mind' (see 306 *et seq*) and 'action that is 'otherwise unconstitutional or unlawful'' (see 325-326)), ch 6 (for a discussion of the concept of 'reasonableness' which includes 'rationality' and 'proportionality') & ch 7 (for 'procedural fairness'). See e.g. ss 3 & 6 of the Promotion of Administrative Justice Act (Act 3 of 2000).

Credit Regulator,[796] a matter that dealt with a contended compliance notice, the Tribunal held that 'the issuing of a compliance notice must be lawful, reasonable and procedurally fair'.[797]

In *SA Taxi Securitisation (Pty) Ltd v National Credit Regulator*,[798] the application of the provisions of the Act was a matter that had, according to the presiding member, not been clearly determined in previous cases that 'merely accepted' and applied the statute.[799] The Tribunal nevertheless did not proceed to rationalise or apply the Act in the matter as it relied on competition-related findings by the Supreme Court of Appeal to come to the following conclusion:[800]

> 'In my view the applicability of PAJA to the issuing of a compliance notice in terms of the NCA and whether or not it constitutes administrative action is not as settled as it would appear. … For the purposes of this judgment it is however not necessary to consider the provisions of PAJA in detail. It suffices to say that although the *Yara* matter dealt with a referral by the Competition Commission, the principle being expressed by the court is clear, the regulator is not required to engage with the party being investigated and allow them to make representations. Their rights to a fair administrative process are provided for in a hearing before the Tribunal. This principle can be applied equally to the issuing of a compliance notice. Section 55 of the NCA already clearly provides that the compliance notice can only be issued on reasonable grounds and prescribes what it must contain. Section 56 provides for a clear process whereby the aggrieved party can apply to the Tribunal for the compliance notice to be set aside. Therefore the NCA already provides for fair administrative action in this specific regard and the provisions of PAJA are not necessary, even if it were applicable.'[801]

Under circumstances where the activities do not constitute administrative action, and thus pre-empts reliance on the Promotion of Administrative Justice Act, the actions can be

[796] [2014] ZANCT 52 (10 November 2014).

[797] Par 47. In paras 49 & 50, the Tribunal held: 'This aspect was fully ventilated in *City of Johannesburg v NCC* where it was decided by the Tribunal that a person under investigation is entitled to be informed of the nature of the investigation and is entitled to make representations. Respondent argued that the Applicant was fully involved in the investigations and made all the representations at the time and that it is not necessary for the Respondent to seek or accept representations subject to the issuing of the compliance notice in terms of Section 55(1) but prior to its publication. The Applicant's rights are fully protected under Section 56 in that the Applicant has a right to apply for the review of a compliance notice. … The record reflects that the parties had discussions prior to the issuing and publication of the compliance notice and in any event that the Applicant had a year to make any representations, should he so wish in the period before the issuing and publication of the compliance notice. The Applicant cannot therefore argue that it did not have a full opportunity to make any such representations. The long delay between the initial investigation and the issuing and publication of the compliance notice favoured the Applicant and gave the Applicant full opportunity to make such representations. Thus the Tribunal finds that the Applicant is the author of its own demise and that this point should fail.'

[798] [2018] ZANCT 1 (3 January 2018).

[799] Par 26.

[800] *SA Taxi Securitisation (Pty) Ltd v National Credit Regulator* (n 798) par 22.

[801] *Idem* at paras 27 & 28.

benchmarked against the principle of legality.[802] Numerous court decisions have characterised this concept, *inter alia* as encompassing 'the exercise of public power' that is 'lawful ... not … arbitrary or irrational', executed with *bona fides*, with a correct understanding of what the administrator's authority entails and with 'procedural fairness'.[803] The South African regime therefore allows for fairly comprehensive *rationales* that enable recourse to the courts where public authority was inappropriately exercised.[804]

Finally, the characteristics of administrative law are often in conflict with internal prerogatives, as well as the prerogatives of other legal fields. Hoexter, referring to Cynthia Farina, highlights the discord between inspiring administrative officials to deal expertly and autonomously with matters under their jurisdiction and the need to ensure that the authority is not abused to the detriment of those endowed with specific rights.[805] Farina suggests a renewed approach by construing the aim of administrative law as enabling, as opposed to restrictive.[806] Likewise, Gillian Metzger writes that administrative law is focused on accountability, whereas autonomy is the core concern for financial law.[807] Her research, however, shows that measures implemented in the United States through the Dodd-Frank Act, have taken steps to ameliorate the discrepancies and, in some instances, to 'inject more political accountability into financial-system oversight'.[808] These include aspects such as commitment to the material outcomes of consumer protection, and public awareness and participation.[809]

[802] Hoexter (n 35) 121, 245 & 248.

[803] *Idem* at 122-123.

[804] *Idem* at 124. It must also be noted, as indicated by Hoexter (n 35) 9 that '[j]udicial review is essentially concerned with the judicial detection and correction of maladministration. Administrative law, on the other hand, is concerned with non-judicial as well as judicial safeguards against poor decision-making.'

[805] Hoexter (n 35) 137-139.

[806] Farina 'Administrative law as regulation: The paradox of attempting to control and to inspire the use of public power' 2004 *South African Public Law* 489 502, and at 507 where she makes the following suggestion: 'However, in the end, the best protection, the greatest likelihood of success, will come if administrative law defines its objective as working to promote the validity of administrative action, rather than as struggling to prevent its invalidity. If we see this as our objective, then we are looking for ● strategies that help build within agencies a culture of responsibility and professionalism; ● conditions which encourage decision-makers to use their discretion for public-regarding purposes, and to engage in the sort of self-critique from which regulatory systems "get smarter"; ● procedural requirements that encourage transparency, rationality and public participation in administrative decision-making, without overwhelming the agency; and ● standards of judicial review that are at once serious, yet express respectful of agency responsibility and expertise.'

[807] Metzger (n 609) 130 & 155. She also notes at 144 that 'these differences between administrative law and financial regulation appear more contingent than inherent and appear to turn in large part on path dependency and political economy'.

[808] Metzger (n 609) 146 (see also 146-149). She specifically refers to the Consumer Financial Protection Bureau at 146 where she states that '[t]he CFPB presents a different structural approach, albeit one that similarly links independence and accountability'.

[809] Metzger (n 609) 148 & 152.

6.4. The courts

6.4.1. The National Credit Regulator

In this part of the chapter, I discuss the involvement of the courts with the two independent regulators under consideration. Judicial intervention can occur on various occasions, resulting in the consideration of the policies, choices, opinions and actions of the regulator – whether directly or indirectly.

A civil dispute between industry stakeholders, such as credit providers and consumers or debt counsellors and credit providers, based on credit agreements to which the National Credit Act applies or debt review proceedings may be brought before the judiciary. In these instances, guidelines issued by the National Credit Regulator would have influenced the conduct of the parties before the court, as was the case in *Rougier v Nedbank Ltd*[810] and *Firstrand Bank Ltd and Another v Barnard and Another.*[811] In both instances, the ultimate decision of the court was made without any reference to the industry guidelines issued and followed by the debt counsellors. The attention of the court was also not drawn to the guidelines.

It is submitted that, had the National Credit Regulator been joined in these proceedings[812] or specific reference made to these guidelines in connection with the conditions of registration signed by registrants, it would have led to an opportunity to evaluate the mechanisms used to impose conduct-changing rules on regulatees and the actual actions or rules of the Regulator in this regard. Whilst the two cases mentioned above did not make the necessary references, the Western Cape High Court considered the validity of the withdrawal guidelines issued by the National Credit Regulator in *Phaladi v Lamara*[813] and found that some of the provisions therein did not accord with the provisions of the National Credit Act. The court firstly reiterated that section 16(1)(b) of the National Credit Act provides for non-peremptory

[810] [2013] ZAGPJHC 119.
[811] (A801/2014) [2015] ZAGPPHC 1109.
[812] See par 9 of ch 6 *supra*.
[813] 2018 JDR 0001 (WCC).

directives and determined that the application process put forward by the Regulator in its guiding notes was in any event not supported by the provisions of the Act.[814]

I agree with the contention that the Regulator has to work within the boundaries set by the Act, but this judgment still does not address those aspects where the interpretation of the Regulator does fall within the legislative parameters set, and compliance has been mutually agreed upon through acceptance of the conditions of registration. The question is twofold: whether the creation of a process to deal with challenges experienced in practice falls under the provisions of section 16 as an interpretation of legislation and, if so, whether section 16, which provides for the non-peremptory nature of the Regulator's interpretations, can be circumvented when the registrant agrees to the conditions of registration. Under circumstances where compliance with conduct rules was brought about through conditions of registration, it would probably include a justification of the lawfulness of the means used to compel compliance as well as the contents of the rules.

Section 48(6) alludes to some form of consensual recognition of the conditions and provides for the prospective registrant to debate the imposition of certain conditions with the Regulator and for recourse to the Tribunal through section 59 of the National Credit Act. This last-mentioned aspect reminds of the argument in *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council*, where compliance with the rules of the Micro Finance Regulatory Council was considered and the Constitutional Court noted the following:

> 'In my view, the applicant's general complaint that the rules of the regulatory institution may not impose any obligation upon lenders other than those expressly provided for in the Exemption Notice, must be rejected. Once it has been accepted, as it has been above, that the Exemption Notice, properly interpreted, necessarily and lawfully delegated a rule-making power to the regulatory institution, the requirement that lenders must comply with those rules must follow inevitably. The Notice requires lenders to register with a regulatory institution; the obvious corollary must be that they must comply with the rules of that institution. In this regard, the general complaint of the applicant fails.'[815]

[814] Paras 18, 23 & 26-27. The Regulator's guidelines made provision for an application to be made in terms of section 87(1)(a) to have the consumer declared 'not over-indebted', but the court held at paras 26 & 27: 'Section 87(1)(a) provides for a *negative* response by the court to the application brought before it. It is to that provision that s 88(1)(b) effectively cross-references. The Act most certainly does not contemplate an application to the magistrates' court for a declaration that the consumer is not over-indebted. Any such declaration would require a *positive* response to an application for which the Act makes no provision. Once a debt review has been confirmed, whether by way of court order in terms of s 87(1)(b) or by voluntary debt re-arrangement in terms of s 86(8)(a), the only way to end its effect is in terms of s 71 read with s 88(1)(c). There is no halfway house … In short, the NCA just does not make provision for the sort of application conjured in paragraph 4.2 of the Explanatory Note.' Original emphasis.

[815] (n 55) par 143.

Therefore, two scenarios can be presented. One, that where the registrant has accepted the conditions of registration, which the National Credit Regulator is lawfully permitted to make in terms of section 48 of the National Credit Act, he or she has agreed to submit to the interpretations of the Regulator and, in light of the court judgments, as long as it does not transgress the provisions of the National Credit Act. This would probably not preclude the registrant from challenging the validity of such an interpretation. Two, processes developed for practical purposes, such as the debt review processes developed by the Task Team and other matters dealt with by the Credit Industry Forum, do not amount to interpretations of the National Credit Act but are aimed at adhering to the provisions of the Act in a meaningful way.

The matter of withdrawal within the context of debt review illustrates this point. One could argue that the debt counsellor is compelled to bring the debt review application of the consumer to its logical conclusion – being a court or tribunal order – and then issuing a clearance certificate when the consumer meets the requirements set in the Act and Regulations. However, the practical steps provided for in the interim, such as aftercare functions or using certain prescribed document formats to facilitate interaction with other role players, are founded in the contractual undertaking via the conditions of registration.

I do not think that the court has given a definite pronouncement on the latter aspect and this viewpoint may go some way towards ameliorating the disharmonised interaction between the regulatory and judicial spheres. For example, whilst a debt counsellor would not be able to withdraw from debt review as originally contemplated by the National Credit Regulator, for example where the consumer fails to cooperate with the debt counsellor, it would be able to cease offering those services that are not specifically provided for in the Act without incurring the wrath of the Regulator and be merely responsible for obtaining the debt review order and issuing a clearance certificate. What happens in between would be the sole responsibility of the consumer.

The Regulator has been joined in some proceedings to present its views as *amicus curiae* – such as in the case of *Sebola and Another v Standard Bank of South Africa and Others*[816] where compliance with section 129 was scrutinised by the Constitutional Court. The court may be also approached by the National Credit Regulator on its own initiative for a declaratory order in terms of section 16(1)(b)(ii) of the National Credit Act.[817] Declaratory orders have also been sought by members of the consumer credit industry and the Regulator

[816] (n 750).

[817] See *National Credit Regulator v Nedbank Limited and Others* 2009 (6) SA 295 (GNP).

joined as a party to the proceedings.[818] In the given examples, where a substantive matter or a declaratory order brings the Regulator before a court, it was mostly a reasoned presentation of the Regulator's preferred perspective which was evaluated by the court.[819] Cases can be brought before a court of law as appeal or review proceedings by or against the National Credit Regulator pursuant to a decision of the National Consumer Tribunal and in terms of section 148(2). Direct access to the courts could probably also be obtained in cases where the National Credit Regulator's actions are judicially reviewable in terms of the Promotion of Administrative Justice Act,[820] but this would only be possible under those circumstances where the National Credit Act does not specifically require that the National Consumer Tribunal be approached first.[821]

I have discussed the administrative justice regime of South Africa in the part that deals with the National Consumer Tribunal, which is applicable to the National Credit Regulator as well as the Financial Sector Conduct Authority. The provisions that were discussed are also applicable to the judiciary.[822] The National Credit Regulator can be classified as an organ of

[818] See *Van der Hoven Attorneys v National Credit Regulator and Others* (10918/2015) Order given Jansen J on 25 May 2015 (Gauteng Division of the High Court, Pretoria).

[819] See e.g. *Sebola v Standard Bank of South Africa* (n 750) par 25 ('The second amicus curiae is the National Credit Regulator (NCR), a body established under the Act to promote public awareness of consumer credit matters, and to provide guidance to the credit market and industry. The NCR submits that section 129(1) should be interpreted so that its notice requirement is prima facie satisfied only when the credit grantor shows that it has taken the steps necessary to bring the notice to the attention of the consumer acting reasonably. Ordinarily, this will require the credit provider to satisfy the court that the section 129(1)(a) notice actually reached the address specified by the consumer.') & *National Credit Regulator v Nedbank Limited* (n 817).

[820] See Van Eeden & Barnard (n 689) 437.

[821] Van Eeden & Barnard (n 689) 402 – in fact, Van Eeden and Barnard argue, albeit from the perspective of the Consumer Protection Act, consumer rights and the National Consumer Commission, that the National Consumer Tribunal enjoys some 'exclusive jurisdiction' and that recourse to the judiciary by means of review or appeal is 'indirect[..]'. However, see also the aforementioned authors' submission at 437 referred to in the previous fn.

[822] See *Micro Finance South Africa v Minister of Trade and Industry and the National Credit Regulator* (n 791).

state within the scope of section 239 of the Constitution and this classification affects the applicability of the Constitution including principles of fair administrative practice.[823]

6.4.2. The Financial Sector Conduct Authority

I have already indicated on numerous occasions that the regulatory abilities of the Financial Sector Conduct Authority differ from the National Credit Regulator. The Financial Services Tribunal serves mostly as a forum to reconsider the decisions of the Financial Sector Conduct Authority whilst the National Consumer Tribunal is both a forum of reconsideration and a forum of the first instance to determine alleged misconduct and non-compliance with the National Credit Act.[824]

As the Financial Sector Conduct Authority decides on non-compliance and sanctions same – subject to a right of recourse for the affected person to the Tribunal and court as and where provided for – any subsequent forum approached will be for purposes of evaluating whether the decision was rightly and justly made. In addition to this process, section 152 provides *locus standi* to the Financial Sector Conduct Authority to approach a High Court directly for 'an order to ensure compliance with the financial sector law'. This is possible where it 'appears' to the Court that there is, has been, or will be, an event of non-compliance with a financial sector law or such non-compliance has a risk of material or irreversible impairment or prejudice.[825] The order that aims to 'ensure compliance' may be sought 'even if another

[823] Ss 8(1) & 32 of the Constitution, 1996; Govender *Has the National Credit Regulator fulfilled its mandate in promoting a credit market as envisaged in the preamble and purposes of the National Credit Act 34 of 2005?* November 2014 LLM Dissertation Faculty of Law University of Johannesburg 18. However, in the latter instance, the author states: 'Being a creature of statute it must be stated that the NCR, in the fulfilment of its duties and functions and undertaking of industry changing decisions, conducts an administrative function and is therefore subject to administrative review under the Promotion of Administrative Justice Act' – the authority for the author's statement is a bare reference to the mentioned Act. In spite of the author's reliance on the NCR's status as 'a creature of statute', 'administrative action' as per s 1 of the Promotion of Administrative Justice Act encompasses many of the NCR's activities, directly refers to an organ of state and has been referenced in case law – in *ABSA Bank Limited v Petersen* [2012] 4 All SA 642 (WCC) par 10 fn 6, the court referred to the NCR as the 'organ of State immediately responsible for the administration of the statute'. See also *Micro Finance South Africa v Minister of Trade and Industry* (n 791). In addition, the fact that the NCR 'exercis[es] a public power or perform[s] a public power in terms of' the NCA (see s 1(a)(ii) of the Promotion of Administrative Justice Act) or, in any event, the NCR is a 'juristic person' as per s 12(1)(b) of the NCA operating 'in terms of .. empowering provision[s]' in the NCA (see s 1(b) of the Promotion of Administrative Justice Act). See *Matjokana v National Credit Regulator* [2012] ZANCT 16 par 19 & fn 2 where the NCT referred the reader to s 1 as well as literature in support of its contention that '[t]he decision of the Respondent to issue a compliance notice qualifies as administrative action'. The NCT subsequently stated at fn 2: 'The National Credit Regulator is established under section 12 of the Act as an entity that 'is independent and subject only to the constitution and the law'. It exercises public power and it performs a public function in pursuance of the objects of the Act. The issuing of a compliance notice adversely affects the rights of the Applicant and it has a direct, external and legal effect in that the compliance notice compels the Applicant to comply with the terms thereof, failing which the Applicant may be subject to deregistration or the imposition of an administrative penalty of up to 10% of its annual turnover in the preceding financial year.'

[824] See par 6.3 *supra.*

[825] S 152(2) of the FSRA.

remedy is available'.[826] The Conduct Authority is enabled to give debarment orders (ordinarily effective on date of service),[827] impose civil penalties that are enforceable as if given by a competent court upon filing of the order with that court,[828] retract, suspend or refuse retraction of licenses,[829] remove functionaries of financial institutions[830] and accept enforceable undertakings.[831]

In all these aforementioned actions, the effect is immediate save for contravention of an enforceable undertaking which, after a finding to this effect by the Financial Services Tribunal and filing of the Tribunal order with a High Court[832] of same will have the enforceability status of that court.[833] It is also able to retract or modify (lessen) penalties or orders so imposed.[834] The Financial Sector Regulation Act also makes provision for offences.[835] As such, it seems as if recourse to the courts may be a form of interdict based on the requirements set out in the Regulation Act, as opposed to the usual common-law requirements.[836] Should the recalcitrant person not comply with the court order, such a person will be criminally liable for contempt of court.

The courts also become involved in terms of section 142(4)(b) where it amends or invalidates a section 142-interpretation of the Financial Sector Conduct Authority in respect of its interpretation or application of the law.

7. MISCELLANEOUS MATTERS

7.1. Introduction

I have not dealt with all the features of an answerability regime as set out in chapter four. Whilst the framework exists, it is not always possible to deal with every aspect in detail. The additional features of such a regime that relate to regulated stakeholders revolve around the ability of regulated entities and consumers to obtain information from the Regulator; the nature, value or use of this data and the resources expended to account in this manner.[837]

[826] S 152(2)(d) of the FSRA.
[827] Ss 153(1) & (3)(a) of the FSRA.
[828] Ss 167 & 170 of the FSRA.
[829] Ss 120 & 121 of the FSRA.
[830] S 145 of FSRA.
[831] S 151(1) of the FSRA.
[832] See s 1 of the FSRA, which defines a court as a 'Superior Court'.
[833] S 151(8) of the FSRA.
[834] See e.g. ss 153(6) (debarment order) & 173 (administrative penalties) of the FSRA.
[835] See part 3 of ch 17 of the FSRA.
[836] See Hoexter (n 35) 559-560, for a discussion of interdicts in the administrative law context and the common-law prerequisites for granting such an order.
[837] See par 4.8 of ch 4 *supra*.

Although this part is not a main feature of this chapter, I have included it in order to be as comprehensive as possible when considering the contents of chapter four.

7.2. Information dissemination

7.2.1. The Promotion of Administrative Justice Act (Act 3 of 2000) and the Promotion of Access to Information Act (Act 2 of 2000)

The Promotion of Administrative Justice Act provides that reasons must be provided under those circumstances where the activities can be classified as administrative action and, where it does not, the legality principle may be interpreted in such a manner that it includes the provision of reasons.[838] Hoexter states that '[r]easons are not really reasons unless they are properly informative. They must explain *why* action was taken or not taken; otherwise they are better described as findings or other information'.[839] She further distinguishes between constitutional rights, such as reasons, by virtue of the right to just administrative action and rights that pertain to information per se, by virtue of the right of access to information.[840]

In these cases, the Promotion of Administrative Justice Act and the Promotion of Access to Information Act[841] deal with different concepts of knowledge dissemination: reasons and information.[842] In contrast to the provision of reasons to specific persons who are entitled thereto, the application of the right to access information insofar as the state is concerned is all-encompassing as the Constitution allows 'everyone' to have 'access to "any information held by the state"'.[843] The concept of access to information has been the focus of many, and I will not deviate to deal with the matter in further detail neither will I gauge the exact application of this right to an independent financial regulatory authority.[844] This is a matter fit for further research.

[838] Hoexter (n 35) 460; par 6.3.3 *supra*.

[839] *Idem* at 461. Original emphasis.

[840] *Idem* at 462.

[841] Act 2 of 2000.

[842] Hoexter (n 35) 462 – she notes that '[r]easons are not reasons until they have been *formulated*, while information of any kind is already "information" …' subject to the delineations of the Promotion of Access to Information Act.

[843] Hoexter (n 35) 462.

[844] See e.g. Locke 'The application of the Promotion of Access to Information Act 2 of 2000 in Consumer Protection' 2007 *South African Mercantile Law Journal* 461; Ntlama 'The effectiveness of the Promotion of Access to Information Act 2 of 2000 for the protection of socioeconomic rights' 2003 *Stellenbosch Law Review* 273; Cloete & Auriacombe 'Counterproductive impact of freedom of access to information-related legislation on good governance outcomes in South Africa' 2008 *Journal for the South African Law* 449.

7.2.2. The information dissemination mandate of the National Credit Regulator and the Financial Sector Conduct Authority

The National Credit Regulator has a specific 'research and public information' mandate, set out in section 16 of the National Credit Act. General information disseminated by the Regulator includes publications on the National Credit Regulator's website of the state of the credit market via the quarterly Consumer Credit Market Reports and the Credit Bureau Monitors.

The National Credit Regulator and the Financial Sector Conduct Authority are tasked with conducting research[845] and the National Credit Regulator has published some of its research projects on its website.[846] The Financial Sector Conduct Authority also has to publish its research.[847] In addition, the National Credit Regulator issues media statements and releases other informative leaflets from time to time.[848]

7.2.3. Other stakeholders and industry role-players

Further aspects to consider are whether there are interactive processes that allow for participation by affected stakeholders; consumer education; the role and effect of the media and the availability of organisations such as ombudsmen and complaints-resolution offices.[849]

7.2.4. Consumer education

The aforementioned aspects feature in one form or another in both the National Credit Act and the Financial Sector Regulation Act. Section 16(1)(a) obliges the National Credit Regulator to edify the general populace on the provisions of the Credit Act in order to increase 'awareness' thereof. The Regulator has also contracted, or sought to contract, teams to evaluate the effectiveness of its endeavours.[850] Section 57(1)(b)(ii) of the Financial Sector Regulation Act is worded somewhat differently and more broadly worded than the

[845] S 16 of the NCA & s 58(1)(h) of the FSRA.

[846] See http://www.ncr.org.za/research ('Research Reports') – unfortunately, this site has not been updated to reflect post-2013 projects at the time of writing this thesis.

[847] S 58(1)(h) of the FSRA: 'In order to achieve its objective, the Financial Sector Conduct Authority must conduct and publish research relevant to its objective …'

[848] See http://www.ncr.org.za/article; http://www.ncr.org.za/images/Public%20Notices/Debt%20Counselling%20Explained%20Advert.pdf; http://www.ncr.org.za/brochure; http://www.ncr.org.za/brochures/Take%20Control%20Of%20Your%20Finances/brochure5.pdf; http://www.ncr.org.za/latest-news. See also in respect of statements e.g. NCR 'Junk mail publishing' June 2014, http://www.ncr.org.za/junk-mail-publishing; NCR 'Credit Regulator's final decision on the Credit Industry's Code of Conduct' April 2013, http://www.ncr.org.za/press_release/NCR's%20final%20decision%20on%20credit%20industry%20codes.pdf;NCR 'Deadline looms for credit providers' 26 July 2006, http://www.ncr.org.za/press_release/Deadline%20looms.pdf.

[849] See par 4.8 of ch 4 *supra*.

[850] See Topline Research Solutions (n 267); NCR *Terms of Reference to conduct an Impact Assessment of the educational and investigation activities* May 2017 (n 267).

educational mandate of the National Credit Act.[851] In pursuit of the Authority's consumer protection mandate, the Authority has to provide

> 'financial customers and potential financial customers with financial education programs, and otherwise promot[e] financial literacy and the ability of financial customers and potential financial customers to make sound financial decisions …[and] formulate and implement strategies and programs for financial education for the general public'.[852]

7.2.5. Participation: The National Credit Regulator

I have referred to some of the individualised participatory processes in earlier chapters, such as the interaction between the National Credit Regulator and a prospective registrant in respect of conditions of registration proposed by the Regulator[853] and fee exemptions granted on reasoned application by the Financial Sector Conduct Authority.[854] Participatory processes that involve general public and stakeholder input into the decisions and activities of the regulators, have not been dealt with. Hoexter highlights that public participation is a feature of democracy and includes the governed people in the process of development of the rules that will govern them.[855] This is also a mechanism that is associated with holding public officials accountable and requiring justification of choices.[856]

This is not a phenomenon that is viewed often when perusing the National Credit Act, at least not when the Credit Act is compared with the Financial Sector Regulation Act. A probable reason, when considering the circumstances where the Regulation Act makes provision for input, is the differing statutory authorities of the two regulators under consideration. In terms of the National Credit Act, the inclusion of section 48A through the amendment of the Act by the National Credit Amendment Act[857] imposed the duty of the Regulator to distribute[858] recommended codes of conduct for public comment and consulting with those market role-players that will be impacted by, or who has an interest in, these codes.[859] The Minister is only authorised to impose a code where the National Credit Regulator has undertaken the two prescribed public participation processes and subsequently taken the comments received into

[851] See also Pearson *et al* 'Balancing responsibilities – Financial literacy' 2017 *Potchefstroom Electronic Law Journal* on the different financial literacy mandates of various regulators.
[852] Ss 57(1)(b)(ii) & 58(1)(j) of the FSRA.
[853] Ss 48(3), 48(5) & 59 of the NCA.
[854] S 245 of the FSRA.
[855] Hoexter (n 35) 80 & 82-83. See also NCR 'Request for comments on recommended debt counselling fee structure' Circular 12 of 2017 August 2017; NCR 'Section 103(5) Proposed Guidelines' Circular 3 of 2015 January 2015 for examples in this regard.
[856] Hoexter (n 35) 82 & 84.
[857] 19 of 2014.
[858] S 48A(1)(a) of the NCA refers to publication, but Hoexter (n 35) 85-86 states that it is important to ensure that all interested parties are given the opportunity to respond and as such, must be informed of the matter.
[859] Ss 48A(1)(a) & (c) of the NCA.

account.[860] The Regulator is also the responsible authority when it comes to amending the initial codes after consideration of comments.[861]

(i) Codes of conduct

As the Regulator has been responsible for developing codes of conduct for debt counsellors and credit providers prior to the amendments taking effect in 2015 (and incorporating consultation and some publication of its reasons in the process),[862] it is quite plausible that the Regulator will continue to draft, publish and revise section 48A codes and the Minister will merely use his authority to transform ordinarily voluntary codes into mandatory behavioural norms. In addition, section 48A refers specifically to codes of conduct that apply to credit providers and the content relates to section 48(1)(b):

> 'If a person qualifies to be registered as a credit provider, the National Credit Regulator must further apply the following criteria in respect of the application: … the commitments, if any, made by the applicant or any associated person in connection with combating over-indebtedness and compliance with a prescribed code of conduct as well as affordability assessment regulations made by the Minister on the recommendation of the National Credit Regulator.'

Two aspects in respect of answerability become relevant here. Firstly, the Minister 'prescribes' the code of conduct and I presume that the manner in which this prescription will occur will be by way of regulation, otherwise the authority of the Minister does not differ from that of the Regulator. I deal with the status of codes of conducts briefly hereafter to illustrate the importance of this aspect. Secondly, any person contesting the section 48A codes will have to confront the Minister in this regard – an aspect that will have to resort to the courts under judicial review as the Tribunal does not make provision for Minister-regulatee disputes. The National Credit Regulator will not be the first respondent in this regard – similar to what happened in *Micro Finance South Africa v Minister of Trade and Industry and the National Credit Regulator*.[863]

[860] S 48A(1) of the NCA.

[861] S 48A(1)(d) of the NCA.

[862] See NCR 'Final Decision on Credit Industry Codes of Conduct' Circular 2 of 2013; NCR 'Credit Industry Codes of Conduct' Circular 3 of 2013; NCR 'Review of the Credit Industry Codes of Conduct' Circular 8 of 2012; NCR 'Notice of Intention to Withdraw Approval of Industry Codes of Conduct' Circular 11 of 2012. I cannot attest to the link between conditions of registration and the codes for other role players, but debt counsellors were required to acknowledge compliance with these codes as part of the imposed conditions of registration – see NCR *Conditions of Registration* 17 October 2011 3 & version of *Debt Counsellor's Code of Conduct for Debt Review* applicable when Conditions of Registration were signed (JS van Wyk) on file with author. The codes are apparently constantly under review – see the proposed activities of the Credit Industry Forum in this regard: NCR 'Update from the Credit Industry Forum' Circular 10 of 2014.

[863] (n 791).

Codes of conduct affect regulated markets[864] and industry participants.[865] It is therefore of notable value,[866] although SF du Toit contends that the impact that a code has in respect of a particular regulated situation is not necessarily as apparent as legislation.[867] However, codes of conduct do have a consequential role to play within the regulatory regime.[868] For purposes of the following discussion, the concept of 'regulation',[869] codes as a way of effecting regulation[870] and the role of stakeholders *vis-à-vis* codes of conduct, need to be briefly canvassed.[871] Gail Pearson writes the following of the Australian perspective on codes of conduct:

> 'A code of conduct is "a comprehensive body of rules that sets enforceable standards across an industry (or part of an industry), and delivers measurable consumer benefits". It is a body of rules with three characteristics: it must be contractually binding and enforceable on members of the code; it needs to be transparent in its development and further review; and it must have effective mechanisms for administration and compliance. The distinction between codes and other forms of self-regulation means that single-issue guidelines and arrangements without compliance, administration and review mechanisms are not codes for the purposes of the ASIC test.'[872]

The code of conduct is a mechanism or manner of regulation, which means that it is objectively fitted into the scheme of regulation of a particular market.[873] In this regard, the source of the code becomes applicable as the foundation of the mechanism affects not only its position in the scheme, but also the extent to which it can produce certain results.[874] If one considers Julia Black's basic categorisation of 'regulation', then conduct alteration and a form of intervention are the two primary characteristics of a manifestation of 'regulation'.[875] Again, this presupposes the third aspect, which is the effected change,[876] necessitating a consideration of the actual contents of the code of conduct.[877]

[864] Du Toit 'Reflections on the South African Code of Banking Practice' 2014 *Journal for the South African Law* 568 568.

[865] Pearson 'The place of codes of conduct in regulating financial services' 2006 *Griffith Law Review* 333 336.

[866] Du Toit (n 864) 568.

[867] *Ibid*.

[868] Pearson 'The place of codes of conduct in regulating financial services' (n 865) 334, see also 335-337.

[869] See Black 'Critical reflections on regulation' 2002 *Australian Journal of Legal Philosophy* 1 in respect of the various perceptions of 'regulation'.

[870] Pearson 'The place of codes of conduct in regulating financial services' (n 865) 334 describes 'the code of conduct [as] ... another spanner in the "regulatory toolkit" or another way to "enroll" industry in its own "decentred" regulation'. See also the references at 338 and 339 to codes as 'a form of regulation'.

[871] See Black (n 869) for a comprehensive discussion of the notion of 'regulation'.

[872] Pearson 'The place of codes of conduct in regulating financial services' (n 865) 353. I have omitted the specific references but the author references ASIC policy statements as authority for her statements.

[873] Pearson 'The place of codes of conduct in regulating financial services' (n 865) 334.

[874] Du Toit (n 864).

[875] Black (n 869) 11.

[876] Pearson 'The place of codes of conduct in regulating financial services' (n 865) 336.

[877] *Idem* at 334.

Pearson views codes of conduct as a mechanism to draw the industry into the regulatory sphere, although it is limited to the interaction between the provider and the user of the product.[878] The effect is that industry participants are incorporated into the framework and tasked to ensure that their interactions with customers conform to a certain standard.[879] In addition, she highlights that codes of conduct embody two very specific aspects pertaining to consumer protection, namely customer-provider dispute resolution and codification of 'best practice'.[880]

In general, codes of conduct can fall into two categories depending on the source of the codes.[881] Codes are either 'voluntary, non-statutory' or 'statutory', the latter often founded in regulations mandated by principal acts.[882] In addition, different approaches can be followed in respect of the recognition of codes of conduct by regulatory authorities – some authorities are empowered to prescribe codes of conduct whilst others are limited to endorse codes upon submission of same to the authority.[883]

Codes of conduct pertaining specifically to consumer credit, and to role-players in general, were not initially part of the regulatory scheme under the National Credit Act.[884] Banks are, for example, subject to the Code of Banking Practice, regulating the interaction between bank and customer.[885] However, codes of conduct in respect of specific consumer credit role-players did not materialise until January 2011[886] and only after recommendation by the Task Team.[887] On 1 January 2011, the codes of conduct for debt counsellors, credit providers and payment distribution agencies became operational and debt counsellors whose applications

[878] *Idem* at 334; see also Black (n 869).
[879] Pearson 'The place of codes of conduct in regulating financial services' (n 865) 334.
[880] *Idem* at 335-337.
[881] Van Zyl 'Codes of conduct for the financial services industry' 2006 *Journal for the South African Law* 510 510.
[882] Van Zyl 'Codes of conduct' (n 881) 510; see also Pearson 'The place of codes of conduct in regulating financial services' (n 865) 334.
[883] Pearson 'The place of codes of conduct in regulating financial services' (n 865) 337, referencing the position in respect of two Australian authorities, namely the Australian Securities and Investments Commission (ASIC) and Australian Competition and Consumer Commission (ACCC). The author further highlights four characteristics of a code that would meet the commendation of ASIC, namely enforceability, reviewability within set time period, provision for 'internal dispute-resolution system' and 'external dispute-resolution scheme'
[884] This statement needs to be viewed within the contexts of the pre- and post amended versions of the NCA as well as the industry developments in the period between the introduction and amendment of the act in 2006/2007 and 2015 specifically. The unchanged version of the NCA referred to codes of conduct in s 48(1)(b), but did not refer to comprehensive codes tailor-made for the consumer credit industry. The amended version of the NCA, in the form of the newly introduced s 48A, now makes specific reference to codes of conduct.
[885] Du Toit (n 864) 568 *et seq*.
[886] See NCR *Debt Counsellor's Code of Conduct for Debt Review* January 2011 par 9.
[887] NCR *National Credit Regulator Debt Review Task Team Report* May 2010 par 3.3 p 4; Covering Report par 5.3 p 9; Annexure B (Proposed Debt Review Process Enhancements and Code of Conduct Provisions) par 1 p 3.

for registration post-dated January 2011, were expected to agree to their codes as a condition of registration.[888] The codes of conduct were not industry-negotiated codes but responses to recommendations[889] set out by a Task Team consisting of seven members, of which one chaired the team and three fulfilled supporting roles.[890] Although the Task Team reportedly consulted extensively with industry role-players, the purpose was primarily to identify the experienced challenges to the industry, whilst the role of the Task Team was to report on the challenges and provide solutions.[891] Likewise, the 2013 version of the codes were redrafted by the National Credit Regulator after requesting submissions from the industry.[892]

The 2013 versions of the industry codes of conduct for debt counsellors and credit providers respectively reiterate core aspects of the National Credit Act,[893] express acquiescence to the authority of the Regulator and its guidance of the industry,[894] advance informal mechanisms to address grievances of consumers,[895] endorse meaningful collaboration between industry role-players,[896] assure that sufficient enterprise strategies are developed and practiced as specified,[897] provide for accounting to the Regulator in respect of certain activities[898] as well as espousal of market projects directed at consumer information and edification.[899] The codes are substantially focused on mechanisms to avert over-indebtedness and facilitation of the debt review process as embodied in the National Credit Act.

[888] NCR *Conditions of Registration* 17 October 2011 3 & version of *Debt Counsellor's Code of Conduct for Debt Review* applicable when Conditions of Registration were signed (JS van Wyk) 2.

[889] Devnomics *Literature Review on the Impact of the National Credit Act (NCA) has had on South Africa's Credit Market – Final report* June 2012 41.

[890] NCR *Debt Review Task Team Report* (n 887) Summary p 2 par 1.2.

[891] See NCR *Debt Review Task Team Report* (n 887) Summary p 2 par 1.

[892] NCR 'Review of the Credit Industry Codes of Conduct' Circular 8 of 2012; NCR 'Notice of Intention to Withdraw Approval of Credit Industry Codes of Conduct' Circular 11 of 2012; NCR 'Final Decision on Credit Industry Codes of Conduct' Circular 2 of 2013; NCR 'Credit Industry Codes of Conduct' Circular 3 of 2013.

[893] NCR *Debt Counsellors' Code of Conduct* May 2013 paras 1.1 & 2.1.4-2.1.5; NCR *Credit Industry Code of Conduct to Combat Over-Indebtedness in terms of Section 48(1)(b) of the National Credit Act (NCA)* May 2013 paras 1.1-1.4, 2.1.1, 2.1.3-2.1.5 & 2.2.2.

[894] NCR *Debt Counsellors' Code of Conduct* (n 893) paras 2.1.6, 2.2.1, 3.1 & 4.1.

[895] *Idem* at paras 2.2.1-2.2.5; NCR *Credit Industry Code of Conduct* (n 893) paras 2.4 & 2.4.1-2.4.2.

[896] NCR *Debt Counsellors' Code of Conduct* (n 893) paras 2.1.11 & 2.3.2-2.3.5; NCR *Credit Industry Code of Conduct* (n 893) paras 2.2 & 2.2.1-2.2.3.

[897] NCR *Debt Counsellors' Code of Conduct* (n 893) par 2.1.10; NCR *Credit Industry Code of Conduct* (n 893) par 2.3.

[898] NCR *Debt Counsellors' Code of Conduct* (n 893) par 4; NCR *Credit Industry Code of Conduct* (n 893) par 2.6.

[899] NCR *Debt Counsellors' Code of Conduct* (n 893) par 2.4.1; NCR *Credit Industry Code of Conduct* (n 893) par 2.5.

The codes set out the required behaviour for debt counsellors and credit providers,[900] including standards for ethical conduct[901] and cooperative efforts.[902] I submit that the section 48A process will differ where adherence to codes of conduct become mandatory due to acceptance of a provision to this extent by a prospective registrant (such as a debt counsellor) as part of the conditions of registration. As such, the section 59 process will have to be followed as dealt with in the context of the National Consumer Tribunal earlier. The question of the Minister's role becomes relevant, particularly when pondering the extent to which the Minister has adopted the practice of 'rubber stamping' the changes to the regulatory scheme received from the Regulator. If this is the case, it would be valuable to consider whether some of these regulatory duties would not befit the Regulator better and would further streamline the mechanisms for answerability where the Regulator has a core function.

In *Micro Finance South Africa v Minister of Trade and Industry and the National Credit Regulator* the applicant challenged the validity of regulations issued by the Minister and that affected the monetary amounts that could be charged by a credit provider under the National Credit Act.[903] The basis for referring the matter to the High Court for review was the disregard of the Minister to take the factors specified in the National Credit Act into account when deciding on the new amounts.[904] In terms of regulation 45 of the Regulations to the National Credit Act, the National Credit Regulator bears the responsibility to advise the Minister on changes required in this regard, although section 105 places the responsibility on the Minister to review the finance charges on a tri-annual basis:

[900] In some instances, the codes exceed the statutory provisions – see e.g. NCR *Debt Counsellors' Code of Conduct* (n 893) paras 2.1.4 ('Provide factual information to consumers in a plain language to explain the benefits, process, risks, fees and implications of debt counselling under the NCA and in terms of this code'), 2.1.8 ('Use the PDAs accredited by the NCR') & 2.3.4 ('Raise and discuss such operational difficulties with credit providers and PDAs in good faith'); NCR *Credit Industry Code of Conduct* (n 893) paras 2.1.5 ('...collaborate with registered credit bureaux to ensure that additional datasets are made available to credit bureaux for use by credit providers in affordability assessments') & 2.3.1.2 ('having a single appropriated mandated point of contact in our business with adequate resources to deal with all such matters'). See also NCR *Debt Review Task Team Report* (n 887); NCR 'Debt Review Task Team Agreements of 2010' Guideline 1 of 2015. In some instances, the codes confirm the approach of the judiciary – see *FirstRand Bank Ltd v Munsamy* [2013] ZAWCHC 13 (14 February 2013) par 22 in respect of the reasonability of a proposal; NCR *Debt Counsellors' Code of Conduct* (n 893) par 2.1.1(a).

[901] NCR *Debt Counsellors' Code of Conduct* (n 893) e.g. paras 2.1.2-2.1.4.

[902] NCR *Debt Counsellors' Code of Conduct* (n 893) paras 2.1.1-2.1.2, 2.1.11 & 2.3; NCR *Credit Industry Code of Conduct* (n 893) paras 2.2. & 2.3.4.

[903] (n 791).

[904] *Idem* at par 8.

> ‘[Regulation] 45 Periodic review of limitations on fees and interest rates
>
> The National Credit Regulator must –
>
> (1) perform a review of interest rates and cost factors at intervals of no more than 3 years and advise the Minister of any changes that may be required;
>
> (2) when making a recommendation to the Minister in terms of this regulation, consider:
>
> (a) ruling interest rates and fees;
>
> (b) cost of providing such credit;
>
> (c) the choice available to consumers in the particular category of credit agreements, between different products and different credit providers; and
>
> (d) the impact upon access to finance for persons referred to in section 13(a) of the Act.’

and

> ‘[Section] 105 Maximum rates of interest, fees and charges
>
> (1) The Minister, after consulting the National Credit Regulator, may prescribe a method for calculating
>
> *(a)* a maximum rate of interest; and
>
> *(b)* the maximum fees contemplated in this Part,
>
> applicable to each subsector of the consumer credit market, as determined by the Minister.
>
> (2) When prescribing a matter contemplated in subsection (1), the Minister must consider, among other things –
>
> *(a)* the need to make credit available to persons contemplated in section 13 *(a)*;
>
> *(b)* conditions prevailing in the credit market, including the cost of credit and the optimal functioning of the consumer credit market; and
>
> *(c)* the social impact on low income consumers.
>
> (3) When establishing regulations contemplated in this section, the Minister –
>
> *(a)* must establish different maximums for credit agreements within each subsector of the consumer credit market; and
>
> *(b)* may prescribe the method, consistent with section 101 (3), for allocating service fees between the provision of credit and the provision of related financial services, in circumstances in which a credit provider offers multiple financial services under a single agreement.’

In dealing with the matter, the court considered the conduct of the Regulator as it affected the decision of the Minister, as well as the Minister’s ultimate decision itself.[905] As such, the final

[905] *Idem* at par 19. See also par 8: ‘[8] The applicant contends that the above mandatory requirements were not complied with by the Minister and the regulator, and that the Minister’s decision to publish the new regulations is accordingly reviewable in terms of sections 6(2)(e)(iii) and/or 6(2)(e)(vi) and/or 6(2)(h) of PAJA. In terms of s 6(2)(e)(iii), an administrative decision is reviewable if irrelevant considerations were taken into account or relevant considerations were not taken into account. In terms of s 6(2)(e)(vi), it is reviewable if it was taken arbitrarily or capriciously. In terms of s 6(2)(h), it is reviewable if the exercise of the power or the performance of the function authorised by the empowering provision is so unreasonable that no reasonable person could have so exercised the power or performed the function.’

regulations published were examined in light of the reasons, evidence and steps taken by the Minister as well as the Regulator.[906] In addition, a part of the Minister's actions was criticised for acting without the advice of the Regulator.[907]

7.2.6. Participation: The Financial Sector Conduct Authority

The Financial Sector Regulation Act makes provision for a number of instances where the Financial Sector Conduct Authority has to engage with stakeholders through a notice-and-comment procedure. Sections 92 and 93 of the Act require transparency insofar as the administrative procedures of the Authority is concerned. This is achieved by publicly announcing its intended procedures and inviting comments thereon.[908] The process also applies to any amendments to its processes.[909] Section 92 implores the Regulator to take certain aspects into account: fairness, consistency, alignment with the provisions of the Promotion of Administrative Justice Act and financial sector laws and, where deviation from the Administrative Justice Act is envisaged, to be able to show that the deviation is reasonable and justifiable. It is thought-provoking that the call for comments should be aimed at soliciting public commentary, published on the Financial Sector Conduct Authority's website and the procedure must be sent to the Director-General of the National Treasury and the Prudential Authority.[910]

(i) Regulatory instruments

The legislative procedure for issuing the binding regulatory instruments also includes a participatory element: in terms of section 98 of the Financial Sector Regulation Act, the instrument must be published together with specific documents by the Financial Sector Conduct Authority. The fact that it must be published presumes that public comment is ordinarily sought but section 98(3) specifically requires that a copy be sent to the Prudential Authority, National Credit Regulator, Reserve Bank, the Director-General of the National

[906] *Micro Finance South Africa v Minister of Trade and Industry and the National Credit Regulator* (n 791) par 20. This paragraph reads as follows: 'I have referred above to the requirements of s 105(2) and regulation 45(2) with which the Minister and the regulator have to comply. These include the need to make credit available to historically disadvantaged persons and low income persons and communities, the impact of access to finance for such persons, and the conditions prevailing in the credit market, including the cost of providing credit. Apart from the regulator stating in general terms that research was done, no evidence has been provided of how these matters were investigated or considered. The Minister and the regulator have not addressed in any meaningful way the applicant's contention that the amended fees and interest rates will lead to closures of the businesses of many of the applicant's members and will impair access to credit by those members of the population who require short term credit provided by the applicant's members.'

[907] *Micro Finance South Africa v Minister of Trade and Industry and the National Credit Regulator* (n 791) par 19.

[908] S 93 of the FSRA.

[909] *Ibid*.

[910] S 93(1) read with s 1 of the FSRA.

Treasury and the Council for Medical Schemes. Parliament also has to be informed after the comments have been taken into account.[911]

Contrary to the provisions of section 48A of the National Credit Act, the Financial Sector Conduct Authority is not specifically required to consult in matters that have a more general application to the financial sector industry.

The aforementioned process echoes some features of the regulatory impact assessment as dealt with in chapter four.[912] In terms of section 98(1)(a) of the Financial Sector Regulation Act, the Conduct Authority has to prepare a 'statement explaining the need for and the intended operation of the regulatory instrument' and 'a statement of the expected impact of the regulatory instrument'. The assessment in itself should be a topic for further research, especially in a comparative format as the Australian experience has highlighted some shortcomings in their legislated process[913] and in order to determine how the South African version of the impact statement can become truly suited to the unique circumstances of this country. At present, the Financial Sector Regulation Act does not prescribe substantive or procedural characteristics for the section 98 impact statement and it would be prudent to do so whilst the matter is still within the remit of the Authority – as opposed to a challenge to an impact statement referred for judicial review. The mentioned research would be valuable to determine the factors identified in chapter four in respect of the South African accountability scheme, namely, whether provision is made for these assessments and if so, the basis therefore; the target audience of the completed assessment; the scope of application and desired consequences of the assessment, and obstacles and resource expenditures related to the impact assessment.[914]

7.3. Analysis of miscellaneous matters

The features discussed under this heading differ from the earlier mechanisms, showing the unique (and complimentary) nature of each element of an accountability regime – Colin Scott's 'web' of accountability.[915] In addition, the current element of participation has unique benefits:

> 'Judicial review is essentially a reactive or backward-looking safeguard. The passivity of the judicial process means that courts only hear disputes that happen to be brought to them by litigants. This results in incremental and sporadic decision-making, since the judge's power to decide

[911] S 98(1)(b) of the FSRA.
[912] See paras 4.6.3 & 5.2.3 of ch 4 *supra*.
[913] See par 5.2.3 of ch 4 *supra*.
[914] See par 4.6.3 of ch 4 *supra*.
[915] Scott 'Accountability in the regulatory state' (n 9) 57.

> obviously depends on the limited range of powers that are before her. In this respect political and representative controls such as public participation may guide and shape the exercise of administrative action far more effectively than review. Moreover, because adjudication focuses upon the immediate interests of the parties involved, often to the exclusion of broader policy and public-interest issues, it is often regarded as an inappropriate tool for resolving polycentric problems. The adversarial nature of the process also means that there is little scope for compromise. In some instances, negotiation or mediation may address and resolve the substantive issues in dispute more effectively. In other cases the investigation and reporting functions of an institution like the Public Protector are better suited to resolving the conflict between an affected individual and the administration.'[916]

The above aspects have two important contributions to add to this discussion. First, David Spence wrote that the prior legislative incorporation of specific matters and persons' views that have to be taken into account when making decisions, is a manner of pre-emptive control as it forces certain perspectives into the ambit of the agency's considerations.[917] As such, the ultimate outcomes of decisions by agencies over which politicians do not have *ex post* authority, are still influenced by a method referred to as the 'structure and process hypothesis'[918] – this approach is brought about by the inherent problem posed by delegating to an independent institution: the ability to effect the discretion so delegated.[919] Although Spence's analysis of the hypothesis through research into the conduct of the United States' Federal Energy Regulatory Commission shows that there are some challenges associated with this hypothesis, his research highlights aspects that need to be taken into account in order for the incorporated elements to be effective, rather than discrediting the hypothesis.[920] The hypothesis underscores the approach that indirect control can be effected by deliberately devising the missionary, organisational and resolution-making features of the independent agency in such a manner that these inherent characteristics will impact the conduct of the institution.[921] There are uncontrollable aspects that will still impact the decisions of the institution – such as the proficiency of expert employees (in effect 'technical expertise'), 'professional norms' and 'the relevant policy network', but authors have identified specific features that can impact how agencies make their decisions – such as generating certain goals

[916] Hoexter (n 35) 168. See also Metzger (n 609) 153-154: 'Courts not only lack agency substantive expertise, access to data, and CBA [cost-benefit analysis] expertise, but in addition, they perform their reviews ex post, once a rule is finally promulgates, and are much less predictable in their reviews, given the importance that judicial-panel composition can play in judicial review of regulation.'

[917] Spence 'Managing delegations ex ante: using law to steer administrative agencies' 1999 *The Journal of Legal Studies* 413 & 415-420.

[918] *Idem* at 414.

[919] *Idem* at 444.

[920] *Idem* at 414-415 & 444-446.

[921] *Idem* at 414 & 415-416.

for the institution, allocating responsibilities to a specific chosen institution and requiring adherence to administrative rules such as transparency and participation.[922]

In the South African context, I believe that the distribution of regulation of the credit process between two regulators, mandatory consultation and commentary requirements that involved not only regulators but also public and political interested parties – and a concomitant administrative law requirement to take relevant considerations into account – as well as segregated goals are indicative of a similar approach which will effect certain outcomes, whether this was a deliberate attempt at control or not.[923] In my mind, the discord about whether the National Credit Regulator should be part of the Financial Sector Conduct Authority is evident of deliberation by National Treasury and the Department of Finance.[924] However, the initial strong wording of the National Credit Act as an independent agency and its commitment to its consumer credit mandate strengthen the preferences of the Department of Trade and Industry – in this regard, this is a clear example of what David Spence refers to as 'dedication to mission [as] illustrating one form of ex ante structural control'[925] and what Gillian Metzger (in the context of the Consumer Financial Protection Bureau) refers to as 'programmatic accountability'.[926]

Second, Freeman and Rossi highlight the importance of the timing of input by other regulators.[927] They argue that the earlier the input is provided, the more likely it is that it would have a meaningful impact on the ultimate outcome.[928] Input as part of the coordination efforts of regulators advances the knowledge and competencies of the different institutions

[922] Spence (n 917) 416-417. However, see Spence (n 917) 445-446 where he notes that 'procedural controls' are not as effective unless they are 'sufficiently specific' and thus require some political 'foresight'.

[923] See Spence (n 917) 444-445 regarding foresight and effects that were not purposefully incorporated.

[924] Testing the value of these decisions can, however, very difficult when using certain methods, as Spence (n 917) notes at 434-435 when considering the results of his empirical study on the Federal Energy Regulatory Commission: '2. *Effects of Structural Controls*. First, neither the Wild and Scenic Rivers Act nor the Clean Water Act produced statistically significant effects in either model. As I note above, however, this result does not necessarily mean that these statutes were ineffective instruments of ex ante control. Rather, by removing some decisions from the FERC's jurisdiction, these statutes may have had significant effects that were not captured by the models, and I have recounted elsewhere the anecdotal evidence to support the conclusion that some state agencies successfully used the Clean Water Act 401 certification process to stop or change environmentally problematic projects. However, if these two distribution-of-power structural controls were effective, they operated in ways that these models cannot detect and did so by design. This is one of the impediments to tests of this particular kind of structural control device.' See also Spence (n 917) 444, where he notes that 'strategic behaviour' can also affect the research.

[925] Spence (n 917) 444. In this regard, he also notes at 444 that '[w]hile the 1935 Congress probably did not foresee the environmental challenge to hydroelectric licensing, it did create an agency that was able to stay the course in the face of that subsequent challenge'.

[926] Metzger (n 609) 148. She states at 148 that 'though achieving greater accountability was an animating goal behind the CFPB's structure, the type of accountability sought was programmatic accountability to the substantive goals of consumer financial protection embodied in the statute rather than accountability to current national political leaders'.

[927] Freeman & Rossi (n 506) 1195.

[928] *Ibid*.

and increases the likelihood of rational, considered[929] and 'quality' choices.[930] The Financial Sector Regulation Act already includes a significant element to ensure proper consideration of other regulators' inputs by requiring that the Financial Sector Conduct Authority document the feedback on the comment process and its responses thereto.[931] In addition, section 106(5)(b) requires the Financial Sector Conduct Authority to consult with the National Credit Regulator prior to issuing a conduct standard that affects credit providers over which the Credit Regulator has jurisdiction, but there is no indication of when the consultation needs to take place. However, the singularity of the obligatory input process – as opposed to a potential discussion during a meeting of one of the committees or councils established by the Financial Sector Conduct Authority or an understanding in a memorandum of agreement to this effect – may have the effect that the current statutory provisions may adversely affect meaningful consideration:

> '[I]nteragency input often comes too late to be of maximum benefit – such as comments on analyses that have already been substantially designed or completed. To ameliorate this problem, it is important to ensure that consultations occur early in the decisionmaking process, before initial positions are locked in, and that the consultations be ongoing and integrated rather than periodic and reactive. This can be accomplished, for example, by establishing cross-cutting agency teams to produce and analyse data together over the course of the decisionmaking process.'[932]

In this regard, Michael Ting converted the redundancy model used in engineering to a game theoretical model that accounts for strategic behaviour by bureaucrats – an aspect that is significant when multiple agencies have to work together in a specific milieu.[933] His work is of real importance to the South African regime that relies heavily on collaboration and coordination between financial market regulators and it shows that there are instances where collaboration can foster shirking.[934]

[929] See Freeman & Rossi (n 506) 1184: 'The obligation to consult with other agencies, especially those with different missions, can also help pierce a closed decisionmaking culture and overcome group polarization effects by introducing viewpoints that do not identify with the dominant agency culture.' See also Vermeule (n 733) in respect of multi-party decision-making.

[930] Freeman & Rossi (n 506) 1184.

[931] See e.g. s 104 of the FSRA.

[932] Freeman & Rossi (n 506) 1195.

[933] Ting (n 622).

[934] Paras 5.2, 5.3 & 5.5 *supra*.

This concludes the part on miscellaneous aspects. I will not be dealing with the impact of the media on the regulators, although the media does report on the National Credit Regulator.[935]

Neither will I be dealing with market ombudsmen and consumer resolution offices that deal with stakeholder disputes as opposed to Regulator-stakeholder disputes. The desktop research conducted for purposes of this thesis is further not conducive to providing meaningful input into informal answerability measures, even though there have been instances where I allude to the presence of these measures – I referred to the media reports, and subsequent parliamentary enquiry, of the involvement of the Minister of Trade and Industry, Doctor Rob Davies, in the reduction of the fine levied against African Bank (a claim that was denied) as well as the statements by the National Credit Regulator that it meets with delegates from the Department of Trade and Industry on a regular basis.[936] Lastly, my research has not been conducive to calculating the resource expenditures for specific accountability mechanisms. In this regard, there may be a need to develop an evaluative system to determine the resources expended to deal with accountability-related matters.[937]

8. COMPARATIVE ANALYSIS OF THE ACCOUNTABILITY OF THE NATIONAL CREDIT REGULATOR AND THE FINANCIAL SECTOR CONDUCT AUTHORITY

It is not the aim of this chapter to conduct evaluations of the National Credit Regulator and Financial Sector Conduct Authority but to evaluate the mechanisms of accountability relevant to these regulators. However, in order to analyse these mechanisms, some consideration of the actual substantive activities of the National Credit Regulator was necessary – a feat that was not possible in respect of the Financial Sector Conduct Authority because it only came into existence on 1 April 2018.[938]

Accountability has been recognised by domestic and international authorities and is also of significance for any regulator itself.[939] The National Credit Act itself makes provision for a number of mechanisms, ranging from the institution of the National Consumer Tribunal to mandatory reporting requirements to the Minister of Trade and Industry and Parliament. The

[935] See e.g. Arde ‘Credit regulator to be probed for failing consumers’ Business Report 26 November 2016; Arde ‘NCR in hot water over enforcement’ Personal Finance 2 April 2016; Barry ‘Credit regulator to take ownership of debt counselling rules’ Moneyweb 12 December 2014; Zerbst ‘New codes of conduct throw credit industry into disarray’ FAnews 20 May 2013; Sapa ‘Watchdog steps up credit fight’ Fin24 2 May 2013.

[936] See paras 4.2.2 & 4.2.3 *supra*.

[937] See e.g. Freeman & Rossi (n 506) 1181 *et seq*.

[938] See *Commencement of the Financial Sector Regulation Act 9 of 2017* National Treasury Notice 169 of 2018 in GG 41549 of 29 March 2018 .

[939] National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 305) 25-26; Bird (n 434) 744.

National Credit Regulator is the first forum that a person can approach when there is doubt as to the accuracy of a decision taken by the Regulator. The Credit Act provides general *locus standi* to a party via the provisions of sections 59 and 148. Both the Tribunal and the courts can be classified as 'strong' answerability mechanisms as these institutions have the capacity to change the decisions made and therefore impact the future conduct of the Regulator.

These oversight institutions have an extremely important role that can be detrimental rather than enhancing when not exercised properly, sufficiently or competently. A strong argument is made that the ability of these mechanisms to effect oversight can only be meaningfully executed when the mechanisms themselves are adequately enlightened and autonomous:

> '[T]he very purpose of regulators (that is, to act with expertise and independence) is undermined when they are held to account, especially using strong accountability mechanisms that lead to responses imposed by those who do not possess the same level of expertise and independence as the regulators. This is the accountability dilemma: … Particular institutions may be designated as regulators because their expertise and independence from political influence maximize the prospects of their fulfilling public interest goals. Those prospects are reduced if their judgments may be overridden by other bodies which do not combine the same degree of expertise and political independence.'[940]

The importance of the above becomes even more significant when one considers Joanna Bird's assertion that answerability mechanisms have past and future implications because the general understanding that a regulatory entity must vindicate its actions, and the real execution of this expectation, affects the reasoning of a regulator when taking action in the first place.[941] In this regard, it is important that the institutions responsible for oversight over the conduct of the regulators, specifically the Tribunals, realise that the members' decisions affect more than just the immediate matter before them and that members are indeed the specialists ideally envisaged by Hoexter.[942] Scott highlights that 'feedback-learning' should be integrated into oversight mechanisms in order to exceed that which a mere accountability exercise would generate.[943]

[940] Bird (n 434) 744.

[941] *Ibid*: 'This is not an argument that regulators should not be required to explain and justify their actions, and consult or conduct regulatory impact analyses. In fact, the regulator's knowledge that it may be called on to explain and justify its actions creates strong incentives to ensure that its actions are, in fact, explicable and justifiable. Likewise, consultation and regulatory impact analysis generally lead to improved regulatory decision-making. So in this way, appropriate accountability mechanisms will significantly improve regulators' performance of their core functions.'

[942] See Hoexter (n 35) 66.

[943] Scott 'Evaluating the performance and accountability of regulators' (n 343) 374.

Over and above the specific mechanisms, the determination of the performance indicators for the financial sector regulators is a point of contention. Bird writes that:

> 'No-one has very good answers to any of these questions: no-one can confidently assess ASIC's performance. The same analysis can be conducted in relation to the activities of all regulators with complex mandates. Essentially, noone [*sic*] has come up with the perfect key performance indicators ("KPIs") for these regulators. This is a significant impediment to effective accountability. Strong accountability mechanisms, in particular, require measuring the quality of the regulator's performance; there can be no response if the regulator fails to meet the required standard unless that standard is known and unless one can measure whether that standard has been met. Even weak accountability mechanisms are not particularly meaningful if those receiving the justification or explanation cannot discriminate between convincing and unconvincing justifications or explanations.'[944]

A solution, but particularly difficult assessment, may very well be the evaluation of adherence to the principles set out in the Market Conduct Policy document.[945] Similarly to the principles-based approach introduced by the Treating Customers Fairly regime, the Authority can be held to these eight principles. In this regard, one wonders if a similar assessment would not befit the regulators – that they need to show, to the satisfaction of the oversight regime, that they have incorporated these principles into their regulatory culture. This would be a point of departure for determining performance indicators similarly versed as the Australian Government's *Regulator Performance Framework*. Similar principles would have to be sourced from the National Credit Act for the National Credit Regulator, taking into account the different authority over the credit market players bestowed on this particular Regulator – it cannot change the market landscape as straightforwardly as the Financial Sector Conduct Authority.

Further to the above, the State should take responsibility to monitor the training, and improvement in line with the training, of regulators on a continuous basis. This is an international phenomenon as the member countries of the Organisation for Economic Co-operation and Development have invested in their regulators through competency development in the areas of 'high quality regulation' including 'key skills, … cost-benefit analysis and use of alternative policies'. [946] The progress reports indicate that increased

[944] Bird (n 434) 746-747.
[945] National Treasury *Treating Customers Fairly in the Financial Sector* (n 151) 25.
[946] Organisation for Economic Co-operation and Development (hereinafter 'OECD') *Regulatory Policy Committee Indicators of Regulatory Management Systems 2009* Report 2009 29.

competence insofar as stakeholder interaction and dissemination of policies are concerned, has been challenging.[947]

Scott has indicated that the mechanisms form a 'web' and that the different parts are interrelated.[948] He furthers the argument that the different mechanisms should be correlated in order to develop a scheme that is conducive to exhort the necessary degree of pressure.[949] I deal with this in the next chapter when I bring the research findings together. However, in preparation, it is important to note that my research has shown that accountability mechanisms also have the potential to protect the independence of autonomous agencies. I refer to some examples briefly.

I have indicated in this chapter that the National Credit Regulator and the Financial Sector Conduct Authority, both independent, are held accountable by all three branches of government in South Africa. The national executive holds the entities accountable through the Ministers of Trade and Industry and Finance, and the correlating executive departments. The legislature holds them accountable through regular reporting requirements, presentations and inquiries before portfolio committees and committees of the National Council of Provinces. The judiciary holds the regulators accountable through the court process, whether through ordinary litigious processes, review of a decision or appeal from one of the Tribunals. In addition, an independent Public Protector has jurisdiction to deal with maladministration and abuse of public power.

The Public Protector has shown that it is able to decide in favour of an agency that experiences pressure from the executive even where it finds against the agency in respect of compliance with its duties[950] and the parliamentary committees have shown that they will criticise the National Credit Regulator for lessening punitive measures, that later may have been the outcome of influence by the executive.[951] The Minister of Trade and Industry, together with the parliamentary committees, seem to favour the National Credit Regulator as

[947] *Ibid*: 'Progress has been less strong on providing guidelines for communicating with stakeholders, as well as enforcement and compliance policies. Countries have also started to adopt innovative methods to facilitate capacity building, including by establishing partnerships through universities and graduate schools. The challenge for the coming years will be to improve the quality of training programmes and their relevance. OECD member countries can benefit from innovations and lessons learned in developing high-quality training. The OECD has also been involved in capacity building in this area, in Brazil, South Africa and Turkey, APEC and the MENA region for instance.'

[948] Scott 'Accountability in the regulatory state' (n 9) 57: 'The logic of the argument presented here is that conflict and tension are inevitable within the complex accountability webs within any particular domain, and that the objective should not be to iron out conflict, but to exploit it to hold regimes in appropriate tension.'

[949] *Ibid*.

[950] See par 6.2 *supra*. See also Venter (n 657) 184-185 in respect of the negative attitude of the legislature and executive towards the Protector in some instances.

[951] See par 4.2.2 & 4.2.3 *supra*.

a consumer protector above all else. It has neglected the credit market development role that the legislature attributed to the Credit Regulator. However, the courts have shown that they will reject regulations in respect of which the National Credit Regulator has had a significant role, but that do not take the necessary prescribed information into account that relate to the credit market, even where the Minister has approved, adapted and issued same.[952]

Judicial review authorises the court to consider whether the decision-maker duly considered the matter by 'applying [his or her] mind'[953] and whether there was 'unlawful dictation or unlawful referral'.[954] In the latter instance, the principle underlying the pre-emption of undue adherence to the directions of others is to prevent an administrator 'rubber-stamping' the preference of another who is not permitted to take the decision him- or herself.[955]

Lisa Bressman highlights the importance of justification through reasons and the determination of norms as a tool for the judiciary to limit 'corrupting influences from pervading administrative enforcement decisionmaking'.[956] Likewise, Freeman and Rossi write that the likelihood of capture is diminished where collaborative endeavours are supported – although it would not eliminate the possibility,

> 'it can help to control it by making it more difficult for agencies to act unilaterally without consequences. At minimum, interagency consultations, signed agreements, joint policymaking exercises, and similar instruments provide opportunities for the agencies to hold each other to account for such behaviour.'[957]

9. RECOMMENDATIONS AND CONCLUSION

In light of the above, I propose the following for the National Credit Regulator:

Recommendation 1: I reiterate the need stated in chapter six for a board-like/multi-person governing body for the National Credit Regulator. This characteristic strengthens internal answerability[958] and assists with sound decision-making.[959]

Recommendation 2: The Minister of Trade and Industry should not approve the National Credit Regulator's annual and strategic plans as this essentially transfers some of the

[952] See *Micro Finance South Africa v Minister of Trade and Industry and Another* (n 791) par 20.
[953] Hoexter (n 35) 313.
[954] *Idem* at 273-274.
[955] *Idem* at 274.
[956] Bressman 'Judicial review of agency inaction: an arbitrariness approach' 2004 *New York University Law Review* 1657 1193 – she specifically raises this issue in respect of omissions by institutions.
[957] Freeman & Rossi (n 506) 1186.
[958] See *PHH Corporation v Consumer Financial Protection Bureau* (n 130): 'But to ensure some check against arbitrary decision-making and to help preserve individual liberty, independent agencies have traditionally been structured as multi-member bodies where the commissioners or board members can check one another.'
[959] See Vermeule (n 733).

Regulator's responsibilities for determining proper outcomes onto the Minister.[960] In this regard, section 70 of the Financial Sector Regulation Act can be used to determine the process. However, the Minister should still present his or her expectations to the Regulator and in this regard, the Australian use of Statements of Expectation and Intent can be useful.[961] The Regulator should also be mandated to draft a regulatory strategy similar to the strategy required in terms of section 70, and the incorporation of a similar call to reduce conflict as incorporated by way of section 70(7) should be valid between the National Credit Regulator and the Financial Sector Conduct Authority.

Recommendation 3: At present, there is no independent review of the outcomes approved in respect of the National Credit Regulator in the first case. Whilst there is oversight by the Minster and the Department of Trade and Industry, the review by Parliament is mostly done against the reports submitted to the Minister/Department and criticised on an *ad hoc* basis.[962] The criticisms are mostly grounded in politically infused contentious issues, such as needing identification documents in order to vote, or based on the Auditor-General's reports, which is more concerned with proper financial management and sound reporting than quality performances. There is therefore limited 'new' reviews that are qualitative as opposed to quantitative in nature,[963] and reviews are done based on the same information.

Recommendation 4: The Minister of Trade and Industry should not conduct the audit required by section 36 of the National Credit Act in respect of 'the exercise of the functions and powers of the National Credit Regulator', but the legislation must be changed to oblige the Minister to commission an independent audit in this regard.

[960] See Bird (n 434) 744: 'Cynics may add an additional reason – beyond the reasons of expertise and independence – for the creation of regulators. Governments and Parliaments may create regulators out of a desire to distance themselves from potentially unpopular decisions. For example, from a political perspective, it is preferable for an independent body to decide to raise interest rates. Of course, if this is the reason for the creation of a regulator neither the government nor the Parliament will have an interest in ensuring strong accountability mechanisms; *the imposition of a strong accountability mechanism will involve some assumption of responsibility for assessing and, perhaps, changing the decision of the regulator*. So even from the cynic's perspective, there is a trade-off between accountability and the raison d'etre of the regulator.' Own emphasis.

[961] See *Financial System Inquiry* (n 462) 241-242: 'Regulators currently receive little guidance about how they should balance the different objectives in their respective mandates. At present, SOEs typically list each regulator's objectives, without guidance from Government on its tolerance for risk, or how it expects the regulators to balance the different components of their mandates, especially where there may be a trade-off between objectives. Similarly, annual reports by regulators provide scant information on how they have balanced their different objectives. As the Inquiry noted in its Interim Report, regulators' annual reports lack performance indicators.'

[962] See *Financial System Inquiry* (n 462) 241.

[963] See Scott 'Evaluating the performance and accountability of regulators' (n 343) 367 in respect of the importance of quality outcomes as opposed to high 'targeted numbers' and the manner in which the latter can shape the conduct of the regulator.

Recommendation 5: There should be increased awareness and training on the side of the members of Parliament seeking to hold the Regulator to account. There is a need to deal with the issues identified regarding parliamentary committees in general, as these challenges seemingly persist in the trade and industry arena.[964] It is also imperative that the guidelines for reporting by financial market conduct regulators be specifically tailored to the institution of the regulator and the unique role that a regulator has, and the challenges that it experiences. In addition, a system to track, monitor and compare findings on the performances of the regulators should be designed.

In this regard, an office similar to the United States' Office of Financial Research[965] can be considered as a further research theme, albeit that the duties would then specifically include the collection of data on the performances of regulators for distribution to official institutions to which the regulators are accountable.[966] There is no mechanism to consolidate reporting by regulators to draw inferences and make comparisons. There is also no consistent pattern to matters evaluated by parliament and parliamentary committees, or recording of same, in a matter that allows for reflection on progress over time.

Recommendation 6: The aforementioned recommendation would go some way to dealing with the problem with comprehensive accountability because the current answerability regime is fragmented. Each mechanism deals with a specific measure and there is a need for consolidation of the outcomes of the specific institutions. I submit that the information would be of particular value to the parliamentary oversight committees, the executive oversight

[964] Hoexter (n 35) 78: 'In practice there are considerable difficulties with the reporting system which considerably reduce its utility and effectiveness. In their penetrating analysis of parliamentary oversight, Corder *et al* identify the main problems as the absence of official procedures for recording, indexing or tracking written submissions to parliamentary committees; the format and content of many reports, which tend to provide too much detail while excluding the information most pertinent to the oversight function; the late submission of reports; and the absence of an established procedure for responding to reports. The last problem is especially pernicious, as it means that many reports are simply not addressed.'

[965] See Barr 'Comment: Accountability and independence in financial regulation: checks and balances, public engagement, and other innovations' 2015 *Law and Contemporary Problems* 119 125-126.

[966] See s 153(a) of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* Public Law 111-203 (*Title X: Consumer Financial Protection Act of 2010*). S 152(g) of the Act contains the following provision: '(g) POST-EMPLOYMENT PROHIBITIONS.—The Secretary, with the concurrence of the Director of the Office of Government Ethics, shall issue regulations prohibiting the Director and any employee of the Office who has had access to the transaction or position data maintained by the Data Center or other business confidential information about financial entities required to report to the Office from being employed by or providing advice or consulting services to a financial company, for a period of 1 year after last having had access in the course of official duties to such transaction or position data or business confidential information, regardless of whether that entity is required to report to the Office. For employees whose access to business confidential information was limited, the regulations may provide, on a case-by-case basis, for a shorter period of post-employment prohibition, provided that the shorter period does not compromise business confidential information.'

designations and the committees – in particular the Inter-Ministerial Council and the Council of Financial Regulators.

At this stage, I do not think that an additional oversight layer to an already complicated structure, such as the proposed 'regulator for the regulators'[967] is necessary but this can be a theme for further research. My view, at this stage, is that there is not a lack of mechanisms to hold the regulators to account, but a lack of coordination in order to provide a holistic view of the outcomes of the various answerability exercises. Many of the benefits that Schmulow alludes to when he discusses the value of such a regulatory body for South Africa,[968] may very well be dealt with by the committees and councils established by the Financial Sector Regulation Act and could be incorporated into their mandate where it is felt that the existing mandate does not deal with these issues with sufficient particularity.

Recommendation 7: A possible hazardous outcome of multiple regulators within a particular arena is that it may encourage 'drift' or 'shirking'.[969] It is therefore important that oversight committees, drafted memoranda of agreements and other regulators[970] be cognisant of this issue.[971] As section 76 agreements in terms of the Financial Sector Regulation Act are yet to manifest, it would be prudent to consider international experiences. In addition, the value of section 17(4) agreements in terms of the National Credit Act should not be underestimated as a means to bring matters into the ambit of consumer credit legislation. The requirement in the National Treasury's guideline for annual reports should not only require reiteration of strategic relationships but also include a self-assessment of the efficacy of the section 76 methods implemented.[972]

Recommendation 8: In line with the aforementioned recommendation and as the research in this chapter has indicated, the value of suitably drafted collaboration and coordination instruments can negate the need for assimilation of the National Credit Regulator into what will become the ultimate mega-market conduct regulator. These instruments need to be

[967] See Schmulow (n 431) 6 referring to the Australian Financial System Inquiry when considering the South African context.
[968] Schmulow (n 431) 6.
[969] Freeman & Rossi (n 506) 1187.
[970] *Idem* at 1188.
[971] See also Freeman & Rossi (n 506) 1189 on the benefits of smartly constructed collaborative mechanisms: 'Indeed, interagency monitoring may well thrive when agencies coordinate. The closer the coordination, the better positioned staff would be to monitor each other. In this respect, coordination instruments that allow agencies to remain at arm's length or to interact in only superficial, discrete ways may be less salutary for accountability than are those that require a greater degree of interaction, allowing each agency's staff considerable access to the other's domain. On balance, then, we see coordination instruments as helping to control drift by providing structured opportunities for agencies to account to each other, with spillover benefits for Congress.'
[972] IOSCO (n 603) 81: 'The regulator should be able to demonstrate the gateways or channels through which required information can be made available and that those channels work when needed.'

drafted with care and foresight. Although assimilation would not be a core consideration anymore, I believe that the existence of the debate prior to making a decision would remain a consideration for the Regulator. I base this contention on Michael Ting's 'latent redundancy' model, which forecasts that the knowledge of potential dissolution or replacement can inspire performance.[973]

In light of the above, I propose the following for the Financial Sector Conduct Authority:

Recommendation 1: Under the new regime, the market conduct regulator established by the Financial Sector Regulation Act, will also be bound by principles.[974] The eight principles binding on the regulators are descriptive of the regulatory structure that has been designed.[975] Thus, the system and approach to regulation should be known and comprehensible, thorough and uniform, suitable and invasive, focused on achieving set goals, '[r]isk-based and proportional', preventative and practical, convincing in its preclusion of deviation from directives and harmonized with international norms.[976] I cannot see why the regulatory body itself cannot also be subject to a specific form of regulation.[977] Furthermore, if these principles are applicable to the regulators they are also benchmarks against which the performance of the regulator may be evaluated.[978] As such, Australian Government's Regulator Performance Framework is but a model that can be adjusted to South African policies, as I discuss further in chapter seven. Nevertheless, the principles reflect many of those found in National Treasury's *Treating Customers Fairly in the Financial Sector: A Draft Market Conduct Policy Framework for South Africa Discussion Document* of December 2014.[979] I therefore do not discuss every Australian performance indicator here, but correlate relevant indicators with South African policies in chapter seven.

Recommendation 2: The authority of the Minister to initiate a review and require recommendation to remedy a situation envisaged in section 85 of the Financial Sector Regulation Act should be extended to include scenarios where issued instruments under the Financial Sector Regulation Act can have a detrimental effect on consumer protection measures in terms of the National Credit Act or the Consumer Protection Act.

[973] Ting (n 622) 275.
[974] Financial Regulatory Reform Steering Committee (n 305) 11.
[975] *Idem* at 7.
[976] *Idem* at 7-8.
[977] See Farina (n 806) 490; Gilligan *et al* (n 265) 260; Australian Government *Regulator Performance Framework* 2014; ch 4 *supra*.
[978] See Gilligan *et al* (n 265) 260; Australian Government *Regulator Performance Framework* (n 977); par 5.3 of ch 4 *supra*.
[979] See National Treasury *Treating Customers Fairly in the Financial Sector* (n 151) 25.

Recommendation 3: Any regulator affected by section 76 should be able to request an evaluation mandated by section 86 of the Financial Sector Regulation Act in respect of the collaborative and cooperative measures put in place. The same cognition of the value of properly drafted section 76 agreements remains valid for the Financial Sector Conduct Authority as well. In addition, the importance of making policies, strategies and agreements publicly available should not be underestimated.[980] In addition, if an office such in line with the Office of Financial Research in the United States is established, some of the specific aspects mentioned in Freeman and Ross' paper on coordination in a shared regulatory space should be dealt with by this institution:

> 'To institutionalize and strengthen these tools, we propose the adoption of a comprehensive, government-wide policy to promote coordination, including a number of targeted reforms that should help agencies to use coordination instruments more effectively and study their effects. Such a program would include development of agency policies on coordination, sharing of best practices, ex post evaluation of at least a subset of coordination processes, and tracking of outcomes and costs.'[981]

In light of the above, I propose the following general recommendations for both regulators:

Recommendation 1: The 'Key Questions' relating to accountability developed by the International Organization of Securities Commissions should be adapted and incorporated into any framework for the South African financial market conduct regulators:

> 'With reference to the system of accountability for the regulator's use of its powers and resources: (a) Is the regulator accountable to the legislature or another government body on an ongoing basis? (b) Is the regulator required to be transparent in its way of operating and use of resources and to make public its actions that affect users of the market and regulated entities, excluding confidential or commercially sensitive information? (c) Is the regulator's receipt and use of funds subject to review or audit? … Are there means for natural or legal persons adversely affected by a regulator's decisions or exercise of administrative authority ultimately to seek review in a court, specifically: (a) Does the regulator have to provide written reasons for its material decisions? (b) Does the decision-making process for such decisions include sufficient procedural protections to be meaningful? (c) Are affected persons permitted to make representations prior to such a decision being taken by a regulator in appropriate cases?(d) Are all such decisions taken by the regulator subject to a sufficient, independent review process, ultimately including judicial review? … Where accountability is through the government or some other external agency, is confidential and

[980] Freeman & Rossi (n 506) 1196.
[981] *Idem* at 1197.

> commercially sensitive information subject to appropriate safeguards to prevent inappropriate use or disclosure?'[982]

Recommendation 2: Regulators should be obligated to undertake training programs in line with the example set by the members of the Organisation for Economic Co-operation and Development.[983] This would also require that the oversight institutions familiarise themselves with the progress and development of these regulators in order to adjust their views (to account for, and monitor, the expected increased competency) accordingly.

Recommendation 3: A standing committee on financial sector regulation should be established to counteract the fragmented views of parliamentary committees and the incidences of evaluating the regulators as part the executive departments.

I identified the features of a regulator that would render it accountable from international scholarship in chapter four. Against this background, I assessed the South African regime in order to determine which features affect the accountability of the National Credit Regulator and the Financial Sector Conduct Authority as statutory market conduct regulators of the consumer credit industry. Based on the aforementioned evaluation, the research disproves the hypothesis by finding that the *status quo* can be modified and these recommendations must be incorporated into the institution deliberately in order to enhance the accountability of the South African regulators.[984]

This chapter concludes the specific South African analyses. I have dealt with the independence and answerability mechanisms available in the South African financial sector regulatory framework, guided by the framework established in chapters three and four. The next chapter concludes the thesis and is a reflection on the research questions, the outcomes of the research and on the broader challenges that were identified during the course of this study.

[982] IOSCO (n 603) 25.

[983] See OECD (n 946) 29 indicating that there are programs running in South Africa: 'Progress has been less strong on providing guidelines for communicating with stakeholders, as well as enforcement and compliance policies. Countries have also started to adopt innovative methods to facilitate capacity building, including by establishing partnerships through universities and graduate schools. The challenge for the coming years will be to improve the quality of training programmes and their relevance. OECD member countries can benefit from innovations and lessons learned in developing high-quality training. The OECD has also been involved in capacity building in this area, in Brazil, South Africa and Turkey, APEC and the MENA region for instance.'

[984] See par 3.1 of ch 1 *supra*.

CHAPTER 8: CONCLUSION AND RECOMMENDATIONS

> 'Principle 5a: Regulators must operate objectively with integrity and be operationally independent, but must also be accountable for their actions and performance. Regulators must be empowered to work without fear or favour and be operationally independent within an approved legislative and policy framework. They must operate transparently and fairly within the law, and be accountable for their actions – meeting agreed performance objectives and targets for each year. Special mechanisms may need to be considered to protect the integrity of regulators, and avoid abuse and unwarranted interference from those breaking the rules.'[1]

1. INTRODUCTION

The South African financial sector is modern, complex and made up of multiple role-players, services and products.[2] The consumer credit section is in itself a complex part of the overall sector.[3] The monetary value of the credit sector is in the estimated billions, there are multiple forms of credit extension and the sector serves diverse consumer communities – ranging from poverty-stricken participants who use credit to purchase food, to participants who use credit to create better futures through education, starting businesses and accessing wealth-products such as cars and houses.[4]

The regulators that are created to ensure the proper functioning of the financial sector are generally designed to be expert, independent institutions with considerable responsibilities.[5] Independence *per se* has internationally featured prominently as desired character for market conduct regulators of the consumer financial sector.[6] In addition, the empowerment of regulators in line with their mandates has culminated in a corresponding requirement for proper accountability measures.[7]

In South Africa, the policies underlying the creation of the market conduct regulator for the broad financial sector created in the style of the Financial Sector Conduct Authority were

[1] National Treasury *A Safer Financial Sector to Serve South Africa Better: National Treasury Policy Document* 23 February 2011 25-26.

[2] Par 2.1 of ch 1; National Treasury *Treating Customers Fairly in the Financial Sector: A Draft Market Conduct Policy Framework for South Africa Discussion Document* December 2014 15 & 18-19; Financial Stability Board *Peer Review of South Africa Review Report* 5 February 2013 27-28.

[3] Par 2.1 of ch 1.

[4] Paras 2.1 & 2.2 of ch 1; National Treasury *Treating Customers Fairly in the Financial Sector* (n 2) 21; FinMark Trust *FinScope Consumer Survey South Africa* November 2016; Department of Trade and Industry South Africa (hereinafter 'DTI') *Consumer Credit Law Reform – Policy Framework for Consumer Credit* August 2004 par 1.

[5] See chs 3 & 6. See also National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 1) 25-26; World Bank *Good Practices for Financial Consumer Protection* 2017 11.

[6] Par 2 of ch 1; paras 1 & 2 of ch 3.

[7] Par 3.3 of ch 2; par 2 of ch 3; paras 1 & 2 of ch 4.

inclusive of enhanced independence and accountability.[8] The National Treasury cited international best practices as foundations for the attention to independence and accountability.[9] Likewise, the National Credit Regulator is statutorily endowed with independence and the underlying policy clearly envisioned it as an entity that must be accountable.[10]

The core research theme that I aimed to answer through the course of this thesis was whether the market conduct regulators for the consumer credit market in South Africa are indeed independent and accountable as initially envisaged – this was necessary in order to ascertain whether any remedial steps could be taken to enhance the independence and accountability of the researched regulators.[11] Although the policy drafters and legislatures denoted the National Credit Regulator and the Financial Sector Conduct Authority as independent and accountable, the research indicated that these are two complex concepts underscored by multi-disciplinary theoretical considerations.[12] I could not find best practices and research papers that applied *only* to consumer credit, *and* that *added* elements that were not also relevant to the financial services sector's conduct regulator, but the proposals pertaining to market conduct practices in respect of financial service provision often included consumer credit as a distinct segment of the evaluated market.[13]

The research showed that statements to effect independence and accountability are mere lip service and insufficient without the deliberate incorporation of multiple features to support a structured arrangement for independence and accountability.[14] In addition, the interaction between the different elements that constitute the framework is as follows:

> 'Having established that there are several additional layers of complexity in the operation of RSAs [Regulatory and Supervisory Agencies] compared with monetary policy authorities, we turn now to

[8] Par 2.4 of ch 1; National Treasury *Treating Customers Fairly in the Financial Sector* (n 2) 31 & 72; National Treasury 'Media statement Implementing the twin peaks model of financial regulation Invitation for public comments on the draft Financial Sector Regulation Bill, 2013' 11 December 2013; National Treasury *Twin peaks in South Africa: Response and Explanatory Document Accompanying the Second Draft of the Financial Sector Regulation Bill* 2014 5.

[9] Par 2.4 of ch 1; National Treasury *Twin peaks in South Africa* (n 8) 15.

[10] Par 2.4 of ch 1.

[11] See par 2 of ch 1.

[12] Chs 2, 3 & 4.

[13] Par 3.3 of ch 1; par 1 of ch 3 (referring specifically to the following sources in respect of market conduct regulators for financial services including credit): World Bank (n 5) (see 8, specifically including credit); Financial Stability Board *Consumer Finance Protection with Particular Focus on Credit* 26 October 2011 (see 10 & 11); Organisation for Economic Co-operation and Development (hereinafter 'OECD') *G20 High-Level Principles on Financial Consumer Protection* October 2011; Quintyn *et al The Fear of Freedom: Politicians and the Independence and Accountability of Financial Sector Supervisors* (IMF Working Paper WP/07/25) 2007; Hüpkes *et al The Accountability of Financial Sector Supervisors: Principles and Practice* (IMF Working Paper WP/05/51) 2005.

[14] Chs 3 & 4. See also par 2.3 of ch 1.

> the question of how these complexities can be addressed, in practice, through accountability arrangements to keep the independent RSA "in check" without curtailing its operational independence ... The guiding principle, which has emerged from the previous sections, is that a highly complex and specialized activity like regulation and supervision of financial markets, involved with such a broad range of principals, can only be monitored and held accountable by a combination of instruments and arrangements. Thus, the task is to create a network of complementary and overlapping checking mechanisms.'[15]

The reader is referred to the specific element-related recommendations made in chapters six and seven to deliberately enhance the independence and accountability of the National Credit Regulator and the Financial Sector Conduct Authority in the South African regime.[16]

2. THE SOUTH AFRICAN SYSTEM

South Africa has modified its regulatory scheme in order to align with the Twin Peaks model adopted in other jurisdictions such as Australia and the United Kingdom.[17] The change from a fragmented institutional scheme to a regime that regulates according to the objectives of regulation, has resulted in the creation of the Financial Sector Conduct Authority as one of the peaks of the model.[18] Since 1 April 2018, it is the market conduct regulator for the whole of the financial sector, save for some credit-related aspects that remain the exclusive market conduct responsibility of the National Credit Regulator.[19] These two regulators function alongside the Reserve Bank, responsible for systemic stability through macro-prudential oversight, and the other designated peak of the Twin Peaks model, the Prudential Authority responsible for individual institutions' financial welfare through micro-prudential supervision.[20]

South Africa's framework did not end up as a true version of the Twin Peaks model: the original model envisaged one regulator for financial stability matters and another for market conduct regulations.[21] The South African version has two stability regulators in the form of the Reserve Bank and the Prudential Authority – one for macro-prudential matters and

[15] Hüpkes *et al* (n 13) 19.
[16] Paras 8 & 9 of ch 6; par 8 of ch 7. See also par 3.1 of ch 1.
[17] Par 2.4 of ch 1; paras 3.4.2 & 3.4.3 of ch 2.
[18] Par 2.3 of ch 1; National Treasury *Treating Customers Fairly in the Financial Sector* (n 2) 24; s 56 of the Financial Sector Regulation Act (Act 9 of 2017) (hereinafter '('FSRA').
[19] *Commencement of the Financial Sector Regulation Act 9 of 2017* National Treasury Notice 169 of 2018 in GG 41549 of 29 March 2018; see ch 5.
[20] Par 2.2-2.4 of ch 1; paras 3.4.2 & 3.4.3 of ch 2.
[21] Par 3.4 of ch 2; Pan 'Structural Reform of financial regulation' 2011 *Transnational Law & Contemporary Problems* 796 820-821; par 3.4.2 of ch 2.

another for micro-prudential matters.[22] Insofar as market conduct regulation is concerned, the Financial Sector Conduct Authority became responsible for the general financial sector whilst the National Credit Regulator retained its original authority over consumer credit matters.[23]

Against this backdrop, I reviewed the features of the National Credit Regulator and the Financial Sector Conduct Authority in order to isolate the aspects that enhance the independence and the accountability of these regulators.[24] My primary focus was on market conduct regulation although many of the sources that I consulted also dealt with prudential regulators.[25] The lack of academic consideration in South Africa of the independence and accountability of financial sector regulators necessitated that I determine the indicators of independence and accountability by perusing domestic, extraterritorial and international (interterritorial) practices before I could apply and analyse the South Africa position.[26]

In this chapter, I am not going to repeat the research in detail. Instead, I will set out the basic research questions; highlight the analyses and the final findings. The reader can refer to chapter six for the recommendations regarding independence and chapter seven for the recommendations regarding accountability because I reiterate all the recommendations in a combined manner in this chapter.[27]

3. PURPOSE AND SCOPE OF THE RESEARCH

The primary research questions for the thesis were the following:

1. Are the National Credit Regulator and the Financial Sector Conduct Authority sufficiently independent and accountable when assessed against factors extrapolated from international scholarship?
2. How can the South African regime be enhanced to align with international best practices and potentially viable options sourced from foreign jurisdictions and international commentators?

In order to address the primary questions, I considered the following secondary questions:

- What are the *raisons d'être* for statutory regulators?

[22] See ch 5; National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 1) 12 & 31; National Treasury *Treating Customers Fairly in the Financial Sector* (n 2) 7; Financial Reform Steering Committee *Implementing a twin peaks model of financial regulation in South Africa Published for public comment* 1 February 2013 43.

[23] See ch 5.

[24] See chs 6 & 7.

[25] In this regard, see the explanation of my approach in par 1 of ch 3.

[26] In this regard, see the explanation of my approach in par 3 of ch 1.

[27] Paras 8 & 9 of ch 6; par 8 of ch 7.

- What are the *raisons d'être* for measures that advance independence and accountability in respect of statutory regulators?
- What are the measures that advance independence and accountability of regulators as per international best practices and practices in foreign jurisdictions, and are there any specifically applicable to statutory regulators of consumer credit?
- What are the measures that advance the independence and accountability of the South African market conduct regulators for consumer credit?
- In order to link parts one and two of the thesis, I kept the following question in mind: How does the South African system compare with the identified international benchmarks for independency and accountability?
- How can the South African system be aligned – as indicated above – to the extent that the research identifies shortcomings that can be ameliorated with reference to the identified international options and practices?

The research determined why financial regulators are created in the first place and why these regulators should be independent and accountable.[28] The reasons for the creation of the regulators were researched in the context of delegation, which led to the question about independence and accountability.[29] I did not have to examine the hypothesis that financial sector regulators need not be independent or accountable as none of the sources that I researched, gave any indication that these are not desirable attributes. At most, there were authors who indicated that there were degrees, and desired degrees, of independence and accountability.[30] Kenneth Mwenda wrote that each system would need to find the ideal degree of independence as ultimate independence is not desirable in all circumstances.[31] Likewise, the Constitutional Court referred to a norm of adequacy when it had to consider the independence of a purported autonomous institution[32] and Colin Scott referred to a similar benchmark in respect of accountability.[33] Rachel Barkow indicated that complete isolation from undue political influences is simply not possible, and that the measures implemented aim at lessening the influence as opposed to total eradication of unwanted interferences.[34]

[28] Par 3.3 of ch 1.
[29] Par 3 (specifically par 3.3) of ch 2; par 2 of ch 3.
[30] Par 2.1 of ch 3.
[31] Mwenda *Legal aspects of financial services regulation and the concept of a unified regulator* (2006) 33-34.
[32] Par 3 of ch 3; *Helen Suzman Foundation v President of the Republic of South Africa and Others; Glenister v President of the Republic of South Africa and Others* [2014] ZACC 32 par 2;
[33] Scott 'Accountability in the regulatory state' 2000 *Journal of Law and Society* 38 42-43.
[34] Barkow 'Insulating agencies: Avoiding capture through institutional design' 2010 *Texas Law Review* 15 79.

As the South African literature collection did not deal with regulatory independence and accountability in the depths that I sought to analyse the South African market conduct regulators, my initial research was of a comparative nature.[35] I specifically considered developments in the United States of America and the Commonwealth of Australia, with some marginal reference to the United Kingdom.[36] These jurisdictions were chosen due to their structural similarities with South Africa and because the independence and accountability of the financial market conduct regulators in these jurisdictions had already been the focus of academic and non-academic researchers.[37] The respective jurisdictions and sources written on these jurisdictions were valuable to highlight those elements that enhance independence and accountability that I sought to isolate and apply to the South African regime.[38]

The fundamental and comparative research was set out in part one of the thesis, which dealt with the foundational principles and considerations from theoretical and practical perspectives. In this part, the research showed the importance of independence and accountability for regulators and highlighted the difficulties associated with creating an enabling scheme that provides for these two elements in a balanced and realistic manner.[39]

In part two, I considered the mandates of the statutory market conduct regulators and the research conducted for part one enabled me to identify the elements that affect independence and accountability in respect of the National Credit Regulator and the Financial Sector Conduct Authority.[40] This lead to the ultimate outcome envisaged for this research project: 'How can the South African regime be enhanced to align with international best practices and potentially viable options sourced from other jurisdictions?'[41]

4. ASSESSMENT OF FUNDAMENTAL CONSIDERATIONS

The challenge inherent to independent government agencies can be structured in a particular manner.[42] A political regime decides to create an agency with specific powers and responsibilities.[43] There are various benefits to creating an independent agency, but there are also a number of risks: the agency needs to keep to the rationales for its creation and there

[35] Paras 3.1-3.3 of ch 1.
[36] Par 3.3 of ch 1.
[37] Par 3.1 of ch 1; see e.g. paras 1 & 3 of ch 3; paras 3.3.2, 4.2, 4.3, 4.4, 5.2.1, 5.2.2, 5.2.3, 5.3 & 5.4 of ch 4; par 9 of ch 6; par 9 of ch 7.
[38] In this regard, see the explanation of my approach in par 3.1 of ch 1.
[39] Par 2 of ch 3.
[40] Paras 3.3 & 3.4 of ch 1.
[41] Par 3.3 of ch 1.
[42] Par 3.3 of ch 2; par 2 of ch 3. See also par 3.2 of ch 2.
[43] Par 3.3 of ch 2.

needs to be sufficient means to hold the institution to account without prejudicing its efficacy and autonomy.[44] A particular dilemma is found in the nature of these agencies – they are still public entities, but because they come about through delegation of authority and responsibilities by politically elected forums, they are not in themselves governed by elected persons.[45] As such, the legitimacy of independent regulators lies in their ability to be held to account and to discharge their mandates in a meaningful way.[46]

The principal may not be an expert but is given responsibility for a technical field, and can decide to delegate its ability to regulate to an institution that is, or can become, an expert in the field.[47] In some instances, delegation is the order of the day when compared to international trends.[48] We have become accustomed, in the South African regime, to regulators for the financial sector.[49] This is not a new phenomenon under Twin Peaks.[50] However, a matter worth contemplating in the South African context is that the delegation is not effected by virtue of the will of one branch of government alone.[51] Whilst the legislature is the most directly elected body of government, it chooses the President, who appoints his or her ministers.[52] The ministers introduce legislation, based on their policies, to Parliament, and in respect of which independent agencies are created.[53] The legislature then passes the legislation creating the entity and the introducing ministry usually takes some responsibility for the regulator.[54]

Another reason for delegating to independent agencies is the ability to shift the blame to the regulator if regulatory failure occurs.[55] I fully agree with the rationality of such an outcome – if the responsibility is indeed bestowed on the regulator, it is blameworthy if it does not effect its duties accordingly.[56] In this regard, I recommended in chapter seven that the Minister of Trade and Industry should not be too directly involved in pre-approving the conduct of the National Credit Regulator because the Regulator bears the responsibility for its conduct.[57] In doing so, the Minister takes on some of the responsibility that should be left to the Regulator

[44] *Ibid*; par 2 of ch 3; par 2 of ch 4.
[45] Par 3.3.1 of ch 2.
[46] Paras 2.1 & 2.2 of ch 4.
[47] Par 3.3 of ch 2.
[48] *Ibid*.
[49] Paras 3.1 & 3.2 of ch 5.
[50] Paras 2.3 & 2.4 of ch 1.
[51] Par 2 of ch 7.
[52] Par 2.1 of ch 7.
[53] *Ibid*.
[54] *Ibid*.
[55] Par 3.3 of ch 2.
[56] See Bird 'Regulating the regulators: Accountability of Australian regulators' 2011 *Melbourne University Law Review* 739 742; Quintyn *et al* (n 13) 7.
[57] Par 9 of ch 7; Bird (n 56) 744. See also par 3 of ch 2; par 4.3.3 of ch 3.

in order to constitute effective delegation in the context of independent regulatory authorities and criticism, and resultant reformative actions, should therefore also take the role of the Minister into account if the matter is not addressed as I suggested.[58] In addition, the organisation should be properly authorised and empowered – in respect of the National Credit Regulator, I am of the opinion that the responsibilities were delegated by the accompanying authority and required powers to effect the responsibilities were not.[59] The Financial Sector Conduct Authority is, however, a model example for reform in this regard – it informs the Minister of Finance of its plans as opposed to receiving instructions, and exerts noteworthy authority over the financial industry.[60]

Delegation installs discretion in a regulator and, because the delegation occurs in a fashion that renders the recipient autonomous, the principal is no longer in direct control of the behaviour of the entity.[61] The independence is a desirable outcome for the many reasons set out in chapter two, but the challenge arises on how to hold the institution to account in a meaningful way – especially in the South African regime where government answerability has become such an important factor in the new constitutional post-apartheid era – without eradicating its autonomy.[62] Jonathan Bendor and his co-authors' construction of the arena of delegation games indicate that the principal will construct the agents functional areas by deliberately delegating specific authority and incorporating calculated control mechanisms.[63]

Mark Bovens, however, distinguishes between accountability and control based on the ability of the mechanism to require explanation and justification.[64] As such, he does not include all pre-emptive manners of directing the organisation in the scope of accountability.[65] I did not follow such a strict interpretation of accountability and my reasoning includes recognition of the initial delegation-control approach and the need to be able to gauge the impact of these

[58] See par 9 of ch 7; Bird (n 56) 744. See also the discussion on delegation and control in par 3.3 of ch 2; Bendor *et al* 'Theories of delegation' 2001 *Annual Review of Political Science* 235.

[59] See par 4.1, 5.1, 6 & 9 of ch 6; Renke *An evaluation of debt prevention measures in terms of the National Credit Act 34 of 2005* November 2012 LLD Thesis Faculty of Law University of Pretoria 642-643. See also the requirements of proper empowerment set out in *inter alia* World Bank (n 5) 9; International Organization of Securities Commissions (hereinafter 'IOSCO') *Methodology for Assessing Implementation of the IOSCO Objectives and Principles of Securities Regulation* May 2017 5 & 20.

[60] See par 3.3 of ch 5; paras 4.2, 5.2 & 7.3 of ch 6 in this regard.

[61] Par 3.3 of ch 2.

[62] *Ibid*.

[63] Bendor *et al* (n 58) 237 & 238; par 3.3 of ch 2.

[64] Bovens 'Analysing and assessing accountability: A conceptual framework' 2007 *European Law Journal* 447 453-454; par 3.3 of ch 2. See also Hüpkes *et al* (n 13) 5.

[65] Bovens (n 64) 453-454; par 3.3 of ch 2.

mechanisms on the independence of the regulators – and some *ex ante* mechanisms have as much impact as *ex post* mechanisms.[66]

Scott's networks and Bovens's mapping of accountability has informed my opinion of the South African regime.[67] I have the following concerns as examples to the above. Firstly, Parliament oversees the executive as is its constitutional duty.[68] However, the fact that parliamentary committees oversee regulators as part of their duty to oversee the executive can lead to a situation where the regulator is not reviewed against its mandate (whether the individual members agree with all aspects of the mandate or not) but as part of the substantive performance of the executive department against its performance indicators.[69] The difference lies in identifying a problem with the regulator and reviewing the *oversight* duty of the Minister, and in identifying the problem and seeing it as a substantial departmental failure (in a similar fashion as not issuing legislation where the annual plan indicated that legislation would be issued).[70] It is also questionable as to whether Parliament always has the will to hold the executive to account,[71] especially if the interference supports the reigning regime's policies.[72]

Secondly, the Public Protector has the jurisdiction to deal with maladministration and can, in light of recent case law supporting the binding nature of its findings and recommendations, be viewed as a strong accountability mechanism.[73] The Protector can also protect the independence of a regulator, but this is also dependent on the specific Protector in office[74] and the ability to withstand criticism from the other branches of government:

> 'From the cases discussed above it is evident that there is a distinct lack of respect on the part of the executive and the legislature toward the office of the public protector in spite of its important constitutional status and purpose as enshrined in the supreme constitution. Firstly, the executive seems to view the public protector as an interfering "witch" who wants to usurp its functions and infringe the separation of powers. … When considered together, these actions are indicative of the executive's seriously flawed view of the importance and function of the public protector in a constitutional democracy. The purpose of the public protector is, in essence, to curb

[66] See Bovens (n 64) 453-454. See also par 3.4.2 of ch 4.

[67] Scott 'Accountability in the regulatory state' (n 33) 59; Bovens (n 64) 460. See also Hüpkes *et al* (n 13) 5 & 19; Quintyn *et al* (n 13) 11.

[68] See par 2 of ch 7.

[69] See par 4.2.6 of ch 7. This is problematic when considering Hüpkes *et al* (n 13) 20 – that Parliament is ideally suited to require answers in respect of adherence and performance in terms of the regulatory mandate.

[70] See par 4.2.6 & 4.5 of ch 7.

[71] See par 4.2.3 of ch 7.

[72] See par 4.2 of ch 7.

[73] Par 6.2 of ch 7.

[74] *Ibid*; Hoexter *Administrative Law in South Africa* (2012) 91-92.

> maladministration and corruption in government and government owned institutions and therefore to protect society against abuse of power. From the executive's actions it seems as though the executive sees itself as a mighty "lion" whose decisions cannot be second guessed by an unelected body which falls outside the spheres of government. …the legislature is also bound to assist and protect the office of the public protector in terms of section 181(3) of the constitution. From the cases above it is, however, evident that the legislature acted as impassive as a "wardrobe".'[75]

Thirdly, courts and tribunals can deal with specific matters, but rarely take a holistic and futuristic approach.[76] In addition, administrative law controls can 'backfire' as Cynthia Farina indicated[77] and the interpretation of parties' rights by administrative adjudication bodies, where not stipulated in legislation, can limit the authority of the regulator.[78] Many answerability approaches are also focused 'inwards' in the sense that the parliamentary committees are concerned with their political constituents, the executive with proper performance in line with political policies (otherwise the President may dismiss him or her) and the courts and tribunals with keeping to the laws that they are meant to apply.[79]

It can also be a dilemma where a regulator acts within a broader scheme of strategy, or coordination, of which the accountability regime cannot, or will not, take note.[80] Jody Freeman and Jim Rossi indicate that collaborative instruments and actions can be factors to consider under judicial review and that the courts can have an important role to ensure that independent organisations, especially when they work as a team, keep within the scope of the law.[81] In this regard, a similar recommendation in respect of the National Credit Regulator's behavioural guidelines under conditions of registration made in chapter six can be applied in this regard in that it has to be brought to the attention of the court.[82]

The aforementioned is even more important in light of the self-evaluative, resource intensive and prospective impact that the results of evaluation can have on a regulator.[83] In chapter four, the research showed that regulators have to expend resources to meet accountability demands, which can divert resources from the execution of the regulator's mandate and have

[75] Venter 'The executive, the public protector and the legislature: "The lion, the witch and the wardrobe"?' 2017 *Journal for the South African Law* 176 184-185.
[76] Par 7.3 of ch 7.
[77] Paras 2.3 & 3.4.4 of ch 4.
[78] See e.g. *National Credit Regulator v Capitec Bank Limited* [2014] ZANCT 14 discussed in par 6.3.1 of ch 7.
[79] See par 4.2.6 of ch 7.
[80] See e.g. par 4.3 of ch 4; par 6.3.3 of ch 7.
[81] Freeman & Rossi 'Agency coordination in shared regulatory space' 2012 *Harvard Law Review* 1131 1203.
[82] Par 9 of ch 6.
[83] Paras 2.3 & 3.1 of ch 4.

an 'undermining' effect on the regulator's actions.[84] More importantly, the regulators will need to be adequately resourced in proportion to stringent accountability demands.[85] In respect of the Financial Sector Conduct Authority, the expenses will be borne by the industry, which is the sole source of funding for the Authority.[86] In addition, the industry may rarely be involved in the overall accountability mechanisms referred to in the policy documents – only in respect of specific instances where a rule is published for comment or a decision is challenged by way of review.[87] The research undertaken in chapter seven indicated that regulators function an era where comprehensive accountability of technocratic regulators is becoming more and more important.[88]

The South African regime under the Twin Peaks stratagem has added an additional layer to game theoretical models of agencies.[89] In this regard, Michael Ting converted the redundancy model used in engineering to a game theoretical model that accounts for strategic behaviour by bureaucrats – an aspect that is significant when multiple agencies have to work together in a specific milieu.[90] His work is of real importance to the South African regime that relies heavily on collaboration and coordination between financial market regulators and it shows that there are instances where collaboration can foster shirking.[91] In chapter two, I dealt with the possibilities of 'shirking' and 'drifting': phenomena that occur either when the independent organisation does not perform by neglecting its duties, or performs in pursuit of goals that are not in line with the goals for which the organisation was initially created.[92]

I also found that the South African regime reflected the theoretical reasons why these entities are created. The nature of the theoretical underpinnings added to my recommendations because they rationalise the recommendation from a very fundamental point. Fabrizio Gilardi highlights three forms of institutionalism.[93] The first form is rational choice institutionalism, which reasons that the regulator is politically generated for specific reasons.[94] In chapter two, I wrote the following:

[84] Par 3.1.2 of ch 4. See also Govender *Has the National Credit Regulator fulfilled its mandate in promoting a credit market as envisaged in the preamble and purposes of the National Credit Act 34 of 2005?* November 2014 LLM Dissertation Faculty of Law University of Johannesburg 19.
[85] Par 3.1 of ch 4.
[86] Par 7.3.1 of ch 6.
[87] Paras 6, 7.2.5 & 7.2.6 of ch 7.
[88] See par 3.3 of ch 4.
[89] See the fns in par 3.3 of ch 2 where I deal with my approach to game theory in this thesis.
[90] Ting 'A strategic theory of bureaucratic redundancy' 2003 *American Journal of Political Science* 274.
[91] Paras 5.2, 5.3 & 5.5 of ch 7.
[92] Par 3.3 of ch 2; par 3.3 of ch 4.
[93] Par 3.2 of ch 2.
[94] *Ibid*.

> 'According to Gilardi, the regulator, through its reactive rules, is therefore directly connected to the challenges that it seeks to manage. Subsequently, the rationalisation of the regulator lies in its ability to resolve identified obstacles. The political value of regulators who are unrelated to government is situated in the ability of these regulators to act as vessels for political strategies and, in doing so, to enhance the integrity of the strategies.'[95]

A particularly significant part of rational choice institutionalism, apart from the creation of agencies in order to deal with specially identified problems, is the matter of 'credible commitment'.[96] In the South African context, I would believe that independence would be a valuable commodity for the political regime to present in light of the impression of corruption that many have of the current political regime in South Africa.[97] Independence is also valuable to protect institutions from detrimental political influences because autonomous agencies are created to be experts.[98] I indicated through numerous examples that the political committee members responsible for overseeing the National Credit Regulator are not always experts on the matters before them[99] and according to Joanna Bird, this is a problematic aspect when it comes to holding an expert regulator to account:

> 'Therefore, the very purpose of regulators (that is, to act with expertise and independence) is undermined when they are held to account, especially using strong accountability mechanisms that lead to responses imposed by those who do not possess the same level of expertise and independence as the regulators. This is the accountability dilemma: … "Particular institutions may be designated as regulators because their expertise and independence from political influence maximize the prospects of their fulfilling public interest goals. Those prospects are reduced if their judgments may be overridden by other bodies which do not combine the same degree of expertise and political independence."'[100]

The adherence to the form of an independent-regulator-type of organisation to deal with the financial sector's challenges can also be indicative of sociological and historical institutionalism.[101] The creation of the Financial Sector Conduct Authority as part of the Twin Peaks model of regulation is clearly a cross-border incursion.[102] The International Monetary Fund's commendation of the conversion to the Twin Peaks model and the multiple

[95] Par 3.2.1 of ch 2. References omitted.
[96] Par 3.2.1 of ch 2.
[97] Par 4.6 of ch 3.
[98] Par 3.2.1 of ch 2.
[99] Par 4.2.6 of ch 7.
[100] Bird (n 56) 744; par 4 of ch 4.
[101] Paras 3.2.2 & 3.2.3 of ch 2.
[102] Financial Stability Board *Peer Review of South Africa* (n 2) 13. See par 3.2.2 of ch 2.

references to international examples in policy and discussion documents are indicative hereof.[103]

However, the South African version of Twin Peaks has retained some existing frameworks, such as the National Credit Regulator. The retention of the Regulator as is, without adapting it to the new framework within which it has to function, is in my opinion indicative of path dependency – an aspect that features from time to time in legal discourse.[104] I observe that the type of institutions endorsed under the auspices of the Department of Trade and Industry are similarly structured (and different from other regulatory bodies developed by other departments) and this structure is retained notwithstanding other changes – an indication that the internal drivers support the part and that Twin Peaks is a development external to this particular unit.[105] The units are thus path dependent and I mentioned in chapter two, paraphrasing Rixen and Viola, that 'path dependency enhances the course of direction that the entity is on, improves its constancy and intensifies its adversity to alteration from the course'.[106] In my opinion, Freeman and Rossi substantiate this view when they note the following with regard to arenas where more than one regulator has a function:

> 'Yet another explanation is that such delegations are mostly accidental – by-products of a legislative process that occurs on a rolling basis over time … Agencies will resist efforts to shrink or eliminate their authority and will fight for bigger, not smaller, budgets. And clients and beneficiaries of the agencies will advocate for their benefactor's survival. Even where these delegations are accidental rather than intentional, they may nevertheless prove hard to dislodge because of path dependency and bureaucratic entrenchment.'[107]

Further to the above, Andy Schmulow's clear statement on the retention of the National Credit Regulator, and the acknowledgement of the Regulator's endeavours so far, supports the notion that the existence of the Regulator may have been influential.[108] This becomes an important aspect to consider as Gail Pearson questions whether it will now be a matter of 'business as usual' or a chance for 'regulatory innovation'.[109] New structures have been introduced and authors such as Freeman and Rossi, and David Spence, have shown the effect

[103] International Monetary Fund *South Africa Financial System Stability Assessment* November, 11 2014 December 2014 8; par 2.3 of ch 1.

[104] Par 3.2.4 of ch 2.

[105] See par 3.2.4 of ch 2 for the theory in this regard. See also paras 3.1 of ch 5; par 4.1.1 of ch 6; par 5.2 of ch 7.

[106] Par 3.2.4 of ch 2. References omitted.

[107] Freeman & Rossi (n 81) 1143-1144.

[108] See the discussion of his views in par 5.2 of ch 7; Schmulow 'Retail Market Conduct Reforms in South Africa Under Twin Peaks' 2018 *Law and Financial Markets Review* 1 4-5. See also Pearson 'A credit lens: implementing twin peaks' 2017 *Law and Financial Markets Review* 1 5-6.

[109] Pearson (n 108) 6.

that politically construed regulatory structures can have on regulators.[110] I discussed the interaction between regulators and regulatory forums in a number of chapters[111] because of the following stated in chapter two:

> '…if accountability measures, when and where implemented, are seen as turning points in time, any designed measure must be strong and able enough to effect deviation from a set path as and when necessary. As Hathaway puts it, "[p]ath dependence theory predicts that, where punctuations occur more frequently, the system 'self-corrects' more frequently".'[112]

5. INDEPENDENCE

5.1. Assessment of some salient findings

In chapter three, I identified regulatory, supervisory, institutional and budgetary independence as core parts of the overall independence of a regulator or agency.[113] The Constitutional Court highlighted that independence must include 'structural and operational' independence at the very least.[114] Operational autonomy is the term of choice when it comes to the South African policy documents and some of the international best practice documents.[115] I elaborate on specific issues hereafter, but for sake of brevity, the following extract from chapter six:

> 'The level of independence of the National Credit Regulator is not adequate. On the one hand, the Regulator is given a clear independent legislative character, can govern its human resources, and is not required by statute to obtain ministerial permission to register, investigate, enforce, litigate or otherwise execute its duties. In addition, the Minister does not have the statutory authority to overturn decisions of the Regulator or consent to the policies adopted. On the other hand, the single-person governance model employed, lack of legislated causa for removal of the most senior official, dependency on the Department for its main income stream, the lack of input on the amount of licence fees due to it, reported lack of proper funding, dependency on the Minister to address market conduct regulatory needs via legislative or regulation-related amendments, inability to effect behavioural changes directly through disciplinary measures, judicial ignorance of its measures, and undermining of its authority through tribunal and judicial decisions, all work towards eradicating the autonomy of the Regulator.

[110] Freeman & Rossi (n 81); Spence 'Managing delegations ex ante: using law to steer administrative agencies' 1999 *The Journal of Legal Studies* 413; par 3.2.3 of ch 4.

[111] See par 4.6 of ch 3, par 4.7 of ch 4; paras 5.2, 5.3 & 5.5 of ch 7.

[112] Par 3.2.4 of ch 2. References omitted. See also Bovens (n 64) 453: 'Norms are (re)produced, internalised and, where necessary, adjusted through accountability.'

[113] Par 3 of ch 3.

[114] Par 5 of ch 3.

[115] See e.g. National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 1) 25; World Bank (n 5) 11; IOSCO (n 59) 55.

> The Financial Sector Regulation Act provides many of the necessary legislative protections in respect of the autonomy of the Financial Sector Conduct Authority: measures that determine the selection and dismissal criteria for the Executive Commission, measures that determine that the process for appointment must be set through regulations, an independent inquiry that precede dismissals, provisions that allow for joint decision-making on performance parameters of the Commission members, budgetary freedom including the freedom to set levies subject to a legislated formula, and limited, if any, ministerial intervention in the decisions and activities of the Authority. It also has vast regulatory and supervisory powers as it is *inter alia* able to issue conduct standards, provide (presumably binding) interpretation rulings, grant, and retract licences.'[116]

Regulatory independence refers to the ability of a regulator to prescribe binding rules of conduct to members of the regulated industry.[117] In chapter six, I indicated that the National Credit Regulator does not enjoy regulatory independence as understood in the context of chapter three.[118] It is dependent on the Minister of Trade and Industry to issue binding regulations or codes of conduct.[119] The Regulator has taken to incorporating conduct rules in the conditions of registration but non-compliance therewith has not yet been a singular ground for deregistration of a registrant and the civil courts have reiterated the non-binding (and ignorable) nature of the rules so issued.[120] In contrast, the Financial Sector Conduct Authority is widely empowered to issue legislative instruments that are binding on regulated institutions.[121] In this regard, I recommend – the same as others before me – that the authority of the National Credit Regulator has to be enhanced.[122]

Supervisory independence refers to the authority of the regulator to monitor and sanction members of the regulated industry.[123] The National Credit Regulator and the Financial Sector Conduct Authority are both tasked with monitoring the suppliers of credit, and financial services and products respectively, and to ensure that these participants comply with the stipulations of the relevant frameworks.[124] However, the general view is that the National Credit Regulator is not empowered to retract licenses on its own accord and can only present a case to the National Consumer Tribunal to this extent.[125] The Financial Sector Conduct Authority is entitled to cancel or suspend licenses on its own accord, but the affected person

[116] Par 9 of ch 6. References omitted.
[117] Par 3 of ch 3.
[118] Par 9 of ch 6.
[119] Par 4.1 of ch 6.
[120] *Ibid.* See also par 6.4.3 of ch 7.
[121] Par 4.2 of ch 6.
[122] Par 9 of ch 5. See also fn 59 *supra*.
[123] Par 3 of ch 3.
[124] Paras 3.2 & 3.3 of ch 5.
[125] Paras 5.1.2 & 5.1.3 of ch 6.

may resort to the Financial Services Tribunal for reconsideration of the matter.[126] The different authorities to conduct on-site inspections, initiate investigations and conduct searches exist for each of the regulatory authorities, but the Financial Sector Conduct Authority enjoys more discretion in initiating monitoring activities whereas the National Credit Regulator's authority has been limited by considerations of legislative authority as interpreted by the National Consumer Tribunal.[127]

Budgetary independence refers to the ability of a regulatory authority to source its own funds and its dependency, if any, on a particular influential role-player for its financial resources.[128] This form of independence is also affected by the adequacy of funding and the ability to obtain the necessary resources, such as qualified personnel, in order to meet the mandate of the regulator.[129] Many of the features that are prescribed in international best practices are also mechanisms that protect the independence of a financial sector regulatory authority – such as the ability to employ competent people.[130] The National Credit Regulator is partially funded through the industry that it regulates, for example, by way of registration fees, and partly by the Department of Trade and Industry.[131] The Regulator drafts its own budget and the Portfolio Committee on Trade and Industry has considered its needs when considering the budget vote for the Department of Trade and Industry.[132] The Financial Sector Conduct Authority is wholly funded by industry and it is entitled to a fixed statutory increase of fees without requiring the permission of a political appointee.[133]

Institutional independence is concerned with the location of the regulator,[134] and in both instances the regulators with which this thesis is concerned is independently located.[135]

Numerous specific matters affect the independence of a regulatory authority and the primary concern in this regard is to limit undue interference with the objectivity and expertise of the regulator in order to gain the preferred treatment – whether by the reigning political regime, regulated industry or a vulnerable consumer group.[136] The ability to decide who can be appointed in meaningful and influential positions within a regulatory agency, or the authority to elect to remove a person from office are considerations that can point to an outsider who

[126] Par 5.2.3 of ch 6; par 6.3.2 of ch 7.
[127] Paras 5.4.1 & 5.2.4 of ch 6.
[128] Par 3 of ch 3.
[129] Par 4.3 of ch 3.
[130] World Bank (n 5) 16.
[131] Par 7.2.1 of ch 6.
[132] *Ibid*.
[133] Par 7.3.1 of ch 6.
[134] Par 3 of ch 3.
[135] Par 4.2 of ch 3. See also par 2.2 of ch 3 in respect of capture.
[136] Par 4.2 of ch 3.

can exert pressure to motivate regulatory action or inaction in its favour.[137] In this regard, it seems as if the fixed-term provisions, labour legislation applicable to South African employment contracts and statutory restrictions that limit removal from position to impropriety or incompetency confer some protection to the South African agencies.[138] However, a major cause for concern is that the choice of the most senior appointee – and in the case of the Financial Sector Conduct Authority, the second-in-command – lies with the Minster tasked with administering the particular regulatory agency.[139]

The proper delineation of the regulatory authority's mandate is of cardinal importance – the more specific and certain the mandate is, the less room there is for undesirable behaviour.[140] I am of the opinion that there is not enough clarity in respect of authority of the Financial Sector Conduct Authority *vis-à-vis* the National Credit Regulator when it comes to the consumer credit arena.[141] In chapter six, I noted the following two aspects: Firstly, the National Credit Regulator does not have to follow a directive by, nor wait for a permissive direction from, the Minister of Trade and Industry in respect of its duties, but the clear alignment of the Regulator's self-stated objectives with that of the Department of Trade and Industry is a cause for concern.[142] Secondly, whilst the Financial Sector Conduct Authority is properly authorised to monitor the market, it seems as if its mandate is not as focused as the National Credit Regulator when one considers its prudential responsibilities – it merely has a facilitative role.[143]

5.2. Assessment of the overall position

In *Helen Suzman Foundation v President of the Republic of South Africa; Glenister v President of the Republic of South Africa* the court recognized that absolute independence was not required for the entity to fulfil its mandate but that an adequate degree of independence was needed.[144] This entails that a holistic view needs to be taken of the independence-enhancing features of an entity, over and above single considerations.[145] In addition, the domestic milieu is as important as the role and nature of the regulatory agency.[146]

[137] *Ibid*.
[138] See paras 7.2.2 & 7.3.2 of ch 6.
[139] Paras 7.3.2 & 9 of ch 6.
[140] Par 4.4 of ch 3.
[141] See par 3.5 of ch 5; 4.2.3 of ch 6.
[142] Paras 3 & 5 of ch 3; par 6 of ch 6.
[143] Par 4.3 of ch 6.
[144] (n 32) par 2.
[145] *Idem* at par 177; paras 4.2 & 4.5 of ch 3.
[146] See e.g. Financial Stability Board (n 13) 11 in respect of market conduct regulators; par 4.2 of ch 3.

In my conclusion of chapter six, I found that the National Credit Regulator is the lesser independent regulator when compared with the Financial Sector Conduct Authority. Although the National Credit Act specifically characterises the Regulator as independent in section 12, the actual framework does not support its autonomy.[147] In contrast, although the Financial Sector Conduct Authority is underscored by a policy of independence, it is not specified as such in the Financial Sector Regulation Act – however, many of the independence-enhancing features discussed in this thesis is present.[148] The National Credit Regulator is *prima facie* independent but in reality not much more than an executive agency.[149] In contrast, the Financial Conduct Authority is not denoted as being independent *per se* although the policy document clearly intends it to be, but the finer nuances show that the Authority is exposed to many manipulations that will render it subject to the will of others if the leadership of this Authority is not strong.[150]

In addition, the accountability regimes for the two regulators seem similar.[151] The general executive, legislature, court, stakeholder participation and administrative mechanisms apply equally to the Regulator and the Authority.[152] Both will also be part of the structures developed under the Financial Sector Regulation Act.[153]

The analyses of the frameworks for both regulators, analysed in chapters six and seven, show a number of following shortcomings that I deal with briefly. In the extracts from the policy documents mentioned hereafter, I show that the policies or preceding research documents support independence and accountability, but that it did not realise fully under the legislative regime. As the National Credit Regulator is also a market conduct regulator for the financial sector, I do not see why similar policy considerations should not apply to it – as I indicated earlier, many of the international best practices documents and researchers do not make a distinction between what is expected from a consumer credit regulator and from a financial services regulator from a market conduct perspective.[154]

The 2014 *Treating Customers Fairly in the Financial Sector: A Draft Market Conduct Policy Framework for South Africa Discussion Document* drafted by the National Treasury indicated

[147] See paras 4.1, 5.1, 7.2 & 8 of ch 6 read with the elements discussed in ch 3.
[148] See paras 4.2, 5.2, 7.3 & 8 of ch 6 read with the elements discussed in ch 3.
[149] See par 8 of ch 6.
[150] See paras 7.3.1, 7.3.2 & 8 of ch 6.
[151] See ch 7.
[152] *Ibid*.
[153] Paras 5.2 & 5.3 of ch 7.
[154] Par 1; fn 12 *supra*.

that financial market integrity should be underpinned by '[a]n independent regulator which is not prone to political interference in the carrying out of its mandate'.[155]

In both instances of the National Credit Regulator and the Financial Sector Conduct Authority, the respective Ministers are intimately involved in the appointment, and policy choices, of the regulators.[156] Neither regulator has a multi-person governing board that is made up of diversely selected incumbents chosen for their expertise.[157] In the National Credit Regulator's case, the Chief Executive Officer bears the sole responsibility for the activities of the Regulator, is appointed by the Minister of Trade and Industry and there is no limit on the renewal of terms that the Chief can serve.[158] In addition, the annual plans and changes thereto are approved by the Minister of Trade and Industry.[159] Insofar as the Financial Sector Conduct Authority is concerned, all members of the commission are appointed by the Minister of Finance, their terms may be renewed and the Tribunal, which is designed to reconsider the Authority's decisions, is staffed by members appointed solely by the Minister of Finance.[160] I alluded to the protection that may be garnered by the labour laws insofar as security of tenure is concerned or that certain legislative provisions provide protection against undue removal from office,[161] but Barkow's research and the developments in the United States show that the appointment phase is also important when it comes to independence.[162]

It was curious that the following aspects were not incorporated into the legislative framework as these features accord with what international scholars have suggested to remove sole authority over the decision.[163] In chapter six, I made some proposals for South Africa in this regard as a theme for further research.[164] However, the recommendation could be furthered by including as assessment of whether the forms of remedial action that could be taken by Parliament are conducive to correct the situation and evaluating the 'rules' referred to hereafter against the research findings of this thesis:[165]

> '**The heads of supervisory or regulatory agencies should be appointed for a fixed term of at least five years.** Once appointed, regulators should appoint their own staff, within the framework determined by their governance board or the minister of finance, *eventually approved by*

[155] National Treasury *Treating Customers Fairly in the Financial Sector* (n 2) 72.
[156] Paras 7.2 & 7.3 of ch 6 read with paras 2, 3 & 4 of ch 3. See specifically par 7.2.3 of ch 6.
[157] Paras 7.2.2 & 7.3.2 of ch 6 read with paras 2 & 4.3 of ch 3.
[158] Par 2.2 of ch 6 read with par 4.2 of ch 3 & par 5.2.3 of ch 4.
[159] Par 6 of ch 6.
[160] Par 7.3.2 of ch 6.
[161] Paras 7.2.2 & .2.3 of ch 6.
[162] Par 4.2 of ch 3.
[163] See Quintyn *et al* (n 13) 13; Mwenda (n 31) 25.
[164] See par 9 of ch 6.
[165] See par 3 of ch 6.

> *Parliament*. Regulators should not be dismissed without good causes shown, and which are transparent and *reported to Parliament*.'[166]
>
> 'Heads of supervisory or regulatory agencies must be fair and seen to be fair, and be protected from undue pressure and interference. Regulators should have mechanisms to protect them from political and other interference when acting within their mandate. *The procedures to hire and fire regulators must be transparent and subject to clear rules*.'[167]
>
> '**Current legislation will have to be amended.** … Despite the recent financial sector assessment programme noting that there do not appear to be any indications that the possibility of staff termination has affected operational independence, the assessors recommended amending the laws to remove this potential power of intervention by the executive. The first issue could be resolved by adding a simple requirement that the Minister of Finance or Reserve Bank Governor may dismiss board members, registrars or other senior officials only for good cause, *with the reasons to be made public and tabled in Parliament*.'[168]

In light of the above, the presence of dedicated parliamentary committees committed to evaluating the conduct of the Regulator and Authority based on their legislative mandates, as opposed to the value that they pose in assisting the responsible executive department to meet the latter's obligations, is of significant importance to guard against executive misconduct.[169] Scott writes that

> 'the various accountability networks which operate uniquely within each policy domain have the character of a complex system of checks and balances in which particular forms of behaviour are inhibited or encouraged by the overall balance in the system at any particular time.'[170]

Quintyn and Taylor note the value of an open declaration of aims and outcomes in order to clarity the role and responsibilities of the regulator.[171] I observed a need for the National Credit Regulator and the Financial Sector Conduct Authority to formulate and publish their views of their mandates (and recommend that they do not just issue the regulatory strategy as envisaged for the Authority in section 70 of the Financial Sector Regulation Act).[172] In addition, the value of properly drafted collaboration and coordination mechanisms was noted by Freeman and Rossi,[173] and Scott.[174] Barkow also indicate that different agencies can exert have positive and negative influences on each other.[175] Interagency agreements and

[166] National Treasury *A Safer Financial Sector to Serve South Africa Better* (n 1) 30. Own emphasis.
[167] *Ibid*.
[168] *Idem* at 30-31.
[169] See par 8 of ch 7.
[170] Scott 'Accountability in the regulatory state' (n 33) 55.
[171] Par 3.1 of ch 4.
[172] Par 9 of ch 6.
[173] Freeman & Rossi (n 81) 1155 *et seq*; paras 5.2 & 5.3 of ch 7.
[174] Scott 'Accountability in the regulatory state' (n 33) 50.
[175] Barkow (n 34) 49-58.

interactions therefore adds to the overall regime and at this stage, it is still uncertain how much influence the memoranda, committees and councils will have.

6. MECHANISMS OF ACCOUNTABILITY

As a point of departure, it is important to reiterate the complexity of consumer market, the developing role of the regulator[176] and realise that the answerability regime is also complex.[177] Furthermore, the same requirement of suitability as opposed to multiplicity is relevant for accountability: 'adequacy' as opposed to 'quantity'.[178] This is particularly relevant when one considers the resources expended to meet the demands placed upon a regulator by an accountability framework.[179] The importance of a number of features that work optimally within a particular scheme should not be underestimated[180] and I was cognisant of the position, purpose and limits of the respective mechanisms during my approach to the South African regime.[181]

In contrast to the supportive role that the different elements of the accountability scheme play in the ideal scenario referred to earlier,[182] the reality of the South African system is that some mechanisms can be contra-indicative because of poor consideration of overlapping challenges that may fall partially in the jurisdiction of each regulator.[183] The interaction between the National Consumer Tribunal, the Financial Services Tribunal, the National Credit Regulator and the Financial Sector Conduct Authority is an example.[184]

It has been noted that 'greater extension of independence may be an indication of faith in the established methods of holding the regulator sufficiently accountable'.[185] If there is significant trust in the answerability mechanisms, following the recommendations set out in chapter six pertaining to the regulatory authority of the National Credit Act should not be a burdensome task. Further to the aforementioned, a number of research findings in chapter six that pertained to independence were also important considerations in the answerability-

[176] Par 2.1 of ch 4.
[177] See par 5.3 of ch 4.
[178] Par 6 of ch 4.
[179] Par 3.1 of ch 4.
[180] See Scott 'Accountability in the regulatory state' (n 33) 55.
[181] See ch 7.
[182] See par 4 *supra*.
[183] See par 6.3.3 of ch 7.
[184] *Ibid*.
[185] Par 3.3 of ch 2; Quintyn & Taylor *Should financial sector regulators be independent?* 2004 *International Monetary Fund Economic Issues* No 32; Mwenda (n 31) 14.

assessment – in particular, the lack of a clearly defined mandate in order to allocate responsibility.[186] In this regard, I stated the following in chapter four:

> 'The regulator is accountable for its conduct and performance. This extends the breadth of the regulatory realm and ranges from conduct and behaviour to achievements and outcomes. As Bird puts it, "they should be accountable for anything that they do". However, regulators should also be accountable for anything that they do not do, but should have done. Thus, the importance of an evident and delineated mandate becomes obvious.'[187]

In line with the Twin Peaks model that frames the arena within which the regulators under discussion function, the collaborative duties of the financial sector regulators would pre-empt some of the challenges of the model.[188] Eric Pan indicated that 'the achievement of such coordination and information sharing is more important than the structural question of a single regulator versus twin peaks system' and that '[w]hat is most important is that [the] regulators have clear lines of responsibility, share information freely and continuously, and coordinate regulatory actions'.[189] As such, clarification of the mandates[190] and the mechanisms set out in section 76 (as an example) of the Financial Sector Regulation Act should firstly receive attention in an independent-regulatory mind-set and secondly, deliberately form part of the substantive aspects for which the regulators should be held accountable.[191]

A prominent theme that the research findings on accountability brought to the fore, was the need for proficient answerability mechanisms in the form of knowledgeable forums to which the regulator accounts.[192] Chapter seven showed that some answerability forums did not possess the necessary knowledge or competency to hold the regulator to account for its

[186] Par 3.1 of ch 4. See also paras 3, 4.6.4 & 4.6.5 of ch 4 in respect of clarity regarding, and the impact of, human resources, government interaction and budgetary matters.

[187] Par 3 of ch 4.

[188] Par 3.4 of ch 2.

[189] Pan (n 21) 799 & 804.

[190] Par 3.1 of ch 4.

[191] See also par 5.2 of ch: 'On the other side, this construction can be an ideal peer-to-peer answerability scheme that evaluates efficacy, if handled correctly and with the necessary forbearance on the side of both regulators. Whilst the National Credit Regulator is a specialist regulator, it does not have exclusive specialist jurisdiction over many steps in the credit extension process. The current position introduces a new feature in the answerability scheme as it demands that the National Credit Regulator is perceived as the specialist regulator insofar as credit is concerned, and delivers on its mandate and authority in a manner that is acceptable to its peer conduct Regulator. It can be expected that the performance of the National Credit Regulator, and what it brings to the regulatory table, will be scrutinised for value, and not just process. Although section 76 requires that the Conduct Authority and Credit Regulator assist each other in meeting respective objectives, and work together to present a unified front, without confidence in the ability of the Regulator to bear its weight, it is difficult to see how the Conduct Authority will defer to the views of the Regulator, especially if it is an area for which the Conduct Authority also bears responsibility.' Footnotes omitted.

[192] Par 3.1 of ch 4.

actions.[193] In addition, most of the features discussed in chapter seven did not show a regulator-orientated approach and dealt with regulatory activities in the same generic manner as all other categories of stakeholders that reported to it.[194] The impact of ill-suited forums can also have an effect on future conduct:

> 'Accountability measures can therefore enhance the functioning of the regulator insofar as the presence thereof encourages intentional answerable conduct and the information gathered whilst complying with the methods results in better choices. Answerability is not only beneficial to those who hold the regulator to account but can inform self-improving behaviour initiated by the regulator itself. On the one hand, accountability cannot simply be a self-evaluation exercise. On the other hand, the value of answerability outcomes for the regulator itself cannot be underestimated.'[195]

The aforementioned aspects highlight the need for proper information retention on the findings of, and demands for remedial action demanded by, forums as I recommended in chapter seven.[196] I also noted that there are shortcomings in respect of the ability to conduct long-term oversight, as deduced from the challenges experienced by parliamentary committees for example, and the reporting needs when compared with the work of international scholars – I indicate that some of these tasks should be completed by the regulatory authority itself.[197]

As was noted in chapter four, '[m]eaningful answerability methods, capable of effecting accurate assessments and controlling the behaviour of regulatory entities, are invaluable'.[198] These mechanisms can also assist with developing the regulatory skills of the regulator, if the quality of oversight is conducive to progress.[199]

Under the theme of 'extended accountability', Scott notes that 'interdependent actors' can hold each other to account in a more 'practical' manner as they have 'powers or capacities which constrain the capacities of the others'.[200] He also links this interdependency to consultation approaches, the design of innovative measures and dissemination of information on practices.[201] In line with the networking-image[202] – where the executive and parliament are concerned with politically entrusted mandates; the courts and tribunals are concerned with legality; participants through notice-and-comment and complaints; and the interacting

[193] See e.g. par 4.2.3 of ch 7. See also the comments in par 6.3.1 of ch 7.
[194] Par 4.5 of ch 7.
[195] Par 5.3 of ch 4. References omitted.
[196] Par 8 of ch 7.
[197] Par 4.5 of ch 7.
[198] Par 6 of ch 4. References omitted.
[199] Par 6 of ch 4.
[200] Scott 'Accountability in the regulatory state' (n 33) 50 & 51.
[201] *Idem* at 51.
[202] *Idem* at 55.

regulators with the proper functioning of the sector for which they are responsible[203] – there is still a need in South Africa to determine proper performance.[204] It is no longer a matter of whether the regulator ticked all the boxes, as is the case with the National Credit Regulator. There is a need for *evaluation* as Bovens[205] and Bird indicate:

> '[T]he accountability of regulators is hampered by the difficulty of effectively measuring and assessing their performance. It is very difficult to hold someone to account if you cannot actually determine when they have performed well and when they have performed badly.'[206]

An exercise to this effect would also be the start of drafting holistic performance indicators for the regulators,[207] as I do not think that evaluation of the performance of the National Credit Regulator against the number of enforcement actions or financial education programs without contextualisation is sufficient.[208] There are various aspects to consider.[209] One might also consider the annual use of Statements of Intent and Statements of Expectation, as per the Australian practice,[210] or publish outcome statements.[211] The former annual mechanism is particularly useful to oblige the regulators and the governing ministries to publish and articulate their preferences.[212]

Regulators are ordinarily associated, or at least potentially ingrained via founding legislation, with particular values that are broad behavioural standards for regulatory bodies – the more prominent values are independence,[213] fairness and reasonableness,[214] transparency,[215] accountability,[216] effectiveness and efficiency.[217] Norms that guide regulatory behaviour of

[203] See ch 7.

[204] In par 8 of ch 7 I noted that the Australian Government *Regulator Performance Framework* 2014 can be used as a point of departure although this is not a substantive matter that I addressed in this thesis. In South Africa (see also the brief reference by Pearson (n 108) 3) there exists a *Performance Information Handbook* but it does not contain substantive performance indicators or similar indicators as the Australian framework. The aspects referred to by Pearson at 3 and headed 'Regulatory performance information' are sourced from the OECD and are discrete examples – referring to aspects such as 'Examples of regulatory performance information' and 'Number of individuals trained' – see National Treasury *Performance Information Handbook* April 2011 23.

[205] See the quote at the beginning of ch 7;Bovens (n 64) 462.

[206] Bird (n 56) 743.

[207] Par 3.3 of ch 2.

[208] See par 4.2.4 of ch 7 read with par 5.2.1 of ch 4.

[209] See e.g. Braithwaite & Drahos *Global Business Regulation* (2000) 17: 'The important thing to note about this kind of explanation is that the consequences of creating an organization (reduction of complexity) become in some sense the explanation for the emergence of the organization.'

[210] Par 5.2.2 of ch 4.

[211] Par 3.1 of ch 4.

[212] Par 5.2.2 of ch 4.

[213] Mwenda (n 31) ch 2, specifically 31-35; Quintyn *et al* (n 13) 6-7; Gilardi 'Institutional change in regulatory policies: regulation through independent agencies and the three new institutionalisms' in Jordana & Levi-Faur (ed) *The Politics of Regulation Institutions and Regulatory Reforms for the Age of Governance* (2004).

[214] Mwenda (n 31) 20. Some also highlight the need for 'integrity' – see Quintyn *et al* (n 13) 6-7.

[215] Regulatory Reform Steering Committee (n 22) 48; Quintyn *et al* (n 13) 6-7.

[216] Mwenda (n 31) 25-31; Bird (n 56); Quintyn *et al* (n 13) 6-7.

[217] Mwenda (n 31) 25; Quintyn *et al* (n 13) 6.

regulators and supervisors have also been identified in South African literature, namely that conduct should be apparent and open, uniform and thorough, suitable, forceful and invasive, result- and hazard-focused, balanced according to exposure posed by the regulated entity, preventative, anticipatory and a realistic disincentive for undesirable behaviour.[218] As I indicated in chapter seven, and in line with a holistic approach, these principles can form the basis for a principles-based assessment framework for the regulators under Twin Peaks.[219] In addition,

> '[t]he assessment is not an end in itself. Rather, assessment should be viewed primarily as a tool for identifying potential gaps, inconsistencies, weaknesses and areas where further powers or authorities may be necessary, and as a basis for framing priorities for enhancements or reforms to existing laws, rules and procedures. This Methodology specifically contemplates that the assessment process will involve a dialogue in which the regulator will explain the details of its market structure, laws, and regulatory program and how, in view thereof, the regulator believes its regulatory program addresses the Key Questions and Key Issues so as to meet the objectives of the Principles.'[220]

I have not been able to deal with every applicable aspect, partially due to the research method that I employed,[221] and the following aspects are suggested themes for further research in respect of South Africa: The impact of informal accountability measures;[222] the costs and effects of answerability measures;[223] in-depth comparative research regarding the contents and role of memorandums of agreement;[224] the viability of incorporating mandatory regulatory impact assessments and cost-benefit analyses into the financial sector regime as a function of the financial sector regulators;[225] and the viability of a consumer advocate's office for credit matters should the National Credit Regulator is assimilated into the Financial Sector Conduct Authority.[226]

[218] Regulatory Reform Steering Committee (n 22) 8-49.
[219] Par 9 of ch 7.
[220] IOSCO (n 59) 15.
[221] See par 3 of ch 1.
[222] See par 3.4.3 of ch 4.
[223] See Bovens (n 64) 467; Freeman & Rossi (n 81) 1181.
[224] Par 5.2 of ch 7. See also Freeman & Rossi (n 81) 1195-1196.
[225] Paras 4.6.3, 5.2.3 & 5.3 of ch 4.
[226] Par 4.6 of ch 3.

7. RECOMMENDATIONS

In light of the research findings, I propose the following for the National Credit Regulator:[227]

Recommendation 1: The National Credit Act must be amended to enable the National Credit Regulator to issue binding rules in respect of conduct required from market participants.[228] There also needs to be clear and appropriate recourse to effective remedial action for affected parties.

Recommendation 2: Section 16(1)(b)(i) must be enhanced to add the option of an interpretation ruling on interpretation and application of the provisions of the National Credit Act, similar to the provisions and safeguards set out in section 142 of the Financial Sector Regulation Act. This would be in addition to the ability to issue non-binding interpretations of a section of the National Credit Act, or the ability to approach the court for a declaratory order on the interpretation or application of the Act. The feasibility of including a pre-issue impact assessment should also be considered. This should enable the Regulator to take the views of, and impact on, interested parties into account. The legislation should further provide for a clear right to approach the court to challenge the interpretation and create precedent for further interpretations. Provision should be made for all-encompassing *locus standi* requirements to prevent inaccessibility due to, for example, funding restrictions.

Recommendation 3: The National Credit Regulator must be joined in litigious actions where a rule or guideline or official arrangement is a source of contention. Alternatively, it has to be given the opportunity to intervene. Matters such as *Firstrand Bank Limited v Barnard* and *Rougier v Nedbank Ltd* serve as examples in this regard.

Recommendation 4: The National Credit Regulator should be able to deregister registrants in line with the recommendation set out in *Draft National Credit Act Policy Review Framework, 2013*. I do not support a clear mandate for deregistration as some issues will require wide, unlegislated discretion[229] – such as the provision in section 46(3)(e)(ii) that refers to a person who 'brought the consumer credit industry into disrepute' – and this can become a fertile ground for capture-related actions. In this regard, I support the recommendation by Renke, although his recommendation was made in line with fit and proper registration requirements, in respect of clear internal policies that need to be published and followed by the Regulator when executing its deregistration duty.

[227] Paras 9 of chs 6 & 7 respectively.

[228] See Quintyn *et al* (13) 9 in respect of 'Regulatory independence'.

[229] See par 3.1 of ch 3 *supra* in respect of a clear mandate to limit unwanted influence.

Recommendation 5: A section that comprehensively limits the personal liability of a person acting in his or her professional capacity and in the course of his or her duties specified by the National Credit Regulator must be inserted into the National Credit Act. Section 285 of the Financial Sector Regulation Act can be used as a point of departure.

Recommendation 6: Consideration should be given to develop a formula for a minimum annual amount of funding that can be expected from the Department of Trade and Industry, taking into account the amount allocated to the Department from the National Treasury.[230] In this regard, the position of the Consumer Financial Protection Bureau can be considered as a point of departure.

Recommendation 7: A statutory provision must be inserted into the National Credit Act that obligates the Minister of Trade and Industry to review the fees due and payable to the National Credit Regulator upon request by the Regulator, alternatively that the fees are 'determined jointly'.[231] The fees must further be subject to an automatic minimum base amount similar to the provision made in section 239 of the Financial Sector Regulation Act to ensure that the amount is not reduced upon reconsideration.[232] The Regulator can also be given the authority to conduct an impact analysis, with the necessary intrusive investigative powers to obtain the necessary information to ensure that the suggestions are 'reasonable', such as due regard for reigning market conditions for regulatees.[233]

Recommendation 8: The Board of the National Credit Regulator (or a commission-like structure) should be re-introduced as its governing structure and construed of a diverse group of experts.[234] The executive should not have members on the Board in an executive, operational or policy-affecting capacity.[235]

Recommendation 9: The sources consulted for purposes of this thesis have referred, in the main, to fixed-term appointments and not dealt with permanent appointments. Further research should be undertaken in respect of the issue of a permanent versus a fixed-term appointment for a single-headed regulatory model. It is also of particular importance that the issue of renewability or re-appointment be considered, especially in light of the impression that the Chief Executive Officer of the National Credit Regulator is appointed on a fixed-term

[230] Although the independence rating of a regulator would increase where there are multiple income streams (as opposed to the only stream being provided by the state), the greatest increase is where no government funds are relied upon – see Quintyn *et al* (n 13) 39.

[231] See Quintyn *et al* (n 13) 10.

[232] Quintyn *et al* (n 13) 10.

[233] *Ibid*.

[234] See par 4.2 of ch 3.

[235] See Quintyn *et al* (n 13) 13.

basis but that the position is held over numerous terms. As indicated above, the possibility of renewal can negatively affect the independence of the Regulator.[236] However, if the Board is reinstated, the Board members' individual terms should be set for a determined period and executed in such a manner that they overlap, as per the recommendations of the authors referred to in chapter three.

Recommendation 10: I did not suggest any recommendations in respect of 'post-employment restrictions' as found in other jurisdictions.[237] In light of the specific socio-economic circumstances and labour-related values of the South African legal framework, I do not think that this is a proposal that can be supported or rejected without further in-depth research. The matter of public-private personnel interchange is, however, a very real issue.[238]

Recommendation 11: The National Credit Regulator needs to take ownership of its mandate and interpret it holistically – not just in line with the selected outcomes and priorities envisaged by the Department of Trade and Industry. There is a strong focus on consumer protection, but seemingly limited attention to the promotion of a market with the characteristics set out by section 13 of the National Credit Act. In addition, the Regulator should be actively aware of the potential of capture by politicians or the industry (the latter, for example, through the Credit Industry Forum through unscreened reliance on its recommendations).

Recommendation 12: The National Credit Regulator needs to take ownership of its independence. There are various questionnaires that have been developed to give an indication of the level on independence, or in respect of specific independence-enhancing measures. In this regard, the *Key Questions* developed by the International Organisation of Securities Commissions[239] and Quintyn *et al*'s *Criteria for the Index on Independence and Accountability for Financial Sector Supervisors*,[240] with the necessary changes, can be used as a point of departure. The above can be followed by a capability review, similar to the one conducted in respect of the Australian Securities and Investments Commission,[241] but with an awareness of the weaknesses discussed in this regard in chapter four. It is plausible that the National Credit Act already provides for a review of this nature in section 36(1) and, if so, the

[236] See *inter alia* par 4.2 of ch 3 *supra*.
[237] *Ibid*.
[238] See Portfolio Committee of Trade and Industry *Budgetary Review and Recommendation Report of the Portfolio Committee on Trade and Industry* 18 October 2017.
[239] IOSCO (n 59) 25 & 26.
[240] Quintyn *et al* (n 13) 39-41.
[241] *Fit for the Future A capability review of the Australian Securities and Investments Commission A report to Government* December 2015 96-97 (and see the independent nuance thereof when one considers par 4.3 of ch 3).

Australian review can be used as a comparative example, including aspects that are not covered by the wording of the National Credit Act.

Recommendation 13: The internal documents that govern the interaction between the executive and the National Credit Regulator should be perused to determine the effect thereof on the independence of the Regulator. These documents should ideally be drafted by independent experts. The policies and processes should be clear in order to limit manipulation.

Recommendation 14: The presence of the aforementioned internal documents should not be a substitute for legislating the core mechanisms that protect and enhance the independence of the National Credit Regulator, such as clear statutory 'for cause' dismissal requirements.[242]

Recommendation 15: An in-depth evaluation should be undertaken of the impact of labour law provisions on the issue of dismissal of senior members of staff, particularly to ascertain whether, and under which circumstances, the generic South African labour regime offers suitable protection in this context. Memoranda of understanding between regulators should be carefully drafted not to encroach on parties' independence.

Recommendation 16: I reiterate the need stated in chapter six for a board-like/multi-person governing body for the National Credit Regulator. This characteristic strengthens internal answerability[243] and assists with sound decision-making.[244]

Recommendation 17: The Minister of Trade and Industry should not approve the National Credit Regulator's annual and strategic plans as this essentially transfers some of the Regulator's responsibilities for determining proper outcomes onto the Minister.[245] In this regard, section 70 of the Financial Sector Regulation Act can be used to determine the process. However, the Minister should still present his or her expectations to the Regulator and in this regard, the Australian use of Statements of Expectation and Intent can be useful.[246] The Regulator should also be mandated to draft a regulatory strategy similar to the strategy required in terms of section 70, and the incorporation of a similar call to reduce conflict as incorporated by way of section 70(7) should be valid between the National Credit Regulator and the Financial Sector Conduct Authority.

[242] Quintyn *et al* (n 13) 39-40.

[243] See *PHH Corporation, Et Al., Petitioners, v. Consumer Financial Protection Bureau, Respondent* No. 15-1177 (Argued April 12, 2016. Decided October 11, 2016.) United States Court of Appeals, District of Columbia Circuit.

[244] See Vermeule 'Many-minds arguments in legal theory' 2009 *Journal of Legal Analysis* 1.

[245] See Bird (n 56) 744.

[246] See *Financial System Inquiry Final Report* November 2014 241-242.

Recommendation 18: At present, there is no independent review of the outcomes approved in respect of the National Credit Regulator in the first case. Whilst there is oversight by the Minster and the Department of Trade and Industry, the review by Parliament is mostly done against the reports submitted to the Minister/Department and criticised on an *ad hoc* basis.[247] The criticisms are mostly grounded in politically infused contentious issues, such as needing identification documents in order to vote, or based on the Auditor-General's reports, which is more concerned with proper financial management and sound reporting than quality performances. There is therefore limited 'new' reviews that are qualitative as opposed to quantitative in nature, and reviews are done based on the same information.

Recommendation 19: The Minister of Trade and Industry should not conduct the audit required by section 36 of the National Credit Act in respect of 'the exercise of the functions and powers of the National Credit Regulator', but the legislation must be changed to oblige the Minister to commission an independent audit in this regard.

Recommendation 20: There should be increased awareness and training on the side of the members of Parliament seeking to hold the Regulator to account. There is a need to deal with the issues identified regarding parliamentary committees in general, as these challenges seemingly persist in the trade and industry arena.[248] It is also imperative that the guidelines for reporting by financial market conduct regulators be specifically tailored to the institution of the regulator and the unique role that a regulator has, and the challenges that it experiences. In addition, a system to track, monitor and compare findings on the performances of the regulators should be designed.

In this regard, an office similar to the United States' Office of Financial Research[249] can be considered as a further research theme, albeit that the duties would then specifically include the collection of data on the performances of regulators for distribution to official institutions to which the regulators are accountable.[250] There is no mechanism to consolidate reporting by regulators to draw inferences and make comparisons. There is also no consistent pattern to matters evaluated by parliament and parliamentary committees, or recording of same, in a matter that allows for reflection on progress over time.

[247] See *Financial System Inquiry Final Report* November 2014 241.

[248] Hoexter (n 74) 78.

[249] See Barr 'Comment: Accountability and independence in financial regulation: checks and balances, public engagement, and other innovations' 2015 *Law and Contemporary Problems* 119 125-126.

[250] See ss 152(g) & 153(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act Public Law 111-203 (Title X: Consumer Financial Protection Act of 2010).

Recommendation 21: The aforementioned recommendation would go some way to dealing with the problem with comprehensive accountability because the current answerability regime is fragmented. Each mechanism deals with a specific measure and there is a need for consolidation of the outcomes of the specific institutions. I submit that the information would be of particular value to the parliamentary oversight committees, the executive oversight designations and the committees – in particular the Inter-Ministerial Council and the Council of Financial Regulators.

At this stage, I do not think that an additional oversight layer to an already complicated structure, such as the proposed 'regulator for the regulators'[251] is necessary but this can be a theme for further research. My view, at this stage, is that there is not a lack of mechanisms to hold the regulators to account, but a lack of coordination in order to provide a holistic view of the outcomes of the various answerability exercises. Many of the benefits that Andy Schmulow alludes to when he discusses the value of such a regulatory body for South Africa,[252] may very well be dealt with by the committees and councils established by the Financial Sector Regulation Act and could be incorporated into their mandate where it is felt that the existing mandate does not deal with these issues with sufficient particularity.

Recommendation 22: A possible hazardous outcome of multiple regulators within a particular arena is that it may encourage 'drift' or 'shirking'.[253] It is therefore important that oversight committees, drafted memoranda of agreements and other regulators be cognisant of this issue.[254] As section 76 agreements in terms of the Financial Sector Regulation Act are yet to manifest, it would be prudent to take international experiences into account. In addition, the value of section 17(4) agreements in terms of the National Credit Act should not be underestimated as a means to bring matters into the ambit of consumer credit legislation. The requirement in the National Treasury's guideline for annual reports should not only require reiteration of strategic relationships but also include a self-assessment of the efficacy of the section 76 methods implemented.[255]

Recommendation 23: In line with the aforementioned recommendation and as the research in this chapter has indicated, the value of suitably drafted collaboration and coordination instruments can negate the need for assimilation of the National Credit Regulator into what will become the ultimate mega-market conduct regulator. These instruments need to be

[251] See Schmulow (n 108) 6.
[252] Schmulow (n 108) 6.
[253] Freeman & Rossi (n 81) 1187.
[254] *Idem* at 1188.
[255] IOSCO (n 59) 81.

drafted with care and foresight. Although assimilation would not be a core consideration anymore, I believe that the existence of the debate prior to making a decision would remain a consideration for the Regulator. I base this contention on Michael Ting's 'latent redundancy' model, which forecasts that the knowledge of potential dissolution or replacement can inspire performance.[256]

I propose the following in respect of the Financial Sector Conduct Authority:[257]

Recommendation 1: The need for independence must be formally recognised by the legislature,[258] particularly as the Financial Sector Conduct Authority functions within a ministerial department that has been subjected to rapid political changes in the past. At the very least, acknowledged independence can alleviate some concerns about policy stability.[259]

Recommendation 2: The Executive Committee of the Financial Sector Conduct Authority is solely appointed by the Minister of Finance. At least one of the four possible deputy members should be appointed by, or in consultation with, or on recommendation of, another department, such as the Department of Trade and Industry (due to the blurred jurisdiction of the Financial Sector Conduct Authority and National Credit Regulator in respect of credit related matters). This would be particularly important where the National Credit Regulator is assimilated into the Financial Sector Conduct Authority. The expertise-requirements for committee members should be reconsidered to ensure that the committee has the necessary expert knowledge to regulate a sector as diverse as the financial sector of South Africa. A 'contemporary best practice merit based recruitment process' as recommended to the Australian Securities and Investments Commission in the 2015 capability review, may be considered as well.[260]

Recommendation 3: The Commissioner should be appointed by the Minister of Finance but the appointment must be approved by the National Assembly. I submit that the fact that the legislature delegates authority to the independent agency warrants involvement in the appointment of its head.

Recommendation 4: Section 63(1) (b) should be repealed and the term of office fixed at five years. I deal with the accountability-related aspects of statutorily determined grounds for removal in chapter seven but submit in the interim, that the provision of section 65(3) provides sufficient protection against malpractice.

[256] Ting (n 90) 275.
[257] Paras 9 of chs 6 & 7 respectively.
[258] See Quintyn *et al* (n 13) 39.
[259] See Barkow (n 34) 24-25.
[260] *Fit for the Future* (n 241) 19.

Recommendation 5: Provision must be made for staggered terms of office for the Deputy Commissioners.

Recommendation 6: In light of recent developments in the United States of America, section 61 has to be amended to ensure that a Commissioner who resigns or leaves office prior to the end of his or her term, can appoint an interim person as to act as successor until the expiration of the original term, as opposed to the Minister of Finance. At present, the legislation only provides for an interim appointment until a new Commissioner is selected, which means that the Minister will be responsible for the appointment of the new Commissioner in the absence of a provision that states otherwise.

Recommendation 7: The internal documents and contracts of employment should be drafted by an independent expert with due regard for independence, and protective measures that can be incorporated into the documents to enhance independence.

Recommendation 8: It is important for the Financial Sector Conduct Authority to obtain the services of a consumer advocate, especially in light of its supportive prudential duties.[261]

Recommendation 9: Under the new regime, the market conduct regulator established by the Financial Sector Regulation Act, will also be bound by principles.[262] The eight principles binding on the regulators are descriptive of the regulatory structure that has been designed.[263] Thus, the system and approach to regulation should be known and comprehensible, thorough and uniform, suitable and invasive, focused on achieving set goals, '[r]isk-based and proportional', preventative and practical, convincing in its preclusion of deviation from directives and harmonized with international norms.[264] I cannot see why the regulatory body itself cannot also be subject to a specific form of regulation.[265] Furthermore, if these principles are applicable to the regulators they are also benchmarks against which the performance of the regulator may be evaluated.[266] As such, Australian Government's Regulator Performance Framework is but a model that can be adjusted to South African policies, as I discuss further in chapter seven. Nevertheless, the principles reflect many of those found in National Treasury's *Treating Customers Fairly in the Financial Sector: A*

[261] See par 3.4.2 of ch 2.
[262] Financial Regulatory Reform Steering Committee (n 22) 11.
[263] *Idem* at 7.
[264] *Idem* at 7-8.
[265] See ch 4.
[266] See par 5.3 of ch 4.

Draft Market Conduct Policy Framework for South Africa Discussion Document of December 2014.[267]

Recommendation 10: The authority of the Minister to initiate a review and require recommendation to remedy a situation envisaged in section 85 of the Financial Sector Regulation Act should be extended to include scenarios where issued instruments under the Financial Sector Regulation Act can have a detrimental effect on consumer protection measures in terms of the National Credit Act or the Consumer Protection Act.

Recommendation 11: Any regulator affected by section 76 should be able to request an evaluation mandated by section 86 of the Financial Sector Regulation Act in respect of the collaborative and cooperative measures put in place. The same cognition of the value of properly drafted section 76 agreements remains valid for the Financial Sector Conduct Authority as well. In addition, the importance of making policies, strategies and agreements publicly available should not be underestimated.[268] In addition, if an office such in line with the Office of Financial Research in the United States is established, some of the specific aspects mentioned in Freeman and Ross' paper on coordination in a shared regulatory space should be dealt with by this institution:

> 'To institutionalize and strengthen these tools, we propose the adoption of a comprehensive, government-wide policy to promote coordination, including a number of targeted reforms that should help agencies to use coordination instruments more effectively and study their effects. Such a program would include development of agency policies on coordination, sharing of best practices, ex post evaluation of at least a subset of coordination processes, and tracking of outcomes and costs.'[269]

In light of the above, I propose the following general recommendations for both regulators:

Recommendation 1: The 'Key Questions' relating to accountability developed by the International Organization of Securities Commissions should be adapted and incorporated into any framework for the South African financial market conduct regulators:

> 'With reference to the system of accountability for the regulator's use of its powers and resources: (a) Is the regulator accountable to the legislature or another government body on an ongoing basis? (b) Is the regulator required to be transparent in its way of operating and use of resources and to make public its actions that affect users of the market and regulated entities, excluding confidential or commercially sensitive information? (c) Is the regulator's receipt and use of funds subject to review or audit? … Are there means for natural or legal persons adversely affected by a regulator's

[267] See National Treasury *Treating Customers Fairly in the Financial Sector* (n 2) 25.
[268] Freeman & Rossi (n 81) 1196.
[269] *Idem* at 1197.

> decisions or exercise of administrative authority ultimately to seek review in a court, specifically: (a) Does the regulator have to provide written reasons for its material decisions? (b) Does the decision-making process for such decisions include sufficient procedural protections to be meaningful? (c) Are affected persons permitted to make representations prior to such a decision being taken by a regulator in appropriate cases? (d) Are all such decisions taken by the regulator subject to a sufficient, independent review process, ultimately including judicial review? … Where accountability is through the government or some other external agency, is confidential and commercially sensitive information subject to appropriate safeguards to prevent inappropriate use or disclosure?'[270]

Recommendation 2: Regulators should be obligated to undertake training programs in line with the example set by the members of the Organisation for Economic Co-operation and Development.[271] This would also require that the oversight institutions familiarise themselves with the progress and development of these regulators in order to adjust their views (to account for, and monitor, the expected increased competency) accordingly.

Recommendation 3: A standing committee on financial sector regulation should be established to counteract the fragmented views of parliamentary committees and the incidences of evaluating the regulators as part and parcel of the executive departments.

8. CONCLUSION

Although the principles underlying the independence and accountability of the South African market conduct regulators are sound, it is necessary that these important policy considerations are translated into meaningful statute-bound characteristics. The South African experience has shown that the policy documents set out the basic requirements and touched on crucial issues. However, the proposed safeguards were not incorporated into the legislation in a satisfactory manner, which leaves many elements to the discretion of the significant role-players. In this regard, South Africa would do well to resort to extraterritorial and international practices to strengthen its own regulatory system.

[270] IOSCO (n 59) 25.

[271] See OECD *Regulatory Policy Committee Indicators of Regulatory Management Systems 2009* Report 2009 29.

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