Twin Peaks – The Legal and Regulatory Anatomy of Australia’s System of Financial Regulation

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TWIN PEAKS – THE LEGAL AND REGULATORY ANATOMY OF AUSTRALIA’S SYSTEM OF FINANCIAL REGULATION

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INTRODUCTION

Australia has a very high level of compliance with the Basel Core Principles for Effective Banking Supervision (BCPs). The Australian banking system was more sheltered than a number of other countries and weathered the Global Financial Crisis relatively well. This was in part due to relative concentration of the system on a well performing domestic economy, but also due to a material contribution from a well-developed regulatory and supervisory structure.¹

Australia adopts a functionally-based model – the ‘twin peaks’ model – under which the functions for financial regulation are consolidated into two regulators: 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. Under this model, the central bank, the Reserve Bank of Australia (RBA), remains responsible for monetary policy and financial stability, including ensuring a safe and reliable payments system.

The two other models with which the twin peaks model is usually compared are the institutional model, under which the different sectors - namely, banking, insurance and securities - are supervised by different regulators, and the integrated model, under which supervision is consolidated in a single integrated regulator, or ‘super-regulator’, as was previously the case in the United Kingdom before it adopted the twin peaks model.²

Under the twin peaks model, it is necessary to ensure that the objectives of each regulator and the boundaries or ‘regulatory perimeters’ between them are clearly defined.³ This is because a market participant may be regulated by both regulators. Further, to ensure that comprehensive supervision is achieved and that issues do not fall between the cracks, it is necessary to achieve effective coordination between the regulators. This requires consultation, information-sharing and mutual cooperation in areas such as supervision and enforcement action.

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² For a detailed examination of the different models, see Eddy Wymeersch, ‘The Structure of Financial Supervision in Europe: About Single Financial Supervisors, Twin Peaks and Multiple Financial Supervisors’ (2007) 8(2) European Business Organization Review 237-306. As noted by ASIC in its submission to the Financial System Inquiry (FSI), ‘the United Kingdom has established the Prudential Regulation Authority (PRA) to take primary responsibility for prudentially supervising individual firms, separate from the responsibility for market conduct regulation held by the Financial Conduct Authority (FCA), as it found that the previous model of a single regulator handling both responsibilities could not exercise sufficiently close and effective scrutiny of prudential soundness.’

³ See Wymeersch, above n 2, 258.
This paper is one of a series of working papers that explore various aspects of Australia’s system of financial regulation and the relevance of its experience to reform in other jurisdictions. Adopting a broad perspective that outlines the context in which the system operates in Australia, it examines the anatomy of the twin peaks model as it exists in Australia from a legal and regulatory perspective and how it deals with fundamental regulatory issues. The relevance of the twin peaks model is becoming greater as an increasing number of jurisdictions have adopted, or are considering adopting, this model. It has also been of recent interest in Australia in the context of the Financial System Inquiry of 2014 (the ‘FSI’), which reviewed Australia’s financial system and examined many issues that are relevant to the ways in which the twin peaks model works in Australia. Other working papers in this series will focus on specific aspects, including a comparative analysis of Australia and other twin peaks jurisdictions and an examination of how the experience in Australia may be of relevance to reform in China.

Part II of this paper outlines the findings of the Wallis Inquiry in the nineties, which led to the adoption of the twin peaks model, and the legislative reform that was introduced to implement it. Part III considers the collapse of HIH, which put the model to the test and brought about reforms in the form of legislative amendments and changes to working practices. Part IV examines the way in which the model works in Australia by reference to critical elements that are required to exist for the model to work effectively; namely, clear responsibilities and objectives of each regulator, operational independence and effective regulatory coordination. Part V analyses the policy framework underpinning regulatory coordination. Part VI explores how regulatory coordination in Australia works in practice and draws on interviews conducted with senior representatives of ASIC, APRA, RBA and the Department of the Treasury. Part VII concludes by assessing the twin peaks model in Australia and what the analysis reveals in terms of its legal and regulatory anatomy.

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5 South Africa is in the process of reforms that would introduce a twin peaks model. In the US, a twin peaks model was proposed in the 2008 Department of Treasury, Blueprint for a Modernized Financial Regulatory Structure (Washington D.C., Department of the Treasury, 2008), 13-14, 142-3.
6 The FSI issued its interim report on 15 July 2014 (‘FSI Interim Report’) and its final report on 7 December 2014 (‘FSI Final Report’). The FSI was ‘charged with examining how the financial system could be positioned to best meet Australia’s evolving needs and support Australia’s economic growth’. See The Hon Joe Hockey MP, Treasurer of the Commonwealth of Australia, ‘Financial System Inquiry’ (Media Release, 20 December 2013) <http://jbh.ministers.treasury.gov.au/media-release/037-2013/>. Submissions were invited from the public and were made in two rounds: one prior to the FSI Interim Report and the other prior to the FSI Final Report. It was the first comprehensive review of developments in the Australian financial system since the 1997 Financial System Inquiry, known as the ‘Wallis Inquiry’, and since the global financial crisis. Included within the terms of the FSI was a review of Australia’s regulatory architecture and ‘the role, objectives, funding and performance of financial regulators, including an international comparison’.
II THE WALLIS INQUIRY AND LEGISLATIVE REFORM

A The Recommendations of the Wallis Inquiry

The reforms that introduced the twin peaks model in Australia were driven by the Wallis Inquiry, which was established in 1996 to review the financial system. The Wallis Inquiry made a number of important recommendations that are relevant for the purpose of this paper. First, it recommended that a single agency be established for the regulation of companies, market conduct and consumer protection.

Noting that conduct and disclosure regulation in Australia had previously ‘been provided through a variety of agencies, with arrangements governed by the institutional form of the service provider’, the Wallis Inquiry considered that ‘such arrangements [were] inconsistent with the emerging structure of markets’ and ‘resulted in inefficiencies, inconsistencies and regulatory gaps and [were] not conducive to effective competition in financial markets.’

Secondly, the Wallis Inquiry recommended that a single prudential regulator be established to carry out prudential regulation in the financial system. It considered that ‘[c]ombining prudential regulation in a single regulator [would] better accommodate the emergence of wide ranging financial conglomerates and enable a more flexible approach over time to changes in the focus of prudential regulation.’ Further, ‘[s]uch an entity [would] be better placed to reduce the intensity of regulation, and so lower its cost, in the likely event that new technologies or other developments facilitate a reduction in systemic risks.’

Thirdly, the Wallis Inquiry recommended that the prudential regulator ‘should be separate from, but cooperate closely with, the Reserve Bank of Australia’ and that ‘strong mechanisms should be established to ensure appropriate coordination and cooperation between the two agencies.’

7 For the recommendations of the Wallis Inquiry, see <http://fsi.treasury.gov.au/content/downloads/FinalReport/overview.pdf>. See also Anthony Jensen and Michael Kingston, ‘The Australian ‘Twin Peaks’ framework of financial system regulation: Australia and UK compare’ (2010) Journal of International Banking and Financial Law, 548, 549: ‘The concept of separate prudential and disclosure/conduct regulators, forming a ‘Twin Peaks’ regulatory structure, emerging from the Wallis Inquiry, owes at least some debt to the influential work of Michael Taylor who in 1995 wrote an article entitled “Twin Peaks”: A regulatory structure for the new century’ ...In a UK regulatory context, the article advocated functionally based regulation and the consolidation of the existing multiplicity of regulatory bodies into two commissions, one responsible for the financial soundness of all systemically important financial institutions and the other responsible for consumer protection’.

8 Recommendation 1.

9 Financial System Inquiry (‘Wallis Report’), ‘Overview – The Financial System: Towards 2010’ (Commonwealth of Australia, 1997) 17. According to the Wallis Report, 17-8 ‘[r]egulation for the integrity of market conduct, consumer protection and the regulation of companies have significant synergies. These functions should therefore be combined.’

10 Recommendation 31. This would involve transferring all prudentially regulated financial corporations from state jurisdiction to Commonwealth jurisdiction in a move away from the state-based regulation as is still much the case in the United States.


12 See Recommendation 32. Coordination and cooperation were to be achieved by making provision for ‘full information exchange between the RBA and [APRA]’ and for ‘RBA participation in [APRA] inspection teams’. Further, ‘[a] bilateral operational coordination committee, chaired by an RBA deputy governor, should be
The following reasons were given for keeping the prudential regulator separate from the central bank:

- The combination of deposit taking, insurance and superannuation regulation is unlikely to be carried out efficiently and flexibly by a central bank whose primary operational relationships are with banks alone and whose operational skills and culture have long been focused on banking.
- Separation will clarify that, while the central bank may still provide support to maintain financial stability, there is no implied or automatic guarantee of any financial institution or its promises in the event of insolvency.
- Separation will enable both the RBA and the [prudential regulator] to focus clearly on their primary objectives and will clarify the lines of accountability for the regulatory task.

Fourthly, the Wallis Inquiry recommended that the regulatory agencies have operational autonomy and their own staffing and remuneration structures ‘in whatever form [would] be most conducive to their effectiveness and efficiency.’

Fifthly, the Wallis Inquiry recommended a funding structure that reflected the costs of the regulatory agencies. In particular, ‘[a]s far as practicable, the regulatory agencies should charge each financial entity for direct services provided, and levy sectors of industry to meet the general costs of their regulation.’

Sixthly, the Wallis Inquiry recommended that the regulatory agencies should have boards of directors ‘responsible for their operational and administrative policies, the fulfilment of their respective legislative mandat[es] and their performance’ with a majority of independent directors and substantial cross-representation.

Finally, for our purposes, the Wallis Inquiry recognised the need for information sharing and co-ordination between the key regulators and recommended that the Council of Financial Regulators coordinate a broad range of activities ‘with the aims of facilitating the cooperation of its three members (the RBA, [APRA] and [ASIC]) across the full range of regulatory functions, and the attainment of regulatory objectives with the minimum of agency and compliance costs.’

The Wallis Inquiry identified several factors justifying a move towards a twin peaks model of financial regulation. These included innovation in product design and distribution, which had ‘blurred the boundaries between financial instruments and institutions,’ intensifying competition from new competitors ‘emerging from outside the financial system and from overseas’ and conglomeration, which was occurring within financial services institutions. The Wallis Inquiry noted

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established to coordinate information exchange, reporting arrangements on financial system developments, and other ongoing operational cooperation between the RBA and [APRA], including cooperation in establishing clear procedures for the management of regulated entities which experience financial difficulties’: Wallis Report, ‘Overview’, above n 9, 11-2.

14 See Recommendation 103. Further, ‘[APRA] and [ASIC] should locate their headquarters in the main financial capitals, rather than Canberra. Inspection staff should be located in the cities where the financial industry operates.’
15 Wallis Report, ‘Overview’, above n 9, 37
16 See Recommendation 108. This was subsequently changed as a result of the HIH reforms.
17 See Jensen and Kingston, above n 7, 549.
18 See Recommendation 112.
that ‘[t]he ideal regulatory scheme [required] a balance between preventing market failure and allowing financial markets to perform efficiently the functions for which they were designed.’

B Legislative Reform

The APRA Bill 1998 was the first in a series of financial sector legislative reforms that introduced the twin peaks model. The Second Reading Speech for the Bill noted that the replacement of the institutionally based structure with an objectives-based structure was a ‘central part of the reform approach.’ It identified ‘three fundamental regulatory objectives for government intervention in the financial system’: (1) financial stability, which was the regulatory focus of the RBA; (2) ‘the provision of specialised regulation of conduct, disclosure and dispute resolution for financial service providers and financial markets’, which was to be pursued by ASIC; and (3) ‘prudential supervision of those parts of the financial system which require more intense regulation for safety and stability reasons’, and which was to be undertaken by APRA.

In line with the recommendations of the Wallis Inquiry, the Bill made provision for APRA to operate under a charter that balanced the safety objectives of prudential regulation with efficiency, competition, contestability and competitive neutrality considerations. Further, the Bill made provision for secrecy provisions to ‘ensure the protection of information and documentation obtained as part of the regulation process but allow for effective information exchange between the financial sector regulatory bodies, including the Reserve Bank and ASIC.’ The Second Reading Speech concluded by noting that APRA would ‘be able to provide flexible, efficient, coordinated and consistent regulation across the financial sector, particularly for financial service conglomerates.’

The legislation was subsequently amended in 2003, largely as a result of the problems arising out of the collapse of a high-profile insurer as discussed in the next section.

III PUTTING TWIN PEAKS TO THE TEST – THE HIH COLLAPSE AND TRIO CAPITAL

As noted above, the twin peaks model in Australia was a product of the Wallis Inquiry. It was subsequently strengthened, particularly in relation to prudential supervision, following recommendations made by the HIH Royal Commission, which was established to examine issues arising out of the collapse of the general insurer, HIH Insurance Limited, in 2001 and which reported in 2003. This resulted in several major amendments to the legislation governing ASIC and APRA.

In the report of the HIH Royal Commission, the twin peaks model was considered and given a qualified endorsement by the HIH Commissioner. Justice Neville Owen noted the two models of financial regulation that had emerged at the international level: ‘the two-agency model adopted in

21 Ibid.
22 Ibid 1650. In many ways, it is the rise of universal banking and financial services conglomerates that has undermined the traditional institutional approach to financial regulation and boosted the arguments in favour of the objectives-based, functional approach.
24 Australian Securities and Investments Commission Act 2001 (Cth) (the ‘ASIC Act’); Australian Prudential Regulation Authority Act 1998 (Cth) (the ‘APRA Act’).
Australia, where the prudential regulator is separate from the companies and securities regulator; and the single agency model where corporate and prudential regulation is the responsibility of a single agency.\textsuperscript{25} Although Justice Owen found arguments in favour of the two-agency approach not ‘entirely persuasive’, he did not recommend the creation of a single agency.\textsuperscript{26}

There were several reasons behind Justice Owen’s qualified endorsement of the twin peaks model. One reason was apparent confusion in the context of the HIH collapse about the allocation of functions between APRA and ASIC and how they should coordinate their roles.\textsuperscript{27} Another reason was sub-optimal information-sharing arrangements between the two regulators and the way in which APRA analysed and responded to information provided by HIH in relation to its financial well-being and solvency.\textsuperscript{28}

A further reason for concern was the way in which APRA was governed. In place of the non-executive board structure, which the HIH Report did not consider to be optimal for an organisation of its type, Justice Owen recommended that control be vested in a small full-time executive, comprising a chief executive and two or three commissioners appointed by the government. This ‘would make APRA more efficient and better able to discharge the responsibilities it has.’\textsuperscript{29} This recommendation was accepted by the Australian Government and implemented by amendments to the APRA Act in 2003.

The HIH Report also queried the benefits of cross-representation, including its impact on inter-agency coordination, and recommended that ‘the direct involvement of representatives of the Australian Securities and Investments Commission and the Reserve Bank of Australia in the governance of the Australian Prudential Regulation Authority be discontinued.’\textsuperscript{30} In comments that are relevant to the analysis below on coordination,\textsuperscript{31} the HIH Report stated as follows:

There is...a risk that the participation of RBA and ASIC representatives on the APRA board may impede as much as improve coordination between the agencies at working level. There was some indication in the evidence I heard that staff may have assumed that necessary exchange of information would be occurring at board level obviating the need for communication at a working level.

Effective coordination of activities and exchange of information between relevant agencies should be part of the operational responsibility of those who run the agencies. This should be developed through regular formal and informal mechanisms involving agency staff at various levels. At a broader level, a mechanism such as the Council of Financial Regulators, which has representation from the Treasury as well as the agencies, would seem to me to be a more appropriate forum for the strategic consideration of issues affecting the financial services sector.\textsuperscript{32}

\textsuperscript{25} As was previously the case in the UK with the Financial Services Authority (FSA).
\textsuperscript{26} Commonwealth, The HIH Royal Commission, The failure of HIH insurance: A corporate collapse and its lessons (April 2003) 203 (the ‘HIH Report’).
\textsuperscript{27} It was in response to concerns about the lack of coordination between APRA and ASIC that the new section 10A in the APRA Act was inserted. See further below in Part IV(C)(1).
\textsuperscript{28} HIH Report, above n 26, liii.
\textsuperscript{29} Ibid lii. See Recommendation 18.
\textsuperscript{30} Ibid 210, Recommendation 20.
\textsuperscript{31} See Part V below.
\textsuperscript{32} HIH Report, above n 26, 209. This is particularly pertinent to the discussion on coordination below.
The HIH Report further recommended that the exchange of information between APRA and ASIC be reinforced and that it ‘be undertaken in a systematic way (through both formal and informal means) and based on clear protocols.’³³ Accordingly, the HIH Report recommended that ‘the effectiveness of the current memorandum of understanding between APRA and ASIC be reviewed.’³⁴ The HIH Report found that ‘the roles of APRA and ASIC were complementary, though not mutually exclusive’³⁵ and stated that the exchange of information and coordination between the two agencies ‘should not be discretionary but built into the operating procedures of the agencies.’³⁶ A related recommendation was that ‘APRA take steps to ensure that it effectively exchanges with relevant foreign regulators information and intelligence on the operations of Australian insurers with international operations.’³⁷

Issues and concerns similar to those outlined above arose some ten years later with the collapse of Trio Capital. As noted by ASIC in its submission to the FSI,³⁸ Trio Capital was a superannuation fund trustee and licensed responsible entity for 17 managed investment schemes, which included investments in a number of overseas vehicles, including hedge funds. It went into voluntary administration on 19 December 2009 and was placed into liquidation on 22 June 2010. ASIC launched criminal and administrative actions against Trio Capital, its directors and other parties as a result of alleged misappropriation of investor funds.

Unlike HIH, which involved a general insurer, the collapse of Trio Capital involved a superannuation fund trustee and managed investment schemes. As discussed above, HIH revealed deficiencies in terms of APRA’s response to information and the lack of coordination between APRA and ASIC. There was also a lack of clarity as to the functions and responsibilities of each regulator. 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.

In its report on the collapse of Trio Capital,³⁹ the Parliamentary Joint Committee on Corporations and Financial Services found that ‘[c]ommunication between ASIC and APRA was lacking’⁴⁰ and that when ASIC commenced its surveillance of the hedge funds, it did not seem to be aware of the failure of

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³⁴ See Recommendation 31. The previous MoU was replaced on 30 June 2004 in light of the HIH Report. An analysis of the current regulatory memoranda of understanding is contained in Part V below.
³⁶ See Jensen and Kingston, above n 7; HIH Report, above n 26, 223.
³⁷ HIH Report, above n 26, lxxi, Recommendation 40. There are now several memoranda of understanding in place between APRA and foreign regulators. Recommendation 40 is similar to Recommendation 16 of the Palmer Report: ‘… APRA should review its relationships with foreign regulators in light of the activities of Australian institutions and groups in foreign jurisdictions, and foreign entities in Australia. Where there are high levels of activity involving a foreign jurisdiction, consideration should be given to entering into a Memorandum of Understanding with that jurisdiction to establish a formal basis for cooperation between home and host regulator...’: Report to Messrs Corrs Chambers Westgarth From John Palmer, ‘Review of the Role Played by the Australian Prudential Regulation Authority and the Insurance and Superannuation Commission in the Collapse of the HIH Group of Companies’ (15 July 2002).
⁴⁰ Ibid xix-xx.
Trio Capital to provide information to APRA.\textsuperscript{41} Noting that ‘the Memorandum of Understanding between ASIC and APRA contains sections on mutual assistance and coordination, information sharing and unsolicited assistance’, the report encouraged the regulators ‘to continuing sharing information, even where a request for the information [had] not been received.’\textsuperscript{42}

In its 2013/2014 annual report, APRA noted that:

APRA and ASIC [had] strengthened their information-sharing arrangements, in part to address the recommendations of the report of the Joint Parliamentary Committee into the failure of Trio Capital Limited. Steps taken included:

- measures to raise the awareness amongst staff of both agencies about matters of joint interest, which has led to more exchanges of information in between formal meetings;
- presentations to APRA staff on ASIC’s role and functions;
- the development of guidance notes to assist APRA staff to identify matters relevant to ASIC; and
- secondment of staff between APRA and ASIC in a number of areas, including enforcement.\textsuperscript{43}

The experience from the HIH and Trio Capital collapses highlights the critical importance of information-sharing between APRA and ASIC, particularly at the operational levels of each regulator. It also highlights the importance of ensuring that each regulator is able to respond in a timely and effective manner to problems experienced by regulated entities and coordinate the performance of functions and responsibilities between both regulators.

### IV CRITICAL ELEMENTS OF THE TWIN PEAKS MODEL IN AUSTRALIA

A functional or objectives-based approach to regulation means that there will be dual-regulated entities; namely, entities that will be subject to the regulation and supervision of both regulators. It also means that the two regulators will need to work cooperatively to deal with regulatory overlap. Consequently, there are certain elements that are critical to making this model work properly. This section considers the legislative anatomy of twin peaks in Australia in relation to APRA and ASIC by reference to three critical elements that go to the heart of the effectiveness of the regulatory model: (i) clear responsibilities and objectives; (ii) operational independence; and (iii) effective regulatory coordination.

#### A Clear responsibilities and objectives

The requirement for regulators to have clear responsibilities and objectives is reflected in the Basel Core Principles for Effective Banking Supervision (‘Basel Core Principles’) and the Insurance Core Principles (‘Insurance Core Principles’):

**Basel Core Principles**

**Principle 1 – Responsibilities, objectives and powers:** An effective system of banking supervision has clear responsibilities and objectives for each authority involved in the supervision of banks and

\textsuperscript{41} Ibid 77.
\textsuperscript{42} Ibid 84.
\textsuperscript{43} Australian Prudential Regulation Authority, ‘Annual Report’ (2013) 63. See further below in Part V on coordination.
banking groups. A suitable legal framework for banking supervision is in place to provide each responsible authority with the necessary legal powers to authorise banks, conduct ongoing supervision, address compliance with laws and undertake timely corrective actions to address safety and soundness concerns.\textsuperscript{44}

\textbf{Insurance Core Principles}

\textbf{ICP 1 Objectives, Powers and Responsibilities of the Supervisor}

The authority (or authorities) responsible for insurance supervision and the objectives of insurance supervision are clearly defined.\textsuperscript{45}

The following discussion outlines the responsibilities and objectives of each of APRA and ASIC.

1 \textit{APRA}

The APRA Act sets out the purposes of APRA in subsection 8(1):

\begin{quote}
(1) APRA exists for the following purposes:
(a) regulating bodies in the financial sector in accordance with other laws of the Commonwealth that provide for prudential regulation or for retirement income standards;
(b) administering the financial claims schemes provided for in the Banking Act 1959 and the Insurance Act 1973;
(c) developing the administrative practices and procedures to be applied in performing that regulatory role and administration.
\end{quote}

Prior to an amendment in 2003, subsection 8(1)(c) read as follows: ‘developing the policies and procedures to be applied in performing that regulatory role and administration’. The effect of the amendment was to replace the word ‘policy’ with ‘administrative practices and procedures.’ According to the explanatory memorandum for the amending legislation:

[This was] intended to remove some confusion that has arisen in the past and led to uncertainty about where responsibility resides for formulating the policy behind the prudential regulatory framework. The responsibility for formulating the broader legislative framework policy has always been and remains the responsibility of the Minister.\textsuperscript{46}

In its submission to the FSI, APRA noted that this ‘change was in response to Government concerns at the time about early APRA attempts to involve itself in broader policy issues without prior consultation with the Government’ and submitted that this had reduced its regulatory independence.\textsuperscript{47} APRA explained its view on this change as follows:

\begin{quote}
APRA accepts that it is necessary and appropriate for the Government to decide matters of financial system policy, such as those affecting the structure of the financial industry and how it best serves the needs of the Australian community. Nonetheless, the original APRA Act recognised APRA’s authority to develop and implement prudential policies that it has judged as necessary to meet its statutory objectives, and restoration of that authority would be consistent with the independence of a
\end{quote}

\textsuperscript{44} Basel Committee on Banking Supervision, ‘Core Principles for Effective Banking Supervision’ (September 2012) 21.
\textsuperscript{45} International Association of Insurance Supervisors, ‘Insurance Core Principles’ (October 2011) 1. See also IOSCO, ‘Objectives and Principles of Securities Regulation’ (June 2010), Principle 1: ‘The responsibilities of the Regulator should be clear and objectively stated.’
\textsuperscript{46} Explanatory Memorandum, Australian Prudential Regulation Authority Amendment Bill 2003 (Cth) para 3.11.
prudential regulator envisaged by the Wallis Inquiry. There are now sufficient accountability mechanisms in place, including consultation with the relevant Minister and through the Council of Financial Regulators, as well as the Parliamentary disallowance process, to address any concerns that APRA might act in a manner inconsistent with broader Government policy.\textsuperscript{48}

Subsection 8(2) of the APRA Act provides that in ‘performing and exercising its functions and powers, APRA is to balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality and, in balancing these objectives, is to promote financial system stability in Australia.’ APRA thus has an express mandate to promote financial system stability.\textsuperscript{49}

The concept of ‘competitive neutrality’ reflects the desire that smaller institutions ‘be held to standards comparable with large institutions, in order to maintain competitive neutrality’,\textsuperscript{50} that APRA’s ‘prudential requirements [be] applied in a competitively neutral manner’ and that APRA ‘not place unreasonable expectations on smaller regulated institutions.’\textsuperscript{51} The concept of contestability is aimed at making it possible for market entrants to enter the market and compete effectively with existing participants.\textsuperscript{52}

2 ASIC

Subsection 1(1) of the ASIC Act sets out the objects of the Act and refers to the functions and powers of ASIC:

\begin{quote}
(1) The objects of this Act are:
\begin{enumerate}
\item[(a)] to provide for the Australian Securities and Investments Commission (\textit{ASIC}) which will administer such laws of the Commonwealth, a State or a Territory as confer functions and powers under those laws on ASIC; and
\item[(b)] to provide for ASIC’s functions, powers and business;
\end{enumerate}
\end{quote}

Subsection 1(2) of the ASIC Act provides that ‘in performing its functions and exercising its powers, ASIC must strive to:’

\begin{enumerate}
\item[Ibid 30. The point was reiterated in APRA’s second-round submission (66), in which APRA stated that it was ‘preferable that the law clearly recognise APRA’s ability to set prudential policy, within the bounds set out by the APRA Act and relevant Industry Acts. APRA’s policy-making role could also be reflected clearly in the Government’s Statement of Expectations (SOE) and APRA’s Statement of Intent (SOI).’
\item[51] Ibid. In its FSI submission, APRA elaborated by saying ‘APRA acknowledges that the prudential regime can affect the relative position of competitors by imposing differential costs. For that reason, APRA aims to ensure that its prudential requirements are applied in a competitively neutral manner. All ADIs [authorised deposit-taking institutions], for example, are subject to the same set of behavioural requirements and minimum capital requirements; so too are general and life insurers. However, APRA also aims to ensure that its prudential requirements and supervisory approach are proportionate to risks. APRA works actively to ensure that it does not place unreasonable expectations on smaller regulated institutions. For example, in areas such as data management and analysis, capital planning and stress testing, APRA sets proportionately higher expectations for large ADIs and insurance companies than for smaller institutions, commensurate with their structure, resourcing and size and complexity of risks’: Ibid 25-6.
\item[52] See Ibid 27: ‘Contestability is strengthened when new entrants to a market have the potential to challenge the incumbents.’
\end{enumerate}
(a) maintain, facilitate and improve the performance of the financial system and the entities within that system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy; and
(b) promote the confident and informed participation of investors and consumers in the financial system; and
(d) administer the laws that confer functions and powers on it effectively and with a minimum of procedural requirements; and
(e) receive, process and store, efficiently and quickly, the information given to ASIC under the laws that confer functions and powers on it; and
(f) ensure that information is available as soon as practicable for access by the public; and
(g) take whatever action it can take, and is necessary, in order to enforce and give effect to the laws of the Commonwealth that confer functions and powers on it.

It is relevant to note that there is no express mandate to promote financial system stability as in the case of APRA. Instead, the focus is on market conduct and investor/consumer protection. Nor is there a reference to competition, as in the case of APRA. In its FSI submission, ASIC suggested that this was anomalous and was supportive of a formal requirement ‘to consider the effect of its decision making on competition’, which it said ‘would drive a greater focus on the long-term benefits for the end users of the financial system’ and ‘help ensure that ASIC’s approach to regulation considered market-wide effects more explicitly.’

The effect of including a formal competition objective would be that ASIC would ‘select the most “competition-friendly” option from a range of potential regulatory responses, provided that this option was also capable of achieving ASIC’s other regulatory objectives.’ This was accepted in the recommendations of the FSI in its Final Report, which recommended that ASIC ‘be given an explicit competition mandate’ and that ‘periodic reviews of the state of competition should be conducted.’

Detailed reference to the functions and powers of ASIC are contained in sections 11 and 12A. Section 12A (2) provides that ‘ASIC has the function of monitoring and promoting market integrity and consumer protection in relation to the Australian financial system.’

3 Analysis

As outlined above, APRA’s focus is on promoting financial system stability, whereas ASIC’s focus is on promoting ‘the confident and informed participation of investors and consumers in the financial system’. There is an inherent potential for conflicting priorities between these regulatory objectives as action that is taken by one regulator may conflict with or undermine the objectives of the other. As the legal regulator, ASIC should be relatively blind to institutional failure. APRA, on the other hand, acts as an economic regulator, the focus of which is on protecting customers of prudentially regulated institutions, such as bank depositors and insurance policy-holders, from institutional failure. It is conceivable that action undertaken by APRA in the interests of financial stability, particularly in a time of crisis, would run counter to the interests of consumers or consumer protection laws. Examples of such action include action undertaken by APRA as the statutory

54 Ibid 18-9. ASIC noted that the Australian Competition and Consumer Commission (ACCC) would remain the competition regulator. The call for a competition mandate was also made in the submission to the FSI by Minter Ellison: Minter Ellison, Submission, Financial System Inquiry, March 2014.
56 See Pearson, above n 35, 56.
manager of a bank under section 144AA of the Banking Act 1959 (Cth), and the exercise of bail-in powers if statutory bail-in of bondholders is adopted.

The distinction between the roles of the regulators was explained by the IMF in a report published in 2012:

In practice, ASIC’s approach to the supervision of the entities that fall under its sole responsibility is different from APRA’s. APRA’s mandate as the prudential regulator is to ensure that under all reasonable circumstances, financial promises made by prudentially regulated entities are met within a stable, efficient and competitive financial system. This type of regulation involves prudential standards directed to ensuring prudent financial management of the supervised entities, and more intensive scrutiny of their operations and operating models.

By contrast, ASIC’s role is understood to be that of a conduct regulator, which means that it must ensure compliance with statutory obligations and other regulatory standards. According to ASIC, this means that it does not necessarily seek to ensure that entities under its supervision (in particular operators of collective investment schemes and market intermediaries) cannot fail or limit the possibility that they fail. Rather, such entities are regulated to ensure that they meet certain conduct and competency standards and have sufficient risk management mechanisms in place, and that in the event of a failure, client funds and property are adequately segregated and protected. In order to ensure compliance, ASIC however frequently uses prudential tools, such as the imposition and monitoring of capital requirements and risk management requirements. Given ASIC’s view that the entities it regulates generally pose fewer risks (and in particular have less potential systemic impact) than the banks regulated by APRA, it generally applies and monitors prudential requirements less intensely than APRA does in relation to banks.\(^{57}\)

The report found that ‘[t]he responsibilities of ASIC [were] clearly set out in the [Corporations Act] and ASIC Act.’\(^{58}\) However, it also noted that ‘[t]he sharing of supervisory responsibilities for market intermediaries between ASIC, APRA and operators of the ASX Group’s clearing facilities [had] created a complex supervisory structure’\(^{59}\) and recommended that ‘ASIC, APRA and ASX [be] encouraged to

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\(^{58}\) Ibid 21.

\(^{59}\) Ibid 40: ‘Between APRA and ASIC, the main area of potential regulatory overlap arises as a consequence of ASIC having the supervisory role for all AFSL holders, which capture entities that are also regulated by APRA (banks, insurers and superannuation fund trustees). The regulatory framework aims at dealing with this overlap, firstly, by disapplying certain CA provisions for the AFSL holders that are also regulated by APRA (in particular, the ones relating to financial, technological and human resources and risk management procedures). Further, where the holder of an AFSL is subject to prudential regulation, ASIC must consult with APRA prior to imposing, revoking or varying any AFSL conditions or suspending or cancelling an AFSL, if the changes in ASIC’s opinion could prevent the AFSL holder from carrying out its activities that are regulated by APRA. In other cases ASIC is required to inform APRA within a week of its action (s 914A(4) CA).’ The IMF noted that ‘[t]he dispersion of regulatory roles might lead to unjustified differences in supervisory practices and lack of a market level overview of the risks arising from the participants in securities markets. Smooth cooperation between the authorities … [was] therefore essential for the functioning of the current model. Going forward, the authorities should ensure that the current regulatory set-up continues to best ensure the protection of investors and the reduction of systemic risk. This relates in particular to considering whether the responsibilities for prudential supervision are appropriately allocated’: Ibid 42.
continue to further develop their cooperation mechanisms to ensure appropriate supervision of jointly supervised entities.\textsuperscript{60}

A consistent theme in many of the submissions to the FSI was the need to reduce regulatory overlap and inconsistency between ASIC and APRA in circumstances involving jointly supervised or dual-regulated entities.\textsuperscript{61} According to several submissions, this was particularly relevant with respect to superannuation funds and superannuation regulations administered by APRA and ASIC. In its submission, Treasury suggested that there was a ‘[n]eed to draw clearer demarcations with the responsibilities attributable to ASIC and APRA’:

Market developments and policy changes since the Wallis Inquiry have blurred some of the responsibilities between the regulators, particularly between APRA and ASIC. This risks confusion about their roles and potentially reduces the benefits to industry and consumers of a regulatory architecture based on clear functional lines. It is timely for the Financial System Inquiry to address overlaps or gaps between the roles of the regulators to ensure a clear demarcation between regulators is maintained.\textsuperscript{62}

In addition, Treasury noted that although the regulatory framework determined the prudential/non-prudential boundary based on the ‘intensity of promises’,\textsuperscript{63} it was difficult for investors, particularly retail investors, to distinguish between, on the one hand, institutions subject to prudential regulation by APRA and, on the other hand, institutions registered with ASIC and subject to the conduct and disclosure regime, and that this invited regulatory arbitrage.\textsuperscript{64}

However, according to Treasury, ‘[i]mproving the ability to distinguish between entities regulated in different ways is likely to present the lowest cost option for dealing with this issue.\textsuperscript{65} The alternative, expanding the prudential perimeter to cover a larger range of businesses, is likely to invite regulatory arbitrage, and involve significant industry compliance and opportunity costs.’\textsuperscript{66}

One submission noted the possibility of reducing regulatory overlap by adopting a system where an institution would have a primary regulator depending on the sector to which it belonged whilst all of the regulators would regulate in their respective areas of responsibility. However, the direct compliance and enforcement responsibilities would rest with the primary regulator. Such a model, it was suggested, ‘would ensure a consistent and coordinated approach for regulated entities informed by a regulator who understands the business of their regulated entities and…ensure that

\textsuperscript{60} Ibid 30.
\textsuperscript{62} Australian Government Treasury, Submission, \textit{Financial System Inquiry}, 3 April 2014, 26. Other areas in which regulatory overlap could occur include shadow banking and peer-to-peer lending.
\textsuperscript{63} The ‘intensity of promises’ approach posits that the intensity of prudential regulation should be greatest where the intensity of financial promises (and the risks of market failure) are greatest.
\textsuperscript{64} Treasury, ‘Submission’, above n 62, 29. Regulatory arbitrage may arise where financial products are structured to avoid being subject to prudential regulation.
\textsuperscript{65} This, Treasury suggested, was ‘not a trivial task, and it [underlined] the role for financial advisers in assisting unsophisticated investors to navigate the financial system and potential benefits of the new tools for consumer empowerment’: Ibid 31.
\textsuperscript{66} Ibid 26. Treasury noted that the opportunity costs included ‘the opportunity cost associated with locking capital in low-risk assets (Australia already has a very high proportion of financial assets in prudentially regulated institutions, reflecting the dominance of banking and APRA-regulated funds)’: Ibid 30.
any regulation is enforced in a manner that promotes innovation, efficiency and competition in the particular sector.\textsuperscript{67} Although a logical solution to regulatory overlap, the ‘primary regulator’ or ‘lead supervisor’ approach has been said to ‘[create] problems in terms of coordinating supervisory action, information flows and, ultimately, crisis intervention’\textsuperscript{68} and was not recommended in the FSI Final Report.

### B Operational independence

The requirement for regulators to have operational independence is reflected in the Basel Core Principles and the Insurance Core Principles:

**Basel Core Principles**

**Principle 2 – 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.\textsuperscript{69}

**Insurance Core Principles**

**ICP 2 Supervisor**

The supervisor, in the exercise of its functions and powers:

- is operationally independent, accountable and transparent
- protects confidential information
- has appropriate legal protection
- has adequate resources
- meets high professional standards\textsuperscript{70}

This section examines the operational independence of each regulator by reference to the following factors: (a) relationship with the executive government; (b) governance; (c) funding; (d) protection from liability; and (e) accountability.\textsuperscript{71}

#### 1 Relationship with the executive government

The nature of the relationship between each regulator and the executive government is a key issue, as in any area of regulation that is administered by regulators that are designed to be operationally independent. The analysis below examines this issue in terms of the obligations of the regulators to advise the executive government and the extent to which they are subject to its direction.

\textsuperscript{67} Minter Ellison, ‘Submission’, above n 54. Minter Ellison noted that it did not expect that the primary regulator regime would apply to all regimes (e.g. the investigation and enforcements powers of the Australian Taxation Office in relation to the taxation of financial institutions).

\textsuperscript{68} Wymeersch, above n 2, 262.

\textsuperscript{69} Basel Committee, ‘Core Principles’, above n 44.

\textsuperscript{70} International Association of Insurance Supervisors, above n 45. See also IOSCO, above n 45, Principle 2: ‘The Regulator should be operationally independent and accountable in the exercise of its functions and powers.’

\textsuperscript{71} Operational independence also brings into play the question about the relationship of the prudential authority to the central bank and whether it should be housed within the central bank or, instead, take the form of an independent authority. For a discussion of this issue in the context of the proposed reforms in South Africa, see Godwin and Schmulow, above n 4.
(a) Advice to the Minister – APRA

Section 10 of the APRA Act sets out the circumstances in which APRA must, or may, advise the Minister:

10 Advice to the Minister

(1) APRA must advise the Minister as soon as practicable if it considers that a body regulated by APRA is in financial difficulty.

(2) APRA must advise the Minister, if requested by the Minister, and may advise the Minister on its own initiative, respecting:
   (a) matters that would improve the financial safety and efficiency, competition, contestability or competitive neutrality of the sectors in which the bodies regulated by APRA operate; or
   (b) changes to, or in relation to, any prudential regulation framework law that APRA considers would overcome or assist in overcoming problems APRA has identified in the course of performing or exercising any of its functions and powers.

(3) In addition, APRA must advise the Minister, if requested by the Minister, and may advise the Minister on its own initiative, respecting any of the Minister’s functions and powers.

Paragraph 4.10 of the Explanatory Memorandum to the Australian Prudential Regulation Authority Bill 1998 (Cth) explained the background to section 10 as follows:

The Government [has] a legitimate interest in APRA’s operations, its policies and the way they are applied. The possibility of a prudentially regulated institution experiencing financial difficulty is properly a matter of concern to the Government, particularly when the institution is a deposit-taking institution involved in the payments system. It is appropriate, therefore, that the Treasurer, as the Minister with overall responsibility for the financial system, should be informed when an institution is in financial difficulty. The Bill, therefore, contains a provision requiring APRA to advise the Treasurer in such situations (clause 10).

Sections 10(2) and 10(3) were introduced by amendments in 2003 following the HIH Report. Section 10(2) indicates that the government expects to be kept abreast of developments that may have implications in terms of financial stability and systemic risk. According to the explanatory memorandum to the 2003 amendment, section 10(2) ‘recognises APRA’s role in advising the Minister in relation to prudential regulation framework laws and policy, and any of the Minister’s functions and powers. It is intended that this cover all functions and powers of the Minister, whether statutory or not, and whether directly related to APRA’s functions and powers or not.’

(b) Direction by the Minister – APRA

Section 12 of the APRA Act, amended in 2003, provides as follows:

12 Directions by Minister respecting APRA policies and priorities

(1) The Minister may give APRA a written direction about policies it should pursue, or priorities it should follow, in performing or exercising any of its functions or powers.

(2) The Minister must not give a direction under subsection (1) unless he or she has:
   (a) notified APRA in writing that he or she is considering giving the direction; and

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Explanatory Memorandum, Australian Prudential Regulation Authority Amendment Bill 2003 (Cth) para 3.15.
(b) given the Chair an adequate opportunity to discuss with the Minister the need for the proposed direction.

(3) The Minister must not give a direction under subsection (1) about a particular case.

(4) APRA must comply with a direction under subsection (1).

(5) The Minister must cause a copy of a direction under subsection (1):
   (a) to be published in the Gazette within 21 days after the direction is given; and
   (b) to be laid before each House of the Parliament within 15 sitting days of that House after the publication;
   but failure of the Minister to do so does not affect the direction’s validity.

(6) This section does not limit any other powers to give directions that the Minister has under any other law.

The original provision set out a consultative process by which any disagreement between the Government and the APRA Board should be resolved as follows.\(^{73}\)

12 Government’s powers in relation to APRA policies

(1) The Board is to regularly inform the Government of APRA’s policies.

(2) If the Government and the Board disagree as to whether one of APRA’s policies is directed to the best performance of its functions or exercise of its powers, the Treasurer and the Board are to try to reach agreement.

(3) If the Treasurer and Board cannot agree, the Board must immediately give the Treasurer a statement about the matter in relation to which the Treasurer and Board have failed to agree.

(4) The Treasurer may then give the Governor-General a recommendation as to the way the matter should be resolved.

(5) The Governor-General, acting with the advice of the Federal Executive Council, may, by order, determine the policy to be adopted by APRA.

The rationale behind the original provisions was explained in the APRA Second Reading Speech as follows:

APRA will be an independent regulator, but, like the Reserve Bank, will be subject to an overriding policy determination power of the Treasurer in the very rare event of unreconciled disagreement with the government of the day. As a Commonwealth authority, it will be accountable to the government and the parliament, as provided for under the Commonwealth Authorities and Companies Act 1997.\(^{74}\)

The background to the subsequent amendment was outlined by APRA in its submission to the FSI:\(^{75}\)

The 2003 legislative changes...eliminated the consultative processes in section 12 of the original APRA Act, which were designed to mediate any differences in views on APRA’s policies between APRA and

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\(^{73}\) This adopted a consultation process as reflected in s 11 of the Reserve Bank Act.

\(^{74}\) Commonwealth, ‘Parliamentary debates’, above n 20, 1650. The consultation process for resolving differences concerning policy still applies in the case of the RBA.

the Government. These consultation processes were identical to those applying (and still applying) to
the RBA. They provided that, in the case of a disagreement between the Treasurer and APRA on one
of APRA’s policies, the Treasurer and APRA are to try to reach agreement. If they cannot, the
Treasurer may give a recommendation to the Governor-General, who could with advice from the
Executive Council determine the policy to be adopted by APRA. The 2003 amendments replaced
section 12 with the new section under which the Minister may, after consultation with APRA, give a
direction to APRA about the policies and priorities it should pursue, without any requirement to reach
agreement through a formal mediation process. However, the Minister must not direct APRA about a
particular entity. The Explanatory Memorandum explained that the new ministerial directions power
was consistent with directions powers in relation to other statutory agencies, in particular ASIC.

APRA’s compliance with the relevant Core Principles for the independence of a prudential regulator
was assessed by an IMF review of Australia in 2012. The grading was ‘Largely Compliant’. In relation
to the above issue, the IMF expressed the concern that ‘APRA’s independence could be
compromised by this’, although the IMF acknowledged as well that the power had never been
invoked and was unlikely to be invoked.76 Further, it acknowledged that there was ‘no evidence of
government or industry interference which compromises the operational independence of [APRA].’77
Nonetheless, the IMF suggested that ‘APRA explore with the Australian Government possible
avenues which would ensure unambiguous independence within APRA.’78 In its response, the
Australian Government challenged IMF’s assessment in this regard:

The Australian authorities agree with the need for an independent supervisor and are of the view that
APRA is already unambiguously independent. APRA is established as a statutory authority, at arm’s
length from Government and with substantial statutory and operational independence, including
extensive powers to determine prudential standards. There is no evidence, past or present, of any
Government or industry interference that compromises APRA’s operational independence.79

76 IMF, ‘Australia IOSCO Assessment’, above n 57. The IMF also expressed concern about the Parliamentary
disallowance procedure, under which ‘prudential regulations made by APRA must be tabled in each House of
Parliament. After the prudential standards have been laid before each House, a notice of motion to disallow
the prudential standards may be given within 15 sitting days. If the notice of motion to disallow is then passed
within 15 sitting days after the giving of the notice, the regulations will cease to have effect.’ Once again, the
IMF suggested that this had the potential to compromise the independence of APRA. See also
(GIRA) introduced the power for APRA to make and enforce prudential standards. High order prudential
principles were included in the Act, with detailed requirements for general insurance companies to be
included in Prudential Standards, and underpinned by non-binding Guidance Notes. The Prudential Standards
are disallowable instruments (meaning that they may be disallowed by the Parliament) and APRA is required to
undertake a consultation process with industry in developing the standards.’ APRA’s prudential standards are
legislative instruments under the Legislative Instruments Act 2003 (Cth).


78 Ibid 17.

79 Ibid 21. An argument might also be made that it is unlikely that the Government would relinquish all powers
to give directions to a regulator given the exposure that the Government has under the Financial Claims
Scheme and the committed liquidity facility that the Reserve Bank has made available to the banks to meet
their liquidity requirements.
In its FSI submission, APRA noted the above recommendation of the IMF that APRA ‘explore with the Australian Government possible avenues which would ensure unambiguous independence within APRA’ and stated that it would welcome such an opportunity.\(^80\)

(c) Advice to the Minister - ASIC

Unlike section 10(1) and (2) of the APRA Act, ASIC is not under any express statutory obligation to advise the Minister.

(d) Direction by the Minister - ASIC

Section 12 of the ASIC Act is expressed in the same terms as section 12 of the APRA Act.

Section 12(3), which prohibits the Minister from giving a direction about a particular case, is different from the arrangement in the previous legislation applying to ASIC’s predecessor, the National Companies and Securities Commission, which empowered the Ministerial Council to give a direction in respect of particular cases.\(^81\) Although ASIC now has autonomy in this regard, section 14 of the ASIC Act provides that the Minister may direct that ASIC investigate particular matters ‘[w]here, in the Minister’s opinion, it is in the public interest in respect of this jurisdiction for a particular matter to which subsection (2) applies to be investigated.’\(^82\) The matters in subsection (2) include ‘the affairs, or particular, affairs of a corporation’ and ‘the establishment or conducting of a financial market’. Under subsection (3), ASIC is required to comply with a direction under subsection (1).

In its 2012 assessment, the IMF found that Australia had only partially implemented the requirement under Principle 2 that the regulator ‘be operationally independent and accountable in the exercise of its functions and powers.’\(^83\) This was due to certain features of the Corporations Act and the ASIC Act, particularly the powers of the Minister to give directions to ASIC under both sections 12 and 14. The IMF noted that there was ‘no evidence of the interference of the Minister in day-to-day decision making of ASIC and that the Minister had noted in the 2007 Statement of Expectations\(^84\) that ‘the use of the directions power would only be considered in rare and exceptional circumstances’ and that ‘[t]he only time that a direction [had] been made was in 1992, where the Minister directed ASIC under s 12 of the ASIC Act to develop and implement policy for the discharge of its powers vis-à-vis those of the Commonwealth Director of Public Prosecutions.’\(^85\) Nonetheless, the IMF recommended that the Government ‘consider the continued appropriateness of the extent of the powers assigned to the Minister to ensure sufficient independence of ASIC.’\(^86\)

In its response, the Australian Government stated its view that the above power did not impede ASIC’s independence in any way and that ‘ASIC [had] compete independence in relation to the performance of its functions and exercise of its powers.’ Further, according to the response of the

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\(^{80}\) APRA, ‘Submission’, above n 47, 30.
\(^{81}\) Explanatory Memorandum, Australian Securities Commission Act 1989 (Cth) para 73.
\(^{82}\) Section 14(1).
\(^{83}\) IMF, ‘Australia IOSCO Assessment’, above n 57.
\(^{84}\) See note 125 below for an explanation of Statements of Expectations.
\(^{85}\) IMF, ‘Australia IOSCO Assessment’, above n 57, 43.
\(^{86}\) Ibid 30.
Australian Government, ‘it [was] difficult to reconcile the IOSCO approach to independence with notions of ministerial accountability.’

(e) Analysis

The above discussion highlights the challenges that arise in determining the relationship between the regulators and the executive government. The IMF has suggested that the power of the Minister to give directions to the regulators detracts from their operational independence. The impact is tempered by the fact that the Minister cannot give directions to the regulators about a particular case and also the fact that the power has rarely been invoked in practice. There are, however, valid questions about whether this is an appropriate legislative setting and whether the position in Australia is too dependent on an expectation that the executive government will not intervene in the operations of the regulators except where it is absolutely necessary. The fact that the directions power has rarely been invoked raises the query about whether it should exist in the first place and whether it would be better to ensure unambiguous independence as suggested by APRA in its FSI submission.

2 Governance

Of critical importance to the twin peaks regulatory framework is an appropriate governance system. A relevant question in this regard is whether it should be designed along similar lines to a corporate board, with independent members, or whether it should instead be vested in a small full-time executive group to achieve efficiencies and encourage collegial decision-making, as recommended by the HIH Commission Report in relation to APRA. Another important question is how to determine the basis for the appointment and termination of members.

(a) Structure and appointment of members – APRA

Section 16 of the APRA Act provides for the appointment of APRA members as follows:

16 Appointment of APRA members

(1) APRA is to consist of not fewer than 3 members nor more than 5 members.

(2) The APRA members are to be appointed by the Governor-General by written instrument.

(3) At least 3 of the APRA members must be appointed as full-time members, and each of the other APRA members (if any) may be appointed as a full-time or part-time member.

(4) The performance of APRA’s functions or the exercise of APRA’s powers is not affected by reason only that:

(a) there are fewer than 3 APRA members; or

(b) there are fewer than 3 full-time APRA members.

Section 17 imposes restrictions on the appointment of APRA members. For example, ‘[a] person may not be appointed as an APRA member if the person is a director, officer or employee of a body

87 Ibid 33.
regulated by APRA.’

This provision is aimed at ensuring that an APRA member acts independently of any bodies that are regulated by APRA.

APRA was originally governed by a board consisting of a majority of independent members and an independent Chair. In addition, there was cross-representation with both the RBA and ASIC being represented on the APRA Board. However, as previously discussed, the original section was subsequently amended to replace the board and the ex officio members with a full-time executive group in line with the recommendations of the HIH Royal Commissioner.

One submission to the FSI called for the concept of independent members of the governing body of a regulator to be applied to APRA, ASIC and other bodies ‘in a similar manner in which it applies to the RBA’ and that ‘the governing body of a financial regulator should include a majority of non-executive (or independent) members.’

(b) Termination of appointment of members – APRA

Section 25 of the APRA Act provides that ‘[t]he appointment of an APRA member is immediately terminated if the member becomes a director, officer or employee of a body regulated by APRA.’ It further provides that the Governor-General may terminate the appointment of an APRA member on various grounds, including ‘misbehaviour or physical or mental incapacity’ and bankruptcy of a member.

The original section referred to ‘the Treasurer’ in place of ‘the Governor-General’. In addition, given the cross-representation of both the RBA and ASIC members on the APRA Board, the original section provided that each of the RBA and ASIC could terminate the appointment of its members at any time.

It is likely that the reason why the power to terminate was taken away from the Treasurer and vested in the Governor General was to sever the link between the Treasurer and APRA members and to enhance APRA’s operational independence. The handbook for the Executive Council provides that the powers exercisable by the Governor General in Council include ‘the making and terminating of

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88 Section 17(2). Under section 17(3), ‘[a] person who is a director, officer or employee of a body operating in the financial sector, other than a body regulated by APRA, may be appointed as an APRA member, but only if the Minister considers that the person will not be prevented from the proper performance of the functions of the office because of resulting conflicts of interest.’
89 The former section 19 of the APRA Act provided that the Board would consist of the following members: (a) a Chair; (b) the CEO; (c) 2 members, each of whom is either the Governor or the Deputy Governor of the Reserve Bank or an officer of the Reserve Bank Service; and (d) 1 member who is also an ASIC member of an ASIC staff member: and (e) 4 other members.
90 Explanatory Memorandum, Australian Prudential Regulation Authority Amendment Bill 2003 (Cth) para 3.24.
91 King and Wood Mallesons, Submission, Financial System Inquiry, 31 March 2014. According to this submission, ‘[s]uch independent directors / members will also assist our financial regulators to more effectively consider the extent to which Australia should assert our own patterns of regulation, rather than relying on financial / prudential systems and global standards developed primarily in the US / European markets and designed to solve problems different from our own. In the words of another commentator, “institutionalizing independent ‘devil’s advocates’ within agencies to represent contrarian viewpoints; by forcing regulators to justify their positions using evidence and reason, they could reduce the influence of unconscious biases and reliance on illegitimate proxies”’.
92 APRA Act s 25(1).
93 Former section 31.
appointments to statutory offices, boards, commissions, courts and tribunals and diplomatic posts.\(^{94}\)

In its 2012 assessment of Australia against the Basel Core Principles, the IMF found that APRA’s independence would be compromised by the lack of a ‘mandated provision for the public disclosure of the terms relating to the termination of appointment of an APRA Member’\(^{95}\) and recommended that a legal provision be introduced accordingly.\(^{96}\)

(c) Structure and appointment of members – ASIC

Section 9 of the ASIC Act provides for the appointment of ASIC members as follows:

9 Membership

1. ASIC is to consist of not fewer than 3 nor more than 8 members.
2. The Governor-General appoints the members on the nomination of the Minister.
3. At least 3 of the members must be appointed as full-time members and each of the remaining members (if any) may be appointed as a full-time member or as a part-time member.
4. The Minister is to nominate a person as a member only if the Minister is satisfied that the person is qualified for appointment by virtue of his or her knowledge of, or experience in, one or more of the following fields, namely:
   a. business;
   b. administration of companies;
   c. financial markets;
   d. financial products and financial services;
   e. law;
   f. economics;
   g. accounting.
5. The performance of ASIC’s functions or the exercise of ASIC’s powers is not affected by reason only that the number of members, or the number of full-time members, is less than 3 unless a continuous period of 3 months has elapsed since the number of members, or the number of full-time members, as the case may be, fell below 3.
6. For the purposes of subsection (5), an acting member is taken to be a member.

The above provision attempts to achieve an appropriate balance between full-time and part-time members. It also strives to ensure that the members have expertise in the relevant fields.

(d) Termination of appointment – ASIC

Section 111 of the ASIC Act provides that the Governor-General may terminate the appointment of an ASIC member on various grounds, including those referred to in section (ii) above in relation to APRA.


\(^{96}\) Ibid 17.
(e) Analysis

The appointment and dismissal of the members of each regulator are important elements in achieving an appropriate level of operational independence. Although there do not appear to be any major concerns in Australia in this regard, as noted above, there have been calls for independent members to be appointed to the regulators along similar lines to independent directors on corporate boards. In addition, the IMF has suggested that the regulators’ independence is compromised by the lack of a provision mandating disclosure of the basis on which the appointment of a member is terminated.

3 Funding

As noted above, the Basel Core Principles require the banking supervisor to have adequate resources.97 A similar requirement applies to the insurance supervisor under the Insurance Core Principles.98

(a) APRA

According to the Explanatory Memorandum for the APRA Act, APRA’s independence was reflected in its ability ‘to impose charges and receive levy funding from the institutions regulated, set out in other Parts of this Act.’99 The Explanatory Memorandum went on to state that ‘[t]he levies are designed to raise funds to cover the cost of all regulation of prudentially regulated institutions.’100

Because the regulation of financial institutions would ‘be undertaken on a functional not institutional basis’ and ‘the disclosure and consumer protection regulation of these institutions [would] be undertaken by ASIC, not by APRA’, it was necessary to split the levy revenue raised by the two regulators.101

Section 50 of the APRA Act provides that the Minister will determine the levy payable to the Commonwealth for the cost of prudential supervision and the amount to be paid to APRA and credited to the APRA Special Account on an ongoing basis.102

In its 2012 assessment against the Basel Core Principles, the IMF noted the following:

APRA’s budget is proposed by the APRA Members and put to Government for consideration and ultimately endorsement. In this respect, it appears that Government support for APRA is strong and that to date budgets have been adequate. When the budget figure is agreed by Government, that figure forms the basis on which the levy from the regulated entities is calculated. Thus, APRA is self-funding. Apart from the levy, APRA also receives, from time to time, Special Appropriations from Government to deal with particular matters. For instance, in 2008 APRA received a Special Appropriation of $45m, payable over the following four years, to assist APRA deal with the global

98 International Association of Insurance Supervisors, above n 45, Principle 2.
100 Ibid para 4.41.
101 Ibid para 4.42. ‘The Treasurer, who will determine the rate for the levies each year, will also determine the amount, in dollar terms, that will go to ASIC. The balance will, under this clause, go to APRA.’
102 See APRA Act s 50(1) and s 50(1A).
financial crisis. Similarly, in the recently announced State budget for 2012/13, APRA was allocated a total of $82.4m by way of Special Appropriation, payable over a four year period.\(^\text{103}\)

APRA included a discussion on funding and budgetary independence in its submission to the FSI, noting that ‘[b]udgetary independence refers to the ability of the prudential regulator to determine the size of its own budget and the specific allocation of resources and setting of priorities.’ APRA further submitted that ‘financial arrangements [had] not to date materially affected its ability to conduct effective supervision’ but it was ‘likely to face increasing constraints on its funding and operating flexibility...an important issue for a risk-based prudential regulator like APRA, where the ability to attract and flexibly utilise highly skilled staff is critical to the delivery of its mission.’\(^\text{104}\)

\(b\) \text{ASIC}

Unlike APRA, ASIC is largely funded by government appropriation.\(^\text{105}\) As noted by the IMF:

\begin{quote}
The funding of ASIC is appropriated to it each financial year by the Parliament and provided from the Commonwealth’s Consolidated Revenue Fund under Appropriations Bill. Although ASIC raises revenue for Government through fees and charges on those it regulates, it does not retain that revenue. Almost all fees and charges collected by ASIC are returned to the Commonwealth Consolidated Revenue Fund.\(^\text{106}\)
\end{quote}

In its submissions to the FSI, ASIC noted the ‘limitations and inefficiencies in the way ASIC is currently funded’ and submitted that consideration be given to ‘moving to a user pays funding model that better reflects the costs associated with regulation.’\(^\text{107}\)

In its 2012 assessment of Australia, the IMF stated that ‘[t]he independence and sufficiency of resources of ASIC [had been] hampered by the flattening of its overall operating funding over the last three years and a not insignificant dependence on non-core funding.’\(^\text{108}\) The IMF recommended that ‘the authorities consider alternative possibilities to arrange the funding of ASIC in such a manner that it will be best equipped to respond to the current and emerging challenges in securities regulation both domestically and globally’ and that the Government ‘ensure that ASIC’s core funding will be sufficient to meet the future regulatory and supervisory challenges, also in light of the global regulatory commitments.’\(^\text{109}\)

\(c\) \text{Analysis}

Both APRA and ASIC raised concerns about funding in their submissions to the FSI. APRA stated that its funding had been reduced as a result of general ‘efficiency dividend’ requirements that the Government had imposed ‘with the objective of driving efficiency savings and improving its overall budget position’ and that such a mechanism was ‘not well-suited to an industry funded regulatory

\(^{\text{105}}\) ASIC, ‘Submission’, above n 38, para 197.
\(^{\text{106}}\) IMF, ‘Australia IOSCO Assessment’, above n 57, 44.
\(^{\text{108}}\) As noted by IOSCO on page 44, ‘Core funding is funding the allocation and use of which is a matter for ASIC (within some limitations). Non-core funding is funding allocated for specific purposes.’
agency’ and would ‘ultimately compromise financial safety but make no contribution to the Government’s budgetary objectives.’ 110

For its part, ASIC called for ‘a user pays (cost recovery) funding model’, submitting that this would ‘better reflect the costs associated with market regulation’ and would ‘provide better incentives for industries to improve their own standards and practices.’ 111 In its Final Report, the FSI noted that the funding arrangements had some significant weaknesses, particularly in the case of ASIC, 112 and recommended that ‘ASIC and APRA should both be strengthened through increased budget stability built on periodic funding reviews.’ 113

Although funding constraints do not appear to have undermined the operational independence of APRA and ASIC, there are valid concerns about the extent to which funding constraints have limited the ability of the regulators to perform their functions. In the case of ASIC, this is particularly relevant in view of the need, identified by the FSI, to strengthen ASIC’s enforcement tools and to give ASIC ‘stronger licensing powers to address misconduct, and substantially higher criminal and civil penalties.’ 114

4 Protection from liability

As noted above, the Basel Core Principles require the legal framework for banking supervision to include legal protection for the supervisor. 115 A similar requirement applies to the insurance supervisor under the Insurance Core Principles. 116 The legislation in Australia makes express provisions for this as set out below.

(a) APRA

Section 58 of the APRA Act provides as follows:

58 Protection from liability

(1) Subject to subsection (2), APRA, an APRA member, an APRA staff member, or an agent of APRA, an APRA member or an APRA staff member, is not subject to any liability to any person in respect of anything done, or omitted to be done, in the exercise or performance, or the purported exercise or performance, of powers, functions or duties conferred or imposed on APRA, an APRA member or an APRA staff member by or under:

(a) this Act or another law of the Commonwealth; or

(b) a law of a State or Territory referred to in paragraph 9(b); or

111 ASIC, ‘Submission’, above n 38, 52. According to ASIC, ‘revenue collected by the Government from the new sectors we now regulate is increasingly misaligned with ASIC’s cost of regulation in these areas. For example, it costs ASIC about $108 million to regulate AFS licensees; however, ASIC collects for the Government only $3.7 million in registry fees from AFS licensees, approximately 3.5% of the cost of regulation.’
112 FSI, ‘Final Report’, above n 6, XX-XXI.
113 Ibid 235.
114 Ibid.
116 International Association of Insurance Supervisors, above n 45, Principle 2.
subject to subsection (3), an agreement referred to in paragraph 9(c).

(2) Subsection (1) does not apply to an act or omission in bad faith.

(3) ...

(b) ASIC

A similar provision applies in respect of ASIC under section 246. As noted by the IMF:

[Section] 246 of the ASIC Act provides that ASIC, its Commissioners and its staff are protected from legal liability in relation to an act done or omitted in good faith in performance or purported performance of any function, or in exercise or purported exercise of any power, under the corporations legislation or a prescribed law. According to ASIC, from a practical perspective it is unlikely that ASIC staff would be sued in connection with the discharge of their obligations. In the event that a staff member was sued in relation to his/her employment, the Australian Government would cover the legal costs (unless it was in relation to an administrative law issue, in which case ASIC would cover the legal costs).\(^\text{117}\)

5 Accountability

The Basel Core Principles require a banking supervisor to be ‘accountable for the discharge of its duties and use of its resources.’\(^\text{118}\) A similar requirement applies to the insurance supervisor under the Insurance Core Principles.\(^\text{119}\)

(a) APRA

Under section 59 the APRA Act, APRA is required to provide annual reports to the Minister on APRA’s operations during the relevant financial year. In addition, APRA is subject to a half-yearly review called the Financial Stability Review.

In its 2012 assessment of Australia against the Basel Core Principles, the IMF noted that ‘APRA [had] a risk management and audit committee whose membership [comprised] both internal and external members’ and that ‘[i]nternal membership on an audit committee [was] contrary to good corporate governance practices.’ Consequently, the IMF recommended that ‘APRA’s Risk Management and Audit Committee be split in two and that membership of the new audit committee [be] comprised solely of external members.’\(^\text{120}\)

(b) ASIC

Similar to the requirement applicable to APRA, section 136 of the ASIC Act requires ASIC to provide an annual report to the Minister on its operations during the relevant financial year. In addition, ASIC is subject to the oversight of the Parliamentary Joint Committee on Corporations and Financial Services under Part 14 of the ASIC Act.

\(^{117}\) IMF, ‘Australia IOSCO Assessment’, above n 57, 45.
\(^{118}\) Basel Committee, ‘Core Principles’, above n 44, Principle 2.
\(^{119}\) International Association of Insurance Supervisors, above n 45, Principle 2.
\(^{120}\) This was ‘to avoid any conflict of interest on the part of any executives if they were on the Committee’: Page 25.
(c) Analysis

As noted above, the Core Principles acknowledge the need for a supervisor to be ‘accountable for the discharge of its duties and use of its resources’. The accountability of the regulators was a theme that figured prominently in the submissions to the FSI.

In its submission to the FSI, Treasury suggested that ‘the existing mechanisms for accountability should be further strengthened by defining measures of success that recognise the trade-offs inherent in the regulators’ statutory mandates’ and noted that the Government was ‘developing a framework for assessing regulator performance drawing on work by the Productivity Commission.’

Interestingly, accountability is one of the areas in which it appears that the FSI came up with a recommendation that was not directly based on any of the submissions that had been made to it. In its Final Report, the FSI recommended ‘establishing a new Financial Regulator Assessment Board (Assessment Board) to undertake annual ex post reviews of overall regulator performance against their mandates.’ This board would replace the current Financial Sector Advisory Council and ‘could be supported by a separate secretariat housed in Treasury.’ It would not direct the regulators or examine individual complaints against regulators or the merits of specific regulatory or enforcement decisions. However, it would ‘assess how regulators have used the powers and discretions available to them.’

It will be interesting to see whether the FSI’s recommendation in this regard is adopted. As APRA noted in its submission, there are challenges in assessing the performance and effectiveness of regulators. These challenges include ‘demonstrating causality or an explicit link between the prudential regime or supervisory actions and the outcomes for individual financial institutions or the financial system as a whole’; the secrecy obligations that prevent a regulator from ‘offering public commentary on its day-to-day activities’ and also the fact that ‘performance assessment of a prudential regulator does not lend itself to straightforward cost-benefit analysis.’

The FSI made a further recommendation in relation to regulator accountability; namely, that ‘clearer guidance [be provided] to regulators in Statements of Expectation and [that] the use of performance indicators for regulator performance [be increased].’

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121 Treasury, ‘Submission’, above n 62, [11]. This involved issuing new statements of expectation and considering ‘specific indicators for assessing agency performance, including explicit metrics of success that take account of policy objectives and compliance costs.’ The need for regulators to be given key performance indicators was also suggested by KPMG in its submission, page 47.


123 Ibid 239.


125 APRA, ‘Submission’, above n 47, 61.

126 FSI, ‘Final Report’, above n 6, 239. As noted by Treasury on its website, ‘Ministers issue Statements of Expectations to statutory agencies. Through issuing a Statement of Expectations, Ministers are able to provide greater clarity about government policies and objectives relevant to a statutory authority, including the policies and priorities it is expected to observe in conducting its operations’: <http://www.treasury.gov.au/Policy-Topics/PublicPolicyAndGovt/Statements-of-Expectations>.
C  Effective Regulatory Coordination

As noted above, coordination is critical for the twin peaks model to operate effectively because a market participant may be regulated by both regulators. Effective coordination requires consultation, information-sharing (within an appropriate confidentiality framework) and mutual cooperation in areas such as supervision and enforcement action.

This section examines coordination between the regulators. The requirement to have a framework for cooperation and collaboration is reflected in the Basel Core Principles and the Insurance Core Principles:

**Basel Core Principles**

**Principle 3 – Cooperation and collaboration:** Laws, regulations or other arrangements provide a framework for cooperation and collaboration with relevant domestic authorities and foreign supervisors. These arrangements reflect the need to protect confidential information.  

**Insurance Core Principles**

**ICP 3 Information Exchange and Confidentiality Requirements**

The supervisor exchanges information with other relevant supervisors and authorities subject to confidentiality, purpose and use requirements.

**ICP 25 Supervisory Cooperation and Coordination**

The supervisor cooperates and coordinates with other relevant supervisors and authorities subject to confidentiality requirements.

The first part of this section examines the express legislative provisions concerning coordination. The second part examines the legislative framework dealing with information-sharing and confidentiality. The third part considers the cross-delegation of powers between the regulators in Australia.

1  Express coordination provisions

As noted by the IMF, in Australia ‘[c]oordination among the agencies is effective in a largely informal arrangement.’ In fact, there is only one provision that expressly refers to coordination; namely, section 10A of the APRA Act, which was inserted pursuant to the recommendations of the HIH Report:

**10A  Cooperation with other agencies**

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127 See Part I above.
128 Basel Committee, ‘Core Principles’, above n 44.
129 International Association of Insurance Supervisors, above n 45. See also IOSCO, above n 46, Principle 13: ‘Regulator should have authority to share both public and non-public information with domestic and foreign counterparts’; Principle 14: ‘Regulators should establish information sharing mechanisms that set out when and how they will share both public and non-public information with their domestic and foreign counterparts’; and Principle 15: ‘The regulatory system should allow for assistance to be provided to foreign Regulators who need to make inquiries in the discharge of their functions and exercise of their powers.’
(1) The Parliament intends that APRA should, in performing and exercising its functions and powers, have regard to the desirability of APRA cooperating with other financial sector supervisory agencies, and with other agencies specified in regulations for the purposes of this subsection.

(2) This section does not override any restrictions that would otherwise apply to APRA or confer any powers on APRA that it would not otherwise have.

Note: For example, APRA’s ability to provide information to another agency remains subject to section 56.\textsuperscript{131}

The Explanatory Memorandum noted that ‘Section 10A [implemented] a number of the HIH Royal Commissioner’s recommendations on liaison and coordination with both domestic and international regulators and other agencies (for example law enforcement agencies).’\textsuperscript{132}

There is no equivalent provision to section 10A above in the ASIC Act or the Reserve Bank Act. However, the Reserve Bank Act provides in section 13 that ‘[t]he Governor and the Secretary to the Department of the Treasury shall establish a close liaison with each other and shall keep each other fully informed on all matters which jointly concern the Bank and the Department of the Treasury.’\textsuperscript{133}

The extent to which coordination in Australia is based on policy and informal arrangements, as distinct from statutory prescription, can be contrasted with the more prescriptive approach in jurisdictions such as the UK, where the legislation prescribes the nature of coordination between the regulators and imposes a statutory duty on the regulators to cooperate or coordinate their activities.\textsuperscript{134}

2 Information-sharing and confidentiality

Under its governing legislation, each of APRA and ASIC is subject to confidentiality or secrecy requirements. However, provision is made for each body to share information with the other.

\textit{(a) APRA}

In the case of APRA, section 56 of the APRA Act provides that it is not an offence to disclose ‘protected information’ (as defined) or to produce a ‘protected document’ (as defined) in the following circumstances:

- the disclosure of protected information or the production of a protected document is for the purposes of a prudential regulation framework law;\textsuperscript{135}
- the disclosure of protected information or the production of a protected document by a person occurs when the person is satisfied that the disclosure of the information, or the production of the document, will assist a financial sector supervisory agency, or any other agency (including foreign agencies) specified in the regulations, to perform its functions or exercise its powers and the disclosure or production is to that agency;\textsuperscript{136} or

\textsuperscript{131} Section 56 deals with confidentiality. See further in section (b) below in relation to confidentiality.
\textsuperscript{132} Explanatory Memorandum, Australian Prudential Regulation Authority Amendment Bill 2003 (Cth) 8.
\textsuperscript{133} Reserve Bank Act 1959 (Cth) s 13.
\textsuperscript{134} See section 3D of the Financial Services Act 2012 (UK).
\textsuperscript{135} APRA Act s 56(3).
\textsuperscript{136} APRA Act s 56(5).
the production of a document that was given to APRA was to the Reserve Bank of Australia or ‘another prescribed authority’.  

According to the 2012 assessment of Australia against the Basel Core Principles by the IMF, ‘[a]rrangements, formal or informal, are in place for cooperation and information sharing between all domestic authorities with responsibility for the soundness of the financial system, and there is evidence that these arrangements work in practice, where necessary.’

(b) ASIC

Similar to the APRA Act, the ASIC Act authorises disclosure of information that is otherwise subject to the confidentiality requirements. This includes disclosure to the Minister, ‘the Secretary of the Department for the purpose of advising the Minister, or an officer authorised for that purpose’ and APRA. Disclosure is also authorised where the Chairman of ASIC is satisfied that the particular information ‘will enable or assist a foreign body, although not an agency of a foreign country, to perform a regulatory function, or to exercise a related power, conferred on the body by or under a law in force in that foreign country.’

3 Cross-delegation of powers

Cross-delegation is a means of dealing with regulatory overlap, which is one of the challenges that exist under the twin peaks model. In Australia, cross-delegation may occur in relation to a federal and state body, or two federal or state bodies. The traditional approach in legislation has been to permit delegation where a ‘person’ is a prescribed person pursuant to regulations. The alternative is to specify the person (or agencies) to whom powers may be delegated. Cross-delegation is particularly useful for the purpose of collecting information. However, it does not appear to have been widely used to date between APRA and ASIC.

(i) APRA

Section 15 of the APRA Act permits APRA to delegate its functions or powers to the Chair of ASIC, another ASIC member or an ASIC staff member if the Chair of ASIC agrees to the delegation. APRA may also delegate to the Governor or Deputy Governor of the Reserve Bank or to an officer of the Reserve Bank Service if the Governor of the Reserve Bank agrees to the delegation. In each case, the delegate must comply with any directions given by APRA.

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137 APRA Act s 56(5B).
139 ASIC Act s 127(2A)(a), (b), (c).
140 Ibid s 127(4)(ca). Section 127(4A) provides that the ‘Chairperson may impose conditions to be complied with in relation to information disclosed under subsection (4).’
141 See, for example, ASIC Act s 102(2)(c).
142 See, for example, APRA Act s 15.
143 The ASIC Act s 102(2C) imposes restrictions on the delegation of functions and powers in certain areas such as enforcement action.
144 Inserted in 2003 by Act No. 42.
145 APRA Act s 15(2)(a).
146 Ibid s 15(2)(a).
147 Ibid s 15(3).
(ii) ASIC

Section 105 of the ASIC Act permits ASIC to delegate to a person all or any of its functions and powers. This includes a person appointed by the Chair of APRA. In the case of the delegation of a function or power to an APRA staff member, the Chief Executive Officer of APRA must agree to the delegation in writing.

V COORDINATION – THE POLICY FRAMEWORK IN AUSTRALIA

It has been noted that ‘[c]oordination can be formal or informal. It can be long or short-term, and frequent or occasional. Coordination can be voluntary and cooperative, or mandated by legislative or executive action.’ Adopting the categorisation by Camacho and Glicksman, regulatory coordination in Australia is primarily informal, long-term, frequent, voluntary and cooperative in nature.

As noted in paragraph 42 of the Basel Committee on Banking Supervision Core Principles for Effective Banking Supervision, ‘[t]he Core Principles are neutral with regard to different approaches to supervision, so long as the overriding goals are achieved.’ According to the Core Principles, one of the preconditions for effective banking supervision is a ‘well established framework for financial stability policy formulation’. This in turn requires mechanisms for effective cooperation and coordination among the relevant agencies, as noted in paragraph 49:

In view of the impact and interplay between the real economy and banks and the financial system, it is important that there exists a clear framework for macroprudential surveillance and financial stability policy formulation. Such a framework should set out the authorities or those responsible for identifying systemic risk in the financial system, monitoring and analysing market and other financial and economic factors that may lead to accumulation of systemic risks, formulating and implementing appropriate policies, and assessing how such policies may affect the banks and the financial system. It should also include mechanisms for effective cooperation and coordination among the relevant agencies.

We suggest that there are four aspects to the policy framework supporting coordination that are critical to the approach in Australia, all of which are interrelated:

- proactive information-sharing between the regulators;
- consultation and mutual assistance between the regulators;
- practical measures to encourage and facilitate coordination; and
- a coordination body.

The discussion below examines each of the above aspects by reference to the memoranda of understanding (MoUs) between the regulatory bodies and also the published statements and policy documents issued by the regulatory bodies.

148 Ibid s 102(1), (2)(d).
149 Ibid s 102(2A).
In Australia, the MoUs between the regulators and between each regulator and the RBA are not legally binding. Empirical evidence suggests that the experience in Australia is that the MoUs do not have any practical effect or utility in terms of achieving the relevant outcomes, and that neither ASIC nor APRA relies strictly on the letter of the memoranda of understanding. Instead, the main value of the MoUs is in signalling to the public how the regulators intend to achieve effective co-ordination, and also in the process by which they are reviewed from time to time.\textsuperscript{151}

A Proactive information-sharing

Information-sharing is underpinned by the confidentiality provisions in the relevant legislation, which allow confidential information to be shared between the regulators to assist the regulators to perform their functions or exercise their powers.\textsuperscript{152} It is further supported by provisions in the MoUs that relate to information-sharing. Extracts from the regulatory MoUs are set out below.

As noted by a representative of one of the regulators in Australia, information-sharing is important at all levels, including policy and enforcement. However, it gives rise to tensions given the different regulatory objectives and the different philosophical propositions about how to regulate; in particular, whereas the prudential regulator must control information tightly in order to maintain confidence on the part of the regulated entities, the emphasis of the market conduct regulator is on disclosure.\textsuperscript{153}

1 APRA and ASIC

The MoU between APRA and ASIC makes provision for information-sharing between the regulators as follows:

5.1 Full and timely exchange of information is a crucial element in co-ordination between APRA and ASIC.

5.2 APRA gathers a wide range of information on the entities which it prudentially supervises. ASIC gathers a wide range of information in its role in monitoring and promoting market integrity and consumer protection in relation to the Australian financial system.

5.3 The agencies agree that, subject to legislative provisions, information available to one agency, which is relevant to the responsibilities of the other agency will be shared as requested. Each agency will provide relevant information to the other on a best endeavours basis, with due regard to the urgency of doing so.

5.4 When exchanging confidential information, APRA and ASIC acknowledge the confidentiality and secrecy requirements of the legislation under which each agency operates. The agency providing information has the right to specify the level of confidentiality attached to the information it provides to the other.

5.5 The agencies will work together to avoid duplication in the collection of information so as to minimise the reporting burden on financial institutions.

\textsuperscript{151} Interviews conducted with the regulators by the authors (July 2014).
\textsuperscript{152} See the discussion in Part IV (B) above.
\textsuperscript{153} Interviews with regulators (July 2014).
Subject to legal restrictions and appropriate cost sharing, each agency may arrange for information relevant to its responsibilities to be collected from financial entities by the other agency.

This MoU also has provisions on proactive information-sharing or ‘unsolicited assistance’:

Each agency recognises that in the course of carrying out its functions and exercising its powers, it will come into possession of information which would, if provided to the other agency, be likely to assist that other agency in administering or enforcing the particular laws for which it is responsible.

Each agency agrees, subject to legal restrictions, to use its best endeavours to notify the other agency of the existence of any information of a kind referred to above, and with due regard to the urgency of doing so to provide such information to the other agency, notwithstanding that it may not have received a request from the other agency for such information.

APRA has noted that it is making improvements to information-sharing with ASIC and other agencies following the failure of Trio Capital and the recommendations of the Parliamentary Joint Committee.\(^{154}\)

2 **RBA and APRA**

The MoU between RBA and APRA mirrors paragraphs 5.1 to 5.6 in the MoU between APRA and ASIC. In addition, there is a paragraph dealing with the exchange of information in the context of threats to financial system stability:

**Threats to Financial System Stability**

If either the RBA or APRA identifies a situation which it considers is likely to threaten the stability of the financial system, it will inform the other as a matter of urgency. Responses to a disturbance of this type will depend on the particular circumstances prevailing, but in all cases the RBA and APRA will keep each other informed of their on-going assessment and will consult closely on proposed actions.

3 **RBA and ASIC**

Paragraphs on information-sharing appear in the MoU between RBA and ASIC in relation to settlement and clearing facilities.\(^{155}\)

4 **Treasury, RBA, APRA and ASIC**

Information-sharing is included in the MoU between Treasury, RBA, APRA and ASIC on Financial Distress Management.\(^{156}\)

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B  Consultation and mutual assistance

The second aspect to the policy framework supporting coordination in Australia is consultation and mutual assistance between the regulators in those areas in which action by one regulator may have an impact on the regulatory responsibilities of the other. As reflected in the MoUs referred to below, this is supported by regular meetings, consultation, proactive dialogue and liaison between the regulators.

1  APRA and ASIC

The MoU between APRA and ASIC provides as follows:

3.  Regulatory and Policy Development

3.1  Each agency will notify the other of any proposed changes in regulatory policy, guidance\textsuperscript{157} or regulatory decisions which are likely to impact on the responsibilities of the other and provide the opportunity to consult.\textsuperscript{158}

3.2  Where the implementation of regulatory policy, guidance or regulatory decisions by one of the agencies is likely to impact on the responsibilities of the other, that agency will notify the other.

3.3  Where appropriate, the agencies will consult with each other in relation to regulatory or policy document and media releases, which are being formulated and which may be of interest to or have an effect on each agency. Where appropriate, the agencies may consider whether to issue a regulatory\textsuperscript{159} or policy document or media release on a joint basis, having regard to the subject matter of the release, the policy objectives of each regulator and the objectives of this MOU.

4.  Mutual Assistance and Co-ordination

4.1  The agencies recognise the need for full collaboration and co-operation between them at all levels to effectively discharge their respective responsibilities. The agencies also acknowledge the importance of co-operation to promote confidence in the financial system and the confident and informed participation of all stakeholders in that system.

4.2  The agencies agree to provide each other with mutual assistance in a timely manner in relation to the exchange of information, appropriate referral of matters and cooperation in relation to areas of mutual interest in relation to regulation, compliance, policy matters and enforcement consistent with all relevant laws.

4.3  The agencies agree to establish such arrangements as are appropriate to facilitate cooperation in matters such as co-ordinating information sharing, joint inspections or task forces, referral of cases and enforcement action or major supervisory intervention. The agencies will also co-ordinate operational matters such as administrative arrangements to avoid duplication, statistical collections, joint research work or industry consultation, and participation in international fora. These arrangements will include APRA’s Members and ASIC’s Commissioners, and senior executives in each agency as necessary.

\textsuperscript{157}  The word ‘guidance’ was inserted in the 2010 MoU.

\textsuperscript{158}  In the 1998 MoU, the word ‘comment’ appeared in place of ‘consult’.

\textsuperscript{159}  The word ‘regulatory’ was inserted in the 2010 MoU.
4.4 The agencies agree that liaison in respect of routine operational matters will occur on an “as needed” basis between appropriate staff of the two agencies. In addition, the agencies will, where appropriate, consult each other in relation to arrangements for media releases, joint publications, and joint contact with stakeholders.

Under the 1998 MoU, a Co-ordination Committee was established. In the 2010 MoU, this was replaced by looser, more flexible arrangements as reflected in paragraphs 4.3 and 4.4 above.


The MoU sits with the Joint Protocol which was signed in June [2010].

The Joint Protocol sets out an overview of the ASIC–APRA liaison structure, including the seniority of attendees and frequency of the meetings. Both agencies meet every 8 weeks for operational liaison meetings and enforcement liaison meetings.\footnote{The Joint Protocol also sets out the circumstances in which each agency should notify and assist the other in Enforcement Matters (as defined) and Regulatory Matters (as defined). Only a redacted version of the Joint Protocol is available to the public.}

These liaison meetings discuss:

- current projects;
- matters relating to dual-regulated entities; and
- requests for information to be shared.

These arrangements were also reflected in the APRA 2013-2014 Annual Report:

Regulatory liaison meetings and enforcement liaison meetings are the main formal channels for cooperation between APRA and ASIC. The former meetings focus on policy issues or operational supervision matters concerning industries and institutions regulated by both agencies; they are also a forum for discussion on practical supervision outcomes arising out of changes to legislative and administrative procedures. The latter meetings discuss broad enforcement-related issues, coordinate specific actions related to jointly regulated institutions and discuss cases identified by one agency that may have relevance to the other.\footnote{Australian Prudential Regulation Authority, ‘Annual Report 2013 - 14’ (Report, 2014) Chapter 4.}

2 \textbf{RBA and APRA}

The MoU between RBA and APRA provides as follows:

\textbf{Consultation on Regulatory Policy Changes}

14. Each organisation will notify the other of any proposed changes in regulatory policy, and provide the opportunity to consult on changes which are likely to impinge on the responsibilities of the other.
16. A joint Co-ordination Committee will be established to facilitate close co-operation between the RBA and APRA. The Committee will be responsible for ensuring that appropriate arrangements are in place to respond to threats to system stability, and for co-ordinating information sharing. It will also handle operational matters such as statistical collections, joint research work and participation in international fora.

17. The Committee will be chaired by the Assistant Governor (Financial System) of the RBA and meet monthly or more frequently as required.

3 Treasury and APRA

Similar to the above MoUs, the MoU between the Treasury and APRA contains provisions on consultation in the development of law and policy, financial distress and instability and operational functions. The MoU further provides that ‘[s]enior executives of APRA and Treasury will meet regularly to co-ordinate and give effect to the consultation process agreed by the Memorandum’. 163

4 RBA and ASIC

The MoU between RBA and ASIC in relation to settlement and clearing facilities contains provisions concerning consultation, the exercise of powers in circumstances where the exercise may impact on the regulatory responsibilities of the other agency and regular coordination meetings and liaison.

C Practical measures to encourage and facilitate coordination

The third aspect to the policy framework supporting coordination in Australia is the availability of practical measures to encourage and facilitate coordination between the regulators. These practical measures include informal communications and secondments, as noted in a speech by Greg Medcraft, Chairman, Australian Securities and Investments Commission on 30 June 2011:

I believe there is now a habit and practice of:

- engaging with the other regulator before regulatory actions are taken;
- notifying, discussing and jointly planning supervisory activities;
- discussing which regulator is the most appropriate to investigate certain matters or take particular action;
- if necessary, modifying original timetables to accommodate the other regulator; and
- coordinating day-to-day operations, especially in special circumstances.

I think the GFC has increased the level of cooperation between ASIC and APRA and I will be encouraging the co-operation to continue. 164

These practical measures were also reflected in the APRA 2013 – 2014 Annual Report. 165

163 Paragraph 15.
D A coordination body

The fourth aspect to the policy framework supporting coordination in Australia is a coordination framework. This is achieved through a coordinating body for the relevant regulatory agencies; namely, the Council of Financial Regulators (CFR).

In its *Technical Note on Australia’s Financial Safety Net and Crisis Management Framework*, the IMF noted the following:

- There is strong coordination and exchange of information between the agencies, largely facilitated through the Council of Financial Regulators (CFR);
- Informal coordination within the Council and separate, formal coordination mechanisms promote informed decision-making on financial sector policy issues; and
- The activities of the CFR are supported by an adequate legal basis for information sharing.166

The CFR has no statutory basis in Australia and ‘has no legal functions or powers separate from those of its individual member agencies.’167 As outlined by the RBA in its submission to the FSI:

The CFR is the coordinating body for Australia’s main financial regulatory agencies. Its membership comprises APRA, ASIC, the RBA and the Treasury. The CFR was established in 1998 following the recommendations of the previous Financial System Inquiry (the Wallis Inquiry). It is a non-statutory interagency body, and has no regulatory functions separate from those of its four members.

CFR meetings are chaired by the Reserve Bank Governor, with secretariat support provided by the RBA. They are typically held four times per year but can occur more frequently if required.168 As stated in the CFR Charter, the meetings provide a forum for:

- identifying important issues and trends in the financial system, including those that may impinge upon overall financial stability;
- ensuring the existence of appropriate coordination arrangements for responding to actual or potential instances of financial instability, and helping to resolve any issues where members’ responsibilities overlap; and
- harmonising regulatory and reporting requirements, paying close attention to the need to keep regulatory costs to a minimum (CFR 2004).

Much of the input into CFR meetings is undertaken by interagency working groups, which has the additional benefit of promoting productive working relationships and an appreciation of cross-agency issues at the staff level.

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167 The Council of Financial Regulators, *About the CFR* (11 May 2015) <http://www.cfr.gov.au/about-cfr/index.html>. See also IMF, ‘Australia: Core Principles’, above n 1: ‘The CFR does not have a legal personality, nor does it have powers separate from its member agencies. Its members share information and views and advise the Government on Australia’s financial system architecture. APRA and the RBA both have mandates for financial stability and have legal gateways to share institution-level data that is needed for them to carry out their respective duties.’
168 See IMF, ‘Australia: Technical Note’, above n 167, 11: ‘The CFR is a non-statutory, coordinating body chaired by the Governor of the RBA created to contribute to the efficiency and effectiveness of financial regulation by providing a high-level forum for cooperation and collaboration among its members. The CFR operates in normal times and in crisis situations, meeting quarterly, and, as necessary on an ad hoc basis.’
The CFR has worked well since its establishment and, during the crisis in particular, it has proven to be an effective means of coordinating responses to potential threats to financial stability...

The experience since its establishment, and especially during the crisis, has highlighted the benefits of the existing non-statutory basis of the CFR.\textsuperscript{169}

In referring to its relationship with the other members of the CFR, APRA has noted the following:

Since the onset of the crisis..., the focal point for agency cooperation has been the Council of Financial Regulators, a non-statutory body made up of these four agencies.

The Council's active work program since the crisis began has not replaced APRA's bilateral relationships with the other agencies. These relationships are based in each case on a Memorandum of Understanding (MoU) and a structured coordination process involving meetings between staff at different operational levels, from agency heads down; however, much of the regular contact occurs via informal as well as formal channels. Both channels have worked well over the years.\textsuperscript{170}

In Australia, the membership of the CFR is limited to APRA, ASIC, the RBA and the Treasury. Submissions to the FSI called for the membership in Australia to be extended to other regulatory agencies.\textsuperscript{171} In its Final Report, the FSI stated that it did ‘not see a need to expand the permanent membership of the CFR to include the Australian Competition and Consumer Commission (ACCC), the Australian Transaction Reports and Analysis Centre (AUSTRAC) or the Australian Taxation Office (ATO), as these agencies can already attend meetings as necessary. However, there would be benefit in increasing the transparency of the CFR’s deliberations, including its assessment of financial stability risks and how these are being addressed.’\textsuperscript{172}

Two questions are relevant in terms of the substantive powers and functions that such a body should have: (1) should the CFR have substantive powers and functions that go beyond its consultative and co-ordinating role?; and (2) how should accountability and transparency be ensured?

Both of these questions have been the subject of current debate in Australia. In submissions to the FSI, various stakeholders suggested that the role and functions of the CFR should be enshrined in statute. For example, KPMG submitted that the CFR’s ‘role, transparency and accountability would be strengthened if it were given statutory recognition.’\textsuperscript{173} In addition, the National Australia Bank recommended that ‘the Council of Financial Regulators (CFR) should be given a more formal structure and be tasked by the Treasurer to coordinate the implementation of regulatory change by APRA and ASIC.’\textsuperscript{174}

One concern in having a statutory-based inter-agency co-ordinating body is that it might be treated as the only channel through which inter-agency co-ordination can be achieved. A further concern, which was expressed by the RBA in its submission to the FSI, is that ‘formalising the CFR with explicit responsibilities and policy tools would involve transferring agency constituent powers to the CFR,

\textsuperscript{169} Reserve Bank of Australia, `Submission’, above n 49, 66.
\textsuperscript{170} APRA, `Co-operation and Liaison’, above n 154.
\textsuperscript{171} See, for example, the submissions of the Commonwealth Bank of Australia, 'Submission', above n 59, 88 and KPMG, Submission, \textit{Financial System Inquiry}, 31 March, 2014, 4.
\textsuperscript{172} FSI, `Final Report’, above n 5, 234.
\textsuperscript{173} KPMG, ‘Submission’, above n 172, 5.
\textsuperscript{174} NAB, ‘Submission’, above n 59, s 3.2.2.
with the risk of blurring lines of responsibility that to date have worked well.\textsuperscript{175} In other words, conferring explicit powers and responsibilities on the CFR that go beyond its consultative and co-ordinating role might cut across the powers and responsibilities of the member agencies. A better approach, the FSI suggested, is for the CFR to be ‘seen as the collaborative dimension of the regulatory agencies’ activities, rather than as a separate body with its own ability to make the regulatory agencies cooperate.’\textsuperscript{176} This is consistent with the attitude of one of the regulators, expressed during interviews conducted by the authors, that giving formal co-ordination powers to the CFR may confuse accountability and require a more intrusive infrastructure, and that the system in Australia works well without one body directing the process. Further, what is critical to regulatory co-ordination is, at a formal level, the regular meetings of the CFR and its working committees and, at an informal level, the relationship between the people involved.\textsuperscript{177}

In its submission, RBA noted that although formal structures for co-ordination between agencies might assist to mediate resolution of differences between regulatory agencies and enforce outcomes, ‘it is unclear how reassigning part of a regulatory agency’s constituent powers to an overarching body will influence coordination and effectiveness of regulatory policies. Similarly, it remains to be seen if formality is the feature of institutional arrangements that ensures better outcomes.’ The RBA further noted that cooperation without formal arrangements appeared to be working well in Australia.\textsuperscript{178}

Underlying this reservation, it is suggested, is a concern that formalising the role of the CFR and the inter-agency co-ordinating arrangements might distract from the flexibility and robustness required to make co-ordination work; namely, it might result in a situation where the regulators involved are more concerned about complying – and being seen to comply – with the formal requirements than they are about regulatory performance and achieving the desired outcomes.

One area in which there has been some development in Australia in relation to the CFR, albeit somewhat limited, is increased transparency in the form of a webpage for the CFR on the website of the Australian Commonwealth Treasury.\textsuperscript{179} The webpage contains information about the CFR, media releases, publications and other resources. To date, however, the minutes of the meetings of the CFR have not been published.

\textsuperscript{175} Reserve Bank of Australia, ‘Submission’, above n 49, 67.
\textsuperscript{177} Interviews conducted with the regulators by the authors (July 2014).
\textsuperscript{178} See RBA, ‘Submission’, above n 48, 53: ‘Some other jurisdictions, including the United States, United Kingdom, the European Union (EU), Sweden and Norway have formalised arrangements in the last few years to delineate their respective financial stability mandates, powers and tools….It is too early to judge the performance of these more formal structures for coordination between agencies.’
VI COORDINATION – THE EXPERIENCE IN PRACTICE

A The benefits of coordination, and the use of soft law

In their article Functional Government in 3-D: A Framework for Evaluating Allocations of Government Authority, Camacho and Glicksman compare independent and coordinated authority. Their observations provide a useful introduction for a discussion of the benefits of coordination experience as it relates to the twin peaks model in Australia:

Although efforts to coordinate require the investment of time and resources that need not be incurred when agencies act independently, some claim that these costs may be more than offset by reductions in duplication of effort and inconsistent action, so that coordination can result in a net administrative efficiency gain...Scholars also argue that coordination can promote accountability by combating drift, shirking, and free-riding through facilitation of inter-agency monitoring. Coordination also can promote accountability by providing governmental authorities the opportunity and even the duty to review and serve as a check on other authorities in the performance of delegated governmental functions, thereby reducing the risk of regulator capture. Each regulatory authority can essentially serve as an accountability check on the others. Finally, the coordinated exercise of multi-jurisdictional authority can promote fairness by minimizing the imposition of inconsistent or redundant demands on regulated entities...

As in the case of the distinctness/overlap dimension, proponents of both coordination and independence have identified accountability benefits. Both accounts note the potential for one agency armed with information about what others are doing to serve as a check on the failures of co-regulators. Whether one finds one account or the other more convincing in a specific context may turn on a number of factors, including the particular governmental function at issue. Coordinated information gathering, for example, may allow co-regulators to stretch their resources farther than they could acting independently.

In their article Agency Coordination in Shared Regulatory Space, Freeman and Rossi also assess the relative strengths and weaknesses of coordination using the normative criteria of efficiency, effectiveness, and accountability, and argue that the benefits of coordination will frequently be substantial.

Much has been written about soft law in the context of regulation, and its relative merits, as compared with hard law. For example, it has been said that regulators turn to soft law in financial regulation because of the ‘sociological pull of soft law venues’, the fact that soft law is ‘quicker, cheaper and more flexible’ and also its non-binding nature, which ‘appeals to fast-moving regulators who need to try things out’. Soft law is often embodied in memoranda of understanding between the regulatory agencies. As Ferran and Alexander state:

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180 The US has several coordinating bodies: the Financial Stability Oversight Council; the Federal Financial Institution Examinations Council and the President’s Working Group on Financial Markets.
181 Camacho and Glicksman, above n 150, 55-6.
Hard law ordinarily gives rise to enforceable obligations and therefore has to be reasonably certain and predictable so that people can determine what is expected of them. Soft law, not being directly enforceable, can be more open-textured.\textsuperscript{184}

In Australia, the legislative framework for regulatory co-ordination is high-level and outcomes-focused. This framework relies substantially on ‘soft law’ mechanisms in the form of memoranda of understanding and informal protocols between the regulators, where the legislative framework is more facilitative, or enabling, than prescriptive. Overseeing the process is the Council of Financial Regulators (CFR), which ‘operates as a high-level forum for co-operation and collaboration among its members.’\textsuperscript{185} The soft law approach in Australia is reflected in the fact that neither the CFR nor the form or content of the regulatory MOUs is prescribed by statute.

The soft law approach was underscored in the Interim Report of the Australian Financial System Inquiry, which drew on the submission of the RBA in stating that ‘[l]egislation cannot be relied on to promote a culture of cooperation, trust and mutual support between domestic regulatory agencies. These have been highlighted as essential elements of an effective financial stability framework, especially during a crisis.’\textsuperscript{186} Of greater importance to the regulators in Australia, the RBA has suggested, is cultivating a culture of co-ordination, under which the main focus is on regulatory performance rather than regulatory structure. The Assistant Governor (Financial) of the RBA has attributed the effective coordination between the regulators in Australia to a culture:

where we regard cooperation with the other agencies as an important part of our job, and there is a strong expectation from the public and the government that we will continue to do so...Key aspects [of coordination] include an effective flow of information across staff in the market operations and macroeconomic departments of a central bank and those working in the areas of financial stability and bank supervision. Regular meetings among these groups to focus on risks and vulnerabilities and to highlight warning signs can be very valuable. A culture of coordination among these areas is very important in a crisis because, in many instances, a stress situation is first evident in liquidity strains visible to the central bank, and the first responses may be calls on central bank liquidity.\textsuperscript{187}

B The perspectives of the regulators and Treasury\textsuperscript{188}

As reflected in their submissions to the FSI and interviews conducted by the authors, the regulators and the Treasury hold the view that the framework of coordination in Australia is working well and does not need to be redesigned or radically overhauled. The following were identified as key factors in the success of the framework of coordination to date:

\textsuperscript{186} FSI, 'Interim Report', above n 6, 3-119.
\textsuperscript{187} Malcom Edey, ‘Macroprudential Supervision and the Role of Central Banks’ (Regional Policy Forum on Financial Stability and Macroprudential Supervision Hosted by the Financial Stability Institute and the China Banking Regulatory Commission, 28 September, 2012).
\textsuperscript{188} The following discussion is based on interviews conducted with ASIC, APRA, the Reserve Bank of Australia and The Treasury in July 2014 on an anonymous basis.
• **A focus on process as well as outcomes** – under which coordination is considered to be an end in itself and not just a means to an end.

• **The strength of relationships** – which involves a good working relationship between the senior executives, many of whom have known each other for years, and regular meetings at the Council of Financial Regulators and at other fora. In particular, the APRA knows RBA well as the first three APRA chairs came from RBA. This results in robust dialogue at the Council of Financial Regulators. As one interviewee noted, better interaction produces better regulatory outcomes. Relationship-building is also supported at the lower levels through secondments and mutual briefings.

• **The twin peaks system itself** - which means that the regulators need to develop a high level of mutual trust and, because of their complementary roles, have a collective interest in making coordination work. This underscores the importance for each regulator to avoid getting in the way of the other regulators and to stay out of each other’s territory.

• **Effective consultation and information-sharing** – under which there is regular consultation, particularly with ASIC and APRA by the Treasury.

• **The framework of coordination itself** – which is facilitative, informal and not prescriptive and involves a flexible approach to coordination that can adapt to the circumstances. As one interviewee noted, ‘it is not possible to rely on legislation to enforce regulatory coordination….over-prescription or formalisation can stifle coordination.’ For example, the approach was able to adjust quickly to accommodate the specific needs during the Global Financial Crisis and also the 2010 Sovereign Debt Crisis in Europe. In addition, it was suggested that the flexible and informal nature of the framework of coordination had given rise to a ‘culture of coordination’ in which there was informal ‘give and take’ between the regulators and an intuitive sense as to which agency should be the lead agency in certain areas. This reduced the risk of turf warfare or territory-grabbing.

At the same time, it was acknowledged by two of the interviewees that greater public transparency would be good to overcome the criticism that CFR was invisible, ‘to demonstrate that the Council of Financial Regulators was thinking about the rights things and doing the right things in the right order’ and to provide the ‘outward appearance of coordination and accountability.’ To this end, one interviewee suggested, it would be useful for CFR to produce minutes and possibly a document that outlines the sequence of regulatory actions to enable industry to plan change and determine the cumulative impact of change.

**VII CONCLUSION – ASSESSING TWIN PEAKS**

This paper has examined the legislative and regulatory anatomy of the twin peaks model as it applies in Australia. For this purpose, it has identified the model’s constituent parts and inner workings. Two features stand out as being of critical importance to the effective operation of the model. The first is

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189 One of the interviewees noted that ‘the Trio collapse had hammered this home’. The strength of the relationship is also enhanced as a result of long-standing personnel at ASIC and APRA (there is greater turnover at Treasury).

190 It was acknowledged, however, that there had sometimes been some shifting of responsibility from one agency to the other.
clarity in terms of the responsibilities and objectives of each regulator, which requires a clear demarcation between the roles of the regulators and the minimisation of regulatory overlap. The second, which is closely related to the first, is a framework of coordination that encourages both regulators to share information proactively and to cooperate in the performance of their supervisory and enforcement functions.

In terms of operational independence, the Australian model appears to fare relatively well when measured against international standards. The international assessments and submissions to the FSI suggest that minor weaknesses exist in areas such as the ability of the executive government to give directions, the funding structure and accountability. However, these concerns are common to all regulatory models and do not relate specifically to the twin peaks model.

An interesting point of distinction in relation to Australia’s system, when compared with other twin peaks jurisdictions, is that regulatory coordination is primarily informal, voluntary and cooperative in nature, relying more on soft law than prescriptive legislation. As suggested by interviews with the regulators in Australia, the framework is facilitative and involves a flexible approach to coordination that can adapt to the circumstances. Underpinning the framework is said to be a culture where mutual trust exists between the regulators, who have a collective interest in making coordination work and allowing each other to perform its role effectively. Permeating such a culture is the reality that because both regulators may find themselves regulating the same institutions and market participants, they need to rely on each other to share information and to cooperate in the performance of their functions. In such circumstances, their roles, responsibilities and effectiveness are inextricably inter-connected.

It is perhaps in this respect – namely, the existence of two independent regulators who have different functions but nonetheless must achieve effective coordination in order to make the system work for both – that the twin peaks model might claim an advantage over the other models. When compared with the institutional model, the twin peaks model is less susceptible to functional overlap and the resulting territorial conflicts. When compared with the integrated – or super-regulator – approach, the twin peaks model is less susceptible to the internal conflicts of interest that arise as a result of the concentration of regulatory functions in one regulator.

The FSI Final Report found that the twin peaks model in Australia did not need major change, reflecting the conclusions previously reached by international agencies that ‘Australia’s financial system is sound, resilient and well-managed’ and that ‘[t]he financial regulatory and supervisory framework exhibit a high degree of compliance with international standards.’

However, certain recommendations were made to ‘refine Australia’s regulatory system and keep it fit for purpose.’ The aims of the recommendations were to ‘[i]mprove the accountability framework governing Australia’s financial sector regulators’, to ensure that they had ‘the funding, skills and regulatory tools to deliver their mandates effectively’, to ‘[r]ebalance the regulatory focus

192 FSI Final Report, above n 6, xx-xxi.
towards competition by including an explicit requirement to consider competition in ASIC’s mandate’ and to ‘[i]mprove the process for implementing new financial regulations.’

In terms of those aspects of Australia’s financial system that relate specifically to the twin peaks model, the assessment by the FSI was positive. Instead of recommending structural changes to the model, the FSI focussed on ways in which certain aspects such as coordination and regulatory overlap could be strengthened and improved. Interestingly, the most significant recommendations of the FSI related to those aspects that were common to all models; namely, the objectives of the regulators or their ‘regulatory focus’, the accountability framework governing financial sector regulators, funding arrangements and regulatory tools (including enforcement powers).

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