APPRAISAL OF SOUTH AFRICA'S LEGISLATIVE ADOPTION OF THE TWIN-PEAKS SYSTEM IN LIGHT OF INTERNATIONAL EXPERIENCES

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DECLARATION

I, **Chad-Lee Cameron Bedeker**, declare that the ***Appraisal of South Africa's legislative adoption of the Twin-Peaks system in light of international experiences***, is my original work (except where acknowledgments indicate otherwise) and that neither the whole work nor any part of it has been, is being or is to be submitted for another degree or examination in any other University or academic institution. All sources and materials used are duly acknowledged and properly referenced. I authorise the University of the Western Cape to reproduce for the purpose of research only, either the whole or any portion of the contents in any manner whatsoever.

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DEDICATION

This thesis is dedicated to Jesus Christ and my Lord God Almighty who has guided me through the completion of this research and to my family for their continued love and support.

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ABSTRACT

Appraisal of South Africa's legislative adoption of the Twin-Peaks system in light of international experiences

The 2007-2008 global financial crisis demonstrated the weakness of a light-touch financial regulatory system. The global financial crisis thus formed the basis for countries to reconsider a model of financial regulation that functions as a preventative measure and was able to protect the financial sector in the wake of a financial crisis. This saw an international trend in financial regulation, with many countries such as Australia, the United Kingdom, Netherlands, Belgium, New Zealand, inter alia, adopting the Twin Peaks model of financial regulation. The impact felt in South Africa (SA) saw the loss of millions of jobs owing to the global financial crisis.

This thesis analyses and assesses the implementation of the Twin Peaks model of financial regulation (Twin Peaks) within SA's broad financial sector. The Twin Peaks model offers a basis for international minimum standards for making the financial sector safer and better. Furthermore, an assessment of the roles of the regulatory agencies established in terms of the Financial Sector Regulation Act 9 of 2017 (hereinafter, FSRA) is conducted. In light of the aforementioned assessments, SA's implementation of Twin Peaks is analysed against the comparators of choice, Australia's and the United Kingdom's (UK) implementation of Twin Peaks system. The justification for selecting Australia as a comparator is due to it being the first country to have adopted and experienced the Twin Peaks as a model of financial regulation through independent reviews and having been tested against banking failures. The UK iteration of the Twin Peaks model has been selected in light of the view that the Twin Peaks model of financial regulation was first theorised by an Englishman, Michael Taylor, in 1995.

The comparative analysis demonstrates how SA through the FSRA establishes two regulatory bodies, the Prudential Authority and the Financial Sector Conduct Authority, which regulators are also found in the Twin Peak systems of comparators of choice. From the examination of experiences from the comparators of choice, lessons are drawn for improved implementation and regulatory effectiveness of Twin Peaks as a model of financial regulation in SA and the point is made that South Africa the FSRA reflects modern international standards of financial regulation.

KEY WORDS AND PHRASES:

Twin Peaks

Financial Sector Regulation Act 9 of 2017

Prudential Authority

Financial Services Conduct Authority

Financial Sector

Financial Institutions

Financial Regulation

Global Financial Crisis

South Africa

LIST OF ABBREVIATIONS

Financial Sector Regulation Act 9 of 2017	FSRA
Republic of South Africa	SA
United Kingdom	UK
Global Financial Crisis (2007-2008)	GFC
Australian Prudential Regulation Authority	APRA
Australian Securities and Investments Commission	ASIC
Financial Services Conduct Authority	FSCA
Prudential Authority	PA
South African Reserve Bank	SARB
Conduct of Financial Institutions Bill	CoFI
Financial Services Board Act 97 of 1990	FSBA
Financial Stability Board	Stability Board
Financial Sector Assessment Programmes	FSAP
International Monetary Fund	IMF
Financial Stability Board Peer Reviews	FSBPR
Treasury of the Republic of South Africa	National Treasury
Memoranda of Understanding	MoU

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CHAPTER 1: INTRODUCTION TO STUDY

1.1 INTRODUCTION

This thesis will analyse and assess the implementation of the Twin Peaks model of financial regulation (hereinafter, Twin Peaks) within South Africa's (hereinafter, SA) broad financial sector. Furthermore, an assessment of the roles of the regulatory agencies established in terms of the Financial Sector Regulation Act 9 of 2017 (hereinafter, FSRA) will be conducted. In light of the aforementioned assessments, SA's implementation of Twin Peaks will be analysed against Australia's and the United Kingdom's (hereinafter, UK) implementation of Twin Peaks system.

The Twin Peaks model is designed to address many of the shortcomings of the other models such as the 'institutional model' of financial regulation which adopts the institutional approach by regulating individual institutions and establishes a separate specialist regulator for that institution. The relevant regulator supervises all the activities undertaken by the institution, irrespective of the market or sector in which the activities occur and the institution is normally regulated by one regulator alone. The shortcomings of the 'institutional model' concerns coordination problems and regulatory overlap between the relevant regulators.[1] The 'unified' or 'super regulator' model creates a single regulator to monitor both the conduct of market participants and the prudential soundness of financial institutions.[2] The observed problems with the unified model concerned prudential and conduct regulation of financial institutions which require fundamentally different approaches and cultures to regulation.[3] Additional issues observed concerning the unified model is that a single regulator might not delineate the different objectives and rationales of regulation and supervision, consequently the single regulator might not then make the required differentiations between different types of financial institutions and businesses.[4] The Twin Peaks

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[1] Buttigieg C 'The Institutional Models for Financial Supervision: An Analysis' (2013) *The Accountant, Spring* 12.
[2] Godwin A 'Introduction to special issue - the twin peaks model of financial regulation and reform in South Africa' (2017) 4(11) *Routledge* 151.
[3] Godwin A 'Introduction to special issue - the twin peaks model of financial regulation and reform in South Africa' (2017) 4(11) *Routledge* 151.
[4] Godwin A 'Introduction to special issue - the twin peaks model of financial regulation and reform in South Africa' (2017) 4(11) *Routledge* 151.

model addresses the shortcomings these models by for example, addressing the inherent conflicts that may arise from time to time between the objectives of prudential safety and soundness, consumer protection and transparency. In contrast to the other models of financial regulation, Twin Peaks is the only model that separates oversight into two independent regulators, market conduct and consumer protection on the one hand and prudential regulation on the other.[5]

The Twin Peaks model separates financial regulation into two broad functions, namely; market conduct regulation, which concerns consumer protection and prudential regulation with its focus on financial stability.[6] The one peak, termed the 'system stability' regulator, is charged solely with creating and enforcing prudential regulations, designed to prevent a financial crisis.[7] Prudential regulation is charge with maintaining and enhancing the safety and soundness of regulated financial institutions, with the purpose of protecting consumers of financial services.[8] Through prudential regulation, prudential safety and soundness concerns the continuance of the financial health of individually regulated institutions, which underpins confidence in the financial sector.[9] The regulatory scope of the prudential regulator concerns the prudential regulation and supervision of banks, insurers and other financial sector institutions.[10] The other peak is responsible for deterring market misconduct and protecting consumers of financial products and services.[7] The focus is on mandatory information disclosure, the honesty and integrity of firms and their employees, the level of competency of firms supplying financial services and products.[8] In addition to contributing toward the financial sector's policy objectives of financial stability, financial inclusion and combating financial crime.[11]

[5] Schmulow A 'SA joins the club that regulates financial markets through Twin Peaks' available at *https://www.citizen.co.za/business/1909688/sa-joins-the-club-that-regulates-financial-markets-through-twin-peaks/amp/* (accessed on 2 July 2019).
[6] Godwin A, Howse T & Ramsay I 'Twin Peaks South Africa's Financial Sector Regulatory Framework' (2017) 134 *SALJ* 3.
[7] Schmulow A 'Twin Peaks - the Big Bang of SA's financial industry' available at *https://www.fin24.com/Opinion/twin-peaks-the-big-bang-of-sas-financial-industry-20180408* (accessed on 2 July 2019).
[8] Financial Regulatory Reform Steering Committee *Implementing a twin-peaks model of financial regulation in South Africa* (2013) 43.
[9] Financial Regulatory Reform Steering Committee *Implementing a twin-peaks model of financial regulation in South Africa* (2013) 43.
[10] Financial Regulatory Reform Steering Committee *Implementing a twin-peaks model of financial regulation in South Africa* (2013) 43.
[11] Financial Regulatory Reform Steering Committee *Implementing a twin-peaks model of financial regulation in South Africa* (2013) 47.

As a result of the two separate peaks, the Twin Peaks model creates clear and unequivocal goals that are separated between the two peaks. This is a core feature of the Twin Peaks model: a model that recognises that the two peaks can have differing regulatory goals, and then creates the peaks as separate, but equal.[12] It is therefore argued that the two types of regulation are so different that they are best carried out by two separate authorities.[10] In other words, each of the above functions is vested in a separate regulator.[11] With the Twin Peaks model, the two peak regulators are more likely to have dedicated objectives and clear mandates to which they are exclusively committed to and the model may be better adapted towards keeping pace with the growing complexity of financial markets and the continuing rise of financial corporations.

Financial regulation and the models of regulation it encompasses ultimately finds application within the financial sector of the economy. The financial sector is a section of the economy which is constituted by firms and institutions that provide financial products and services to commercial and retail customers.[13] This sector comprises of a broad range of industries such as, amongst others, banks, investment companies, insurance companies, and real estate firms.[14] The health of the economy is largely dependent on the strength of its financial sector as it ensures economic stability.[15] The financial sector is of importance to the economy as it enables economic growth, job creation, the building of vital infrastructure and sustainable development for the SA economy.[16] In effectively regulating its financial sector and in keeping with international standards of financial regulation SA has commenced the process of reforming its system of financial regulation and has adopted the Twin Peaks model.[17]

[12] Schmulow A 'Twin Peaks - the Big Bang of SA's financial industry' available at *https://www.fin24.com/Opinion/twin-peaks-the-big-bang-of-sas-financial-industry-20180408* (accessed on 2 July 2019).

[13] Kenton W 'Financial Sector' available at *https://www.investopedia.com/terms/f/financial_sector.asp* (accessed on 30 June 2019).

[14] Kenton W 'Financial Sector' available at *https://www.investopedia.com/terms/f/financial_sector.asp* (accessed on 30 June 2019).

[15] Kenton W 'Financial Sector' available at *https://www.investopedia.com/terms/f/financial_sector.asp* (accessed on 30 June 2019).

[16] *National Treasury A Safer Financial Sector to serve South Africa Better* (2011).

[17] Schmulow A 'Explainer: who will be doing what under South Africa's new 'Twin Peaks' model' available at *https://www.polity.org.za/article/explainer-who-will-be-doing-what-under-south-africas-new-twin-peaks-model-2018-05-09* (accessed on 2 July 2019).

1.2 BACKGROUND TO RESEARCH

The global financial crisis (hereinafter, GFC) was indicative of the vulnerabilities in the global financial system, amplified by the interconnectedness of financial markets, which necessitated a change in financial regulation worldwide.[18] The Twin Peaks model was first implemented in the Australian financial sector in 1998 and was so named by virtue of the two peak regulatory authorities it creates.[19] It should be noted that the Twin Peaks model was first suggested by an Englishman, Michael Taylor, in 1995,[20] to address the problem of blurred boundaries experienced in the financial services sector.[21] This concerned different financial institutions such as banks that were merging with insurers; merchant banks that were merging with securities traders, consequently causing gaps within the financial sector, exceeding regulatory coverage.[22] As a result, regulators could not effectively regulate the market conduct of financial institutions as it exceeded the regulatory scope of regulators. The purpose of Twin Peaks, in addition to addressing the blurring of the boundaries phenomenon, is to protect consumers by deterring market misconduct and ensuring financial system stability.[23]

The Twin Peaks model, which was first applied in Australia as aforementioned, separates financial regulation into two functions namely, market conduct regulation, which includes consumer protection, and prudential regulation.[24] Australia's implementation of Twin Peaks within its financial services sector gave rise to the first peak, the Australian Prudential Regulation Authority

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[18] Viljoen A, Lallo V & Bunge S 'EY Financial Sector Regulation Act Implementing Twin Peaks and the impact on the industry' available at *https://www.ey.com/Publication/vwLUAssets/ey-financial-sector-regulation-act-twin-peaks/%24FILE/ey-financial-sector-regulation-act-implementing-twin-peaks-and-the-impact-on-the-industry.pdf* (accessed on 21 May 2019).

[19] Schmulow A 'Twin Peaks - the Big Bang of SA's financial industry' available at *https://www.fin24.com/Opinion/twin-peaks-the-big-bang-of-sas-financial-industry-20180408* (accessed on 21 May 2019).

[20] Schmulow A 'CIFR Working Papers Twin Peaks: A Theoretical Analysis' available at *https://www.researchgate.net/publication/315366898_Twin_Peaks_A_Theoretical_Analysis* (accessed on 21 May 2019).

[21] The UK did not adopt Michael Taylor's proposed Twin Peaks model in 1995, however the UK adopted a single regulatory model. For the rationale of the proposed Twin Peaks model in the UK, see Mhango M 'Twin Peaks is not for SA' available at *https://www.fin24.com/Companies/Financial-Services/Twin-Peaks-is-not-for-SA-20140205* (accessed on 22 August 2019).

[22] Schmulow A 'Retail Market Conduct Reforms in South Africa Under Twin Peaks' (2017) 4(11) *Routledge.*

[23] Schmulow A 'Retail Market Conduct Reforms in South Africa Under Twin Peaks' (2017) 4(11) *Routledge.*

[24] Godwin A, Howse T & Ramsay I 'Twin Peaks South Africa's Financial Sector Regulatory Framework' (2017) 134 SALJ 3.

(hereinafter, APRA) tasked with the duty of ensuring system stability with the objective of creating and enforcing preventative measures against the occurrence of a financial crisis.[25] The second peak is the Australian Securities and Investments Commission (hereinafter, ASIC) tasked with deterring misconduct by institutions who provide financial services and products and protecting consumers of financial services and products.[26] The Twin Peaks model has thus been described as an objective based form of regulation in which there exists a separation of regulatory functions between two regulators whereby one performs the safety and soundness supervisory function while the other focuses on the conduct of business regulation.[27] SA has gleaned from Australia's implementation of Twin Peaks and has quite similarly adopted a Twin Peaks regulatory approach.[28]

1.3 PROBLEM STATEMENT

Prior to SA's implementation of the Twin Peaks model, the financial regulatory model that governed the financial services sector was the Sectoral Model.[28] This approach gave effect to the sector-based model (hereinafter, sectoral model) of financial regulation.[35] The regulatory architecture of the former financial regulatory model was largely divided, as it was based on various laws applied at an industry level without uniformity.[36] This model had three separate authorities, which focused on three different areas within the financial sector, namely banking, insurance and securities.[29] The Sectoral Model regulated banks independently from other financial firms such as insurers.[30] Although the Sectoral Model approach to financial regulation, is said to have performed relatively well in SA, it did not however address the fact that institutions from different sectors often merge.[31] For example, where a financial institution offers banking and life insurance products, it may be dually regulated by the banking regulator and the insurance regulator.[32] When institutions began to merge, the new firms that were created presented a problem for regulators whose authority was divided along the lines that mirrored the division between

[25] Schmulow A 'Twin Peaks - the Big Bang of SA's financial industry' available at *https://www.fin24.com/Opinion/twin-peaks-the-big-bang-of-sas-financial-industry-20180408* (accessed 21 May 2019).

[26] Schmulow A 'Explainer: who will be doing what under South Africa's new 'Twin Peaks' model' available at *https://www.polity.org.za/article/explainer-who-will-be-doing-what-under-south-africas-new-twin-peaks-model-2018-05-09* (accessed on 21 May 2019).

[27] Botha E & Makina D 'Financial Regulation and Supervision: Theory and Practice in South Africa' (2011) 10(11) *International Business & Economics Research Journal.*

[28] Mhango M 'Twin Peaks is not for SA' available at *https://www.fin24.com/Companies/Financial-Services/Twin-Peaks-is-not-for-SA-20140205* (accessed on 18 June 2019).

banks, insurers and other financial firms.[33] In identifying this regulatory problem SA required a regulatory system that effectively dealt with this issue.

The problems identified with sectoral model was that the nature of SA's financial sector as being highly interconnected and dominated by large financial groups is argued to have contributed to the blurring of the boundaries phenomenon, which consequently caused gaps within the financial sector.[29] This may be said to have resulted in regulatory inefficiencies from a prudential perspective.

In addressing the issues concerning prudential regulation, the goal is centred on a shift away from a fragmented regulatory approach which will subsequently reduce the possibility of regulatory arbitrage or forum shopping and close gaps in the regulatory system.[30]

The National Treasury provided that the former financial regulatory model catered for wealthier customers, consequently limiting the access to financial services and products for poorer and rural customers, as they would either receive inappropriate or expensive financial services or products or none at all.[31] Furthermore, in the investment management sector, the Fidentia and Sharemax scandals, in 2007 and 2010 respectively, identified the lack of protection of investors and the need for improvement thereof.[32] These are the highlighted problems within the former financial regulatory system which required to be addressed from the focus of the financial conduct of institutions.

The goals of law reform envisaged by the National Treasury included the objectives to ensure that the regulatory framework is transformative and more inclusive by being more accessible to all customers.[33] The regulatory financial framework required a shift of focus in respect of both

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[29] Schmulow A 'Retail Market Conduct Reforms in South Africa Under Twin Peaks' (2017) 4(11) *Routledge.*

[30] National Treasury of the Republic of South Africa 'Twin Peaks: Second draft of Financial Sector Regulation Bill and draft Market Conduct Policy Framework discussion document published for comment' available at *http://www.treasury.gov.za/comm_media/press/2014/2014121201%20-%20Media%20release%20FSR%20Bill%20and%20MCP.pdf* (accessed on 29 July 2019).

[31] National Treasury of the Republic of South Africa *Twin Peaks in South Africa: Response and Explanatory Document* (2014).

[32] National Treasury of the Republic of South Africa *Explanatory Policy Paper Accompanying the Conduct of Financial Institutions Bill* (2018) 7.

[33] National Treasury of the Republic of South Africa *Explanatory Policy Paper Accompanying the Conduct of Financial Institutions Bill* (2018) 7.

customer and investor protection, accountability of financial service providers and improvement of market conduct standards by financial institutions.[34]

It was imperative for SA to reform its financial sector laws in order to become globally competitive through adopting international best practices. This was unavoidable given SA's participation at international fora such as the G20[35] and the Financial Stability Board.[36]

In keeping with international standards of financial regulation, SA has recently adopted the Twin Peaks model of financial regulation. The FSRA was promulgated on 21 August 2017 and effectively became law from 1 April 2018 which provides for a restructured and robust framework for the financial sector, intended to support an extensive regulatory system.[37] Although the FSRA has come into force, it is only partially in effect.[38] The rationale of the FSRA in the implementation of Twin Peaks aims to improve SA's approach to consumer protection and create a more resilient and stable financial system.[39]

The FSRA establishes two regulatory bodies, forming the two peaks of SA's Twin Peaks model. The first being the Financial Services Conduct Authority (hereinafter, FSCA) replacing the Financial Services Board (FSB) and is established in terms of s56 of the FSRA.[40] The FSCA is tasked with monitoring the conduct of all financial services institutions by ensuring that consumers

[34] National Treasury of the Republic of South Africa *Explanatory Policy Paper Accompanying the Conduct of Financial Institutions Bill* (2018) 7.
[35] The G20 is a group of twenty of the world's most important industrialised and developing economies of which holds summits addressing global economic challenges and means of ensuring economic and financial stability. For more information of countries that comprise G20, see Alimova A & Goggin N 'The G20 summit explained' available at *https://www.atlanticcouncil.org/blogs/new-atlanticist/the-g20-summit-explained/* (accessed on 29 July 2019).
[36] Itzikowitz A & Meiring I 'Banking Regulation 2019 South Africa' available at *https://www.globallegalinsights.com/practice-areas/banking-and-finance-laws-and-regulations/south-africa* (accessed on 29 July 2019).
[37] Viljoen A, Lallo V & Bunge S 'EY Financial Sector Regulation Act Implementing Twin Peaks and the impact on the industry' available at *https://www.ey.com/Publication/vwLUAssets/ey-financial-sector-regulation-act-twin-peaks/%24FILE/ey-financial-sector-regulation-act-implementing-twin-peaks-and-the-impact-on-the-industry.pdf* (accessed on 21 May 2019).
[38] Van Heerden C & Van Niekerk G 'Twin Peaks in South Africa: a new role for the central bank' (2017) 4(11) *Routledge*.
[39] Ferreira J '"Twin Peaks" to aid low income earners' available at *https://www.fanews.co.za/article/views-letters-interviews-comments/18/all/1102/twin-peaks-to-aid-low-income-earners/23058* (accessed 24 May 2019).
[40] Financial Sector Regulation Act 9 of 2017.

of financial products and services are treated fairly.[41] The FSCA is therefore responsible for the market conduct of financial institutions and consumer protection.[42] In ensuring the protection of consumers, the FSCA is mandated with providing financial customers with financial education programmes, to promote financial literacy and financial capability, thereby enhancing the efficiency and integrity of the financial system.[43]

The second peak is the Prudential Authority (hereinafter, PA) which is established within the South African Reserve Bank (hereinafter, SARB) and is established in terms of s32 of the FSRA.[44] The PA is mandated with the supervisory task of ensuring the capital adequacy, safety and soundness of banks, insurers and other financial institutions and is therefore charged with maintaining the financial system.[45] The ultimate objective of the PA is to anticipate and avoid a financial crisis through prudential regulation.

In light of the fact that SA's financial sector is undergoing the transition of implementing Twin Peaks, this research aims to assess how Twin Peaks may be effectively implemented in realising the objectives of its regulatory agencies and ensuring that it functions in a sustainable manner in keeping with achieving its objectives. Furthermore, this study will identify potential factors that may affect or have a bearing on the implementation of Twin Peaks. A critical comparison will be made with the financial sector regulation jurisdictions such as Australia and the UK (hereinafter, the comparators of choice).

This thesis seeks to inquire whether the current regulatory coordination framework put in place by the FSRA meets international best practices and is tailor-made to meet SA's domestic needs and will truly result in a more effective financial regulation than before. The issues highlighted herein will be further discussed in Chapter 2.

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41 Ferreira J '"Twin Peaks" to aid low income earners' available at *https://www.fanews.co.za/article/views-letters-interviews-comments/18/all/1102/twin-peaks-to-aid-low-income-earners/23058* (accessed on 24 May 2019).

42 Schmulow A 'Explainer: who will be doing what under South Africa's new 'Twin Peaks' model' available at *https://www.polity.org.za/article/explainer-who-will-be-doing-what-under-south-africas-new-twin-peaks-model-2018-05-09* (accessed on 24 May 2019).

43 Ferreira J '"Twin Peaks" to aid low income earners' available at *https://www.fanews.co.za/article/views-letters-interviews-comments/18/all/1102/twin-peaks-to-aid-low-income-earners/23058* (accessed on 24 May 2019).

44 Financial Sector Regulation Act 9 of 2017.

45 Ferreira J '"Twin Peaks" to aid low income earners' available at *https://www.fanews.co.za/article/views-letters-interviews-comments/18/all/1102/twin-peaks-to-aid-low-income-earners/23058* (accessed on 24 May 2019).

1.4 RESEARCH QUESTIONS

1.4.1 Main Research Question

Whether the regulatory coordination framework put in place by the FSRA meets international best practices and is tailor-made to meet SA's domestic needs.

1.4.2 Research Sub-Inquiries

The implementation of Twin Peaks financial regulatory agencies will be evaluated against international perspectives and academic opinion. The following are some of the sub-inquiries to be pursued in this mini-thesis:

(i) What was the rationale for adopting the Twin Peaks model of financial regulation?

(ii) What are the international best practices in the implementation of the Twin Peaks system?

(iii) What can South Africa learn from these international best practice jurisdictions regarding implementation of its own Twin Peak system?

(iv) What are the inherent issues in implementing Twin Peaks within South Africa's financial sector?

(v) How can the implementation of Twin Peaks be enhanced/improved in ensuring the objectives of the regulatory agencies are realised and sustained?

(vi) Whether the economic environment is taken into consideration before implementation Twin Peaks in ensuring suitability and effective cohesion?

1.5 BRIEF LITERATURE REVIEW

This literature review serves to critically discuss what other academics have written in respect of the SA implementation of Twin Peaks and to highlight considerations not taken into account in its implementation in the SA financial sector.

In implementing Twin Peaks it is important to note that the choice a country makes in adopting any regulatory model is primarily dependent on a careful study and understanding of the existing industry structure, consumer protection and the nature of the relevant financial market.[46] The

[46] Mhango M 'Twin Peaks is not for SA' available at *https://www.fin24.com/Companies/Financial-Services/Twin-Peaks-is-not-for-SA-20140205* (accessed on 27 May 2019).

existing arguments on the implementation of Twin Peaks in SA are centered around the cost implication concerning its implementation[47] and counter arguments on the basis that the cost of implementation justifies the purpose it seeks to achieve, mainly being to avoid a financial crisis and the consequences thereof. Further arguments raised by academics and writers[48] are that the SA Twin Peaks regulatory agencies are quite complex in that there are various committees and commissions which may suggest over regulation. Conversely, the rationale behind the committees and commissions is to ensure that the respective regulatory agencies functions efficiently and effectively in ensuring prudential regulation and consumer protection. It is submitted, that in order to establish whether the regulatory agencies are merely just over regulated or ensuring performance in meeting their respective objectives, a performance review should be undertaken to ensure that the regulatory agencies are in fact meeting their expected mandates.

In favour of the implementation of Twin Peaks, Schmulow is of the opinion that the adoption of Twin Peaks by various countries including SA is attributable to Australia's implementation of Twin Peaks having fared better than most other countries during the GFC and the adoption of it by other countries asserts its implementation as international best practice.[49] Conversely, van Zyl contends that only 3 out of 140 countries who are members of the International Association of Insurance Supervisors have implemented Twin Peaks, all with dubious degrees of success and is therefore of the opinion that it does not constitute international best practice.[50] Twins Peaks as a financial regulatory model having weathered the storm of the GFC[51] sets a high standard in terms of its durability and sustainability within the financial sector, in light of this fact, countries may seek to implement Twin Peaks contingent on achieving the same result as Australia but as a

[47] Van Zyl G 'Twin Peaks now law - 'sad day' for SA financial services consumers - FMF' available at *https://www.biznews.com/sa-investing/2017/08/23/twin-peaks-now-law-sa-financial-services-consumers-fmf/amp* (accessed on 27 May 2019).

[48] Van Zyl G 'Twin Peaks now law - 'sad day' for SA financial services consumers - FMF' available at *https://www.biznews.com/sa-investing/2017/08/23/twin-peaks-now-law-sa-financial-services-consumers-fmf/amp* (accessed on 27 May 2019).

[49] Schmulow A 'Twin Peaks: A Theoretical Analysis' available at *https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2625331* (accessed on 27 May 2019).

[50] Van Zyl G 'Twin Peaks now law - 'sad day' for SA financial services consumers - FMF' available at *https://www.biznews.com/sa-investing/2017/08/23/twin-peaks-now-law-sa-financial-services-consumers-fmf/amp* (accessed 27 May 2019).

[51] Chimbombi A *Regional Integration of Financial Services Regulation and Supervision in the Southern African Development Community* (unpublished LLM thesis, University of the Western Cape, 2015).

framework in ensuring financial stability. However financial sectors differ from jurisdiction to jurisdiction, in achieving the result as Australia the implementation of Twin Peaks is subject to the financial sector environment in which it finds application, cognisant of the various factors that have an effect on the financial sector both internally and externally.

A criticism of Twin Peaks is raised by Louw stating that it compounds complexity, constraints and costs incurred by regulatory agencies, regulators and staff.[52] This criticism suggests that the complexities of the regulatory agencies are a result of over regulation which ultimately places a financial burden on the financial sector and adds to the cost of consumer goods and services. Louw furthermore provides that the implementation of Twin Peaks will levy compliance costs on the financial sector industry and consumers, and argues that the money would be better spent on financial literacy to enable consumers to make informed decisions concerning the financial products and services they purchase.[53] Vegter contends that in light of Twin Peaks placing a heavy compliance burden upon financial institutions and intermediaries that will consequently be sourced through an increase in customer prices and fees, it will be made harder for the poor to access banking and other financial services.[54] Invariably inhibiting the access to banking and financial services for the poor serves to be contradictory to the objectives of the regulatory agencies such as protecting consumers and financial inclusion, it is therefore questioned whether the interests of financial consumers are really protected?

In assessing the suitability of the Twin Peaks model for SA's financial sector it is noteworthy to highlight the two conditions Taylor states is required to exist within a financial sector for the effective implementation of Twin Peaks. The first condition is that banks are not to dominate the financial sector, but occupy the sector with other non-bank financial participants, and the second condition is that the financial sector must have a highly developed consumer protection regime.[55]

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52 Barry H 'Why Twin Peaks? Critics cry foul as Parliament presses on' available at *https://www.moneyweb.co.za/news/industry/why-twin-peaks/* (accessed on 28 May 2019).

53 Barry H 'Why Twin Peaks? Critics cry foul as Parliament presses on' available at *https://www.moneyweb.co.za/news/industry/why-twin-peaks/* (accessed on 28 May 2019).

54 Vegter I 'Op-Ed: 'Twin Peaks' trades simple, effective financial regulation for a complex mess' available at *https://www.dailymaverick.co.za/article/2017-09-13-op-ed-twin-peaks-trades-simple-effective-financial-regulation-for-a-complex-mess/amp/* (accessed on 28 May 2019).

55 Mhango M 'Twin Peaks is not for SA' available at *https://www.fin24.com/Companies/Financial-Services/Twin-Peaks-is-not-for-SA-20140205* (accessed on 27 May 2019).

These conditions were true for the UK financial sector and therefore the implementation of Twin Peaks was found to be sensible in light of this understanding, however these conditions are not prevalent in SA and sees Twins Peaks not suitable for SA financial sector.[56] Taylor further provides that SA should carefully consider the financial sector's structures and circumstances and then design and implement a regulatory system that is suitable in relation to those circumstances.[57] This is further reiterated by Godwin, providing that the SA perspective of Twin Peaks is required to accommodate SA characteristics and challenges that are unique to SA.[58] It is submitted that, in light of the fact that SA has passed the stage of considering a financial regulatory framework that is indigenous and adapted to the SA financial sector, given that Twin Peaks is in the process of being implemented. It is argued that SA should redefine the financial sector in aligning with the conditions set out by Taylor, thereby ensuring effective implementation of Twin Peaks. Alternatively, the Twin Peaks regulatory agencies may be restructured in a manner that aptly adapts to the peculiar circumstances of SA.

The implementation of Twin Peaks is quite extensively debated amongst academics and financial sector participants of which its implementation may affect. Consequently, there exist many criticisms and identified advantages and disadvantages in relation to its implementation; however Twin Peaks is in the process of transitioning into the financial regulatory sphere. It is therefore submitted that Twin Peaks should be refined in a manner that ensures optimal efficiency and effectives in which will further be dealt with in the foregoing thesis.

[56] Mhango M 'Twin Peaks is not for SA' available at *https://www.fin24.com/Companies/Financial-Services/Twin-Peaks-is-not-for-SA-20140205* (accessed on 27 May 2019).
[57] Mhango M 'Twin Peaks is not for SA' available at *https://www.fin24.com/Companies/Financial-Services/Twin-Peaks-is-not-for-SA-20140205* (accessed on 27 May 2019).
[58] Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge.*

1.6 SIGNIFICANCE OF STUDY

The financial sector is described as the 'handmaiden of commerce'[59] alluding to the importance and significant contribution it makes in serving the performance of the economy and ensuring the overall wellbeing of the economy. It is thus important to ensure that the regulatory system charged with ensuring the stability of the financial sector performs effectively and optimally in realising its mandated objectives.

As Twin Peaks is newly implemented within the SA financial sector this research intends to assess its implementation in comparison to the jurisdictions of the comparators of choice that has experience in implementing Twin Peaks as a financial regulatory system. This research aims to identify the inadequacies and inherent difficulties, or problems associated with the implementation of Twin Peaks as experienced in the jurisdictions of the comparators of choice. This research will further note how the jurisdictions of the comparators of choice (the UK and Australia) resolved the inherent inadequacies and difficulties in implementing Twin Peaks. The findings made in this research may prove to be useful in sustaining the effective performance of Twin Peaks in regulating the financial sector in the future should it incur analogous difficulties.

1.7 LIMITATIONS OF STUDY

This research focuses on assessing the implementation of Twin Peaks which is non-inclusive of assessing the performance of its implementation in SA, as Twin Peaks has been newly implemented. Currently, there is no way of accurately assessing the impact that Twin Peaks has on the financial sector as it is still in the progress of being implemented. Thus this research is limited to assessing SA's implementation of Twin Peaks in relation to that of the jurisdictions of the comparators of choice. Thus, this research takes a theoretical standpoint in proposing solutions to inherent problems within implementing Twin Peaks with an international perspective.

[59] Mhango M 'Twin Peaks is not for SA' available at *https://www.fin24.com/Companies/Financial-Services/Twin-Peaks-is-not-for-SA-20140205* (accessed on 27 May 2019).

1.8 RESEARCH METHODOLOGY

The research methodology that will be undertaken for purposes of assessing SA's implementation of Twin Peaks will be qualitative research by way of analytical and comparative desktop research. The primary sources concerned will include legislation such as the FSRA and the Conduct of Financial Institutions Bill (hereinafter, CoFI). In addition, foreign legislation of the jurisdictions of the comparators of choice that informs their respective financial regulatory systems. Secondary sources such as explanatory policy papers, commentaries, journal articles and textbooks on the relevant legislation by leading writers and academia in respect of financial regulation, theses and the internet will be used to further supplement assessing SA's implementation and enforcement of Twin Peaks.

1.9 CHAPTER OUTLINE

CHAPTER 1:INTRODUCTION TO STUDY

This chapter will present and explain the background and statement of the problem which is to be solved by carrying out this research, justification for conducting this study, the methodology that will be employed in finding out answers to the problem and finally the research questions that will act as guidelines of the issues to be tackled throughout the study.

CHAPTER 2: FINANCIAL REGULATION CHALLENGES PRIOR TO THE FINANCIAL SECTOR REGULATION ACT: THE NEED FOR REFORM

This chapter will assess the former financial regulatory system prior to the enactment of the FSRA and the implementation of Twin Peaks, the challenges faced by the former financial regulation system. In addition, this chapter will discuss the policy rationale that prompted the need for financial regulation reform and the adoption of the Twin Peaks system. Furthermore, this chapter will assess the legislative framework that establishes the regulatory agencies of Twin Peaks.

CHAPTER 3: TWIN PEAKS SYSTEM: INTERNATIONAL BEST PRACTICES

In this chapter, the implementation and the regulatory framework that gives effect to Twin Peaks in Australia and the United Kingdom will be assessed. The inherent problems associated with the implementation of Twin Peaks in respect of the financial sectors within the jurisdictions of the comparators of choice will be identified and the solutions implemented in addressing these problems. Furthermore, this chapter will assess how Twin Peaks is enforced within the jurisdictions of the chosen comparators of choice.

CHAPTER 4: SOUTH AFRICA'S NEW TWIN PEAK SYSTEM: THE LEGAL & REGULATORY FRAMEWORK

Under this chapter, the regulatory framework that informs Twin Peaks in SA will be discussed and assessed. In addition, the regulatory frameworks assessed in Chapter 3 with regard to the jurisdictions of the comparators of choice will be comparably analysed in respect of SA's regulatory framework.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

This chapter will consist of a summation of assessing SA's implementation of Twin Peaks, accompanied by recommendations and suggestions as to how SA can improve Twin Peaks as identified by the jurisdictions of the comparators of choice, ensuring an improved and sustainable implementation of Twin Peaks.

CHAPTER 2: FINANCIAL REGULATION CHALLENGES PRIOR TO THE FINANCIAL SECTOR REGULATION ACT: THE NEED FOR REFORM

2.1 INTRODUCTION

This chapter will assess the financial regulatory system prior to the enactment of the Financial Sector Regulation Act (hereinafter, FSRA) and the implementation of the Twin Peaks into South African law. In addition, this chapter discusses the policy rationale that prompted the need for financial regulation reform and the adoption of the Twin Peaks model into South African law through the FSRA.

2.2 OVERVIEW OF FINANCIAL REGULATION

The term 'regulation' refers to the rules that inform the legal framework of a particular industry.[60] It may also be defined as a set of binding rules issued by a private or public body.[61] Therefore, financial regulation is a network of rules that governs the conduct of financial sector participants[62] and ensures financial system stability.[63] The objective of financial regulation is to protect consumers or investors; to ensure the solvency and financial soundness of financial institutions; to promote fairness, efficiency and transparency in the securities markets; and to promote a stable financial system.[64] The objectives that are sought to be achieved by financial regulation may be done through two methods of regulation, namely, micro-prudential regulation or macro-prudential regulation.[65] Micro-prudential regulation focuses on the stability of each individual institution within the financial sector and is thus the 'institutional approach', and macro-prudential regulation

[60] Botha E &Makina D 'Financial Regulation and Supervision: Theory and Practice in South Africa' (2011) 10(11) *International Business & Economics Research Journal* 27.

[61] Mwenda *K Legal Aspects of Financial Services Regulation and the concept of a Unified Regulator* (2006) 5.

[62] Financial sector participants refer to consumers and providers of financial services such as banks, insurance and investment companies. For examples of financial sector participants, see Kenton W 'Financial Sector' available at https://www.investopedia.com/terms/f/financial_sector.asp (accessed on 26 July 2019).

[63] Chimbombi A *Regional Integration of Financial Services Regulation and Supervision in the Southern African Development Community* (unpublished LLM thesis, University of the Western Cape, 2015) 1.

[64] Botha E &Makina D 'Financial Regulation and Supervision: Theory and Practice in South Africa' (2011) 10(11) *International Business & Economics Research Journal* 27.

[65] Chimbombi A *Regional Integration of Financial Services Regulation and Supervision in the Southern African Development Community* (unpublished LLM thesis, University of the Western Cape, 2015) 2.

concerns itself with the stability of the financial sector as a whole and is thus the 'systemic approach' to financial regulation.[66] These approaches to financial regulation form the basis of the models of financial regulation.

The 'institutional model' of financial regulation adopts the institutional approach by regulating individual institutions and establishes a separate specialist regulator for that institution.[67] In terms of this model the relevant regulator supervises all the activities undertaken by the institution, irrespective of the market or sector in which the activities occur and the institution is normally regulated by one regulator alone.[68] The institutional approach is often referred to as the broader sectoral or operational approach, under which institutions are regulated by reference to the sector in which they operate or the products or business in which they engage.[69] The sectoral or operational model, like the institutional model, becomes increasingly difficult to operate as the complexity of financial products and financial institutions increases.[70] This potentially causes coordination problems and regulatory overlap between the relevant regulators.

The 'unified' or 'super-regulator' model attempts to address the problems experienced by the institutional and sectoral approaches by creating a single regulator to monitor both the conduct of market participants and the prudential soundness of financial institutions.[71] One of the perceived problems with this model, however, is that prudential and business conduct regulations require fundamentally different approaches and cultures, and there may be doubt about whether a single regulator would in practice, be able to effectively encompass these objectives to the necessary degree in the discharge of its duty as a regulator.[72]

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[66] International Centre for Monetary and Banking Studies *Geneva Reports on the World Economy 11 Fundamental Principles of Financial Regulation* (2009) 18.
[67] Buttigieg C 'The Institutional Models for Financial Supervision: An Analysis' (2013) *The Accountant,Spring* 12.
[68] Buttigieg C 'The Institutional Models for Financial Supervision: An Analysis' (2013) *The Accountant,Spring* 12.
[69] Godwin A 'Introduction to special issue - the twin peaks model of financial regulation and reform in South Africa' (2017) 4(11) *Routledge* 151.
[70] Buttigieg C 'The Institutional Models for Financial Supervision: An Analysis' (2013) *The Accountant,Spring* 14.
[71] Schmulow A 'Retail Market Conduct Reforms in South Africa Under Twin Peaks' (2017) 4(11) *Routledge.*
[72] Schmulow A 'Retail Market Conduct Reforms in South Africa Under Twin Peaks' (2017) 4(11) *Routledge.*

2.3 THE FINANCIAL REGULATORY SYSTEM OF SOUTH AFRICA PRE-FINANCIAL SECTOR REGULATION ACT ERA

Prior to the FSRA, SA followed an institutional approach to financial regulation in which banks, insurers and capital markets were regulated separately from both conduct and prudential perspectives.[73] The institutional approach to financial regulation may be divided into three main institutional structures. These are the sector-based model (hereinafter, sectoral model), the Twin Peaks model and the single-regulator model.[74] The sectoral model of financial regulation was adopted prior to SA adopting the Twin Peaks model.[75] The pre-FSRA financial regulatory system was characterised by the notion of multiple regulators: one each for banks, insurers and medical aid schemes.[76] The sectoral approach as a model of financial regulation focuses on the form of the regulated institution and establishes a separate specialist regulator for that institution.[77] Under this approach, the relevant regulator supervises all activities undertaken by the institution, irrespective of the market or sector in which the activities take place, whereby the institution is normally regulated by one regulator alone.[78] In terms of the sectoral model, institutions are regulated by reference to the sector in which they operate or the products or business in which they engage.[79]An institution's legal status (whether they are a bank, stockbroker or insurance company) determines which regulator supervises its activities from both prudential and market conduct perspectives.[80]

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[73] Schmulow A 'Financial Regulatory Governance in South Africa: The Move Towards Twin Peaks' (2017) *African Journal of International and Comparative Law* 401.

[74] Huang RH &Shoenmaker D 'Institutional structure of financial regulation: Theories and international experiences' (2015) 4(11) *Routledge*.

[75] Vegter I 'Op-Ed: 'Twin Peaks' trades simple, effective financial regulation for a complex mess' available at *https://www.dailymaverick.co.za/article/2017-09-13-op-ed-twin-peaks-trades-simple-effective-financial-regulation-for-a-complex-mess/amp/* (accessed on 26 July 2019).

[76] Collocott C 'Financial Regulation in South Africa – Brief I of II'available at *https://hsf.org.za/publications/hsf-briefs/financial-regulation-in-south-africa-2013-brief-i-of-ii* (accessed on 26 July 2019).

[77] Buttigieg C 'The Institutional Models for Financial Supervision: An Analysis' (2013) *The Accountant,Spring* 12.

[78] Buttigieg C 'The Institutional Models for Financial Supervision: An Analysis' (2013) *The Accountant,Spring* 12.

[79] Buttigieg C 'The Institutional Models for Financial Supervision: An Analysis' (2013) *The Accountant,Spring* 12.

[80] Michael B 'The "Twin Peaks" Regulatory Model: The Future of Financial Regulation?' available at *http://www.law.hku.hk/aiifl/wp-content/uploads/2014/09/Twin-Peaks.pdf* (accessed on 26 July 2019).

A fundamental characteristic of the sectoral model is that banks are to be regulated separately from other kinds of financial institutions such as insurers.[81]

2.3.1 Financial Services Board (FSB)

The sectoral approach to financial regulation, was given effect through the SARB and the FSB.[82] The FSB was established in terms of the Financial Services Board Act 97 of 1990 (hereinafter, FSBA) as a separate government agency.[83] The FSB until its repeal was the statutory body charged with supervising the non-bank financial industry such as insurers, medical aid schemes and securities.[84]

2.3.2 South African Reserve Bank (SARB)

The SARB ensures banking regulation and supervision of the banking sector.[85] It serves as the primary monetary authority and custodian of the country's gold and foreign exchange reserves.[86] Prior to the enactment of the FSRA, the supervision of banks and mutual banks was the responsibility of the Registrar of Banks as part of the SARB.[87] The overarching function of the SARB is to protect the value of SA's currency, however in respect of financial regulation the SARB provides liquidity to banks during periods of cash deficits, and in doing so, it ensures

[81] Schmulow A 'South Africa joins the club that regulates financial markets through 'Twin Peaks'' available at *https://theconversation.com/south-africa-joins-the-club-that-regulates-financial-markets-through-twin-peaks-95558* (accessed on the 06 August 2019).

[82] Schmulow A 'Financial Regulatory Governance in South Africa: The Move Towards Twin Peaks' (2017) *African Journal of International and Comparative Law* 401.

[83] McKenzie R, MfongehNdonwi G, Mohamed S, Ncube P and Strauss I 'FESSUD Studies in Financial Systems No 15: The South African Financial System' available at *http://fessud.eu/studies-in-financial-systems/* (accessed on 06 August 2019).

[84] Schmulow A 'Financial Regulatory Governance in South Africa: The Move Towards Twin Peaks' (2017) *African Journal of International and Comparative Law* 402 andLopes R & Sheik F 'Banking law developments in South Africa' available at *https://www.fanews.co.za/article/banking/35/general/1223/banking-law-developments-in-south-africa/26509*(accessed 1 August 2019).

[85] Moloi T 'Understanding Banking Regulatory and Market Framework in South Africa including the Perceived Strength, Weaknesses, Opportunities and Threats' (2014) 3(3) *Journal of Governance and Regulation* 35.

[86] South African Reserve Bank 'Introduction to the South African Reserve Bank' available at *https://www.resbank.co.za/AboutUs/Documents/Introduction%20to%20the%20SARB.pdf* (accessed on 1 August 2019).

[87] Lopes R & Sheik F 'Banking law developments in South Africa' available at *https://www.fanews.co.za/article/banking/35/general/1223/banking-law-developments-in-south-africa/26509* (accessed 1 August 2019).

financial stability of banks.[88] The role of the SARB include the formulating and implementing of SA monetary policy, ensuring the efficiency of the financial system and educating citizens about the monetary and economic situation of the financial sector.[89] The purpose of bank regulation and supervision by means of the SARB is to achieve a sound, efficient banking system in the interest of the depositors of banks and the economy as a whole.[90]

2.4 THE POLICY RATIONALE FOR ADOPTING THE TWIN PEAKS MODEL OF FINANCIAL REGULATION

The features that characterise SA's financial sector prior to the FSRA, such as it being highly interconnected and dominated by large financial groups, of which generally comprises of at least a bank and insurance company, are highlighted by the National Treasury as reasons for adopting the Twin Peaks model.[91] It is submitted that the financial sector being highly interconnected may have contributed to the blurring of the boundaries phenomenon, which consequently caused gaps within the financial sector.[92] Furthermore, the domination of the South African financial sector by large financial groups stifles market competition, when in fact, market competition should be encouraged as it enhances efficiency, provides for better products to consumers, greater innovation, lower prices and improves international competitiveness.[93] These reasons, inter alia, formed the basis for financial regulation reform which then sought to address these issues as identified by the National Treasury. In addition, the National Treasury assessed how the financial sector was regulated in respect of providing for consumer protection and sought to address the issues it had identified in the framework of the financial regulation reform.

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88 South African Reserve Bank 'Management of the South African money and banking system' available at *https://www.resbank.co.za/AboutUs/Functions/Pages/Management-of-the-South-African-money-and-banking-system.aspx* (accessed on 1 August 2019).

89 Chen J 'South African Reserve Bank' available at*https://www.investopedia.com/terms/s/south-african-reserve-bank.asp* (accessed on 31 July 2019).

90 South African Reserve Bank 'Management of the South African money and banking system' available at *https://www.resbank.co.za/AboutUs/Functions/Pages/Management-of-the-South-African-money-and-banking-system.aspx* (accessed on 1 August 2019).

91 National Treasury of the Republic of South Africa *Twin Peaks in South Africa: Response and Explanatory Document* (2014).

92 Schmulow A 'Retail Market Conduct Reforms in South Africa Under Twin Peaks' (2017) 4(11) *Routledge.*

93 OECD 'Competition and Financial Markets' available at *https://www.oecd.org/daf/competition/43067294.pdf* (accessed on 12 November 2019).

The National Treasury provided that the former financial regulatory model catered for wealthier customers, consequently limiting the access to financial services and products for poorer and rural customers, as they would either receive inappropriate or expensive financial services or products or none at all.[94] The redress that the National Treasury envisaged to achieve as part of law reform to the financial sector was the need to ensure that the regulatory framework is transformative and subsequently more inclusive.[95]

There have been a number of high-profile cases of poor practices in the financial sector such as the 2006 Competition Commission investigation into the retail banking sector, with its findings being published in 2008, noting a number of poor customer outcomes in the sector.[96]Furthermore, in the investment management sector, the Fidentia and Sharemax scandals, in 2007 and 2010 respectively, identified the lack of protection of investors and the need for improvement thereof.[97] The regulatory financial framework at the time required a shift of focus in respect of customer/investor protection.[98] It also required improvement in accountability and market conduct standards by financial institutions.[99]

The regulation of the financial sector prior to the FSRA was largely fragmented, as it was based on various laws that applied at an industry level.[100] This consequently led to a 'silo' approach to regulation of the various industries within the financial sector, with varying requirements, standards and legislation applying to different industries, creating regulatory arbitrage.[101] In addressing these issues the National Treasury stated that the Twin Peaks model is indicative of a

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94 National Treasury of the Republic of South Africa *Twin Peaks in South Africa: Response and Explanatory Document* (2014).
95 National Treasury of the Republic of South Africa *Explanatory Policy Paper Accompanying the Conduct of Financial Institutions Bill* (2018) 7.
96 National Treasury of the Republic of South Africa *Explanatory Policy Paper Accompanying the Conduct of Financial Institutions Bill* (2018) 7.
97 National Treasury of the Republic of South Africa *Explanatory Policy Paper Accompanying the Conduct of Financial Institutions Bill* (2018) 7.
98 National Treasury of the Republic of South Africa *Twin Peaks in South Africa: Response and Explanatory Document* (2014).
99 National Treasury of the Republic of South Africa *Twin Peaks in South Africa: Response and Explanatory Document* (2014).
100 National Treasury of the Republic of South Africa *Twin Peaks in South Africa: Response and Explanatory Document* (2014).
101 National Treasury of the Republic of South Africa *Twin Peaks in South Africa: Response and Explanatory Document* (2014).

shift away from a fragmented regulatory approach which will subsequently reduce the possibility of regulatory arbitrage or forum shopping and close gaps in the regulatory system.[102] The Twin Peaks model is a departure from the fragmented approach as it has two dedicated peaks – namely one peak addressing market conduct regulation and another peak dedicated to prudential regulation of all financial sector participants.[103]

South Africa's participation at international fora such as the G20[104] and the Financial Stability Board[105] (hereinafter, Stability Board) can be argued as evidence of the country's commitment to the development of effective and efficient global standards of financial regulation.[106] The Global Financial Crisis (hereinafter, GFC) formed the reasoning for financial regulation reform and in response thereto saw the adoption of the Twin Peaks model in the UK, New Zealand and Belgium.[107] SA in adopting the Twin Peaks model has identified the need to avoid the risk of being left behind by its G20 peers and opted to align itself with a shifting trend towards an international standard of financial regulatory practice.[108] SA's financial sector is subject to the G20 framework in assessing the effectiveness of its domestic financial system.[109] The G20 assessment framework

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[102] National Treasury of the Republic of South Africa 'Twin Peaks: Second draft of Financial Sector Regulation Bill and draft Market Conduct Policy Framework discussion document published for comment' available at *http://www.treasury.gov.za/comm_media/press/2014/2014121201%20-%20Media%20release%20FSR%20Bill%20and%20MCP.pdf* (accessed on 29 July 2019).

[103] National Treasury of the Republic of South Africa *Twin Peaks in South Africa: Response and Explanatory Document* (2014).

[104] The G20 is a group of twenty of the world's most important industrialised and developing economies of which holds summits addressing global economic challenges and means of ensuring economic and financial stability. For more information of countries that comprise G20, see Alimova A & Goggin N 'The G20 summit explained' available at *https://www.atlanticcouncil.org/blogs/new-atlanticist/the-g20-summit-explained/* (accessed on 29 July 2019).

[105] The Financial Stability Board FSB) is a global organisation that regulates and makes recommendations regarding the global financial system. For more information regarding the functions and structure of the Financial Stability Board, see CFI 'Financial Stability Board (FSB)' available at *https://corporatefinanceinstitute.com/resources/knowledge/finance/financial-stability-board-fsb/* (accessed on 29 July 2019).

[106] Itzikowitz A & Meiring I 'Banking Regulation 2019 South Africa' available at *https://www.globallegalinsights.com/practice-areas/banking-and-finance-laws-and-regulations/south-africa* (accessed on 29 July 2019).

[107] Godwin A, Howse T & Ramsay I 'Twin Peaks South Africa's Financial Sector Regulatory Framework' (2017) 134 *SALJ* 3 667.

[108] National Treasury of the Republic of South Africa *Twin Peaks in South Africa: Response and Explanatory Document* (2014) 23.

[109] Financial Stability Board *Peer Review of South Africa Review Report* (2020) 6.

concerns the Financial Sector Assessment Programmes (hereinafter, FSAP) conducted by the International Monetary Fund (hereinafter, IMF) every 5 years and the Financial Stability Board Peer Reviews (hereinafter, FSBPR) conducted by G20 in-between FSAP assessments.[110] The main findings made by the FSBPR in 2013 were that there existed poor interagency coordination and regulatory structure.[111] In addition, it was highlighted that there were inadequate over-the-counter derivatives[112] (hereinafter, OTC derivatives) reforms. It was proposed that SA needs to create a framework for centrally clearing OTC derivatives where possible.[113] G20 leaders noted that trading of OTC derivatives was a practice that was largely unregulated and a significant contributor to the GFC.[114] Improved OTC derivate reform reduces market vulnerabilities and increases transparency.[115] The findings made by the FSAP in 2014 identified poor coordination between and among regulators, as well as deep interconnection within the financial sector without a consolidated approach to supervision.[116]

[110] National Treasury of the Republic of South Africa*Financial Sector Regulation ("Twin Peaks") Bill: Implementing Twin Peaks* (2015) 12.
[111] National Treasury of the Republic of South Africa*Financial Sector Regulation ("Twin Peaks") Bill: Implementing Twin Peaks* (2015) 12.
[112] Over-the-counter derivatives are private contracts that are traded between two parties without going through an exchange or other intermediaries and enables parties to negotiate on the exact risk and return needed by each party. For detailed information on over-the-counter derivatives, see Beers B 'Over-the-Counter Derivative' available at *https://www.investopedia.com/ask/answers/052815/what-overthecounter-derivative.asp* (accessed on 19 November 2019).
[113] National Treasury of the Republic of South Africa*Financial Sector Regulation ("Twin Peaks") Bill: Implementing Twin Peaks* (2015) 12.
[114] King B 'Finance and Banking Alert: OTC derivatives regulations are final and in force' available at *https://www.cliffedekkerhofmeyr.com/en/news/publications/2018/Finance/finance-and-banking-alert-26-february-otc-derivatives-regulations-are-final-and-in-force.html* (accessed on 19 November 2019).
[115]Johannesburg Stock Exchange 'The Regulation of Over-The Counter Derivatives Products' available at *https://www.jse.co.za/events-and-facilities/training-regulation-of-over-the-counter-derivatives-products* (accessed on 19 November 2019).
[116] National Treasury of the Republic of South Africa*Financial Sector Regulation ("Twin Peaks") Bill: Implementing Twin Peaks* (2015) 12.

2.5 OVERVIEW OF THE FINANCIAL SECTOR REGULATORY LEGISLATIVE AMENDMENTS AND REFORM

The proposed shift to a Twin Peaks model of regulation was first proposed in the 2011 policy document titled 'A Safer Financial Sector to Serve South Africa Better' (hereinafter, Policy Document).[117] The Policy Document sets out as its main proposal, the separation of prudential and market conduct regulation.[118] Furthermore, the Policy Document provides for the objectives the National Treasury of the Republic of South Africa (hereinafter, National Treasury) aims to achieve within the financial sector, which are stability, consumer protection, access to financial services, coordination and comprehensiveness.[119] In ensuring that there is a separation of prudential and market conduct regulation and realising the objectives sought to be achieved, the Policy Document identifies the Twin Peaks model of financial regulation as being best suited in the achievement of the aforementioned objectives.[120] This was followed by the 2013 document, entitled 'Implementing a twin peaks model of financial regulation in South Africa' which was a road map that provided more detailed proposals on implementing the decisions arising from the initial 2011 policy document.[121]

The first draft of the Financial Sector Regulation Bill of 2013 (hereinafter, FSRB) implemented the Policy Document's proposed Twin Peaks model within its legislative framework.[122] The first draft of the FSRB dealt largely with the legislative foundation of the Twin Peaks model for regulating the financial sector, in addition to the creation of the two regulators and the framework which identified their respective modus operandi and scope of duty within the financial sector.[123] Following the first draft of the FSRB, the National Treasury published a revised second draft of the FSRB which outlined the various changes and improvements made in light of the comments

[117] National Treasury of the Republic of South Africa *New Twin Peaks Regulators Established* (2018) 1.
[118] National Treasury of the Republic of South Africa *A Safer Financial Sector to serve South Africa Better* (2011) 2.
[119] National Treasury of the Republic of South Africa *A Safer Financial Sector to serve South Africa Better* (2011) 2.
[120] National Treasury of the Republic of South Africa *A Safer Financial Sector to serve South Africa Better* (2011) 8.
[121] Financial Regulatory Reform Steering Committee *Implementing a twin-peaks model of financial regulation in South Africa* (2013) 3.
[122] Financial Sector Regulation Bill 2013.
[123] Godwin A, Howse T & Ramsay I 'Twin Peaks South Africa's Financial Sector Regulatory Framework' (2017) 134 SALJ 8.

made by stakeholders on the previous draft.[124]Accompanying the second draft of the FSRB, the 'Twin Peaks in South Africa: Response and Explanatory Document' (hereinafter, Explanatory Document) was published, explaining the underlying purpose and regulatory architecture of the second draft of the FSRB.[125] The Explanatory Document was indicative to what extent public comments on the first draft of the FSRB) had been taken into account, and provides an explanation for the changes and the proposed architecture of the regulatory system.[126] Stakeholders were encouraged to make comment submissions in respect of the second draft of the FSRB up until 2 March 2015.[127]

A third draft of the FSRB was tabled in Parliament 27 October 2015, affording stakeholders a further opportunity to comment during the Parliamentary process.[128] The National Treasury commented on the changes between the second and third versions of the FSRB and noted that while no substantive changes in policy position were required, further refinements of the drafting of provisions in the FSRB have been made to ensure technical accuracy and cohesive alignment with existing legislation in the financial sector.[129] On 21 July 2016 and 21 October 2016 further drafts of the FSRB were subsequently released, in addition to invitations for further public comment.[130]

It is evident that there has been extensive consultation with stakeholders throughout the financial regulatory legislative process and the various drafts of the FSRB. The National Treasury has

[124] Godwin A, Howse T & Ramsay I 'Twin Peaks South Africa's Financial Sector Regulatory Framework' (2017) 134 SALJ 8.
[125] National Treasury of the Republic of South Africa *Twin Peaks in South Africa: Response and Explanatory Document* (2014) 4.
[126] National Treasury of the Republic of South Africa *Twin Peaks in South Africa: Response and Explanatory Document* (2014) 4.
[127] Godwin A, Howse T & Ramsay I 'Twin Peaks South Africa's Financial Sector Regulatory Framework' (2017) 134 SALJ 8.
[128] National Treasury of the Republic of South Africa *Twin Peaks in South Africa: Response and Explanatory Document* (2014) 4.
[129] National Treasury of the Republic of South Africa 'Tabling of Financial Sector Regulation Bill to give effect to Twin Peaks reform' available at *http://www.treasury.gov.za/comm_media/press/2015/2015102701%20-%20Twin%20Peaks%20Reform.pdf* (accessed on 25 November 2019).
[130] Godwin A, Howse T & Ramsay I 'Twin Peaks South Africa's Financial Sector Regulatory Framework' (2017) 134 SALJ 8. Further, see documents Financial Sector Regulation Bill Revied Version 21 October 2016 and National Treasury of the Republic of South Africa *Financial Sector Regulation Bill National Treasury's Responses to Issues Raised During the Public Consultation Period on the Tabled Draft FSR Bill [B 34-2015]* (2016).

ensured the continual involvement and engagement of stakeholders through the consultation and feedback process and is indicative of a high level of transparency throughout the financial regulatory reform process.[131]

2.6 CONCLUSION

The shortfalls the National Treasury identified in respect of the former financial regulatory authority and the approach it adopted to financial regulation prompted the need for regulatory reform. The challenges and shortfalls faced by the former financial regulatory authority such as the blurring of the boundaries phenomenon, SA financial sector being dominated by large financial group, the need for transformation and inclusivity and improved customer protection. These shortfalls were seen to be best addressed through the implementation of the Twin Peaks model and the approach to financial regulation it adopted.

[131] Godwin A, Howse T & Ramsay I 'Twin Peaks South Africa's Financial Sector Regulatory Framework' (2017) 134 SALJ 8.

CHAPTER 3: TWIN PEAKS SYSTEM: INTERNATIONAL BEST PRACTICES

3.1 INTRODUCTION

The thesis sets out to critically analyse the effectiveness of the financial regulation in South Africa brought about by the Twin Peak system introduced in terms of the Financial Sector Regulation Act 9 of 2017 (hereinafter, the FSRA). Of great relevance to this chapter, is that this thesis, in Chapter 1,[132] sets out to evaluate the effectiveness of the new financial regulation, with a Twin Peak system at its center, in light of international best practices. The specific question that this chapter will seek to interrogate is: what are the international best practices with regard to the implementation of the Twin Peaks system, and what can South Africa learn from these international best practice jurisdictions regarding implementation of its own Twin Peak system? In this regard, this chapter assesses the implementation and the regulatory framework that gives effect to Twin Peaks in Australia and the United Kingdom. This chapter will assess how Twin Peaks is enforced within the jurisdictions of the chosen comparators of choice. Furthermore, the inherent problems associated with the implementation of Twin Peaks in respect of the financial sectors within the jurisdictions of the comparators of choice will be identified and the solutions implemented in addressing these problems.

3.2 THE SELECTED COMPARATORS OF CHOICE: AUSTRALIA & THE UK

The Australian iteration of the Twin Peaks model has been selected for purposes of this mini-thesis as Australia is the first country to adopt the Twin Peaks model and consequently has the longest experience in having the model implemented within its financial sector.[133] Additionally, the Australian Twin Peaks model has been tested against banking failures of which various aspects of the model had been tested and lessons were learnt from these failures. Furthermore, Australia has subjected its implementation of the Twin Peaks model to independent review by way of the

[132] See part 1.4 of Chapter 1.

[133] Schmulow A 'CIFR Working Papers Twin Peaks: A Theoretical Analysis' available at *https://www.researchgate.net/publication/315366898_Twin_Peaks_A_Theoretical_Analysis* (accessed on 11 March 2020).

Financial System Inquiry in ensuring its suitability and regulatory effectiveness.[134] For these reasons, Australia's implementation of Twin Peaks has been selected and will be analysed in the hope that South Africa could draw comparative value from the strengths of the Australian Twin Peak model and its experiences with financial regulation based on this model.

The UK iteration of the Twin Peaks model has been selected in view of the fact that Twin Peaks was first suggested by an Englishman, Michael Taylor, in 1995,[135] to address the problem of blurred boundaries experienced in the financial services sector.[136] Michael Taylor identified the two conditions[137] that are required to exist in assessing the suitability of the Twin Peaks model for a particular financial sector and the UK thus met these conditions, proving Twin Peaks to be suitable.[138]Furthermore, the UK economy and the financial sector was hard hit by the Global Financial Crisis (hereinafter, GFC) and Her Majesty's Treasury (hereinafter, HM Treasury) sought to overhaul the financial sector in redress of the consequences of the GFC.[139] It is thus important to look at the extent to which the Twin Peaks model remedied the negative effects that the GFC had on the UK financial sector.

[134] Government of Australia *Financial System Inquiry Final Report* (2013) 9.
[135] Schmulow A 'CIFR Working Papers Twin Peaks: A Theoretical Analysis' available at *https://www.researchgate.net/publication/315366898_Twin_Peaks_A_Theoretical_Analysis* (accessed on 21 May 2019).
[136] Mhango M 'Twin Peaks is not for SA' available at *https://www.fin24.com/Companies/Financial-Services/Twin-Peaks-is-not-for-SA-20140205* (accessed on 11 March 2020).
[137] The first condition is that banks are not to dominate the financial sector but occupy the sector with other non-bank financial participants, and the second condition is that the financial sector must have a highly developed consumer protection regime. See Mhango M 'Twin Peaks is not for SA' available at *https://www.fin24.com/Companies/Financial-Services/Twin-Peaks-is-not-for-SA-20140205* (accessed on 16 March 2020).
[138] Mhango M 'Twin Peaks is not for SA' available at *https://www.fin24.com/Companies/Financial-Services/Twin-Peaks-is-not-for-SA-20140205* (accessed on 16 March 2020).
[139] Her Majesty's Treasury *HM Treasury Annual Report and Accounts 2008-9 Including the spring Departmental Report and Consolidated Departmental Resource Accounts* (2009) 14.

3.3 THE IMPLEMENTATION OF TWIN PEAKS IN THE AUSTRALIAN FINANCIAL SECTOR

The reforms that introduced the Twin Peaks model in Australia were as a result of the Wallis Inquiry, which was established in 1996 with the purpose of reviewing the country's financial system.[140] The Twin Peaks model effectively began regulating the Australian financial sector in 1998.[141] The Australian Wallis Inquiry noted the factors motivating the implementation of the Twin Peaks model.[142] These particular factors concerned innovation in financial product design and distribution, which had resulted in the boundaries between financial instruments and institutions being blurred.[143] The increasing of financial market competition and conglomeration occurring within financial services institutions.[144]

The Wallis Inquiry recommended that a single regulator be established for the regulation of companies, market conduct and consumer protection.[145] This recommendation was made in light of conduct and disclosure regulation in Australia that had previously been provided through various agencies.[146] In addition, the Australian conduct and disclosure regulation was governed by the institutional form of the service provider which proved to be inconsistent with the emerging structure of markets which resulted in inefficiencies, inconsistencies and regulatory gaps not conducive for effective competition in financial markets.[147] In response thereto, a separate market

[140] Godwin A and Ramsay I 'Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation' available at *https://pdfs.semanticscholar.org/7a0f/fadd88ed94f106c4e05f1a7e1964a5463f5f.pdf* (accessed on 16 March 2020).
[141] Schmulow A 'CIFR Working Papers Twin Peaks: A Theoretical Analysis' available at *https://www.researchgate.net/publication/315366898_Twin_Peaks_A_Theoretical_Analysis* (accessed on 17 March 2020).
[142] Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 183.
[143] Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 183.
[144] Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 183.
[145] Godwin A, Kourabas S and Ian Ramsay I 'Twin Peaks and Financial Regulation: The Challenges of Increasing Regulatory Overlap and Expanding Responsibilities' (2016) 3(49) *American Bar Association* 279.
[146] Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 184.
[147] Godwin A &Ramsay I 'Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation' available at *https://pdfs.semanticscholar.org/7a0f/fadd88ed94f106c4e05f1a7e1964a5463f5f.pdf* (accessed on 16 March 2020).

conduct regulator was established, known as the Australian Securities and Investments Commission (hereinafter, ASIC).[148]

The Wallis Inquiry recommended that a single regulator be established for purposes of prudential regulation in the financial system.[149] The recommendation was made on the reasoning that by creating a single regulator, it would improve the emergence of wide ranging financial conglomerates and enable a more flexible approach over time to changes in prudential regulation.[150] The Australian Prudential Regulation Authority (hereinafter, APRA) was established in response to the recommendation as a body corporate and operates entirely outside of the Reserve Bank of Australia (hereinafter, RBA).[151]

Australia diverges from other Twin Peaks jurisdictions on the basis of the recommendation made by the Wallis Inquiry providing that the prudential regulator should be separate from, but cooperate closely with the RBA.[152] Furthermore, the Wallis Inquiry recommended that strong mechanisms are to be established to ensure appropriate coordination and cooperation between the two agencies.[153]

The Wallis Inquiry made several other recommendations pertaining to how the regulatory agencies are required to operate within the Australian financial sector in achieving the ideal regulatory framework. This was to be achieved through a careful balance between preventing market failure and allowing financial markets to perform the functions for which they were designed efficiently.[154]

[148] Australian Securities and Investments Commission Act 2001.
[149] Walker G 'U.K. Regulatory Revision – A New Blueprint for Reform' (2012) 3(46) *The International Lawyer* 817.
[150] Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 184.
[151] Australian Prudential Regulation Authority 'About APRA' available at https://www.apra.gov.au/about-apra (accessed on 8 April 2020).
[152] Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 184.
[153] Godwin A and Ramsay I 'Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation' available at https://pdfs.semanticscholar.org/7a0f/fadd88ed94f106c4e05f1a7e1964a5463f5f.pdf (accessed on 16 March 2020).
[154] Godwin A and Ramsay I 'Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation' available at https://pdfs.semanticscholar.org/7a0f/fadd88ed94f106c4e05f1a7e1964a5463f5f.pdf (accessed on 16 March 2020).

The recommendations made by the Wallis Inquiry formed the basis of the legislative reform giving effect to the implementation of Twin Peaks. The Australian Prudential Regulation Authority Bill of 1998 (hereinafter, APRA Bill) was the first in a number of financial sector legislative reforms that formally introduced the Twin Peaks model.[155] The legislation that gives effect to the Twin Peaks model in the Australian financial sector are the Australian Prudential Regulation Authority Act of 1998 (hereinafter, APRA Act) and the Australian Securities and Investment Commission Act of 2001 (hereinafter, ASIC Act).[156] The APRA Act charges APRA as the regulatory authority for financial stability and the ASIC Act charges ASIC as the regulatory authority for market conduct and consumer protection.[157]

As previously noted, the Twin Peaks model comprises of two peak regulators with their respective objectives concerning the enforcement of prudential regulation, and market conduct and consumer protection.[158] In Australia, the Australian Prudential Regulation Authority (APRA) is responsible for the safety and soundness of banks, and the Australian Securities and Investments Commission (ASIC) isresponsible for market conduct and consumer protection.[159] However, the title is a misnomer, to the extent that the RBA, has responsibilities as the Lender of Last Resort (hereinafter, LLR), and the overall responsibility for financial system stability.[160] Consequently, Australia's implementation of Twin Peaks may be more accurately described as a Triple Peak model.[161]

An important aspect of the Australian Twin Peaks model is the ideal of 'separate but equal' being the cornerstone of the Australian Twin Peaks model which sees the consumer protection regulator

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155 Godwin A &Ramsay I 'Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation' available at https://pdfs.semanticscholar.org/7a0f/fadd88ed94f106c4e05f1a7e1964a5463f5f.pdf (accessed on 16 March 2020).

156 S7(1) of the Australian Prudential Regulation Authority Act of 1998 and, s8(1) of the Australian Securities and Investment Commission Act of 2001.

157 S8(1) and s8(2) of the Australian Prudential Regulation Authority Act of 1998 and, s12A(2) and s12A(3) of the Australian Securities and Investment Commission Act of 2001.

158 Schmulow A 'Twin Peaks: An Analysis of Australian Architecture' available at https://pdfs.semanticscholar.org/f731/d590486b36d7efeb46c7420045859f5069a3.pdf(accessed on 8 April 2020).

159 Schmulow A 'Twin Peaks: An Analysis of Australian Architecture' available at https://pdfs.semanticscholar.org/f731/d590486b36d7efeb46c7420045859f5069a3.pdf(accessed on 8 April 2020).

160 Reserve Bank of Australia 'Role of the Reserve Bank in Maintaining Financial Stability' available athttps://www.rba.gov.au/fin-stability/reg-framework/role-of-the-reserve-bank-in-maintaining-financial-stability.html (accessed on 8 April 2020).

161 Schmulow A 'Twin Peaks: An Analysis of Australian Architecture' available at https://pdfs.semanticscholar.org/f731/d590486b36d7efeb46c7420045859f5069a3.pdf(accessed on 8 April 2020).

and its objectives as equal to that of the prudential regulator.[162] Theoretically, consumer protection may not be subordinated to financial system stability as instability may lead to systemic risk.[163] However, the rationale for the ideal stems from the market misconduct and consumer abuse that gave rise to the subprime disaster that led to the GFC which showcases the importance of consumer protection and the objectives incidental thereto.[164] Thus, guarding consumers has a positive effect on system stability by averting malpractices that may initially be detrimental to consumers but ultimately becomes systemic risks.[165]

APRA and ASIC have independent and distinctive mandates reflective of the Twin Peaks model of financial regulation in Australia.[166] Broadly, APRA is concerned with financial and non-financial risks to the soundness of regulated entities and on the financial stability of the overall system, while ASIC is concerned with the preservation of market integrity, conduct and investor protection.[167]

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162 Schmulow A 'Twin Peaks: An Analysis of Australian Architecture' available at *https://pdfs.semanticscholar.org/f731/d590486b36d7efeb46c7420045859f5069a3.pdf*(accessed on 8 April 2020).

163 Schmulow A 'Twin Peaks: An Analysis of Australian Architecture' available at *https://pdfs.semanticscholar.org/f731/d590486b36d7efeb46c7420045859f5069a3.pdf*(accessed on 8 April 2020).

164 Schmulow A 'Twin Peaks: An Analysis of Australian Architecture' available at *https://pdfs.semanticscholar.org/f731/d590486b36d7efeb46c7420045859f5069a3.pdf*(accessed on 8 April 2020).

165 Schmulow A 'Twin Peaks: An Analysis of Australian Architecture' available at *https://pdfs.semanticscholar.org/f731/d590486b36d7efeb46c7420045859f5069a3.pdf*(accessed on 8 April 2020).

166 Australian Prudential Regulation Authority - Australian Securities and Investments Commission Memorandum of Understanding 'Memorandum of Understanding between the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission' available at *https://www.apra.gov.au/sites/default/files/APRA-ASIC%20Memorandum%20of%20Understanding%202019.pdf*(accessed on 8 April 2020).

167 Australian Prudential Regulation Authority - Australian Securities and Investments Commission Memorandum of Understanding 'Memorandum of Understanding between the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission' available at *https://www.apra.gov.au/sites/default/files/APRA-ASIC%20Memorandum%20of%20Understanding%202019.pdf*(accessed on 8 April 2020).

3.3.1 Overview of the Australian Prudential Regulation Authority (APRA)

APRA was established by the Australian Government on 1 July 1998 following the recommendations made by the Wallis Inquiry into the Australian financial system.[168] APRA is mandated with ensuring financial safety and stability through prudential regulation.[169] APRA is established in terms of s7 of the APRA Act as a listed entity of which is accountable to the Chair[170].[171] The APRA Act identifies the objectives APRA is required to achieve and balance in promoting financial system stability in terms of s8, which underlines the purpose for establishing APRA.[172] The purpose for establishing APRA concerns regulating financial sector participants in accordance with relevant legislation of the Commonwealth that provide for standards for prudential regulation.[173] Furthermore, APRA administers the financial claims schemes provided for in the Banking Act 1959 and the Insurance Act 1973 and accordingly develop administrative practices and procedures to be applied for its role as regulator and the accompanying administrative duties.[174] Prudential regulation within the context of the Australian financial sector is understood as maintaining the safety and soundness of financial institutions, ensuring that depositors are confident that financial commitments and obligations will be met under all reasonable circumstances.[175]

[168] Australian Prudential Regulation Authority 'About APRA' available at https://www.apra.gov.au/about-apra (accessed on 11 February 2020).
[169] Australian Prudential Regulation Authority 'About APRA' available at https://www.apra.gov.au/about-apra (accessed on 11 February 2020).
[170] The Chair refers to the Chairman of APRA, currently Wayne Byres, available at https://www.apra.gov.au/news-and-publications/apra-welcomes-reappointment-of-helen-rowell-and-nomination-of-john-lonsdale (accessed on 10 February 2020).
[171] S7 of the Australian Prudential Regulation Authority of 1998.
[172] S7 of the Australian Prudential Regulation Authority of 1998.
[173]Carmichael J 'The Framework for Financial Supervision: Marco and Micro issues' available at https://www.bis.org/publ/plcy07i.pdf (accessed on 10 February 2020).
[174] Australian Prudential Regulation Authority of 1998.
[175]Australian Prudential Regulation Authority 'About APRA' available at https://www.apra.gov.au/about-apra (accessed on 12 February 2020).

3.3.2 Overview of the Australian Securities and Investment Commission (ASIC)

ASIC started operations within the Australian financial sector in 1991 as the Australian Securities Commission by replacing the National Companies and Securities Commission and the Corporate Affairs offices.[176] In 1998 the Australian Securities Commission's jurisdiction extended to insurance, superannuation, consumer protection and deposit taking, consequently the organisation was renamed ASIC.[177]

ASIC is established by the Australian Securities and Investments Commission Act of 2001 (hereinafter, ASIC Act) as an independent Commonwealth Government body.[178]The ASIC Act sets out the role, functions and powers of ASIC as a regulator within the Australian financial market.[179] In 2010 ASIC took on additional responsibility by consumer credit and finance broking, regulating trustee and fulfilling a supervisory function over trading on Australian licensed equity, derivatives and futures markets.[180]

ASIC is the regulator of Australia's markets and financial services mandated with ensuring fairness and transparency within Australia's financial markets.[181] In terms of the ASIC Act ASIC is required to ensure the maintenance, facilitation and improvement of the financial system's performance, to promote investor confidence and informed participation.[182] ASIC is to ensure the administration and enforcement of the law effectively and efficiently, as well as the processing and efficient storage of information and making information regarding companies and other

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[176]Australian Securities and Investments Commission 'History' available at *https://asic.gov.au/about-asic/what-we-do/our-role/history/* (accessed on 27 March 2020).
[177]Australian Securities and Investments Commission 'History' available at *https://asic.gov.au/about-asic/what-we-do/our-role/history/* (accessed on 27 March 2020).
[178] Kenton W 'Australian Securities and Investments Commission (ASIC)' available at *https://www.investopedia.com/terms/a/australian-securities-and-investments-commission-asic.asp* (accessed on 26 March 2020).
[179] Australian Securities and Investments Commission Act 2001.
[180] Australian Securities and Investments Commission 'History' available at *https://asic.gov.au/about-asic/what-we-do/our-role/history/* (accessed on 27 March 2020).
[181] Kenton W 'Australian Securities and Investments Commission (ASIC)' available at *https://www.investopedia.com/terms/a/australian-securities-and-investments-commission-asic.asp* (accessed on 26 March 2020).
[182] S12A(2) and s12A(3)*(a)* – *(d)* Australian Securities and Investments Commission Act 2001.

relevant bodies readily available to the public.[183] ASIC has general powers to protect consumers against misleading or deceptive and unconscionable conduct relating to all financial products and services, along with other regulators and to administer aspects of legislation concerning insurance, retirement savings accounts and superannuation.[184]

3.3.3 Regulatory Coordination and Collaboration between the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission

Coordination between regulators as espoused in terms of Principle 3 of the Basel Core Principles[185] is of particular importance for the Twin Peaks model to operate effectively as market participants are generally regulated by both regulators.[186] In order to ensure that market participants are sufficiently regulated, coordination is required to be effective through consultation, information-sharing (within a framework that supports an appropriate standard of confidentiality) and cooperation in areas such as supervision and enforcement action.[187]

Coordination between the separate financial regulators is thus of utmost importance and there are several structures tasked with facilitating the required level of communication and collaboration between them.[188] The Wallis Inquiry recognised the importance of information-sharing and coordination between the regulators and provided that the Council of Financial Regulators (hereinafter, CFR) coordinate a broad range of activities with the objective of facilitating the cooperation of its three members namely, the RBA, APRA and ASIC, across the full range of regulatory functions, and the attainment of regulatory mandates.[189]

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[183] Kenton W 'Australian Securities and Investments Commission (ASIC)' available at https://www.investopedia.com/terms/a/australian-securities-and-investments-commission-asic.asp (accessed on 26 March 2020).

[184] Australian Securities and Investments Commission *The integration of financial regulatory authorities – the Australian experience* (2006) 7.

[185] Principle 3 concerns Cooperation and collaboration: Laws, regulations or other arrangements provide a framework for cooperation and collaboration with relevant domestic authorities and foreign supervisors. These arrangements are required reflect the need to protect confidential information. See, Basel Committee on Banking Supervision 'Core Principles for Effective Banking Supervision' available at https://www.bis.org/publ/bcbs213.pdf (accessed on 27 March 2020).

[186] Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 185.

[187] Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 185.

[188] Australian Securities and Investments Commission *The integration of financial regulatory authorities – the Australian experience* (2006) 11.

[189] Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 185.

To facilitate the coordination and collaboration between the regulators, Australia has established the Council of Financial Regulators (hereinafter, CFR), the purpose of which is to oversee inter-agency co-operation.[190] The CFR operates as an informal body in which enables members to share information and views, it provides a platform to discuss regulatory reforms or issues where responsibilities overlap and, if the need arises, coordinate responses to potential threats to financial stability.[191] Additionally, the CFR also acts in an advisory capacity by advising Government on the adequacy of Australia's financial system architecture in light of ongoing developments within the financial sector.[192]

The Memorandum of Understanding between APRA and ASIC (hereinafter, Australian MoU) sets out a framework for engagement, including cooperation, coordination and disseminating information between the regulators.[193] The Australian MoU is reflective of the intention of the regulators to maintain a proactive, open and collaborative relationship.[194] The key objectives of the Australian MoU concerns the regulators committing to engage proactively on matters that are relevant to each other's responsibilities so as to ensure that cooperation and collaboration between the regulators are sufficiently facilitated.[195]

The legislative framework that provides for collaboration and cooperation between the regulators is in terms of s10A(1) of the APRA Act confirming that APRA should, in performing and exercising its functions and powers, have regard to the desirability of APRA cooperating with

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190 Schmulow A 'Twin Peaks: An Analysis of Australian Architecture' available at *https://pdfs.semanticscholar.org/f731/d590486b36d7efeb46c7420045859f5069a3.pdf*(accessed on 27 March 2020).

191 Australian Securities and Investments Commission *The integration of financial regulatory authorities – the Australian experience* (2006) 11.

192 Australian Securities and Investments Commission *The integration of financial regulatory authorities – the Australian experience* (2006) 11.

193Australian Prudential Regulation Authority - Australian Securities and Investments Commission Memorandum of Understanding 'Memorandum of Understanding between the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission' available at *https://www.apra.gov.au/sites/default/files/APRA-ASIC%20Memorandum%20of%20Understanding%202019.pdf*(accessed on 8 April 2020).

194 Australian Prudential Regulation Authority - Australian Securities and Investments Commission Memorandum of Understanding 'Memorandum of Understanding between the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission' available at *https://www.apra.gov.au/sites/default/files/APRA-ASIC%20Memorandum%20of%20Understanding%202019.pdf*(accessed on 8 April 2020).

195 Australian Prudential Regulation Authority - Australian Securities and Investments Commission Memorandum of Understanding 'Memorandum of Understanding between the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission' available at *https://www.apra.gov.au/sites/default/files/APRA-ASIC%20Memorandum%20of%20Understanding%202019.pdf*(accessed on 8 April 2020).

other financial sector supervisory agencies, and with other agencies specified in regulations for the purposes of the subsection.[196] The legislative framework for regulatory coordination is outcomes-focused, it does not, however, provide detailed provisions as to the nature of coordination or how it should be achieved.[197]

Although there are various structures in place ensuring coordination and cooperation, whether it be effective or not, there exist a general risk that should coordination and cooperation not be sufficient it may then have potentially serious consequences on the financial sector.[198] While these risks are manageable through robust coordination and liaison channels, it persists to be a key consideration for jurisdictions that have adopted the model.[199]

In terms of the Twin Peaks model, it is paramount to ensure that the objectives of each regulator and the regulatory parameters between them are clearly defined.[200] This is because market participants may fall within the regulatory jurisdiction of both regulators.[201] Furthermore, in ensuring that comprehensive supervision is achieved and that issues that do not fall clearly within the defined regulatory perimeters are duly regulated, it is necessary to achieve effective coordination between the regulators.[202] This requires consultation, information-sharing and mutual cooperation through maintaining a collaborative relationship in areas such as supervision and enforcement action.[203]

196 Australian Prudential Regulation Authority Act 1998.
197 Schmulow A 'Twin Peaks: An Analysis of Australian Architecture' available at https://pdfs.semanticscholar.org/f731/d590486b36d7efeb46c7420045859f5069a3.pdf(accessed on 8 April 2020).
198 Godwin A 'Introduction to special issue – the twin peaks model of financial regulation and reform in South Africa' (2017) 4(11) *Routledge* 152.
199 Godwin A 'Introduction to special issue – the twin peaks model of financial regulation and reform in South Africa' (2017) 4(11) *Routledge* 152.
200 Godwin A and Ramsay I 'Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation' available at https://pdfs.semanticscholar.org/7a0f/fadd88ed94f106c4e05f1a7e1964a5463f5f.pdf (accessed on 8 April 2020).
201 Godwin A and Ramsay I 'Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation' available at https://pdfs.semanticscholar.org/7a0f/fadd88ed94f106c4e05f1a7e1964a5463f5f.pdf (accessed on 8 April 2020).
202 Godwin A and Ramsay I 'Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation' available at https://pdfs.semanticscholar.org/7a0f/fadd88ed94f106c4e05f1a7e1964a5463f5f.pdf (accessed on 8 April 2020).
203 Godwin A and Ramsay I 'Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation' available at https://pdfs.semanticscholar.org/7a0f/fadd88ed94f106c4e05f1a7e1964a5463f5f.pdf (accessed on 8 April 2020).

3.3.4 Enforcement of the Australian Twin Peaks Model

Enforcement of the Twin Peaks model within the Australian financial sector is an important component in ensuring that regulations are abided by and that there are no issues that impedes upon regulators achieving the respective objectives. In terms of the ASIC Act it provides for the legislative basis informing ASIC's enforcement powers and remedies as provided by Subdivision G and the provisions enumerated within the subdivision.[204] The enforcement powers provided for in terms of Subdivision G identifies the offences such as non-compliance with regulations, such as consumer protection as provided by Subdivision D of the ASIC Act, which enables ASIC to institute criminal or civil actions or both against individuals or body corporates.[205] Offenders contravening regulations may be liable to fines or pecuniary penalties. ASIC may institute proceedings in the relevant court for the recovery on behalf of the Commonwealth or a pecuniary penalty.[206] ASIC may institute pre-emptive actions through injunctions that may be instituted in respect of conduct that constitute or potentially constitute a contravention.[207] ASIC aims to act effectively and quickly against fraud, dishonesty and misconduct to maintain public confidence in companies, financial markets and financial services businesses, through its enforcement powers granted in terms of the ASIC Act.[208]

Enforcement and investigations from a coordinated and collaborative perspective in terms of the Australian MoU provides that where possible, regulators agree to engage on investigations or enforcement actions and share relevant information.[209] Furthermore, that regulators agree to inform each other of breaches, and suspected or potential breaches of regulatory requirements that are relevant to the others responsibilities.[210] The Australian MoU ensure effective coordination

[204] Australian Securities and Investments Commission Act 2001.
[205] Australian Securities and Investments Commission Act 2001.
[206] Australian Securities and Investments Commission Act 2001.
[207] Australian Securities and Investments Commission Act 2001.
[208] Australian Securities and Investments Commission *The integration of financial regulatory authorities – the Australian experience* (2006) 8.
[209] Australian Prudential Regulation Authority and Australian Securities and Investments Commission Memorandum of Understanding 'Memorandum of Understanding between the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission' available at *https://www.apra.gov.au/sites/default/files/APRA-ASIC%20Memorandum%20of%20Understanding%202019.pdf* (accessed on 17 March 2020).
[210] Australian Prudential Regulation Authority and Australian Securities and Investments Commission Memorandum of Understanding 'Memorandum of Understanding between the Australian Prudential Regulation Authority and the Australian Securities and Investments Commission' available at

through enlisting the assistance of APRA and strengthens enforcement mechanisms between the regulators.

3.3.5 Inherent Problems Identified with Australia's Experience of Implementing Twin Peaks: Australia's Twin Peaks Failures

The collapse of HIH Insurance Limited on 15 March 2001 put the Australian Twin Peaks model under the spotlight, particularly on the front of prudential regulation.[211] Prior to the collapse of HIH Insurance Limited, it was the second largest general insurer in Australia with operations in many countries.[212] HIH Insurance Limited was a regulated entity, under the jurisdiction of APRA as the system stability regulator.[213] As consequence to the collapse of HIH Insurance Limited the HIH Royal Commission was established to examine the issues which arose from the collapse of the insurer.[214]

Following the collapse of HIH, the Commission identified various deficiencies in coordination in terms of the HIH Report.[215] The Commission identified deficiencies in APRA's analysis and response to information received from HIH Insurance Limited concerning its financial well-being and solvency and the lack of required coordination between APRA and ASIC.[216] There was also uncertainty in respect of the functions, responsibilities and how the roles of each regulator should be coordinated.[217] The HIH Report recommended that the reinforcement of the exchange of

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https://www.apra.gov.au/sites/default/files/APRA-ASIC%20Memorandum%20of%20Understanding%202019.pdf (accessed on 17 March 2020).

211 Schmulow A 'CIFR Working Papers Twin Peaks: A Theoretical Analysis' available at https://www.researchgate.net/publication/315366898_Twin_Peaks_A_Theoretical_Analysis (accessed on 17 March 2020).

212 HIH Insurance 'Background' available at https://www.hih.com.au/background (accessed on 17 March 2020).

213 Schmulow A 'CIFR Working Papers Twin Peaks: A Theoretical Analysis' available at https://www.researchgate.net/publication/315366898_Twin_Peaks_A_Theoretical_Analysis (accessed on 17 March 2020).

214 Godwin A and Ramsay I 'Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation' available at https://pdfs.semanticscholar.org/7a0f/fadd88ed94f106c4e05f1a7e1964a5463f5f.pdf (accessed on 17 March 2020).

215 Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 185.

216 Godwin A and Ramsay I 'Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation' available at https://pdfs.semanticscholar.org/7a0f/fadd88ed94f106c4e05f1a7e1964a5463f5f.pdf (accessed on 23 March 2020).

217 Godwin A and Ramsay I 'Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation' available at https://pdfs.semanticscholar.org/7a0f/fadd88ed94f106c4e05f1a7e1964a5463f5f.pdf (accessed on 23 March 2020).

information between APRA and ASIC and that it be done in a systematic manner through both formal and informal means and based on defined protocols.[218] As a result of the recommendations made in the HIH Report the APRA Act was amended to include a new provision namely s10A of the APRA Act which provides for cooperation with other agencies.[219] In addition, the HIH Report recommended that the exchange of information and coordination between the two regulators should not be discretionary but incorporated in the operating procedures of the respective regulators.[220]

Furthermore, the HIH Royal Commission noted from a governance perspective that the non-executive board structure was not suited to APRA and recommended that control be vested in a small full-time executive, consisting of a chief executive and two or three commissioners appointed by the government.[221] The rationale for this recommendation was that it would make APRA more efficient and better able to discharge its mandated responsibilities.[222] This recommendation was accepted by the Australian Government and implemented in the APRA Act in 2003 by amendments.[223]

Similar issues as those outlined in the collapse of HIH Insurance Limited echoed 8 years later with the collapse of Trio Capital in June 2009.[224] Trio Capital was a superannuation[225] fund trustee and

[218] Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 185.
[219] Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 185
[220] Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 185.
[221] Godwin A and Ramsay I 'Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation' available at *https://pdfs.semanticscholar.org/7a0f/fadd88ed94f106c4e05f1a7e1964a5463f5f.pdf* (accessed on 23 March 2020).
[222] Godwin A and Ramsay I 'Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation' available at *https://pdfs.semanticscholar.org/7a0f/fadd88ed94f106c4e05f1a7e1964a5463f5f.pdf* (accessed on 23 March 2020).
[223] Godwin A and Ramsay I 'Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation' available at *https://pdfs.semanticscholar.org/7a0f/fadd88ed94f106c4e05f1a7e1964a5463f5f.pdf* (accessed on 23 March 2020).
[224] Godwin A and Ramsay I 'Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation' available at *https://pdfs.semanticscholar.org/7a0f/fadd88ed94f106c4e05f1a7e1964a5463f5f.pdf* (accessed on 23 March 2020).
[225] Superannuation refers to an organisational pension program created by a company for the benefit of its employees. It is generally referred to as a company's pension plan. Funds deposited in a superannuation account will grow, typically unencumbered by tax implications, until retirement or withdrawal. For more information on superannuation see, Kagan J 'Superannuation' available at *https://www.investopedia.com/terms/s/superannuation.asp* (accessed on 23 March 2020).

licensed responsible entity that managed 17 investment schemes.[226] Trio Capital went into voluntary administration on 19 December 2009 and consequently placed into liquidation on 22 June 2010.[227] The collapse of Trio Capital was described as being the biggest superannuation fraud in the history of the Australian financial sector by a joint parliamentary inquiry at the time, devastating the sector by taking a total $176 million from more than 6000 investors.[228] ASIC instituted criminal and administrative actions against Trio Capital, its directors and other parties as a result of alleged misappropriation of investor funds.[229] In respect of Australia's financial regulation, Trio Capital highlighted deficiencies in terms of poor information-sharing between the two regulators and the need to encourage proactive information-sharing between the regulators; namely, effective information-sharing on an unsolicited basis.[230]

The Parliamentary Joint Committee on Corporations and Financial Services in its report of the collapse of Trio Capital found that communication between ASIC and APRA was substandard[231] and that when ASIC commenced its surveillance of the hedge fund, it had seemed to be unaware of the failure of Trio Capital to provide information to APRA.[232] It is noted that the Memorandum of Understanding between ASIC and APRA contains provisions concerning mutual assistance and coordination, information sharing and unsolicited assistance which regulators are mandated to

[226] Australian Securities and Investments Commission *Financial System Inquiry: Submission by the Australian Securities and Investments Commission* (2014) 101.
[227] Australian Securities and Investments Commission *Financial System Inquiry: Submission by the Australian Securities and Investments Commission* (2014) 101.
[228] Sadauskas A 'Lifetime ban for director over missing $118 million following Trio Capital collapse' available at https://www.smartcompany.com.au/business-advice/legal/lifetime-ban-for-director-over-missing-118-million-following-trio-capital-collapse/ (accessed on 23 March 2020).
[229] Godwin A and Ramsay I 'Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation' available at https://pdfs.semanticscholar.org/7a0f/fadd88ed94f106c4e05f1a7e1964a5463f5f.pdf (accessed on 23 March 2020).
[230] Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 186.
[231] Godwin A and Ramsay I 'Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation' available at https://pdfs.semanticscholar.org/7a0f/fadd88ed94f106c4e05f1a7e1964a5463f5f.pdf (accessed on 23 March 2020).
[232] Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 185.

adhere to.[233] The report further reiterated the need for the regulators to continue sharing information, even in the instance where no request for information had been tendered.[234]

In the APRA 2013/2014 annual report, APRA stated that they had strengthened their information-sharing arrangements through addressing the recommendations of the report of the Joint Parliamentary Committee into the failure of Trio Capital Limited.[235] This was done through taking measures to raise awareness amongst staff of both agencies about matters of mutual interest; presentations to APRA staff on ASIC's role and functions; developing guidance notes to assist APRA staff in identifying matters relevant to ASIC; and the temporary transfer of staff between APRA and ASIC in a number of areas, including enforcement.[236]

The Australian Twin Peaks experience in light of the HIH and Trio Capital collapses are indicative of the critical importance of information-sharing between APRA and ASIC, specifically at the operational levels of the respective regulators.[237] It also highlights the importance of ensuring that each regulator is capable of responding in a timeous and effective manner to problems experienced by regulated entities and coordinate the performance of functions and responsibilities between both regulators.[238]

[233] Godwin A and Ramsay I 'Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation' available at *https://pdfs.semanticscholar.org/7a0f/fadd88ed94f106c4e05f1a7e1964a5463f5f.pdf* (accessed on 23 March 2020).
[234] Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 186.
[235] Godwin A and Ramsay I 'Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation' available at *https://pdfs.semanticscholar.org/7a0f/fadd88ed94f106c4e05f1a7e1964a5463f5f.pdf* (accessed on 23 March 2020).
[236] Godwin A and Ramsay I 'Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation' available at *https://pdfs.semanticscholar.org/7a0f/fadd88ed94f106c4e05f1a7e1964a5463f5f.pdf* (accessed on 23 March 2020).
[237] Godwin A and Ramsay I 'Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation' available at *https://pdfs.semanticscholar.org/7a0f/fadd88ed94f106c4e05f1a7e1964a5463f5f.pdf* (accessed on 23 March 2020).
[238] Godwin A and Ramsay I 'Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation' available at *https://pdfs.semanticscholar.org/7a0f/fadd88ed94f106c4e05f1a7e1964a5463f5f.pdf* (accessed on 23 March 2020).

3.4 TWIN PEAKS IN THE UNITED KINGDOM FINANCIAL SECTOR

As previously noted, Twin Peaks was originally proposed by Michael Taylor in 1995 in response to the 'blurring of lines' phenomenon experience by the UK financial sector by proposing objectives for regulating financial institutions that required to be achieved. These objectives were ensuring soundness of the financial system and protecting financial consumers as the regulatory structure address these aims it was consequently called the Twin Peaks model.[239] However, the UK did not adopt Taylor's proposed Twin Peaks model, instead it adopted a single regulatory model.[240]

Prior to the UK adopting a single regulatory model, its regulatory regime was based on specialised functional regulation that involved numerous separate agencies.[241] In terms of this regulatory framework the Bank of England (hereinafter, BoE) was responsible for the supervision of banks, the Department of Trade and Industry for insurance and the Securities and Investments Board for securities.[242] The day-to-day responsibility was held between three self-regulatory organisations, namely the Personal Investment Authority responsible for conduct of business and financial advisers, the Securities and Futures Authority responsible for securities firms and the Investment Management Regulatory Organisation responsible for fund managers.[243] A central characteristic of this regulatory regime was that diversified financial groups were subject to multiple authorisation and supervisory requirements applied by specialist functional regulators.[244] Financial firms in the UK shifted towards a trend by becoming multi-functional firms which resulted in a new industry structure that did not co-exist easily with a fragmented regulatory system based on

[239] Mhango M 'Twin Peaks is not for SA' available at *https://www.fin24.com/Companies/Financial-Services/Twin-Peaks-is-not-for-SA-20140205* (accessed on 1 April 2020).
[240] Mhango M 'Twin Peaks is not for SA' available at *https://www.fin24.com/Companies/Financial-Services/Twin-Peaks-is-not-for-SA-20140205* (accessed on 1 April 2020).
[241] Leahy G (ed) *Managing Banking Relationships* (1997) 41.
[242] Leahy G (ed) *Managing Banking Relationships* (1997) 41.
[243] Dale R & Wolfe S 'The UK Financial Services Authority: Unified regulation in the new market environment' (2003) 3(4) *Journal of International Banking Regulation* 213.
[244] Dale R & Wolfe S 'The UK Financial Services Authority: Unified regulation in the new market environment' (2003) 3(4) *Journal of International Banking Regulation* 213.

regulation by function.[245] This resulted in financial firms and institutions not being effectively regulated.

The UK adopted the single regulator model in 1997 as the UK Chancellor of the Exchequer announced the decision to create a single UK regulatory agency namely, the Financial Services Authority (hereinafter, the FSA).[246] The FSA was created in response to the regulatory difficulties experienced by the UK based on the regulatory regime specialised functional regulation, as the FSA sought to oversee the entire financial services sector.[247] The rationale for this decision was on the basis that financial institutions were becoming increasingly multi-functional resulting in blurring the distinctions between different types of financial institutions.[248] Prior to the single regulatory model these multi-functional institutions were regulated by a plethora of different supervisors which had the drawback of increased costs and reduced supervision effectiveness and by having one regulator to address these issues.[249] The decision to move to a single regulator was met with approval, with the financial services industry supporting the decision as it addressed overlaps, gaps and inconsistencies in regulation, the imposition of accountability and the clarity of purpose.[250]

During the FSA's tenure as the single regulator it has experienced devastating bank collapses that ultimately led to the economic crisis happening due to multiple failures in policy and practice.[251] The perceived failure of the FSA to predict and prevent impacts of the GFC as a single regulator prompted a need for reform.[252] The key disadvantage of a single regulator was that inherently it

[245] Dale R & Wolfe S 'The UK Financial Services Authority: Unified regulation in the new market environment' (2003) 3(4) *Journal of International Banking Regulation* 214.
[246] Norton J 'Global Financial Sector Reform: The Single Financial Regulator Model Based on the United Kingdom FSA Experience: A Critical Re-evaluation' (2005) 1(39) *American Bar Association* 23.
[247] Moodley A *The Twin Peaks Model: A Critical Analysis of its Effectiveness in South Africa* (unpublished LLM thesis, University of the Witwatersrand, 2018) 37.
[248] Masciandaro D (ed) *Handbook of Central Banking and Financial Authorities in Europe: New Architectures in the Supervision of Financial Markets* (2005) 142.
[249] Dale R & Wolfe S 'The UK Financial Services Authority: Unified regulation in the new market environment' (2003) 3(4) *Journal of International Banking Regulation* 214.
[250] Dale R & Wolfe S 'The UK Financial Services Authority: Unified regulation in the new market environment' (2003) 3(4) *Journal of International Banking Regulation* 214.
[251] Leek A 'Lord Turner admits FSA failures in financial crisis' available at https://www.pensionsage.com/pa/lord-turner-admits-fsa-failures-in-financial-crisis.php (accessed on 7 April 2020).
[252] Yuan K, Paech P, Lou D & Zhou H 'A Financial Regulatory Regime Reform Template To Ensure Financial Stability For The Chinese Economy' available

gave rise to an elevated risk of a single point of failure.[253] Thus having a single regulator may have been putting too high of a burden on a single authority in a large market, making it difficult to govern and potentially creating inefficiencies and conflict of interests.[254] These factors taken into consideration acted as impetus-prompting regulatory reform in the UK particularly in light of the effects of the GFC and the regulatory failures such as bank collapses that made the UK financial system susceptible to the effects of the GFC.

In the aftermath of GFC as a result of the subprime lending in US in 2008, most leading countries introduced reforms in financial regulation, including changes to the regulatory structures.[255] Following suit, the UK embarked on regulatory reform by initiating processes for implementing Twin Peaks in 2010 and saw its implementation within the financial sector in 2013.[256] The main objective of shifting to the Twin Peaks Model was to alleviate the regulatory deficiencies of the single regulatory approach.[257] The Financial Services Act 2012 (hereinafter, FS Act) was implemented in 2013 within the UK financial sector, and new supervising bodies took over the regulatory functions from the Financial Services Authority (hereinafter, FSA).[258] The UK abolished the FSA and divided its functions into prudential regulation and conduct regulation respectively, adopting the Twin Peaks model.[259]

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/701846/financial_regulatory_regime_reform.pdf (accessed on 8 April 2020).

253 Yuan K, Paech P, Lou D & Zhou H 'A Financial Regulatory Regime Reform Template To Ensure Financial Stability For The Chinese Economy' available *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/701846/financial_regulatory_regime_reform.pdf* (accessed on 8 April 2020).

254 Yuan K, Paech P, Lou D & Zhou H 'A Financial Regulatory Regime Reform Template To Ensure Financial Stability For The Chinese Economy' available *https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/701846/financial_regulatory_regime_reform.pdf* (accessed on 8 April 2020).

255 Bando H 'Twin Peaks – Financial Market Regulation In Switzerland, the UK and Japan' available at https://ssrn.com/abstract=2876022 (accessed on 8 April 2020).

256 Moodley A *The Twin Peaks Model: A Critical Analysis of its Effectiveness in South Africa* (unpublished LLM thesis, University of the Witwatersrand, 2018) 37.

257 Moodley A *The Twin Peaks Model: A Critical Analysis of its Effectiveness in South Africa* (unpublished LLM thesis, University of the Witwatersrand, 2018) 37.

258 Bando H 'Twin Peaks – Financial Market Regulation In Switzerland, the UK and Japan' available at https://ssrn.com/abstract=2876022 (accessed on 8 April 2020).

259 Bando H 'Twin Peaks – Financial Market Regulation In Switzerland, the UK and Japan' available at https://ssrn.com/abstract=2876022 (accessed on 8 April 2020).

The legislative framework that gave effect to the implementation of the Twin Peaks model was the FS Act.[260] The FS Act amended the Bank of England Act and the Financial Services and Market Act to create three supervisory bodies.[261] The Financial Policy Committee (hereinafter, FPC) which was created within the BoE for purposes of overseeing financial stability as the macro-prudential regulator.[262] The Prudential Regulation Authority (hereinafter, PRA) was created as a subsidiary of the BoE to oversees financial stability however, as the micro-prudential regulator.[263] The Financial Conduct Authority (hereinafter, FCA) which was formerly named the FSA and established outside the BoE as the market conduct regulator.[264]

The UK financial sector has adapted to frequently occurring changes to its regulatory structure, indicative of its adaptability and resilience to regulation. These changes albeit drastic, addresses regulatory issues and concerns that are present within the sector.

3.4.1 Overview of the Prudential Regulation Authority (PRA)

The PRA was established on 1 April 2013 in terms of s2A of the FS Act as a body corporate.[265] The PRA is a subsidiary of the BoE and is a UK public regulatory body that assumes responsibility for the prudential regulation and supervision of banks, building societies, credit unions, insurers and major investment firms.[266] It sets prudential standards and supervises financial institutions at the level of the individual firm.[267]

The PRA has two statutory objectives namely, promoting the safety and soundness of its regulated firms and, from an insurer orientated perspective, to contribute to the attaining of an appropriate

[260] Financial Services Act 2012.

[261] Bando H 'Twin Peaks – Financial Market Regulation In Switzerland, the UK and Japan' available at https://ssrn.com/abstract=2876022 (accessed on 8 April 2020).

[262] Stephen V & Molyneux P *An Introduction to Global Financial Markets* 8 ed (2016) 53.

[263] Bando H 'Twin Peaks – Financial Market Regulation In Switzerland, the UK and Japan' available at https://ssrn.com/abstract=2876022 (accessed on 8 April 2020).

[264] Spicer A, Lindley D & Gond J et al 'Cultural change in the FCA, PRA & Bank of England - Practising what they preach?' available at *https://newcityagenda.co.uk/wp-content/uploads/2016/10/NCA-Cultural_Change_in_regulators_report.pdf*(accessed on 8 April 2020).

[265] Financial Services Act 2012.

[266] Deloitte 'Prudential Regulation Authority (PRA)' available at *https://www.iasplus.com/en-gb/resources/other-regulatory/pra* (accessed on 2 April 2020).

[267] Journal of Regulation and Compliance 'Prudential Regulation Authority (PRA)' available at *https://thejournalofregulation.com/en/article/prudential-regulation-authority-pra/* (accessed on 2 April 2020).

degree of protection for policyholders.[268] These objectives are advanced by way of ensuring two key tools.[269] Firstly through regulation, it sets standards or policies that firms are expected to meet.[270] These may include Threshold Conditions that firms must meet, firms maintaining the appropriate capital and liquidity standard, and having suitable management.[271] Secondly through supervision, it assesses the risks that firms pose to the objectives of the PRA and, take action where necessary to reduce them.[272]

The PRA as the prudential regulator is tasked with supervision and prudential standard setting. It also has an additional insurance objective in terms of s2C of the FS Act where the PRA as a prudential regulator assists conduct regulation to the extent of contributing to an appropriate degree of protection for policy holders.[273] Within the UK insurance industry, extra protection is provided for policyholders as this is included within the objectives of the prudential regulator. Furthermore, PRA's prudential regulatory mandated is specifically focused on micro-prudential regulation with the assistance of the FPC focused on macro-prudential regulation and oversight of micro-prudential regulation.[274]

The purpose of the reform in the UK, under which the functions of prudential regulation is exercised by the BoE acting through the PRA is to "maximise the synergies of having monetary

[268] Deloitte 'Prudential Regulation Authority (PRA)' available at *https://www.iasplus.com/en-gb/resources/other-regulatory/pra* (accessed on 2 April 2020).
[269] Journal of Regulation and Compliance 'Prudential Regulation Authority (PRA)' available at *https://thejournalofregulation.com/en/article/prudential-regulation-authority-pra/* (accessed on 2 April 2020).
[270] Deloitte 'Prudential Regulation Authority (PRA)' available at *https://www.iasplus.com/en-gb/resources/other-regulatory/pra* (accessed on 2 April 2020).
[271] Journal of Regulation and Compliance 'Prudential Regulation Authority (PRA)' available at *https://thejournalofregulation.com/en/article/prudential-regulation-authority-pra/* (accessed on 2 April 2020).
[272] Journal of Regulation and Compliance 'Prudential Regulation Authority (PRA)' available at *https://thejournalofregulation.com/en/article/prudential-regulation-authority-pra/* (accessed on 2 April 2020).
[273] Financial Services Act 2012.
[274] Bando H 'Twin Peaks – Financial Market Regulation In Switzerland, the UK and Japan' available at https://ssrn.com/abstract=2876022 (accessed on 2 April 2020).

policy, macro-prudential policy[275] and micro-prudential policy[276] under the aegis of one institution."[277] This places a greater regulatory presence and focus in respect of prudential matters and prioritises the objectives of the prudential regulator.

3.4.2 Overview of the Financial Policy Committee (FPC)

The FPC is established in terms of s9B of the FS Act and has the responsibility of macro-prudential regulation.[278] It is responsible for identifying the systemic risks as a result of structural characteristics of financial markets or risk distribution within the financial sector and enhancing the resilience of the UK financial system.[279] It also has a secondary objective in supporting the economic policy of the UK Government.[280]

In meeting its responsibilities, the FPC has two sets of powers namely, powers of direction and powers of recommendation.[281] The FPC has the power to direct regulators to act on several specific policy tools called macro-prudential tools.[282] These tools falls within the powers of direction of the FPC such as setting countercyclical capital buffers which ensures that banks increase capital as a security measure, through variable risk weights which enforces targeted capital requirements

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275 Macro-prudential policy matters concerns risk management within the financial system as a result of external factors and market failures. Furthermore, these policies aim to protect the overall financial system by ensuring financial sector resilience and the effects of possible contagion are limited, and through encouraging a system-wide perspective which promotes sound incentives for market participants. See, European Central bank 'Financial stability and macroprudential policy' available at *https://www.ecb.europa.eu/ecb/tasks/stability/html/index.en.html* (accessed on 5 August 2021).

276 Micro-prudential policy matters refer to oversight or financial regulation by regulators of financial institutions and individual institution or firm-level, such as "ensuring the balance sheets of individual institutions are robust to shocks". See, IGI Global 'What is Microprudential Policy' available at *https://www.igi-global.com/dictionary/impacts-of-global-financial-crisis-and-changes-in-monetary-policy-of-central-banks/54550* (accessed on 5 August 2021).

277 Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 184.

278 Financial Services Act 2012.

279 The Chartered Insurance Institute 'Towards Twin Peaks: The UK's Emerging Regulatory Landscape (January 2013 Update)' available at *https://thepfs.org/media/4119720/regulatory_landscape_dec_2012__20_dec_.pdf* (accessed on 3 April 2020).

280 Bank of England 'Financial Stability' available at *https://www.bankofengland.co.uk/financial-stability* (accessed on 3 April 2020).

281 Bank of England 'Financial Stability' available at *https://www.bankofengland.co.uk/financial-stability* (accessed on 3 April 2020).

282 The Chartered Insurance Institute 'Towards Twin Peaks: The UK's Emerging Regulatory Landscape (January 2013 Update)' available at *https://thepfs.org/media/4119720/regulatory_landscape_dec_2012__20_dec_.pdf* (accessed on 3 April 2020).

on specific sectors or asset classes.[283] In addition, the FPC can make recommendations to anyone to reduce risks to financial stability.[284] The responsibilities of the FPC from an accountability perspective requires the FPC to publish a Financial Stability Report twice a year that reflects the committee's view on the main risks to financial stability and assesses how prepared the financial system is to withstand these risks, in addition to summarising the FPC's recent activities and an assessment of the impact of any actions it has taken.[285]

The macro-prudential responsibility of the FPC in relation to its objectives relates primarily to the identification of, monitoring of, and taking of action to remove or reduce, systemic risks with a view of protecting and enhancing the UK financial system. In doing so, the FS Act grants the FPC powers and policy tools in the exercise of its mandates and achievement of its objectives.[286]

3.4.3 Overview of the Financial Conduct Authority (FCA)

The FCA is established in terms of s1A of the FS Act with the overarching strategic objective of ensuring that the relevant markets are functioning well.[287] It also has three operational objectives namely, ensuring financial consumers are sufficiently protected; protecting and enhancing the financial integrity of the UK financial system; and promoting effective market competition in the interests of financial consumers.[288]

In the attainment of the FCA's objectives it conforms to two approaches being an approach to regulation and to supervision. In terms of the FCA's approach to regulation it focuses on three key areas. The first being product intervention and governance which concerns reviewing the lifecycle

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283 The Chartered Insurance Institute 'Towards Twin Peaks: The UK's Emerging Regulatory Landscape (January 2013 Update)' available at https://thepfs.org/media/4119720/regulatory_landscape_dec_2012__20_dec_.pdf (accessed on 3 April 2020). For more information on the Financial Policy Committee policy tools see, Bank of England 'Financial Stability' available at https://www.bankofengland.co.uk/financial-stability (accessed on 3 April 2020).

284 Bank of England 'Financial Stability' available at https://www.bankofengland.co.uk/financial-stability (accessed on 3 April 2020).

285 Bank of England 'Financial Stability' available at https://www.bankofengland.co.uk/financial-stability (accessed on 3 April 2020).

286 Sections 9H – 9R of the Financial Services Act 2012 details the extent of the Financial Policy Committees powers and policy tools in the exercise of its mandates and achievement of its objectives.

287 Financial Services Act 2012.

288 Chartered Insurance Institute 'Towards Twin Peaks: The UK's Emerging Regulatory Landscape (January 2013 Update)' available at https://thepfs.org/media/4119720/regulatory_landscape_dec_2012__20_dec_.pdf (accessed on 3 April 2020).'

of financial products from design to distribution and having the power to ban products should it prove to be detrimental to consumers.[289] The second is super-complaints in which the FCA is the authorised body to review and act upon submission from consumer groups indicating systematic problems in particular markets.[290] The third concerns competition powers, it enables the FCA to promote effective market competition in the interests of consumers through offering better services and financial products that are in demand.[291]

The FCA's approach to supervision also has three focus key areas. The first area is identification of general principles encourages firms to base their business culture and model on the foundations of the fair treatment of consumers.[292] The second area is the supervision organisation which focuses on a flexible focus on issues as they arise such as having an assigned supervisor for larger-risk firms.[293] Thirdly, firm categorisation is a system that covers risk categories such as large banking and insurance institutions with a large number of customers referred to as C1 and smaller institutions with less customers referred to as C4.[294]

[289] Chartered Insurance Institute 'Towards Twin Peaks: The UK's Emerging Regulatory Landscape (January 2013 Update)' available at https://thepfs.org/media/4119720/regulatory_landscape_dec_2012__20_dec_.pdf (accessed on 3 April 2020).
[290] Chartered Insurance Institute 'Towards Twin Peaks: The UK's Emerging Regulatory Landscape (January 2013 Update)' available at https://thepfs.org/media/4119720/regulatory_landscape_dec_2012__20_dec_.pdf (accessed on 3 April 2020).
[291] Financial Conduct Authority 'FCA Mission: Approach to Competition' 2018 6.
[292] Chartered Insurance Institute 'Towards Twin Peaks: The UK's Emerging Regulatory Landscape (January 2013 Update)' available at https://thepfs.org/media/4119720/regulatory_landscape_dec_2012__20_dec_.pdf (accessed on 3 April 2020).
[293] Chartered Insurance Institute 'Towards Twin Peaks: The UK's Emerging Regulatory Landscape (January 2013 Update)' available at https://thepfs.org/media/4119720/regulatory_landscape_dec_2012__20_dec_.pdf (accessed on 3 April 2020).
[294] Chartered Insurance Institute 'The regulatory framework' available at https://www.cii.co.uk/fact-files/law-and-regulation/the-regulatory-framework/ (accessed on 15 March 2020).

3.4.4 Regulatory Coordination and Collaboration between the UK Prudential Regulation Authority and the Financial Conduct Authority

As the potential for regulatory overlap may exist between the PRA and the FCA in the exercise of their mandates, the FS Act provides for several coordination mechanisms available to the regulators.[295] Section 3D of the FS Act places a duty on the PRA and FCA to ensure the coordinated exercise of their functions on matters that may have adverse effects on the advancement of either regulators objectives and matters of mutual regulatory interests.[296] In terms of s3E of the FS Act, the PRA and FCA are required to prepare and maintain a Memorandum of Understanding (hereinafter, UK MoU) that sets out the role of each regulator and how their functions are coordinated.[297]

The UK MoU sets out the coordination and collaborative framework the FCA and the PRA will use in carrying out their respective responsibilities as prescribed in terms of the FS Act.[298] The FCA and the PRA have separate and independent mandates which are prescribed in terms of legislation, reflecting the UK's Twin Peaks model.[299] Although independence is to be maintained between regulators, the purpose of the UK MoU serves to ensure that regulators coordinate and cooperate in matters which require the effective coordination between them.[300]

An interesting departure from the general nature of an equal power relationship between prudential regulation and market conduct regulation on matters of coordination is the veto mechanism afforded to the PRA. The PRA's veto mechanism enables the regulatory regime to prioritise financial stability over consumer protection in times of economic stress or threats or potential

[295] Chartered Insurance Institute 'Towards Twin Peaks: The UK's Emerging Regulatory Landscape (January 2013 Update)' available at https://thepfs.org/media/4119720/regulatory_landscape_dec_2012__20_dec_.pdf (accessed on 3 April 2020).
[296] Financial Services Act 2012.
[297] Financial Services Act 2012.
[298] Bank of England 'Memorandum of Understanding: Between the Financial Conduct Authority and the Bank of England (exercising its prudential regulation functions)' available at https://www.fca.org.uk/publication/mou/mou-bank-pra.pdf (accessed on 5 August 2021).
[299] Bank of England 'Memorandum of Understanding: Between the Financial Conduct Authority and the Bank of England (exercising its prudential regulation functions)' available at https://www.fca.org.uk/publication/mou/mou-bank-pra.pdf (accessed on 5 August 2021).
[300] Bank of England 'Memorandum of Understanding: Between the Financial Conduct Authority and the Bank of England (exercising its prudential regulation functions)' available at https://www.fca.org.uk/publication/mou/mou-bank-pra.pdf (accessed on 5 August 2021).

threats imposed on financial stability which includes the PRA reducing the risk of regulatory actions inducing these risks to stability.[301] Section 3I of the FS Act empowers the PRA to direct the FCA to refrain from a specified action if it believes that action may be detrimental to financial stability or result in the failure of a PRA authorised person.[302]

In terms of accountability measures it is required that the PRA and FCA in their annual reports include an account of how they have coordinated during the year.[303] This ensures that the FCA and PRA comply with their mandate requiring coordinated exercise of their functions.

3.4.5 Enforcement of the United Kingdom Twin Peaks Model

In ensuring that the UK Twin Peaks model is duly enforced, regulators are provided with enforcement powers to ensure the attainment of their respective regulatory objectives in terms of the FS Act and the Financial Services and Markets Act 2000 (hereinafter, FSM Act). Both the FCA and the PRA have wide-ranging enforcement powers that enable them to investigate and discipline firms and individuals who have not complied with regulatory, and certain legal requirements.[304]

The enforcement division of the FCA supports its objectives by making it clear that there are real and meaningful consequences for firms and individuals alike who are not compliant with market conduct regulations.[305] The enforcement action taken by the FCA is wide-ranging and not limited to court action.[306] The FSM Act provides for an extensive range of disciplinary, criminal and civil powers to take enforcement action against regulated and non-regulated firms and individuals who are not compliant with the standards required of the FCA.[307] The enforcement powers at the

[301] Cranston R, Avgouleas E & Van Zwieten K et al *Principles of Banking Law* 3 ed (2017) 143.
[302] Financial Services Act 2012.
[303] Bank of England 'Memorandum of Understanding: Between the Financial Conduct Authority and the Bank of England (exercising its prudential regulation functions)' available at *https://www.fca.org.uk/publication/mou/mou-bank-pra.pdf* (accessed on 5 August 2021).
[304] Lexis Nexis 'FCA and PRA investigations, enforcement and discipline—overview' available at *https://www.lexisnexis.com/uk/lexispsl/corporatecrime/document/393813/583N-GY51-F18F-M1K2-00000-00/FCA-and-PRA-investigations,-enforcement-and-discipline%E2%80%94overview* (accessed on 5 April 2020).
[305] Financial Conduct Authority 'Enforcement' available at *https://www.fca.org.uk/about/enforcement* (accessed on 5 April 2020).
[306] Financial Conduct Authority 'Enforcement' available at *https://www.fca.org.uk/about/enforcement* (accessed on 5 April 2020).
[307] Financial Conduct Authority *Enforcement Information Guide* (2017) 3.

disposal of the FCA concern the right to impose a penalty on a firm or person and make a public statement in respect of the penalty imposed.[308] The FCA has powers to investigate and take disciplinary action, in addition to instituting criminal proceedings.[309] In addition thereto, the FCA is able to withdraw a firm's authorisation, prohibit operations within the financial sector and prosecute firms and individuals who conduct regulated activities void of the prerequisite authorisation.[310] Working closely with the FCA's Authorisation, Supervision, and Strategy and Competition divisions, in addition to other regulators and law enforcement enables the Enforcement division to identify and act timeously when enforcement action is necessary.[311]

The PRA's regulatory approach to enforcement is aimed at limiting or preventing current and potential future risks to the stability of the financial system.[312] The PRA enforcement powers are enumerated in terms of its statutory powers as provided for by the FSM Act.[313] The powers as provided for in terms of the FSM Act falls broadly into two categories namely, the supervisory and disciplinary categories. In terms of the supervisory category the PRA can vary a PRA-authorised firm's permissions to undertake certain regulated activities or requires a firm to undertake or stop an action.[314] The PRA can take action to address emerging risk within the financial sector on matters concerning financial stability and the integrity of the UK financial sector.[315] The disciplinary category sees the PRA taking action such as imposing fines or public censure where firms or individuals are non-compliant with regulations.[316] The PRA's approach to

[308] XpertHR 'What powers are available to the Financial Conduct Authority and Prudential Regulation Authority to enforce their rules?' available at *https://www.xperthr.co.uk/faq/what-powers-are-available-to-the-financial-conduct-authority-and-prudential-regulation-authority-to-enforce-their-rules/110442/* (accessed on 5 April 2020).

[309] XpertHR 'What powers are available to the Financial Conduct Authority and Prudential Regulation Authority to enforce their rules?' available at *https://www.xperthr.co.uk/faq/what-powers-are-available-to-the-financial-conduct-authority-and-prudential-regulation-authority-to-enforce-their-rules/110442/* (accessed on 5 April 2020).

[310] Financial Conduct Authority *Enforcement Information Guide* (2017) 3.

[311] Financial Conduct Authority 'Enforcement' available at *https://www.fca.org.uk/about/enforcement* (accessed on 5 April 2020).

[312] Lexis Nexis 'FCA and PRA investigations, enforcement and discipline—overview' available at *https://www.lexisnexis.com/uk/lexispsl/corporatecrime/document/393813/583N-GY51-F18F-M1K2-00000-00/FCA-and-PRA-investigations,-enforcement-and-discipline%E2%80%94overview* (accessed on 5 April 2020).

[313] Financial Services and Markets Act 2000.

[314] Bank of England 'The PRA's statutory powers' available at *https://www.bankofengland.co.uk/prudential-regulation/pra-statutory-powers* (accessed on 5 April 2020).

[315] Bank of England 'The PRA's statutory powers' available at *https://www.bankofengland.co.uk/prudential-regulation/pra-statutory-powers* (accessed on 5 April 2020).

[316] Bank of England 'The PRA's statutory powers' available at *https://www.bankofengland.co.uk/prudential-regulation/pra-statutory-powers* (accessed on 5 April 2020).

enforcement is further set out in terms of the document titled *The Prudential Regulation Authority's approach to enforcement: statutory statements of policy and procedure* (hereinafter, Statement of Policy).[317] The Statement of Policy was first published on 1 April 2013 and comprehensively details the PRA's approach to enforcement which includes statutory statements of policy and procedure.[318] The PRA's approach to enforcement relates to statutory notices and decision making, financial penalties, suspensions and restrictions, settlements, publicity of regulatory action, and conduct of interviews.[319] The Statement of Policy reinforces the PRA's enforcement powers by clearly defining its approach in terms of its varying actions and procedures when instituting enforcement actions against firms or individuals contravening or non-compliance with regulations.

3.4.6 The UK Perceived Problems with the Implementation of Twin Peaks in Light of Prior Regulatory Failures

The UK has a history of financial failures and reforming its regulatory system to address the issues identified through those failures. A notable failure being the collapse of Northern Rock bank as consequence of the GFC impacting the UK financial system prompting as impetus for reform and a shift to the Twin Peaks model.

[317] Lexis Nexis 'FCA and PRA investigations, enforcement and discipline—overview' available at *https://www.lexisnexis.com/uk/lexispsl/corporatecrime/document/393813/583N-GY51-F18F-M1K2-00000-00/FCA-and-PRA-investigations,-enforcement-and-discipline%E2%80%94overview* (accessed on 5 April 2020).

[318] Prudential Regulation Authority *The Prudential Regulation Authority's approach to enforcement: statutory statements of policy and procedure* (2019) 3.

[319] Prudential Regulation Authority *The Prudential Regulation Authority's approach to enforcement: statutory statements of policy and procedure* (2019) 3.

3.4.7 The Collapse of Northern Rock Bank

In August 2007 the UK experienced its first bank run[320] in over 140 years as Northern Rock Bank a medium-sized domestic bank was hit by a crisis.[321] Northern Rock Bank was previously a mutual building society which converted to bank status in 1997.[322] On conversion and after having been stripped of the previous constraints on its business powers under the Building Societies Act, Northern Rock bank acquired legal powers to conduct the full range of banking business.[323] Although Northern Rock Bank was not a particularly large bank as it was at the time ranked 7th in terms of assets, it was nonetheless a significant retail bank and a substantial mortgage lender.[324] However, Northern Rock Bank was vulnerable because of its reliance upon short-term loans on international money markets to finance mortgage provision.[325] Due to the sub-prime crisis in 2007 Northern Rock Bank had to refinance a lot of debt with new interest rates as a result being prohibitively high. Due to the effect of the sub-prime crisis, Northern Rock Bank sought an emergency loan from the BoE as a lender of last resort.[326] Depositors' response upon learning of the emergency loan was to view this as potential future insolvency with the result that depositors then began to withdraw large sums of money en masse.[327]

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320 A 'bank run' is as a result of many customers withdrawing all their money en masse from their deposit accounts with a banking institution on the basis that the institution is, or might become, insolvent. The result of an uncontrolled bank run can lead to bankruptcy, and when multiple banks are involved, it creates an industry-wide panic which may lead to an economic recession. See, Corporate Finance Institute 'Bank Run The bane of Basel III' available at https://corporatefinanceinstitute.com/resources/knowledge/other/bank-run/ (accessed on 6 August 2021).

321 Balling M, Bruni F & Llewellyn D 'The Failure of Northern Rock - A Multidimensional Case Study' available at https://www.suerf.org/studies/2141/the-failure-of-northern-rock-a-multi-dimensional-case-study (accessed on 6 April 2020).

322 Bruni F & Llewellyn D 'The Failure of Northern Rock: A Multi-Dimensional Case Study' available at https://www.suerf.org/docx/s_5d6646aad9bcc0be55b2c82f69750387_2141_suerf.pdf (accessed on 6 April 2020).

323 Bruni F & Llewellyn D 'The Failure of Northern Rock: A Multi-Dimensional Case Study' available at https://www.suerf.org/docx/s_5d6646aad9bcc0be55b2c82f69750387_2141_suerf.pdf (accessed on 6 April 2020).

324 Balling M, Bruni F and Llewellyn D 'The Failure of Northern Rock - A Multidimensional Case Study' available at https://www.suerf.org/studies/2141/the-failure-of-northern-rock-a-multi-dimensional-case-study (accessed on 6 April 2020).

325 Linell P & Markova I (eds) *Dialogical Approaches to Trust in Communication* (2014) 88.

326 Bruni F & Llewellyn D 'The Failure of Northern Rock: A Multi-Dimensional Case Study' available at https://www.suerf.org/docx/s_5d6646aad9bcc0be55b2c82f69750387_2141_suerf.pdf (accessed on 6 April 2020).

327 Linell P & Markova I (eds) *Dialogical Approaches to Trust in Communication* (2014) 89.

In the case of Northern Rock bank, it was a liquidity crisis arising from the international money markets which had initiated the bank run.[328] Northern Rock Bank had made an emergency loan by the BoE which was meant to alleviate the pressure as a result of the liquidity crisis which created the bank run, by signalling the banks liquidity crisis, it consequently had the effect of worsening the banks liquidity problems.[329] The bank run resulted in deposits at Northern Rock Bank declining from £24 billion to £14 billion.[330]

The failure on the part of the FSA saw Northern Rock Bank not being adequately supervised as it did not allocate sufficient resources of time to monitoring a bank whose business model was particularly unusual, its procedures were inadequate to supervise a bank whose business had grown exponentially.[331] The failure of Northern Rock Bank, while a failure of its own Board, was also an attributed failure of its regulator.[332] This reasoning is based on the fact that the FSA exercises a judgment as to which 'concerns' about financial institutions should be treated as systemic and thus require action by the regulator.[333] However, the FSA in this regard appears to have systematically failed in its duty as a regulator to ensure Northern Rock Bank would not pose such a systemic risk.[334]

[328] Bruni F & Llewellyn D 'The Failure of Northern Rock: A Multi-Dimensional Case Study' available at https://www.suerf.org/docx/s_5d6646aad9bcc0be55b2c82f69750387_2141_suerf.pdf (accessed on 6 April 2020).
[329] Linell P & Markova I (eds) *Dialogical Approaches to Trust in Communication* (2014) 89.
[330] Linell P & Markova I (eds) *Dialogical Approaches to Trust in Communication* (2014) 89.
[331] Caprio G 'Financial Regulation After the Crisis: How Did We Get Here, and How Do We Get Out?' available at http://www.lse.ac.uk/fmg/assets/documents/papers/special-papers/SP226.pdf (accessed on 6 April 2020).
[332] Ungureanu M & Cocriş V 'Northern Rock: The Crisis of a UK Mortgage Lender' available at https://www.academia.edu/1630937/NORTHERN_ROCK_THE_CRISIS_OF_A_UK_MORTGAGE_LENDER (accessed on 6 April 2020).
[333] Caprio G 'Financial Regulation After the Crisis: How Did We Get Here, and How Do We Get Out?' available at http://www.lse.ac.uk/fmg/assets/documents/papers/special-papers/SP226.pdf (accessed on 6 April 2020).
[334] Caprio G 'Financial Regulation After the Crisis: How Did We Get Here, and How Do We Get Out?' available at http://www.lse.ac.uk/fmg/assets/documents/papers/special-papers/SP226.pdf (accessed on 6 April 2020).

3.4.8 The Collapse of HBOS Bank

HBOS was formed in 2001 when Halifax Plc and the Bank of Scotland merged.[335] HBOS was the fourth largest UK bank in terms of assets at the end of 2006.[336] Like many other banks, HBOS experienced exponential growth between 2003 and 2008.[337] However, HBOS experienced liquidity problems during the GFC.[338]It was stated by the Chief Executive of HBOS at the time that over many years of reliance on wholesale funding was what had left the bank in a vulnerable position.[339] On 1 October 2008 HBOS was approaching a point at which it was unable to meet its liabilities when they fell due and so sought Emergency Liquidity Assistance (ELA) from the BoE.[340] While the failure of the Group was directly triggered by insufficient liquidity, in large part this reflected underlying concerns about the solvency of the firm.[341]

The FSA's supervision was found to be deficient in its regulatory approach in relation to the collapse of HBOS. The FSA's deficient supervisory approach gave rise to a supervisory framework riddled with inadequacy relating to resources devoted to the prudential regulation of large systemically important banks, focus on core prudential risk areas of asset quality and liquidity, strategic and business model related risks, and over-reactive risk-assessment process.[342]

The FSA failed to ensure that adequate resources were devoted to supervision of large, systemically important firms such as HBOS.[343] The report made into the collapse of HBOS

[335] Lui A 'Single or twin? the UK financial regulatory landscape after the financial crisis of 2007-2009' (2012) 13(1) *Journal of Banking Regulation* 7.
[336] Ryder N, Turksen U & Tucker J (eds) *The Financial Crisis and White Collar Crime - Legislative and Policy Responses* (2017).
[337] Prudential Regulation Authority *The failure of HBOS plc (HBOS) A report by the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA)* (2015) 16.
[338] Lui A 'Single or twin? the UK financial regulatory landscape after the financial crisis of 2007-2009' (2012) 13(1) *Journal of Banking Regulation* 7.
[339] Lui A 'Single or twin? the UK financial regulatory landscape after the financial crisis of 2007-2009' (2012) 13(1) *Journal of Banking Regulation* 7.
[340] Prudential Regulation Authority *The failure of HBOS plc (HBOS) A report by the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA)* (2015) 1.
[341] Prudential Regulation Authority *The failure of HBOS plc (HBOS) A report by the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA)* (2015) 32.
[342] Prudential Regulation Authority *The failure of HBOS plc (HBOS) A report by the Financial Conduct Authority (FCA) and the Prudential Regulation Authority (PRA)* (2015) 32.
[343] Chu B 'HBOS collapse was the result of a catalogue of FSA failures' available at https://www.independent.co.uk/news/business/news/hbos-collapse-was-the-result-of-a-catalogue-of-fsa-failures-a6741401.html (accessed on 6 April 2020).

provided that the FSA was unable to appreciate the full extent of the risks was running as flaws existed in the FSA's supervisory approach and was therefore not in a position to intervene before the damage was already done.[344] These factors ultimately lead to the regulatory failure of the FSA in respect of HBOS.

The regulatory failures of financial institutions within other regulatory modules gives insight on how the implementation of Twin Peaks can be improved based on these experiences and empirical information. Furthermore, the inherent problems associated with the implementation of Twin Peaks can be identified through the failures experienced within a financial system. The problems which gave rise to these failures are indicative of the fundamental issues associated with the implementation of Twin Peaks within its particular jurisdiction and the characteristic or traits native to that jurisdiction can be identified and avoided in future.

3.5 CONCLUSION

The Australian's and UK's respective implementation of Twin Peaks has set international standards for financial regulation. Regulatory reforms within these two jurisdictions brought Twin Peaks into the concerned financial systems with legislation enacted to provide clarity on the roles, functions and objectives of the prudential and conduct regulators. In addition, MoUs ensured the cooperation, coordination and nurturing of a collaborative relationship between the two regulators. This helps to facilitate efficient and effective information sharing. Twin Peaks being an objective orientated approach to regulation defines clear mandates for the respective regulators, however, approaches to prudential regulation varies between the jurisdictions. Furthermore, enforcement is a key focus on ensuring the effective implementation of Twin Peaks within the respective financial systems. In spite of how Twin Peaks is implemented, financial stability may still be affected by banking failures, however, what is important and insightful is how those failures were dealt with under the Twin Peaks systems in jurisdictions analysed in this chapter.

[344] Chu B 'HBOS collapse was the result of a catalogue of FSA failures' available at *https://www.independent.co.uk/news/business/news/hbos-collapse-was-the-result-of-a-catalogue-of-fsa-failures-a6741401.html* (accessed on 6 April 2020).

CHAPTER 4: SOUTH AFRICA'S NEW TWIN PEAKS SYSTEM: THE LEGAL & REGULATORY FRAMEWORK

4.1 INTRODUCTION

Under this chapter, the legal and regulatory framework that informs the Twin Peaks model of financial sector regulation in SA will be discussed and assessed. In addition, the lessons drawn from the study of comparators of choice (namely Australia and the UK) in regulating the Twin Peak systems in those jurisdictions, will be used to analyse South Africa's Twin Peak legal and regulatory framework. Chapter 4 occupies a very important part of the journey towards answering the key research question for this thesis. This thesis investigates the main/key research question whether the regulatory coordination framework put in place by the Financial Sector Regulation Act 9 of 2017 (hereinafter, FSRA) meets international best practices and is tailor-made to meet SA's domestic needs and will truly result in a more effective financial regulation than before. As its contribution towards answering this key research question, this chapter critically analyses the FSRA in light of international best practices and experiences from two jurisdictions already analysed in Chapter 3. In particular, this Chapter will seek to interrogate sub-inquiries relevant to answering the main/key research question. One such inquiry seeks an answer to this question: what are the inherent issues in implementing Twin Peaks within South Africa's financial sector? Another sub-inquiry asks the question as to how the implementation of Twin Peaks can be enhanced/improved to ensure that the objectives of the regulatory agencies are realised and sustained. One such objective of law reform is ensuring effectiveness of the regulatory agencies which form part of the Twin Peak system as introduced by the FSRA.[345]

[345] See part 2.4 in Chapter 2.

4.2 THE REGULATORY FRAMEWORK THAT INFORMS TWIN PEAKS IN SOUTH AFRICA

The purpose of this section is to analyse the legal framework that gives effect to the SA Twin Peaks model as adopted in terms of the FSRA.[346] In giving effect to Twin Peaks in SA, the FSRA establishes a regulatory authority for market conduct regulation which is the responsibility of the Financial Sector Conduct Authority (the FSCA) through consumer protection, and prudential regulation which is the responsibility of the Prudential Authority (the PA).[347] The FSCA constitutes a solely independent market conduct authority, while the PA is an authority established within the administration of the SARB.[348] SA's approach in its implementation of the Twin Peaks model places equal focus on prudential and market conduct regulation and the mandated objectives of the respective authorities.[349] The FSRA identifies the objectives, functions and jurisdictional authority of the regulatory authorities.

An important component of financial regulation in terms of the implementation of Twin Peaks is ensuring coordination between the regulatory authorities. Financial regulatory coordination in SA is mandated in terms of s77 of the FSRA, requiring financial sector regulators to enter into one or more MoUs.[350] The importance of a MoU stems from the objectives it sets out to achieve within SA's financial sector, which are to strengthen and formalise collaborative and cooperative relationships between regulatory authorities.[351] The MoU enables regulatory authorities to reach a mutual understanding through providing clarity to areas where their respective regulatory and supervisory objectives and responsibilities may overlap.[352] Through the mandate provided for in terms of the MoU, it ensures effective and efficient financial sector regulation.

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346 Financial Sector Regulation Act 9 of 2017.
347 Financial Sector Regulation Act 9 of 2017.
348 Godwin A, Howse T & Ramsey I 'Twin Peaks South Africa's Financial Sector Regulatory Framework' (2017) 3(134) *SALJ* 7.
349 South African Reserve Bank *Prudential Authority Regulatory Strategy 2018-2021* (2018) 7.
350 South African Reserve Bank, Prudential Authority and Financial Sector Conduct Authority *Memorandum of Understanding between the Prudential Authority and the Financial Sector Conduct Authority* (2018) 3.
351 South African Reserve Bank, Prudential Authority and Financial Sector Conduct Authority *Memorandum of Understanding between the Prudential Authority and the Financial Sector Conduct Authority* (2018) 3.
352 South African Reserve Bank, Prudential Authority and Financial Sector Conduct Authority *Memorandum of Understanding between the Prudential Authority and the Financial Sector Conduct Authority* (2018) 3.

SA's legislative framework and enabling legislation gives effect to Twin Peaks as SA's regulatory model. SA's regulatory legislation enables accompanying mechanisms such as MoUs that ensure cooperation and avoids regulatory overlap. The regulatory framework that informs Twin Peaks in SA gives effect to its implementation to support the South African economy.

Although regulatory framework through enabling legislation is an important consideration for the implementation of a financial regulatory model, it is however not the only consideration. It is argued that the unique circumstances of a particular financial sector should be taken into consideration such as understanding the economic environment within which Twin Peaks is to be implemented. This enables one to holistically assess the compatibility of a desired model of financial regulation, in terms of a broad focus looking at the Twin Peaks implementation within the SA economy.

4.3 TWIN PEAKS IMPLEMENTATION WITHIN THE SOUTH AFRICAN FINANCIAL SECTOR – A BRIEF COMMENT

It is said that a financial system responds to developmental externalities, such as changes in technology and consumer demand, and to the regulatory climate in which it operates.[353] In assessing the framework that gives effect to Twin Peaks, its implementation within the SA's economy will be analysed. In general terms, the economic environment refers to all the economic factors that affect or influence commercial and consumer behaviour.[354] The economic environment thus encapsulates all the external factors in the immediate marketplace and the broader economy.[355] The economic environmental factors may be subdivided, consisting of microeconomic and macroeconomic factors.[356]

[353] Thompson D & Abbott M 'Australian Financial Prudential Supervision: An Historical View' (2000) 59(2) *Australian Journal of Public Administration*.
[354] Market Business News 'What is the economic environment? Definition and examples' available at *https://marketbusinessnews.com/financial-glossary/economic-environment/* (accessed on 18 April 2020).
[355] Market Business News 'What is the economic environment? Definition and examples' available at *https://marketbusinessnews.com/financial-glossary/economic-environment/* (accessed on 18 April 2020).
[356] Market Business News 'What is the economic environment? Definition and examples' available at *https://marketbusinessnews.com/financial-glossary/economic-environment/* (accessed on 18 April 2020).

The macroeconomic environment refers to factors that affect the entire economy.[357] In SA this concerns matters of unemployment, rising public debt, inefficient state-owned enterprises, and spending pressures, which have reduced the country's global competitiveness.[358] The SA power utility Eskom contributes immensely in affecting the economy through continuous rolling power shortages, which affects business operations.[359] Macroeconomic factors such as structural factors including persistent strikes, electricity shortages, and soft external demand have constrained growth and kept unemployment high.

The microeconomic environment refers to factors that occur at the individual company or consumer level.[360] A closer inspection of the microeconomic environment looks at individuals, households and firms' behaviour in decision making and allocation of resources.[361] It generally finds applicability to markets of goods and services and deals with individual and economic issues.[362]

It is important to point out that the Twin Peaks system of financial regulation on its own must not be seen as a panacea in reforming the macro- and micro- economic challenges of a country. Nonetheless, the effective implementation of Twin Peaks in the economy of SA will go a long way in ensuring the viability and long-term success of the financial sector and positively impact macro- and micro- economic aspects.

With the understanding of what constitutes an economic environment and what factors has an effect or influence on the economic environment, it is necessary to identify what characterises

[357] Examples of macroeconomic factors may be unemployment, inflation, interest rates, GDP growth and levels of consumer confidence. For more examples on macroeconomic factors see, Market Business News 'What is the economic environment? Definition and examples' available at *https://marketbusinessnews.com/financial-glossary/economic-environment/* (accessed on 18 April 2020).
[358] Nordea Trade 'The economic context of South Africa' available at *https://www.nordeatrade.com/fi/explore-new-market/south-africa/economical-context* (accessed on 09 January 2021)
[359] Bishop A 'Tough Times ahead for SA Economy' available at *https://www.investec.com/en_za/focus/economy/sa-economics.html* (accessed on 09 January 2021)
[360] Examples of microeconomic factors may be demand, competitors, market size and supply. For more examples on microeconomic factors see, Market Business News 'What is the economic environment? Definition and examples' available at *https://marketbusinessnews.com/financial-glossary/economic-environment/* (accessed on 18 April 2020).
[361] The Economic Times 'Definition of 'Microeconomics' available at *https://economictimes.indiatimes.com/definition/microeconomics* (accessed on 08 January 2021).
[362] The Economic Times 'Definition of 'Microeconomics' available at *https://economictimes.indiatimes.com/definition/microeconomics* (accessed on 08 January 2021).

SA's economic environment in respect of financial regulation and how it affects the implementation of Twin Peaks.

4.4 CHARACTERISTICS OF THE SOUTH AFRICAN ECONOMY

SA's economy is characterised as being a mixed economy in which there is a variety of private freedom, combined with centralised economic planning and government regulation.[363] Furthermore, it has a highly developed economy with advanced infrastructure.[364] SA is one of the world's largest exporters of gold, platinum, and other natural resources, it also has well-established financial, legal, communications, energy, and transport sectors as well as being the continent's largest stock exchange.[365] Despite the abundance of goods and natural resources that characterise SA and advanced infrastructure, it is still in the list of developing countries.[366]

SA's financial service market exists within a dual economy which constitutes a first world sector superimposed by a developing economy.[367] This is due to, in part, the financial services sector's growth in relation to that of the world economy.[368] Furthermore, there has been a structural and regulatory overhaul of the financial service market in an attempt to align domestic institutions and systems with international best practices.[369] This overhaul has resulted in a growing number of people from previously disadvantaged groups now participating in the country's economy, which is in stark contrast to the situation which obtained during the apartheid era when the majority of the population was excluded from participating in the economy.[370] However, there remains a

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363 Global Edge 'South Africa: Introduction' available at https://globaledge.msu.edu/countries/south-africa (accessed on 18 April 2020).

364 2020 Index of Economic Freedom 'South Africa' available at https://www.heritage.org/index/country/southafrica (accessed on 18 April 2020).

365 2020 Index of Economic Freedom 'South Africa' available at https://www.heritage.org/index/country/southafrica (accessed on 18 April 2020).

366 Bakari S 'Why is South Africa Still a Developing Country?' available at https://mpra.ub.uni-muenchen.de/80763/1/MPRA_paper_80763.pdf. (accessed on 18 April 2020).

367 Arora S & Leach J 'Towards Building an Inclusive Financial Sector: Lessons from South Africa' (2005) 40(17) *Economic and Political Weekly* 1726.

368 Arora S & Leach J 'Towards Building an Inclusive Financial Sector: Lessons from South Africa' (2005) 40(17) *Economic and Political Weekly* 1726.

369 Arora S & Leach J 'Towards Building an Inclusive Financial Sector: Lessons from South Africa' (2005) 40(17) *Economic and Political Weekly* 1726.

370 Arora S & Leach J 'Towards Building an Inclusive Financial Sector: Lessons from South Africa' (2005) 40(17) *Economic and Political Weekly* 1726.

substantial amount of the SA population that remains on the periphery of the economy and is disassociated from engagement with financial services.[371]

It is to be noted that the current implementation of Twin Peaks in SA addresses inclusiveness of low-income households and communities in that amongst the objectives of the FSCA, it aims to provide financial education to promote a more accessible and inclusive financial sector, with due considerations of the realities of the SA economy in which Twin Peaks is implemented.

4.5 SOUTH AFRICA'S FINANCIAL SYSTEM PROFILE

The South African banking system (which forms part of the financial sector) is characterised as being well developed and effectively regulated.[372] The banking system comprises of the SARB as the central bank, in addition to four large banks namely, ABSA, FirstRand, Nedbank and Standard Bank, which dominates the banking system.[373] Additionally, the banking system comprises of a mid-sized investment bank identified as Investec, and two smaller banks identified as African Bank and Capitec Bank focused on unsecured lending to low income households.[374] Furthermore, the SA capital market is large, supported by non-banking financial institutions (hereinafter, NBFI) and foreign investor participation.[375]

The economic environment that Twin Peaks is implemented in is a necessary and important consideration in terms of financial regulation. As the financial sector is an important aspect and contributor to the growth of the economy as a whole, it is reasoned that it does not operate in

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[371] Arora S & Leach J 'Towards Building an Inclusive Financial Sector: Lessons from South Africa' (2005) 40(17) *Economic and Political Weekly* 1726.

[372] Mupangavanhu BM 'Banking Crises in South Africa: Some Lessons for Corporate Governance and the Regulation of Banks (2021) 10, *Interdisciplinary Journal of Economics and Business Law* 37. Also see Brand South Africa 'South Africa's financial sector' available at *https://www.brandsouthafrica.com/governance/south-africas-financial-sector* (accessed on 15 December 2020).

[373] Mupangavanhu BM 'Banking Crises in South Africa: Some Lessons for Corporate Governance and the Regulation of Banks (2021) 10, *Interdisciplinary Journal of Economics and Business Law* 37. Also see International Monetary Fund 'Financial System Profile' available at *https://www.elibrary.imf.org/view/IMF002/22173-9781484372005/22173-9781484372005/22173-9781484372005_A001.xml* (accessed on 15 December 2020).

[374] International Monetary Fund 'Financial System Profile' available at *https://www.elibrary.imf.org/view/IMF002/22173-9781484372005/22173-9781484372005/22173-9781484372005_A001.xml* (accessed on 15 December 2020).

[375] International Monetary Fund 'Financial System Profile' available at *https://www.elibrary.imf.org/view/IMF002/22173-9781484372005/22173-9781484372005/22173-9781484372005_A001.xml* (accessed on 15 December 2020).

isolation to other economic sectors of the economy.[376] Therefore, the effectiveness or ineffectiveness of model of financial regulation may have far reaching implications within the SA economy in terms of how effectively the financial sector is regulated and for this reason is a crucial consideration to the SA economy.

In noting the economic environment that Twin Peaks finds implementation, it is important to consider what notable variations of the Twin Peaks regulatory model have been implemented in other countries in addressing the unique characteristics of their respective economies and more importantly the financial sector. The international best practices from Australia and the UK with regard to the implementation of Twin Peaks, have already been analysed in Chapter 3.

4.6 THE LEGISLATIVE FRAMEWORK THAT ESTABLISHES THE REGULATORY AGENCIES OF THE TWIN PEAKS MODEL IN SOUTH AFRICA

The FSRA was promulgated on 21 August 2017 and effectively became law from 1 April 2018 which provides for a restructured and robust new legal framework for the financial sector, intended to support an extensive regulatory system.[377] The rationale of the FSRA in the implementation of Twin Peaks is to improve SA's approach to consumer protection through financial conduct regulation and create a more resilient and stable financial system through prudential regulation.[378]The FSRA aims to consolidate the regulation and supervision of the financial sector and its various subsectors, namely, banking, insurance, financial products and services and market

376 These economic sectors include trade (wholesale, retail and motor trade), finance, real estate and business services through allocating the economy's resources in the form of capital. See, South African Market Insights 'South Africa's GDP page' available at *https://www.southafricanmi.com/south-africas-gdp.html* (accessed on 6 August 2021) and TIPS 1999 Annual Forum 'The South African Financial Sector: Background Research for the Seattle Round' available at *http://www.tips.org.za/files/287.pdf* (accessed on 6 August 2021).

377 Viljoen A, Lallo V & Bunge S 'EY Financial Sector Regulation Act Implementing Twin Peaks and the impact on the industry' available at *https://www.ey.com/Publication/vwLUAssets/ey-financial-sector-regulation-act-twin-peaks/%24FILE/ey-financial-sector-regulation-act-implementing-twin-peaks-and-the-impact-on-the-industry.pdf* (accessed on 25 November 2019).

378 Ferreira J '"Twin Peaks" to aid low income earners' available at *https://www.fanews.co.za/article/views-letters-interviews-comments/18/all/1102/twin-peaks-to-aid-low-income-earners/23058* (accessed 25 November 2019).

infrastructure[379].[380] This therefore ensures that each subsector is subject to financial regulation by the FSCA and PA respectively.[381]

The FSRA introduces a new system of financial regulation through the establishment of the PA and the FSCA and conferring the requisite powers in the discharge their respective duties pertaining to prudential and market conduct regulation.[382] This is done through having dedicated regulatory authorities for prudential and conduct matters regulated independently.[383] The FSRA grants the PA and the FSCA jurisdiction over all financial institutions and provides them with a range of supervisory tools to fulfill their mandates.[384] The National Treasury has noted that the FSCA will be a solely independent market conduct authority, while the PA will be an authority established within the SARB.[385] This is how the FSRA gives legislative effect to the Twin Peaks model, by placing equal focus on the said Twin Peaks.[386]

[379] Market infrastructure is a system administered by a public instrument that provides services to the financial industry for trading, clearing and settlement, matching of financial transactions, and depository functions. Examples thereof may be exchanges, central counterparties, central securities depositories, clearing houses and trade repositories. For more information on market infrastructures, see IES 'Financial Market Infrastructure' available at *http://www.arthapedia.in/index.php?title=Financial_Market_Infrastructure_(FMI)* (accessed on 30 November 2019).

[380] Benn L 'Twin Peaks: A New Regulatory Era' available at http://southafrica.moorestephens.com/news/january-2018/twin-peaks-a-new-regulatory-era (accessed on 25 November 2019).

[381] Benn L 'Twin Peaks: A New Regulatory Era' available at http://southafrica.moorestephens.com/news/january-2018/twin-peaks-a-new-regulatory-era (accessed on 25 November 2019).

[382] Financial Sector Regulation Act 9 of 2017.

[383] Viljoen A, Lallo V & Bunge S 'EY Financial Sector Regulation Act Implementing Twin Peaks and the impact on the industry' available at https://www.ey.com/Publication/vwLUAssets/ey-financial-sector-regulation-act-twin-peaks/%24FILE/ey-financial-sector-regulation-act-implementing-twin-peaks-and-the-impact-on-the-industry.pdf (accessed on 25 November 2019).

[384] Viljoen A, Lallo V & Bunge S 'EY Financial Sector Regulation Act Implementing Twin Peaks and the impact on the industry' available at https://www.ey.com/Publication/vwLUAssets/ey-financial-sector-regulation-act-twin-peaks/%24FILE/ey-financial-sector-regulation-act-implementing-twin-peaks-and-the-impact-on-the-industry.pdf (accessed on 25 November 2019).

[385] Godwin A, Howse T & Ramsay I 'Twin Peaks South Africa's Financial Sector Regulatory Framework' (2017) 134 SALJ 7.

[386] South African Reserve Bank *Prudential Authority Regulatory Strategy 2018-2021* (2018) 7.

4.7 ESTABLISHMENT OF THE FINANCIAL SECTOR CONDUCT AUTHORITY (FSCA)

The FSCA came into being on the 1 April 2018 and is established in terms of s56 of the FSRA.[387] The FSCA is tasked with monitoring the conduct of all financial services institutions by ensuring that consumers of financial products and services are treated fairly.[388] The FSCA is a stand-alone market conduct regulator with the purpose of enhancing and supporting the integrity and efficiency of financial markets and protecting financial customers.[389] One of the key changes brought about by SA moving towards a Twin Peaks model is the amalgamation of multiple market conduct regulators and consequentially having one conduct regulatory authority.[390]

4.7.1 Structure of the Financial Sector Conduct Authority

Part 2 of the FSRA deals with the governance of SA's financial regulation and identifies the required committees of the respective regulatory authorities.[391] The establishment and role of the Executive Committee is provided for in terms of s60 of the FSRA.[392] The Executive Committee consists of a Commissioner and between two and four Deputy Commissioners, with the appropriate expertise in the financial sector, all of who are to be appointed by the relevant Minister.[393] In terms of s68 of the FSRA, it provides for the establishment by the Director-General of the FSCA subcommittee which acts as a review and advisory body unto the Executive Committee on matters relating to remuneration policy and risks faced by the FSCA and corresponding risk management.[394] The FSCA has adopted a primarily functional, activity based organisation design which includes dedicated divisions for business conduct supervision, licensing, and investigations and enforcement, each dealing with the full spectrum of financial

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387 S56 of the Financial Sector Regulation Act 9 of 2017.

388 Ferreira J '"Twin Peaks" to aid low income earners' available at *https://www.fanews.co.za/article/views-letters-interviews-comments/18/all/1102/twin-peaks-to-aid-low-income-earners/23058* (accessed on 24 May 2019).

389 South African Reserve Bank *Prudential Authority Regulatory Strategy 2018-2021* (2018) 1.

390 Godwin A, Howse T & Ramsay I 'Twin Peaks South Africa's Financial Sector Regulatory Framework' (2017) 134 SALJ 13.

391 Part 2 of the Financial Sector Regulation Act 9 of 2017.

392 S60 Financial Sector Regulation Act 9 of 2017.

393 S60(2) of the Financial Sector Regulation Act 9 of 2017.

394 S68 Financial Sector Regulation Act 9 of 2017.

institutions and activities.[395] It also includes a Business Centre operating as a point of entry for all applications, submissions and queries processed by the FSCA.[396] The FSCA organisation design consists of a centralised Specialist Support Division for providing specialist technical support to for supervisory functions, and a centralised Regulatory Policy Division responsible for carrying out key research and regulatory framework development functions.[397]

4.7.2 Powers/Functions of the Financial Sector Conduct Authority

The powers and functions of the FSCA are granted in relation to the objectives it is required to achieve, of which are provided for in terms of s58 of the FSRA.[398] The functions of the FSCA are extensively provided for in terms of s58 of the FSCA and provides that the FSCA is to regulate and supervise conduct of financial institutions within the confines of financial sector regulation laws.[399] The FSCA regulates and supervises conduct of financial institutions, co-operates with all the other financial sector regulators and committees, promotes financial inclusion and sustainable competition.[400] The FSCA is to regularly review the perimeter and scope of financial sector regulation and take steps to minimise risks identified in the achievement of its objective or the effective performance of its functions.[401] The FSCA supervises financial institution's conduct in relation to the provision of credit as well as providing oversight of debt collection services and ensures the administration of the collection and distribution of levies.[402] The duty of formulating

395 Financial Sector Conduct Authority *Regulatory Strategy of the Financial Sector Conduct Authority: October 2018 to September 2021* (2018) 28.
396 Financial Sector Conduct Authority *Regulatory Strategy of the Financial Sector Conduct Authority: October 2018 to September 2021* (2018) 28.
397 Financial Sector Conduct Authority *Regulatory Strategy of the Financial Sector Conduct Authority: October 2018 to September 2021* (2018) 28.
398 Financial Sector Regulation Act 9 of 2017.
399 Financial Sector Regulation Act 9 of 2017.
400 Viljoen A, Lallo V & Bunge S 'EY Financial Sector Regulation Act Implementing Twin Peaks and the impact on the industry' available at *https://www.ey.com/Publication/vwLUAssets/ey-financial-sector-regulation-act-twin-peaks/%24FILE/ey-financial-sector-regulation-act-implementing-twin-peaks-and-the-impact-on-the-industry.pdf* (accessed on 30 November 2019).
401 Financial Sector Regulation Act 9 of 2017.
402 Viljoen A, Lallo V & Bunge S 'EY Financial Sector Regulation Act Implementing Twin Peaks and the impact on the industry' available at *https://www.ey.com/Publication/vwLUAssets/ey-financial-sector-regulation-act-twin-peaks/%24FILE/ey-financial-sector-regulation-act-implementing-twin-peaks-and-the-impact-on-the-industry.pdf* (accessed on 30 November 2019).

and implementing strategies and programs for financial education for the general public also falls in the ambit of the FSCA's functions.[403]

The FSCA will have the authority for licensing financial and advisory services, and in terms of standard setting it will set conduct standards for product design, advice, disclosure and transparency.[404] Additionally, the FSCA will conduct its supervisory function through information gathering, supervisory on-site inspections and investigations.[405]

4.7.3 Scope of Duty of the Financial Sector Conduct Authority

In terms of the Twin Peaks framework, the FSCA's scope of duty concerns the jurisdiction over all financial institutions in SA.[406] The FSCA's scope of duty in performing its function as a conduct authority is determined by the financial market related activities carried out by financial institutions.[407] This may involve where an entity carries out an activity that requires it to be licensed as a financial institution in accordance with the FSRA, namely providing a financial product, operating a market infrastructure or a financial service as a business or part of a business.[408] Where the financial market related activities of financial institutions requires the prescribed licensing in terms of the licensing requirements of Chapter 8 of the FSRA the FSCA has the authority to regulate and supervise that institution.[409] This authority means that the FSCA may use the full regulatory and supervisory provisions of the FSRA and enabling financial sector laws to meet its statutory objective.[410]

403 Financial Sector Regulation Act 9 of 2017.

404 Benn L 'Twin Peaks: A New Regulatory Era' available at http://southafrica.moorestephens.com/news/january-2018/twin-peaks-a-new-regulatory-era (accessed on 30 November 2019).

405 Viljoen A, Lallo V & Bunge S 'EY Financial Sector Regulation Act Implementing Twin Peaks and the impact on the industry' available at https://www.ey.com/Publication/vwLUAssets/ey-financial-sector-regulation-act-twin-peaks/%24FILE/ey-financial-sector-regulation-act-implementing-twin-peaks-and-the-impact-on-the-industry.pdf (accessed on 30 November 2019).

406 National Treasury of the Republic of South Africa *Explanatory Policy Paper Accompanying the Conduct of Financial Institutions Bill* (2018) 20.

407 Financial Sector Conduct Authority *Regulatory Strategy of the Financial Sector Conduct Authority: October 2018 to September 2021* (2018) 11.

408 Financial Sector Conduct Authority *Regulatory Strategy of the Financial Sector Conduct Authority: October 2018 to September 2021* (2018) 11.

409 Financial Sector Conduct Authority *Regulatory Strategy of the Financial Sector Conduct Authority: October 2018 to September 2021* (2018) 11.

410 Financial Sector Conduct Authority *Regulatory Strategy of the Financial Sector Conduct Authority: October 2018 to September 2021* (2018) 11.

Due to the fact that the terms 'financial product' and 'financial service' are broadly defined in the FSRA, it has the effect of extending the jurisdictional range of the FSCA over a wide range of traditional types[411] of regulated entities.[412] This enables flexibility within financial regulatory law and further extends the scope of the FSCA's regulation to financial sector activities that have not been clearly addressed in the regulatory framework.[413] In addition to the regulating financial institutions providing financial products and services, the FSCA also has the authority to regulate and supervise aspects of the conduct of key persons and control functions.[414]

4.7.4 Objectives of the Financial Sector Conduct Authority

The s59 provision of the FSRA provides that the FSCA has an overall governance objective of managing the affairs of the conduct authority in an efficient and effective manner and it is required to have regard to internationally accepted standards.[415] Detailed objectives of the FSCA is further encapsulated in terms of s57 of the FSRA in which provides that the FSCA is to enhance and support the efficiency and integrity of financial integrity of financial markets and it is required to protect financial customers.[416] This is required to be done through promoting fair treatment of financial customers by financial institutions and by providing financial customers with financial education programs, thereby promoting financial literacy and the ability of financial customers to make sound financial decisions.[417] In addition, the FSCA is required to assist in the maintenance of financial stability.[418]

[411] Such as life and non-life insurers, banks, collective investment schemes (CIS), retirement funds, investment managers, financial advisers and other financial intermediaries. For more information on traditional types of regulated entities, see Financial Sector Conduct Authority *Regulatory Strategy of the Financial Sector Conduct Authority: October 2018 to September 2021* (2018) 12.
[412] Financial Sector Conduct Authority *Regulatory Strategy of the Financial Sector Conduct Authority: October 2018 to September 2021* (2018) 11.
[413] Financial Sector Conduct Authority *Regulatory Strategy of the Financial Sector Conduct Authority: October 2018 to September 2021* (2018) 11.
[414] Financial Sector Conduct Authority *Regulatory Strategy of the Financial Sector Conduct Authority: October 2018 to September 2021* (2018) 11.
[415] S59 of the Financial Sector Regulation Act 9 of 2017.
[416] S57 of the Financial Sector Regulation Act 9 of 2017.
[417] S57 of the Financial Sector Regulation Act 9 of 2017.
[418] Financial Sector Conduct Authority *Regulatory Strategy of the Financial Sector Conduct Authority: October 2018 to September 2021* (2018) 8.

4.7.5 The Conduct of Financial Institutions Bill

The Conduct of Financial Institutions Bill (hereinafter, CoFI Bill) is a pivotal guide within the regulatory framework espoused in terms of the FSCA, as it aims to set clear and define conduct standards of which financial institutions are required to meet. The CoFI Bill proposes a consolidated financial sector regulatory framework that not only finds applicability to financial services or products but also to supervised entities that have not traditionally been defined as financial institutions.[419] The reasoning for the proposed consolidated financial sector regulatory framework follows a shift from a silo approach and reduces regulatory arbitrage that is often associated with the implementation of fragmented financial sector regulation.[420] The CoFI Bill will primarily be regulated entity-facing by setting the requirements that financial institutions under the jurisdiction of the FSCA are to adhere to and the outcomes they are expected to deliver.[421] The CoFI Bill covers aspects of all business conduct, for both the retail and non-retail markets within the financial sector in the achievement of its objectives.[422] The objectives of the CoFI Bill include protecting and promoting the fair treatment of customers, as well as promoting transformation, financial inclusion and innovation in the financial sector.[423] The objectives of the CoFI Bill gives effect to the mandated objectives of the FSCA and fulfills its objective as the conduct authority through the proposed framework.

[419] Mkhize T & Du Plessis W 'Everyone's Cup of COFI?' available at *http://financialregulationjournal.co.za/2019/05/24/everyones-cup-of-cofi/* (accessed on 2 December 2019).
[420] Mkhize T & Du Plessis W 'Everyone's Cup of COFI?' available at *http://financialregulationjournal.co.za/2019/05/24/everyones-cup-of-cofi/* (accessed on 2 December 2019).
[421] National Treasury of the Republic of South Africa *Explanatory Policy Paper Accompanying the Conduct of Financial Institutions Bill* (2018) 21.
[422] National Treasury of the Republic of South Africa *Explanatory Policy Paper Accompanying the Conduct of Financial Institutions Bill* (2018) 20.
[423] National Treasury of the Republic of South Africa *Explanatory Policy Paper Accompanying the Conduct of Financial Institutions Bill* (2018) 8.

4.8 THE ESTABLISHMENT OF THE PRUDENTIAL AUTHORITY

The PA is established in terms of s32 of the FSCA and gives effect to the prudential regulation component forming part of the Twin Peaks model.[424] It is worthy to note that the PA is a juristic person operating within the administration of the SARB.[425] This is because prudential regulation will require microprudential[426] regulation and oversight from the PA, and macroprudential[427] regulation and oversight from the SARB.[428] The governance systems and processes adopted by the PA are aligned to those of the SARB, where similar structures exist and allows for ease of cooperation.[429] In accordance with the FSRA, the PA will follow a risk-based and proportional, outcomes-focused and integrated supervisory approach in its microprudential supervision.[430] This approach aims to ensure that financial institutions are cognisant of the risks to their businesses and to address these risks through implementing adequate corporate governance frameworks and risk management processes to appropriately mitigate these risks.[431]

The purpose of prudential regulation and supervision is to ensure that financial institutions operating within the financial sector are inherently safe and sound, from a financial perspective.[432] The role of the PA is thus to ensure the safety and soundness of financial institutions, market infrastructures and assist in financial stability maintenance.[433] The focus of prudential regulation and supervision is to ensure that financial institutions comply with minimum prudential

[424] S32 Financial Sector Regulation Act 9 of 2017.

[425] Godwin A, Howse T & Ramsay I 'Twin Peaks South Africa's Financial Sector Regulatory Framework' (2017) 134 *SALJ* 10.

[426] Microprudential regulation focuses on the stability of each individual institution within the financial sector and adopts an 'institutional approach' to regulation. Found at International Centre for Monetary and Banking Studies *Geneva Reports on the World Economy 11 Fundamental Principles of Financial Regulation* (2009) 18.

[427] Macroprudential regulation concerns itself with the stability of the financial sector as a whole and adopts a 'systemic approach' to financial regulation. Found at International Centre for Monetary and Banking Studies *Geneva Reports on the World Economy 11 Fundamental Principles of Financial Regulation* (2009) 18.

[428] International Centre for Monetary and Banking Studies *Geneva Reports on the World Economy 11 Fundamental Principles of Financial Regulation* (2009) 18.

[429] South African Reserve Bank *Prudential Authority Regulatory Strategy 2018-2021* (2018) 5.

[430] Financial Sector Regulation Act 9 of 2017.

[431] South African Reserve Bank *Prudential Authority Regulatory Strategy 2018-2021* (2018) 2.

[432] South African Reserve Bank *Prudential Authority Regulatory Strategy 2018-2021* (2018) 3.

[433] Viljoen A, Lallo V & Bunge S 'EY Financial Sector Regulation Act Implementing Twin Peaks and the impact on the industry' available at https://www.ey.com/Publication/vwLUAssets/ey-financial-sector-regulation-act-twin-peaks/%24FILE/ey-financial-sector-regulation-act-implementing-twin-peaks-and-the-impact-on-the-industry.pdf (accessed on 2 December 2019).

requirements related to capital, liquidity, leverage and other relevant considerations that measure financial health, in addition to ensuring that they are managed by suitably qualified and experienced individuals.[434]

4.8.1 Structure of the Prudential Authority

The overall governance of the PA is the responsibility of the Prudential Committee which consists of the Governor of the SARB (as Chairperson), the Chief Executive Officer (CEO) of the PA (who is also a Deputy Governor of the SARB) and the other Deputy Governors of the SARB.[435] The subcommittee established by the Prudential Committee in terms of s45 of the FSCA is required to review, monitor and advise the Prudential Committee on the risks faced by the PA and submit plans for managing those risks.[436] The structure of the PA comprises of four departments, namely the Banking, Insurance and Financial Market Infrastructure (FMI) Supervision Department which is responsible for the prudential supervision of all financial institutions.[437] The Financial Conglomerate Supervision Department is responsible for the consolidated prudential supervision of financial conglomerates and it is also responsible for anti-money laundering and for combating the financing of terrorism supervision.[438] The Risk Support Department is responsible for providing regulatory and supervisory support on credit risk, operational risk, market risk, liquidity risk and insurance risk, as well as providing for financial institution analysis and statistics.[439] The Policy, Statistics and Industry Support Department is charged with assisting in policy formulation and implementation, developing supervisory frameworks, providing operational and regulatory support, providing industry analyses, enforcement, resolution of prudentially regulated financial institutions and industry technical support on capital and accounting requirements.[440]

[434] South African Reserve Bank *Prudential Authority Regulatory Strategy 2018-2021* (2018) 3.
[435] South African Reserve Bank *Prudential Authority Regulatory Strategy 2018-2021* (2018) 4.
[436] S45(1)*(a)* Financial Sector Regulation Act 9 of 2017.
[437] South African Reserve Bank *Prudential Authority Regulatory Strategy 2018-2021* (2018) 4.
[438] South African Reserve Bank *Prudential Authority Regulatory Strategy 2018-2021* (2018) 4.
[439] South African Reserve Bank *Prudential Authority Regulatory Strategy 2018-2021* (2018) 4.
[440] South African Reserve Bank *Prudential Authority Regulatory Strategy 2018-2021* (2018) 4.

4.8.2 Powers/Functions of the Prudential Authority

The functions of the PA is enumerated in terms of s34 of the FSRA which requires it to regulate and supervise financial institutions and market infrastructures within financial sector laws.[441] The PA serves regulatory and supervisory functions in respect of financial institutions and market infrastructure, co-operates with all the other financial sector regulators and councils and supports financial inclusion and sustainable competition.[442] The PA is required to regularly review the perimeter and scope of financial sector regulation and take steps to minimise risks identified to the achievement of its objective or the effective performance of its functions.[443]

Similar to the FSCA, the PA will have the authority for issuing, suspending and revoking licences. In terms of standard setting, the PA will set prudential standards for ensuring capital adequacy, financial safety and soundness of banks, insurers and other financial institutions.[444] Additionally, the PA will conduct its supervisory function through information gathering, supervisory on-site inspections and investigations.[445]

It is evident that the functions of the PA are similar to the FSCA albeit requiring different outcomes which are mandated in terms of the FSRA. The functions of the PA are to give effect to its objectives and outcomes in terms of prudential regulation.

[441] S34(1)*(a)* Financial Sector Regulation Act 9 of 2017.

[442] Viljoen A, Lallo V & Bunge S 'EY Financial Sector Regulation Act Implementing Twin Peaks and the impact on the industry' available at *https://www.ey.com/Publication/vwLUAssets/ey-financial-sector-regulation-act-twin-peaks/%24FILE/ey-financial-sector-regulation-act-implementing-twin-peaks-and-the-impact-on-the-industry.pdf* (accessed on 2 December 2019).

[443] Financial Sector Regulation Act 9 of 2017.

[444] Viljoen A, Lallo V & Bunge S 'EY Financial Sector Regulation Act Implementing Twin Peaks and the impact on the industry' available at *https://www.ey.com/Publication/vwLUAssets/ey-financial-sector-regulation-act-twin-peaks/%24FILE/ey-financial-sector-regulation-act-implementing-twin-peaks-and-the-impact-on-the-industry.pdf* (accessed on 2 December 2019).

[445] Viljoen A, Lallo V & Bunge S 'EY Financial Sector Regulation Act Implementing Twin Peaks and the impact on the industry' available at *https://www.ey.com/Publication/vwLUAssets/ey-financial-sector-regulation-act-twin-peaks/%24FILE/ey-financial-sector-regulation-act-implementing-twin-peaks-and-the-impact-on-the-industry.pdf* (accessed on 2 December 2019).

4.8.3 Scope of Duty of the Prudential Authority

The PA is to act within the policy framework agreed by the Minister of Finance and the Governor of the SARB.[446] From a prudential perspective the PA is responsible for regulating banks, insurers, cooperative financial institutions, financial conglomerates and certain market infrastructures.[447] The scope of the PA's powers concerns matters of supervising and ensuring capital adequacy, financial safety and soundness of banks, insurers and other financial institutions.[448] In achieving its mandate of assisting in ensuring financial stability and related prudential regulatory objectives within the financial sector, s34 of the FSRA provides that the PA may do anything else reasonably necessary to achieve its objective.[449]

The scope of the powers of the PA are provided for and limited by the FSRA as it provides for what type of institutions are to be regulated by the PA and how it is to carry out its duties as a prudential authority.

4.8.4 Objectives of the Prudential Authority

The objectives of the PA is enumerated in terms of s33 of the FSRA which provides that the PA is to promote and enhance the financial safety and soundness of financial institutions that provide financial products, services and securities.[450] The PA is required to promote and improve the financial safety and soundness of market infrastructures.[451] In addition, the PA is to protect financial customers against the risk of financial institutions failing to meet their obligations and assist in maintaining financial stability.[452] The projected objectives that the PA seeks to achieve between 2018-2021 insofar as it is within its mandate is provided for in the *Prudential Authority Regulatory Strategy 2018-2021*.[453] The projected objectives of the PA concerns assisting in the

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446 Viljoen A, Lallo V & Bunge S 'EY Financial Sector Regulation Act Implementing Twin Peaks and the impact on the industry' available at *https://www.ey.com/Publication/vwLUAssets/ey-financial-sector-regulation-act-twin-peaks/%24FILE/ey-financial-sector-regulation-act-implementing-twin-peaks-and-the-impact-on-the-industry.pdf* (accessed on 14 December 2019).

447 South African Reserve Bank 'Prudential Authority' available at *https://www.resbank.co.za/PrudentialAuthority/Pages/default.aspx* (accessed on 14 December 2019).

448 Ferreira J '"Twin Peaks" to aid low income earners' available at *https://www.fanews.co.za/article/views-letters-interviews-comments/18/all/1102/twin-peaks-to-aid-low-income-earners/23058* (accessed on 14 December 2019).

449 S34(3) of the Financial Sector Regulation Act 9 of 2017.

450 South African Reserve Bank *Prudential Authority Regulatory Strategy 2018-2021* (2018) 3.

451 S33*(b)* of the Financial Sector Regulation Act 9 of 2017.

452 S33*(c)* and s33*(d)* of the Financial Sector Regulation Act 9 of 2017.

453 South African Reserve Bank *Prudential Authority Regulatory Strategy 2018-2021* (2018) 3.

transformation of the broader financial sector, supporting sustainable competition in the provision of financial products and services, and supporting financial inclusion as well as financial technology.[454]

4.9 THE MEMORANDUM OF UNDERSTANDING BETWEEN THE FINANCIAL SECTOR CONDUCT AUTHORITY AND THE PRUDENTIAL AUTHORITY

The mandated function requiring the FSCA and the PA to co-operate and collaborate with each other and other regulatory authorities within the financial sector is expanded on in terms of Chapter 5, Part 1 of the FSRA. In terms of s76 of the FSRA under Chapter 5, provides that the financial regulators are to co-operate and collaborate in the performance of their functions with due regard to financial sector laws.[455] Furthermore, s76 of the FSRA extensively provides how cooperation and collaboration between the regulatory authorities are to occur, such as assisting each other in the pursuit of their objectives, sharing information concerning matters of common interest, ensuring consistent regulatory strategies and policies, and ensuring minimal redundancies and coordinating actions efficiently.[456]

In giving effect to the mandated cooperation and collaboration between the regulatory authorities, the FSRA requires that in terms of s77, financial sector regulators are to enter into one or more Memoranda of Understanding (hereinafter, MoU).[457] The MoU ensures cohesive collaboration between the regulatory authorities namely the FSCA and the PA through the alignment of regulatory actions in terms of financial sector laws such as the National Credit Act and the Financial Intelligence Centre Act.[458] The MoU ensures that the FSCA and PA work together effectively and efficiently, with minimal redundancy and inconsistency.[459] The MoU concerns matters of how the delegation of power is to be affected, the validity of actions taken by financial

[454] South African Reserve Bank *Prudential Authority Regulatory Strategy 2018-2021* (2018) 3.
[455] S76(1) of the Financial Sector Regulation Act 9 of 2017.
[456] S76(1)*(a) – (g)* of the Financial Sector Regulation Act 9 of 2017.
[457] South African Reserve Bank, Prudential Authority and Financial Sector Conduct Authority *Memorandum of Understanding between the Prudential Authority and the Financial Sector Conduct Authority* (2018) 3.
[458] Financial Sector Regulation Act 9 of 2017.
[459] South African Reserve Bank, Prudential Authority and Financial Sector Conduct Authority *Memorandum of Understanding between the Prudential Authority and the Financial Sector Conduct Authority* (2018) 3.

sector regulators, the frequency of review of the MoU and the publication of the MoU, in addition to giving effect to s76 of the FSRA.[460]

The purpose of the MoU is to strengthen and formalise collaborative and cooperative relationships between regulatory authorities.[461] The MoU enables regulatory authorities to reach a mutual understanding pertaining to areas where their respective regulatory and supervisory objectives and responsibilities may overlap.[462] In addition, the MoU is intended to identify matters where concurrence or notification between regulators which may or may not be necessary and provides for delegation of authority between regulators.[463]

4.10 SOUTH AFRICA'S IMPLEMENTATION OF THE TWIN PEAKS MODEL COMPARED WITH AUSTRALIAN AND UNITED KINGDOM EXPERIENCES

It is accepted that SA and the jurisdictions of the comparators of choice (Australia and the UK) have adopted the Twin Peaks model to regulate their respective financial sectors, however their approach to implementation differs based on the needs, circumstances and financial failures prior or post implementation of Twin Peaks.

In comparably analysing the implementation of Twin Peaks, the differences in the implementation will be identified between SA and the jurisdictions of the comparators of choice. In addition, the advantages and disadvantages of the factors that characterises the implementations of Twin Peaks will be identified.

[460] Financial Sector Regulation Act 9 of 2017.
[461] South African Reserve Bank, Prudential Authority and Financial Sector Conduct Authority *Memorandum of Understanding between the Prudential Authority and the Financial Sector Conduct Authority* (2018) 3.
[462] South African Reserve Bank, Prudential Authority and Financial Sector Conduct Authority *Memorandum of Understanding between the Prudential Authority and the Financial Sector Conduct Authority* (2018) 3.
[463] South African Reserve Bank, Prudential Authority and Financial Sector Conduct Authority *Memorandum of Understanding between the Prudential Authority and the Financial Sector Conduct Authority* (2018) 3.

4.11 LOCATION OF THE PRUDENTIAL REGULATOR

The general role of a prudential regulator is to ensure financial system stability through ensuring that firms meet capital requirements, liquidity standards and have adequate risk controls in place. In SA the prudential regulator is the PA, in Australia it is APRA and in the UK, it is the PRA. These are the regulatory authorities charged with prudential regulation within the financial sectors of their respective countries.

One of the key considerations in the implementation of Twin Peaks as a regulatory model is deciding where the prudential regulator should be housed.[464] The aforementioned jurisdictions reveal three options in terms of housing the prudential regulator. Firstly, the prudential regulator is an independent and distinct juristic entity which is located outside of the central bank. Secondly, the prudential regulator is a subsidiary of the central bank. Lastly, the prudential regulator is located within the central bank.

4.11.1 Location of South Africa's Prudential Regulator

In SA, the PA is a juristic person operating within the administration of the SARB.[465] It is a significant consideration in noting that the PA 'is a juristic person' as defined in the FSRA and affirms that the prudential regulator has a legal status that is independent from the SARB.[466] In terms of the structuring arrangements of SA's implementation of Twin Peaks, the government appears to have drawn inspiration from the UK, where the prudential regulator was originally created as a subsidiary of the BoE.[467] During the consultation process in respect of the FSRA, debate ensued regarding the status of the PA and its relationship to the SARB.[468] The decision was ultimately made to establish the PA as a juristic entity within the SARB.[469] The question then remains, why did SA prefer a variation of the UK subsidiary model by distinguishing the PA from the SARB as a separate legal entity?[470] The National Treasury held that, whilst the PA will function

[464] Godwin A, Howse T & Ramsay I 'A Jurisdictional Comparison of the Twin Peaks Model of Financial Regulation' (2017) 18 *Journal of Banking Regulation* 112.
[465] Financial Sector Regulation Act 9 of 2017.
[466] Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 184.
[467] Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 184.
[468] Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 184.
[469] Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 184.
[470] Godwin A, Howse T & Ramsay I 'Twin Peaks: South Africa's Financial Sector Regulatory Framework' (2017) 134(134) *SALJ* 3 675.

within the administration of the SARB, they are two distinct entities with separate legal identities in law and have different mandates and objectives.[471] It is submitted that the National Treasury in asserting its decision, by having the PA as being legally independent from the SARB, ensures regulatory independence which is constituted as an important factor in achieving effective financial regulation.[472] Furthermore, the PA operating within the administration of the SARB provides for funding, accommodation and other resources and services in the achievement of its prudential regulatory objectives.[473]

As SA has drawn inspiration from the UK's previous subsidiary model's implementation of Twin Peaks, it is necessary to note under what circumstances or reasoning led the UK in having its prudential regulator operate within the BoE.

4.11.2 Location of the United Kingdom's Prudential Regulator

The Bank of England and Financial Services Act 2016 (hereinafter, BoEFS Act) ended the PRA's status as a subsidiary and constituted the BoE as the PRA, the functions of which are exercised by the BoE acting through a new committee of the BoE known as the Prudential Regulation Committee (hereinafter, PRC).[474] The BoEFS Act thus reformed the governance and accountability of the BoE in accordance with fully integrating the PRA as part of the BoE.[475]

Prior to the UK making the PRA a part of the BoE, the prudential regulator was a subsidiary of the BoE and a UK public regulatory body that assumed responsibility for the prudential regulation and supervision of banks, building societies, credit unions, insurers and major investment firms.[476] The PRA functioned entirely independent of the UK government and was a wholly owned subsidiary

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[471] National Treasury of the Republic of South Africa *Comments Received on the Second Draft Bill Published By National Treasury for Comments on 11 December 2014* (2014) 76.

[472] Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 184.

[473] Godwin A, Howse T & Ramsey I 'Twin Peaks: South Africa's Financial Sector Regulatory Framework' (2017) 3(134) *SALJ* 675.

[474] Godwin A, Howse T & Ramsay I 'Twin Peaks: South Africa's Financial Sector Regulatory Framework' (2017) 134(134) *SALJ* 3 675.

[475] Spicer A, Lindley D & Gond J, et al 'Cultural change in the FCA, PRA & Bank of England – Practising what they preach?' available at *https://newcityagenda.co.uk/wp-content/uploads/2016/10/NCA-Cultural_Change_in_regulators_report.pdf* (accessed on 17 August 2020)

[476] Deloitte 'Prudential Regulation Authority (PRA)' available at *https://www.iasplus.com/en-gb/resources/other-regulatory/pra* (accessed on 2 April 2020).

of the BoE.[477] It could therefore contribute to and draw on the financial sector expertise of the BoE, while retaining operational independence.[478] Thus the PRA's prudential regulatory authority concerned micro-prudential regulation with the assistance of the FPC focused on macro-prudential regulation and oversight of micro-prudential regulation.[479] The FPC was the additional structural component of the UK's prudential regulation charged with macro-prudential regulation and was established within the BoE.[480]

One of the main motivations for making the PRA a part of the BoE was culture.[481] When the PRA became a subsidiary of the BoE, it was reasoned that benefit would accrue from the BoE's judgement-driven culture.[482] This had proved to be challenging as many key personnel in the new PRA had come from the FSA, and presumably had been imprinted by the culture that was embedded in the FSA.[483] In response to this challenge, the Governor of BoE, announced the 'One Bank' initiative.[484] At the heart of this initiative was the plan to develop a common culture in both of the organisations. The initiative established a renewed mission for the BoE focusing on working together with the PRA on aspects of central banking previously dealt with separately such as macro-prudential supervision, micro-prudential supervision and monetary policy.[485]

[477] Professional Financial Claims Association 'What Is Prudential Regulatory Authority' available at *https://www.pfca.org.uk/financial-claims/organisations/prudential-regulatory-authority.html* (accessed on 17 August 2020).
[478] Her Majesty's Treasury *A New Approach to Financial Regulation: Judgement, Focus and Stability* (2010) 3.
[479] Bando H 'Twin Peaks – Financial Market Regulation in Switzerland, the UK and Japan' available at https://ssrn.com/abstract=2876022 (accessed on 2 April 2020).
[480] Her Majesty's Treasury *A New Approach to Financial Regulation: Judgement, Focus and Stability* (2010) 3.
[481] Spicer A, Lindley D & Gond J, et al 'Cultural change in the FCA, PRA & Bank of England – Practising what they preach?' available at *https://newcityagenda.co.uk/wp-content/uploads/2016/10/NCA-Cultural_Change_in_regulators_report.pdf* (accessed on 17 August 2020)
[482] Her Majesty's Treasury *A New Approach to Financial Regulation: Judgement, Focus and Stability* (2010) 3.
[483] Spicer A, Lindley D & Gond J, et al 'Cultural change in the FCA, PRA & Bank of England – Practising what they preach?' available at *https://newcityagenda.co.uk/wp-content/uploads/2016/10/NCA-Cultural_Change_in_regulators_report.pdf* (accessed on 17 August 2020)
[484] The Bank of England 'Mark Carney: One Mission. One Bank. Promoting the good of the people of the United Kingdom' available at *https://www.bankofengland.co.uk/speech/2014/one-mission-one-bank-promoting-the-good-of-the-people-of-the-uk* (accessed on 17 August 2020)
[485] Spicer A, Lindley D & Gond J, et al 'Cultural change in the FCA, PRA & Bank of England – Practising what they preach?' available at *https://newcityagenda.co.uk/wp-content/uploads/2016/10/NCA-Cultural_Change_in_regulators_report.pdf* (accessed on 17 August 2020)

The rationale for the UK's decision of creating the prudential regulator as a subsidiary of the BoE was to bring together responsibility for macro- and micro-prudential regulation housed within a single institution.[486] The premise for this decision was that there would no longer be a gap in which responsibilities are unclear, and regulatory powers uncertain.[487] The FPC would be able, within the remit of macro-prudential policy, to require the PRA to take regulatory action in respect of all firms.[488] The FPC is provided with firm-specific information that would indicate the potential impact of emerging system-level risks on specific types of institutions.[489] This enables the FPC to fulfil its macro-prudential mandate through micro-prudential action employed by the PRA and ensures overall prudential stability from both macro- and micro-prudential fronts.

As previously mentioned, the UK has ended the subsidiary status of the PRA and has integrated it within the BoE in terms of the BoEFS Act.[490] This is mandated in terms of s12(2A) of the BoEFS Act, which provides that the PRA is the BoE. Furthermore, it provides for the functions of the BoE as the PRA, which are to be exercised by the BoE acting through its Prudential Regulation Committee (hereinafter, PRC) and may not be exercised by the BoE in any other manner.[491] The creation of the PRC thus constitutes a structural change, there are however no changes to the PRAs objectives or functions.[492] The reasoning for the change in structure is intended to provide a concise and more coherent governance structure within the BoE, while ensuring that the PRA remains focused on its statutory objectives.[493]

[486] Her Majesty's Treasury *A New Approach to Financial Regulation: Judgement, Focus and Stability* (2010) 5.
[487] Her Majesty's Treasury *A New Approach to Financial Regulation: Judgement, Focus and Stability* (2010) 5.
[488] Her Majesty's Treasury *A New Approach to Financial Regulation: Judgement, Focus and Stability* (2010) 5.
[489] Her Majesty's Treasury *A New Approach to Financial Regulation: Judgement, Focus and Stability* (2010) 5.
[490] Yuan K, Paech P, Lou D & Zhou H 'A Financial Regulatory Regime Reform Template To Ensure Financial Stability For The Chinese Economy' available https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/701846/financial_regulatory_regime_reform.pdf (accessed on 8 August 2020).
[491] Bank of England and Financial Services Act 2016.
[492] Yuan K, Paech P, Lou D & Zhou H 'A Financial Regulatory Regime Reform Template To Ensure Financial Stability For The Chinese Economy' available https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/701846/financial_regulatory_regime_reform.pdf (accessed on 8 August 2020).
[493] Bank of England 'Prudential Regulation Committee replaces PRA Board' available at https://www.bankofengland.co.uk/news/2017/february/prudential-regulation-committee-replaces-pra-board (accessed on 19 August 2020).

The UK has made structural changes in terms of its prudential regulation, making its regulatory peak adaptive in achieving a concise and coherent governance structure. This was done by ending the subsidiary status of the PRA and making it apart of the BoE. The BoE as the PRA may only exercise its prudential regulatory functions through the PRC. The UK has opted for a shift away from the operational independence it once deemed an important component of prudential regulation by having the PRA as a subsidiary of the BoE and now has its central bank as the prudential regulatory authority. This shows an interesting variation of the Twin Peaks model whereby the UK has chosen its central bank as being more suitably fit in terms of governance structuring and in the achievement of the objectives of prudential regulation.

4.11.3 Location of Australia's Prudential Regulator

Australia provides yet another variation in the implementation of the Twin Peaks model of financial regulation with regard to the positioning of the prudential regulator. The Australian prudential regulator was recommended by the Wallis Inquiry of 1997 which advocated for the establishment of a single agency to carry out prudential regulation in the financial system.[494] APRA was consequently established in terms of the s7 of the APRA Act on 1 July 1998 as a body corporate and operates entirely outside of the RBA.[495]

The criticism expressed by the Wallis Inquiry in respect of the institutional approach to regulation that Australia had adopted prior to its implementation of Twin Peaks, was that it did not provide for competitive neutrality in the way in which prudential supervision was applied to financial institutions (Financial System Inquiry Final Report (1997)).[496] Competitive neutrality is an important aspect in respect of prudential regulation as it ensures that state-owned and private financial intermediaries compete on an equal footing which is essential to use resources effectively within the economy and thus achieve growth and development.[497] The rationale for the objective

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494 Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 183.
495 Australian Prudential Regulation Authority 'About APRA' available at https://www.apra.gov.au/about-apra (accessed on 19 August 2020).
496 Thompson D & Abbott M 'Australian Financial Prudential Supervision: An Historical View' (2000) 59(2) *Australian Journal of Public Administration* 75.
497 OECD 'Competitive Neutrality: Maintaining a level playing field between public and private business' available at https://www.oecd.org/competition/competitiveneutralitymaintainingalevelplayingfieldbetweenpublicandprivatebusiness.htm (accessed on 30 January 2021).

of competitive neutrality is extended by the view that financial institutions undertaking the same type of transactions should have the same form of prudential supervision.[498]

The institutional form of financial regulation that Australia had implemented led to unpredictability and regulatory overlaps in Australia's regulatory system in that deposit taking institutions that assume similar activities such as banks, credit unions and building societies had been supervised in a like manner by different regulators.[499] The institutional approach to regulation may have been considered adequate when the financial system was less sophisticated and institutional categories closely corresponded with defined types of financial functions. The distinctive feature of the prudential regulation of the financial system in Australia had been the fragmentation of regulatory bodies, which led to the segmentation of financial markets and inefficiencies arising from additional costs of compliance.[500] More recently, however, financial innovation and technological developments have seen a blurring of distinctions between the traditional financial service providers and consequent problems from overlapping jurisdictions.[501]

The Wallis Inquiry of 1997 into the financial system in Australia proposed the establishment of a single independent prudential authority and a further independent agency to supervise corporations, market conduct and consumer protection regulation.[502] This saw the establishment of APRA as a single prudential regulatory agency, operating outside of the RBA on the reasoning that by creating a single regulator, it would improve the emergence of wide ranging financial conglomerates and enable a more flexible approach over time to changes in prudential regulation.[503]

Furthermore, APRA is responsible for supervising authorised deposit-taking institutions, most non-authorised deposit taking institution lenders, insurance businesses, and superannuation

[498] Thompson D & Abbott M 'Australian Financial Prudential Supervision: An Historical View' (2000) 59(2) *Australian Journal of Public Administration* 76.
[499] Thompson D & Abbott M 'Australian Financial Prudential Supervision: An Historical View' (2000) 59(2) *Australian Journal of Public Administration* 77.
[500] Thompson D & Abbott M 'Australian Financial Prudential Supervision: An Historical View' (2000) 59(2) *Australian Journal of Public Administration* 75.
[501] Thompson D & Abbott M 'Australian Financial Prudential Supervision: An Historical View' (2000) 59(2) *Australian Journal of Public Administration* 75.
[502] Schmulow A 'Approaches to Financial System Regulation: An International Comparative Survey' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2556545 (accessed on 30 January 2021).
[503] Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 184.

entities other than self-managed superannuation funds.[504] The main goal of APRA is the promotion of Australia's financial system stability with ancillary objectives which include financial safety and efficiency, competitive neutrality, competition, and contestability.[505] APRA establishes principles-based prudential standards to ensure that the institutions it supervises are solvent, well-managed and profitable and publishes detailed guidelines on how its principles based standards can be met.[506]

The primary reasoning for Australian prudential regulation is to ensure effective risk management within financial institutions and across the financial system as a whole, so that finance supports the economy and does not negatively affect the communities it serves.[507]

Upon a further analysis of APRA's approach to prudential regulation, it is to be noted that APRA sets generalised standards and provides guidelines on prudential standards rather than prescribing a specific conduct.[508] This approach toward the achievement of prudential regulation is explained by APRA as supervision that allows institutions to use a variety of approaches to comply with high-level principles, rather than APRA seeking to direct an institution through detailed direction.[509] To this end, it has been argued that this approach is more effective than a 'one size fits all' approach to regulation because it enables financial institutions to comply with standards and outcomes in a manner aligned to their own context.[510] However, it is argued that the efficacy of

[504] North G & Wilson T 'Has the Australian Prudential Regulation Authority Done Enough to Meet its Legislated Objectives and Prepare Australia for the Next Financial Crisis?' (2020) 43(2) *University of New South Wales Law Journal* 553.

[505] Australian Prudential Regulation Authority Act of 1998.

[506] North G & Wilson T 'Has the Australian Prudential Regulation Authority Done Enough to Meet its Legislated Objectives and Prepare Australia for the Next Financial Crisis?' (2020) 43(2) *University of New South Wales Law Journal* 553.

[507] North G & Wilson T 'Has the Australian Prudential Regulation Authority Done Enough to Meet its Legislated Objectives and Prepare Australia for the Next Financial Crisis?' (2020) 43(2) *University of New South Wales Law Journal* 554.

[508] North G & Wilson T 'Has the Australian Prudential Regulation Authority Done Enough to Meet its Legislated Objectives and Prepare Australia for the Next Financial Crisis?' (2020) 43(2) *University of New South Wales Law Journal* 571.

[509] North G & Wilson T 'Has the Australian Prudential Regulation Authority Done Enough to Meet its Legislated Objectives and Prepare Australia for the Next Financial Crisis?' (2020) 43(2) *University of New South Wales Law Journal* 571.

[510] North G & Wilson T 'Has the Australian Prudential Regulation Authority Done Enough to Meet its Legislated Objectives and Prepare Australia for the Next Financial Crisis?' (2020) 43(2) *University of New South Wales Law Journal* 571.

any prudential framework, whether principle or rules based, is dependent upon oversight of systematic risks and timely and appropriate regulatory intervention when the desired standards and outcomes are not being realised.[511]

The recommendations made by the Wallis Inquiry led to an overhaul of the Australian financial regulatory framework.[512] While the previous regulatory system was adequate, it was not adaptive to the major global changes of conglomeration and the erosion of the traditional distinctions between financial institutions.[513] The Wallis Inquiry's recommendation saw the establishment of APRA as a single prudential regulatory agency, operating outside of the RBA in realising Australis's financial system's prudential aims and objectives.[514] The primary aim of the Australian prudential regulatory frameworks is to ensure sound and effective risk management within financial institutions and across financial systems, and to limit disruption and consequential damages to the economy and community.[515] The formation of APRA to achieve this aim has moved the Australian financial system of regulation decisively toward a functional-based system of regulation that to a large degree extend toward competitive neutrality.[516]

[511] North G & Wilson T 'Has the Australian Prudential Regulation Authority Done Enough to Meet its Legislated Objectives and Prepare Australia for the Next Financial Crisis?' (2020) 43(2) *University of New South Wales Law Journal* 571.
[512] Thompson D & Abbott M 'Australian Financial Prudential Supervision: An Historical View' (2000) 59(2) *Australian Journal of Public Administration* 86.
[513] Thompson D & Abbott M 'Australian Financial Prudential Supervision: An Historical View' (2000) 59(2) *Australian Journal of Public Administration* 86.
[514] Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 184.
[515] North G & Wilson T 'Has the Australian Prudential Regulation Authority Done Enough to Meet its Legislated Objectives and Prepare Australia for the Next Financial Crisis?' (2020) 43(2) *University of New South Wales Law Journal* 578.
[516] Thompson D & Abbott M 'Australian Financial Prudential Supervision: An Historical View' (2000) 59(2) *Australian Journal of Public Administration* 86.

4.12 ADVANTAGES AND DISADVANTAGES OF LOCATING THE PRUDENTIAL AUTHORITY WITHIN AND OUTSIDE OF THE CENTRAL BANK

The implementation of Twin Peaks may vary depending on a country's financial system and the needs of its economy. The location of the prudential regulator is one such variation of the Twin Peaks model which sees the prudential regulator as a single and independent entity. A single prudential regulatory agency, operating outside of the RBA has been based on the rationale that by creating a single regulator, it would improve the emergence of wide ranging financial conglomerates and enable a more flexible approach over time to changes in prudential regulation.[517]

In understanding the role of the prudential regulator in relation to the central bank, it is important to note the role and function of the central bank within the financial system. The central bank is generally considered as the monetary authority, in that it is the agent designated by society to manage liquidity while pursuing the monetary policy objectives.[518] The central bank acts as a source of liquidity and acts as lender of last resort, central banks naturally fulfil a preventative mandate in respect of banking crises as a macroprudential supervisory agency through risk management.[519]

In determining the regulatory efficacy of locating the prudential regulator outside of the reserve bank or at the very least, as an independent juristic entity, it is thus necessary to weigh the advantages against the disadvantages of such a variation in the implementation of Twin Peaks.

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517 Godwin A 'Australia's Trek towards Twin Peaks - Comparisons with South Africa' (2017) 4(11) *Routledge* 184.
518 Pellegrinaa D, Masciandaroc D & Pansini R 'The central banker as prudential supervisor: Does independence matter?' (2013) 9 *Journal of Financial Stability* 416.
519 Pellegrinaa D, Masciandaroc D & Pansini R 'The central banker as prudential supervisor: Does independence matter?' (2013) 9 *Journal of Financial Stability* 416.

4.12.1 Advantages of Locating the Prudential Regulator outside the Central Bank

In terms of housing the prudential regulator outside the central bank, this prudential regulatory approach can be said to align closely with Principle 2[520] of the Core Principles of Basel III and is often synonymous with a more competitive financial system.[521] Furthermore, a separation between the prudential regulator and the central bank may serve to protect the central bank from the reputational harm[522] associated with the failure of a regulated institution, as was the case with the collapse of the Australian insurer, HIH.[523]

There are conflicts of interest that should be taken into consideration when locating the PA.[524] Conflicts of interests may be present where the prudential regulator is housed within the central bank. In terms of this arrangement, the concern of the central bank's focus is primarily macro-prudential regulation, whereas the prudential regulator's focus is microprudential regulation.[525] As consequence of being a lender of last resort, the central bank may find itself strained in assisting regulated institutions when the prudential regulator is located within the central bank.[526] It is thus reasoned that such conflicts of interest are best avoided. Locating the prudential regulator outside of the central bank ensures that regulatory mandates are achieved void of conflicts of interests and allows the central bank to discharge its duties as a lender of last resort without pressure or constrain

520 Principle 2 states '– Independence, accountability, resourcing and legal protection for supervisors: The supervisor possesses operational independence, transparent processes, sound governance, budgetary processes that do not undermine autonomy and adequate resources and is accountable for the discharge of its duties and use of its resources. The legal framework for banking supervision includes legal protection for the supervisor.' See, Basel Committee on Banking Supervision *Core Principles for Effective Banking Supervision* (2012) 10.

521 Noia C & Giorgio G 'Should banking supervision and monetary policy tasks be given to different agencies?' (1999) 2(3) *International Finance* 373.

522 Noia C & Giorgio G 'Should banking supervision and monetary policy tasks be given to different agencies?' (1999) 2(3) *International Finance* 369.

523 Schmulow A 'CIFR Working Papers Twin Peaks: A Theoretical Analysis' available at *https://www.researchgate.net/publication/315366898_Twin_Peaks_A_Theoretical_Analysis* (accessed on 30 January 2021).

524 Noia C & Giorgio G 'Should banking supervision and monetary policy tasks be given to different agencies?' (1999) 2(3) *International Finance* 368.

525 Schmulow A 'CIFR Working Papers Twin Peaks: A Theoretical Analysis' available at *https://www.researchgate.net/publication/315366898_Twin_Peaks_A_Theoretical_Analysis* (accessed on 30 January 2021).

526 Schmulow A 'CIFR Working Papers Twin Peaks: A Theoretical Analysis' available at *https://www.researchgate.net/publication/315366898_Twin_Peaks_A_Theoretical_Analysis* (accessed on 30 January 2021).

ensuring financial system stability. The advantage of locating the prudential regulator outside of the central bank is that it ensures regulatory independence on the part of the prudential regulator.[527]

4.12.2 Disadvantages of Locating the Prudential Regulator outside the Central Bank

The disadvantages of locating the prudential regulator outside of the central bank may be identified in terms of its shortfalls in comparison to the advantages of locating the prudential regulator within the central bank.[528] This regulatory arrangement will not benefit from the increased coordination and information flow as the case may be for the prudential regulator housed within the central bank. The same can be said in respect of information synergies between the conduct of monetary policy and the prudential supervision of banks.[529]

In times of financial crisis, the separation of the prudential regulator and the central bank as a lender-of-last-resort will be required to act in close co-ordination should a crisis eventualise. Where the prudential regulator is housed within the central bank, co-ordination is inherently close.[530]

It is submitted that the overarching characteristic of locating the prudential regulator outside of the central bank is that of regulatory independence. It is argued that framework that gives effect to this prudential regulatory arrangement sufficiently regulates the financial system from a prudential perspective, provided that it is implemented correctly. However, with regard to the shortfalls of the arrangement, it is submitted that regulators may seek to enhance the framework in order to align with the needs of the financial system.

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[527] Schmulow A 'CIFR Working Papers Twin Peaks: A Theoretical Analysis' available at https://www.researchgate.net/publication/315366898_Twin_Peaks_A_Theoretical_Analysis (accessed on 30 January 2021).

[528] Pellegrinaa D, Masciandaroc D & Pansini R 'The central banker as prudential supervisor: Does independence matter?' (2013) 9 *Journal of Financial Stability* 416.

[529] Llewellyn D 'Institutional Structure Of Financial Regulation And Supervision: The Basic Issues' available at https://www.researchgate.net/publication/255585648_Institutional_structure_of_financial_regulation_and_supervision_the_basic_issues (accessed on 31 January 2021).

[530] Llewellyn D 'Institutional Structure Of Financial Regulation And Supervision: The Basic Issues' available at https://www.researchgate.net/publication/255585648_Institutional_structure_of_financial_regulation_and_supervision_the_basic_issues (accessed on 31 January 2021).

4.12.3 Advantages of Locating the Prudential Regulator within the Central Bank

An alternative variation of prudential regulation sees the location of the prudential regulator operating within the reserve bank and jointly acts as a prudential regulator. In this instance the central bank is charged with macroprudential regulation[531], together with the prudential regulator acting as a subsidiary of the reserve bank, charged with microprudential regulation.[532]

The advantages of locating the prudential regulator within the central bank are the combined value and performance in respect of the efforts of both bodies and the resulting efficiencies concerning the flow of information and resources, which exist by adopting this approach of prudential regulation.[533] Furthermore, advantages may be gained by locating the regulator within the central bank, provided that the central bank has a strong tradition of independence, this is emulated by SA and the SARB as the Constitution provides for the independence of the SARB.[534] Additionally, the central bank may be able to gain valuable insights into the state of the economy from a prudential regulatory perspective by conducting the activities of the prudential regulator, if the prudential regulator is located within the SARB.[535]

Furthermore, additional advantages of this approach to prudential regulation are that the location of the PA will allow for the optimal use of resources including skilled human resources within the SARB.[536] Superior access to information due to the prudential regulator being housed within the central bank assists the central banker to act as a more effective and efficient prudential

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531 Macroprudential regulation concerns itself with the stability of the financial sector as a whole and is thus the 'systemic approach' to financial regulation, and micro-prudential regulation focuses on the stability of each individual institution within the financial sector and is thus the 'institutional approach'. See, International Centre for Monetary and Banking Studies *Geneva Reports on the World Economy 11 Fundamental Principles of Financial Regulation* (2009) 18.

532 Her Majesty's Treasury *A New Approach to Financial Regulation: Judgement, Focus and Stability* (2010) 5.

533 Schmulow A 'CIFR Working Papers Twin Peaks: A Theoretical Analysis' available at *https://www.researchgate.net/publication/315366898_Twin_Peaks_A_Theoretical_Analysis* (accessed on 30 January 2021).

534 Chapter 13, s 224(2), Constitution of the Republic of South Africa, 1996 provides that '[t]he South African Reserve Bank, in pursuit of its primary object, must perform its functions independently and without fear, favour or prejudice, but there must be regular consultation between the Bank and the Cabinet member responsible for national financial matters'.

535 Noia C & Giorgio G 'Should banking supervision and monetary policy tasks be given to different agencies?' (1999) 2(3) *International Finance* 367.

536 Pellegrinaa D, Masciandaroc D & Pansini R 'The central banker as prudential supervisor: Does independence matter?' (2013) 9 *Journal of Financial Stability* 416.

supervisor.[537] The central bank generally has considerable authority in an economy and established identity which enhances the credibility of prudential regulation and supervision if it is allocated this task.[538]

The advantages with regard to the involvement of central banks in prudential regulation concern access to better information, more effective crisis resolution, economies of scale derived from housing all prudential functions under the same umbrella of the authority which manages liquidity, and the ability to retain better equipped staff. However, there are disadvantages in terms of drawbacks like conflicts of objectives, reputational risk, scope, and conflicts of interests.[539]

4.12.4 Disadvantages of Locating the Prudential Regulator within the Central Bank

One of the main disadvantages of assigning the central bank to the joint responsibility of prudential regulation is that of conflict of interest. This may be true in instances where the central bank may compromise its monetary stability mandates because they may conflict with its objective of securing the safety and soundness of banks as a prudential objective.[540]

There are, however, contrary arguments to having the central bank as the supervisory agency of banks in terms of prudential regulation which highlights the disadvantages of this regulatory arrangement.[541] It may be viewed as centralising a disproportionate degree of power in the hands of an unelected central bank whose accountability may be feeble.[542] Regulatory failures of financial institutions may compromise the authority of the central bank in other areas of its activity

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537 Pellegrinaa D, Masciandaroc D & Pansini R 'The central banker as prudential supervisor: Does independence matter?' (2013) 9 *Journal of Financial Stability* 416.

538 Llewellyn D 'Institutional Structure Of Financial Regulation And Supervision: The Basic Issues' available at *https://www.researchgate.net/publication/255585648_Institutional_structure_of_financial_regulation_and_supervision_the_basic_issues* (accessed on 31 January 2021).

539 Doumpos M, Gaganis C & Pasiouras F 'Central bank independence, financial supervision structure and bank soundness: An empirical analysis around the crisis' (2015) 6 *Journal of Banking & Finance* 69.

540 Llewellyn D 'Institutional Structure Of Financial Regulation And Supervision: The Basic Issues' available at *https://www.researchgate.net/publication/255585648_Institutional_structure_of_financial_regulation_and_supervision_the_basic_issues* (accessed on 31 January 2021).

541 Llewellyn D 'Institutional Structure Of Financial Regulation And Supervision: The Basic Issues' available at *https://www.researchgate.net/publication/255585648_Institutional_structure_of_financial_regulation_and_supervision_the_basic_issues* (accessed on 31 January 2021).

542 Llewellyn D 'Institutional Structure Of Financial Regulation And Supervision: The Basic Issues' available at *https://www.researchgate.net/publication/255585648_Institutional_structure_of_financial_regulation_and_supervision_the_basic_issues* (accessed on 31 January 2021).

therefore there exists a potential for reputational risk.[543] There may be a loss of independence on the part of the prudential regulator as the central bank assumes similar prudential regulatory activities.[544] A moral hazard may ensue to the extent that the public may hold the perception that they have the same protection such as deposit insurance with all financial business as they have with banks.[545]

This benefit of combining the functions needs to be weighed against the risk of a conflict of interest emerging within the Central Bank. For example, it has been suggested that 'a central bank with responsibility for preventing systemic risk is more likely to loosen monetary policy on occasions of difficulty'[546]

4.13 CONCLUSION

The regulatory framework that informs Twin Peaks in SA has been assessed. The revised legislation that gives effect to Twin Peaks has also been analysed, with consideration given to the mechanisms such as MoUs which have the objective of ensuring regulatory coordination. An important consideration of this chapter concerned the economic environment in which Twin Peaks finds implementation. In light of this consideration, it has been discussed how the implementation of Twin Peaks my vary with due regard to the economic environment in which it finds implementation.

The notable variations of the Twin Peaks regulatory model that have been implemented in the international best practice jurisdictions in addressing the unique characteristics of their respective economies were analysed. These variations concerned the location of the prudential regulator, which sees three variations. These variations are, the prudential regulator is an independent and

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543 Llewellyn D 'Institutional Structure Of Financial Regulation And Supervision: The Basic Issues' available at *https://www.researchgate.net/publication/255585648_Institutional_structure_of_financial_regulation_and_supervision_the_basic_issues* (accessed on 31 January 2021).

544 Doumpos M, Gaganis C & Pasiouras F 'Central bank independence, financial supervision structure and bank soundness: An empirical analysis around the crisis' (2015) 6 *Journal of Banking & Finance* 71.

545 Llewellyn D 'Institutional Structure Of Financial Regulation And Supervision: The Basic Issues' available at *https://www.researchgate.net/publication/255585648_Institutional_structure_of_financial_regulation_and_supervision_the_basic_issues* (accessed on 31 January 2021).

546 Llewellyn D 'Institutional Structure Of Financial Regulation And Supervision: The Basic Issues' available at *https://www.researchgate.net/publication/255585648_Institutional_structure_of_financial_regulation_and_supervision_the_basic_issues* (accessed on 31 January 2021).

distinct juristic entity which is located outside of the central bank, the prudential regulator is a subsidiary of the central bank, and the prudential regulator is located within the central bank. Notably, the advantages and disadvantages of the prudential regulator's location, within or outside of the central bank show a great deal of efficient and effective prudential regulation. However, there is no preferred prudential regulator location, as it is located based of the needs of the financial system and the economy of a particular financial sector.

SA's implementation is very closely aligned with the Twin Peaks implementation of the jurisdictions of the comparators of choice. In particular, we see that SA has drawn inspiration the UK's former approach to prudential regulation, namely, where the prudential regulator was originally created as a subsidiary of the BoE. However, the point of departure is that SA has established the PA as a juristic entity within the SARB. This decision thus indicates how SA has approached uniquely implementing Twin Peaks to ensure that it meet its financial sector needs. The regulatory coordination framework put in place by the FSRA thus therefore meets international best practices and is tailor-made to meet SA's domestic needs and will truly result in a more effective financial regulation than before.

CHAPTER 5: CONCLUSIONS AND RECOMMENDATIONS

5.1 INTRODUCTION

The main objective of this research has been to assess whether the regulatory coordination framework put in place by the Financial Sector Regulation Act (hereinafter, FSRA) meets international best practices and is tailor-made to meet South Africa's (hereinafter, SA) domestic needs and will truly result in a more effective financial regulation than before. In considering the information presented in chapters 2 to 4 above, the core components of these chapters answer the research sub-inquiries as identified in chapter 1.[547] The research sub-inquiries identified form the building blocks in answering the main research question and all aspects incidental thereto. The main focus of each chapter which answers the sub-enquiries will be presented in part 5.2 which serves to summarise each chapter. This will be followed by part 5.3 which provides a conclusion. Part 5.4 presents recommendations and suggestions as to how SA can improve implementation of its Twin Peaks system with lessons from the selected international best practice jurisdictions.

5.2 SUMMARY OF THE SALIENT FEATURES ACROSS CHAPTERS 1-4

5.2.1 The Research Focus (The Legal Problem)

Chapter 1 introduces the research problem by identifying the problems with SA's financial regulation model prior to the introduction of the FSRA. Problems identified with the financial regulation model prior to the FSRA, from a prudential regulation front concerned the blurring of the boundaries phenomenon, consequently causing gaps within the financial sector, resulting in unregulated areas within the financial sector. This was a consequence of SA's financial sector being highly interconnected and dominated by large financial groups.[548] The financial sector faced the challenge of a fragmented approach to regulation which created regulatory arbitrage or inefficiencies. The goals in reforming prudential regulation, was to shift away from a fragmented regulatory approach as envisaged by the National Treasury. Included in the objectives was to ensure that the regulatory framework is transformative, it is more inclusive and more accessible to all customers than before. Other law reform objectives of the Twin Peaks goals were that of

[547] See part 1.4.2 of Chapter 1.
[548] See part 1.3 of Chapter 1.

customer and investor protection, accountability of financial service providers and improvement of market conduct standards by financial institutions.

5.2.2 Financial Regulation Challenges Prior to the Financial Sector Regulation Act: The Need for Reform

Chapter 2 set out to examine the need for financial regulation reform through identifying the problems experienced with the SA's model of financial regulation prior to the FSRA. The problems which hindered effective financial regulation as discussed in 5.2.1 formed the policy rationale for adopting the Twin Peaks model of financial regulation. This chapter therefore engaged with the sub-inquiry as to what was the rationale for the reform of financial regulation in SA that led to the adoption of the Twin Peaks model of financial regulation.

The reform objectives identified by the National Treasury addresses problems related to prudential and conduct regulation of financial institutions. The said problems necessitated the introduction of the Twin Peak system under the FSRA. The SA Twin Peaks model as already pointed out in this thesis, establishes the Financial Sector Conduct Authority (hereinafter, FSCA) and the Prudential Authority (hereinafter, PA).

5.2.3 Twin Peaks System: International Best Practices

Chapter 3 examines the international best practices in respect of the implementation of the Twin Peaks model. The relevant sub-inquiry addressed in Chapter 3 is whether SA can learn from the international best practice jurisdictions regarding implementation of its own Twin Peak system. The selected jurisdictions for purposes of answering this sub-inquiry are Australia and the United Kingdom (hereinafter, UK). The lessons learnt from the Australian implementation of Twin Peaks looks at the financial failures which occurred and how the issues which lead to these failures were addressed. The collapse of HIH Insurance Limited and the collapse of Trio Capital superannuation fund 8 years later, identified the deficiencies in the Australian Prudential Regulation Authority's (hereinafter, APRA) analysis and response to information received concerning the financial well-being and solvency of HIH Insurance Limited. Furthermore, it highlighted the lack of required coordination between APRA and the Australian Securities and Investments Commission (hereinafter, ASIC).[549] In response to these financial failures the Ausralian Prudential Regulation

[549] See part 3.3.5 of Chapter 3.

Authority Act (hereinafter, APRA Act) was amended to include s10A provides for cooperation with other agencies.[550] The Australian Twin Peaks experience in light of the HIH and Trio Capital collapses are indicative of the critical importance of information-sharing and cooperation between APRA and ASIC, specifically at the operational levels of the respective regulators.[551]

The UK adopted the Twin Peaks as a model of financial regulation due to the devastating bank collapses[552] as a result of multiple failures in policy and practice during the subsistence of the Financial Services Authority (hereinafter, FSA) as the single regulator.[553] The banking collapses experienced by the UK financial system resulted in regulatory reform particularly in light of the effects of the GFC and the regulatory failures which resulted in these banking collapses that made the UK financial system susceptible to the effects of the GFC.[554] The perceived failure of the FSA to predict and prevent impacts of the GFC as a single regulator prompted a need for the adopting of Twin Peaks as a model of financial regulation.[555]

The selected comparators of choice provided valuable insight in terms of the circumstances the jurisdictions of the comparators of choice have implemented Twin Peaks as a model of financial regulation. Furthermore, it has displayed how Twin Peaks was varied in addressing issues experience within their respective financial systems. The lessons that SA may draw from in terms of the Australian implementation of Twin Peaks, highlights the value and importance of coordination, information-sharing, and analysis and response to information received concerning the financial well-being and solvency of regulated institutions between regulators. The significance of these lessons is further echoed in terms of the decision to amend the APRA Act to include s10A provides for cooperation with other agencies.[556] The lessons that may be learnt from the UK's experience with implementing Twin Peaks looks at the circumstances in which the UK implemented Twin Peaks. The UK implemented Twin Peaks, as there was a need for reform as a result of devasting bank failures which had made the UK susceptible to the negative effects of the

550 See part 3.3.5 of Chapter 3.
551 See part 3.3.5 of Chapter 3.
552 These bank collapses relate to that of Northern Rock Bank in 2007 and HBOS Bank in 2008. See part 3.4.7 of Chapter 3 and part 3.4.8 of Chapter 3.
553 See part 3.4 of Chapter 3.
554 See part 3.4 of Chapter 3.
555 See part 3.4 of Chapter 3.
556 See part 3.3.5 of Chapter 3.

GFC. The significance of this lessons indicates the purpose of Twin Peaks in addressing systemic banking failures and to withstand the effects of a GFC.

This thesis has set out to establish whether the regulatory coordination framework put in place by the FSRA meets international best practices and is tailor-made to meet SA's domestic needs and will truly result in a more effective financial regulation than before.

This thesis has endeavored to compare the SA implementation of Twin Peaks with that of the comparators of choice and from this comparison, lessons were learnt on how to improve implementation of the fairly new Twin Peak system in terms of the FSRA.

5.2.4 South Africa's New Twin Peak System: The Regulatory Framework

Chapter 4 analysed the relevant provisions of the FSRA which introduced the Twin Peak system into the South African financial sector regulation. This analysis thus addresses the sub-inquiry whether the economic environment that Twin Peaks finds application taken into consideration before implementation in ensuring suitability and effective cohesion. In addressing this sub-inquiry, it makes a case for the considering the economic environment before implementing Twin Peaks as a model of financial regulation.

The comparative analysis of the SA Twin Peaks implementation with the jurisdictions of the comparators of choice revealed that the location of the prudential regulator may vary between one of three options. Firstly, the prudential regulator is an independent and distinct juristic entity which may be located outside of the central bank as is the case with the Australian Twin Peaks implementation. Secondly, the prudential regulator may be seen as a subsidiary of the central bank as is the case for SA. Lastly, the prudential regulator could be located within the central bank as is the case for the location of the UK prudential regulator.[557]

The variations in the location of the prudential regulator and its relationship with the central bank was one of the points of discussion for the thesis. Each country adopted an approach which seeks to meet the needs of their respective financial sector and sought best to ensure effective prudential regulation.

[557] See part 4.11 of Chapter 4.

Chapter 4 analysed the advantages and disadvantages of locating the prudential regulator within the central bank, and/or outside the central bank by considering different choices made by the comparators of choice and South Africa. The analysis revealed that there are both advantages and disadvantages when it comes to the choice of locating the prudential regulator - whether outside of the central bank, or within the central bank.

One of the advantages of locating the prudential regulator outside the central bank, it ensures regulatory independence and accountability to the Treasury, thereby aligning with Principle 2 of the Core Principles of Basel III.[558] Furthermore, a separation between the prudential regulator and the central bank may serve to protect the central bank from the reputational harm associated with the failure of a regulated institution.[559] The disadvantage of locating the prudential regulator outside the central bank is that it will not benefit from the increased coordination and information flow as the case may be for the prudential regulator housed within the central bank.[560] The same can be said for information synergies between the conduct of monetary policy and the prudential supervision of banks.[561]

The advantages of locating the prudential regulator within the central bank are the said synergies and efficiencies which exists by adopting this approach of prudential regulation. An additional advantage may be superior access to information due to the prudential regulator being housed within the central bank, which assists the central banker to act as a more effective and efficient prudential supervisor.[562] A main disadvantage of assigning the central bank the responsibility of prudential regulation is that of conflict of interest.[563] This may be true in instances where the central bank may compromise its monetary stability mandates because they may conflict with its objective of securing the safety and soundness of banks as a prudential objective.[564] Further, regulatory failures of financial institutions may compromise the authority of the central bank in other areas of its activity therefore there exists a potential for reputational risk.[565]

[558] See part 4.12.1 of Chapter 4.
[559] See part 4.12.1 of Chapter 4.
[560] See part 4.12.2 of Chapter 4.
[561] See part 4.12.2 of Chapter 4.
[562] See part 4.12.1 of Chapter 4.
[563] See part 4.12.2 of Chapter 4.
[564] See part 4.12.2 of Chapter 4.
[565] See part 4.12.2 of Chapter 4.

The analysis in Chapter 4 pertaining to the location of the prudential regulator may prove useful for SA's implementation of Twin Peaks should the National Treasury reconsider the location of the prudential regulator. It is vital to note that the SA's adoption of the Twin Peaks regulatory framework compares favourably with the international best practice jurisdictions, despite numerous differences between SA and the comparators of choice as demonstrated in Chapters 2 and 3. This may be expected, given that SA's level of economic development is significantly lower than the positions in the jurisdictions of the comparators of choice.[566] These differences highlight the particular design choices SA has made in its proposed model which model has been tailored to suit SA's realities on the ground.[567] This is noteworthy as SA is the first developing country to adopt the Twin Peaks model of financial regulation.[568] The experience that SA acquires during the course of implementing the Twin Peaks regulatory framework is likely to be of interest to other developing countries, especially within the African region. In South Africa, African and other developing countries will have a model should they contemplate reforms to their own system of financial regulation.[569]

SA's decision to shift towards a Twin Peaks model is an opportune development, particularly as the country experiences a continued increase in the complexity of financial products and the presence of financial conglomerates.[570] SA has had the benefit of observing how and under unique circumstances other jurisdictions have approached the implementation of a Twin Peaks model of financial regulation. SA appears to have learnt from the studied international best practices and

566 Godwin A, Howse T & Ramsay I 'Twin Peaks: South Africa's Financial Sector Regulatory Framework' (2017) 3(134) *SALJ* 41.
567 Godwin A, Howse T & Ramsay I 'Twin Peaks: South Africa's Financial Sector Regulatory Framework' (2017) 3(134) *SALJ* 41.
568 Moodley A *The Twin Peaks Model: A Critical Analysis of its Effectiveness in South Africa* (unpublished LLM thesis, University of the Witwatersrand, 2018).
569 Moodley A *The Twin Peaks Model: A Critical Analysis of its Effectiveness in South Africa* (unpublished LLM thesis, University of the Witwatersrand, 2018).
570 Godwin A, Howse T & Ramsay I 'Twin Peaks: South Africa's Financial Sector Regulatory Framework' (2017) 3(134) *SALJ* 42.

has adapted lessons which it has tailored to meet its own needs as it implements its own Twin Peaks model.[571] As is usually the case, the true test of its effectiveness will be seen with time.[572]

5.3 CONCLUSION & RECOMMENDATION

This thesis as summarised above, has demonstrated that the FSRA meets international standards of modern financial regulation based on a Twin Peaks system. The comparative analysis has demonstrated how SA through legislation has established two regulatory bodies also found in the Twin Peak systems of comparators of choice. There are clear lessons that South Africa can learn from the comparators of choice as specified in 5.2.3 above.

Australia experienced financial failures which highlighted inherent shortfalls of the Twin Peaks model, such as deficient coordination mechanisms and analysis and response to information received between the regulatory authorities. In redress, financial authority regulators were required to strengthen their information-sharing arrangements. The HIH Report recommended that the exchange of information and coordination between the two regulators should not be discretionary but incorporated in the operating procedures of the respective regulators.[573]

In light of the Australian experience, it is recommended that the SA implementation of Twin Peaks incorporates the response guidelines to information received between financial regulatory authorities in order to ensure efficient, effective and meaningful coordination and cooperation in the achievement of financial system stability. This may be done through taking measures to raise awareness amongst staff of both agencies about matters of mutual interest; presentations to staff on the role and functions of their counterpart regulators; developing guidance notes to assist regulatory staff in identifying matters relevant to their counterpart; and the temporary transfer of staff between financial regulatory authorities in a number of areas, including enforcement.[574]

Word count: 35 697

[571] Godwin A, Howse T & Ramsay I 'Twin Peaks: South Africa's Financial Sector Regulatory Framework' (2017) 3(134) *SALJ* 42.
[572] Godwin A, Howse T & Ramsay I 'Twin Peaks: South Africa's Financial Sector Regulatory Framework' (2017) 3(134) *SALJ* 42.
[573] See part 3.3.5 of Chapter 3.
[574] See part 3.3.5 of Chapter 3.

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