



**THE GLOBAL FINANCIAL CRISIS AND THE PURSUIT OF FINANCIAL
STABILITY AS A NEW REGULATORY PARADIGM**

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DECLARATION

I declare that this research project is my own work. It is submitted in partial fulfilment of the requirements for the degree of Master of Law at the University of Pretoria. It has not been submitted for any degree or examination in any other University. I further declare that I have obtained the necessary authorisation and consent to carry out this research.

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SUMMARY

The 2008 Global Financial Crisis was a watershed event in financial regulation. In response to this global crisis the pursuit of financial stability emerged as core objective of financial regulation. Although South Africa escaped the GFC relatively unscathed the South African Government nevertheless committed to reform of the approach to financial regulation in South Africa. The silo and fragmented approach to financial regulation was discarded in favour of the Twin Peaks model of Financial Regulation as encapsulated in the Financial Sector Regulation Act 9 of 2017. This model comprises of two peak regulators, namely the Prudential Authority, dedicated to oversee the safety and soundness of all financial institutions in South Africa and the Financial Sector Conduct Authority mandated with market conduct oversight. The South African Reserve Bank is given a comprehensive and express financial stability mandate which concentrates on the prevention of systemic risk.

Australia is a jurisdiction that is well-known for its resilient financial system which can largely be attributed to its robust approach to financial regulation. It was the first jurisdiction to adopt a Twin Peaks model of Financial regulation in 1998-well before the 2008 GFC. In the Australian model APRA is the prudential regulator and ASIC is the market conduct regulator. The Reserve Bank of Australia is mandated with maintenance of financial stability.

This dissertation interrogates the various approaches to financial regulation, focusing specifically on the Twin Peaks model. It analyses the Financial stability mandate of the SARB within the South African Twin Peaks model and also reviews the Australian Twin Peaks model in order to benchmark Twin Peaks in South Africa and how it enables the promotion and maintenance of financial stability.

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Chapter One

Background to the Study



1.1 Introduction

The 2008 Global Financial Crisis (“GFC”) was one of the most catastrophic financial events to hit the world since the Great Depression.

The crash of the real estate sub-prime mortgage bubble in the United States precipitated the 2008 GFC resulting in capital and asset market failures across the globe¹. House prices in America peaked in 2006 and soon dipped by more than 30% triggering a spiral effect of the greatest declines since the 1930s Great Depression.² During the last phase of the boom, sub-prime mortgage lending to low income borrowers had reached excessive heights and the default rate increased.³ The market experienced major shocks as properties lost value and the interbank rates at which banks used to lend each other sky-rocketed.⁴ This led to liquidity shortages in the market prompting government interventions.⁵ By the end of March 2008, the market capitalization of banks globally had shrunk by US\$720 billion. By July, major credit rating agencies had either downgraded or placed on review a large number of collateralized debt obligations (CDOs) that relied on mortgages as collateral. In August, the troubles spread to asset-backed commercial paper (ABCP) issued by entities that had invested in CDOs of mortgage-backed securities, and interbank markets around the world began to experience shortages of liquidity. On 9 August, the markets were shaken by the news that BNP Paribas, France’s largest bank, halted withdrawals from three of its investment funds because it could not ‘fairly’ value their

¹ Hellwig, *Systemic Risk in the Financial Sector: An Analysis of the Subprime-Mortgage Financial Crisis*, Max Planck Institute for Research on Collective Goods (November 2008).

² International Organizations of Supreme Audit Institutions (INTOSAI), ‘The Causes of the Global Financial Crisis and Their Implications for Supreme Audit Institutions’, at.8. <http://www.intosai.org/uploads/gaohq4709242v1finalsubgroup1paper.pdf> accessed on 2 October 2017.

³ See Cohen and Remolona *The Unfolding Turmoil of 2007–2008: Lessons and Responses* (2008) Proceedings of a Conference of the Reserve Bank of Australia held at the H.C. Coombs Centre for Financial Studies, Kirribilli on 14–15 July 2008, available at <http://www.rba.gov.au/publications/conf/2008/pdf/conf-vol-2008.pdf> accessed on 7 October 2017.

⁴ Borio ‘The Financial Turmoil of 2007–?: A Preliminary Assessment and Some Policy Considerations’, (2008) BIS Working Papers No 251.

⁵ Ibid.

holdings. All these events culminated in September with a run on Northern Rock, a UK mortgage lender, when its liquidity problems became known. .⁶

The GFC revealed a number of very important lessons that eventually led to some significant changes in financial regulation on an international level. Before the GFC, regulators were of the opinion that microprudential supervision⁷ was sufficient to maintain financial system stability. The argument was that if all institutions were soundly regulated, then the financial system would be stable. The GFC, however, has shown that the build-up of macroeconomic risks (such as asset bubbles, high household debt levels or the increasing interconnectedness between large financial institutions) may pass unnoticed by microprudential regulators who focus only in silos on individual institutions. ⁸ The GFC also showed that large, complex and highly interconnected financial institutions (and not only banks) that were allowed to become far too big were a major regulatory concern because of the risk to which they exposed the financial system. These systemically important financial institutions were referred to as “Too-Big-To-Fail” (TBTF),⁹ because their size, complexity and interconnectedness meant that in the event of failure they would not be able to exit the financial system without causing major disruption and threatening financial stability. Due to the fact that these TBTF institutions could trigger the collapse of a whole financial systems the regulatory response when such an institution encountered financial distress was usually to bail it out using taxpayers’ money but this approach gave rise to moral hazard¹⁰ problems associated with the TBTF institutions as it

⁶ Mboweni ‘Central Banks in Times of Turmoil’, address as the Governor of the South African Reserve Bank, given at the Gordon Institute of Business Science on 28 May 2008, available at <https://www.resbank.co.za/Publications/Speeches/Detail-Item-View/Pages/Default.aspx?sarbweb=3b6aa07d-92ab-441f-b7bf-bb7dfb1bedb4&sarblast=a01d874c-c3f6-4b93-a9dc-c984cf8652cf&sarbitem=102> accessed on 22 October 2017.

⁷ Microprudential supervision is supervision of individual financial institution and is different from macroprudential supervision which entails supervision of the financial system as a whole.

⁸ National Treasury “A Safer Financial Sector to Serve South Africa Better”(2011) available at www.nationaltreasury.gov.za

⁹ Farrell “Too important to fail: legal complexity in planning for the failure of financial market infrastructure” 2014 (29) *Journal of International Banking Law and Regulation* 469.

¹⁰ Federal deposit insurance corporation in bank supervision: 2008 and a few of its lessons (2009) https://www.fdic.gov/regulations/examinations/supervisory/insights/sisum09/bank_supervision.html accessed 23 October 2017.

encouraged risky behaviour by these institutions who were of the opinion that they had “nothing to lose”.¹¹

The CFC further revealed the failure of “light touch” regulation by regulators who were lax and failed to make proper use of their regulatory and enforcement powers. The GFC also emphasized the need for a holistic approach to financial regulation, with the focus being on a macroprudential approach within a regulatory regime where prudential regulation is supported by efficient market conduct regulation.¹² Although the need to focus more on financial stability as a regulatory objective gained increased importance prior to the GFC De Jager remarks that the general criticism was that the responsibility of financial stability was not well defined before the GFC and the tools to ensure the maintenance of financial stability were not developed well enough.¹³

The GFC therefore emphasized the need to approach financial regulation in a way that would contribute to the maintenance of financial stability and so to try and avoid the collapse of financial systems on both a domestic and international scale.¹⁴

1.2 Financial stability as core regulatory objective

Financial stability gained momentum as a regulatory objective in the last few decades and after the GFC it has emerged as the core paradigm of international financial regulation. Notably however, there exists no universally accepted definition of the concept of financial stability and express reference to financial stability has over the years generally not been captured expressly in legislation although it was acknowledged as a traditional de facto role of central banks.¹⁵

Allen points out that although many international financial instruments mention the concept of financial stability they generally neglect to define this concept.¹⁶ Allen and

¹¹ Morisson “Systemic risks and the “Too-Big-To-Fail” problem” 2011 (27) *Oxf. Rev.Econ. Policy* 498

¹² National Treasury “A Safer Financial Sector to Serve South Africa Better”(2011)

¹³ De Jager “The South African Reserve Bank: Blowing the Winds of Change (Part 2) 2013 *SA Merc LJ* 492.

¹⁴ *Ibid.*

¹⁵ Goodhart “The Past Mirror: Notes, Surveys, Debates – The changing role of central banks” 2011 *Financial History Review* 142.

¹⁶ Allen “What is “financial stability”? The need for some common language in international financial regulation” 2014 *Georgetown Journal of International Law* 929.

Wood are however of opinion that financial stability can be described as “as a state of affairs in which episodes of instability are unlikely to occur”.¹⁷

Schinasi believes that financial stability is a continuum and changeable over time and consistent with multiple combinations of the constituent elements of finance. He uses the word “continuum” because the financial world involves uncertainty and it is dynamic and involves many interlinked and evolutionary elements.¹⁸

Schinasi breaks up his notion of financial stability into five principles:¹⁹The first principle is that financial stability is a broad concept because it involves many different aspects of finance. It involves both private and public persons participating in the financial market and deals with both companies and lay persons. Hence there are many “moving parts” involved in the financial stability of a country. The second principle relates to the consistency of the payment and settlement system of a country and the requirement that such system must run smoothly.²⁰ The third principle deals with the ability of a financial system to limit, contain, and deal with the emergence of imbalances before they constitute a threat to itself or economic processes.²¹ Schinasi points out that this principle emphasises the importance that financial institutions have safeguards in place should an economic or financial crisis arise. These safeguards must be continuously evolving and adapting to the financial market at any given time and must always strive to be effective and corrective. Financial market regulators are tasked with the responsibility of putting effective and resilient market conduct regulations in place that will govern the conduct of private dealings (such as with consumers dealing with financial institutions) as well as public dealings (such as governmental spending) which will impact the country’s economy as a whole. The fourth principle explains that financial stability must be viewed in terms of the potential consequences for the real economy.²² The overall financial stability of a country’s economy should not be concerned with the disturbances that individual private

¹⁷ Allen and Wood “Defining and achieving financial stability” 2006 (2) *Journal of Financial Stability* 152.

¹⁸ *Ibid.*

¹⁹ Schinasi ‘Defining Financial Stability’ *IMF Working Paper* 6.

²⁰ Schinasi ‘Defining Financial Stability’ *IMF Working Paper* 6.

²¹ Schinasi ‘Defining Financial Stability’ *IMF Working Paper* 6.

²² Schinasi ‘Defining Financial Stability’ *IMF Working Paper* 7.

dealings encounter if they do not have the potential to affect the economic activity at large.²³

The fifth and final principle entails that maintaining financial stability does not necessarily mean that each part of the financial system operates at optimal performance persistently, but that it is appropriate that it operates at the performance needed at a specified time. Thus Schinasi remarks that not all financial mishaps are “significant or a crisis or disastrous”, and that some can be viewed as an opportunity for financial regulators to learn from mistakes and do better and prepare more.

Schinasi therefore concludes that the continuum is relevant to financial stability as the financial system is dynamic and involves many interlinked and evolutionary elements. He accordingly remarks that what might be described as financial stability at one point in time may not be so at another point of time because financial stability is dependent on the economic circumstances which are prevalent at that given moment in time.²⁴

However, several implications arise from Schinasi’s view of financial stability. The first implication is that there is no single quantitative indicator which can correctly summarise the concept of financial stability. No one unit of measurement is used to quantify what how financial stability can be determined. Rather, financial stability is assessed based on a number of factors which may influence financial stability as a whole, and it relates to both financial stability and resilience of financial institutions, and to the smooth functioning of financial markets and settlement systems.²⁵ Another implication identified by Schinasi is that financial stability is inherently difficult to forecast and that it is therefore difficult to predict financial crises. This means that regulators need to adopt a forward looking approach and put regulations in place which assist in detecting risks before they manifest or become uncontrollable.²⁶

Ultimately defining financial stability is therefore a daunting task as what constitutes a stable financial sector is dependent on various dynamic factors. The most important

²³ Schinasi ‘Defining Financial Stability’ *IMF Working Paper 7*.

²⁴ Schinasi ‘Defining Financial Stability’ *IMF Working Paper 7*. He states “Moreover, financial stability can be seen as being consistent with various combinations of the conditions of its constituent parts, such as the soundness of financial institutions, financial market conditions, and effectiveness of the various components of the financial infrastructure.”

²⁵ Schinasi ‘Defining Financial Stability’ *IMF Working Paper 11*.

²⁶ Schinasi ‘Defining Financial Stability’ *IMF Working Paper 11* remarks that “...risks to financial stability often reflect the far-reaching consequences of unlikely events.”

thing a country can do is therefore to establish a financial legislative framework which assists in upholding financial stability.

1.3 Rethinking the most appropriate model of financial regulation

The GFC have led to a reconsideration of existing models of financial regulation and their ability to contribute to financial stability. The four most prevalent regulatory models at the time of the GFC were: the Institutional Approach, the Functional Approach, the Integrated Approach and the Twin Peaks approach.²⁷

1.3.1 The Institutional Approach

The Institutional Approach, also known as the traditional approach, is a legal-entity-driven approach. The legal status of the firm (for example, a registered bank) determines which regulator is tasked with overseeing its activity both from safety and soundness perspectives as well as determines the scope of the entity's permissible business activities.²⁸ . The Institutional Approach is however viewed as being outdated and under strain to be reformed.²⁹ This approach suffers from various communication and coordination deficiencies which render the structure suboptimal.³⁰

1.2.2 The Functional Approach

The second approach is the Functional Approach where supervisory oversight is determined by the type of business that is being transacted by the entity, without regard to the entity's legal status. This type of approach results in each type of business having its own functional regulator. The main challenge with this approach

²⁷ 'The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace' *Group of Thirty 2008* 13.

²⁸ 'The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace' *Group of Thirty 2008* 24.

²⁹ 'The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace' *Group of Thirty 2008* 25:

³⁰ 'The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace' *Group of Thirty 2008* 13 – 14.

is that activities must fall within clear categories for the regulator to identify.³¹ The functional approach is still quite common amongst financial markets and appears to work relatively well as long as coordination among agencies is established and maintained.³² Examples of jurisdictions which have implemented this approach are Italy and France.

1.2.3 The Integrated Approach

Under this approach there is a single universal regulator who oversees safety and soundness as well as conduct-of-business regulation for all the sectors of the financial services business.³³ This type of approach would be most effective in smaller less complex markets as it would be easier for a single regulator to perform its duties over the financial market. However, it can be considered as a flexible and streamlined approach in some larger more complex markets. The main advantage of this approach is that because there is only one regulator there is a unified focus on regulation and supervision without the confusion or conflict over jurisdictional lines. However, the main disadvantage of this approach is that there is a risk of a single point of regulatory failure.³⁴ An example of a country that is using this approach is Germany.

1.3.4 The Twin Peaks Approach

In 1995 Michael Taylor advocated a new approach to financial regulation, called “Twin Peaks” that attracted widespread attention amongst financial regulators. The Twin Peaks model was stated to be a focused approach to financial regulation, designed to yield greater efficiencies than that produced by a fragmented regulation of the financial system.³⁵ Taylor proposed that when financial services are regulated, it should be done with two goals in mind, namely to protect the stability and integrity of the financial system (“systemic protection”) and to ensure that the interests of individual depositors,

³¹ ‘The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace’ *Group of Thirty 2008 24.*

³² ‘The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace’ *Group of Thirty 2008 14.*

³³ ‘The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace’ *Group of Thirty 2008 24.*

³⁴ ‘The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace’ *Group of Thirty 2008 14.*

³⁵ Michael Taylor “*Twin peaks*”: *A regulatory structure for the new century* published by the Centre for the Study of Financial Innovation, 1995 – Financial Service Industry - Issue 20 of DSFI series, hereinafter Taylor 1995.

investors, and policy-holders are protected (“consumer protection”).³⁶ Accordingly, he suggested that to ensure efficient financial regulation and supervision a Twin Peaks model comprising of systemic protection, on the one hand, and consumer protection, on the other hand, should be implemented and that these “peaks” should be regulated by two separate bodies, having overlapping staff and governing boards, all answerable to the Treasury.³⁷

In the original Twin Peaks model as proposed by Taylor the central bank would be the one peak responsible for overall financial stability and also prudential regulation of financial institutions in order to achieve or maintain financial stability. The other peak would be the systemwide market conduct regulator who would be accountable for the conduct of business regulation across all sectors of financial services, like banking, insurance and securities and who would focus on the behaviour of financial institutions toward customers in the market.³⁸

The Twin Peaks approach thus regulates the financial sector in an all-inclusive way. Taylor argued that the focus of the Twin Peaks regulatory approach is balanced between the two aforementioned authorities as each authority is dedicated to its clearly demarcated objective of prudential and market conduct, respectively but both authorities are simultaneously focusing on financial stability.³⁹

1.4 Nature and scope of dissertation

The 2008 GFC was a watershed event that gave rise to the maintenance of financial stability emerging as main regulatory objective after the Crisis. The regulatory pursuit of financial stability is however complex in nature as there exists no generally accepted definition of what exactly constitutes financial stability. The practical implementation of steps to achieve financial stability largely hinges on economic interpretations and applications which is beyond the scope of this dissertation. However it is clear that the regulatory objective of financial stability will have to be pursued within a specific

³⁶ Ibid.

³⁷ Ibid.

³⁸ De Jager “The South African Reserve Bank: Blowing the Winds of Change”2013 SA Merc LJ 492.

³⁹ Department of National Treasury in the RSA “Twin Peaks in SA: Response and explanatory document” Dec 2014 accompanying the second draft of the Financial Sector Regulation Bill available at www.nationaltreasury.gov.za accessed on 27 October 2017.

regulatory framework that provides an institutional and legislative architecture for the execution of this mandate. In this regard it is submitted that the Twin Peaks model as suggested by Michael Taylor appears to be the most suitable framework by which to attain the objective of the maintenance of financial stability. This is because this model focuses specifically on financial stability as a regulatory objective and pertinently assigns a regulatory peak to systemic regulation. It also gives effect to the realization that occurred as a result of the GFC, namely that prudential regulation has to be supported by market conduct regulation in order to achieve a stable financial system.

The purpose of this dissertation is therefore to consider the Twin Peaks model of Financial regulation that was adopted in Australia (being the first country to adopt this model) and to compare the Australian Twin Peaks model with the South African Twin Peaks model to see whether there are any lessons that South Africa can learn that might assist in the effective implementation of the South African model.

1.5 Chapter Lay-out

Chapter One is an introductory chapter that provides background to the 2008 GFC, including the causes of the GFC and lessons learnt from a regulatory perspective. A discussion is provided on the concept of financial stability that emerged as core regulatory pursuit after the GFC. The chapter also provides an overview of the main approaches to financial regulation, focusing more in detail on the Twin Peaks approach. It further sets out the nature and scope of the dissertation and its structural lay-out.

Chapter Two deals with the salient features of the Australian Twin Peaks model as the first model to have been implemented-also well in advance of the GFC. The focus is specifically on whether the Australian model facilitates the maintenance of financial stability.

Chapter Three sets out the salient features of the South African Twin Peaks model as contained in the Financial Sector Regulation Act 9 of 2017. Here again the focus is on the potential for this model to facilitate the maintenance of financial stability.

Chapter Four contains the conclusions of the study and also makes some recommendations regarding the South African Twin Peaks model in the context of maintenance of financial stability.

Chapter 2

FINANCIAL STABILITY IN AN AUSTRALIAN CONTEXT



2.1 Introduction

In the early 1980s Australia decided to deregulate its financial system as it was of the opinion that the existing financial system was outdated. After the deregulation was carried out, the Wallis Committee was tasked in 1997 with reviewing the deregulated financial system outcomes.⁴⁰ The Wallis Committee put forward a recommendation that Australia should move to a Twin Peaks model of financial regulation and suggested the establishment of two peak regulators⁴¹: The Australian Prudential Regulation Authority (APRA), which is responsible for all ADIs⁴², insurers, and most of the superannuation industry, and the Australian Securities and Investments Commission (ASIC)⁴³, which is responsible for market conduct relative to financial services and general corporate and business legal standards.⁴⁴

The Reserve Bank of Australia functions as central bank within the Australian Twin Peaks model and in addition to its traditional roles pertaining to monetary policy, payment system oversight and acting as lender of last resort, it is also responsible for the maintenance of financial stability. It shares the responsibility for financial stability with APRA.. ASIC does not have a similar financial stability mandate but nevertheless has some responsibility for financial stability imposed on it by the Corporations Act 2001 as indicated below.

⁴⁰ Wallis Report on the Australian Financial System: Summary and Critique – Research Paper No. 16 1996-97 published by the Department of the Parliamentary Library (1997) http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/D2G30/upload_binary/D2G30.pdf;fileType=application/pdf#search=%221990s%201997%20publications%22 (accessed 30 October 2017).

⁴¹ See also Schmulow “Doing it the Australian Way, ‘Twin Peaks’ and the Pitfalls in between’ *Columbia Law Schools Blog on Corporations and the Capital Market* <<http://clsbluesky.law.columbia.edu/2016/03/31/doing-it-the-australian-way-twin-peaks-and-the-pitfalls-in-between-2/>> accessed on 24/09/2017.

⁴² Authorized Deposit-Taking Institutions – which include banks, building societies, and credit unions.

⁴³ Which replaced the previous Australian Securities Commission (“ASC”).

⁴⁴ ‘The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace’ *Group of Thirty 2008* 188 – 189.

Having pioneered the Twin Peaks model Australia is the country that has been using the Twin Peaks Model for the longest time since adopting it in 1998. This regulatory model is credited with making Australia's financial system more resilient and enabling Australia to fare the best during the 2008 GFC out of all the G20 countries.⁴⁵ It should be noted though that the Australian Twin Peaks model is not a "classic" Twin Peaks model as proposed by Michael Taylor. It deviates from the classic Twin Peaks model as the role of bank supervision has been taken away from the RBA who was the bank supervisor in the pre-Twin Peaks dispensation.⁴⁶ The Wallis Committee considered giving the responsibility of prudential regulation to the RBA, however, it was ultimately decided that such prudential responsibility should vest with an independent regulatory authority hence it was given to APRA.⁴⁷

In the Twin Peaks system the main objectives of the RBA are therefore the stability of the financial system, the safety and reliability of the payments systems, and monetary policy. The RBA is also the sole currency-issuing authority and acts as banker to the federal government and remains the lender of last resort for financial institutions.⁴⁸

APRA is the prudential authority of all banks and deposit taking institutions. APRA has a dual role of regulation: firstly, regulating bodies in the financial sector and, secondly, developing the administrative practices and procedures to be applied in the performing of that regulatory role which includes the making of prudential standards. APRA is also responsible for sanctioning institutions that are not meeting the published prudential standards. The RBA coordinates with APRA when any action is taken against ADIs who fail to comply with prudential requirements. The regulation and supervision undertaken by APRA provides for early detection of financially troubled institutions and APRA is empowered to close an insolvent entity. The Australian government protects depositors by means of a first priority claim against the assets of the ADI to ensure the security of their deposits. Also, recently the Australian

⁴⁵ Schmulow "Doing it the Australian Way, 'Twin Peaks' and the Pitfalls in between" *Columbia Law Schools Blog on Corporations and the Capital Market* <<http://clsbluesky.law.columbia.edu/2016/03/31/doing-it-the-australian-way-twin-peaks-and-the-pitfalls-in-between-2/>> (accessed on 24/09/2017). See also Godwin; Kourabas; Ramsay 'Twin Peaks and Financial Regulations: The Challenges of Increasing Regulatory Overlap and Expanding Responsibilities' *The International Lawyer* 2016 9.

⁴⁶ Ibid.

⁴⁷ Godwin; Kourabas; Ramsay 'Twin Peaks and Financial Regulations: The Challenges of Increasing Regulatory Overlap and Expanding Responsibilities' *The International Lawyer* 2016 8.

⁴⁸ See also 'The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace' *Group of Thirty* 2008 192.

government introduced a Financial Claims Scheme to provide depositors with early access to their funds should the ADI fail or become financially troubled.⁴⁹

ASIC, as market conduct regulator, is responsible for market integrity and consumer protection in the financial system as a whole. It oversees financial markets, financial services organisations, and professionals who deal with and advise about investments, superannuation, insurance, deposit taking and credit.⁵⁰

Although financial stability is the primary duty of the APRA, ASIC and the RBA, there are other entities that assist to ensure financial stability. One of those entities is the Australian Competition Consumer Commission which oversees competition in the financial system as a whole and prevents any conduct which it deems anticompetitive which is performed by banks and all other financial institutions.⁵¹ The Financial Sector Advisory Council was created as part of the financial sector reform triggered by the Wallis Enquiry in 1997. The Council is a resource for the eliciting and distilling the views of both industry and regulators, it provides for independent advice to the government.⁵² Lastly, the Australian Stock Exchange and the Sydney Futures Exchange both monitor the conduct and compliance of market participants and ensure that it is in line with the business and listing rules. These organisations are supported by ASIC that regulates the overall conduct of financial market participants.⁵³

2.2 Legislative framework

The legislative framework which exists and confers the authority onto the ASIC, APRA and the RBA includes, *inter alia*:

- The Banking Act⁵⁴ which contains numerous regulations that are relevant to banks and other financial participants, but it most importantly regulates banking

⁴⁹ 'The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace' *Group of Thirty 2008* 193

⁵⁰ 'The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace' *Group of Thirty 2008* 191.

⁵¹ 'The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace' *Group of Thirty 2008* 190.

⁵² 'The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace' *Group of Thirty 2008* 190 – 191.

⁵³ 'The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace' *Group of Thirty 2008* 191.

⁵⁴ Banking Act 1959.

and contains provisions relating to the licencing of ADIs, the protection of depositors, APRA's powers to issue directions or take control of ADIs, amongst other things.⁵⁵

- The Reserve Bank Act⁵⁶ establishes the RBA as Australia's central Bank and empowers it to conduct monetary policy in line with the objectives as set out in the Act.
- The Australian Prudential Regulation Authority Act⁵⁷ establishes APRA as prudential regulator and confers on it the responsibility to regulate financial institutions and sets out framework for the APRA's operation.
- The Australian Securities and Investments Commission Act⁵⁸ establishes ASIC's role of monitoring the market conduct of corporations registered under the Act. Some acts which were governed by the former Insurance and Superannuation Commission were split between the APRA and ASIC.
- The Financial Sector (Collection of Data) Act⁵⁹ moved the responsibility for the registration of financial institutions from the RBA to APRA. This Act applies to corporations which are not governed by the Banking Act.

APRA, ASIC and the RBA are entitled to issue standards to financial institutions. APRA is empowered to issue Prudential Standards which sets out the APRA's prudential requirements, as well as, Prudential Practice Guides which provide guidance and elaboration in relation to how regulated institutions may comply with the associated standard.

1.3 The role of the RBA in respect of financial stability

In terms of the Banking Act 1959 the RBA must "ensure that the monetary and banking policy of the Bank is dedicated to the greatest advantage of the people of Australia and that its powers are executed in such a manner as, in the opinion of the Reserve Bank Board, will best contribute to (a) the stability of the currency in Australia; (b) the

⁵⁵ See also 'The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace' *Group of Thirty 2008* 191.

"The RBA is formally responsible for the responsibility for ensuring that licenced facilities for the clearing and settlement of securities and derivatives conduct their affairs in a way that is consistent with financial system stability."

⁵⁶ Reserve Bank Act 1959.

⁵⁷ Australian Prudential Regulation Authority Act 1998.

⁵⁸ Australian Securities and Investment Commission Act 2001.

⁵⁹ Financial Sector (Collection of Data Act) 2001.

maintenance of full employment in Australia; and (c) the economic prosperity and welfare of the people of Australia.” Given the serious damage to employment and economic prosperity that can occur in times of financial instability section 10 has long been interpreted to imply a mandate to “pursue” financial stability.⁶⁰

By the time that the move to Twin Peaks occurred the RBA as Australian central bank thus had a longstanding implied financial stability mandate in the pre-Twin Peaks dispensation as inferred from a purposive interpretation of section 10 of the Reserve Bank Act 1959 and from the broader context of its roles with regard to monetary policy, the payments system, lender of last resort and, pre-Twin Peaks, also as supervisor of banks.⁶¹ Prior to move towards Twin Peaks in Australia the mandate of the RBA with regard to financial stability was however not expressly and comprehensively captured in the Reserve Bank Act.

The Wallis Inquiry that recommended the Twin Peaks approach for Australia nevertheless made it clear that under Twin Peaks the TBA would have an expanded financial stability mandate and that its banking supervision duties would have to be moved over to APRA as the new systemwide prudential regulator.

The move toward Twin Peaks did however not result in any express changes to the RBA Act to specifically and comprehensively set out the RBA’s role with regard to financial stability. The financial stability mandate of the RBA was merely confirmed in 1998 when APRA was created and the then Treasurer explicitly referred to financial stability being the regulatory focus for the RBA in the Second Reading Speech for the

⁶⁰Reserve Bank of Australia and Australian Prudential Regulation Authority “Macroprudential Analysis and Policy in the Australian Financial Stability Framework” (September 2012) <http://www.rba.gov.au/fin-stability/resources/2012-09-map-aus-sf/pdf/2012-09-map-aus-fsf.pdf> accessed 22 March 2017(hereinafter RBA & APRA Financial Stability 2012)

⁶¹ Schmulow “Financial regulatory governance in South Africa: the move towards Twin Peaks” 2017 (25) *African Journal of International and Comparative Law* 397.

APRA Act.⁶² Revised, though basically unchanged, statements were published in July 2003 and September 2006.

It is further clear that the RBA did not have the sole responsibility for financial stability as it shared this mandate with APRA. Malcolm Edey , a previous Assistant Governor of the RBA provides the following explanation of the shared responsibility of the RBA and APRA in the context of financial stability.⁶³ Edey remarks that “It is sometimes said in answering that question that the Bank is the macro-prudential authority in Australia and APRA is the micro-prudential authority. The implication is that the bank looks at stability from the point of view of the system while APRA looks only at the individual institutions. I think that is at best an oversimplification and is an unhelpful way to look at the two institutional roles. It presupposes that it is possible to focus on the system as a whole without taking an interest in the individual components or, conversely, that an agency can sensibly look at parts without being interested in how they interact with the whole. The difference between the two roles, I suggest, is best understood in terms of their powers and responsibilities rather than their objectives. APRA has powers and responsibilities that relate mainly to individual institutions, but its legislative mandate includes stability of the system, and it can adjust its prudential settings to address system-wide concerns. The RBA has a broad financial stability mandate, existing in conjunction with other macroeconomic objectives and attached to a very different set of powers.”

Edey thus states that in a legal sense, the RBA is authorized to provide financial services to the government and to the financial system, and has significant powers to engage in financial activities in the public interest. Those powers enable the RBA to act as lender of last resort and liquidity manager for the financial system in addition to its monetary policy role. He indicates that when Bank supervisory powers were shifted from the RBA to APRA under the 1998 Wallis Reforms, the Bank’s general mandate to use its powers to promote financial stability was reaffirmed. The Wallis Reforms and subsequent legislative changes also gave the RBA significant regulatory powers in

⁶² [Statement Monetary Policy 2010.](#)

⁶³ Edey “The Financial Stability Role of Central Banks” Address delivered by Malcolm Edey at the Thomson Reuters Regulatory Summit Sydney May 1 ,2013 available at <https://www.rba.gov.au/speeches/2013/sp-ag-010513.html>

relation to the resilience of the payments system and of financial markets infrastructure. Thus Edey concludes: "...the RBA and APRA have different powers but overlapping and complementary objectives in relation to financial stability."

2.4 The role of APRA in respect of financial stability

APRA's main purpose is to prudentially regulate bodies in the financial sector in accordance with other laws of the Commonwealth that provide for prudential regulation⁶⁴ or for retirement income standards; to administer the financial claims schemes provided for in the Banking Act 1959 and the Insurance Act 1973; to develop the administrative practices and procedures to be applied in performing that regulatory role and administration.⁶⁵ In performing and exercising its functions and powers, APRA is obliged to balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality and, in balancing these objectives, to "promote financial system stability in Australia".⁶⁶ It thus has an express mandate to promote financial system stability.⁶⁷

APRA has three main categories of powers in regulating financial institutions: authorisation or licensing powers; supervision and monitoring powers; and powers to act in circumstances of financial difficulties to protect depositors, policy holders and superannuation fund members, including powers relating to taking control of entities and/or winding up insolvent entities.⁶⁸

It is important to note that APRA is the only agency in Australia who has the power to use the tools available for macroprudential supervision in order to change the behaviour of financial institutions.⁶⁹ APRA is able to respond to risks through direct

⁶⁴ Section 3 APRA Act: Prudential regulation or advice services means services of either or both of the following kinds: (a) services consisting of APRA performing a role in the prudential regulation or supervision of entities; (b) services consisting of APRA providing advice relating to the prudential regulation or supervision of entities.

⁶⁵ Section 8 (1).

⁶⁶ Section 8 (2).

⁶⁷ RBA & APRA Financial Stability 2012 at 13

⁶⁸ *Ibid.*

⁶⁹ RBA & APRA Financial Stability 2012 at 14.

intervention if necessary, for example, by imposing higher prudential capital requirements for individual ADIs beyond the minimum requirements of the Basel framework. APRA also has a wide range of legislated powers that enable it to take direct action if it identifies behaviour or financial distress that may threaten an ADI's ability to meet its financial obligations to depositors, or otherwise threaten financial system stability. These include powers to obtain information from an ADI; investigate an ADI; give binding directions to an ADI (such as to recapitalise); and, if necessary, to appoint a statutory manager to assume control of a distressed ADI.⁷⁰

2.5 The role of ASIC in promoting and maintaining financial stability

As market conduct regulator ASIC administers and enforces a range of legislative provisions relating to financial markets, financial sector intermediaries and financial products, including investments, insurance, superannuation, consumer credit and deposit-taking activities. ASIC's aim is to protect markets and consumers from manipulation, deception and unfair practices and, more generally, to promote confident participation in the financial system by investors and consumers. It thus has systemwide responsibility for market integrity and consumer protection across the financial system.⁷¹

ASIC's powers include being able to investigate situations where a breach of its legislation might have occurred; prosecute in a criminal court; bring a civil action; apply for a civil penalty order; accept and enforce an undertaking to comply with the law; apply to the Takeovers Panel; and disqualify people from managing corporations or dealing in financial services.⁷²

ASIC does not have an express financial stability mandate given to it by its founding legislation. However it should be noted that the Corporations Act 2001 includes as an objective "the reduction of systemic risk and the provision of fair and effective services by clearing and settlement facilities."⁷³

⁷⁰ RBA & APRA Financial Stability 2012 at 15.

⁷¹ Ibid.

⁷² Ibid.

⁷³ RBA & APRA Financial Stability 2012 at 2.

ASIC therefore plays an important role in monitoring, mitigating and managing systemic risk in the Australian financial system through its Emerging Risk Committee. Important issues and concerns are communicated with the RBA and APRA directly or through the Council of Financial Regulators as discussed below.⁷⁴

2.6 Cooperation and collaboration

Cooperation and collaboration between the RBA and APRA and ASIC and also between APRA and ASIC specifically, is crucial to the effective working of the Australian Twin Peaks model. Schmulow points out that what is important about the Australian Twin Peaks Model is that no one regulator must be regarded as more important than the other; they must each work separately and independently as well as cooperate and collaborate with one another.⁷⁵

The Council of Financial Regulators (“CFR”) is the main coordinating body of the financial regulators of Australia. Its members consist of the RBA, who chairs the Council, APRA, ASIC and the Australian Treasury. The Council operates as an informal body and contributes to the efficiency of the financial regulation by providing for a high-level forum for cooperation and collaboration among its members. The Council has no statutory powers other than the powers conferred on its members.⁷⁶

To facilitate cooperation and collaboration between the RBA and APRA and ASIC and also between APRA and ASIC a soft law approach of entering into Memoranda of Understanding (MOUs) rather than requiring cooperation in accordance with legislative provisions is followed. These MOUs clarify the roles of the RBA and regulators in relation to the financial market as a whole and with one another.⁷⁷

⁷⁴ RBA & APRA Financial Stability 2012 at 3.

⁷⁵ See also Schmulow “Doing it the Australian Way, ‘Twin Peaks’ and the Pitfalls in between” *Columbia Law Schools Blog on Corporations and the Capital Market* <<http://clsbluesky.law.columbia.edu/2016/03/31/doing-it-the-australian-way-twin-peaks-and-the-pitfalls-in-between-2/>> (accessed on 24/09/2017). Schmulow states that “Twin Peaks rejects this approach because, correctly, it anticipates that if a lead regulator is created, it will far more likely be the system stability regulator, not the market conduct and consumer protection regulator. This is simply because a threat to the entire financial system would be regarded by policy-makers as more severe than a series of instances of consumer abuse or market misconduct...Market conduct and consumer protection are nonetheless important because enough that they ought not to be created weak, and then be allowed to decline in importance even further from then on.

⁷⁶ RBA & APRA Financial Stability 2012 3.

⁷⁷ Ibid.

2.7 Conclusion

Australia took the brave step to pioneer the Twin Peaks model in 1998, well before the Global Financial Crisis. This model has served them well as the Australian financial system proved to be resilient during the GFC.

It appears that the success of the Australian Twin Peaks model can be ascribed to the fact that it has three dedicated entities that each has a clear regulatory focus. In this model the achievement of the promotion and maintenance of financial stability is enhanced by having both the RBA and APRA sharing the overall responsibility for financial stability. As indicated by Edey these mandates are complementary and together they serve to achieve financial stability objectives.

It is further important to bear in mind that ASIC as the market conduct regulator also plays a role in financial stability: not only must it keep checks on risks in the payment and clearing system but, as was demonstrated by the GFC, prudential regulation by APRA needs to be supported by proper market conduct regulation by ASIC to ensure financial stability.

The Australian Twin Peaks system also rests on a culture of extensive collaboration. The measures for cooperation and collaboration are not cast in legislation though but it appears that the informal MOUs entered into between the various regulators are working well in ensuring the smooth and effective running of the Australian Twin Peaks model.

Chapter 3

FINANCIAL STABILITY IN THE SOUTH AFRICAN CONTEXT



3.1 Introduction

South Africa's economy emerged relatively unscathed from the GFC compared to some of its international counterparts. Various features of the South African financial system protected South Africa during the GFC. These included a sound framework for financial regulation and well-regulated financial institutions that ensured that potential risks were anticipated and appropriate action was taken to mitigate these risks; appropriate and conservative risk management practices at domestic banks; limited exposure to foreign assets; subsidiary structure and listing requirements entailing that registered banks have to be subsidiaries of the domestic or foreign parent company, so their assets and liabilities are ring-fenced even when the parent company is in distress; a proactive approach to dealing with the bank credit risk in terms whereof the Registrar of Banks took proactive steps to reduce potential risks – including the raising of capital adequacy requirements and setting conservative leverage ratios and a focus on reducing household vulnerabilities. In this regard the introduction of the National Credit Act⁷⁸ protected households and consumers from reckless lending practices.”⁷⁹

Even though the South African economy was able to weather the GFC, certain shortfalls in financial regulation were nevertheless identified: The President also indicated in the G20 Seoul Summit that South Africa was committed to the global regulatory reform agenda. This commitment related to four areas: a stronger regulatory framework, effective supervision, crisis resolution and addressing systemic institutions, and international assessment and peer review.⁸⁰

In 2011 the National Treasury, in pursuit of the new regulatory reform agenda, published a Policy Document entitled “A safer financial sector to serve South Africa better”(the Red Book). This document set out the new financial framework proposed for South Africa based on four main policy objectives, namely:

⁷⁸ National Credit Act 34 of 2005.

⁷⁹ ‘A Safer Financial Sector to Serve South Africa Better’ Department of National *Treasury (Republic of South Africa) 2011* available at www.nationaltreasury.gov.za accessed on 12 September 2017 at 13 – 15.

⁸⁰ ‘A Safer Financial Sector to Serve South Africa Better’ Department of National *Treasury (Republic of South Africa) 2011* 4.

(a) Financial stability – it was indicated that the GFC highlighted the need for better coordination regarding monetary, fiscal and other economic policies and to take into account systemic risks.⁸¹

(b) Consumer protection and market conduct – the Redbook pointed out that South Africa’s financial sector was characterized by high, opaque fees and unfair treatment of consumers.⁸² The National Treasury proposed to launch the comprehensive “Treating Customers Fairly” initiative to help create standards across the financial sector which must be adhered to in relation to financial customers.

(c) Expanding access through financial inclusion – it was indicated that this can be done through the education of customers and assisting those who are vulnerable, namely women, persons in rural communities and previously disadvantaged persons.

(d) Combating financial crime – Treasury pointed out that there are international principles and rules that South Africa has to adopt which stipulate the preventative measures that must be taken where potential financial crime is concerned.

After considering the various regulatory approaches as set out in Chapter One of this dissertation, National Treasury selected the Twin Peaks Model as the most appropriate approach to financial regulation in order to achieve the abovementioned objectives. Reasons why Treasury favoured this model was stated to be the fact that there are two separate and dedicated regulators for prudential and market conduct supervision respectively and each regulator has a clear mandate making the attainment of its objectives more probable. The Twin Peaks model also places emphasis on financial stability which is the apex objective of financial regulation post GFC. The Twin Peaks model further provides sufficient focus for cooperation and

⁸¹ ‘A Safer Financial Sector to Serve South Africa Better’ Department of National *Treasury (Republic of South Africa) 2011* 4 – 6. See also ‘Financial Sector Regulation Bill: Impact Study of the Twin Peaks Reforms’ *Department of National Treasury (Republic of South Africa) 2016* 7 - The Treasury proposed the following policy objectives of the Twin Peaks reforms:

- “Maintaining the stability of the financial system as a whole (a financial stability objective)
- Maintaining safety and soundness of regulated financial institutions and market infrastructure (a prudential objective)
- Protecting consumers of financial products and services and ensuring financial institutions treat their customers fairly (a market conduct objective)
- Expanding access to appropriate financial products and services (a financial inclusion objective)
- Combating market abuse and financial crime (a market integrity objective)”.

⁸² *Ibid.* It was pointed out that many consumers had limited saving options which were expensive and inappropriate, and for many borrowers access to funding was often difficult, especially for small and medium enterprises.

consultation between regulators as well as an emphasis on a pre-emptive, risk-based and outcome-focused approach to regulation.⁸³

3.2 The Financial Sector Regulation Act

The architecture of the South African Twin Peaks model is contained in the Financial Sector Regulation Act 9 of 2017 (FSR Act) which was signed into law on 22 August 2017 after a considerable number of drafts and wide consultation with industry and other relevant stakeholders. At the time of writing this dissertation the Act has not yet been put into operation.

The object of the FSR Act is to achieve a stable financial system by promoting, *inter alia*, financial stability, safety and soundness of financial institutions fair treatment of consumers, prevention of financial crime and financial inclusion.⁸⁴

The Act contains the following definition of financial stability to guide the regulators:

“4. (1) For the purposes of this Act, “financial stability” means that—

- (a) financial institutions generally provide financial products and financial services, and market infrastructures generally perform their functions and duties in terms of financial sector laws, without interruption;
- (b) financial institutions are capable of continuing to provide financial products and financial services, and market infrastructures are capable of continuing to perform their functions and duties in terms of financial sector laws, without interruption despite changes in economic circumstances; and
- (c) there is general confidence in the ability of financial institutions to continue to provide financial products and financial services, and the ability of market infrastructures to continue to perform their functions and duties in terms of financial sector laws, without interruption despite changes in economic circumstances.”

The main focus of financial stability in South Africa is therefore consistency of provision of financial products and services, continuation of the provision of financial functions

⁸³ ‘Financial Sector Regulation Bill: Impact Study of the Twin Peaks Reforms’ *Department of National Treasury (Republic of South Africa) 2016 7.*

⁸⁴ Section 7.

and duties despite economic crisis or change in circumstances, and upholding consumer confidence in financial institutions' ability to continue to provide financial services despite change in economic circumstances.

In the South African Twin Peaks model the South African Reserve Bank (SARB) as central bank is given the mandate for promotion and maintenance of financial stability in South Africa. Bank supervision which was previously done by the Bank Supervision Department of the SARB has been taken away from the SARB's regulatory remit and moved over to the Prudential Authority (PA). The PA is a new prudential regulator, established in terms of section 32 of the FSR Act that is tasked with systemwide supervision of all financial institution and not just banks (as was previously the case when the SARB was still the prudential supervisor of banks). The Financial Services Board that pre-Twin Peaks did market conduct supervision of some financial institutions such as insurance companies (but not banks) have also been dissolved and in its place the FSR Act created a new systemwide market conduct supervisor in section 56 called the Financial Services Conduct Authority (FSCA).

3.3 The SARB's financial stability mandate

The FSR Act is quite innovative as it now sets out a more expanded and explicit financial stability mandate for the SARB, that previously had an implied financial stability mandate that was quite uncertain as it was not captured in any legislation.⁸⁵

Section 11 of the FSR Act provides that the SARB is responsible for "protecting and enhancing" financial stability and if a systemic event has occurred or is imminent, the SARB has the responsibility for "restoring and maintaining" financial stability in the South African financial system.

As a first step in exercising its financial stability mandate SARB is required to monitor and keep under review strengths and weaknesses of the financial system; and any risks to financial stability, and the nature and extent of those risks, including risks that systemic events will occur and any other risks contemplated in matters raised by

⁸⁵ De Jager "The South African Reserve Bank: Blowing the Winds of Change" (2013) *SA Merc LJ* 492.

members of the Financial Stability Oversight Committee⁸⁶ or reported to the SARB by a financial sector regulator.⁸⁷

The SARB must make an assessment of the stability of the South African financial system at least every six months and publish such assessment in the form of a Financial Stability Review. The following matters must be set out in the Financial Stability Review:⁸⁸ the SARBs assessment of financial stability in the period under review; its identification and assessment of the risks to financial stability in at least the next 12 months; an overview of steps taken by it and the financial sector regulators to identify and manage risks, weaknesses and disruptions in the financial system in the period under review and that are envisaged to be taken during at least the next 12 months; and an overview of recommendations made by SARB and the FSOC during the period under review and progress made in implementing those recommendations.

The SARB is given the power to designate an event as a systemic event which means that the SARB can then apply its powers to deal with that event so that it does not erode financial stability in South Africa.⁸⁹ The SARB can also designate financial institutions as systemically important financial institutions (SIFI). This means that it can direct the PA to impose increased prudential regulation on SIFI to make sure that they do not put the financial system at risk.⁹⁰

3.4 The role of the PA in respect of financial stability

Chapter 3 of the Financial Sector Regulation Act deals with the Prudential Authority (“PA”). The PA is established in terms of section 32 as a separate juristic person although it is located in the same building as the SARB and operates within the administration of the SARB.

The objectives of the PA are to promote and enhance the safety and soundness of financial institutions and market structures, protect financial customers against risks in

⁸⁶ See the discussion on this committee in paragraph 3.7 below.

⁸⁷ Section 12 (a).

⁸⁸ Section 13(2).

⁸⁹ Section 14. A systemic event is defined in section 1 as “an event or circumstance, including one that occurs or arises outside the Republic, that may reasonably be expected to have a substantial adverse effect on the financial system or on economic activity in the Republic, including an event or circumstance that leads to a loss of confidence that operators of, or participants in, payment systems, settlement system or financial markets, or financial institutions, are able to continue to provide financial products or financial services, or services provided by a market infrastructure.”

⁹⁰ Section 29-31.

the event of financial institutions' failure to meet their obligations; and to assist in maintaining financial stability.⁹¹ In order to achieve these objectives the PA must regulate and supervise financial sector laws, cooperate and assist the SARB and FSOB, the Financial Sector Conduct Authority ("FSCA"), the National Credit Regulator ("NCR") and the Financial Intelligence Centre ("FIC"), as well as support financial inclusion.⁹² The PA must perform its functions without fear, favour or prejudice.⁹³

Section 41 establishes the Prudential Committee as governing body of the PA which is tasked with the general overseeing of the management and administration of the PA to ensure that the PA is efficient and effective.⁹⁴ The PA has wide enforcement powers and a well-stocked regulatory toolkit that can be used in the execution of its systemwide prudential mandate. Apart from being the licensing authority for the financial institutions that it supervises its regulatory powers include the power to make prudential standards⁹⁵, issue prudential directives,⁹⁶ enter into enforceable undertakings;⁹⁷ issue debarment orders⁹⁸ and impose administrative penalties.⁹⁹ It also has wide investigative powers.¹⁰⁰

By being responsible for systemwide prudential regulation of financial institutions the PA therefore assists in maintaining financial stability by making sure that financial institutions are safe and sound and do not put the financial system at risk.

3.5 The Role of the FSCA in respect of financial stability

The Financial Sector Conduct Authority ("FSCA") is established by section 56 of the Financial Sector Regulation Act and its composition, powers and functions are set out

⁹¹ S33(a) – (d).

⁹² S34(1)(a) – (g).

⁹³ S34(5).

⁹⁴ Ss 41 and 42.

⁹⁵ Section 105. The PA and FSCA may also make joint standards-see section 107.

⁹⁶ Section 143. For the consultation requirements that have to be observed in this regard see section 146.

⁹⁷ Section 151. An enforceable undertaking entails that a person gives an undertaking to the regulator concerning that person's future conduct in relation to a matter regulated by a financial sector law, and upon its acceptance by the regulator that undertaking becomes enforceable by that regulator.

⁹⁸ Section 153. A debarment order is made in respect of a person that for example, materially contravened a financial sector law and its effect is inter alia to bar such person from providing certain financial services for a specified period.

⁹⁹ Section 161.

¹⁰⁰ Section 131-139.

in Chapter Four of the FSRA.¹⁰¹ It is a separate juristic person and is governed by an executive committee.¹⁰²

The main objectives of the FSCA as market conduct regulator are to enhance and support the efficiency and integrity of the South African financial markets, to protect financial customers, and (like the PA) to assist in maintaining financial stability.¹⁰³ The functions of the FSCA include, *inter alia*, cooperation with and giving assistance to the SARB, FSOC, the PA, the NCR and the FIC; to promote financial inclusion, and formulate and implement strategies and programs from financial education for the general public.¹⁰⁴ Apart from being the licensing authority for various financial institutions the FSCA also has wide enforcement powers and a well-stocked regulatory toolkit. These tools *inter alia* include the making of conduct standards¹⁰⁵, issuing of conduct directives¹⁰⁶ as well as entering into enforceable undertakings; making debarment orders and having the power to impose administrative penalties.¹⁰⁷ The FSCA also has wide investigative powers.¹⁰⁸

3.6 Cooperation and collaboration

Cooperation and coordination between the SARB as central bank with overall responsibility for financial stability and the financial regulators as well as between the PA and FSCA respectively, is a key element of the South African Twin Peaks Model. Specifically in the context of promotion and maintenance of financial stability section 26 of Financial Sector Regulation Act requires financial regulators to cooperate and collaborate. On a broader level section 76 of Financial Sector Regulation Act deals with the collaboration and coordination of the SARB and the financial regulators. The financial regulators together with the SARB are required to enter into a MoU no later

¹⁰¹ S56.

¹⁰² S 56 read with section 60.

¹⁰³ S57(a) and (b). See also

S57(b) (i) promoting fair treatment of customers by financial institutions; and
(ii) providing financial customers and potential financial customers with financial education programs, and otherwise promoting financial literacy and the ability of financial customers and potential financial customers to make sound financial decisions.”

¹⁰⁴ S58(1)(a) – (j).

¹⁰⁵ S 106 and 108. The FSCA can make joint standards together with the PA.

¹⁰⁶ S 144.

¹⁰⁷ Ss 151, 153 and 161 respectively.

¹⁰⁸ S 131-139.

than six months after Chapter 5 comes into operation, in order for their section 76 powers to be given effect.¹⁰⁹

Various committees are established by the Financial Sector Regulation Act to facilitate the smooth functioning of Twin Peaks in South Africa: The Financial Stability Oversight Committee (FSOC) comprises of the Governor of SARB, the Deputy Governor who is responsible for financial stability matters; one of the other Deputy Governors who is also the CEO of the PA; the Commissioner of the FSCA; the CEO of the National Credit Regulator; the Director-General of Treasury, the Director-General of the Financial Intelligence Centre and a maximum of three additional persons appointed by the Governor.

The functions of the FSOC are: to serve as a forum for representatives of the SARB and the financial sector regulators to be informed and to exchange views about their respective activities regarding financial stability; to make recommendations to the Governor on the designation of systemically important financial institutions (SIFIs); to advise the Minister and the SARB on steps to be taken to promote, protect or maintain, or to manage or prevent risks to, financial stability and on matters relating to crisis management and prevention; to 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 and any other function conferred on it in terms of applicable legislation.¹¹⁰

The FSR Act also provides for a Financial Sector Contingency Forum (FSCF) to be established by the Governor.¹¹¹ This forum, which must meet at least every six months, is composed of at least eight members including, as chairperson, the Deputy Governor designated by the Governor and also representatives of each financial sector regulator, such representatives of other organs of state as the chairperson may determine and representatives of the financial sector industry bodies and any other person as determined by the chairperson.¹¹² The primary objective of the FSCF is to assist the FSOC with the identification of potential risks that systemic events will occur;

¹⁰⁹ S77(1).

¹¹⁰ S 21.

¹¹¹ S 25 (1).

¹¹² S 25 (3) and (4). In terms of s 25 (6) the SARB must provide the administrative support and other resources, including financial resources, for the effective functioning of the FSCF.

and the co-ordination of appropriate plans, mechanisms and structures to mitigate those risks.¹¹³

On a broader Twin Peaks level the Act also establishes the Financial System Council of Regulators as coordinating body in section 79 (1). The FSCR comprises of the following members: the Director-General of the National Treasury; the Director-General of the Department of Trade and Industry; the Director-General of the Department of Health; the Chief Executive Officer of the PA; the Commissioner of the FSCA; the Chief Executive Officer of the NCR; the Chief Executive Officer of the Council for Medical Schemes; the Director of the Financial Intelligence Centre; the Commissioner of the National Consumer Commission; the Commissioner of the Competition Commission; the Deputy Governor responsible for financial stability matters; and the head, however described, of any organ of state or other organisation that the Minister of Finance may determine.¹¹⁴ The objective of the FSCR is to facilitate co-operation and collaboration, and, where appropriate, consistency of action, between the institutions represented on this council by providing a forum for senior representatives of those institutions to discuss, and inform themselves about, matters of common interest.¹¹⁵ The FSCR's purpose is to establish working groups or subcommittees in respect of the following matters:¹¹⁶ enforcement and financial crime; financial stability and resolution; policy and legislation; standard-setting; financial sector outcomes; financial inclusion; transformation of the financial sector; and any other matter that the Director-General of the National Treasury may determine after consulting the other members of the FSCR.

Collaboration on an inter-Ministerial level is also ensured through the formation of the Financial Sector Inter-Ministerial Council. 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

¹¹³ S 25 (2).

¹¹⁴ S 79 (3) (a) – (l).

¹¹⁵ S 79 (2).

¹¹⁶ S 81 (1) (a) – (h). The FSCR must determine the membership, terms of reference and procedure of a working group or subcommittee (s 81 (2)).

interest.¹¹⁷ The members of the Inter-Ministerial Council are the Minister of Finance, the Cabinet members responsible for consumer protection and consumer credit matters,¹¹⁸ the Cabinet member responsible for health¹¹⁹ and the Cabinet member responsible for economic development.¹²⁰

3.7 Conclusion

The South African Twin Peaks model is, like its Australian counterpart, actually also a three-peak model, consisting of the central bank and the prudential and market conduct regulators respectively. It is also geared towards achieving the promotion and maintenance of financial stability. A significant difference however is that in South Africa the PA, although it is a separate juristic person, is housed within the SARB whereas in Australia APRA, as the prudential regulator, is a separate entity and is located outside the RBA.

The main piece of advice given by Schmulow for purposes of effective and efficient implementation of the South African Twin Peaks model was that communication, cooperation and collaboration between the SARB and regulators is imperative. No one regulator should be given more powers than the other and each regulator must know their mandates' boundaries in order to exercise their powers effectively and efficiently. When one looks at the legislative network for cooperation and collaboration created by the Financial Sector Regulation Act it is clear that South Africa paid attention to the wise remarks of Schmulow.

From the perspective of financial stability, the South African Model, is like the Australian model, occupied with the pursuit of financial stability. Notably however the Financial Sector Regulation Act, unlike the Australian legislation, sets out quite clearly the mandate, objectives and functions of the SARB with respect to its new more expanded and express financial stability mandate. The objectives of the PA and FSCA and their functions and the obligation to assist is also clearly spelled out. In this regard it thus seems that the Financial Sector Regulation Act attempts to bring greater legal

¹¹⁷ S 83 (2).

¹¹⁸ Being the Minister of Trade and Industry.

¹¹⁹ Being the Minister of Health.

¹²⁰ Being the Minister of Economic Development. S 83 (3) (a) – (d).

certainty to how financial stability in South Africa must be sought to be achieved. Probably the reason why the Australian legislation is not quite as prescriptive is because Australia generally favours a soft law approach whereas South Africa seems to favour a more certain, hard law approach.

A concern that has been raised is that the new regulatory framework creates a substantial increase in the compliance burden for financial institutions and that it will be costly to implement.¹²¹ This is a valid concern but Treasury is of the view that it will benefit South Africa in the long term as it will help regulators to identify risks sooner which will benefit financial consumers and the financial market as a whole.

The South African Twin Peaks model is however not foolproof and it is foreseeable that some challenges will inevitably arise such as potential conflicts between the financial sector regulators and the SARB relating to their respective mandates. Hopefully the extensive provision that is made in the Financial Sector regulation Act for cooperation and collaboration will assist in resolving any conflicts that may arise.

Everything considered though, it is submitted that the move to a Twin Peaks system of financial regulation in South Africa and the legislative and institutional framework set up by the Financial Sector Regulation Act gives one good reason to be hopeful that in future South Africa will be resilient against any financial crisis.

¹²¹ Financial Sector Regulation Bill: Impact Study of the Twin Peaks Reforms' *Department of National Treasury (Republic of South Africa) 2016 30.*

Bibliography

Journal Articles

Allen “What is “financial stability”? The need for some common language in international financial regulation” 2014 *Georgetown Journal of International Law* 929.

Allen and Wood “Defining and achieving financial stability” 2006 (2) *Journal of Financial Stability* 152.

De Jager “The South African Reserve Bank: Blowing Winds of Change (Part 2)” 2013 *SA Merc LJ* 492

Farrell “Too important to fail: legal complexity in planning for the failure of financial market infrastructure” 2014 (29) *Journal of International Banking Law and Regulation* 469.

Godwin; Kourabas; Ramsay ‘Twin Peaks and Financial Regulations: The Challenges of Increasing Regulatory Overlap and Expanding Responsibilities’ *The International Lawyer* 2016 9.

Goodhart “The Past Mirror: Notes, Surveys, Debates – The changing role of central banks” 2011 *Financial History Review* 142.

Hellwig, *Systemic Risk in the Financial Sector: An Analysis of the Subprime-Mortgage Financial Crisis*, Max Planck Institute for Research on Collective Goods (November 2008).

Morisson “Systemic risks and the “Too-Big-To-Fail” problem” 2011 (27) *Oxf. Rev.Econ. Policy* 498

Schinasi ‘Defining Financial Stability’ *IMF Working Paper*

Schmulow “Financial regulatory governance in South Africa: the move towards Twin Peaks” 2017 (25) *African Journal of International and Comparative Law* 397.

Michael Taylor “*Twin peaks*”: *A regulatory structure for the new century* published by the Centre for the Study of Financial Innovation, 1995 – Financial Service Industry - Issue 20 of DSFI series, hereinafter Taylor 1995.

Internet Sources

Edey “The Financial Stability Role of Central Banks” Address delivered by Malcolm Edey at the Thomson Reuters Regulatory Summit Sydney May 1 ,2013 available at <https://www.rba.gov.au/speeches/2013/sp-ag-010513.html>

Reserve Bank of Australia and Australian Prudential Regulation Authority “Macroprudential Analysis and Policy in the Australian Financial Stability Framework” (September 2012) <http://www.rba.gov.au/fin-stability/resources/2012-09-map-aus-sf/pdf/2012-09-map-aus-fsf.pdf> accessed 22 March 2017

International Organizations of Supreme Audit Institutions (INTOSAI), ‘The Causes of the Global Financial Crisis and Their Implications for Supreme Audit Institutions’, at.8. <http://www.intosai.org/uploads/gaohq4709242v1finalsubgroup1paper.pdf> accessed on 2 October 2017.

Cohen and Remolona *The Unfolding Turmoil of 2007–2008: Lessons and Responses* (2008) Proceedings of a Conference of the Reserve Bank of Australia held at the H.C. Coombs Centre for Financial Studies, Kirribilli on 14–15 July 2008, available at <http://www.rba.gov.au/publications/confs/2008/pdf/conf-vol-2008.pdf> accessed on 7 October 2017.

Federal deposit insurance corporation in bank supervision: 2008 and a few of its lessons (2009) https://www.fdic.gov/regulations/examinations/supervisory/insights/sisum09/bank_supervision.html accessed 23 October 2017.

Mboweni 'Central Banks in Times of Turmoil', address as the Governor of the South African Reserve Bank, given at the Gordon Institute of Business Science on 28 May 2008, available at <https://www.resbank.co.za/Publications/Speeches/Detail-Item-View/Pages/Default.aspx?sarbweb=3b6aa07d-92ab-441f-b7bf-bb7dfb1bedb4&sarblast=a01d874c-c3f6-4b93-a9dc-c984cf8652cf&sarbitem=102> accessed on 22 October 2017.

Schmulow "Doing it the Australian Way, 'Twin Peaks' and the Pitfalls in between" *Columbia Law Schools Blog on Corporations and the Capital Market* <<http://clsbluesky.law.columbia.edu/2016/03/31/doing-it-the-australian-way-twin-peaks-and-the-pitfalls-in-between-2/>> accessed on 24/09/2017.

Policy and Explanatory Documents, Reports and Working Papers

'A Safer Financial Sector to Serve South Africa Better' Department of National Treasury (*Republic of South Africa*) 2011 available at www.nationaltreasury.gov.za accessed on 12 September 2017

'Financial Sector Regulation Bill: Impact Study of the Twin Peaks Reforms' *Department of National Treasury (Republic of South Africa)* 2016 available at www.nationaltreasury.gov.za

Borio 'The Financial Turmoil of 2007–?: A Preliminary Assessment and Some Policy Considerations', (2008) BIS Working Papers No 251.

The Structure of Financial Supervision: Approaches and Challenges in a Global Marketplace' *Group of Thirty* 2008 Department of National Treasury in the RSA "Twin Peaks in SA: Response and explanatory document" Dec 2014 accompanying the second draft of the Financial Sector Regulation Bill available at www.nationaltreasury.gov.za accessed on 27 October 2017.

Wallis Report on the Australian Financial System: Summary and Critique – Research Paper No. 16 1996-97 published by the Department of the Parliamentary Library (1997) http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/D2G30/upload_binary/D2G30.pdf;fileType=application/pdf#search=%221990s%201997%20publications%22 (accessed 30 October 2017).

Legislation

(Australian) Banking Act 1959

(Australian) Reserve Bank Act 1959

Australian Prudential Regulation Authority Act 1998

Australian Securities and Investment Commission Act 2001

Financial Sector (Collection of Data) Act 2001

National Credit Act 34 of 2005

Financial Sector Regulation Act 9 of 2017

