The importance of a legislative framework for co-operation and collaboration in the twin peaks model of financial regulation

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Abstract

The enactment of the Financial Sector Regulation Act 9 of 2017 ('the FSR Act') on 21 August 2017 marks the first stage of South Africa's transition from a sectoral to a Twin Peaks model of financial regulation. On 1 April 2018 — the commencement date of the FSR Act — two regulators, the Prudential Authority and the Financial Sector Conduct Authority, were established. This article considers the mechanisms introduced by the FSR Act to facilitate co-operation and collaboration between the South African Reserve Bank ('SARB') and the financial sector regulators, and other organs of state as well, by comparing these measures to those available in Australia. The co-operation and collaboration in South Africa are discussed on two levels namely, first, the focused co-operation and collaboration enabling the SARB to fulfil its financial stability mandate and, secondly, the broader co-operation and collaboration for the effective operation of the Twin Peaks model. This is compared to the co-operation and collaboration in Australia between the Reserve Bank of Australia and the other two regulatory agencies, APRA and ASIC. It appears that immutable aspects of co-operation and co-ordination should preferably be captured in legislation, especially aspects such as conflict resolution and lines of co-operation and collaboration in crisis times.

Financial sector regulation — Twin Peaks model — role-player collaboration

I The twin peaks model of financial regulation

Llewellyn remarks that a stable and efficient financial system has a potentially powerful influence on a country's economic development. This is so not only because it may have an impact on the level of capital formation and efficiency in the allocation of capital between competing claims, but also because it affects the confidence that consumers have in the integrity of the financial system. In this context, he emphasises that a well-structured regulatory regime contributes to the efficiency and stability of the financial

system. [1] A model for such a well-structured financial regulatory regime was devised by Michael Taylor, who proposed in 1995 that financial services be regulated in such a way that the stability of the whole financial system is protected ('systemic protection') while protection of consumers is simultaneously ensured ('consumer protection'). According to Taylor, systemic protection would include designing prudential measures to ensure the financial soundness of institutions. Consumer protection would include measures to protect individual consumers, such as depositors, investors and policy-holders, from fraudulent actions or incompetence and abuse by large institutions. In order to ensure such effective financial regulation, Taylor proposed the Twin Peaks model of financial regulation, where two separate regulators, namely a prudential regulator and a market conduct regulator, are responsible for systemic protection and consumer protection, respectively. By establishing separate sector-wide prudential and market conduct regulation and supervision, Taylor argued that the focus of the Twin Peaks regulatory approach would be balanced between the two peak regulators. Each authority would be dedicated to its clearly demarcated objective of prudential and market conduct regulation and supervision, respectively, while both authorities would focus on financial stability at the same time. [2]

The need for a regulatory model which takes a holistic and even-handed approach to prudential and market conduct regulation is clear: prudential regulation aims to ensure the safety and soundness of financial institutions, inter alia, by imposing measures to increase their loss absorbency and limit their risk-taking, while market conduct regulation aims to prevent and root out unsound market practices and to instil market discipline. [3] As the 2008 global financial crisis revealed, both these areas of regulation have

a crucially important role in the context of promoting and maintaining financial stability, and without the one or the other, a stable financial system is not possible. [4] Appropriate and adequate prudential and market conduct regulation thus need to operate in tandem to assist with the promotion and maintenance of financial stability. It is further essential that these areas of regulation not only focus on the prudential safety and soundness and market conduct of individual financial institutions, but that financial institutions are also regulated and supervised on a system-wide or macro basis. [5]

The Twin Peaks model of financial regulation is regarded by many as the optimal regulatory model for ensuring that transparency, market integrity and consumer protection receive sufficient priority. [6] Llewellyn mentions the advantages of the Twin Peaks model as being that the two regulators responsible for prudential and market conduct regulation each has its own dedicated objectives and clear mandates to which each is exclusively committed; accountability is clear because of these clearly defined objectives and mandates of each regulator; there is no danger that one of the areas of regulation will come to dominate the other; and if conflicts arise between the two areas of supervision, they are more likely to be resolved internally without publicity. [7] Schmulow also mentions benefits such as the removal of regulatory duplication and overlap; the creation of regulatory bodies with an exact area of operation; the creation of mechanisms for resolving conflicts between the objectives of financial services regulation; and the encouragement of a regulatory process which is open, transparent and publicly accountable. [8]

As Godwin, Li & Ramsay point out, two features, however, stand out as being of critical importance for the optimal operation of all Twin Peaks models. The first is a clear demarcation of the responsibilities and objectives of each regulator, which requires a separation between their roles and the reduction of regulatory overlap. The second is an environment which encourages both regulators to co-operate and share information proactively and to work together in the execution of their supervisory and enforcement functions. [9]

After a long regulatory journey which commenced in 2007 and intensified in 2011, [10] the Financial Sector Regulation Act 9 of 2017 ('FSR Act') was enacted in South Africa on 21 August 2017, marking the first stage of South Africa's transition from a silo sectoral model to a Twin Peaks model of financial regulation by objective. [11] The commencement

date of the Act was determined by the Minister of Finance by notice in the *Government Gazette* to be 1 April 2018. [12] Two new peak regulators were established, namely the Prudential Authority ('PA'), which regulates and supervises the system-wide safety and soundness of

financial institutions, and the Financial Sector Conduct Authority ('FSCA'), which is responsible

for system-wide market conduct regulation and supervision of financial institutions. Notably, the South African Reserve Bank ('SARB') as central bank plays a pivotal role in the South African Twin Peaks model, as it is tasked with an overall financial stability mandate [13] and can rightly be regarded as the apex peak in this model. This in effect makes the South African Twin Peaks model a three-peak model [14] or, if one takes into account that the National Credit Regulator ('NCR'), [15] which is responsible for regulation of the credit market, was not assimilated into the FSCA, and remains a stand-alone regulator of considerable capacity, a quad-peak model. In addition to these peaks, other financial regulators such as the Financial Intelligence Centre ('FIC') are responsible for combating money laundering. [16]

A pertinent challenge which thus presents itself in the context of any Twin Peaks model, and the South African Twin Peaks model in particular, is that the effective implementation of this model will necessarily require serious thought on devising measures for co-operation and collaboration between all the role players in the model. [17] In the South African Twin

Peaks model, such co-operation and collaboration will have to be facilitated at two levels: first, for the narrow purpose of enabling the SARB to execute its financial stability mandate effectively and efficiently and, secondly, for the broader purpose of ensuring the efficient implementation and operation of the Twin Peaks model in general. [18] The purpose of this article is to consider the mechanisms introduced by the FSR Act to facilitate co-operation and collaboration between the SARB and the financial regulators specifically for purposes of maintaining financial stability, as well as the broader co-operation and collaboration between financial regulators and the SARB, and co-operation and collaboration with and by other organs of state to facilitate the general workings of the model. The measures introduced in this regard are compared to those in Australia, where the Twin Peaks model was pioneered in 1998, to draw conclusions and make recommendations regarding the institutional and legislative network for co-operation and collaboration under the South African Twin Peaks model.

In particular, this article also considers the appropriateness of hard law and soft law to capture the measures for co-operation and collaboration in a Twin Peaks model. According to Abbott & Snidal, hard law can refer to exact, legally binding obligations where the power of interpretation and implementation of the law is delegated. Soft law, in contrast, refers to legal obligations which are reduced in obligation, precision or delegation, thus 'softening' the law. [19] Soft law has the advantage over hard law that it is easier to apply where uncertainty exists. It furthermore enables parties to compromise, thereby allowing them to co-operate where there are different values and interests. [20] There are many views on the philosophical difference between hard law and soft law. [21] For purposes of this article, we adopt the view of Shaffer & Pollack that 'hard law and soft law are best seen not as binary categories but rather as choices arrayed along a continuum'. [22]

II Co-operation and collaboration in terms of the Financial Sector Regulation Act

Table summarising various co-operation and collaboration mechanisms

LEVEL	FSR ACT	BODIES	PURPOSE
First	Sections 26 and 27	SARB, FSOC (supported by FSCF) and financial sector regulators	To enable the SARB to fulfil its financial stability mandate
Second	Sections 76 and 77	SARB and financial sector regulators	General co-operation and collaboration on a broader level
Second	Section 78	Other organs of state	General co-operation and collaboration

LEVEL	FSR ACT	BODIES	PURPOSE
Forum	Section 79	FSCR	Providing a forum for discussion between regulatory institutions
Cabinet	Section 83	Financial Sector Inter-Ministerial Council	Co-operation and collaboration between Cabinet members

The above table summarises the various co-operation and collaboration mechanisms in terms of the FSR Act. As we discuss below, the first level relates to the specific and focused co-operation and collaboration between the SARB, the Financial Stability Oversight Committee ('FSOC') (supported by the Financial Sector Contingency Forum ('FSCF')) and each of the regulators, as set out in s 26, read with s 27 of the FSR Act. This co-operation is mandated for purposes of enabling the SARB effectively to fulfil its financial stability mandate. On the second, broader level, there is the mandatory co-operation and collaboration that the FSR Act requires in terms of s 76, read with s 77. This entails co-operation and collaboration in general between the financial sector regulators and the SARB, when performing their functions in terms of the financial sector laws, the National Credit Act 34 of 2005, and the Financial Intelligence Centre Act 38 of 2001. Also included in this regard are co-operation and collaboration with and by organs of state in terms of s 78 of the FSR Act.

(a) Co-operation specifically for purposes of financial stability: Facilitating committees

As alluded to above, the FSR Act imposes an express financial stability mandate on the SARB, captured in legislation for the first time. [23] This mandate is set out in chap 2 of the Act, which contains a number of provisions detailing various aspects, such as risk monitoring and mitigation, the responsibility to issue financial stability reviews, emergency powers relating to systemic events, [24] and designation of

Systemically Important Financial Institutions ('SIFIs'). [25] In terms of s 20 of the FSR Act, the FSOC was established to support the SARB when it performs its functions in relation to financial stability. [26] It is important to note that this committee is, inter alia, tasked with facilitating co-operation and collaboration between, and co-ordination of action among, the financial sector regulators and the SARB in respect of matters relating to financial stability. [27] The FSOC must meet at least every six months. [28] The FSOC comprises the top officials of the SARB and the relevant financial sector regulators, namely the Governor of the SARB (as chairperson), the Deputy Governor responsible for financial stability matters, the Chief Executive Officer of the PA, the Commissioner of the FSCA, the Chief Executive Officer of the NCR, the Director-General of the National Treasury, the Director of the FIC, and a maximum of three additional persons appointed by the Governor. [29] The SARB is obliged to

provide administrative support and other resources, including financial resources, for the effective functioning of the FSOC. [30] Having regard to the functions of the FSOC, it is clear that it is the forum where the main decisions regarding the exercise of the SARB's financial stability mandate will be taken, and that the Governor will act in accordance with decisions taken by this Committee. By creating such a forum for representatives of the SARB and the financial sector regulators to come together and discuss matters affecting financial stability, the FSOC will thus significantly contribute to top-level co-operation and collaboration between those entities.

In order to ensure that the FSOC is apprised of all the critical information it requires effectively and efficiently to execute its mandate, the FSR Act also establishes an FSCF. [31] The FSCF, which should meet at least every

six months, comprises a Deputy Governor of the SARB as chairperson, [32] representatives of the financial sector regulators and other organs of state, and any other relevant persons as determined by the chairperson. [33] The primary objective of the FSCF is to assist the FSOC with the identification of potential risks of systemic events, and co-ordination of appropriate plans, mechanisms and structures to mitigate those risks. [34] The SARB is mandated in terms of s 25(6) to provide administrative support and other resources to the FSCF. [35]

(b) Co-operation and collaboration between the SARB and financial sector regulators in maintaining financial stability

Notably, the objectives of the PA and the FSCA, as set out in ss 33*(d)* and 57*(c)* of the FSR Act respectively, explicitly include the duty to assist the SARB in maintaining financial stability, which also flows logically from their areas of regulation.

Section 26(1)*(a)* of the FSR Act expressly mandates that the financial sector regulators [36]*must* co-operate with the Reserve Bank *and with each other* to 'maintain, protect and enhance financial stability'. Thus, not only do the regulators have to co-operate with the SARB in relation to the maintenance, protection and enhancement of financial stability, but the FSR Act formally obliges them to co-operate with each other. This would mean that if one regulator, for example the FSCA, was privy to information that the PA would need to be apprised of so that it could properly assist the SARB as mandated by s 26, read with s 57(1)*(a)*, the PA would be able to rely on s 26(1)*(a)* to extract the necessary information from the FSCA.

Section 26 further stipulates that the financial sector regulators must provide such assistance and information to the SARB and the FSOC to maintain or restore financial stability, as may reasonably be required. [38] Apart from the fact that it concerns assistance and information to the SARB and also the FSOC, this obligation is more qualified than the one in s 26(1)*(a)*, namely that it has to be for purposes of maintaining or restoring financial stability only and that the request for the information must be reasonable.

The financial sector regulators are further obliged promptly to report to the SARB any matter of which they become aware which poses a risk to financial stability, and they must gather information with regard to financial institutions which concerns financial stability. [39] However, the SARB is not entitled to engage in its financial stability mandate in a dictatorial fashion. It has no discretion to disregard information it may deem irrelevant or less relevant. When exercising its powers in terms of chap 2 of the FSR Act, it is obliged to take into account *any* views expressed and *any* information reported by the financial sector regulators as well as *any* recommendations of the FSOC. [40] This latter part of s 26(2) thus reinforces the combined power of the FSOC as the ultimate decision-taker on financial stability matters. It also illuminates the significance of the views of the financial regulators for purposes of promoting and maintaining financial stability, and the fact that the SARB is not at liberty simply to disregard views and recommendations with which it does not agree. It is clear that the SARB is obliged to have appropriate regard to any such views.

On a practical level, financial sector regulators and the SARB are required to enter into memoranda of understanding ('MOUs') relating to how they will co-operate and collaborate with each other, assist each other, and perform their roles and duties relating to financial stability. The FSR Act does not prescribe the content of these MOUs, apart from providing that the MOUs had to be entered into within six months after chap 2 of the FSR Act took effect. [41] To ensure that they stay current, s 27 stipulates that these memoranda relating to financial stability must be reviewed and updated as appropriate, but at least once every three years. [42] However, the FSR Act provides that the validity of any action taken by a financial sector regulator in terms of a financial sector law, the National Credit Act or the Financial Intelligence Centre Act is not affected by a failure to comply with s 27 or an MOU contemplated in s 27. [43] The Act does not require that these MOUs relating to financial stability be published.

In this context, s 17 should also be noted. Where the SARB declares a systemic event, s 17 requires the financial sector regulators to provide the SARB with information which may be relevant for managing such an event and to consult with the SARB before exercising any of their powers in a way which may compromise steps relating to the management of a systemic event or its effects. In order to enforce such co-operation by the regulators, the SARB may issue directives to the regulators to provide it with information or to assist it in dealing with a systemic event. [44] Section 19 further stipulates that, in the event that the SARB declares an event as systemic, an organ of state exercising powers in respect of a part of the financial system may not, without the approval of the Minister of Finance acting in consultation with the Cabinet Minister responsible for that organ of state, exercise its powers inconsistently with a step taken by the Governor of the SARB to manage the systemic event or its effects. These mandatory provisions, coupled with the obligation regarding collaboration and co-operation for purposes of financial stability which is imposed by s 26, and entering into MOUs, thus create an integrated and well-conceptualised framework for co-operation and collaboration with a focus on promoting and maintaining financial stability.

In addition to the co-operation and collaboration between the SARB and the financial sector regulators, as set out in s 26 of the FSR Act, as a first line of collaboration, statutorily mandated co-operation and collaboration on a broader level is provided for in chap 5 of the FSR Act, [45] as discussed below.

(c) Co-operation and collaboration generally between financial sector regulators and the SARB

Section 76 of the FSR Act deals with co-operation and collaboration generally between the financial sector regulators, and between the regulators and the SARB. It provides that the financial sector regulators and the SARB *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: [46]

(i) 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;

(ii) inform each other, and share information about, matters of common interest;

(iii) strive to adopt consistent regulatory strategies, including addressing regulatory and supervisory challenges;

(iv) co-ordinate actions in terms of financial sector laws, the National Credit Act, and the Financial Intelligence Centre Act, including in relation to standards and other regulatory instruments, licensing, supervisory on-site inspections and investigations, enforcement actions, information sharing, recovery and resolution, and reporting by financial institutions;

(v) minimise duplication, for example through sharing databases;

(vi) agree on attendance at relevant international forums; and

(vii) develop consistent policy positions for presentation at domestic and international forums.

The importance of such co-operation and collaboration is fortified by holding the financial sector regulators and the SARB accountable by obliging them, at least annually as part of their annual reports or on request, to report to the Minister of Finance, 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. [47]

In order to facilitate co-operation and collaboration between the various entities required to work together with the SARB in creating a stable financial sector, the Act requires that the financial regulators and the SARB must, by no later than six months after chaps 2 and 5 of the Act take effect, [48] enter into one or more MOUs. [49] These broader MOUs must be aimed at giving effect to the obligations set out in s 76. In this regard, it is important to note that the FSR Act, as with the MOUs relating to financial stability mandated in terms of s 26, is not prescriptive about the exact content of the memoranda, but merely mandates entering into these memoranda as a measure to ensure co-operation and collaboration between the various role players. The exact content of the memoranda is left to the respective parties to decide. On a practical level, it is submitted that these memoranda should, inter alia, be aimed at clarifying the exact scope of the jurisdiction of each regulator, areas where overlap is likely to occur, and how conflict will be dealt with. Clearly, these MOUs will be 'living documents' which will be subject to annual scrutiny when the regulators report on co-operation and which, in terms of the FSR Act, must be reviewed and updated as appropriate, but at least once

every three years. [50] Notably, the Financial Sector Inter-Ministerial Council, established in terms of s 83 of the FSR Act, is tasked to initially, and then subsequently every two years, commission an independent evaluation of the co-operative and collaborative mechanisms between the financial sector regulators, the SARB, the FIC, the Council for Medical Schemes, and the Competition Commission. [51]

A delegation of a power or duty by one financial sector regulator to another must also be effected by an MOU, entered into in terms of this section. [52] However, the validity of any action taken by a financial sector regulator, the SARB or the Governor in terms of a financial sector law, the National Credit Act, or the Financial Intelligence Centre Act is not affected by a failure to comply with this section or an MOU in terms of this section. [53] Each MOU in terms of s 76 and each amendment must be published. Hence, they will be public documents, which will also serve to heighten the accountability of the regulators to co-operate effectively. [54]

(d) Co-operation and collaboration with, and by, other organs of state

Chapter 5 of the FSR Act also provides for obligations of organs of state relating to co-operation and collaboration generally. An organ of state that has a regulatory or supervisory function in relation to a financial institution must, 'to the extent practicable', consult the financial sector regulators and the SARB in relation to the performance of that function. [55] A financial sector regulator or the SARB may, in writing, request an organ of state to provide information about any action the organ of state has taken or proposes to take, in relation to a financial institution specified in the request. [56] The organ of state is obliged to comply with such a request, but it is expressly stipulated that this obligation does not require or permit an organ of state to do something which contravenes a law. [57]

(e) Financial System Council of Regulators

To further enhance the framework for co-operation and collaboration between the financial sector regulators, the FSR Act establishes the Financial System Council of Regulators ('FSCR') as co-ordinating body in s 79(1). The objective of the FSCR is to facilitate co-operation and collaboration and consistency of action between the regulatory institutions, by providing a forum for those institutions to discuss and inform themselves about matters of common interest. [58]

The FSCR comprises 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; [59] the Chief Executive Officer of the PA; the Commissioner of the FSCA; the Chief Executive Officer of the NCR; the Registrar of Medical Schemes; the Director of the FIC; 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. [60] From the above it appears that the composition of the FSCR is actually broader than the mere inclusion of the regulators themselves, and that it also includes the heads of the relevant state departments, but not the Ministers responsible for those departments. Given that this council will serve as the co-ordinating council for the broader Twin Peaks model, the Minister of Finance who is responsible for the general administration of the FSR Act is empowered to indicate that the head of any other organ of state or other organisation that he or she deems fit also serves on the FSCR. Meetings of the FSCR must be held at least twice a year, or more frequently as determined by the Director-General of the National Treasury, [61] who will also chair the meetings. [62]

The broad purpose of the FSCR is clear from s 81. It is to establish working groups or subcommittees in respect of the following matters: [63] 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 the Director-General of the National Treasury may determine after consulting the other members of the FSCR.

Administrative support and other resources for the FSCR and its working groups and subcommittees must be provided by the FSCA. [64] This arrangement has probably been effected in order to achieve a more equal administrative workload between the FSCA and the PA, as the latter institution will provide administrative support and resources to the FSOC and FSCF. [65]

(f) Financial Sector Inter-Ministerial Council

In order to address all the levels at which decisions may be taken which may impact on financial stability specifically, and also at the broader Twin Peaks level, it is also necessary that some form of 'control' be exerted over government ministers who are responsible for the organs of state within whose jurisdiction each of the financial sector regulators is located, and who therefore also have responsibility for the policy decisions and legislation which affect these regulators.

The FSR Act accordingly caters for this aspect by establishing the Financial Sector Inter-Ministerial Council. [66] 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. [67] The members of the Inter-Ministerial Council are the Minister of Finance; the Cabinet members responsible for consumer protection and consumer credit matters; [68] the Cabinet member responsible for health; [69] and the

Cabinet member responsible for economic development. [70] According to the Department of National Treasury, the Inter-Ministerial forum has been created to embed deeper co-ordination between the various role players. [71]

Meetings of the Inter-Ministerial Council take place at times and places determined by the Minister of Finance. [72] The Minister of Finance, or another Cabinet member nominated by the Minister, chairs the meetings of the Inter-Ministerial Council. [73]

(g) MOUs entered into to give effect to the obligations set out in the FSR Act

Pursuant to the obligation to co-operate and collaborate set out in ss 26, 27, 76 and 77 of the FSR Act, MOUs were entered into during 2018 between the SARB and the PA; the SARB and the FSCA; the PA and the FSCA; the FSCA and the NCR; and the FSCA and the FIC. Due to

constraints on the length of this article, only the MOUs between the SARB, PA and FSCA, and between the twin regulators will be discussed briefly below:

(i) MOU between the SARB and PA (26 September 2018)

This MOU is described as embodying the understanding of the parties with regard to a relationship of mutual co-operation, support and assistance, and serves to strengthen and formalise the existing relationships between the SARB and PA in the areas of information sharing, training, inspections, investigations, and the co-ordination of supervision and enforcement of compliance with the relevant financial laws by supervised entities. It further stipulates that the parties agree to provide mutual assistance and to exchange information, subject to relevant laws, and that they endeavour to reach a common understanding on areas where their respective supervisory responsibilities may overlap. Although they record that it is not their intention that the MOU creates any legally binding obligations between them, they nevertheless agree and undertake to implement the MOU on a foundation of mutual trust and good faith. [74]

Notably, the SARB and PA agree in the MOU that, in order to assist and facilitate the implementation and execution of this MOU, additional or supplementary processes and procedures between 'two or more' parties may be documented in order to prescribe detailed practical steps and/or arrangements between the relevant parties. [75] The MOU further deals with statutory co-operation in relation to the SARB's financial stability responsibilities; minimising the duplication of effort and expense; specific areas of co-operation and collaboration; policies and strategies; regulations and regulatory instruments; licensing; enforcement and administrative action; significant owners; financial conglomerates; recovery and curatorship; and domestic, regional and international fora. [76] The MOU also contains certain general provisions relating, inter alia, to aspects such as meetings, research and training, securing of resources, and assisting each other in formulation of input and comments to, and the implementation of, relevant international financial regulatory and/or supervisory standards. [77] It is further recorded that differences arising out of the interpretation, operation and implementation of the MOU will be amicably settled through consultation between the parties and, where they are at an impasse, the matter will be referred to the CEO of the PA and the Governor of the SARB. The MOU is accompanied by an Annexure A, which deals with consistent regulatory strategies; Annexure B, which deals with regulations and regulatory instruments; Annexure C, which deals with licensing of financial institutions and market infrastructure; Annexure D, which deals with supervisory on-site inspections and investigations; Annexure E, which deals with enforcement and administrative action; Annexure F, which deals with recovery and curatorship; and Annexure H, which deals with information sharing.

(ii) MOU between the SARB and FSCA (28 September 2018)

The purpose of this MOU is to

> 'strengthen and formalise a relationship of trust, good faith, mutual co-operation, support, assistance, information sharing, and appropriate co-ordination of actions in terms of relevant financial sector laws, the Currency and Exchanges Act and the National Payment Systems Act between the parties and matters relating to financial stability, payment services and services related to the buying and selling of foreign exchange'. [78]

The MOU is further intended to enable the parties to reach a common understanding on areas where their respective regulatory and supervisory objectives and responsibilities may overlap, and as such the parties agree in the MOU to execute and fulfil their concomitant legislative roles and responsibilities with utmost good faith. [79] The MOU inter alia contains a paragraph entitled 'Co-operation and collaboration', setting out some general arrangements pertaining to information sharing, [80] and a paragraph entitled 'Minimising the duplication and effort and expense', indicating generally that the parties will make every effort to minimise duplication and expense in the performance of their functions. [81] This is followed by a paragraph entitled 'Specific areas of co-operation and collaboration', which lists various areas of co-operation and collaboration set out in more detail in Annexure A to the MOU. They include: consistent policy positions and regulatory strategies, and international representation (Annexure A1); regulatory instruments (Annexure A2); licensing of payment service providers (Annexure A3); supervisory onsite inspections and investigations (Annexure A4); enforcement and administrative action (Annexure A5); and anti-money laundering and combating of the financing of terrorism (Annexure A6). [82] Specific provision is also made in this paragraph for co-operation and collaboration in relation to financial stability between the Financial Stability Department of the SARB and the FSCA, a matter subsequently set out in more detail in Annexure B to the MOU. It deals with the following matters: statutory co-operation in relation to the SARB's financial stability responsibilities; monitoring of financial stability risks; determination and management of systemic events; designation of SIFIs; resolution, winding up and/or similar steps; actions which require concurrence; information exchange; general matters; and responsible officials. [83] Notably, the MOU provides that, in order to facilitate the implementation and execution of this MOU, additional or supplementary processes and procedures between the parties may be documented in Protocols which prescribe detailed practical steps and/or arrangements between the parties. [84]

(iii) MOU between PA and FSCA

The PA and FSCA entered into an MOU on 28 September 2018. The purpose of this MOU is to

> 'strengthen and formalise a relationship of trust, good faith, mutual co-operation, support, assistance, information sharing, and appropriate co-ordination of actions in terms of relevant financial sector laws between the Parties'.

Its purpose is further to enable the PA and FSCA to reach a common understanding on areas where their respective regulatory and supervisory objectives and responsibilities may overlap, identify matters where concurrence or notification between them is not required, and provide for delegation of authority between them. [85] The MOU further contains general provisions relating to information sharing; minimising duplication of effort and expense; specific areas of co-operation and collaboration; actions of the FSCA which do not require concurrence of the PA; actions of the PA which do not require concurrence of the FSCA; actions of the FSCA which require concurrence by the PA; [86] delegation of powers; resolution of conflicts; and general provisions. [87] In accordance with paragraph 6 of the MOU, the PA and FSCA have agreed to co-operate and collaborate on the following matters, in the manner set out in Annexures 1 to 9 of the MOU: consistent policy positions and regulatory strategies (Annexure 1); regulatory instruments (Annexure 2); licensing of financial institutions and granting of exemptions (Annexure 3); supervisory on-site inspections and investigations (Annexure 4); designation of financial conglomerates (Annexure 6); regulation and supervision of market infrastructures (Annexure 7); delegation of powers (Annexure 8); and supervision of accountable institutions in terms of the Financial Intelligence Centre Act (Annexure 9). Although para 6.1 refers only to Annexures 1 to 9 in its introductory part, it also lists an Annexure 10, which deals with minimising the duplication of effort and expense. The parties further agree in the MOU that, in order to facilitate the implementation and execution of this MOU, additional or supplementary processes and procedures between the parties may be documented in Protocols. The Protocols will prescribe detailed practical steps and/or arrangements between the parties but will not form part of this specific MOU. [88]

III Australia

In 1998, Australia became the first country to implement a Twin Peaks model of financial regulation. During the two decades since the implementation of this model in Australia, experience has accumulated. Hence, valuable comparisons can be made between the Australian and South African Twin Peaks models. Specifically, it might be established whether South Africa could be guided by the Australian experience, having regard to the co-operation and collaboration between the regulatory agencies in Australia, particularly between the Reserve Bank of Australia ('RBA') and the other regulators in the Australian Twin Peaks system.

(a) Introduction

The Australian Twin Peaks model consists of three agencies, each with specific responsibilities:

(i) The Australian Prudential Regulation Authority ('APRA'), which is located outside, and independent of, the central bank. It has responsibility for prudential supervision and regulation, and focuses on the safety and soundness of the entities it supervises; [89]

(ii) The Australian Securities and Investments Commission ('ASIC'), which has responsibility for consumer protection and market integrity in areas such as superannuation and insurance across the financial system and has to maintain, facilitate and improve the performance of the financial system and the entities within that system; [90] and

(iii) The RBA, which operates as the central bank within the Australian Twin Peaks system and has responsibility for monetary policy, overall financial system stability, interest rates, and regulation of the payments system. [91]

(b) Co-operation and collaboration between the RBA and financial regulators in Australia

The Australian legislative framework for regulatory co-ordination relies extensively on 'soft law' mechanisms in the form of bilateral MOUs and informal protocols between the RBA and APRA and ASIC. [92] The form or content of the MOUs is not prescribed by law, and the legislative framework is 'more supporting than prescriptive'. [93] The purpose of these mechanisms which exist between the regulators is to provide complete exchange of information, the avoidance of duplication, and a clear outline of responsibilities, in case of mainly financial disturbances. Various MOUs have been signed between the RBA and APRA, [94] between the RBA and ASIC, [95] and between APRA and ASIC. [96] In these MOUs (discussed in more detail below), issues such as information sharing, speedy notification of any regulatory decisions likely to impact on the other agency's area of responsibility, and consultation arrangements in the event of financial disturbances are addressed. [97] Notably, these MOUs are not legally binding. [98]

After interviews with the regulators and the Australian Treasury, Godwin, Li & Ramsay found that the main reasons for the success of this soft-law framework of co-ordination were that the process as well as the result were regarded as crucial; the working relationships on various levels were strong [99] and regular meetings of the Council of Financial Regulators ('CFR') added to this; the regulators understood their complementary roles for the success of the Twin Peaks model; and the framework of co-ordination was flexible and not prescriptive, [100] and added to the 'culture of co-ordination'. [101] The RBA has also publicly declared that cultivating a 'culture of co-ordination', where the main focus is on regulatory performance rather than regulatory structure, is crucially important. [102]

Schmulow remarks that the relationship between the three peaks in Australia has historically been closely co-operative and has not been plagued by rivalry and turf wars. [103] Even though Australia is in the fortunate position that, over the years, it has built a unique regulatory culture which sustains the effective use of soft-law mechanisms for

co-operation and collaboration and contributes to the effective functioning of the Australian Twin Peaks model, some failings of co-operation and collaboration have nevertheless occurred. This is discussed in more detail in part III(f) below.

(c) The CFR

The CFR is an inter-agency body designed to co-ordinate a broad range of activities in order to facilitate co-operation and collaboration between the RBA, APRA, ASIC and the Treasury. [104]

The ultimate objectives of the CFR are to contribute to the efficiency and effectiveness of regulation, and to promote the stability of the Australian financial system. [105] The CFR operates as an informal non-statutory body, without legal personality, in which members are able to share information and views, discuss regulatory reforms or issues where responsibilities overlap and, if the need arises, co-ordinate responses to potential threats to financial stability. The CFR has no regulatory functions separate from those of its members. [106]

As the CFR Charter states, [107] the CFR meetings provide a high-level forum for identifying important issues and trends in the financial system, including those that may affect overall financial stability. It is also responsible for co-ordinating arrangements for reacting to actual or potential incidents of financial instability. In instances where members' responsibilities overlap, the CFR provides a platform to ensure that the overlap is resolved. The CFR also plays a role in advising the government on the suitability of Australia's financial system design in light of ongoing developments. [108] It further provides a platform to discuss the development and application of various international regulatory reforms in Australia. [109]

Many of the issues discussed by the CFR are reported in the RBA's semi-annual Financial Stability Review, with input from the other CFR member agencies. The CFR normally meets four times per year, but can meet more frequently if necessary. The CFR meetings are chaired by the Governor of the RBA, with secretariat support provided by the RBA. Interagency working groups give much of the input in CFR meetings, and this promotes working relationships across the various agencies at staff level. [110] The CFR published annual reports between 1998 and 2002. Since then, information on Council activities has been included in the annual reports of Council members and Financial Stability Reviews. [111]

Co-operation in the CFR is largely an informal arrangement and, as mentioned, it is governed by a series of bilateral MOUs between the agencies, as discussed in more detail below. [112]

(d) The RBA and APRA

Given that both the RBA and APRA have responsibility for financial stability, they must co-ordinate effectively to ensure that information is aptly shared between them and meaningful policies and strategies are implemented. The MOU between the RBA and APRA was entered into on 12 October 1998. Its objective is to set out a framework for co-operation between the RBA and APRA, which is aimed at promoting the stability of the Australian Financial System. [113] Accordingly it deals with the following matters: responsibilities (paras 1–4); sharing of information (paras 5–10); threats to financial system stability (para 11); RBA participation in consultations (para 12); consultation on regulatory policy changes (para 14); international representation (para 15); and the co-ordination committee (paras 16 and 17). [114] If the RBA or APRA identifies a situation that is likely to threaten the stability of the financial system, each of them has a responsibility to inform the other as a matter of urgency. The Treasurer must also be informed. [115]

Ellis & Littrell remark that, even in the initial phase after separation, APRA and the RBA set up formal and informal structures to ensure effective co-operation in achieving shared goals, for example the Co-ordination Committee, which comprises senior staff of each agency. [116] The Co-ordination Committee is the formal structure for co-operation where attendees from the RBA and APRA meet every six weeks, and as such the Co-ordination Committee provides a regular high-level forum to air financial stability concerns. [117]

Ellis & Littrell further point out that the RBA has also over the years engaged in its own non-supervisory liaison meetings with selected banks ahead of the drafting of each semi-annual Financial Stability Review. However, the RBA has refrained from setting up a rival source of supervisory intelligence and influence, and has therefore avoided diminishing the authority of APRA as the actual prudential supervisor. They accordingly remark that this seems to have been helpful in building relationships and co-operation, and avoiding misunderstandings. [118]

APRA and the RBA also exchange information with other regulators and authorities, subject to confidentiality. [119] APRA has a strong framework for dealing with the exchange and protection of information and has good relationships with the RBA to facilitate the exchange of

information. [120]

APRA also comments on the RBA's half-yearly Financial Stability Review. [121]

Ellis & Littrell remark that these more formal arrangements were initially assisted by existing personal relationships between current and former RBA staff and APRA. Over time, these relationships could no longer be relied upon, as many of the persons responsible for keeping these relationships intact had retired or moved to other jobs. The positive spin-off was, however, that an expectation of a duty to forge good working relationships had already been set up. It was also supported by specific measures, such as the inclusion of a Key Performance Indicator in the job description of the RBA's Head of the Financial Stability Department, requiring the officeholder to build and maintain good relationships with APRA. [122]

(e) The RBA and ASIC

Although ASIC does not have the same comprehensive responsibility for financial stability as the RBA and APRA, ASIC nevertheless has to take certain regulatory actions to minimise systemic risk in clearing and settlement systems and working with the RBA. [123]

The RBA and ASIC agreed on an MOU [124] in 2002, detailing the processes and information-sharing arrangements they would follow in pursuit of these joint responsibilities. The objective of the MOU between the RBA and ASIC is to assist each agency in the performance of its regulatory responsibilities under the Corporations Act 50 of 2001 in relation to clearing and settlement facilities. The framework set out in the MOU is also intended to promote transparency, help prevent unnecessary duplication of effort, and minimise the regulatory burden on licensed facilities. [125] This MOU sets out the respective responsibilities of ASIC and the RBA (paras 3–5) and also addresses the following matters: consultation (para 6); formal requests and use of powers (paras 7–10); notification and information sharing (paras 11–14); reporting to the Minister on annual assessments (para 15); and co-ordination meetings and liaison (paras 16 and 17). [126]

(f) Co-ordination between APRA and ASIC

Co-operation between the RBA and each of the two lead regulators is essential, in the first place, for purposes of financial stability. However, on a broader level, co-operation between APRA and ASIC, as prudential and market conduct regulator respectively, is pivotal to the success of the Australian Twin Peaks model as the broader framework within which the maintenance of financial stability must be accommodated. It is crucially important that these two regulators should co-operate with each other, and that the one does not take any action which may impede on the regulatory work done by the other and by doing so erode efforts at promoting and maintaining financial stability.

With regard to the interaction between prudential and market conduct regulation, Godwin, Li & Ramsay remark that four interrelated aspects in the policy framework which supports co-ordination are critical to the approach to financial regulation in Australia: (i) proactive information sharing between the regulators; (ii) consultation and mutual assistance between the regulators; (iii) practical measures to encourage and facilitate co-ordination; and (iv) a co-ordination body. [127]

Proactive information sharing entails that ASIC and APRA must share information with each other in terms of the relevant legislation governing these bodies. [128] Godwin, Li & Ramsay point out that the

objectives of the regulators in this context are different, in that APRA as prudential regulator has to control information to maintain confidence in the regulated entities, whereas ASIC as market regulator emphasises disclosure. Understandably, this can lead to tension between the regulators. Therefore, the legislation governing the regulators' various confidentiality obligations, and provisions in the MOUs, support them in the sharing of information and the performance of their functions at all levels. This includes establishing policies and enforcing them. The authors indicate that consultation and mutual assistance between the regulators, in those areas in which action by one regulator may have an impact on the regulatory responsibilities of the other, is important to support co-ordination between them. This is reinforced by regular meetings, consultations, proactive dialogue, and liaison between APRA and ASIC. The third feature of the policy framework — supporting co-ordination in Australia — relates to practical measures at the disposal of the regulators to encourage and facilitate co-ordination between them. These practical measures include informal communications and secondments and engaging with the other regulator before regulatory actions are taken; notifying, discussing and jointly planning supervisory activities; discussing which regulator is the most appropriate to investigate certain matters or take particular action and, if necessary, modifying original timetables to accommodate the other regulator; and co-ordinating day-to-day operations, especially in special circumstances. The fourth aspect to the policy framework supporting co-ordination in the Australian Twin Peaks model is a centralised co-ordination framework. This is achieved through a co-ordinating body for the relevant regulatory agencies, namely the CFR, as discussed in more detail in part III(c). [129]

In this vein, Godwin & Ramsay observe that it is critical to the effective operation of the Australian Twin Peaks model that the objectives and the boundaries — or 'regulatory perimeters' — of each regulator should be clearly defined and that there should be co-ordination between them. [130] This is because market participants are regulated by both regulators for prudential and market conduct compliance. Co-operation between APRA and ASIC is furthermore important due to the large number of

financial institutions in respect of which both agencies have regulatory responsibilities. Thus, in the Australian context, co-ordination between APRA and ASIC is essential to ensure that complete supervision is achieved and that issues do not fall between the cracks. According to Godwin, Li & Ramsay, this requires consultation, information sharing (within an appropriate confidentiality framework), and mutual co-operation in areas such as supervision and enforcement action. [131] These MOUs also need to remain current and take into account changes in the regulatory context. Consequently, as mentioned in parts III(b) and (d) above, the MOUs entered into between APRA and ASIC on 12 October 1998 and 30 June 2004 were replaced by a later MOU entered into on 18 May 2010. [132] The stated objective of the latter MOU is to set out a framework for co-operation between APRA and ASIC in areas of common interest where co-operation is essential for the effective and efficient performance of their respective financial regulation functions. [133]

Godwin, Li & Ramsay further remark that regulatory co-ordination in Australia is 'primarily informal, long-term, frequent, voluntary and co-operative in nature'. [134] According to Godwin, Howse & Ramsay, APRA and ASIC would, therefore, not be held to the MOU between them. Instead, it would be used mainly as an indicator of how they intend to co-operate effectively. [135] Regular forums exist between the two agencies

to ensure that there is appropriate sharing of relevant information and market intelligence. These meetings focus on a range of matters, including policy, operational supervision, and issues related to enforcement. The forums also discuss the practical implications for supervision arising out of changes to legislative and administrative procedures, with a view to reducing the burden of supervision on regulated institutions. [136]

Despite the aforementioned structures for co-operation and co-ordination being in place, Australia experienced some regulatory failures as mentioned in the *Interim Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* which was submitted on 28 February 2018. This report revealed that inter-agency co-operation and collaboration was not as regular and smooth as one would be inclined to think, having regard to the culture of co-operation and collaboration referred to above, and it appears that regulatory enforcement was also problematic. The Royal Commission's report inter alia indicated that, in the context of enforcement, 'the conduct

regulator, ASIC, *rarely* went to court to seek public denunciation of and punishment for misconduct. The prudential regulator, APRA, *never* went to court.' [137]

The report further confirmed that APRA's chief focus was governance and risk culture. However, until August 2017, many incidents of deficiency in the governance and risk culture of one of the four largest banks in Australia, CBA, had not been responded to publicly by APRA. The report opined that there might have been other financial services entities which also had deficiencies in governance and risk culture to which APRA had not attended. [138]

In the *Final Report of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry*, which was submitted on 1 February 2019, the Commission indicated that formalised co-operation and co-ordination between the regulators should become more of a reality than it was at the time of the inquiry by the Royal Commission. The Commission was of the view that improved co-ordination and co-operation would assist the regulators in detecting misconduct earlier, and would consequently also assist in prompt enforcement action. According to the Commission, co-ordination has to go beyond the current MOUs and informal meetings between representatives of the agencies, and

> 'the regulators should be required to provide information to each other and to meet at particular intervals. The exchange of critical information should be required, facilitated and protected.' [139]

In the Final Report, it was recommended that both the ASIC Act and the APRA Act should be amended so that ASIC and APRA, in performing their functions, should have a statutory duty to co-operate with each other and to share information to the maximum extent practicable. [140] It was also recommended that ASIC and APRA should enter into a joint memorandum, setting out how they intended to comply with their statutory obligation to co-operate. [141]

It is clear from the above that the soft-law approach in Australia to facilitate co-operation between APRA and ASIC, although having benefits of flexibility and easy adaptation to changing circumstances, has proved also to have shortcomings which require a move to capturing certain aspects thereof in hard law.

IV Recommendations: The way forward for South Africa

As in all instances where new ideas and approaches are pioneered, Australia, as the jurisdiction that led the way in the Twin Peaks realm, had growing pains, having had to navigate the intricacies of the new regulatory model it adopted over the course of two decades. Additionally, as with all instances of implementing new regulatory frameworks and mechanisms, the reality is that circumstances will arise and flaws will be revealed, and that they will need to be addressed. The main lesson is to be mindful of areas where regulatory models fail, and to take action to address them, which seems to be what Australia is doing. It is thus submitted that South Africa can take some important lessons from Australia, not only as the jurisdiction that pioneered the Twin Peaks model, but also as a jurisdiction which seeks to root out problems in their model — even if one is of the opinion that they could have done so much sooner. Financial regulatory models should be 'living mechanisms' — moving with the times, adapting to changes and capable of being corrected where they fail.

Thus, South Africa can take the following lessons from Australia. First, with regard to the issue of co-operation and collaboration, it is suggested that consideration could be given to capturing immutable aspects of this obligation in legislation, in addition to the requirement that the SARB

and the financial regulators enter into MOUs. Although it is conceded that the flexible nature of MOUs is indeed beneficial, as MOUs can easily be adapted to changing circumstances, it is nevertheless submitted that legal certainty will be aided by casting some aspects, such as conflict resolution and which entity will have the final say in such event, in legislation. Crisis times are not times for regulatory stand-offs. Furthermore, the findings of the Royal Commission in Australia emphasise that MOUs that are binding and not mere 'gentlemen's agreements' would be beneficial to effecting improved co-operation and collaboration.

In this vein, the provisions in ss 26(4) and 77(3) of the FSR Act — that failure by a financial sector regulator to comply with its obligation to enter into an MOU or to comply with an MOU does not affect the validity of an action taken by that regulator in terms of a financial sector law, the National Credit Act or the Financial Intelligence Act — should be reconsidered. It appears that this provision may have been modelled on the Australian position with the current non-binding nature of MOUs between the various regulators, which has not passed muster with the Royal Commission. It is submitted that this provision is not appropriate in the South African Twin Peaks model, and may incentivise regulators not to abide by MOUs. The non-binding nature of the South African MOUs, as indicated in ss 26(4) and 77(3), could actually erode the effectiveness of these MOUs. In any event, at least in so far as financial stability is concerned, the SARB has the power to mandate compliance with its request for information and co-operation, as provided for in s 18 of the FSR Act*,* and one could probably argue that if a regulator failed to comply with the terms of an MOU, the SARB may enforce compliance via s 18. However, it is submitted that creating an opportunity for non-compliance with the provisions of an MOU by having provisions such as ss 27(4) and 76(3) in the FSR Act, is not conducive to effective and efficient co-operation and collaboration between the role players in the South African Twin Peaks model, especially not in crisis times when such co-operation and collaboration would be of the utmost importance.

It is further recommended that the MOUs entered into by the SARB and the financial sector regulators should, in addition to setting out general arrangements for co-operation and collaboration, also focus on crisis management in particular, so that there can be no confusion about the roles, functions and powers of the SARB and the financial regulators in times of financial crisis.

It is also suggested that the MOUs for collaboration and co-operation be reviewed, not only locally, but also at regular intervals by international bodies such as the IMF, which has a global benchmarking perspective on the issues that should be dealt with in these documents. South Africa should also regularly consult MOUs entered into by other Twin Peaks jurisdictions, such as Australia, to keep abreast of any new developments

which may aid in achieving greater collaboration and co-operation. Adding the extent to which co-operation and collaboration is achieved by other financial regulators to the performance indicators of the executive officers of each of South Africa's financial regulators (not only those of the PA and FSCA) may also serve as the foundation for a regulatory culture focused on facilitating the success of the South African Twin Peaks model.

Further, we note that the two-year period for review of the effectiveness of co-operative and collaborative mechanisms between the financial sector regulators (the SARB, FIC, Council for Medical Schemes, and Competition Commission), by the Financial Sector Inter-Ministerial Council prescribed in the FSR Act, [142] appears to contradict the three-year period prescribed for review of the various MOUs by the financial sector regulators and the SARB. [143] This will have the result that in every sixth year, a review by both the Financial Sector Inter-Ministerial Council and the regulators and the SARB will be done. The Financial Sector Inter-Ministerial Council could suggest comments in year 4 and will then review the MOUs again in year 6, at the same time as the regulators and the SARB.

It is clear that the new South African Twin Peaks regulatory environment will be one where a much higher premium is placed on co-operation and collaboration between the SARB and financial regulators than was previously the case. Not only is this framework for co-operation and collaboration entrenched extensively in legislation, but its reach is also specifically extended to organs of state. Some would argue that co-operation and collaboration is the bedrock on which the effective implementation of Twin Peaks in South Africa rests. Since no regulation can occur without co-operation, the aspects of co-operation and collaboration are of the utmost importance if the objectives set out in the FSR Act relating to the promotion and maintenance of financial stability are to be realized.

V Conclusion

The transition in South Africa to a Twin Peaks model was a well-considered regulatory event, conducted over the course of a number of years, affording the South African National Treasury, which steered the project, time to probe best practices in other Twin Peaks jurisdictions. From the discussion above it is clear that the Treasury has taken due note of the importance of proper structures for co-operation and collaboration between the SARB and the financial sector regulators, and between organs of state and the regulators, in order to accommodate the effective

functioning of the Twin Peaks model. Treasury has attempted to avoid turf wars and resistance to crisis management measures, by entrenching these obligations to co-operate and collaborate in hard law (viz ss 26, 27, 76 and 77 of the FSR Act). This includes the use of flexible soft law, in the form of MOUs, to flesh out the nature and extent of such co-operation and collaboration. When faced with a systemic event or an issue which may compromise financial stability, the power to be able to extract information and mandate co-operation and collaboration is crucial. Where this power is entrenched in legislation, it protects the central bank against deliberate (or unintentional) non-co-operation by regulators or organs of state.

The FSR Act further acknowledges that the success of the Twin Peaks model is dependent on effective and efficient inter-agency co-operation and collaboration: it thus extensively provides for mechanisms enabling co-ordination and collaboration between the SARB and the financial sector regulators, the SARB and organs of state, and between the financial regulators themselves (ss 26, 76 and 78 of the FSR Act). All these measures serve to enable the promotion and maintenance of financial stability and also to facilitate a broader, effective implementation of the Twin Peaks model. Various committees have been established and overlap is minimised, as each committee has a dedicated purpose — thus creating a well-conceptualised co-ordinating network. In this network, the Financial System Council of Regulators will co-ordinate the broader co-operation and collaboration that are necessary to make the South African Twin Peaks model perform optimally. The Financial Sector Inter-Ministerial Council will facilitate co-operation at government level and will ensure that financial sector legislation, pursuant to policy decisions taken at ministerial level, do not endanger the objectives of financial stability or the broader objectives of financial regulation. The Financial Sector Contingency Forum will draw regulators together for the narrow purpose of identifying systemic risks and crisis planning and management, which is then fed through to the Financial Stability Oversight Committee. The Financial Stability Oversight Committee will fulfil the function of informing the SARB's decisions on financial stability, and will assist the financial sector regulators and the SARB to co-operate and collaborate with regard to financial stability issues. In so far as co-ordination is concerned, it is submitted that entrenching the obligation to co-operate and collaborate in legislation is a prudent strategy. Setting out aspects of mandatory co-operation and collaboration in MOUs is appropriate, because this combination of hard law and soft law will ensure that the regulators observe their obligation to co-operate, while retaining the necessary flexibility to tweak MOUs to deal with new matters and challenges which may arise. This can be done without the cumbersome obligation of going through protracted parliamentary processes that can hamstring swift regulatory action which is necessary to maintain or

restore financial stability. The obligation to co-operate and collaborate is further fortified, and accountability is entrenched, by the provision in s 76(2) to report annually on such co-operation and collaboration, including before Parliament, and by the bi-annual review of the effectiveness of co-operation and collaboration, mandated by s 86(2). It is submitted that these reviews will serve to reveal weaknesses in co-operation and collaboration, which can then be addressed (in accordance with the obligation to update MOUs, as required by ss 26 and 77) to ensure that this carefully crafted network for collaboration and co-operation in the South African Twin Peaks model remains effective and current. It is also submitted that the requirements imposed by s 77, which relate to the adoption of consistent regulatory strategies and policies, and the co-ordination of regulatory actions, assist in avoiding regulatory arbitrage.

Probably the most important lesson to be taken from the Australian experience is that soft law alone may not be the most effective way to achieve the measure of co-operation and collaboration that the successful operation of the new South African Twin Peaks model requires.

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1 David T Llewellyn 'Institutional structure of financial regulation and supervision: The basic issues'. Paper presented at a World Bank Seminar 'Aligning supervisory structures with country needs', Washington DC, 6 and 7 June 2006 at 5, available at *http://siteresources.worldbank.org/INTTOPCONF6/Resources/2057292-1162909660809/F2FlemmingLlewellyn.pdf*, accessed on 30 May 2017.

2 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 at 2 and 3. See also Andrew Schmulow 'Financial regulatory governance in South Africa: The move towards Twin Peaks' (2017) 25 *African Journal of International and Comparative Law* 393 at 394.

3 Johann de Jager 'The South African Reserve Bank: Blowing winds of change (part 2)' (2013) 25 *SA Merc LJ* 492 at 508; Group of Thirty Consultative Group on International Economic and Monetary Affairs Inc — Special Report by Working Group on Financial Supervision 'The structure of financial supervision — Approaches and challenges in a global marketplace' 6 October 2008 at 38, available at *http://group30.org/images/uploads/publications/G30_StructureFinancialSupervision2008.pdf*, accessed on 1 June 2017.

4 Department of National Treasury (Republic of South Africa) 'A safer financial sector to serve South Africa better' 23 February 2011 at 9–22, available at *http://www.treasury.gov.za/twinpeaks/20131211%20%20Item%202%20A%20safer %20financial%20sector%20to%20serve%20South%20Africa%20better.pdf*, accessed on 9 November 2015. The lessons learned from the global financial crisis were considered, and the structure and characteristics of South Africa's financial sector were assessed for gaps and weaknesses.

5 Erik Denters 'Regulation and supervision of the global financial system. A proposal for institutional reform' 2008–2009 *Amsterdam Law Forum* 63 at 78.

6 Department of National Treasury op cit note 4 at 29; Schmulow op cit note 2 at 396; Andrew Godwin, Guo Li & Ian Ramsay 'Is Australia's "Twin Peaks" system of financial regulation a model for China?' Centre for International Finance and Regulation ('CIFR') Paper 102/2016, 11 April 2016 at 6, available at *https://ssrn.com/abstract=2763300*, accessed on 23 March 2017.

7 Llewellyn op cit note 1 at 28. See also Andrew D Schmulow 'Twin Peaks: A theoretical analysis' CIFR: Research Working Paper Series 064/2015 Project E018, 1 July 2015 at 28, available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625331*, accessed on 10 March 2018. The single objective of each regulator minimises overlap and turf wars between them. Schmulow mentions that, over time, overlap can diminish if clear lines are drawn for responsibilities and if key parties are determined to co-operate.

8 Schmulow op cit note 2 at 396–7. Schmulow refers to failures under the regulators Australian Prudential Regulation Authority ('APRA') and Australian Securities and Investments Commission ('ASIC') in Australia, and opines that the failures have not been caused by a confusion of objectives. He ascribes the failures to a weak enforcement culture, especially in the regulation of market conduct and consumer protection. See further the discussion of co-operation and collaboration in the Australian Twin Peaks model in part III below.

9 Godwin, Li & Ramsay op cit note 6 at 24.

10 Department of National Treasury op cit note 4 at 2. The National Treasury launched a formal review of the financial regulatory system in 2007. The scope of this review was expanded in 2008 after the financial crisis. The G-20 Seoul Summit Leaders' Declaration, 12 November 2010, available at *http://www.g20.utoronto.ca/2010/g20seoul.html*, accessed on 26 November 2017, in Douglas W Arner 'Adaptation and resilience in global financial regulation' (2011) 89 *North Carolina LR* 1579 at 1595. This declaration by the G-20 leaders outlined a new stage of international financial regulation, and commitment to previously implemented rules: G-20 Seoul Summit Leaders' Declaration at 2. South Africa, being a member of the G-20, was part of the leadership that identified a range of regulatory issues which would have to be subjected to reform. The South African government thus committed to 'a new financial regulatory framework' to transform the global financial system.

11 This Act was preceded by a formidable number of drafts in an attempt to refine the proposed regulatory model. After the first draft of the Financial Sector Regulation Bill was published for public comment in December 2013, close to 300 pages of comments on the draft Bill were received and various communications between stakeholders followed. Early in 2014, National Treasury published the second draft of the FSR Bill as a revised version of the first draft of the Bill for further public consultation. In Department of National Treasury in the RSA 'Twin Peaks in SA: Response and explanatory document' December 2014, which accompanied the second draft of the FSR Bill, National Treasury summarised some of the responses and comments from stakeholders, including international and local academics, the legal fraternity, the financial services industry and ordinary South Africans, on the first draft of the FSR Bill. The introduction of Twin Peaks in South Africa gained further momentum when the Revised (Third) Draft of the Financial Sector Regulation Bill of 2015, available at *http://www.treasury.gov.za/twinpeaks/Financial%20Sector%20Regulation%20Bill%20tabled%2027%20October%202015.pdf*, accessed on 9 November 2015, was tabled in Parliament on 27 October 2015. 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), available at

http://www.treasury.gov.za/twinpeaks/NT%20Responses%20to%20issues%20raised%20during%20the%20SCOF%20public%20consultation%20process%20(21-07-2016%20).pdf, accessed on 20 November 2016. This draft underwent yet a further revision in July 2016: see FSR July 2016, available at *http://www.treasury.gov.za/twinpeaks/Comparison%20of%20proposed%20revised%20bill%20with%20tabled%20version%20of%20Bill%20July%202016.pdf*, accessed on 1 August 2016. On 21 October 2016, a comparison of the revisions with the July 2016 version of the Bill was published. It is available at *http://www.treasury.gov.za/twinpeaks/FSR%20Bill%20comparison%20of%20revisions%20with%20July%202016%20version.pdf*, accessed on 6 December 2016. On 6 December 2016, the National Assembly voted on the Bill: Financial Sector Regulation Bill, as voted on by the National Assembly on 6 December 2016, available at *http://www.treasury.gov.za/twinpeaks/FSR%20Bill%20as%20voted%20in%20NA%20b%2034b%20-2015%20(financial%20sector%20regulation).pdf*, accessed on 10 December 2016. An erratum was published on 6 December 2017: 'Erratum: Financial Sector Regulation Bill' as voted on by the National Assembly on 6 December 2016, available at *http://www.treasury.gov.za/twinpeaks/2016%2012%2009%20Erratum%20Publication%20of%20tabled%20FSR%20Bill.pdf*, accessed on 23 December 2016. On 22 June 2017, the Financial Sector Regulation Bill was passed by the National Assembly [B34D–2015], available at *http://www.treasury.gov.za/twinpeaks/FSRB%20D%20Bill%20as%20passed%20by%20Parliament.pdf*, accessed on 30 June 2017. Eventually, on 21 August 2017, more than six years after publication of the Red Book, the President signed the Financial Sector Regulation Act 9 of 2017 into law. The Act was published in *GG* 41060 of 22 August 2017: see *http://www.treasury.gov.za/legislation/acts/2017/ Act%209%20of%202017%20FinanSectorRegulation.pdf*, accessed on 28 August 2017 at 1.

12 Commencement of FSR Act published in National Treasury Notice 169 in *GG* 41549 vol 633 of 29 March 2018: see *http://www.treasury.gov.za/twinpeaks/Commencement%20of%20Financial%20Sector%20Regulation%20Act%202017.pdf*, accessed on 1 April 2018. The following provisions of the FSR Act took effect on 29 March 2017: s 1, chap 7 (ss 97–110), ss 288, 301(4), 304, and sched 1. The following provisions of the FSR Act took effect on 1 April 2018: ss 2–10, chap 2 (ss 11–31), chap 3 (ss 32–55), chap 4 (ss 56–75), ss 76–82, 87–9, 91–6, 111(1)*(a)* and (2)–(7), 112–28, chap 9 (ss 129–40), chap 10 (ss 141–56), chap 13 (ss 167–73), chap 15 (ss 218–36), ss 250–55, 265–68, 271–82, 284–86, 289, 291–300, 301(1), (3) and (5), 303, and sched 2. Section 283 took effect on 1 April 2018 in respect of the PA and the FSCA, and on 1 October 2018 in respect of the Ombud Council. The following provisions of the FSR Act took effect on 1 October 2018: s 90, chap 14 (ss 175–217), ss 270 and 301(2), (6) and (7). Chapter 11 (ss 157–59) took effect on 1 January 2019. Chapter 12 (ss 160–166) took effect on 1 March 2019. Section 111(1)*(b)*, chap 16 (ss 237–49) and s 302 took effect on 1 April 2019. See also Press Release of the National Treasury 'New Twin Peaks regulators established' 29 March 2018, available at *http://www.treasury.gov.za/twinpeaks/Press%20release%20Twin%20Peaks%20implementation%20March2018_FINAL.pdf*, accessed on 1 April 2018.

13 Section 11 of the FSR Act. In terms of s 4(1) of the FSR 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.

14 Corlia van Heerden & Gerda van Niekerk 'Twin Peaks in South Africa: A new role for the central bank' 2018 *Law and Financial Markets Review* 1 at 2. Notably, bank supervision has been removed from the remit of the SARB, and is now done by the PA, together with prudential supervision of insurance companies and pension funds.

15 The NCR was established in terms of s 12 of the National Credit Act 34 of 2005, and its powers and functions are set out in ss 13–16 of the Act. It should further be noted that the NCR has not been assimilated into the FSCA as market conduct regulator, and remains an independent regulator which operates within the Twin Peaks model. See inter alia the following sections of the FSR Act 9 of 2017: s 1 regarding financial regulators; s 2(1)*(g)* regarding financial products; s 3 regarding financial services; s 58(2) and (5); s 85; s 106(5).

16 The FIC was established in terms of s 2 of the Financial Intelligence Centre Act 38 of 2001, and its powers and functions are set out in ss 4 and 5 of the Act.

17 Llewellyn op cit note 1 at 30 and 31; Andrew Godwin, Timothy Howse & Ian Ramsay 'Twin Peaks: South Africa's financial sector regulatory framework' (2017) 134 *SALJ* 665 at 701; Andrew J Godwin & Andrew D Schmulow 'The Financial Sector Regulation Bill in South Africa, second draft: Lessons from Australia' (2015) 132 *SALJ* 756 at 758.

18 With regard to co-operation and collaboration between financial regulators in the pre-Twin Peaks era in South Africa, see International Monetary Fund ('IMF') Country Report 14/340 'South Africa: Financial system stability assessment' 3 December 2014 at 24, available at *https://www.imf.org/external/pubs/ft/scr/2014/cr14340.pdf*, accessed on 15 June 2016. It indicates that, in the pre-Twin Peaks era, s 4(3) of the Banks Act provided the framework for co-operation and collaboration as it permitted the Registrar of Banks to enter into written co-operation arrangements, including memoranda of understanding (MOUs), with any supervisor or other person or institution as the Registrar deemed fit, although the permitted scope of such agreements was limited to supervisory matters. See also IMF Country Report 15/53 'South Africa: Financial sector assessment program financial safety net, bank resolution, and crisis management framework — Technical note' February 2015 at 12, available at *https://www.imf.org/external/pubs/ft/scr/2015/cr1553.pdf*, accessed on 7 March 2017. The Bank Supervision Department ('BSD') and the South African Financial Services Board signed an MOU in December 1998 for co-ordination and liaison between them. They also converged on a regular basis to discuss systemic issues. The MOU provided for shared co-operation in supervision, exchange of information, and directions for shared supervision of financial conglomerates such as banks, mutual banks and financial institutions under the jurisdiction of the Financial Services Board. The MOU between the Financial Services Board and the BSD in the SARB that was signed on 8 December 1998 sets out an arrangement between the two parties regarding mutual assistance and exchange of information between them, and with other authorities where appropriate, and co-ordination of the supervision of financial conglomerates involving banks and other financial institutions. Furthermore, s??89 of the Banks Act permitted the sharing of information by the Registrar of Banks with fellow regulators, provided that the Registrar was satisfied that the information was essential for the proper performance of a function under any law by their fellow regulator. See also South African Reserve Bank 'Publication detail' 8 December 1998 at 12, available at *https://www.resbank.co.za/Publications/Detail-Item-View/Pages/Publications.aspx?sarbweb=3b6aa07d-92ab-441f-b7bf-bb7dfb1bedb4&sarblist=21b5222e-7125-4e55-bb65-56fd3333371e&sarbitem=4452*, accessed on 29 March 2018.

19 Kenneth W Abbott & Duncan Snidal 'Hard and soft law in international governance' (2000) 54 *International Organization* 421 at 421–2.

20 Ibid at 423.

21 In our view, the use of hard law and soft law in financial regulation should be researched in more depth in the future. Various articles have been published on the use of hard law and soft law in international law, but not much has been written about hard law and soft law in financial regulation, specifically in MOUs.

22 Gregory C Shaffer & Mark A Pollack 'Hard vs soft law: Alternatives, complements and antagonists in international governance' (2010) 94 *Minnesota LR* 706 at 716.

23 Martha Gertruida van Niekerk *A Comparative Analysis of the Role of the Central Bank in Promoting and Maintaining Financial Stability in South Africa* (unpublished LLD thesis, University of Pretoria, 2018) 101, 154 and 336–7.

24 Section 1 of the FSR Act defines 'systemic event' 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 systems or financial markets, or financial institutions, are able to continue to provide financial products or financial services'.

25 For a detailed discussion, see Van Niekerk op cit note 23 at 101–45.

26 In terms of s 21, 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; 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.

27 Section 20 of FSR Act.

28 Section 24(1).

29 Section 22.

30 Section 23(1).

31 Section 25(1).

32 Such a Deputy Governor will, in accordance with s 25(3)*(a)*, be designated by the Governor of SARB to chair the FSCF.

33 Section 25(3) and (4).

34 Section 25(2).

35 Section 25(6).

36 Section 26 falls into part 5 of chap 2 of the FSR Act. Section 1(1) of the FSR Act states that 'financial sector regulator' means the PA and the FSCA and also includes, in respect of part 5 of chap 2 of the Act, the NCR and the FIC.

37 Emphasis supplied.

38 Section 26(1)*(b)*.

39 Section 26(1)*(c)* and *(d)*.

40 Section 26(2), emphasis supplied.

41 Section 27(1).

42 Section 27(2). Section 27(3) further provides that a copy of each MOU and each amendment of such MOU must, without delay after being entered into or updated, be provided to the Minister and the Cabinet member responsible for consumer credit matters.

43 Section 27(4). Section 27 does not require that the MOU in terms of this section has to be published as is the case in respect of each MOU in terms of s 76: see part II(c) below. This has the effect that the MOU relating to financial stability will not be in the public domain. A possible reason for not requiring publication can be to prevent the MOU from having an adverse effect on financial stability.

44 Section 18.

45 Sections 76–86.

46 Emphasis supplied. Section 76(1)*(a)–(g).*

47 Section 76(2).

48 Chapter 2 and ss 76–82 (which are a part of chap 5) took effect on 1??April 2018. Sections 83–6, with regard to the Financial Sector Inter-Ministerial Council, have not yet taken effect.

49 Section 77(1).

50 Section 77(4). Section 77(5) further provides that a copy of each MOU and each amendment of such MOU must, without delay after having been entered into or updated, be provided to the Minister and to the Minister and Cabinet member responsible for administering the National Credit Act.

51 Section 86(1)*(a)* and *(b).* Section 86(5): 'Any evaluation commissioned by the Inter-Ministerial Council in terms of [s 86] ... must be tabled in Parliament immediately following the Council's consideration of the evaluation, and must be accompanied by a report from the Council on the evaluation's contents.'

52 Section 77(2).

53 Section 77(3).

54 Section 77(6). This is different to s 27, which does not require that the MOU has to be published.

55 Section 78(1).

56 Section 78(2).

57 Section 78(3).

58 Section 79(2).

59 Since it often happens that a medical scheme is a subsidiary in a conglomerate, and in South Africa the biggest banks often have medical schemes that are part of a holding company of a bank, it is important that the Director-General of the Department of Health is a member of the FSCR, so that input regarding the medical scheme industry can be taken into account in the forum.

60 Section 79(3)*(a)–(l).* Godwin, Howse & Ramsay op cit note 17 at 693 opine that the membership of the FSCR involves the most extensive government representation of all Twin Peaks jurisdictions in the world.

61 Section 80(1).

62 Section 80(2). The Director-General must convene a meeting at the request of a member of the FSCR: s 80(3). A member of the FSCR may, with the concurrence of the Director-General of the National Treasury, nominate a senior official of the member's institution to act as an alternate for the member: s 80(4). Meetings of the FSCR must be conducted in accordance with procedures determined by it: s 80(5).

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

64 Section 82(1). The FSCA must ensure that minutes of each meeting of the FSCR, and of each meeting of a working group or subcommittee, are kept in a manner determined by the FSCA: s 82(2).

65 Sections 23(1) and 25(6).

66 Section 83(1). According to Godwin, Howse & Ramsay op cit note 17 at 692, the Financial Sector Inter-Ministerial Council 'is a unique initiative that does not appear in other twin-peaks jurisdictions'.

67 Section 83(2).

68 Being the Minister of Trade and Industry

69 Being the Minister of Health.

70 Being the Minister of Economic Development. Section 83(3)*(a)–(d).*

71 Department of National Treasury explanatory document 2014 op cit note 11 at 30.

72 Section 84(1).

73 Section 84(2). The Minister must convene a meeting at the request of a member of the Inter-Ministerial Council: s 84(3). The Minister may invite any Cabinet member who is not a member of the Inter-Ministerial Council to attend one of its meetings: s 84(5). Meetings of the Inter-Ministerial Council are conducted in accordance with procedures determined by it: s 84(6).

74 SARB/PA MOU 'Memorandum of Understanding between the South African Reserve Bank and the Prudential Authority' 26 September 2018 paras 2.1–2.4, available at *https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/8792/PA-SARB%20Memorandum%20of%20Understanding.pdf*, accessed on 15 March 2019.

75 Ibid para 2.5.

76 Ibid paras 4–14.

77 Ibid para 15.

78 SARB/FSCA MOU 'Memorandum of Understanding between the South African Reserve Bank and the Financial Sector Conduct Authority' 28 September 2018 para 2.1.1, available at *https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/8828/Signed%20MOU%20-%20SARB%20and%20FSCA.pdf*, accessed on 15 March 2019.

79 Ibid para 2.1.2 and para 4.2, respectively.

80 Ibid para 5

81 Ibid para 6.

82 Ibid para 7. See paras 7.1–7.1.6.

83 Ibid para 7.2, read with Annexure B paras 1–9.

84 Ibid para 7.5. It is stipulated that the Protocols will not form part of the MOU between SARB and the FSCA.

85 PA/FSCA MOU 'Memorandum of Understanding between the Prudential Authority and the Financial Sector Conduct Authority' 28 September 2018 paras 2.1.1–2.1.4, available at *https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/8804/PA-FSCA%20Memorandum%20of%20Understanding.pdf*, accessed on 15 March 2019.

86 There is no paragraph that deals with actions by the PA which require concurrence by the FSCA.

87 PA/FSCA MOU op cit note 85 paras 4–12.

88 Ibid para 6.2.

89 RBA 'History' (undated) at 2, available at *http://www.rba.gov.au/ about-rba/history/,* accessed on 23 March 2017; Group of Thirty op cit note 3 at 31 and 189; IMF Country Report 12/308 'Australia: Financial system stability assessment' November 2012 at 24, available at *https://www.imf.org/external/pubs/ft/scr/2012/cr12308.Pdf*, accessed on 24 November 2017.

90 Section 1(2)*(a)* of the ASIC Act.

91 Andrew D Schmulow 'Twin Peaks: An analysis of the Australian architecture' in Hong Joo Jung (ed*) Proceedings of the 2016 Global Forum for Financial Consumers* (2016) 9. See also Andrew D Schmulow 'Approaches to financial system regulation: An international comparative survey' CIFR Research Working Paper Series 053/2015 Project E018, January 2015 at 41, available at *http://apo.org.au/files/Resource/twin_peaks_the_theory_—_a_ theoretical_ analysis_0.pdf*, accessed on 14 April 2017; CFR *Annual Report 2002* (2003) 8, available at *http://www.rba.gov.au/publications/annual-reports/cfr/2002/cfr.html*, accessed on 22 March 2017; Group of Thirty op cit note 3 at 31; IMF 12/308 op cit note 89 at 24.

92 On soft law as a regulatory mechanism see Andrew T Guzman & Timothy L Meyer 'International soft law' (2010) 2 *Journal of Legal Analysis* 171; Maria E Goncalves & Maria I Gameiro 'Hard law, soft law and self-regulation: Seeking better governance for science and technology in the EU' Dinamica'cet-IUL, Centro de Estudos sobre a Mudanca Socioeconomica e o Territorio 1; Kern Alexander 'The role of soft law in the legalization of international banking supervision: A conceptual approach' ESRC Centre for Business Research, University of Cambridge, Working Paper 168 1–29; Abbott & Snidal op cit note 19 at 421–2 as quoted in Gregory C Shaffer & Mark A Pollack op cit note 22 at 714–15. Hard law 'refers to legally binding obligations that are precise (or can be made precise through adjudication or the issuance of detailed regulations) … '. By contrast, soft law is defined as a residual category: '[t]he realm of "soft law" begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation.

93 Godwin, Li & Ramsay op cit note 6 at 34.

94 MOU between the RBA and APRA 12 October 1998 at 1–3, available at *http://www.apra.gov.au/AboutAPRA/Documents/MoU-RBA-Reserve-Bank-of-Australia.PDF*, accessed on 12 September 2017.

95 MOU between the RBA and ASIC 18 March 2002 at 1–3, available at *http://download.asic.gov.au/media/1340888/MOU-ASICandRBA.pdf*, accessed on 12?? September 2017.

96 APRA and ASIC have signed various MOUs, namely in 1998, 2004 and 2010: MOU between APRA and ASIC 12 October 1998, available at *http://www.apra.gov.au/MediaReleases/Pages/98_08.aspx*, accessed on 31 December 2017; MOU between APRA and ASIC dated 30 June 2004; MOU between APRA and ASIC 18 May 2010, available at *http://www.apra.gov.au/AboutAPRA/Documents/ASIC-MoU.pdf*, accessed on 31 December 2017.

97 CFR op cit note 91 at 16.

98 Godwin, Li & Ramsay op cit note 6 at 30 remark that these MOUs have restricted practical effect. The regulators do not rely on the MOUs to achieve the regulatory outcomes, but the MOUs do give an indication of how the regulators intend to achieve effective co-ordination.

99 Godwin, Li & Ramsay op cit note 6 at 35 point out that APRA is well versed in the workings of the RBA, as the first three APRA chairs came from the RBA

100 Ibid; A Schmulow 'The four methods of financial system regulation: An international comparative survey' (2015) 26 *Journal of Banking and Finance Law and Practice* 151 at 171 remarks that the success accomplished in Australia during the GFC, and also during the 2010 sovereign debt crisis in Europe, has been attributed to this flexible approach where the agencies can adjust quickly to accommodate specific needs.

101 Godwin, Li & Ramsay op cit note 6 at 35.

102 Schmulow op cit note 100 at 171; Malcolm Edey 'Macroprudential supervision and the role of central banks'. Remarks to the Regional Policy Forum on

Financial Stability and Macroprudential Supervision hosted by the Financial Stability Institute and the China Banking Regulatory Commission in Beijing 28 September 2012, available at *https://www.rba.gov.au/speeches/2012/sp-ag-280912.html*, accessed on 13 January 2018 (as quoted in Schmulow op cit note 100 at 171), who indicates that the Assistant Governor (Financial) of the RBA has attributed the efficacy of co-ordination between the regulators in Australia to a culture 'where we regard co-operation with the other agencies as an important part of our job, and there is a strong expectation from the public and the government that we will continue to do so. … Key aspects [of co-ordination] include an effective flow of information across staff in the market operations and macro-economic departments of a central bank and those working in the areas of financial stability and bank supervision. Regular meetings among these groups to focus on risks and vulnerabilities and to highlight warning signs can be very valuable. A culture of co-ordination among these areas is very important in a crisis because, in many instances, a stress situation is first evident in liquidity strains visible to the central bank, and the first responses may be calls on central bank liquidity.'

103 A D Schmulow 'Doing it the Australian way, "Twin Peaks" and the pitfalls in between' 31 March 2016, available at *http://clsbluesky.law.columbia.edu/2016/03/31/doing-it-the-australian-way-twin-peaks-and-the-pitfalls-in-between-2/*, accessed on 10 January 2018.

104 Anthony Jensen & Michael Kingston 'Australian "Twin Peaks" framework of financial system regulation: Australia and UK compared' (2010) 25 *Butterworths Journal of International Banking and Financial Law* 549; Godwin, Li & Ramsay op cit note 6 at 23; J Cooper 'The integration of financial regulatory authorities — The Australian experience' Australian Securities and Investments Commission, September 2006 at 11, available at *http://download.asic.gov.au/media/1339352/integration-financial-regulatory-authorities.pdf*, accessed on 24 March 2017; Godwin & Schmulow op cit note 17 at 766. See also Schmulow op cit note 100 at 171.

105 CFR Charter of 13 January 2004 at 1, available at *http://www.cfr.gov.au/about-cfr/charter.html*, accessed on 7 July 2017. See also RBA & APRA 'Macroprudential analysis and policy in the Australian financial stability framework' September 2012 at 3, available at *http://www.rba.gov.au/fin-stability/resources/2012-09-map-aus-sf/pdf/2012-09-map-aus-fsf.pdf*, accessed on 22 March 2017.

106 Cooper op cit note 104 at 12.

107 CFR Charter op cit note 105 at 1.

108 Cooper op cit note 104 at 11.

109 CFR 'About the CFR' (undated) available at *https://www.cfr.gov.au/about-cfr/index.html*, accessed on 10 April 2017. Godwin, Li & Ramsay op cit note 6 at 33 indicate that one area in which there has been some development in Australia in relation to the CFR, is increased transparency in the form of the webpage for the CFR on the website of the Australian Commonwealth Treasury. The webpage contains information about the CFR, media releases, publications and other resources.

110 Godwin & Schmulow op cit note 17 at 766; Schmulow op cit note 100 at 171.

111 CFR op cit note 91.

112 IMF 12/308 op cit note 89 at 29.

113 RBA/APRA MOU op cit note 94 para 1.

114 RBA/APRA MOU ibid; RBA & APRA Financial Stability op cit note 105 at 3 and 7.

115 IMF Country Report 06/415 'Australia: Financial sector assessment program — Detailed assessment of observance of standards and codes' November 2006 at 14, available at *https://www.imf.org/en/Publications/CR/Issues/2016/12/31/Australia-Financial-Sector-Assessment-Program-Technical-Note-Investor-Protection-Disclosure-20176*, accessed on 7 June 2017.

116 Luci Ellis & Charles Littrell 'Financial stability in a low interest rate environment: An Australian case study' 2017 at 2, available at *http://www.rba.gov.au/publications/confs/2017/pdf/rba-conference-2017-ellis-littrell.pdf*, accessed on 8??August 2017.

117 IMF Country Report 12/313 'Australia: Basel Core Principles for Effective Banking Supervision — Detailed assessment of observance' November 2012 at 143, available at *https://www.imf.org/ external/pubs/ft/scr/2012/cr12313.pdf*, accessed on 1 January 2018. The RBA also provides extensive aggregate information on the banking system in its six-monthly Financial Stability Review and makes available extensive data on the banking sector on its website.

118 Ellis & Littrell op cit note 116 at 2.

119 Section 56 of the APRA Act.

120 RBA & APRA Financial Stability op cit note 105 at 11, 12 and 14. It states ibid at 13 that where exchange of information will assist a financial sector supervisory agency to perform its functions or exercise its powers, such exchange does not require the existence of an agreement or understanding. This is also true where the agency is specified in reg 5 for the purposes of s 56 of the APRA Act. The agencies specified under either s 56 or reg 5 include the RBA, ASIC and the CFR. Similarly, the RBA has exemptions under the Reserve Bank Act to share relevant information with APRA, even when that information is institution-specific information, protected under s 79A of the Reserve Bank Act, and therefore cannot be revealed to the public or before a court. The sharing of such protected information with APRA must be for the purposes of one or more of several laws, including the Banking Act, which includes prudential matters.

121 IMF 12/313 op cit note 117 at 125; RBA & APRA Financial Stability op cit note 105 at 10. The process of drafting the Financial Stability Review begins with a meeting of the Financial Stability Department of the RBA and the Assistant Governor (Financial System) of the RBA, where the themes for the issue of the Financial Stability Review, including possible risks to the Australian financial system, are discussed. Drafts of the material proposed for inclusion are reviewed and approved by the senior management team and the Governors, and are also circulated to the other CFR agencies for comment prior to publication.

122 Ellis & Littrell op cit note 116 at 2; Robin Hui Huang 'The regulation of shadow banking in China: International and comparative perspectives' 2015 (30) *Banking and Finance LR* at 496. The RBA and APRA incorporate various tools and practices that are designed to support financial stability from a system-wide perspective. In recognition of the view that there is some degree of connection between prudential regulation and systemic stability, and that the information gathered through prudential regulation is important for effective systemic regulation, the RBA has power to request APRA to collect financial sector data for i

123 RBA & APRA Financial Stability op cit note 105 at 2; speech by the then-Chairman of ASIC, Greg Medcraft, 'Systemic risk: The role of the securities regulators' 28 June 2011 at 4 and 7, available at *http://download.asic.gov.au/media/1347818/Systemic-Risk-Role-of-Securities-Regulators-1.pdf*, accessed on 3 February 2018. Medcraft stated that ASIC is not able to eliminate systemic risks by itself, but has to work in co-operation and consultation with the RBA, APRA and Treasury. He also expressed the hope that securities regulators like ASIC would, in future, in co-operation with their partners, the central banks and the prudential regulatory authorities, be more active in identifying, monitoring, measuring, mitigating, and managing systemic risks and building the resilience of the system as a whole.

124 MOU RBA & ASIC op cit note 95.

125 Ibid paras 1 and 2.

126 Ibid; RBA & APRA Financial Stability op cit note 105 at 3.

127 Godwin, Li & Ramsay op cit note 6 at 30.

128 Namely the Australian Prudential Regulation Authority Act 50 of 1998, also known as the APRA Act, and the Australian Securities and Investments Commission Act 51 of 2001, also known as the ASIC Act.

129 Godwin, Li & Ramsay op cit note 6 at 31.

130 Andrew Godwin & Ian Ramsay 'Twin Peaks — The legal and regulatory anatomy of Australia's system of financial regulation' CIFR Paper 074/2015 and University of Melbourne Legal Studies Research Paper 725, 3 August 2015 at 9, available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657355,* accessed on 15 July 2017, remark that '[a] functional or objectives-based approach to regulation means that there will be dual-regulated entities; namely, entities that will be subject to the regulation and supervision of both regulators. It also means that the two regulators will need to work co-operatively to deal with regulatory overlap.'

131 Godwin, Li & Ramsay op cit note 6 at 24.

132 MOU APRA & ASIC 2010 op cit note 96. The MOU states in para 2.1 that APRA is responsible for the prudential supervision of banks, building societies and credit unions, life and general insurance companies, friendly societies, and superannuation funds and their trustees. APRA is also responsible for administering the Financial Claims Scheme. In performing this function to protect the interest of depositors, policyholders and fund members, APRA is required to balance financial safety with efficiency, competition, contestability, and competitive neutrality. ASIC is responsible for monitoring, regulating and enforcing corporation laws and financial services laws, and promoting market integrity and consumer protection across financial services and the payments system, including financial markets and trustee companies. ASIC is also responsible for administering the national consumer credit legislation, including licensing and conduct obligations on credit providers and intermediaries. On ASIC's behalf, APRA is also responsible for data collection from Australian financial services licensees authorised to deal in general insurance products. The joint administration of this data collection will be set out in a Co-operative Working Agreement between the agencies.

133 MOU APRA & ASIC 2010 op cit note 96 para 1.1. For the sake of completeness it is pointed out that this MOU deals with the following: responsibilities (para 2); regulatory and policy development (para 3); mutual assistance and co-ordination (para 4); information sharing (para 5); unsolicited assistance (para 6); cost of provision of information (para 7) and international representation (para 8).

134 Godwin, Li & Ramsay op cit note 6 at 29.

135 Godwin, Howse & Ramsay op cit note 17 at 697.

136 APRA *Annual Report 2014* (2015) 63, available at *http://apra.gov.au/AboutAPRA/Publications/Documents/1410-AR-2013-Full.pdf*, accessed on 10 April 2017.

137 Commonwealth of Australia *Interim Report Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry vol 1* (28 September 2018) xix, available at *https://financialservices.royalcommission.gov.au/Documents/interim-report/interim-report-volume-1.pdf*, accessed on 14 February 2019 (emphasis supplied).

138 Ibid at 297–8.

139 Commonwealth of Australia *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry vol 1* (1 February 2019) 459, available at *https://www.royalcommission.gov.au/sites/default/files/2019-02/fsrc-volume-1-final-report.pdf*, accessed on 14 February 2019.

140 Ibid at 40, 460 and 464. Recommendation 6.9.

141 Ibid at 40 and 464. Recommendation 6.10.

142 Section 86(1)*(b).*

143 Sections 27(2) and 77(4).