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**THE ROLE OF THE PRUDENTIAL AUTHORITY IN THE SOUTH AFRICAN
TWIN PEAKS MODEL**

BY

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DECLARATION OF ORIGINALITY

I declare that this dissertation is my original work. Any sources that have been used have been referenced and acknowledged. This dissertation is submitted in partial fulfilment of the degree Master of Laws in Mercantile Law at the University of Pretoria.

Signed at **HATFIELD** on **7 JUNE 2019**.

Alude Xuba.

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SUMMARY

The ability of a country to promote and maintain financial stability depends to a large extent on whether it has an effective and efficient financial regulatory model. It is of great importance that the regulators within such a regulatory model must have clear objectives and mandates. A financial regulatory model that has been hailed as an optimal regulatory model is the Twin Peaks model as designed by Michael Taylor.

This model establishes peak regulators namely a systemic and prudential regulator on the one hand and a market conduct regulator on the other who then work together to regulate the financial system in the interests of financial stability.

The Twin Peaks model was first pioneered in Australia in 1998 where it has been adapted to contain three peaks, namely the central bank as systemic regulator, APRA as prudential regulator and ASIC as market conduct regulator.

South Africa has recently transition to a Twin Peaks model with the introduction of the Financial Sector Regulation Act 19 of 2017. The South African Twin Peaks model, like the Australian model is also a three peak model comprising of the central bank as systemic regulator and the newly established Prudential Authority and Financial Sector Conduct Authority as prudential and market conduct regulators respectively.

This dissertation accordingly interrogates the institutional structure of the South African Twin Peaks model with specific focus on the role of the Prudential Authority. It considers the objectives, powers and functions of the Prudential Authority as well as its management structure and location to determine its role as aforesaid.

It further compares the role of the South African Prudential Authority with its Australian counterpart to assess whether there are any aspects that require further reform.

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Chapter 1: Background to the Study

1.1 Introduction

The financial services sector plays a pivotal and meaningful role in the lives of South Africans and its effective and efficient functioning is critical to the South African economy.¹ Financial services allow people to actively partake in socio-economic activities and the financial services sector acts as the enabler that facilitates economic growth, job creation, infrastructure and sustainable development.² Accordingly it is vitally important to ensure that a country's financial sector functions effectively and efficiently for the benefit of all involved. Financial crises however do occur from time to time and can cause large-scale financial disruption which may sometimes result in financial instability such as in the recent 2008 Global Financial Crisis (GFC) which was a severe crisis that led to a fundamental rethink of various aspects of financial regulation.³

1.2 The Global Financial Crisis

The 2008 GFC affected many financial institutions across the globe, exposing weaknesses in financial regulation across multiple financial sectors and jurisdictions.

Early signs indicating the emergence of the GFC manifested in 2007 and the Crisis reached its high-water mark in 2008. The GFC then spread to developing countries through trade links, with a decline in foreign direct investments (FDIs) and a major decrease in the price of commodities. It is widely accepted that the GFC originated in the USA where it was triggered by the collapse of the sub-prime mortgage market. Various events that built up over the span of approximately a decade preceded the subprime mortgage crisis: in 1999, the US government placed political pressure on

¹ The National Treasury "A Safer Financial Sector To Serve South Africa Better" (2011) 1 available at <http://www.treasury.gov.za> accessed 12 December 2018 (hereinafter Safer financial sector (2011)).

² Ibid.

³ Van Niekerk "The role of the central bank in the maintenance and promotion of financial stability" (LLD thesis, University of Pretoria, 2019) (hereinafter Van Niekerk Thesis) at 34.

the national mortgage lending institutions, Fannie Mae and Freddie Mac, to grant mortgage loans for low-and-average income households at a very low cost, i.e sub-prime. The aim was to expand access to housing for poorer households. This meant that the lending institutions would bear more risk due to excessive lending.⁴

Crotty points out that in the US large numbers of risky subprime mortgage loans were securitised and cast into collateralised debt obligations (CDOs). These CDOs were subsequently sold to various investors. Accordingly financial institutions could off-load these risky mortgage loans onto others. Some US banks would acquire mortgages with the aim to securitise them and later sell them off. Loans were written off from the balance sheets of banks in order for the banks to comply with their prudential obligations but the underlying debt, however, remained with the banks.⁵

Between 2004 and 2006 the interest rate in the US increased from 1% to 5% with detrimental consequences for the housing market. The rise in interest rates increased the monthly repayments on mortgages whilst the value of properties in the USA declined sharply and homeowners were unable to repay their mortgage loans. This led to increased foreclosures and lenders being unable to regain their losses. Investors were affected and they became reluctant to take on more CDOs. The property market stagnated because there were no buyers to sell the mortgaged properties to in order to realise cash on the default payments.⁶

During this time lending rates between banks also increased, investors in banks withdrew their equity and depositors likewise withdrew their cash deposits, causing the banks to run into solvency and liquidity problems. Inter-bank lending ceased and this had a “knock-on” effect resulting in the collapse of a number of so-called “Too-Big-To-Fail” institutions (also referred to as Systemically Important Financial Institutions or SIFIs) such as the large investment firm Lehman Brothers.⁷

As a result of the interconnectedness of the global financial system, risk was transferred between non-banking financial institutions and banks through contagion, eventually severely disrupting and threatening the stability of the whole US financial

⁴ Ibid.

⁵ Crotty “Structural Causes of the Global Financial Crisis: a critical assessment of the ‘new financial architecture’ “(2009) *Cambridge Journal of Economics* 563.

⁶ Ibid.

⁷ Ibid.

system. The result was that in April 2008, the US Treasury and the US Federal Reserve Bank inter alia had to bail out two giant financial institutions, American International Group (AIG) and Bear Stearns.⁸

There also appeared to have been causes in the context of regulation that contributed to the GFC. As such the lack of effective government supervision was stated to be a significant cause of the Crisis. In addition to lax regulation the emergence of complex, large and interconnected financial conglomerates presented a significant challenge as to how they should be appropriately regulated and new financial products such as derivatives also posed regulatory challenges.⁹

1.3 Lessons from the GFC

The GFC yielded several important lessons: it emphasized the need to take a holistic macroprudential approach to regulation instead of only focusing on the safety and soundness of individual institutions; the need for prudential regulation to operate in tandem with conduct of business regulation; the failure of light touch regulation, the need for coordinated efforts to address macroeconomic imbalances and the need for swift regulatory action.¹⁰

Most importantly, the Crisis highlighted the need to maintain and promote financial stability by monitoring and addressing systemic risks in the financial system.¹¹ “Systemic risk” is described as “the risk of disruptions to the provision of key financial services that is caused by an impairment of all or parts of the financial system, and which can have serious consequences for the real economy.”¹²

⁸ Ibid.

⁹ Safer Financial Sector 11.

¹⁰ Ibid.

¹¹ Van Heerden and Van Niekerk “The financial stability mandate of the South African Central bank in the post Crisis financial landscape” (2018) *JIBLR* 414 (hereinafter Van Heerden and Van Niekerk).

¹² Report to the G-20 Finance Ministers and Central Bank Governors (2009) Guidance to assess the systemic importance of financial institutions, markets and instruments: initial considerations available at <http://www.imf.org/external/np/g20/pdf/100109.pdf> (accessed 2 June 2016).

Systemic risks fall into two broad categories, namely cyclical risks and structural risks.¹³ Cyclical systemic risk focuses on how risk can build up over time, such as through credit booms and asset price bubbles, and how it impacts negatively on the real economy following such busts.

Structural systemic risks, on the other hand, arise from concentration of risk and the interconnectedness of different parts of the financial system such as the risk posed by large financial conglomerate structures.¹⁴

1.4 The Twin Peaks model of financial regulation

The prime lesson of the GFC was that it highlighted the need to ensure and safeguard financial stability. In order to achieve this objective Llewellyn points out that it is important to have an optimal regulatory model for a country's financial system¹⁵. In this context the Twin Peaks model of functional financial regulation by objective as introduced by Michael Taylor in 1995 has in recent years attracted much attention.

The essence of the Twin Peaks model as proposed by Taylor is that it entails a radical restructuring of the financial services system; in order to give it greater coherence and align it with the realities of the financial and economic market.¹⁶ Taylor proposed the consolidation of existing regulatory bodies, into two peak financial regulatory bodies; one peak regulator would be mandated with ensuring the stability and soundness of the financial system; and the other that would be mandated to protect consumers against unfair business practices. A benefit of the Twin Peaks model was inter alia that it prevented the concentration of power into one institution or body.¹⁷

¹³ SARB Macprudential policy document (2016) 9 available at <https://www.sarb.co.za> accessed in 2 March 2019.

¹⁴ Ibid.

¹⁵ Llewellyn, "Institutional structure of financial regulation and supervision: the basic issues" (2006) paper presented at the World Bank seminar titled "Aligning supervisory structures with country needs" (hereinafter, Llewellyn 2006).

¹⁶Taylor *Twin Peaks: A regulatory structure for the new century* (1996) *The Futures and Derivatives law Review* 1 at 2 (hereinafter Taylor).

¹⁷ Taylor at 2.

The first objective of the Twin Peaks model entails that prudential measures are applied to ensure the financial safety and soundness of institutions. This includes measures such as for example capital adequacy requirements and the vetting of senior managers to ensure that they possess the required skills and experience.¹⁸ The second and equally important objective is to ensure that customers are appropriately protected, and that they are not victims of fraud, incompetence or the abuse of market power.¹⁹

Taylor accordingly proposed the establishment of “twin peaks” within the regulatory framework, being two peak regulatory bodies of equal importance namely, a Financial Stability Commission (FSC); and a Consumer Protection Commission (CPC).²⁰ The FSC would be exclusively concerned with systemic protection. Its functions would include the authorisation, and on-going prudential supervision of all major financial institutions (banks, building societies, securities houses and insurance houses). Such supervision would be carried out on an individual as well as a group basis. The main objective of the FSC would be the prevention of systemic disruption.²¹

The CPC as the other twin regulator would be responsible for consumer protection in the retail markets. In order for the CPC to fulfil its mandate it was envisaged that it should contain various operating divisions, which would deal with private client brokers, future firms, investment managers and packaged products such as life insurance policies and unit trusts. These divisions would operate under one management structure headed by a Commissioner.²²

Taylor regarded this financial regulatory model as optimal for various reasons inter alia that there would be a clear distinction in the roles and objectives of these two peak regulatory entities. The Twin Peaks model would do away with fragmented regulation and would also eliminate regulatory duplication and overlap. Taylor stated that it would create regulatory bodies with clear and precise mandates and perimeters and it would

¹⁸ Taylor at 3.

¹⁹ Ibid.

²⁰ Taylor at 10.

²¹ Ibid.

²² Ibid.

further encourage a system of financial regulation which is open, transparent and accountable to the public.²³

Although initially suggested for the United Kingdom, Australia was the first jurisdiction to adopt a Twin Peaks model in 1998 whereafter a number of other jurisdictions followed suit.

1.5 Twin Peaks in South Africa

South Africa weathered the GFC, partly due to its robust exchange control policy, interest rate policy and the National Credit Act 34 of 2005 which curbed reckless lending.²⁴ As pointed out by Van Heerden and Van Niekerk reform of the approach to financial regulation in South Africa did not occur solely in response to the GFC but took off when South African National Treasury launched a formal review of the financial regulatory system in 2007.²⁵ South Africa as member of the G20 undertook further financial reforms to align it with post GFC-reforms on an international level.

This reform drive culminated in a policy document issued by the National Treasury in 2011 titled “*A Safer Financial Sector to Serve South Africa Better*”.²⁶ This policy document set in motion South Africa’s transition to a Twin Peaks model, proposing a change from the then existing silo sectoral model of financial regulation to a Twin Peaks model focusing on maintaining financial sector stability, safety and soundness of financial institutions and the protection of consumers.²⁷

Approximately six years later the South African Twin Peaks model was eventually formally introduced by the Financial Sector Regulation Act 9 of 2017(hereinafter FSRA). The Act establishes two new authorities, the Prudential Authority and the Financial Sector Conduct Authority, with specific responsibilities, mandates, and powers to achieve effective prudential and market conduct oversight. It also locates within the model the South African Reserve Bank as apex peak responsible for the

²³ Taylor at 16.

²⁴ A safer financial sector to serve South Africa better 7.

²⁵ Van Heerden and Van Niekerk 416.

²⁶ A safer financial sector to serve South Africa better” (2011) 4. See also the follow-up document issued by National Treasury titled “Implementing a Twin Peaks model of financial regulation in South Africa “ (2013) available at <https://www.treasury.gov.za> accessed on 24 March 2019.

²⁷ A safer financial sector to serve South Africa better (2011) 2.

promotion and maintenance of financial stability in accordance with an express and extended financial stability mandate as captured in the FSRA. As remarked by Van Heerden and Van Niekerk the South African Twin Peaks model is thus in actual fact a three peak-model.²⁸

1.6 Nature and scope of dissertation

The South African Twin Peaks model is unique in that it does not combine the systemic (i.e. financial stability) mandate and prudential regulation mandate in one body under the central bank as was proposed by Taylor in his original Twin Peaks model. The purpose of microprudential supervision is, ultimately, to protect a bank from distress or insolvency, and by doing so, also protect the public and depositors from the ill-effects that may follow.

A bank is thus generally considered sound from a prudential perspective when it meets all the mandated regulatory requirements, and customers of the bank are protected.²⁹ Notably, it creates a separate entity to deal with prudential regulation and supervision.

The responsibility for prudential regulation has been shifted from the remit of the central bank that previously attended to this function through its Bank Supervision Department (BSD) and now falls within the exclusive remit of the Prudential Authority.³⁰

Accordingly it is necessary to interrogate the institutional role of the Prudential Authority in the South African Twin Peaks model and how it will contribute to the effectiveness of the model.

1.7 Methodology

The methodology to be followed in this dissertation is that of a desk-top based literature review, focusing on relevant policy documents, legislation, books and journal

²⁸ Van Heerden and Van Niekerk 416.

²⁹ Gohari and Woody "Can macroprudential regulation prevent another global financial disaster?" (2015) *Journal of Comparative Law* 403.

³⁰ Ibid.

articles. It will also include a comparative study with reference to the institutional role of the Prudential Authority in the Australian Twin Peaks model.

1.8 Chapter lay-out

Chapter 1 will provide a general introduction to the topic of the dissertation. It contains the roadmap to the study and also sets out the research statement and objective, research methodology and chapter lay-out. Chapter 2 will focus on the specific role the Prudential Authority (PA) in the South African Twin Peaks model. It will interrogate the objectives and functions of the PA; its institutional and management structure and its regulatory toolkit. Chapter 3 will provide a comparative study of the Twin Peaks model in Australia focusing on the Australian Prudential Authority (APRA). This chapter will provide a brief overview of the Australian model and will consider the objectives and functions of APRA as well as its toolkit and measures aimed at collaboration. Chapter 4 finalises the study and contains the conclusions of the study and recommendations on the way forward.

Chapter 2: The Role of the Prudential Authority in the South African Twin Peaks Model

2.1 Introduction

As indicated in Chapter One, the South African Twin Peaks model differs from the Twin Peaks model originally proposed by Michael Taylor in that it does not locate the responsibility for overall systemic stability and bank regulation and supervision within the same entity or peak. Notably the FSRA removes bank supervision from the remit of the SARB which is given the overall stability mandate for the South African financial system.

In the place of the erstwhile Bank Supervision Department (BSD) of the SARB that was tasked with microprudential supervision of banks, the FSRA introduces the Prudential Authority (PA). The PA however has a much broader, system-wide mandate of prudential regulation of financial institutions and not merely of banks.³¹ The provisions relating to the establishment, governance, staff, resources and financial management of the PA are set out in Chapter 3 of the FSRA.

Although the PA is a separate juristic person it is located and operates within the administration of the SARB.³² It also receives all its administrative support from the SARB. The fact that it is a separate juristic person means that it has operational independence. The PA is governed by a Prudential Committee of which the CEO is a Deputy Governor of the SARB. The Prudential Committee is comprised of the Governor of SARB, the CEO and the other Deputy Governors of SARB.³³ It can thus be said that although the PA is a separate juristic body it seems that it is nevertheless “managed” by SARB given the composition of the Prudential Committee.

³¹ Van Niekerk Thesis 174.

³² Section 32. In terms of section 32(3) the PA is not a public entity in terms of the Public Finance Management Act 1 of 1999.

³³ Section 41.

The role of the Prudential Committee is to generally oversee the management and administration of the PA in order to ensure that it is efficient and effective. It must also act for the PA in signing Memoranda of Understanding (MOUs); in delegating powers to the FSCA in accordance with a MOU; in adopting the PA's regulatory strategy; in adopting administrative action procedures; in appointing members of subcommittees; in making prudential standards; in making determinations of fees in terms of financial sector laws and in any other matter assigned to it by a financial sector law.³⁴

2.2 Objectives and function

The objectives of the PA are:

- (a) to promote and enhance the safety and soundness of financial institutions that provide financial products and securities services;
- (b) to promote and enhance the safety and soundness of market infrastructures; to protect financial customers against the risk that those financial institutions may fail to meet their obligations; and
- (c) to assist in “maintaining” financial stability.³⁵

It is thus clear that the PA is a critical cog in the machinery that regulates the South African financial system given its responsibility to ensure that financial institutions are safe and sound in the interests of financial stability. In order to achieve its objective, the PA must, in accordance with its functions as set out in section 34 of the FSRA, regulate and supervise financial institutions and cooperate with and assist the SARB, the Financial Stability Oversight Committee³⁶, the FSCA, the National Credit Regulator, the Financial Intelligence Centre and the Council for Medical Schemes.³⁷

The PA must also support sustainable competition in the provision of financial products and financial services, including through cooperating and collaborating with the

³⁴ Section 42.

³⁵ Section 33.

³⁶ See section 20 to 24 regarding the establishment, functions and membership of the Financial Stability Oversight Committee.

³⁷ Section 34(1)(a) and (b). .

Competition Commission.³⁸ It is also required to support financial inclusion³⁹ and must regularly review the perimeter and scope of financial sector regulation, and take steps to mitigate risks.⁴⁰ Finally the PA is required to conduct and publish research relevant to its objective.⁴¹

As pointed out by Van Niekerk the PA's tasks are not confined to those set out in the FSRA but it must also perform any other function conferred on it in terms of any other provision of the FSRA or other legislation.⁴²

The PA will thus be carrying out the functions previously assigned to the BSD in terms of the Banks Act but just on a much broader system-wide scale which would inter alia include prudential regulation of insurance companies and pension funds. The FSRA has amended the Banks Act accordingly to facilitate the supervision of banks by the PA.⁴³

Given that it is a separate juristic person with operational independence the PA must perform its functions without fear, favour or prejudice.⁴⁴ Section 34(3) further provides that the PA may do anything that is necessary to achieve its objective, including cooperating with its counterparts in other jurisdictions; and participating in relevant international regulatory, supervisory, financial stability and standard setting bodies.⁴⁵

When performing its functions, the PA is obliged to take into account the need for a "primarily pre-emptive, outcomes focused and risk-based approach". It must further prioritise the use of its resources in accordance with the significance of risks to the

³⁸ Section 34(1)(d).

³⁹ Section 34(1)(e).

⁴⁰ Section 34(1)(f).

⁴¹ Section 34(1)(g).

⁴² Section 34(2).

⁴³ See Schedule 4 of the FSR Act which amends section 1 of the Banks Act 94 of 1990 as follows: "(a) by the insertion in subsection (1) after the definition of 'allocated capital and reserve funds' of the following definition: 'Authority' means the Prudential Authority established in terms of section 32 of the Financial Sector Regulation Act."

⁴⁴ Section 34(5).

⁴⁵ Section 34(3)(a) and (b).

achievement of its objective.⁴⁶ This means that it will afford more regulatory attention to those institutions that pose greater systemic risk to the South African financial system.

The PA must also, to the extent practicable, have regard to international regulatory and supervisory standards set by international standard setting bodies (for example the Basel Committee and Financial Stability Board) and must have regard to circumstances prevailing in South Africa.⁴⁷

Van Niekerk accordingly remarks that the PA thus has a microprudential mandate in terms whereof it must consider the individual safety and soundness of financial institutions, and since it has to have regard to circumstances prevailing in the country and regulate and supervise financial institutions on a system wide basis, it also has a macroprudential mandate.⁴⁸

2.3 The Prudential Authority's Regulatory Toolkit

In order to ensure the safety and soundness of financial institutions and market infrastructures and to protect consumers against failure of financial institutions and assist in maintaining financial stability in South Africa the FSR Act affords the PA broad regulatory powers.

In the first place the PA is the licensing authority for the entities under its supervision. This means that the PA is put in a position where it is able to receive information regarding the financial health and operations of entities under its supervision so that it can make sure they are “safe and sound” and do not pose risks that threaten the stability of the South African financial system.⁴⁹

A very important role that is also assigned to the PA is the task to impose stringent prudential standards on systemically important financial institutions (SIFI) that have

⁴⁶ Section 34(4)(a).

⁴⁷ Section 34(4)(b).

⁴⁸ Van Niekerk Thesis 192.

⁴⁹ Chapter 8 of the FSR Act deals with licensing. See specifically sections 111-128.

been designated as such by the SARB in terms of section 29 of the FRS Act, as discussed below.⁵⁰

Notably the FSR Act decks the PA out with an extensive regulatory toolkit which comprises of various powers. This includes the power to issue standards and directives, to gather information, to conduct supervisory on-site inspections, to conduct investigations if it reasonably suspects that a financial sector law has been or is being contravened or might be contravened and to apply for a search warrant and engage in search and seizure activities.⁵¹

The PA can also issue guidance notices⁵² and interpretation rulings relating to aspects of financial services laws within its remit.⁵³ It may further enter into enforceable undertakings;⁵⁴ institute proceedings in a high court to ensure compliance with a financial sector law;⁵⁵ make an order for debarment of a natural person;⁵⁶ and enter into a leniency agreement.⁵⁷

⁵⁰ Section 29 read together with section 30.

⁵¹ Section 129 -139 deals with information-gathering, supervisory on-site inspections and investigations. Section 129 sets out the application and interpretation of this Chapter and section 130 addresses the aspect of legal professional privilege. Section 134 deals with the appointment of investigators; section 135 indicates the grounds for the exercise of the power of investigation and section 136 deals with the details of the powers of investigators to question persons and to require the production of documents or other items. The powers of investigators to enter and search premises is set out in section 137 whilst the authority and grounds for applying for a search warrant is set out in section 138. Section 139 further contains provisions relating to interference with investigations.

⁵² Section 141. As indicated in section 141(2) a guidance notice is a non-binding notice issued for information purposes.

⁵³ Section 142. As indicated in section 142(1), an interpretation ruling is a statement published by a regulator regarding the interpretation or application of a specified provision of an applicable financial sector law, in circumstances as specified in the statement.

⁵⁴ Section 151. A person may give a written undertaking to the PA concerning that person's future conduct in relation to a matter regulated by a financial sector law, and that undertaking then becomes enforceable upon its acceptance.

⁵⁵ Section 152.

⁵⁶ Section 153. Debarment orders can be made if a person has contravened a financial sector law in a material way; materially contravened an accepted enforceable undertaking; attempted, or conspired with, aided, abetted, induced, incited or procured another person to materially contravene a financial sector law or materially contravened a financial sector law of a foreign country that corresponds to a South African financial sector law. The effect (as per section 153(2)) of a debarment order is that the debarred person is prohibited, for a specified period, from providing, or being involved in the provision of, specified financial products or services or acting as a key person of a financial institution or providing specified services to a financial institution.

⁵⁷ Section 156. Such an agreement gives a person who has contravened a financial sector law leniency from prosecution if he can provide information that the regulator needs to prosecute another person for contravening a financial sector law.

The FSRA also gives the PA specific regulatory powers pertaining to significant owners of financial institutions⁵⁸ and designation of financial conglomerates for purposes also of easing the supervision of such conglomerates.⁵⁹

The PA can also impose an administrative penalty on a person who has contravened a relevant financial sector law for which the PA is responsible or who has contravened an enforceable undertaking that was accepted by the PA.⁶⁰

Van Niekerk remarks that of the aforementioned regulatory tools it can be expected that the PA will most generally make use of standards and directives to facilitate the execution of its mandate making use of a “carrot and stick approach”. In this context standards lay down certain minimum prudential requirements that financial institutions must comply with and directives are used to enforce compliance with these prudential standards.⁶¹

Section 105 deals with the powers of the PA to issue prudential standards which must be aimed at ensuring the safety and soundness of financial institutions and reducing the risk that those financial institutions and key persons engage in conduct that amounts to, or contributes to, financial crime and, importantly, these standards should also be aimed at assisting in maintaining financial stability.⁶²

Notably the PA may not make a standard aimed at assisting in maintaining financial stability without the concurrence of the SARB.⁶³ As pointed out by Van Niekerk this is obviously because the SARB is responsible for protecting and enhancing overall financial stability and thus has to have the final say on any aspect relating to financial stability.⁶⁴

The PA may make prudential standards on a variety of matters namely:⁶⁵

⁵⁸ Section 157-159.

⁵⁹ Section 160.

⁶⁰ See section 167.

⁶¹ Van Niekerk Thesis 194.

⁶² Section 105 (2).

⁶³ Section 109(2).

⁶⁴ The PA is granted the responsibility to assist in maintaining financial stability in section 33(d) and the FSCA in section 57 (c).

⁶⁵ Section 105(3)(a) to (d).

- (a) financial requirements in relation to capital adequacy, minimum liquidity and minimum asset quality;
- (b) matters on which a regulatory instrument may be made by the PA in terms of a specific financial sector law;
- (c) matters that may in terms of any other provision of the FSR Act be regulated by prudential standards,
- (d) prudential matters relating to SIFIs as set out in section 30⁶⁶; and
- (e) any other matter that is appropriate and necessary for achieving any of the aims set out in section 105(2).

Section 108 sets out additional matters in respect of which prudential standards may be made by the PA.⁶⁷ In order to facilitate consistent regulation and avoid regulatory arbitrage the PA and the FSCA may also make joint standards on any matter in respect of which either of them have the power to make a standard.⁶⁸

The PA's power to issue directives is set out in section 143 of the FSRA which authorises the PA to issue a written directive to a financial institution or market infrastructure or a key person of a financial institution, requiring it to take certain action as required in the directive. The PA may also issue a directive to a holding company of a financial conglomerate so that the holding company can ensure that its subsidiaries comply with the directive.⁶⁹

⁶⁶ Section 30.

⁶⁷ In terms of section 108 these additional matters include the following: fit and proper requirements; governance; the appointment, duties and responsibilities, remuneration, reward, incentive schemes and suspension and dismissal of governing bodies and their substructures and also in respect of key persons; the operation and operational requirements for financial institutions; financial management; risk management and internal control requirements; the control functions of financial institutions, including the outsourcing of control functions; record-keeping and data management by financial institutions and representatives; reporting by financial institutions and representatives to a financial sector regulator; outsourcing by financial institutions; insurance arrangements, including reinsurance of financial institutions; the amalgamation, merger, acquisition, disposal and dissolution of financial institutions; recovery, resolution and business continuity of financial institutions; requirements for identifying and managing conflicts of interest; and requirements for the safekeeping of assets, including requirements pertaining to the approval and supervision of nominees and custodians.

⁶⁸ Section 107.

⁶⁹ Section 143(2).

Directives can be issued if the financial institution concerned is conducting its business in an improper or financially unsound way that poses a risk that the financial institution may not be able to comply with its obligations. It can also be issued if the financial institution has contravened or is likely to contravene a financial sector law for which the PA is the responsible authority. Directives can further be issued if the financial institution has not complied with an enforceable undertaking accepted by the PA or if it is involved or likely to be involved in financial crime or is causing or contributing to instability in the financial system, or is likely to do so.⁷⁰

The purposes of a prudential directive are to ensure the safety and soundness of financial institutions; protect consumers against risks that the financial institutions will not be able to meet their obligations and, very importantly, to assist in maintaining financial stability.⁷¹

Prudential directives may further be aimed at ensuring that the financial institution, or the person that it is addressed to, complies with an enforceable undertaking; or to stop the financial institution or holding company of a financial conglomerate from contravening applicable financial sector laws or reducing the risks of such contraventions; or to stop it from being involved in financial crime or reducing the risk that it may be so involvement in financial crime.

Directives may also be aimed at reducing the risk that a systemic event⁷² may occur or to remedy the effects of a contravention of a financial sector law or involvement in financial crime.⁷³

The function of a directive is to require the financial institution to which it is issued to take certain specified actions within a specified time. As pointed out by Van Niekerk it may for instance direct the financial institution to restore its liquidity and enhance its safety and soundness.

A directive can also require a financial institution to stop offering or providing a specific financial product or to modify a specific financial product or its terms and conditions or

⁷⁰ Section 143(1)(b)(i) and (ii). See also section 143(2).

⁷¹ Section 143(3).

⁷² See chapter 1 par 1.5.

⁷³ Section 14 (3)(a) to (f).

to remove a person from a specified position or function, for example removing its key risk officer if he is unfit for the job.

Directives may also require that the financial institution is prohibited from paying a dividend or a specified bonus or performance payment or that the financial institution is prohibited from entering into a specific transaction or undertaking a specific obligation or that the financial institution must remedy the effects of a contravention of a financial sector law.⁷⁴

2.4 The role of the Prudential Authority in relation to SIFIs

Section 30 of the FSR Act provides that after the Governor of SARB has designated a SIFI and in order to mitigate the risk that systemic events may occur, the SARB may, after consulting the PA, direct the PA to impose on such SIFI, either through prudential standards or directives, requirements relating to:

“(a) Solvency matters and capital requirements, which may include requirements in relation to counter-cyclical capital buffers;

(b) leverage ratios;

(c) liquidity;

(d) organisational structures;

(e) risk management arrangements , including guarantee arrangements;

(f) sectoral and geographical exposures;

(g) required statistical returns;

(h) recovery and resolution planning; and

(i) any other matter in respect of which a prudential standard or regulator’s directive may be made.

The rationale behind imposing more stringent prudential regulation on SIFIs is to ensure that they are well capitalised and able to absorb losses if certain risks materialise without such risks leading to their financial collapse. This is because SIFIs

⁷⁴ Section 143(5)(a) to (e).

are so large, complex and interconnected that the failure of a SIFI can trigger the failure of the whole financial system.⁷⁵

2.5 Cooperation and collaboration

According to Llewellyn, irrespective of the kind of model of regulation a country opts for, there are key issues that are universal amongst all models such as the need for co-operation, collaboration and information sharing between the regulators.⁷⁶ Given the fragmented history of the South African financial system,⁷⁷ National Treasury emphasised that it is particularly important for regulators to co-operate and collaborate in order for the Twin Peaks model to work.⁷⁸

The FSRA provides for co-operation and collaboration between financial sector regulators (PA, FSCA, the FIC, and the NCR and the SARB. This is important because there is bound to be conflict, duplication and overlap of regulation and functions. Such cooperation and collaboration has to occur on two levels: firstly for the dedicated purpose of maintaining financial stability (as per section 26) and secondly, on a broader level for the general effective and efficient working of the Twin Peaks model (as per section 76).

Co-operation and collaboration is enabled through entering into various Memoranda of Understanding (MOU's) by the SARB with other regulators in relation to financial stability,⁷⁹ and between regulators themselves when performing their functions in terms of financial sector laws.⁸⁰

⁷⁵ Van Niekerk Thesis 199.

⁷⁶ Llewellyn 2006 at 11.

⁷⁷ Safer Financial Sector 28.

⁷⁸ Safer Financial Sector 19.

⁷⁹ Section 27 of the FSRA.

⁸⁰ Section 76 and 77.

Chapter Three: The Australian Prudential Authority in the Australian Twin Peaks model

3.1 Introduction

Australia pioneered the Twin Peaks model of financial regulation pursuant to the Australian Financial System Inquiry, better known as the Wallis Inquiry.⁸¹

A complete new legal framework for the regulation of the Australian financial system was created that came into operation on 1 July 1998, moving the model of financial regulation in Australia from a sectoral model to a Twin Peaks model of financial regulation by objective. The Australian Twin Peaks model is, like the South African model, also a three peak-model, comprising of the following:⁸²

(a) The Prudential Regulator: The Australian Prudential Regulation Authority (APRA) was established in 1998 by the Australian Prudential Authority Act.⁸³ APRA operates outside and independent of the Reserve Bank of Australia (RBA) which is the Australian central bank. It has the responsibility of prudential supervision of all

⁸¹ Cooper J “The integration of financial regulatory authorities – the Australian experience” Australian Securities and Investments Commission (2006) <http://download.asic.gov.au/media/1339352/integration-financial-regulatory-authorities.pdf> accessed 24 March 2019 at 2 (hereinafter Cooper).

⁸² Schmulow “The four methods of financial system regulation: an international comparative survey” 2015 (26) *Journal of Banking and Finance Law and Practice* 151 (hereinafter Schmulow).

⁸³ Act 50 of 1998, hereinafter the APRA Act.

Authorised Deposit-taking Institutions (ADIs)⁸⁴and focuses on the safety and soundness of the entities it supervises, which includes banks and life insurance and general insurance companies as well as superannuation funds. Together with the RBA as central bank APRA also has an express statutory duty to “promote” the stability of the Australian financial system.⁸⁵

(b) The Market Conduct Regulator: The Australian Securities and Investments Commission (ASIC), is the market conduct regulator in the Australian Twin Peaks model. ASIC operates under the framework of the Australian Securities and Investments Commission Act 2001.⁸⁶ ASIC is responsible for consumer protection and market integrity in areas such as superannuation and insurance across the financial system.⁸⁷ It is also tasked to take regulatory actions to minimise systemic risk in clearing and settlement systems.

(c) The Central Bank: The Reserve Bank of Australia (RBA) is the Australian central bank. Its mandate includes responsibility for monetary policy, overall financial system stability, interest rates and regulation of the payments system. It also functions as lender of last resort under certain limited circumstances.⁸⁸

Coordination and collaboration in the Australian Twin Peaks model is facilitated by a Council of Financial Regulators (CFR) that was established in 1998. On a practical level the regulators have entered into various MOUs to facilitate their cooperation and collaboration in the interests of the effective functioning of the Australian Twin Peaks model, as discussed below.

⁸⁴ Group of Thirty, “Structure of financial supervision: Approaches and challenges in a global market place” (2008) 21, available at www.group30.org/images/uploads/publications, accessed on 8 March 2019. (hereinafter, Group of Thirty).: Banking services in Australia are provided by Authorised Deposit-Taking Institutions (ADIs), which include banks, building societies, and credit unions. Four banks dominate the local market: the Australia and New Zealand Banking Group Limited, Commonwealth Bank of Australia, the National Australia Bank Limited, and Westpac Banking Corporation.

⁸⁵ Section 8(2) APRA Act.

⁸⁶ Act 51 of 2001, hereinafter the ASIC Act.

⁸⁷ Section 1(2)(a) ASIC Act:

⁸⁸ Schmulow at 41.

3.2 Objectives and functions

APRA is an integrated national prudential regulator of all ADIs, friendly societies, insurance companies including life insurance and general insurance and superannuation funds. As APRA also has an express mandate to promote financial stability it can be said that the responsibility for financial stability in Australia is a shared mandate between the RBA and APRA.⁸⁹

However in relation to this shared mandate the RBA and APRA each have different objectives and functions and responsibilities. Edey remarks:⁹⁰ “It is sometimes said that the Bank is the macroprudential authority in Australia and APRA is the microprudential authority. The implication is that the bank looks at stability from the point of view of the system while APRA looks only at the individual institutions. I think that is at best an oversimplification and is an unhelpful way to look at the two institutional roles. It presupposes that it is possible to focus on the system as a whole without taking an interest in the individual components or, conversely, that an agency can sensibly look at parts without being interested in how they interact with the whole.

The difference between the two roles, I suggest, is best understood in terms of their powers and responsibilities rather than their objectives. APRA has powers and responsibilities that relate mainly to individual institutions, but its legislative mandate includes stability of the system, and it can adjust its prudential settings to address system-wide concerns. The RBA has a broad financial stability mandate, existing in conjunction with other macro-economic objectives and attached to a very different set of powers.” According to Edey the RBA and APRA thus “have different powers but overlapping and complementary objectives in relation to financial stability.”⁹¹

In terms of the APRA Act it is stated that APRA’s main purposes are to prudentially regulate bodies⁹² in the financial sector in accordance with other laws of the

⁸⁹ Van Niekerk Thesis 162.

⁹⁰ Edey M “The Financial Stability Role of Central Banks” Address delivered at the Thomson Reuters Australian Regulatory Summit Sydney (1 May 2013) <https://www.rba.gov.au/speeches/2013/sp-ag-010513.html> accessed 25 April 2019).

⁹¹ Ibid.

⁹² Section 3(2) of the APRA Act

Commonwealth that provide for prudential regulation⁹³ or for retirement income standards; to administer the financial claims schemes⁹⁴ provided for in the Banking Act 1959 and the Insurance Act 1973; to develop the administrative practices and procedures to be applied in performing that regulatory role and administration.⁹⁵

In performing its functions and exercising its powers, APRA is required to balance the objectives of “financial safety and efficiency, competition, contestability and competitive neutrality” to promote financial system stability in Australia.⁹⁶

APRA is very prominent in the Australian Twin Peaks model and its financial stability mandate was affirmed by the Treasurer’s Statement of Expectations in 2007 which stated that prudential regulation seeks to reduce market failure by limiting the systemic risks associated with breaches of financial promises.⁹⁷ Unlike South Africa there is currently no provision specifically for prudential regulation of SIFIs in Australia.

3.3 APRA’s Regulatory Toolkit

Cooper points out that APRA has three main categories of regulatory powers, namely authorisation or licensing powers; supervision and monitoring powers; and powers to act in circumstances of financial difficulties to protect depositors, policy holders and superannuation fund members. Where financial institutions encounter severe financial distress APRA can take control of them and can wind them up if they become insolvent.⁹⁸ Cooper further indicates that APRA takes a primarily risk-based approach to prudential regulation and aims to ensure effective and competitive financial markets. When failure of financial institutions does occur, APRA acts to maintain public

⁹³ Section 3 of the APRA Act.

⁹⁴ IMF Country Report on Australia 12/308 at 9.

⁹⁵ Section 8(1) APRA Act.

⁹⁶ Section 8(2).

⁹⁷ The Treasurer “Statement of Expectations for APRA” (20 February 2007) <http://www.apra.gov.au/AboutAPRA/Documents/Statement-of-Expectations-from-Treasurer-20-Feb-07.pdf> (accessed 1 February 2018); See also RBA & APRA Financial Stability 2012 2.

⁹⁸ Cooper 2006 6;

confidence in the financial system by facilitating the failed institution's orderly exit from the market.⁹⁹

ADIs are regulated by APRA under a single licensing regime and depositors are covered by the depositor protection provisions of the Banking Act 1959 which authorise APRA to act in the interest of depositors when necessary.¹⁰⁰ Only APRA may use the tools available for macroprudential supervision¹⁰¹ in order to change the behaviour of financial institutions.¹⁰²

APRA is empowered to issue prudential standards to promote the safety and soundness of financial institution which in turn serves to promote the stability of the Australian financial system.¹⁰³ APRA can also take direct action if it identifies behaviour or financial distress that may threaten an ADI's ability to meet its financial obligations to depositors, or that may otherwise threaten financial system stability.

These measures include powers to extract information from an ADI;¹⁰⁴ investigatory powers;¹⁰⁵ and the powers to give binding directions to an ADI (for example to recapitalise).¹⁰⁶ Where ADIs encounter severe financial distress APRA may appoint a statutory manager to assume control of a distressed ADI¹⁰⁷ or it may take control of the institution itself.¹⁰⁸ As indicated above, if the ADI nevertheless fails then APRA can apply for the winding-up of the ADI.¹⁰⁹ APRA not only grants licences to ADIs but it can also revoke their licences.¹¹⁰

⁹⁹ Ibid.

¹⁰⁰ Section 12 of the Banking Act 1959.

¹⁰¹ These tools for example include interest rates, reserve requirements and countercyclical buffers. See Galati and Moessner "Macroprudential policy: a literature review" (2011) BIS working paper No 337 available at <https://www.bis.org> accessed on 2 April 2019.

¹⁰² Reserve Bank of Australia and Australian Prudential Regulation Authority "Macroprudential Analysis and Policy in the Australian Financial Stability Framework" 14 (September 2012) <http://www.rba.gov.au/fin-stability/resources/2012-09-map-aus-sf/pdf/2012-09-map-aus-fsf.pdf> accessed 22 March 2019 (hereinafter RBA & APRA Financial Stability 2012).

¹⁰³ See section 11AF of the Banking Act.

¹⁰⁴ In terms of section 13(1) of the Banking Act ADI's have to supply information to APRA when required to do so; and in terms of section 13(2) an ADI has to inform APRA if the ADI is likely to become unable to meet its obligations or if it is about to suspend payment.

¹⁰⁵ Section 13(4), 13A(1) and 61 of the Banking Act.

¹⁰⁶ Section 11CA of the Banking Act.

¹⁰⁷ See Division 2 Subdivision B of the Banking Act for provisions regarding the dealing with control of an ADI's business by an ADI statutory manager.

¹⁰⁸ Section 13A(1) and section 65 of the Banking Act.

¹⁰⁹ Section 14F of the Banking Act.

¹¹⁰ Sections 9(4)(b), 9A and 11AB of the Banking Act.

APRA's power to issue directions to an ADI is triggered if the ADI is unable to comply with APRA's regulatory requirements, or if its operations are unsound or if the ADI operates in a manner that could reasonably lead to its failure. The directions power is an early intervention power that kicks in at an early stage before actual or imminent failure of an ADI and APRA can thus issue directions timeously to prevent the failure of such ADI.¹¹¹

APRA also supervises financial conglomerates given their ability to pose risk to the financial system. This task is undertaken by the Diversified Institutions Division in APRA which deals with large and complex financial groups and appropriately administers regulation and supervision proportional to the size of an ADI.¹¹²

This proportionate supervision approach means that APRA undertakes more intensive supervision and imposes potentially higher capital requirements on institutions that pose greater systemic risk. Given that APRA is tasked with both systemwide (macroprudential) regulation and supervision as well as regulation and supervision of individual institutions (microprudential) it monitors and avert risks inter alia through its horizontal reviews and industry-wide stress tests.

Where risks are identified APRA develops suitable responses to mitigate those risks..¹¹³ In terms of section 10 of the APRA Act, APRA must advise the Minister of Finance as soon as practicable if it considers that an ADI under its supervision is in financial difficulty.¹¹⁴

A feature of APRA's regulatory approach that has attracted wide-scale interest is the Probability and Impact Rating System (PAIRS) and the Supervisory Oversight and Response System (SOARS) that was introduced in October 2002.¹¹⁵ PAIRS and SOARS work together. PAIRS is a framework that measures how risky an institution is in relation to APRA's objectives. SOARS is then a framework which determines how

¹¹¹ RBA & APRA Financial Stability 2012 15 and 16.

¹¹² Prudential Standard APS 001 (January 2013) http://apra.gov.au/adi/PrudentialFramework/Documents/120928-APS-001_FINAL.pdf accessed 13 May 2019.

¹¹³ RBA & APRA Financial Stability 2012 4.

¹¹⁴ Section 10(1). Australian Prudential Authority *Annual Report 2016/2017 – Statutory Report (2016/2017)* <http://www.apra.gov.au/AboutAPRA/Publications/Pages/APRA-AR-2017-Statutory-Report.htm> accessed 13 May 2019.

¹¹⁵ RBA & APRA Financial Stability 2012 17 and 18.

officials have to respond to that risk.¹¹⁶

Schmulow explains that PAIRS classifies the risk profile of regulated institutions into five categories: low, lower medium, upper medium, high and extreme. PAIRS works on a multiplier scale and not a linear scale which then results in a higher SOARS scale. A higher SOARS scale attracts more intensive regulation.¹¹⁷ Schmulow indicates that the type of risk that a financial institution may be subject to is thus taken into account. The result is that the potential impact that a regulated entity might have on the financial system is also divided into four categories: low, medium, high and extreme. In addition the size of the ADI is also taken into account.¹¹⁸

PAIRS and SOARS are combined so that the PAIRS measure of supervisory concern is translated into a supervisory stance of one of the following: “normal”, “oversight”, “mandated improvement” or “restructure”. The higher the supervisory concern that is generated on the PAIRS scale the more intrusive the supervisory stance on the SOARS scale.¹¹⁹

3.4 Cooperation and collaboration

The success of the Australian Twin Peaks model depends crucially on the good cooperation and collaboration between the RBA, APRA and ASIC. As pointed out by Godwin et al this includes: (i) proactive information-sharing; (ii) consultation and mutual assistance; (iii) practical measures to encourage and facilitate coordination; and (iv) a coordination body, i.e. the Council of Financial Regulators.¹²⁰

Various memoranda of understanding and informal protocols exist between the RBA and APRA and ASIC. The form or content of the MOUs is not prescribed by law and Godwin et al point out that the legislative framework is “more supporting than prescriptive”.¹²¹ These purpose of the MOUS it to arrange for exchange of information,

¹¹⁶ Ibid.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Ibid.

¹²⁰ Godwin A, Li G and Ramsay I “Is Australia's 'Twin Peaks' System of Financial Regulation a Model for China?” (11 April 2016) CIFR Paper No. 102/2016 <https://ssrn.com/abstract=2763300> accessed 23 March 2019 (hereinafter Godwin et al 2016 30).

¹²¹ Godwin et al 2016 34.

the avoidance of duplication and a clear outline of responsibilities of the regulators, particularly in crisis times.¹²²

Notably, a MOU on Financial Distress Management was signed between the RBA, APRA and ASIC in 2008.¹²³ This MOU confirms that the RBA has the primary responsibility for the maintenance of overall financial system stability, including stability of the payments system and for providing liquidity support to the financial system or to individual financial institutions where appropriate.¹²⁴

APRA has the lead responsibility for monitoring and prudentially supervising financial institutions;¹²⁵ and ASIC is responsible for monitoring financial service providers and for advising on emerging vulnerabilities.¹²⁶ The MOU states that APRA is responsible for assessing and advising on the nature and extent of financial distress in a supervised institution, including liquidity and solvency, and for evaluating and implementing supervisory response options relating to any affected institution; and ASIC assesses and advises on the regulatory implications of the situation for financial markets and investors, the disclosure implications of any resolution option, and for liaising with market operators.¹²⁷

Given that both the RBA and APRA have responsibility for financial stability they have to coordinate effectively to ensure that information is aptly shared between them and meaningful policies are implemented. They do this in terms of a MOU that was entered into on 12 October 1998 and which inter alia sets out their respective responsibilities, how they should share information and how they must deal with threats to financial system stability.¹²⁸

APRA and ASIC entered into MOUs on 12 October 1998 and 30 June 2004, which were replaced by a later MOU entered into on 18 May 2010.¹²⁹ The objective of this MOU is to set out a framework for cooperation between APRA and ASIC in areas of

¹²² Godwin et al 2016 30.

¹²³ Memorandum of Understanding on financial distress management between the members of the Council of Financial Regulators (18 September 2008) <http://www.apra.gov.au/AboutAPRA/Documents/MOU-CoFR-Council-of-Financial-Regulators-on-Financial-Distress-Management.pdf> (accessed 2 May 2019), hereinafter MOU CFR 2008.

¹²⁴ MOU CFR 2008 par 2.

¹²⁵ MOU CFR 2008 par 5.1:

¹²⁶ Ibid.

¹²⁷ MOU CFR 2008 par 5.2.

¹²⁸ RBA & APRA Financial Stability 2012 3 and 7.

¹²⁹ MOU APRA & ASIC 2010.

common interest where cooperation is essential for the effective and efficient performance of their respective financial regulation functions.¹³⁰

Chapter 4: Conclusions and Recommendations

4.1 Introduction

As indicated in Chapter One, South Africa took a calculated decision to reform its approach to financial regulation by moving from a silo sectoral model of financial regulation to a Twin peaks model of functional financial regulation by objective. The framework for the South African Twin Peaks model was finally introduced in August 2017 by the Financial Sector Regulation Act 9 of 2017 (FSRA).

In the main the South African Twin Peaks model is a three peak-model comprising of the SARB as central bank that is tasked with the overall financial stability mandate and the Prudential Authority (PA) as system wide prudential regulator and its twin regulator on an equal footing, the Financial Sector Conduct Authority (FSCA), as market conduct regulator.

In this Twin Peaks model the SARB is no longer responsible for any form of direct prudential supervision but the PA as a separate juristic person located within the SARB has to step up to this task. As pointed out the PA (and also the FSCA) is required in terms of section 32 of the FSRA to assist the SARB with the maintenance of financial

¹³⁰ MOU APRA & ASIC 2010 paragraph 1.1.

stability and one can thus say that the maintenance of financial stability in South Africa is a joint venture between the SARB and the twin regulators.

This dissertation sought to specifically consider the role of the PA in the new South African Twin Peaks model by interrogating the provisions of the FSRA. As such it considered the establishment of the PA, the composition of the prudential authority and its objectives and functions and also broadly looked at its regulatory toolkit.

Given the PA's mandate to oversee the safety and soundness of financial institutions one can appreciate that the PA will play an extremely big role in assisting with the promotion and maintenance of financial stability in the South African financial system and in the context of the new South African Twin Peaks model.

The role that is given to the PA to impose stringent prudential standards on SIFI to enhance their loss absorbency and prevent their financial collapse is a crucially important role within the South African Twin Peaks model. It is clear that the PA being located within the SARB will be able to draw on the resources of the SARB given that the SARB is responsible for facilitating its operational requirements. There is also some synergy to be gained from the fact that the systemic regulator and the prudential regulator are so closely situated and communication between these two entities during crisis times is likely to be much easier than between them and the FSCA which is a separate entity located outside the SARB.

The regulatory toolkit of the PA appears to be rather comprehensive and it seems as if the PA is in a position to deal with the entities under its supervision in a way that will serve to enhance their safety and soundness for instance by setting prudential standards that they may comply with and issuing directives to non-compliant entities to bring them back on the regulatory "straight and narrow."

Alternatively if a financial institution goes into distress and cannot recover the PA can apply standards to facilitate its orderly exit from the financial system so as not to cause major disruptions and crisis. One can thus observe that the PA's toolkit provides for both preventative and remedial tools.

As regards its establishment of the PA as a separate juristic person located within the SARB as central bank it was pointed out that the PA nevertheless seems to have operational independence by virtue of being a separate juristic entity. It is however

submitted that on a practical level such operational independence may be compromised by the fact that, when one has regard to the composition of the Prudential Committee that is responsible for the management of the PA, it seems to be entirely composed of central bank governors.

Also the CEO of the PA is a SARB deputy Governor. One can then ask what guarantee there is that in the event of a conflict between SARB and the PA, for example if the PA is of the view that a certain failing financial entity must rather be allowed to fail and the SARB is of the opinion that the financial entity should be rescued, that the SARB will not just “walk over” the PA?

Having regard to the objectives of the PA it can be remarked that they are set out clearly so that there can be no doubt that the PA is the regulatory entity that attends to the safety and soundness of financial institutions and which guards against risk that may lead to the collapse of these institutions. Given that financial stability will never be possible if the financial institutions that operate in a country’s financial system is not financially appropriately safe and sound, one can appreciate that, even without stating it as directly as it is done in the FSRA, the work undertaken by the PA is indispensable to financial stability.

It is also clear that the PA affords great protection to consumers – even it is more “behind the scenes” type of protection than that rendered by the FSCA - because it is specifically tasked by section 33(c) to “protect financial consumers against the risk that those financial institutions may fail to meet their obligations.”

The FSRA facilitates the execution of the PAs mandate not only by clearly setting out its objectives but also by elaborating on its functions so that there is no confusion regarding the latter. From the broad list of functions of the PA provided in the FSRA it is evident that the PA is not only enjoined to supervise financial institutions and market infrastructures but that it is obliged to cooperate with the SARB and the FSCA and the various other financial regulators that operate within the Twin Peaks model, such as the National Credit Regulator, Financial Intelligence Centre, Council for Medical Schemes and the Competition Commission.

Of particular importance is the role of the PA in regularly reviewing the perimeter and scope of financial sector regulation and the taking of steps to mitigate risk in the

financial system. This illustrates that the PA is a pro-active regulator that has to seek to prevent and mitigate risk in order to aid the maintenance of financial stability in South Africa. The PA is also tasked with cooperating with its counterparts in other countries and with participating in relevant international regulatory, supervisory, financial stability and standard setting bodies which enables the PA to be up to date with international regulatory trends that may benefit financial regulation in South Africa.

When compared to the Australian Twin Peaks model it appears that there are quite a number of similarities, most notably that the Australian model is also a three peak model where the overall financial stability mandate and the mandates for prudential regulation and market conduct regulation is separately afforded to the RBA and APRA and ASIC respectively.

Like with the South African model the RBA as central bank does not have a mandate for prudential regulation of financial institutions which task is imposed on APRA. It appears that APRA is very prominent as a regulator in the Australian financial system and this can be seen also from the fact that it has been afforded a shared mandate for financial stability with the RBA.

It is well-known that Australia has a very resilient financial system and it appears that APRA as pro-active regulator has contributed greatly to such resilience, thus endorsing the role that a well-functioning prudential regulator with a clear mandate and sufficient regulatory powers can play in the effective and efficient functioning of a Twin Peaks model.

It also appears that APRA has an extensive regulatory toolkit and its PAIRS and Soars framework is especially interesting and a measure that the PA can seriously consider adopting.

4.2 Recommendations

To give proper effect to the role of the PA in the South African Twin Peaks model it is recommended that the mandate of the PA as set out in section 33 should be augmented to indicate that it is not only responsible to assist in the promotion of financial stability but also to maintain financial stability.

It is further recommended that the composition of the Prudential Committee be reconsidered in the interest of avoiding a situation where the PA's ability to take independent decisions on matters relating to the safety and soundness of financial institutions is compromised.

It is suggested that persons that actually work in the PA other than the CEO of the PA should also be considered for representation on the prudential committee. In addition it could be considered to also appoint a person from the FSCA as a member of the Prudential Committee to ensure that representation on such committee is well-rounded. Such an arrangement will also facilitate better information sharing because then the Prudential Committee will be comprised of representatives from all three main regulators.

Lastly it is recommended that the PA make a study of the Australian PAIRS and SOARS framework used by APRA to determine whether it needs to adopt a similar type of framework to enhance its supervisory role and its ability to ensure that financial institutions are safe and sound in pursuit of the quest to promote and maintain financial stability in South Africa.

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