

A Comparative Analysis of the Design and Implementation of the Twin Peaks Model of Financial Regulation in South Africa and Australia

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Online ISSN
1727-3781

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Date Submitted

14 November 2023

Date Revised

6 May 2024

Date Accepted

6 May 2024

Date Published

10 September 2024

Editor

Prof W Erlank

Journal Editor

Prof W Erlank

How to cite this contribution

Chitimira H and Mavhuru L "A Comparative Analysis of the Design and Implementation of the Twin Peaks Model of Financial Regulation in South Africa and Australia" *PER / PELJ* 2024(27) - DOI
<http://dx.doi.org/10.17159/1727-3781/2024/v27i0a17256>

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DOI

<http://dx.doi.org/10.17159/1727-3781/2024/v27i0a17256>

Abstract

In response to the 2007-2009 global financial crisis, South Africa, like most other countries, embarked on a journey of financial regulatory reform. This transformation has seen the country shift away from a silo approach, where various sectoral regulators supervise different financial institutions, towards the Twin Peaks model of financial regulation. The term "Twin Peaks" refers to the separation of regulatory functions between two independent regulators. For instance, one regulatory agency is responsible for the supervision of the safety and soundness of financial institutions, and the other is focussed on the regulation of business conduct. The Twin Peaks model is designed to provide the benefits and efficiencies of an integrated approach while simultaneously addressing inherent conflicts between the objectives of the safety and soundness of the financial system and consumer protection. The *Financial Sector Regulation Act* provides for the Twin Peaks model in South Africa. This Act positions South Africa as one of the first developing countries to adopt the model. On the other hand, Australia is the pioneer of the model since it implemented it in 1998. Its implementation in Australia, much as in South Africa, involved the separation of regulators for prudential soundness on the one hand and market conduct and consumer protection on the other. In this article, the authors provide a comparative analysis of the design and implementation of the Twin Peaks model in Australia and South Africa. They argue that while there are minor differences between the design and implementation of this model in Australia and South Africa, the model was customised and implemented to align with the specific needs of each country.

Keywords

Twin Peaks; financial regulation; prudential authority; consumer protection.

1 Introductory remarks

The 2007-2009 global financial crisis prompted an international wave of institutional reform in financial regulation.¹ Since then, countries across the world have been reforming their regulatory architecture, targeting finance and related industries, actors' behaviour, and institutional composition.² In 2011, the South African government initiated a series of financial regulatory reforms. This followed a review of the financial regulatory system that began in 2007 and culminated in a policy paper entitled: *A Safer Financial Sector to Serve South Africa Better*.³ Central to the reforms was a move towards a Twin Peaks model of financial regulation.⁴ In recent years there has been an increased interest in the Twin Peaks model, which was first adopted by Australia in 1998 and has since been implemented in the Netherlands, South Africa, Belgium, New Zealand and the United Kingdom.⁵ The design and implementation of this model differs from one country to another. The specific ways in which it has been structured in each country reflects, *inter alia*, the country's unique history, its policies, size of its economy, its development, and its local business structure.⁶ In order to explore these ways and some related aspects, the article provides an analysis of the way in which the Twin Peaks model of financial regulation is structured and implemented in South Africa and Australia.

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¹ Van Hengel, Hilbers and Schoenmaker "Experiences with the Dutch Twin-Peaks Model: Lessons for Europe" 185-199; Claessens *et al* 2010 <https://www.imf.org/external/pubs/ft/wp/2010/wp1044.pdf> 26; Godwin, Kourabas and Ramsay 2016 *Int'l Law* 273.

² Qumba 2022 *SALJ* 79; Norton 2005 *Int'l Law* 18; IMF 2018 *Global Financial Stability Report* 55-81.

³ National Treasury 2011 <https://www.treasury.gov.za/twinpeaks/20131211%20-%20item%20%20a%20safer%20financial%20sector%20to%20serve%20south%20africa%20better.pdf> 1-82; Godwin 2017 *Law and Financial Markets Review* 152.

⁴ Godwin 2017 *Law and Financial Markets Review* 151.

⁵ Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 104; Moodley *Twin Peaks Model* 4; Qumba 2022 *SALJ* 80; Godwin 2017 *Law and Financial Markets Review* 151.

⁶ Norton 2005 *Int'l Law* 19.

2 What is the Twin Peaks model of financial regulation?

The Twin Peaks model is the brainchild of Michael Taylor, who first advocated for it in 1995.⁷ He submitted that a regulatory system that imposes a clear separation between banking, securities and insurance was no longer suitable for regulating financial institutions, where these distinctions are becoming increasingly irrelevant.⁸ The Twin Peaks model provides for the separation of regulatory functions between two regulatory agencies. For example, one regulatory agency oversees supervision of the safety and soundness of financial institutions, and the other focusses on the regulation of business conduct.⁹ Put differently, the South African Twin Peaks model utilises a prudential regulator, namely the Prudential Authority (PA), which oversees the safety and soundness of all financial institutions such as banks (commercial, mutual and co-operative banks), insurance companies, co-operative financial institutions, financial conglomerates and other market infrastructures. The South African Twin Peaks model also employs a market conduct regulator, namely the Financial Sector Conduct Authority (FSCA) which policies the efficiency and integrity of financial markets and the promotion of financial consumer protection. In other words, the PA's primary objective is prudential supervision, with a primary focus on the safety and soundness of financial institutions, while the FSCA regulates business conduct and promotes consumer protection.¹⁰ The Twin Peaks model mitigates regulatory overlap or underlap in order to prevent systemic risks by ensuring that prudential and market conduct regulation is effectively and consistently enforced.¹¹ It ensures that transparency, market integrity and consumer protection are adequately prioritised.¹² If properly enforced, the Twin Peaks model could curb the occurrence of financial crises.¹³ According to Botha and Makina,¹⁴ the Twin Peaks model fulfils the four broad objectives of financial regulation, namely the protection of consumers,

⁷ Taylor *Twin Peaks* 1-18; Bakir 2009 *Public Administration* 911; Van Niekerk and Van Heerden 2020 *SALJ* 109.

⁸ Taylor *Peak Practice* 1-19.

⁹ Llewellyn "Institutional Structure" 17-93; Schoenmaker and Véron 2021 *A 'Twin Peaks' Version for Europe* 282 - 291

¹⁰ Schmulow 2017 *AJICL* 393; National Treasury 2013 <https://www.treasury.gov.za/twinpeaks/20131211%20%20item%203%20roadmap.pdf>; Schmulow 2018 <https://theconversation.com/south-africa-joins-the-club-that-regulates-financial-markets-through-twin-peaks-95558>

¹¹ Schmulow, Mazzola and De Zilva 2021 *Federal Law Review* 507.

¹² Oksiutycz and Angelopulo 2021 *Communitas* 207; Van Niekerk and Van Heerden 2020 *SALJ* 110; National Treasury 2011 <https://www.treasury.gov.za/twinpeaks/20131211%20-%20item%202%20a%20safer%20financial%20sector%20to%20serve%20south%20africa%20better.pdf>.

¹³ Adair Turner, former chairman of the Financial Services Authority (FSA) in the United Kingdom, is a vocal supporter of the Twin Peaks model. He has argued that separating prudential and conduct regulation helps to create a more focussed and effective regulatory framework; Schmulow, Mazzola and De Zilva 2021 *Federal Law Review* 527.

¹⁴ Botha and Makina 2011 *International Business & Economics Research Journal* 27.

ensuring the solvency and soundness of financial institutions, the promotion of fairness, efficiency and transparency of financial markets, and the promotion of a stable financial sector. The model was designed to provide all the benefits and efficiencies of an integrated approach while simultaneously addressing the inherent conflict between the objectives of safety and soundness and consumer protection. Under the Twin Peaks model, it is essential to ensure that the objectives of each regulator and the boundaries, or "regulatory perimeters", between them are clearly defined. This is crucial especially when a market participant is subject to the regulation by both regulators. Proponents of the Twin Peaks model such as Mc Vea¹⁵ also argue that it helps insulate prudential supervisors from excessive, intrusive consumer-oriented approaches.¹⁶ The Twin Peaks model seeks to counter problems associated with innovations in product design and distribution which had "blurred" the boundaries between financial institutions and their financial products.¹⁷ For instance, challenges caused by different financial institutions such as banks merging with insurers and/or merchant banks merging with securities traders, resulting in some regulatory gaps in the financial sector.¹⁸ This integration between different types of financial entities posed challenges to regulatory frameworks, and oversight by regulatory bodies became unclear and insufficient.

The strength of the Twin Peaks model lies in the fact that the two peak regulators are more likely to have dedicated objectives and clear mandates to which they are exclusively committed.¹⁹ In other words, the twin peak regulatory agencies have clearly defined objectives enabling them to carry out their work expediently and creating an obligation of accountability on each of them.²⁰ Moreover, the Twin Peaks model combats the duplication of roles between the regulatory agencies. The prudential regulator exists to complement the regulatory efforts of the market conduct regulator.²¹ The Twin Peaks model tackles the challenges posed by the growing complexity of financial markets and the constant rise of different financial conglomerates. Furthermore, it seeks to curb the inherent conflict of interest that arises under a single or super regulator model. Such a regulator which combines both prudential and conduct regulation is normally unable to

¹⁵ Mc Vea "The impact of Global Financial Crisis" 44-60.

¹⁶ Group of 30 2008 https://group30.org/images/uploads/publications/G30_Structure_FinancialSupervision2008.pdf

¹⁷ Bedeker "Appraisal of South Africa's Legislative Adoption" 4; Qumba 2022 *SALJ* 86.

¹⁸ Schmulow 2017 *AJICL* 396.

¹⁹ Godwin and Schmulow "Genealogy and Topography of Twin Peaks" 1-14; National Treasury 2014 https://juta.co.za/media/filestore/2015/03/2014_12_12_Response_document.pdf 5-46.

²⁰ Llewellyn "Institutional Structure" 17-85; Abrams and Taylor "Assessing the Case for Unified Financial Sector Supervision" 463-487.

²¹ Godwin 2017 *Law and Financial Markets Review* 151; Moodley *Twin Peaks Model* 58.

objectively fulfil all its conflicting priorities timeously. Different financial sectors often have divergent needs and priorities. Balancing these interests without favouring one sector over another could be more challenging for a single or super regulator. Thus, a single or super regulator could struggle to provide unbiased and equitable oversight in the financial sector. The likelihood of this occurring under Twin Peaks is lower due to the fact that both the prudential and the market conduct regulators are clearly focussed on their mandates and objectives. Nonetheless, the only weakness of the Twin Peaks model is that it could create challenges of regulatory overlap on dual-regulated entities.

3 Overview of the Australian Twin Peaks model

3.1 *The history and structure of the Twin Peaks model*

The introduction of the Twin Peaks model in Australia was spearheaded by the Wallis Inquiry, which was set up by the Australian government in 1996 to review its financial system.²² The Wallis Inquiry held that innovation in product design and distribution had blurred the boundaries between financial institutions and their different products. It also noted that there was an increase in competition in the financial market and "conglomeration" in financial services institutions.²³ Product innovation had enabled different types of financial institutions to offer essentially identical financial products while being subject to different degrees of financial regulation.²⁴ The Wallis Inquiry recommended that a single agency should be established for the regulation of companies, market conduct and consumer protection.²⁵ As a result, the Australian government enacted the *Australian Prudential Regulation Authority Act*²⁶ and the *Australian Securities and Investments Commission Act*,²⁷ which effectively introduced the Twin Peaks model. The

²² Godwin and Ramsay 2015 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657355 4; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 107. According to the Australian Treasury, in June 1996 the Financial System Inquiry (known as the Wallis Inquiry) was established to examine the results of the deregulation of the Australian financial system, to examine the forces driving further change, particularly technological, and to recommend changes to the regulatory system to ensure an "efficient, responsive, competitive and flexible financial system to underpin stronger economic performance, consistent with financial stability, prudence, integrity and fairness." The Inquiry was chaired by Australian businessman, Mr Stan Wallis, and was supported by a full-time secretariat.

²³ The Treasury 1996 <https://treasury.gov.au/publication/p1996-fsi-fr>; Godwin 2017 *Law and Financial Markets Review* 184; Bain and Harper 2000 *North American Actuarial Journal* 17.

²⁴ Bain and Harper 2000 *North American Actuarial Journal* 14; Lumpkin 2009 *OECD Financial Market Trends Report* 2; Blundell-Wignall 2009 *OECD Forum* 1-6.

²⁵ Cooper 2006 <https://download.asic.gov.au/media/1339352/integration-financial-regulatory-authorities.pdf> 1-14; The Treasury 1996 <https://treasury.gov.au/publication/p1996-fsi-fr> 258; Godwin 2017 *Law and Financial Markets Review* 184.

²⁶ *Australian Prudential Regulation Authority Act* 50 of 1998 (*APRA Act*).

²⁷ *Australian Securities and Investments Commission Act* 51 of 2001 (*ASIC Act*).

implementation of this legislation signified a departure from a single regulator model to a Twin Peaks model, which empowers two regulators to oversee their specific mandates in Australia. Accordingly, Australia consolidated the functions for financial regulation into two regulators, namely the Australian Securities and Investments Commission (ASIC), which is responsible for the regulation of companies, market conduct and consumer protection, and the Australian Prudential Regulation Authority (APRA), which is responsible for prudential regulation. The Reserve Bank of Australia (RBA) is responsible for monetary policy and financial stability, including ensuring a safe and reliable payments system.²⁸ To this extent, Schumlow describes the Australian model as a three-peak model, with each peak created as an independent statutory authority.²⁹

3.2 The role of the APRA

APRA is an independent statutory authority established for the purpose of prudential supervision and for promoting financial stability in Australia. It is a body corporate with perpetual succession and it functions completely outside the remit of the RBA.³⁰ This means that the APRA can enter contracts, sue or be sued,³¹ and hold property in its own name, separately from the RBA. The perpetual succession component empowers the APRA to engage in long-term planning and strategy development, knowing that the entity will endure over time. This enables better decision-making and investment in the financial sector. The APRA is able to plan and make long-term regulatory decisions since it has perpetual succession. The APRA took over the responsibilities of eleven separate state and federal financial regulators upon its formation in 1998.³² The *APRA Act* specifies that APRA was created to oversee the regulation of financial sector institutions in accordance with prudential laws and regulations.³³ The APRA may establish prudential standards that should be complied with by regulated institutions.³⁴ These standards provide a number of requirements aimed at promoting the financial soundness, risk management and governance in the Australian financial institutions and financial sector.³⁵ The APRA 2019-20 Annual Report provides that its core functions include the identification and timeous response to the operation and performance of the APRA.³⁶ The

²⁸ Section 10 and 11 of *Reserve Bank Act 4* of 1959; Reserve Bank of Australia date unknown <https://www.rba.gov.au/about-rba/>.

²⁹ Schumlow 2017 *AJICL* 396.

³⁰ Section 13 of the *APRA Act*.

³¹ Section 13(1) of the *APRA Act*.

³² Black 2006 *Law & Policy* 1-30; Gaskel 2007 *IMF Working Together Seminar Series* 84-93; Schumlow 2017 *AJICL* 396.

³³ Section 8 of the *APRA Act*; Hanrahan 2008 *Economic Papers* 9.

³⁴ APRA 2024 <https://www.apra.gov.au/apras-functions-0>.

³⁵ APRA 2024 <https://www.apra.gov.au/apras-functions-0>.

³⁶ APRA 2021 <https://www.apra.gov.au/sites/default/files/2021-01/Governance%20and%20Senior%20Executive%20Accountabilities.pdf>.

APRA Act provides that the APRA executive board should have at least three members and up to five members.³⁷ The five members consist of the chairperson, deputy chairperson, and three other members. The APRA members are appointed by the Governor General, on the advice of the Australian Government, for terms of up to five years.³⁸ The APRA has eight divisions and two independent internal teams. These divisions consist of banking, insurance, superannuation, policy and advice cross-industry, enterprise services, technology, and data division. The two independent internal teams consist of the Chief of Staff Internal Audit Team and the Enterprise Security and Risk Team.³⁹ The Banking division supervises licensed deposit-taking institutions such as banks, credit unions and building societies.⁴⁰ The Insurance division oversees general insurers, life companies, friendly societies and private health insurance companies.⁴¹ The Superannuation division supervises all registered superannuation entity licensees. The Policy and Advice division ensures that APRA's frontline supervisors have the best possible tools to support them in their risk analysis and supervisory interventions.⁴² This division consists of legal services, policy, advice and approvals, resolution and licensing.⁴³ Cross-industry division combines industry analysts and risk experts to assist frontline supervisors in monitoring individual entities and industries as a whole. Enterprise services help other divisions achieve APRA's strategic goals through shared services functions.⁴⁴ The internal audit team advises on managing risk across all of APRA and it has an independent reporting line to the audit committee and direct access to the APRA members and executive board. The APRA is accountable to the Australian government and the parliament. It also promotes the stability in the financial sector.

The division of APRA into the entities has led to greater efficiency and productivity. This partly explains why the Australian financial sector survived the 2007-2009 global financial crisis. The creation of specialised divisions in each industry, such as insurance and superannuation, ensures that each division focusses on a narrow set of tasks and/or functions. Furthermore,

³⁷ Section 16(1) of the *APRA Act*.

³⁸ Section 16 of the *APRA Act*; note that the Governor-General is the King's representative in Australia. The Governor General is appointed by the King on the recommendation of the Prime Minister and is appointed at "the King's pleasure" - that is, without a fixed term - but governors-general are usually given a 5-year term that can be extended. The Governor General has some responsibility for making sure Australia is governed in accordance with the Australian Constitution.

³⁹ APRA 2023 <https://www.apra.gov.au/apras-organisation-structure>.

⁴⁰ APRA 2023 <https://www.apra.gov.au/apras-organisation-structure>.

⁴¹ APRA 2023 <https://www.apra.gov.au/apras-organisation-structure>.

⁴² APRA 2023 <https://www.apra.gov.au/apras-organisation-structure>; IMF Australia Country Report No. 19/053.

⁴³ APRA 2023 <https://www.apra.gov.au/apras-organisation-structure>; UNSW Law Society 2020 https://issuu.com/unswlawsociety/docs/pic_2020_final_copy/s/11207013.

⁴⁴ IMF Australia Country Report No. 19/053.

specialised divisions make it easier to monitor and assess the performance of the relevant financial institutions in the financial sector. This enables a more accurate evaluation of outcomes and adjustments to improve performance by the APRA. As a result, decision-making is faster and more informed since individuals within a division will have a deeper understanding of the issues and challenges pertaining to their specific domain. Each division hires employees with appropriate expertise for their specific functions to increase efficiency.

3.3 The role of the ASIC

The ASIC commenced its operation in 1991, when it was known as the Australian Securities Commission (ASC). Put differently, its name was changed from ASC to ASIC in 1998. The ASIC is the business conduct regulator responsible for promoting market integrity and consumer protection across the financial markets in Australia.⁴⁵ The *ASIC Act* provides that the ASIC is responsible for maintaining, facilitating and improving the conduct of financial institutions.⁴⁶ This Act stipulates further that the ASIC is obliged to focus on financial predictability, reducing business costs, and improving the efficiency and development of the economy.⁴⁷ In addition, the ASIC ensures that investors and consumers effectively participate in the financial sector.⁴⁸ It also issues financial licenses and monitors financial services providers to ensure that they operate efficiently, honestly and fairly. This is done through the Australian financial services licensing system.⁴⁹ The ASIC is empowered to investigate violations of the *ASIC Act*, initiate the prosecution of minor offences and disqualify people from managing corporations or dealing in financial services.⁵⁰

The ASIC operates under the direction of three full-time Commissioners appointed by the Governor General in liaison with the relevant Minister.⁵¹ The Commissioners report to the Minister through their annual report, briefings, submissions and meetings with the Treasurer or Parliamentary Secretary.⁵² The ASIC seeks to curb the collapse of financial institutions by ensuring that they comply with provisions of the *ASIC Act* and certain

⁴⁵ Section 12A(2) of the *ASIC Act*; Comino 2009 *Aust Jnl of Corp Law* 236.

⁴⁶ Section 1(2) of the *ASIC Act*; ASIC 2019 <https://download.asic.gov.au/media/5314396/asic-annual-report-2018-19-full.pdf> 5-285.

⁴⁷ Section 1(2) of the *ASIC Act*; the ASIC 2019 <https://download.asic.gov.au/media/5314396/asic-annual-report-2018-19-full.pdf> 5-285.

⁴⁸ Section 1 of the *ASIC Act*.

⁴⁹ Cooper 2006 <https://download.asic.gov.au/media/1339352/integration-financial-regulatory-authorities.pdf>; Financial Regulator Assessment Authority 2022 <https://apo.org.au/sites/default/files/resource-files/2022-08/apo-nid319322.pdf>.

⁵⁰ Section 12GLD and 15 of the *ASIC Act*; Gilligan and Ramsay 2021 *Company and Securities Law Journal* 436.

⁵¹ Section 9 of the *ASIC Act*; ASIC 2024 <https://asic.gov.au/about-asic/what-we-do/how-we-operate/>.

⁵² ASIC 2024 <https://asic.gov.au/about-asic/what-we-do/how-we-operate/>.

competency standards. The ASIC also ensures the compliance of financial institutions with client funds and it protects clients' property rights.⁵³ However, the ASIC does not have an explicit mandate to promote financial stability. Its focus is on market conduct and investor/consumer protection. In 2010, the ASIC took on the additional responsibility of consumer credit and finance broking, regulating trustees and fulfilling a supervisory function over trading on Australian-licensed equity, derivatives and futures markets.⁵⁴

In light of the above, it appears that the *APRA Act* and the *ASIC Act* provide clear responsibilities and objectives for each regulator. The ASIC promotes confidence and the informed participation of consumers and investors in the financial sector. There is clear demarcation between the roles of the regulators to combat possible overlapping challenges. Moreover, the APRA and the ASIC operate as independent bodies that are free from government or industry interference. To this extent, Australia is considered to have done well during the 2007-2009 global financial crisis because of the clear delineation of responsibilities between the APRA and the ASIC.⁵⁵ This approach enabled the ASIC to curb regulatory arbitrage and other challenges posed by the 2007-2009 global financial crisis.⁵⁶ The ASIC also managed to avoid possible conflicts of interest that could have occurred when prudential oversight and business conduct regulatory functions are concentrated in a single regulator.

3.4 The role of the RBA

In most countries the central bank is historically responsible for financial stability, prudential regulation and the supervision of banks.⁵⁷ However, this has not been the case in Australia since the adoption of the Twin Peaks model of financial regulation in 1998. It is important to note that the Wallis Inquiry recommended that the prudential regulator should be a separate entity from the central bank, though it should cooperate very closely with the RBA in order to collectively maintain financial stability in Australia.⁵⁸ Thus, the RBA's prudential supervision mandate was transferred to the APRA in 1998. Notably, the RBA is still responsible for the promotion of financial

⁵³ IMF 2012 <https://www.imf.org/external/pubs/ft/scr/2012/cr12314.pdf> 41. See related discussion on ASIC 2023 <https://asic.gov.au/regulatory-resources/markets/market-supervision/>.

⁵⁴ ASIC date unknown <https://asic.gov.au/about-asic/what-we-do/our-role/history/>.

⁵⁵ Hill " Why did Australia Fare so Well" 203-300.

⁵⁶ Hill " Why did Australia Fare so Well" 203-300.

⁵⁷ Lumpkin 2002 <https://www.oecd.org/finance/insurance/2089622.pdf>; European Central Bank date unknown https://www.ecb.europa.eu/pub/pdf/other/prudential_supcbrole_en.pdf.

⁵⁸ Godwin and Ramsay 2015 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657355 2-46.

stability.⁵⁹ As part of its financial stability mandate, the RBA assesses a variety of financial and economic data which assists in gauging the robustness of the financial sector regulations.⁶⁰ Furthermore, the *Reserve Bank Act* 4 of 1959 was amended in 1998 to establish the Payments System Board in the RBA to promote the safety and efficiency of the Australian payments system. As part of its functions, the RBA takes steps such as maintaining low and stable inflation rates and overseeing sustainable economic growth to ensure that the environment is conducive for better financial stability. The RBA has responsibilities as the lender of last resort in line with its financial stability mandate.

4 The South African Twin Peaks model

4.1 The history and structure of the Twin Peaks model

The Twin Peaks model of financial regulation was adopted by South Africa almost two decades after its adoption in Australia.⁶¹ In the wake of the 2007-2009 global financial crisis, the South African government committed itself to a financial regulatory reform agenda that was aimed at strengthening its financial stability. The 2007-2009 global financial crisis highlighted several issues including the need to better coordinate monetary and fiscal policy while minimising systemic risk.⁶² As a result, the government of South Africa issued a policy paper in 2011 titled '*A Safer Financial Sector to Serve South Africa Better*' which outlined weaknesses in the structure and features of South Africa's financial sector indicating that there were various gaps that needed to be addressed.⁶³ The adoption of the Twin Peaks model by South Africa was also necessitated by the country's desire to increase transparency and accountability in its financial markets.⁶⁴ The South African government acknowledged that market conduct regulations were being neglected.⁶⁵ A dedicated regulator that is responsible for consumer protection was regarded as the most appropriate solution to this problem. Another reason for South Africa's adoption of the Twin Peaks model was its

⁵⁹ APRA date unknown <https://www.apra.gov.au/sites/default/files/MoU-RBA-Reserve-Bank-of-Australia.PDF>.

⁶⁰ Joshi *Appraisal of the Twin Peaks Model* 45; Reserve Bank of Australia date unknown <https://www.rba.gov.au/fin-stability/reg-framework/role-of-the-reserve-bank-in-maintaining-financial-stability.html>.

⁶¹ National Treasury 2018 https://www.treasury.gov.za/twinpeaks/Press%20release%20Twin%20Peaks%20implementation%20March2018_FINAL.pdf.

⁶² National Treasury 2011 <https://www.treasury.gov.za/twinpeaks/20131211%20-%20item%202%20a%20safer%20financial%20sector%20to%20serve%20south%20africa%20better.pdf>.

⁶³ National Treasury 2011 <https://www.treasury.gov.za/twinpeaks/20131211%20-%20item%202%20a%20safer%20financial%20sector%20to%20serve%20south%20africa%20better.pdf> 1-82; FSCA date unknown <https://www.fsca.co.za/Documents/FSCA%20Financial%20Inclusion%20Strategy.pdf> 5-21.

⁶⁴ Mahasela *Effectiveness of the Twin Peaks* 51; Qumba 2022 SALJ 84.

⁶⁵ National Treasury 2014 https://juta.co.za/media/filestore/2015/03/2014_12_12_Response_document.pdf 5-46.

international commitment to a sound and safe regulatory framework.⁶⁶ The country needed to align its financial sector with the international trends in financial regulation.⁶⁷ The South African government wanted to explore any potential contagion by following acceptable, robust standards in financial regulation and supervision.⁶⁸ Unlike in Australia, where the Twin Peaks model was introduced a year after the Willy Inquiry, the implementation of the model was a two-phase process in South Africa. The first phase involved developing and promulgating overarching legislation to empower the prudential and market conduct regulators to deliver on their mandates. The second phase comprised of harmonising financial sector legislation such as the *Banks Act* 94 of 1990, the *Short-Term Insurance Act* 53 of 1998 and the *Long-Term Insurance Act* 52 of 1998 with the *Financial Sector Regulation Act* 9 of 2017 (*FSR Act*) and developing conduct of financial institutions legislation.

South Africa's Twin Peaks model established two separate regulators, namely the FSCA, which is the market conduct regulator, and the PA, which is the prudential regulator. However, unlike in Australia where these two separate regulators are governed by two different statutes, both the FSCA and the PA are established by the *FSR Act* in South Africa.⁶⁹ The FSCA seeks to enhance South Africa's approach to consumer protection through financial conduct regulation.⁷⁰ Additionally, the adoption of Twin Peaks in South Africa was mainly aimed at creating a more resilient and stable financial sector through prudential regulation.

4.2 The role of the PA

The PA is one of the pillars that constitute the South African Twin Peaks model. The PA is established in terms of section 32 of the *FSR Act*. It plays a similar role to that of the APRA in Australia and it ensures that financial institutions operating in the financial sector are safe and financially sound.⁷¹ However, unlike in Australia, where APRA is an independent body, the PA is a juristic person housed in and administered by the South African Reserve Bank (SARB).⁷² To this extent, the PA is tasked with micro-prudential

⁶⁶ Qumba 2022 SALJ 84.

⁶⁷ Qumba 2022 SALJ 85.

⁶⁸ The South African Treasury 2013 <https://www.treasury.gov.za/twinpeaks/20131211%20%20item%203%20roadmap.pdf> 5-75; Qumba 2022 SALJ 86.

⁶⁹ Masthead 2017 <https://www.masthead.co.za/newsletter/twin-peaks-newsletter-issue-2-fsb-approach/>.

⁷⁰ National Treasury 2015 https://juta.co.za/media/filestore/2015/03/2014_12_12_Response_document.pdf.

⁷¹ Section 33 of the *Financial Sector Regulation Act* 9 of 2017 (the *FSR Act*); SARB 2020 <https://www.resbank.co.za/content/dam/sarb/what-we-do/prudential-regulation/PA%20Regulatory%20and%20Supervisory%20Strategy%202021.pdf>.

⁷² IMF 2022 <https://www.imf.org/en/Publications/CR/Issues/2022/06/16/South-Africa-Financial-Sector-Assessment-Program-Technical-Note-on-Insurance-Sector-519728> 3-31; section 32(2) of the *FSR Act*.

supervision while the SARB is responsible for macro-prudential supervision and overseeing the financial stability in the financial sector.⁷³ The PA functions as a system-wide prudential regulator that is tasked with overseeing all financial institutions that provide financial products or securities services and market infrastructures.⁷⁴ It is also obliged to promote sustainable competition in the provision of financial services and financial products. It is also required to cooperate and collaborate with the Competition Commission,⁷⁵ and it has supervisory roles over banks, insurers and pension funds.⁷⁶

The PA is governed by 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 other Deputy Governors of the SARB.⁷⁷ The CEO is appointed by the Governor of the SARB in consultation with the Minister of Finance. A person appointed as the CEO holds office for a term not longer than five years. The structure of the PA comprises four departments, namely Banking, Insurance and Financial Market Infrastructure Supervision; Financial Conglomerate Supervision; Policy, Statistics and Industry Support; and Risk Support.

4.3 The role of the FSCA

The FSCA came into operation on the 1 April 2018 in terms of section 56 of the *FSR Act*.⁷⁸ The FSCA is obliged to oversee the conduct of financial institutions operating in South Africa.⁷⁹ It is responsible for protecting financial consumers and promoting confidence in South African financial sector. It achieves this by overseeing the regulation of market conduct for various financial entities such as banks, insurers, financial advisers, intermediaries and investment institutions. The *FSR Act* provides that the main aim of the FSCA is to enhance and support the efficiency and integrity of financial markets and protect financial customers.⁸⁰ Like the ASIC in Australia, it is solely an independent market conduct authority separate from the central bank.⁸¹ The FSCA is obliged to regulate and supervise the conduct of financial institutions in accordance with the relevant financial

⁷³ Qumba 2022 SALJ 88; SARB 2018 <https://www.resbank.co.za/en/home/publications/publication-detail-pages/prudential-authority/PA-financial-sector-regulation/sector-regulation-act/2018/8800> 1-27.

⁷⁴ Section 32(2) of the *FSR Act*; Moodley *Twin Peaks Model* 14.

⁷⁵ Section 34(1)(d) of the *FSR Act*.

⁷⁶ IMF 2022 <https://www.elibrary.imf.org/view/journals/002/2022/184/article-A001-en.xml> 2-40.

⁷⁷ Section 36 of the *FSR Act*; SARB 2024 <https://www.resbank.co.za/en/home/what-we-do/Prudentialregulation>.

⁷⁸ Section 56 of *FSR Act*.

⁷⁹ Section 58 read with ss 56 and 57 of the *FSR Act*; Moodley *Twin Peaks Model* 14.

⁸⁰ Section 57 of the *FSR Act*.

⁸¹ Section 57 of the *FSR Act*; Godwin, Howse and Ramsy 2017 SALJ 674.

sector regulation laws.⁸² One of the objectives of the FSCA is to promote sustainable competition in the provision of financial products and financial services through cooperating and collaborating with the Competition Commission.⁸³ The *FSR Act* provides for an executive committee to manage the affairs of the FSCA.⁸⁴ The executive committee is made up of a commissioner and between two and four deputy commissioners, each with the appropriate expertise in the financial sector.⁸⁵ The commissioner is responsible for the day-to-day management and administration of the FSCA.⁸⁶ The commissioner and the deputy commissioners are appointed by the Minister of Finance. The *FSR Act* provides that a person appointed as commissioner or deputy commissioner holds office for a term determined by the Minister, which may not be longer than five years.⁸⁷

5 Overview comparative analysis

One striking difference between the implementation of the Twin Peaks model in South Africa and Australia is that in the latter, the regulatory model is implemented by two different statutes, while in the former, one statute is used. The *ASIC Act* and the *APRA Act* govern the implementation of the Twin Peaks model in Australia while the *FSR Act* governs the same in South Africa.⁸⁸ However, this difference does not have an effect on the implementation of the Twin Peaks model in these two countries. Moreover, there are no under-regulation or over-regulation challenges relating to the reliance on the Twin Peaks model in either South Africa or Australia. The *FSR Act* is the overarching statute enforcing the Twin Peaks model in South Africa and there has so far been no under-regulation and/or over-regulation of financial institutions in the financial sector. Thus, the financial sector is adequately regulated with the Twin Peaks model under the *FSR Act*. The *FSR Act* provides the necessary mechanisms to ensure compliance with the rules and standards of the Twin Peaks model. Similarly, even though two statutes underpin the Australian Twin Peaks, financial institutions are not subject to excessive, draconian or burdensome regulation. Both Australia and South Africa do not apply the model rigidly. Each of these countries has carefully adopted the Twin Peaks model with two peak regulators that have clear and distinct objectives on, inter alia, prudential regulation, market conduct regulation and consumer protection. In South

⁸² Section 58 of the *FSR Act*.

⁸³ Section 58(1)(d) of the *FSR Act*; FSCA 2023 <https://www.fsca.co.za/Regulatory%20Frameworks/FinTechDocuments/Draft%20Position%20Paper%20on%20Open%20Finance.pdf> 20.

⁸⁴ Section 60 of the *FSR Act*; Masthead 2017 <https://www.masthead.co.za/newsletter/twin-peaks-newsletter-issue-2-fsb-approach/>.

⁸⁵ Section 58(1)(a) of the *FSR Act*.

⁸⁶ Section 61 of the *FSR Act*; the FSCA 2022 <https://www.fsca.co.za/Annual%20Reports/FSCA%20Annual%20Report%202021-2022.pdf> 5-70.

⁸⁷ Section 63 of the *FSR Act*.

⁸⁸ Qumba 2022 *SALJ* 96; see the preamble of the *FSR Act*.

Africa, the financial sector is also regulated by other role players such as the National Credit Regulator (NCR), the National Consumer Commission (NCC), the National Consumer Tribunal (NCT) and the SARB. In terms of prudential regulations, the SARB monitors monetary policy and financial stability, including payment system safety and reliability.⁸⁹ In addition, the SARB, inter alia, preserves its traditional role as a lender of last resort and a provider of emergency liquidity assistance.⁹⁰ On the other hand, the NCR regulates all retail credit provision by credit providers, including banks.⁹¹ The NCR operates independently as a credit market regulator. The NCC promotes and protects the interests and rights of consumers in South Africa. On the other hand, the NCT hears and decides on any matter involving consumers, service providers, credit providers and other aggrieved parties. It also reviews decisions of the NCT and the NCC. Consequently, the South African Twin Peaks model does not prohibit the existence of multiple regulatory bodies in the financial sector regulation. This is also the case in Australia. A third, unofficial "pillar" of the Australian financial regulatory framework is Australia's central bank. The RBA is responsible for promoting financial stability in Australia. It develops monetary policy to promote and maintain stability in the financial sector. The RBA also ensures the stability, efficiency and competitiveness of the payments system in Australia.⁹²

The prudential regulators are structured differently in Australia and South Africa. For instance, the APRA is a stand-alone independent body⁹³ that operates outside of the central bank's remit.⁹⁴ This is not the case in South Africa, where the PA is a subsidiary of the SARB. The rationale for housing the PA in the SARB could be for the purposes of sharing financial resources and related infrastructure.⁹⁵ It could be also motivated by the need for mutual collaboration and information sharing between the SARB and the PA. This approach is effective only when the central bank is completely independent from political and socio-economic influences and biases. It appears that this is the case in South Africa, where the Constitution provides for the independence of the SARB.⁹⁶ A central bank often has access to a vast amount of economic and financial data. Therefore, integrating the PA in the central bank could enable timeous sharing of such data. This enhances smooth coordination between monetary policy decisions and

⁸⁹ *South African Reserve Bank Act* 90 of 1989; see s 10.

⁹⁰ De Jager 2006 *SA Merc LJ* 174; SARB 2022 <https://www.resbank.co.za/content/dam/sarb/publications/media-releases/2022/position-paper-on-ela-for-banks/Position%20paper%20on%20ELA%20for%20Banks%20%28Final%29.pdf> 1-16.

⁹¹ Vessio 2008 *SA Merc LJ* 231.

⁹² Reserve Bank of Australia 2023 <https://www.rba.gov.au/education/resources/in-a-nutshell/pdf/roles-and-functions.pdf>.

⁹³ Godwin and Schmulow 2015 *SALJ* 760.

⁹⁴ Cooper "Integration of Financial Regulatory Authorities" 3-5.

⁹⁵ Qumba 2022 *SALJ* 96.

⁹⁶ Section 224(2) of the *Constitution of the Republic of South Africa*, 1996.

prudential supervision. The approach could also enable the prudential authority and the central bank to timeously recognise and manage all potential threats to financial stability. Moreover, incorporating the PA into the central bank could enable it to develop better economic management policies as well as high standards of transparency and accountability.⁹⁷ While these are positive developments, they do not solve the problem of blurred boundaries and regulatory overlaps since the PA is not entirely separate from the central bank, as is the case in Australia.

In addition to the above, cooperation and coordination between the two pillars are crucial for the Twin Peaks model to be effective. Regulatory frameworks that divide authority between multiple agencies require strong coordination mechanisms to ensure that issues needing regulatory oversight do not fall through the gaps. Many jurisdictions such as New Zealand and the United Kingdom have adopted a structure of Memoranda of Understanding (MOUs) and have financial stability committees in place to foster collaboration, information sharing and better coordination between regulators.⁹⁸ Both South Africa and Australia recognise the need for cooperation, collaboration and coordination among financial regulators.⁹⁹ The Australian Twin Peaks model provides a non-binding system of coordination among financial agencies. The *APRA Act*¹⁰⁰ provides that APRA should have regard to the desirability of cooperating with other financial sector supervisory agencies and with other agencies specified in regulations when performing and exercising its functions and powers. In relation to this, the Australian financial regulatory framework is largely dependent on informal bilateral coordination mechanisms as well as the Council of Financial Regulators (CFR), an informal organisation with no regulatory functions in the form of MOUs and informal protocols.¹⁰¹ Neither the CFR nor the content of the regulatory MOUs is prescribed by statute.¹⁰² This soft law approach of employing MOUs is merely persuasive and not legally binding. Consequently, MOUs are non-binding measures that do not give rise to legal consequences for any non-compliance on the part of the offenders.¹⁰³ Therefore, there is poor enforceability of the relevant laws and related measures and/or soft law instruments. In this regard, it must be

⁹⁷ Nier 2009 <https://www.imf.org/external/pubs/ft/wp/2009/wp0970.pdf> 2-64; IMF *Country Report No. 20/33*.

⁹⁸ Schedule 17A of the *Financial Services and Markets Act 2000*; Qumba 2022 *SALJ* 108; also see European Central Bank *Memorandum of understanding on cooperation between the financial supervisory authorities, central banks, and finance ministries of the European Union on cross-border financial stability*.

⁹⁹ Section 27 of the *FSR Act*; section 10A of the *APRA Act*.

¹⁰⁰ Section 10A of the *APRA Act*; Godwin and Ramsay 2015 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657355 2-46.

¹⁰¹ Van Niekerk and Van Heerden 2020 *SALJ* 130.

¹⁰² Godwin and Ramsay 2015 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657355 41.

¹⁰³ Zimmermann 2021 *CADHI Expert Workshop* 5.

noted that requirements for collaboration were inserted in the *APRA Act* after the collapse of HIH Insurance. The collapse was partly attributed to coordination deficiencies between the APRA and the ASIC.¹⁰⁴ The *APRA Act* did not have any cooperation or coordination mechanism at its inception.

Like the position in Australia, the South African Twin Peaks model provides an equally non-binding system of cooperation and coordination among financial regulatory bodies.¹⁰⁵ Financial agencies are required to collaborate and cooperate for two reasons.¹⁰⁶ The first reason is for financial stability, and the second is to ensure the efficient implementation and operation of the Twin Peaks model.¹⁰⁷ The act mandates collaboration and cooperation at various levels, including at the cabinet and forum levels.¹⁰⁸ It provides that financial sector regulators must cooperate and collaborate with the SARB and with each other to maintain, protect and enhance financial stability.¹⁰⁹ The *FSR Act*¹¹⁰ also obliges the SARB to cooperate with other financial regulators in order to fulfil the financial stability mandate of the central bank effectively. The PA is required to collaborate with and assist the SARB, the Financial Stability Oversight Committee, the FSCA, the NCR, and the Financial Intelligence Centre in order to achieve its objective of financial stability.¹¹¹ In addition to this, the *FSR Act*¹¹² requires financial regulators to collaborate with each other when performing their functions in terms of financial sector laws such as the *National Credit Act*¹¹³ and the *Financial Intelligence Centre Act*.¹¹⁴ Further, the section obliges financial regulators to inform each other and share information about matters of common interest.¹¹⁵ The Act also establishes the Financial Sector Inter-Ministerial Council to facilitate the cooperation and collaboration among Cabinet members who administer legislation relevant to financial sector regulation and supervision. To give effect to this, the *FSR Act*, like the *APRA Act* in Australia, requires financial regulators to enter into one or more MOUs.¹¹⁶ The enforcement of MOUs is a challenge, however, because they are generally non-binding and do not carry the same weight as formal contracts. In the case of South Africa's Twin Peaks model, their weight is diminished by sections 26(4) and 77(3), of the *FSR Act*, which provide that

¹⁰⁴ Van Niekerk and Van Heerden 2020 *SALJ* 130; Godwin and Ramsay 2015 https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2657355 2-46.

¹⁰⁵ Chapter 5 of the *FSR Act*; National Treasury 2014 https://juta.co.za/media/filestore/2015/03/2014_12_12_Response_document.pdf.

¹⁰⁶ Sections 26; 34 and 76 of the *FSR Act*.

¹⁰⁷ Van Niekerk and Van Heerden 2020 *SALJ* 114.

¹⁰⁸ Sections 26, 34 and 76 of the *FSR Act*.

¹⁰⁹ Section 26 of *FSR Act*.

¹¹⁰ Section 34 of *FSR Act*.

¹¹¹ Section 58 of *FSR Act*.

¹¹² Section 76 of *FSR Act*.

¹¹³ *National Credit Act* 34 of 2005 (NCA).

¹¹⁴ *Financial Intelligence Centre Act* 38 of 2001 (FICA).

¹¹⁵ Section 76 of the *FSR Act*.

¹¹⁶ Section 76 of the *FSR Act*

non-compliance with a MOU does not affect a regulator's actions under the *FICA* and *NCA*.¹¹⁷ Accordingly, it can be argued that South Africa has modelled its collaboration and cooperation mechanism on the Australian approach, which also utilises non-binding MOUs between various regulators. The two countries have adopted an ineffective method of the use of MOUs to foster cooperation and collaboration among financial regulators.

It is also important to note that both Australia and South Africa employ a risk-based regulatory system in their implementation of the Twin Peaks model. Such a system provides for the development of decision-making frameworks and procedures to prioritise regulatory activities and the deployment of resources, principal inspection and enforcement activities.¹¹⁸ That prioritisation is determined by an assessment of the risks that regulated institutions and companies pose to the regulator's objectives.¹¹⁹ It is submitted that a risk-based approach is a problem-based regulation where regulators "should focus on the most important problems and fix them."¹²⁰ Thus, priority should be given to high-risk problems and relevant resources should be provided to the regulatory bodies to curb such problems. The risk-based approach also stipulates that financial institutions should take enhanced measures to manage and mitigate high risks while less intensive measures are recommended for low risks. Therefore, a risk-based approach has a two-stage inquiry. The first stage involves the identification of the level of risk and the second stage entails acting on the high-level risk.

The *FSR Act* requires the PA to consider the need for a pre-emptive, outcomes-focussed and risk-based approach so as to prioritise its resources in accordance with the significance of risks to the achievement of its objectives.¹²¹ The FSCA is also required to employ a risk-based approach in achieving its objectives. In other words, the risk-based approach requires the FSCA to identify key risks to the achievement of its objectives and prioritise the resources according to the significance of such risks.¹²² The regulatory strategy of the FSCA entails that the objective of the risk-based approach is to pre-emptively identify and assess risks, including cross-sector risks, risks related to specific financial sub-sectors, and risks concerning individual financial institutions.¹²³ It is also aimed at intervening on a timely basis when the governance, culture, or practices of the supervised financial institution are imprudent, unsafe and endangering the integrity of the markets to the detriment of consumers and market

¹¹⁷ Sections 26(4) and 77(3) of the *FSR Act*.

¹¹⁸ Baldwin and Black 2016 *Journal of Law and Society* 567.

¹¹⁹ Black 2006 *Law & Policy* 1-30.

¹²⁰ Baldwin and Black 2016 *Journal of Law and Society* 565.

¹²¹ Section 34(4)(b) of the *FSR Act*.

¹²² Section 54 of the *FSR Act*.

¹²³ FSCA date unknown <https://www.fsca.co.za/News%20Documents/FSCA%20Regulatory%20Strategy%202021-2025.pdf>.

participants. However, the *FSR Act* does not provide detailed guidance on how regulators should employ the risk-based approach. It is silent on the mechanisms and/or measures that should be employed when applying the risk-based approach in South Africa.

On the other hand, Australia has implemented a robust and detailed risk-based regulatory system to enforce its Twin Peaks model, which is enforced through the risk-based regulatory system which was modelled and shaped by the collapse of the HIH insurance company.¹²⁴ The collapse of this company exposed weaknesses in APRA's risk assessment mechanisms and the absence of an effective supervision culture.¹²⁵ To this end, the APRA modified its risk-based approach to financial regulation in 2002 by introducing a system consisting of two elements, namely the Probability and Impact Rating System (PAIRS) and the Supervisory Oversight and Response System (SOARS).¹²⁶ The PAIRS is a framework for assessing how "risky" an institution is in relation to APRA objectives.¹²⁷ It focusses on the probability and impact of the risks that a particular institution poses to APRA's objectives, namely, ensuring that financial institutions meet their obligations to beneficiaries in the context of an efficient and competitive financial sector.¹²⁸ Under the PAIRS, financial institutions are ranked according to their ability to meet relevant financial commitments and their impact on the Australian financial sector should they be liquidated.¹²⁹ The output of the PAIRS process is a risk score which is translated into a probability index rating and an impact score.¹³⁰ The SOARS is designed to determine how officials respond to that risk. It consists of two components, namely the supervisory attention index and the supervisory stance.¹³¹ The supervisory attention index rating is determined by taking the geometric average of the probability rating and the impact index rating.¹³² This rating is intended to set the level of resources to be applied to the financial institution.

South Africa also adopts a risk-based approach to enforce the Twin Peaks model. However, unlike Australia, South Africa does not provide robust risk-based assessment mechanisms. It appears that South Africa has not yet

¹²⁴ Black 2006 *Law & Policy* 2.

¹²⁵ APRA 2016 <https://www.apra.gov.au/sites/default/files/information-paper-risk-culture1.pdf>.

¹²⁶ APRA 2020 <https://www.apra.gov.au/supervision-risk-and-intensity-sri-model>; Black 2006 *Law & Policy* 8.

¹²⁷ Black *Development of Risk-Based Regulation* 32.

¹²⁸ Black 2006 *Law & Policy* 9.

¹²⁹ Black 2006 *Law & Policy* 10.

¹³⁰ Black 2006 *Law & Policy* 4; IOPS 2012 <https://www.iopsweb.org/toolkit/Module4riskmitigants.pdf> 4-38.

¹³¹ APRA 2018 https://www.apra.gov.au/sites/default/files/2018-02-pairs-guide-ud-external_0.pdf.

¹³² APRA 2018 https://www.apra.gov.au/sites/default/files/2018-02-pairs-guide-ud-external_0.pdf.

developed a detailed risk management mechanism because it has not yet experienced the same level of instability that was experienced in Australia when HIH insurance collapsed. In South Africa, both the PA and the FSCA are mandated to utilise the risk-based approach in fulfilling their objectives. On the other hand, only the APRA is obliged to rely on the risk-based approach to fulfil its functions in Australia.

The reliance on the risk-based approach empowers regulatory bodies to employ appropriate measures that are commensurate with the relevant risks that are posed to financial institutions. The risk-based approach requires resources to be directed where they are needed the most to curb high risk threats to the financial sector. If properly employed, the risk-based approach reduces compliance burdens by minimising regulatory intervention where detected risks are relatively low.¹³³ It is assumed that regulatory bodies may sometimes fail to respond to all alleged breaches or monitor all illicit conduct in the financial sector.¹³⁴ This means that there are some risks that do not pose much threat to the financial sector. Regulatory bodies should carefully determine the severity of each risk.

In terms of the governance framework, individuals tasked with supervising the implementation of the Twin Peaks model are appointed in both South Africa and Australia. In South Africa, the Commissioners governing the FSCA are appointed by the Minister of Finance.¹³⁵ The same is true for the PA, whose CEO is appointed by the Governor of the SARB.¹³⁶ In Australia, the ASIC Commissioners and the APRA Chairperson and Deputy Chairperson are appointed by the Governor-General from the nominations of the relevant Minister.¹³⁷ Nevertheless, there are some differences in terms of where these officials report. The APRA is to some extent answerable to the Treasurer, and both the APRA and the ASIC report to the Federal Parliament through the submission of Annual Reports.¹³⁸ In South Africa, the PA reports to the deputy governor and is accountable to the SARB.¹³⁹ The PA also prepares an annual report on its activities, which is submitted to the Minister of Finance for reporting in Parliament.¹⁴⁰ The Governor-General has the power to terminate the appointment of an APRA member under the *APRA Act*.¹⁴¹ This is in contrast to the situation in South Africa, where the Minister of Finance has the power to appoint and dismiss the PA's Chief Executive Officer and is vested with the authority to remove

¹³³ De Sousa 2016 *AIAL Forum* 24.

¹³⁴ De Sousa 2016 *AIAL Forum* 24.

¹³⁵ Section 61 of the *FSR Act*.

¹³⁶ Section 36 of the *FSR Act*.

¹³⁷ Section 16 of the *APRA Act*; s 9 of the *ASIC Act*.

¹³⁸ Section 59 of the *APRA Act*; Black and Jacobzone 2009 *OECD Working papers on public governance* 27.

¹³⁹ Section 55 of the *FSR Act*.

¹⁴⁰ Section 55 of the *FSR Act*; IMF 2012 *Country Report No. 12/314*.

¹⁴¹ Section 25 of the *APRA Act*; also see IMF 2019 *Country Report No. 19/49*

the FSCA Commissioner from office.¹⁴² This approach could result in undue political interference in the functioning of the PA and FSCA.¹⁴³ Thus, the current South African Twin Peaks model does not expressly provide measures that prevent and combat undue political interference on the part of the PA and the FSCA.¹⁴⁴

6 Concluding remarks

As noted above, South Africa and Australia have fundamentally sound designs of the Twin Peaks model. The model is not rigidly enforced in both South Africa and Australia. In this regard it has been carefully adapted to suit the socio-economic needs and circumstances of each country. In addition to the prudential regulator and market conduct regulator, the central banks still play a fundamental role in ensuring financial stability in both South Africa and Australia. Nonetheless, as indicated above, there are still some gaps and flaws that need to be addressed. Accordingly, it is submitted that the Twin Peaks model should be carefully enforced in both countries to foster cooperation and collaboration among the prudential regulator, market conduct regulator, central banks and other relevant role-players. Moreover, it is submitted that South Africa should consider following the Australian approach of not housing the PA in the central bank to promote its independence and curb political interference. However, the complete separation of the prudential regulator from the central bank should be flexibly utilised so as not to discourage relevant cooperation and collaboration between the prudential regulator, the market conduct regulator, central banks and other relevant role-players. Both Australia and South Africa should carefully move away from the soft law approach of relying on MOUs to enact adequate statutory provisions in the *APRA Act* and the *FSR Act* to foster compliance, cooperation and collaboration between financial institutions, market participants, financial regulators and other role-players. This approach could ensure that all relevant parties are legally bound to comply with the MOUs and statutory provisions of the *APRA Act* and the *FSR Act*. The risk-based approach should be effectively utilised in Australia and South Africa to enforce the Twin Peaks model and detect, prevent and combat all systemic risks in their respective financial sectors. In relation to this, South Africa should consider amending the *FSR Act* to enact provisions that expressly and adequately stipulate the measures and/or mechanisms that should be used to implement its risk-based approach to enforce the Twin Peaks model.

¹⁴² Section 36 and 39 of the *FSR Act*.

¹⁴³ Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 9-32.

¹⁴⁴ Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 9-32.

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List of Abbreviations

AIAL Forum	Australian Institute of Administrative Law Forum
AJICL	African Journal of International and Comparative Law
APRA	Australian Prudential Regulation Authority
APRA Act	Australian Prudential Regulation Authority Act 50 of 1998
ASIC	Australian Securities and Investments Commission
ASIC Act	Australian Securities and Investments Commission Act 2001
ASC	Australian Securities Commission
Aust Jnl of Corp Law	Australian Journal of Corporate Law
CEO	Chief Executive Officer
CFR	Council of Financial Regulators
FICA	Financial Intelligence Centre Act 38 of 2001
FL Rev	Federal Law Review
FSA	Financial Services Authority

FSCA	Financial Sector Conduct Authority
FSR Act	Financial Sector Regulation Act 9 of 2017
IMF	International Monetary Fund
Int'l Law	The International Lawyer
IOPS	International Organisation of Pension Supervisors
MOUs	Memoranda of Understanding
NCA	National Credit Act 34 of 2005
NCC	National Consumer Commission
NCR	National Credit Regulator
NCT	National Consumer Tribunal
PA	Prudential Authority
PAIRS	Probability and Impact Rating System
RBA	Reserve Bank of Australia
SA Merc LJ	South African Mercantile Law Journal
SALJ	South African Law Journal
SARB	South African Reserve Bank
SOARS	Supervisory Oversight and Response System