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Twin Peaks and Financial Regulation: The Challenges of Increasing Regulatory Overlap and Expanding Responsibilities

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I. Introduction

The Global Financial Crisis ("GFC") resulted in a major rethink of the rules and assumptions underpinning financial systems across the globe. Attempts to identify the underlying causes are ongoing and the debate is likely to continue for many years.[1] It is, however, clear that regulation in many countries did not capture the risks that banks and other financial institutions were exposed to and that the parameters of regulation were too narrow. The emergence of a vast "shadow" financial sector meant that many areas of finance across the globe were unregulated and accumulation of harmful risk was undetected.[2] In response, new approaches have been considered and adopted in countries across the world with the key aim of

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1. *See, e.g.*, Rosa M Lastra & Geoffrey Wood, *The Crisis of 2007–09: Nature, Causes, and Reactions*, 13 J. INT'L ECON. L. 531, 537–45 (2010). Lastra and Wood identify ten contributing causes of the GFC, rather than relying on one cause as definitive. The factors they discuss are: macro-economic imbalances, lax monetary policy, regulatory and supervisory failures, distorted incentives leading to moral hazard, excessive reliance on securitization, unregulated and lightly regulated companies, failures in corporate governance, bad lending and excessive leverage, poorly structured incentive systems in financial institutions, and an unquestioning belief in the efficient market theory. Despite such attempts at comprehensive analysis, there continues to be strong debate amongst commentators about the origins of the GFC. *See, e.g.*, Stijn Claessens, M Ayhan Köse & Marco E Torrenes, *The Global Financial Crisis: How Similar? How Different? How Costly?* 2 (Tusiad-Koc Univ. Econ. Research Forum, Working Paper No. 1011, Mar. 2010).

2. International Monetary Fund [IMF], *The Making of Good Supervision: Learning to Say "No"*, at 6, IMF Staff Position Note SPN/10/08 (May 18, 2010) [hereinafter *IMF Staff Position Note*]; *see also* Matthias Thiemann, *In the Shadow of Basel: How Competitive Politics Bred the Crisis*, 21 REV. OF INT'L POL. ECON., 1203, 1206–13 (2014). Thiemann provides a comprehensive account of problems regarding shadow banking, cognitive capture, and structural constraints of regulations in explaining the problems of the GFC. *Id.*

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providing regulators with the appropriate tools to detect and mitigate the build-up of systemic risk.[3]

Whilst much of the reform focus aimed at addressing these problems has been on improving substantive rules,[4] there has also been recognition that regulatory weaknesses failed to mitigate the effects of the crisis.[5] This has led to a renewed emphasis on improving the regulatory frameworks of many financial systems.[6] In particular, there has been a push for an improvement of the institutional environment that supports the role of regulators in acting when most needed.[7] This reform program has been spurred on by the perceived failure of many forms of financial regulatory framework in preventing the problems that led to the GFC.[8] Although the apparent poor

3. *See* FINANCIAL SERVICES AUTHORITY, *The Turner Review: A Regulatory Response to the Global Banking Crisis* 51–53 (2009) [hereinafter *The Turner Review*].

4. These systemic faults have led to international efforts to improve funding requirements of banks and other important financial institutions in the hope that the financial sector will be better equipped in the future to deal with crises. *See, e.g.*, G20 Pittsburgh Summit 2009, Pittsburg, Pa., U.S., Sept. 24–25, 2009, *Leaders Statement: The Pittsburgh Summit* (Sept. 25, 2009). Internationally, these efforts have resulted in the negotiation of the Basel III Accord, which has sought to strengthen capital requirements of major international banks and has imposed liquidity and leverage requirements in addition to the funding requirements of internationally active banks. Basel Committee on Banking Supervision, *Basel III: A Global Regulatory Framework for More Resilient Banks and Banking Systems*, BANK FOR INT'L SETTLEMENT 6–7 (Dec. 2010), *available at* http://www.bis.org/publ/bcbs189.pdf.

5. *See, e.g.*, Ross Levine, *The Governance of Financial Regulation: Reform Lessons from the Recent Crisis* 3–8 (Bank for International Settlements, Working Paper No. 329, Nov. 2010) (setting out four examples that show systemic failure of financial regulation to be one of the key reasons for destabilisation of the global financial system); *see also* R Michael Gadbaw, *Systematic Regulation of Global Trade and Finance: A Tale of Two Systems*, 13 J. INT'L ECON. L. 551, 554–57 (2010) (noting that regulators missed many factors contributing to the GFC because they missed the systemic nature of the financial system).

6. In this paper, the term "regulatory" is a reference to both regulation and supervision unless otherwise expressly stated. Financial regulation refers to the processes in place for "rule-making;" whereas, "financial supervision" refers to the structures in place to allow supervisors to monitor and enforce these rules. Luis Garicano & Rosa M Lastra, *Towards a New Architecture for Financial Stability: Seven Principles*, 13 J. INT'L ECON. L. 597, 599 (2010); IMF Staff Position Note, *supra* note 2, at 6; Ben Bernanke, Chairman, Federal Reserve Financial Supervision After the Crisis: The Role of the Federal Reserve, Speech at 54th Economic Conference, Federal Reserve Bank of Boston (Oct. 23, 2009), *available at* http://www.federalreserve.gov/newsevents/speech/bernanke20091023a.htm.

7. IMF Staff Position Note, *supra* note 2, at 5.

8. Criticism to varying degrees has been made of many financial regulatory models, including the fragmented institutional architectures, which divide regulatory authority on the basis of the different institutions within the finance sector (like the traditional approach in the United States of America (USA)); unitary architectures, which place all financial regulatory authority into one regulatory agency (like the previous approach in the United Kingdom(UK)); and those countries that have opted for what has come to be known as a "Twin Peaks" model of regulatory architecture, which separates regulatory authority between prudential regulation and market conduct regulation. *See* Garicano & Lastra, *supra* note 6, at 599; *see also* Sheila C Bair, *The Case Against a Super Regulator*, N.Y. TIMES (Sept. 1, 2009), http://www.nytimes.com/2009/09/01/opinion/01bair.html?_r=0>.

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performance of these frameworks has lent support to theories asserting that the particular form of regulatory institutional infrastructure has little to do with the ability of states to prevent or mitigate the effects of financial catastrophe,[9] it is generally accepted that institutional design remains integral in combating financial crises.[10]

Support for the continued importance of institutional design in financial stability has often looked to the relatively positive performance during the GFC of some countries, including Australia,[11] using the so-called Twin Peaks model of financial infrastructure ("Twin Peaks Model").[12] This has led several countries hardest hit by the GFC to consider adopting various forms of the Twin Peaks Model when introducing their own reforms, in the hope that this would address some of the regulatory concerns identified during the GFC.[13] Australian reformers, relying on positive analysis of the Twin Peaks

9. For example, Steve Keen has been critical of claims that the Australian institutional structure played an important part in Australia's good performance during the GFC, instead claiming that the major difference between countries that were more directly affected by the GFC than Australia is a difference in the build-up of private debt, and Keen does not agree with the analysis that attributes Australia's good performance during the GFC to factors such as the regulatory regime. Steve Keen, *Australia versus the US and UK: the Kangaroo Economy*, *in* BANKING SYSTEMS IN THE CRISIS: THE FACES OF LIBERAL CAPITALISM 193, 210–16 (Suzanne J. Konzelmann & Marc Fovargue-Davies eds., 2013); *see also* Bair, *supra* note 8.

10. *See*, *e.g.*, Suzanne J. Konzelmann & Marc Fovargue-Davies, *Australia: Economic Liberalization and Financialization – An Introduction*, *in* BANKING SYSTEMS IN THE CRISIS: THE FACES OF LIBERAL CAPITALISM 186, 189–91 (Routledge 2013) (noting positively the role of regulation when discussing the difference between Australia's performance to other countries during the GFC); *see also* Kim Hawtrey, *The Global Credit Crisis: Why Have Australian Banks Been so Remarkably Resilient?*, 16 AGENDA 95, 110–11 (2009); Jennifer Hill, *Why did Australia fare so well in the global financial crisis?*, *in* THE REGULATORY AFTERMATH OF THE GLOBAL FINANCIAL CRISIS 203 (Eilis Ferran, Niamh Maloney, Jennifer Hill and John Coffee Jr eds., Cambridge University Press 2012); Donato Masciandaro, Roasaria Vega Pansini & Marc Quintyn, *The Economic Crisis: Did Financial Supervision Matter?* 4 (IMF Working Paper No. WP/11/261, Nov. 2011); Elizabeth Brown, *A Comparison of the Handling of the Financial Crisis in the United States, the United Kingdom and Australia*, 15 VILL. L. REV. 509, 574–75 (2010).

11. Hawtrey, *supra* note 10, at 110. *See also* Tony D'Aloisio, Chairman, Austl. Sec. and Invs. Comm'n, "Twin Peaks": A Regulatory Structure for the New Century, Speech at Securities & Derivatives Industry Association 12th Annual Conference, Sydney (May 29, 2009), *available at* http://download.asic.gov.au/media/1346630/sdia-speech-chairman-May-09.pdf (discussing some of the effects of the GFC on Australia).

12. This form of financial regulation was first recommended by Michael Taylor. Michael Taylor, "TWIN PEAKS": A REGULATORY STRUCTURE FOR THE NEW CENTURY (Centre for the Study of Financial Innovation, London, Dec. 1995); *see also* Michael W. Taylor, *The Road From "Twin Peaks" – And the Way Back*, 16 CONN. INS. L.J. 61 (2009) (reviewing the positive aspects of Twin Peaks as compared to the previous much maligned unitary model adopted in the UK leading up to the GFC); *see, e.g.*, Alex Holevas, *Twin Peaks: The Envy of the World*, WEALTH PROF'L (Feb. 22, 2012), http://www.wealthprofessional.com.au/news/twin-peaks-the-envy-of-the-world-122530.aspx (referencing Australia as the "envy of the world").

13. Even countries like the USA, which have for a long time argued that the complexity of the financial system made it difficult to streamline the financial regulatory system, have flirted with the idea of dividing prudential from market conduct regulation (although a market stability authority was also proposed along with the twin peaks bodies). *See* U.S. DEP'T OF THE

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Model, have been less inclined to engage in a review that would disturb the current status quo for fear of negatively altering what has generally been considered an important factor in Australia's relative successful navigation of the GFC.[14]

But, whilst the Australian financial regulatory framework surely deserves some of the praise that it has received, Australian reformers should continue to explore potential improvements to the financial regulatory system to ensure that the system will be best positioned to meet the challenges of the evolving financial system.[15] In this regard, several improvements in the regulatory framework have been suggested by the recent Financial System Inquiry in Australia (FSI)[16] and the International Monetary Fund (IMF) in its assessment of Australia.[17] But, these recommendations were made with little reference to the way in which the Australian financial regulatory framework had coped in the past with financial crises and challenges in

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TREASURY, BLUEPRINT FOR A MODERNIZED FINANCIAL REGULATORY STRUCTURE 136–80 (2008); Governor Daniel K. Tarullo of the US Federal Reserve has stated in arguing for structural reforms that "the aims and scope of prudential regulation have been fundamentally redefined since the financial crisis." Daniel K. Tarullo, Daniel K. Tarullo, Rethinking the Aims of Prudential Regulation, Speech at the Federal Reserve Bank of Chicago Bank Structure Conference (May 8, 2014), *available at* http://www.federalreserve.gov/newsevents/speech/tarullo20140508a.htm. Ultimately, the Treasury Blueprint was not adopted and instead, the Dodd–Frank Wall Street Reform and Consumer Protection Act (Pub.L. 111–203, H.R. 4173; commonly referred to as the Dodd-Frank Act) was signed into federal law by President Barack Obama on July 21, 2010. *See* Renee M. Jones, *Back to Basics: Why Financial Regulatory Overhaul is Overrated*, 4 ENTREPRENEURIAL BUS. L.J. 391, 398–400 (2010). The Dodd-Frank Act is based on a plan proposed by President Obama in 2009 and amongst other things, provides additional powers to the Federal Reserve to act as a systemic risk regulator and abolishes the Office of Thrift Supervision. *See id.* In the UK, however, there was much more support for regulatory reform in light of the significant blame attributed to what was referred to as the tripartite system, consisting of the Bank of England; the Financial Stability Authority; and the Treasury Department, for not being able to identify the problems associated with the GFC. George Osborne, Chancellor of the Exchequer, Speech at the Lord's Mayor Dinner for Bankers and Merchants in the City of London Mansion House (June 16, 2010), *available at* http://www.bankofengland.co.uk/publications/Documents/speeches/2014/speech736.pdf. This led to the implementation in the UK of a Twin Peaks model with prudential and market conduct regulation being assigned to separate regulators. *See id.*

14. *See infra* Part II B.

15. The recent Financial System Inquiry in Australia itself recognised that it would be imprudent to think that conditions that cushioned Australia during GFC will exist in the future and that Australia should therefore heed the lessons learned by others during the GFC. FIN. SYS. INQUIRY, FINANCIAL SYSTEM INQUIRY FINAL REPORT 21 (2014) [hereinafter *FSI Final Report*]. The FSI Final report provides a detailed discussion of the evolving nature of the Australian financial system. *Id.* at xiv.

16. *Id.* at 233-261.

17. IMF, Australia: Basel Core Principles for Effective Banking Supervision, at 6, IMF Country Report No 12/308 (November 2012) [hereinafter *IMF FSAP*] ("[t]here is some room for improvement in certain areas of supervision, such as further enhancing APRA's formal on-site supervisory review of banks' liquidity risk management. The adequacy and stability of ASIC's funding is crucial for it to carry out proactive supervision, so it is important to increase its core funding.").

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Australia.[18] Viewing the framework through an historic lens may help Australia avoid a repeat of the series of corporate collapses in the early 2000s that followed many years of sustained growth in Australia and Australia's strong performance during the Asian Financial Crisis in the late 1990s.[19] This has become an increasingly important task in light of the interconnected nature of modern day global finance, where risks are likely to emanate from a multitude of sources that are difficult to identify.[20] As a consequence, regulators across the world have been given a more prominent role when it comes to detecting and mitigating systemic risk.[21]

This paper examines how the Twin Peaks Model in Australia has responded to financial collapses and challenges since its implementation.[22] Although isolated corporate collapses do not necessarily indicate regulatory failure,[23] it is useful, in light of the wholesale rethink that is taking place after an event such as the GFC and the increased move towards some form of the

18. ASIC has acknowledged the value of looking to past crises in learning lessons. *See, e.g.*, John Price, Comm'r, Austl. Sec. and Invs. Comm'n, The Biggest Changes to the Financial System Since the Wallis Inquiry, Speech at the Corporate Governance Forum (June 3, 2014), *available at* http://asic.gov.au/about-asic/media-centre/speeches/biggest-changes-to-the-financial-system-since-the-wallis-inquiry/.

19. Jean J du Plessis, *Reverberations after the HIH and Other Recent Australian Corporate Collapses: The Role of ASIC*, 15 AUSTL. J. CORP. L. 225, 229 (2003).

20. Andrew Haldane has discussed the increasingly interconnected nature of the financial system in discussing whether the financial system is a complex adaptive system. Andrew G. Haldane, Exec. Dir., Fin. Stability, Bank of Eng., Rethinking the Financial Network, Speech at the Financial Student Association, Amsterdam (Apr. 28, 2009), *available at* http://www.bankofengland.co.uk/archive/documents/historicpubs/speeches/2009/speech386.pdf. *See also* CHRIS BRUMMER, MINILATERALISM: HOW TRADE ALLIANCES, SOFT LAW, AND FINANCIAL ENGINEERING ARE DEFINING ECONOMIC STATECRAFT 105, 49 (2014) (noting that as international trade linkages have deepened with advances in technology so have financial ties. As a result, capital now flows across borders even more freely than goods and services).

21. For example, the G20 committed early on to the need to "reshape our regulatory systems so that our authorities are able to identify and take account of macro-prudential risks." G20 London Summit 2009, Apr. 2, 2009, *London Summit – Leaders' Statement* (Apr. 2, 2009). In response to a call by the G20 to expand on this need, the Financial Stability Board (FSB), IMF, and Bank for International Settlements (BIS) produced a report, which looked at three broad issues: "(i) advances in the identification and monitoring of systemic financial risk; (ii) the designation and calibration of instruments for macroprudential purposes; and (iii) building institutional and governance arrangements in the domestic and regional context.'" FIN. STABILITY BD., INT'L MONETARY FUND, & BANK FOR INT'L SETTLEMENTS, MACROPRUDENTIAL POLICY TOOLS AND FRAMEWORK: PROGRESS REPORT TO G20 3 (2011).

22. The system was introduced in 1998 by the Howard government in response to the Financial System Inquiry Final Report ("Wallis Report"). FIN. SYS. INQUIRY, FINANCIAL SYSTEM INQUIRY FINAL REPORT (2014) [hereinafter *Wallis Report*]; *see* Press Release, Hon. Peter Costello, Treasurer, Reform of the Australian Fin. Sys. (Sept. 2, 1997), *available at* http://fsi.treasury.gov.au/content/PublicInformation/PressReleases/PR020997.asp (the Howard government's response to the Wallis Report).

23. *See, e.g.*, PARLIAMENTARY JOINT COMM. ON CORP. AND FIN. SERV., PARLIAMENT OF AUSTL, INQUIRY INTO FINANCIAL PRODUCTS AND SERVICES IN AUSTRALIA: FINAL REPORT 50 (2009) [hereinafter *Financial Products and Services Inquiry Report*]. The Inquiry notes that it is not necessarily appropriate to recommend reform in response to a particular collapse or event

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Twin Peaks Model of regulation internationally in response to the GFC, to consider whether these experiences suggest ongoing regulatory challenges.[24] By exploring these common themes in financial regulation by reference to various financial collapses and challenges, we provide an indication of where, even in the absence of a major financial crisis,[25] Australia might focus its reform agenda and improve the current financial regulatory framework. This may in turn assist reformers in foreign jurisdictions looking to the Twin Peaks Model to address regulatory problems that they identified during the GFC. We argue that Australia's experience with financial collapses over the past fifteen years indicates continuing challenges for regulators in coordinating regulatory functions and resolving issues concerning the nature and scope of functions of each regulator (what we will refer to as "border challenges").[26]

The structure of the paper is as follows. Part II provides a brief description of the current Australian Twin Peaks Model and reviews

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because isolated corporate failures, no matter how painful their impact for those caught up in them, are not necessarily indicative of, or caused by, regulatory failure. *Id.*

24. This analysis is important considering the continued contested reasons put forward for Australia's successful navigation through the GFC. For example, factors that have been identified as contributing to Australia's success during the GFC include the underwriting standards and the business models adopted by most Australian lenders, which meant that many lenders were not tempted to engage in the residential sub-prime lending that was controversial overseas. *See* John Trowbridge, The Regulatory Environment – A Brief Tour, Speech at the National Insurance Brokers Association Conference, Sydney (Sept. 22, 2009), *available at* http://www.apra.gov.au/Speeches/Documents/NIBA-Sep-2009.pdf. Another oft cited reason for Australia's successful navigation through the GFC was China's demand for Australian resources during the GFC. *See, e.g.*, Reserve Bank of Austl., *The Global Financial Crisis And its Impact on Australia*, YEARBOOK AUSTL., 2009–10 (Apr. 6, 2010), *available at* http://www.abs.gov.au/AUSSTATS/abs@.nsf/Lookup/1301.0Chapter27092009%E2%80%9310; David Alexander, *How Australia Weathered the Global Financial Crisis While Europe Failed*, THE GUARDIAN (Aug. 29, 2013, 2:53 AM), http://www.theguardian.com/commentisfree/2013/aug/28/australia-global-economic-crisis; Guy Debelle, Assistant Governor, Fin. Mkts., Some Effects of the Global Financial Crisis on Australian Financial Markets, Speech at the Finance Professionals Forum, Sydney (Mar. 31, 2009), *available at* http://www.rba.gov.au/speeches/2009/sp-ag-310309.html.

25. Gary Banks, Chairman, Productivity Comm'n, Structural Reform Australian-Style: Lessons for Others, Speech to the IMF, World Bank, and OECD 15 (May 2005), *available at* http://www.pc.gov.au/news-media/speeches/cs20050601/cs20050601.pdf. In discussing the benefits of the Australian approach to regulatory reform, Banks notes that Australia has often acted proactively rather than reacting to crises as is typical in other industrialised countries:

> as Mancur Olsen has shown, it can take a crisis to pave the way for wide-ranging reform. This has indeed been the precursor to reform in a number of developed and developing countries (often under the 'guidance' of the Fund or World Bank). This was not the case in Australia, although public perception of a looming crisis in the absence of reform has at times been actively promoted by the government — most famously in the mid-1980s, when it was suggested that Australia risked becoming a "banana republic." Id.

26. We have adapted the term "border problems" used by Goodhart and Lastra. *See* Charles A. E. Goodhart & Rosa M. Lastra, *Border Problems*, 13 J. INT'L ECON. L. 705 (2010).

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arguments that have been made in support of the model. Part III considers various financial collapses in Australia over the past 15 years that have revealed the difficulties in arranging adequate coordination mechanisms between regulators and establishing clear borders between Australia's regulators as was the original intention of the Twin Peaks Model. Part IV concludes and provides a summary of the key challenges.

II. The Australian Financial Regulatory Architecture: A Brief Overview

A. Twin Peaks Model

Australia's financial regulatory framework centres on the two institutions that provide the "Twin Peaks" element to the model.[27] These peaks have been created to separate the market conduct and consumer protection authority of the Australian Securities and Investments Commission (ASIC) from the prudential regulatory responsibilities of the Australian Prudential Regulatory Authority (APRA).[28] The emphasis on financial regulation is therefore on functional regulation, rather than on the legal form or activities carried out by the institutions that are regulated. The Wallis Inquiry envisaged that both regulatory bodies would have operational autonomy to pursue their legislated objectives in the most efficient and cost-effective manner possible.[29] Although the Wallis Inquiry recommended that APRA and ASIC should finance their operational costs through levies upon the institutions they supervise, this recommendation was only taken up by the government in relation to APRA and not ASIC.[30] This has meant that

27. *But see* Minter Ellison, Submission to the Financial System Inquiry 6–7 (2014). In criticising the number of regulators with involvement in the Australian financial system, Minter Ellison notes that although the Australian system is usually referred to as the Twin Peaks system, financial institutions are in fact subject to regulation by several more regulators. *Id.* These include the Australian Consumer and Competition Commission, the Australian Taxation Office, the Australian Transactions and Reports and Analysis Centre, the Department of Foreign Affairs and Trade and the Office of the Australian Information Commission. *Id.*

28. *See* A. Godwin & I. Ramsay, *Twin peaks – the legal and regulatory anatomy of Australia's system of financial regulation*, 26 Journal of Banking and Finance Law and Practice 240-68 (2015) (a comprehensive discussion of the Twin Peaks Model).

29. *Wallis Report*, *supra* note 22, at 531-32.

30. *See Australian Prudential Regulation Authority Act 1998* (Cth) div 1, pt 5 (Austl.) (describing APRA's funding arrangements). In its submission to the FSI, ASIC sets out in detail the current problems with its funding arrangements including the following comments:

> ASIC is largely funded by government appropriation. Variance in funding from year to year exacerbates the uncertainty inherent in the budget process and results in inefficiencies in the allocation of ASIC's resources to achieve regulatory outcomes. . . . ASIC's current funding model was criticised by the Financial Stability Board (FSB) and the International Monetary Fund (IMF) in November 2012. The IMF expressed concerns about the government-funded models of Australia, the United States, Japan and Argentina. They were concerned about a lack of stable

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funding continues to be a primary concern for ASIC as its regulatory authority is increasingly expanded.

A third, unofficial "pillar" of the Australian financial regulatory framework is Australia's central bank, the Reserve Bank of Australia (RBA). The Wallis Inquiry debated the possibility of allocating prudential regulatory authority to the RBA as is common in many other systems similar to the Twin Peaks Model,[31] but, ultimately, the Wallis Inquiry decided that the responsibility for prudential regulation should be allocated to an independent regulatory authority.[32] The RBA continues, however, to play an important role in financial regulation as the lender of last resort and the body with primary responsibility for ensuring system stability, including that of the payments system.[33]

Finally, the division of responsibilities between financial regulators in Australia on a functional basis makes it necessary to have strong coordination mechanisms. The Australian financial regulatory framework relies on informal bilateral coordination mechanisms,[34] as well as the Council of Financial Regulators (CFR), an informal organisation with no regulatory functions, consisting of representatives from the RBA, APRA, ASIC and the Treasury Department and whose purpose it is to oversee inter-agency coordination.[35]

> funding, an inability to commit resources to longer term projects and weaknesses in proactive supervision.

AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION, FINANCIAL SYSTEM INQUIRY: SUBMISSION BY THE AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION 52–55 (2014). ASIC suggests that this be rectified through adoption of a user pays funding model based on a cost recovery. *Id.* at 55-59. The Australian government is currently undertaking a process of consultation in respect of the proposed adoption of an industry funding model for ASIC. Australian Government, *Proposed Industry Funding Model for the Australian Securities and Investment Commission* (Consultation Paper, Aug. 2015).

31. *See, e.g.*, Andrew Godwin & Andrew Schmulow, *The Financial Sector Regulation Bill in South Africa: Lessons from Australia*, 132 SOUTH AFRICAN LAW JOURNAL, 756-68 (2015) (providing a discussion on the relationship between the prudential authority and central bank and whether prudential authority should be housed within the central bank).

32. The Wallis Report sets out both the reasons for separation of prudential regulation from the RBA as well as arguments in favour of placing prudential regulatory authority with the RBA. *Wallis Report*, *supra* note 22, at 313–17.

33. *Id.* at 361-415.

34. ASIC provides a list of MoUs with other agencies, including the RBA and APRA. *Other Regulators and Organisations*, AUSTL. SEC. AND INVS. COMM'N, http://asic.gov.au/about-asic/what-we-do/our-role/other-regulators-and-organisations/ (last visited June 2016). APRA similarly has a website containing its Memoranda of Understanding. *Memoranda of Understanding and Letters of Arrangement*, AUSTL. PRUDENTIAL REGULATION AUTH., http://www.apra.gov.au/AboutAPRA/Pages/ArrangementsandMoUs.aspx (last visited June 2016).

35. *See Submission to the Financial System Inquiry*, RESERVE BANK OF AUSTL. 66 (March 2014), http://fsi.gov.au/files/2014/04/Reserve_Bank_of_Australia.pdf. [hereinafter *RBA Submission to the FSI*]. *See also About the CFR*, COUNCIL OF FIN. REGULATORS, http://www.cfr.gov.au/about-cfr/ (last visited June 27, 2016); *Memorandum of Understanding on Financial Distress Management: Between the Members of the Council of Financial Regulators*, COUNCIL OF FIN. REGULATORS (Sept. 18, 2008), http://www.cfr.gov.au/about-cfr/mou/.

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B. Support for the Twin Peaks Model

The Twin Peaks Model described in the above sections has generally been viewed as providing Australia with a strong regulatory foundation from which it successfully navigated the GFC. The FSI, whilst recognising that there was room to improve the Australian financial system's resilience, efficiency and fair treatment for market participants, found that "[a]lthough Australia was not immune to the effects of the GFC, the financial system and institutional framework held up well compared with many financial systems elsewhere in the world. In particular, Australia's regulatory frameworks proved robust during this period."[36]

Such statements suggest a belief that the Twin Peaks Model played at least some part in staving off the worst effects of the GFC and may have lent support for the wider use of the Twin Peaks Model of regulation since the GFC. The fact that Australia's regulatory framework was found to be robust during the GFC was also one of the main reasons why the FSI was reluctant to make changes that would alter the current financial framework.[37]

The generally positive assessment of Australia's financial regulatory approach has also received strong backing from international financial authorities such as the IMF, which in its most recent Financial Sector Assessment Program (FSAP) for Australia found that "[t]he principles-based and outcome-oriented supervisory approach of APRA is effective, with notable strengths in risk analyses embedded in the PAIRS [Profitability and Impact Rating System] and SOARS [Supervisory Oversight and Response System] system, industry-wide risk assessments, and a focus on bank boards'

36. *FSI Final Report*, *supra* note 15, at 13.

37. *Id.* at 233-34. The FSI did not support the view that the CFR should be given a more formal role in coordination because it was felt that this would change the Australian financial regulatory framework. For arguments in support of a more formal role, *see Second Submission to the Financial System Inquiry*, Westpac Banking Corp. 110 (August 2014), http://fsi.gov.au/files/2014/08/Westpac.pdf. Westpac states that the FSI should consider recommending an increase in the role, transparency and external accountability mechanisms of the CFR through measures including formalisation of its role within statute. *Id.* This view was supported by other submitters such as KPMG which states that the "role, transparency and accountability of the CFR would be strengthened if it were given statutory recognition." *Submission: Financial System Inquiry*, KPMG 5 (Mar. 31, 2014), http://fsi.gov.au/files/2014/04/KPMG.pdf. In its second round submission, however, APRA notes that a more formalised approach of coordination by giving CFR powers and functions defined in legislation would substantially risk blurring regulators' existing responsibilities and powers and muddying their accountabilities. *Financial System Inquiry: Response to the Interim Report*, Austl. Prudential Regulatory Authority 72 (Aug. 26, 2014), http://fsi.gov.au/files/2014/08/APRA_2.pdf. Perhaps not surprisingly, these views were echoed by other regulators, such as the RBA. *See Supplementary Submission to the Financial System Inquiry*, Reserve Bank of Austl. 13–14 (Aug. 2014), http://fsi.gov.au/files/2014/08/RBA.pdf. Support for the regulators' approach was provided by submitters such as Minter Ellison, who suggested that the current role of the CFR did not need to be formalised through legislation. *See Submission on the Financial System Inquiry Interim Report*, Minter Ellison 7 (Aug. 2014), http://fsi.gov.au/files/2014/09/Minter_Ellison.pdf.

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responsibility for risk management. ASIC is also a highly regarded enforcer of market regulation."[38]

Australia's financial regulators have, on the back of these official endorsements, pointed out that Australia's financial regulatory model played a significant part in Australia's positive performance during the GFC.[39]

III. The Challenges Revealed by Australia's Experience of Financial Collapses

The generally positive reviews of the Australian financial regulatory framework tend mainly to consider Australia's performance in terms of international best practice standards.[40] When viewed in this light, the theoretical basis of the system appears sound. Practical challenges appear, however, when the performance of financial regulation over the past fifteen years in response to various financial collapses is examined.[41] These events

38. *IMF FSAP*, *supra* note 17 (as with the FSI Final Report, the IMF found that there was room for improvement in the regulatory approach, with particular emphasis placed on enhancing APRA's formal on-site supervisory review of banks' liquidity risk management and increasing ASIC's core funding so that it can carry out proactive supervision). The OECD has similarly endorsed the twin peaks model of financial regulation and has held up Australia as an example of how this model provides a sound basis for supervision. *See The Financial Crisis: Reform and Exit Strategies*, OECD 18 (2009), https://www.oecd.org/regreform/sectors/43091457.pdf.

39. *See, e.g.*, Malcom Edey, Assistant Governor, Fin. Mkts., Reflections on the Financial Crisis: Address to CFO Summit, Gold Coast (16 March 2014), *available at* http://www.rba.gov.au/speeches/2014/sp-ag-160314.html.Edey states that in addition to Australia being fortunate to have high demand for mineral resources leading up to and during the GFC and possessing a sound monetary and fiscal framework:

> At least as important as all this is that Australia was well served by its prudential regulatory framework. The post-Wallis framework that was put in place in 1998 established APRA as the integrated prudential regulator, affirmed the financial stability role of the RBA and set up the Council of Financial Regulators to ensure appropriate coordination among the regulatory agencies. Under APRA's leadership, Australian banks were held to much higher standards of resilience than many of their international counterparts. The banks remained profitable and well capitalised. Loan performance did deteriorate during the crisis period, but nowhere near as much as it did in the North Atlantic economies.

Id.

40. The BCBS, with its Core Principles for Banking Supervision and IOSCO, with its Objectives and Principles of Securities Regulation, provide guidance to national regulations in banking and securities. *See Core Principles for Effective Banking Supervision*, BASEL COMM. ON BANKING SUPERVISION (Sept. 2012), http://www.bis.org/publ/bcbs230.pdf [hereinafter *BCBS Core Principles*]; *see also Objectives and Principles of Sec. Regulation*, INT'L ORG. OF SEC. COMM'NS (June 2010), https://www.iosco.org/library/pubdocs/pdf/IOSCOPD323.pdf. These standards are in turn used by the IMF and the World Bank in their FSAP assessments. There have been critical examinations of the FSAP process, which uses these principles. *See, e.g.*, Brummer, *supra* note 20, at 104–5.

41. *See, e.g.*, Anona Armstrong & Ronald Francis, *Loss of Integrity: The True Failure of the Corporate Sector*, 3 J. OF BUS. SYS., GOVERNANCE & ETHICS 3 (2008) (discussing several

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illustrate that in spite of the relative effectiveness of the Australian regulatory framework, Australian regulators continue, at times, to face challenges in executing their regulatory functions.

These financial collapses reveal that Australian regulators encounter regulatory challenges in two important areas. First, there is the challenge of providing the effective coordination mechanisms required of a multi-agency system. Second, although the Twin Peaks Model was meant to assist regulators in delineating their regulatory objectives, they have in practice encountered several challenges as increased integration has led to an overlap between the functions and expected roles of the regulators. As a result, the clear divisions established between regulators when the Twin Peaks Model was first adopted are sometimes difficult to maintain. This has also made it more difficult to determine what tools should be available to regulators to carry out their functions.

The analysis in the remainder of Part III considers various examples that illustrate these challenges. In determining which collapses and regulatory challenges to examine, we have been guided by those instances where a financial collapse or regulatory challenge has been the subject of official review. The official analysis of "what went wrong" allows us to ascertain whether it was broadly accepted that there were regulatory failings in responding to a particular collapse. In the absence of further scrutiny of the financial regulatory system in Australia, these official accounts of regulatory failings provide the most reliable basis for such an analysis. This approach does have several drawbacks, including the tendency noted earlier to take an individual crisis as indicative of broader regulatory failings that do not actually exist.[42] We have attempted to protect against this tendency by reviewing several collapses, cutting across different sectors of the financial market, to determine whether any common themes arise.

A. Coordination Challenges

It is broadly recognised that regulatory frameworks that divide authority between multiple agencies require strong coordination mechanisms to ensure that issues needing regulatory oversight do not fall through the gaps.[43] These coordination mechanisms have taken on added significance with the recognition that regulation should take account of systemic risk and

collapses of financial institutions amongst a broader analysis of corporate collapses); *see also* Evan Jones, *The Crisis and the Australian Financial Sector*, 64 J. of Austl. Pol. Econ. 91 (2009) (providing a summary of a range of financial sector collapses and scandals that have beset Australia). Jones also laments the fact that Australia's performance during the GFC appears to have led to complacency and optimism, especially in official circles, despite evidence of a string of financial failures. Evan Jones, *The Crisis and the Australian Financial Sector*, 64 J. of Austl. Pol. Econ. 91 (2009). Jones further notes that consideration of financial failures has to date largely focused on isolated instances and even then has been predominantly the concern of journalists. *Id.*

42. *See Financial Products & Services Inquiry Report*, *supra* note 23, at 50.

43. *See, e.g.*, *BCBS Core Principles*, *supra* note 40, at 24 *et seq.*

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macroprudential concerns to address the integrated nature of the financial system.[44] As noted in Part II, Australia relies primarily on informal bilateral arrangements between each of its main financial regulators as well as the informal CFR process to facilitate coordination amongst the most important Australian financial regulators. In its submission to the FSI, the RBA argued against formalising the coordination mechanism of the CFR because "formalising the CFR with explicit responsibilities and policy tools would involve transferring agency constituent powers to the CFR, with the risk of blurring lines of responsibility that to date have worked well."[45] It is not readily apparent why this would blur lines of responsibility, but the statement presents a clear message that in the view of Australia's regulators, formalising coordination mechanisms may do more harm than good.[46] The rest of this section examines whether Australia's experience with the financial collapses considered in the following section supports the positive view of informal coordination mechanisms in dealing with the division of regulatory authority amongst the regulators.

1. *HIH Collapse: The First Coordination Test for the Australian Twin Peaks Model*

The first and perhaps still the most notable instance of insufficient coordination between Australia's financial regulators is provided in the collapse of HIH Insurance ("HIH").[47] A Royal Commission ("HIH Royal

44. *See, e.g.*, Luis I. Jácome & Erlend W. Nier, *Macroprudential Policy: Protecting the Whole*, INT'L MONETARY FUND, http://www.imf.org/external/pubs/ft/fandd/basics/macropru.htm (last visited June 27, 2016). When discussing regulatory approaches that ensure a system-wide approach Jácome and Nier note that:

> The arrangements should foster effective identification of developing risks; provide strong incentives to take timely and effective action to counter those risks; and facilitate coordination across policies that affect systemic risk (citations omitted).
>
> To achieve these goals, the setup should avoid complex and excessively fragmented structures. If there are many players, institutional silos and rivalries can hinder risk identification and mitigation of systemic risk, undermining the effectiveness of macroprudential policies.

Id.

45. *RBA Submission to the FSI*, *supra* note 35, at 67.

46. As a representative of one of the regulators noted during interviews conducted by the authors, "it is not possible to rely on legislation to enforce regulatory coordination . . . .over-prescription or formalisation can stifle coordination." 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.

47. The HIH collapse refers to the financial collapse of the HIH Group in March 2001. The collapse was found to be caused primarily by malfeasance 'borne of a misconceived desire to paper over the ever-widening cracks that were appearing in the edifice that was HIH. COMMONWEALTH OF AUSTL., THE FAILURE OF HIH INSURANCE xvi (2003) [hereinafter *HIH Royal Commission Report*]. The HIH Royal Commission found that a deficiency of several billion dollars had arisen because claims arising from insured events in previous years were far greater

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Commission"), when looking at what factors contributed to the collapse of what was Australia's second largest insurance provider, referred to serious coordination deficiencies between APRA and ASIC.[48] The HIH Royal Commission noted that "[t]he evidence indicated there were difficulties in the relationship between ASIC and APRA. These arose principally from the fact that the two organisations took on overlapping and unclearly delineated roles from June 1998 in relation to financial services providers."[49]

Although the HIH Royal Commission found that the regulators did not cause the collapse of HIH,[50] it found that the collapse had shown existing coordination measures fell short of what was expected of Australia's financial regulators.[51] The HIH Royal Commission went on to find that differences in regulatory approach, including differences in approach to sharing information, meant that there were deficiencies in information-exchange on APRA's part and ASIC was therefore less informed of issues relating to HIH than it should have been.[52]

As a result of these limitations, the HIH Royal Commission recommended that legislative amendments be made to ensure that the regulators would in future cooperate more effectively.[53] In response to this recommendation, section 10A of the *Australian Prudential Regulation Authority Act 1998* (Cth) was inserted, to express the intention of Parliament that APRA, "in performing and exercising its functions and powers, cooperat[e] with other financial sector supervisory agencies."[54] In addition, APRA and ASIC amended their Memorandum of Understanding ("MoU") in 2004 to strengthen cooperation between the two organisations.[55]

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than the company had provided for. *Id.* Overextension into unfamiliar markets, such as the purchase of FAI in the USA, also contributed to the collapse. *Id.*

48. *Id.* at 466.

49. *Id.*

50. *See id.* at xvii.

51. *See id.* at 466.

52. *See id.* at 466–67 (In response to the collapse, ASIC claimed that it was APRA's relaxed regulatory approach that caused the difference in regulatory style and difficulties with information exchange).

53. The HIH Royal Commission noted that "[t]he commitment by both APRA and ASIC to cooperation and full and open exchange of information needs to be reinforced. Communications and exchanges should be undertaken in a systematic way (through both formal and informal means) and based on clear protocols." *Id.* at 224. Refer to the discussion in Part IIIB on how financial integration has potentially exacerbated problems associated with regulatory overlap.

54. Australian Prudential Regulation Authority Act (1998) (Cth) s 10A, https://www.legislation.gov.au/Details/C2014C00500.

55. This amendment was made in response to recommendation 31 of the HIH Royal Commission. *See HIH Royal Commission Report*, *supra* note 47, at 225. The Current version of the MoU provides as its objective in clause 1.1: "[t]his memorandum of understanding (MOU) sets out a framework for cooperation between the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investments Commission (ASIC) (the agencies) in areas of common interest where co-operation is essential for the effective and efficient performance of their respective financial regulation functions." Australian Prudential

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2. *Trio Capital Collapse: An Ongoing Problem of Coordination*

These improvements to the coordination framework between APRA and ASIC, however, may not have assisted the regulators in anticipating and dealing with the collapse of Trio Capital.[56] The Inquiry into the collapse of Trio Capital ("Trio Capital Inquiry") found once again that APRA and ASIC, even following the improvements made after the HIH collapse, had not created a coordination framework that would help them identify the fraud taking place in Trio Capital before its collapse.[57] The Inquiry noted that between 2008 and 2009, Trio Capital was not providing APRA with information requested on the value of certain assets and APRA, as was the case with HIH, did not communicate this information to ASIC.[58] Consequently, when ASIC commenced investigation of the relevant Trio Capital hedge funds in June 2009, it was not aware that Trio Capital had not been providing APRA with basic facts about the existence of assets within its portfolio and their value.[59]

APRA and ASIC once again responded to these criticisms by committing to improve coordination efforts through implementation of measures aimed at enhancing exchange of information between formal meetings, increasing presentations to each other's staff to clarify the role of each agency, developing guidance notes to assist staff identify matters relevant to the other agency, and utilising secondments to increase the familiarity of staff members with the other agency.[60]

It is difficult to determine at this early stage whether these efforts will overcome coordination challenges such as those experienced in the HIH collapse and the Trio Capital collapse. But, both examples raise a further

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Regulation Authority and Australian Securities and Investments Commission, *Memorandum of Understanding between the Australian Prudential Regulation Authority and the Australian Securities & Investments Commission* cl. 1.1 (May 18, 2010), http://download.asic.gov.au/media/1340876/MOU-APRA-and-ASIC-May-2010.pdf.

56. Trio Capital was a superannuation authority that went into voluntary administration on 19 December 2009 and was placed in liquidation on 22 June 2010. *See* Tehani Goonetilleke, *Obligations and Liabilities of the Key Players in Managed Investment Schemes: Contentious Questions Arising from Trio Capital*, (2011) 29 CO. & SEC. L. J. 419, 420. APRA and ASIC launched an investigation into Trio Capital relating to alleged fraudulent conduct by using funds received from Australian investors to fund personal lifestyles and funnel money overseas of approximately $118 million. *See id.* (the Trio Capital Inquiry also looked into matters regarding self-managed superannuation funds, discussed in Part IIIBi).

57. *See Inquiry Into the Collapse of Trio Capital*, PARLIAMENTARY JOINT COMM. ON CORP. & FIN. SERVICES 153 (May 2012), http://www.aph.gov.au/~/media/wopapub/senate/committee/corporations_ctte/completed_inquiries/2010_13/trio/report/report_pdf.ashx [hereinafter *Trio Capital Inquiry Report*].

58. *See id.*

59. *See id.*

60. *See, e.g.*, *Annual Report*, AUSTL. PRUDENTIAL REGULATORY AUTH. 62 *et seq.* (2014), *available at* http://www.apra.gov.au/AboutAPRA/Publications/Documents/1410-AR-2013-Full.pdf (APRA provides a detailed discussion on its co-operation and liaison with other Australian regulators).

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consideration regarding the effectiveness of coordination in the Twin Peaks Model that the coordination improvements may not address. Under the Twin Peaks Model, the performance of one regulator may depend on the performance of another regulator.[61] Both the HIH Royal Commission and the Trio Capital Inquiry were critical of APRA's regulatory response leading up to the collapses and the inadequate response of APRA in turn had implications for the effectiveness of ASIC.[62] In both instances, APRA was criticised for not acting promptly in response to warnings of difficulties that HIH and Trio Capital were experiencing.[63] For instance, the HIH Royal Commission found that despite the mounting evidence of HIH's financial problems, APRA:

> did comparatively little in response. It grappled poorly with the information in its possession, either failing to recognise its significance or failing to analyse it thoroughly. It lacked commitment in enforcing its requests for further information and explanations from HIH. It did not recognise the seriousness of the situation until it was too late for effective intervention.[64]

Although regulators are subject to similar scrutiny under any regulatory system, the problems may become more acute under the Twin Peaks Model, which is structured in such a way that each regulator must rely on other regulators to provide the information and cooperation necessary to allow it to achieve its own regulatory objectives and to respond in a timely manner.[65] The examples considered in this section, therefore, highlight both the importance of coordination and the potential weakness of the need to rely on coordination under a functionally based regulatory system where the regulatory performance of one regulator often depends on the performance of another functionally separate regulator.

B. Setting Appropriate Borders

Setting the borders of financial regulation can be contentious.[66] Policy-makers and regulators across the globe have grappled with debates on

61. *See* Rachel Alembakis, *Australia's Twin Peaks Regulatory Model Optimal: CIFR*, Global Custodian (Feb. 11, 2015), http://www.globalcustodian.com/au/news/news_article.aspx?id=2147489857#.V3wfVpMrJE4.

62. *See HIH Royal Commission Report*, *supra* note 47, at vol. III, 466; *Trio Capital Inquiry Report*, *supra* note 57, at 153.

63. *See HIH Royal Commission Report*, *supra* note 47, at vol. I, lii-liii; *Trio Capital Inquiry Report*, *supra* note 57, at 153.

64. *HIH Royal Commission Report*, *supra* note 47, at vol. I, lii-liii. The Trio Capital Inquiry found similar failings with APRA's approach, nothing that "despite having suspicions about the conduct of the Trio Capital trustees in 2005, it was not until 2009 that APRA issued a 'show cause' letter and eventually suspended the trustee." *Trio Capital Inquiry Report*, *supra* note 57, at 74.

65. *See* Minter Ellison, *supra* note 27, at 7-8.

66. *See* Goodhart & Lastra, *supra* note 26, at 705.

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whether to broaden financial regulatory protections in response to the GFC.[67] Australia's adoption of the Twin Peaks Model has not meant that Australia has escaped such border challenges, and Australia's experience with financial collapses shows that at least two of these challenges persist. The first border challenge relates to the allocation of regulatory functions between regulators. The second border challenge, which often follows from difficulties with the first border challenge,[68] is determining which regulatory tools should be made available to each regulator to enable them to carry out and perform their functions.

1. *Border Challenge One: Allocation of Functions Between Regulators*

As with coordination, the HIH collapse once again provides a useful starting point for examination of this challenge. Importantly for our purposes, the HIH Royal Commission identified that:

> ASIC limited its involvement in HIH's affairs because of a perception that APRA was responsible for and was in fact closely and effectively monitoring the situation. ASIC considered that it had little direct responsibility in relation to prudential regulation of insurers; that was APRA's role. I am not sure that I agree with this view of allocation of functions between ASIC and APRA, but I cannot fault ASIC for assuming that position. It was a view that APRA shared.[69]

The HIH Royal Commission explained that it did not agree with ASIC that it should not be concerned with the safety of financial institutions that it regulates because it was a market conduct regulator rather than a prudential regulator.[70] According to the HIH Royal Commission, ASIC's role in protecting consumers of financial products could extend to the solvency of entities providing the financial products.[71] Alan Cameron, ASIC's chairman from 1993 to 2000,[72] did not accept this proposition.[73] He cited fifty of his speeches as chairman where he set out his views on the allocation of roles

67. *See id.* Goodhart and Lastra set out two of what they refer to as "border problems" relating to international finance: those between regulated and non-regulated entities and those between states. *See id.*
68. We have chosen to deal with these two challenges separately as the challenge in allocating regulatory tools may in some cases not depend on functional division.
69. *HIH Royal Commission Report*, *supra* note 47, at vol. I, liv.
70. *See id.* at 204-05.
71. *See id.* The HIH Royal Commission outlines ASIC's view that it is not responsible for ensuring that the claims of policyholders will be paid in the ordinary course of business, suggesting that it did not have an interest in the financial health of financial services providers. *See id.* The HIH Royal Commission was concerned that this approach meant that ASIC would not be carrying out its consumer protections function in some cases. *See id.* at 205-06. *See also* Jácome & Nier, *supra* note 44 (discussing how weaknesses in market conduct impacted macro-systematic risk, which points toward a more significant role for market conduct regulation than consumer protection alone).
72. *See Fellows of Senate*, U. OF SYDNEY, http://sydney.edu.au/senate/cameron.shtml (last visited July 7, 2016).

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between ASIC and APRA, relying on the Wallis Inquiry and second reading speeches to support his argument that it was not within ASIC's regulatory mandate to ensure the solvency of entities that it regulated.[74] Cameron complained that if he was wrong about the allocation of functions, no-one had told him.[75] Further, he noted that if the HIH Royal Commission's view was adopted, ASIC would in effect be acting as Australia's shadow prudential regulator, a role for which ASIC had not been created.[76]

This debate between the HIH Royal Commission and ASIC's chairman at the time that the HIH events took place may seem peculiar in the context of a regulatory system divided along functional lines; it is often noted that one of the main benefits of the Twin Peaks Model is its clear division of regulatory authority between agencies, which suggests that such disagreements should, in theory, not arise.[77] The division means that, by necessity, on occasion both regulators will need to supervise the same institution, an inescapable effect of functional regulation.[78] The mere fact that one regulator is engaged in its regulatory or supervisory activities in relation to a financial institution does not necessarily alleviate the need for the other regulator to engage in its regulatory functions regarding that financial institution (and, as we saw in the previous section, coordination mechanisms may not be a sufficient means by which to avoid this overlap).[79] As Mr. Cameron stated, ASIC is not a shadow prudential regulator, but, equally, APRA is not a shadow market conduct regulator.[80]

73. Alan Cameron, Chairman, Austl. Sec. & Inv. Comm'n, Lessons from the HIH Royal Commission Report, Address to the Australian Institute of Company Directors at 6 (June 20, 2003) http://www.cameronralph.com.au/Downloaded%20documents/Cameron%20AICD%20speech%20on%20HIH.pdf.

74. *Id.*; *see also* Greg Medcraft, Chairman, Austl. Sec. & Inv., Systemic risk: The role of securities regulators, Speech at Systemic Risk, Basel III, Financial Stability and Regulation Conference at 3-4 (June 28, 2011), http://asic.gov.au/about-asic/media-centre/speeches/systemic-risk-the-role-of-securities-regulators/. Medcraft seems to indirectly endorse the more limited role for ASIC envisaged by Cameron, noting that "many systematic risks arise outside ASIC's regulatory boundary – for instance, *in banking or insurance* or real estate or overseas." *See id.* (emphasis added).

75. *See* Cameron, *supra* note 73, at 6.

76. *Id.* Cameron noted that in other countries that had taken away prudential regulatory functions from their central bank, it was the central bank that had acted as a shadow prudential regulator. *See id.*

77. *See* Alembakis, *supra* note 61.

78. The HIH Royal Commission was of the view that a strong coordination mechanism might assist with reducing the need for "double-supervision," *HIH Royal Commission Report*, *supra* note 47, at vol. I, 205. However, as we noted in Part IIIA, the Australian Twin Peaks Model has exhibited problems in the area of coordination too and, in some instances, belief in the effectiveness of coordination mechanisms may lead to problems in a multi-agency system. *See* Alembakis, *supra* note 61.

79. This observation is relevant to the discussion on coordination problems discussed in Part IIIA.

80. *See* Cameron, *supra* note 73, at 6.

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This issue of functional scope has arisen more recently in the debate over the self-managed superannuation funds (SMSF) sector and whether this sector should fall within the perimeters of prudential regulation exercised by APRA.[81] Both the Trio Capital Inquiry and the FSI considered whether SMSFs should, in light of several controversies relating to provision of financial advice in this area, be subject to the prudential regulatory authority of APRA[82] or should continue to be regulated primarily by the Australian Taxation Office (ATO).[83] Despite the problems identified as a result of the collapse of Trio Capital, neither inquiry thought that SMSFs should be included within APRA's prudential regulatory framework.[84] The FSI, in considering prudential regulation of superannuation, noted that "[s]ome submissions suggest that SMSFs might be prudentially regulated by APRA. The Inquiry does not support this. The defining characteristic of the SMSF sector is that trustee members are directly responsible for each fund and must take responsibility for their own decisions."[85]

This discussion over whether the SMSF sector should be subject to prudential regulation illustrates the ongoing debate in defining regulatory authority and objectives under multi-agency regulatory models that are organised along functional authority.

81. The Trio Capital Inquiry set out the ATO definition of an SMSF at the time as "a complying superannuation fund under the Superannuation Industry (Supervision) Act 1993 that has: fewer than five members; each individual trustee of the fund is a member; each member of the fund is a trustee; no member of the fund is an employee of another member of the fund, unless those members are related; and if the trustee of the fund is a body corporate each director of the body corporate is a member of the fund." *Trio Capital Inquiry Report*, *supra* note 57, at 12. The FSI defined SMSFs as "a superannuation fund with fewer than five members, all of whom are trustees or directors of a corporate trustee," *FSI Final Report*, *supra* note 15, at 320.

82. *See FSI Final Report*, *supra* note 15, at 234. In considering the less stringent regulation of SMSFs, the Trio Capital Inquiry noted that "[SMSFs] are registered with, and overseen by, the ATO. The ATO's focus is on the SMSF's compliance with superannuation and taxation laws, not on prudential safeguards. That is, the ATO focuses on ensuring that SMSFs are not used as vehicles to avoid tax, that the SMSF has an investment strategy and that an independent auditor verifies annually that its investments have been made in accordance with that strategy. Unlike APRA-regulated funds, the ATO's role as regulator is not to ensure that the SMSF has appropriate risk management strategies." *See Trio Capital Inquiry Report*, *supra* note 57, at xxiv.

83. Although SMSFs are regulated by the ATO, which is not one of the official "peaks" of the Twin Peaks Model, the discussion nonetheless illustrates difficulties in allocating regulatory functions in a multi-agency system like the Twin Peaks Model. *See* Minter Ellison, *supra* note 27, at 6-7. In addition, although the Twin Peaks Model is built around the prudential and market conduct regulators, the regulators involved in financial regulation go beyond the two official pillars and determining regulatory borders between these regulators has on occasion proven difficult. *See id.* (discussing the many regulators involved in the Australian regulatory system).

84. *See FSI Final Report*, *supra* note 15, at 234. *See also Trio Capital Inquiry Report*, *supra* note 57, at 152. These views supported those of the Wallis Inquiry, which felt that prudential regulation of SMSFs would be "impracticable," *see Wallis Report*, *supra* note 22, at 333-34.

85. *FSI Final Report*, *supra* note 15, at 234.

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2. *Border Challenge Two: Allocation of Tools Between Regulators*

As the overlap between regulatory functions explored in the previous section increases, it becomes more difficult to determine which tools should be available to each regulator to carry out their mandate. The Parliamentary Joint Committee on Corporations and Financial Services considered issues regarding allocation of regulatory tools in its inquiry into Financial Products and Services ("Financial Products and Services Inquiry")[86] and its inquiry into aspects of agribusiness managed investment schemes ("Agribusiness MIS Inquiry").[87] The inquiries discussed whether ASIC should be given the power to impose capital adequacy requirements on Australian Financial Services License (AFSL) holders and providers of Agribusiness Managed Investment Schemes ("Agribusiness MIS").[88] Both inquiries heard arguments by submitters for and against the power of ASIC to impose capital adequacy requirements and, therefore, had to determine on the basis of these submissions whether the activities in question should be made subject to requirements that are traditionally associated with APRA's prudential regulatory role.[89]

When considering the imposition by ASIC of capital adequacy requirements on AFSL holders generally, the Financial Products and Services Inquiry was not convinced "that increased capital adequacy requirements for licensees would be of overall benefit to consumers. Although there may be some consumer protection advantages, with large entities potentially having better capacity to discharge their licensing duties and meet any compensation claims, any consolidation of the industry away from smaller boutique advisory firms would not necessarily be in consumers' interests."[90]

The Financial Products and Services Inquiry further noted that ASIC was not a prudential regulator and the cost of AFSL holders being brought under APRA's regulatory jurisdiction could not be justified.[91] These findings were made in light of ASIC's submission that, despite reviewing the financial resource requirements for non-APRA regulated AFSL holders, ASIC is not a prudential regulator and therefore could not set prudential

86. *See Financial Products and Services Report*, *supra* note 23, at vii.

87. *See* Parliamentary Joint Committee on Corporations and Financial Services, *Inquiry into aspects of agribusiness managed investment schemes* at 1 (Sept. 7, 2009) [hereinafter *Agribusiness MIS Inquiry Report*], http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/Completed_inquiries/2008-10/MIS/report/index.

88. *See generally* Financial Products and Services Report, *supra* note 23; *see generally* Agribusiness MIS Inquiry Report, *supra* note 87.

89. *See Financial Products and Services Report*, *supra* note 23, at 153-68 (showing submissions to the Financial Products and Services Inquiry). *See Agribusiness MIS Inquiry Report*, *supra* note 87, at 67-68 (showing submissions to the Agribusiness MIS inquiry).

90. *Financial Products and Services Report*, *supra* note 23, at 139.

91. *Id.*

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requirements for AFSL holders.[92] These findings were largely based on the premise that prudential supervision was not directed at protecting consumers.[93] The Financial Products and Services Inquiry did not appear to consider, however, whether capital adequacy requirements should be adopted so as to ensure the safety and soundness of important AFSL holders and ultimately the financial system as a whole.[94]

The focus of the Inquiry was understandable; the Inquiry was responding to submissions that sought to confer regulatory powers that were prudential in nature on ASIC and, as ASIC has stated, it is not a prudential regulator.[95] The result of the Inquiry's recommendations, however, was that AFSL holders would not be subject to capital controls irrespective of the importance of AFSL holders (or some of them) to the safety and soundness of the financial system as a whole.[96]

The recommendations in relation to AFSL holders stand in stark contrast to those of the Financial Products and Services Inquiry and the Agribusiness MIS Inquiry that ASIC be given authority to impose capital adequacy requirements in its regulation of Agribusiness MIS.[97] The review of Agribusiness MIS arose because of several collapses in the industry, most prominently those of Timbercorp and Great Southern.[98] The Agribusiness MIS Inquiry focused primarily on the role of industry actors in these collapses,[99] but it did have occasion to consider perceived regulatory problems that may have contributed to the collapses.[100] The Agribusiness MIS Inquiry noted that the entities under review were not subject to prudential regulation.[101] As with its submission to the Financial Products and Services Inquiry, ASIC noted that this was because prudential regulation in Australia is restricted to entities "where the systemic risks and the

92. Australian Securities and Investments Commission, *Financial System Inquiry: Submission by the Australian Securities and Investments Commission* at 73-74 (Apr. 4, 2014), http://download.asic.gov.au/media/1311553/ASIC-submission-to-the-Financial-System-Inquiry-4-April-2014-1.pdf. ASIC accepted that the fact that it is not a prudential regulation would limit the type and nature of the financial resource requirements that it could impose on those overseas. *See id.* at 143.

93. *See Financial Products and Services Report*, *supra* note 23, at 139.

94. *See id.* at 139-40. The line of thinking can be traced back to the Wallis Inquiry, which held that "[b]eyond deposit taking, systemic risk declines because failure by any one institution is less likely to generate a run on similar institutions through contagion effects." *Wallis Report*, *supra* note 22, at 304. Although, the Wallis Inquiry did note that more intensive prudential regulation may also be appropriate for certain capital backed investments and insurance policies. *Id.* As Andrew Haldane has noted, however, the GFC illustrated that systemic concerns could arise from even the most unexpected of sources. *See* Haldane, *supra* note 20, at 1.

95. *See generally* Financial Products and Services Report, *supra* note 87.

96. *See id.* at 139-40.

97. Agribusiness MIS Inquiry Report, *supra* note 87, at 47.

98. *See id.* at 14-16 (discussing the Timbercorp and Great Southern collapses as well as the state of the Agribusiness MIS industry at the time of the inquiry).

99. *See id.* at 17.

100. *See id.* at 37-40.

101. *See id.* at 37.

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intensity of financial promises,[102] and hence the risk of market failure, are greatest," including "authorised deposit-taking institutions, insurers and superannuation funds, but not managed investment schemes."[103]

In light of the finding of the Financial Products and Services Inquiry that ASIC not be given the power to impose capital adequacy requirements on AFSL holders generally,[104] it may have been reasonable to assume that neither Inquiry would recommend that ASIC be given authority to set capital adequacy requirements for Agribusiness MIS. But, both the Agribusiness MIS Inquiry and the Financial Products and Services Inquiry recommended that ASIC should be authorised to impose capital adequacy requirements in the case of Agribusiness MIS.[105] The Financial Products and Services Inquiry concluded that:

> improving the regulation of financial advice in relation to financial products is more effective than regulators attempting to ensure, through additional regulation, that products are 'safe' for investors. Notwithstanding this and the fact that ASIC is not a prudential regulator, the committee is of the view that the unique nature of agribusiness MIS warrant[s] some regulatory intervention to ensure that these schemes do not, over time, develop a ponzi-like character by relying on new product sales to prop up existing schemes. Accordingly, the committee recommends that, as part of their licence conditions, ASIC require agribusiness MIS licensees to demonstrate they have sufficient working capital to meet current obligations.[106]

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102. The Wallis Report provides a useful discussion defining financial promises as follows:

> Financial contracts play a fundamental role in the efficient functioning of commerce, facilitating the settlement of trade and channelling resources efficiently across time and space. The basic elements of financial contracts are promises - promises to make payments at specified times, in specified amounts and in specified circumstances. Financial arrangements which take the form of trust relationships also involve promises - promises to manage assets in the best interests of beneficiaries.
>
> Financial promises are among those products and services which incorporate risk, including the risk that the promise will not be kept.
>
> The financial system provides the framework within which these promises are created and exchanged. Unlike the markets for most other goods and services, the exchange of many financial contracts takes into account both the explicit contractual promise and the varying risk that the promise will not be kept. Identifying, allocating and pricing risk is a key role of the financial system.

Wallis Report, supra note 22, at 179.

103. *Agribusiness MIS Inquiry Report*, *supra* note 87, at 37 (quoting Australian Securities and Investments Commission, *PJC Inquiry into Financial Products and Services in Australia: Submission by the Australian Securities and Investments Commission* at 19 (Aug. 2009), http://download.asic.gov.au/media/1311547/ASIC-submission-PJC-Financial-Products-and-Services-Inquiry-2009.pdf.).

104. *See* Financial Products and Services Report, *supra* note 87, at 139.

105. *See id.* at 140; Agribusiness MIS Inquiry Report, *supra* note 87, at 47.

106. Financial Products and Services Report, *supra* note 23, at 140.

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Although ultimately deferring the decision on capital adequacy requirements to the Financial Products and Services Inquiry, the Agribusiness MIS Inquiry agreed that "MIS providers should be required to demonstrate that they have sufficient working capital to meet the financial commitments they incur from existing schemes and new MIS sales, without being dependent on further, additional new sales for their viability."[107]

The recommendation to provide ASIC with authority to set capital requirements for Agribusiness MIS followed similar moves in 2009 resulting from the transfer of authority for regulating financial markets from the financial markets themselves to ASIC.[108] This transfer of regulatory authority included the right to impose capital requirements on financial market participants.[109] Although the right to impose capital controls on financial markets appears to have largely been a by-product of the desire to transfer regulatory authority from industry actors to a government authority,[110] along with the Agribusiness MIS example, it signifies an increased willingness by reformers to provide ASIC with the ability to use the traditionally prudential regulatory tool of imposing capital requirements on those it regulates.

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107. *Agribusiness MIS Inquiry Report*, *supra* note 87, at 47.

108. *See* Press Release, Chris Bowen, Reforms to the Supervision of Australia's Financial Markets (Aug. 24, 2009), http://ministers.treasury.gov.au/DisplayDocs.aspx?doc=pressreleases/2009/013.htm&pageID=003&min=ceba&Year=&DocType.

109. ASIC has produced Market Integrity Rules in the exercise of its regulatory duties. *See* *Market integrity rules*, AUSTL. SEC. & INV. COMM'N, http://asic.gov.au/regulatory-resources/markets/market-integrity-rules/ (last visited July 6, 2016). In relation to capital requirements, ASIC has, for instance, produced Regulatory Guide 226. *See* Australian Securities and Investments Commission, *Guidance on ASIC market integrity rules for capital and related requirements: ASX, ASX 24, Chi-X and APX markets* (Aug. 2013), http://download.asic.gov.au/media/3549330/rg226-published-24-february-2016.pdf. ASIC has largely replicated capital requirements that had been imposed by financial markets before their transfer, with the exception of two changes made to requirements for daily reconciliations of client money and lodgment by non-clearing ASX 24 market participants of monthly capital returns within ten business days (rather than one month) after the end of each calendar month. *See* Australian Securities and Investments Commission, *Response to submissions on CP 161 Proposed ASIC market integrity rules for capital and related requirements: ASX, ASX 24 and Chi-X Markets* at 4 (Aug. 1, 2011), http://download.asic.gov.au/media/1343660/rep244-published-1-August-2011.pdf. *See also* Martha Ware, *ASIC makes rules for capital and related requirements for ASX and ASX 24 markets*, LEXISNEXIS AUSTL. (Aug. 1, 2011), http://www.lexisnexis.com.au/blogs/corporations-law/post/asic-makes-rules-for-capital-and-related-requirements-for-asx-and-asx-24-markets.aspx.

110. In announcing the transfer of regulatory authority to ASIC, the government did not refer to the ability to impose capital requirements as a motivating factor. *See* Press Release, Bowen, *supra* note 108. Instead, Minister Bowen stated that "[a]s part of the Government's drive to improve regulation of the financial industry, the Government has decided to transfer supervisory responsibility for Australia's financial markets to ASIC as it is more appropriate for an agency of the Government to perform this important function." *See id.*

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IV. Conclusion

Although the Twin Peaks Model has evolved throughout the past fifteen years in response to collapses and other problems, the challenges set out in Part III can be traced back to the recommendations by the Wallis Inquiry regarding financial regulation. The Wallis Inquiry, emphasising a desire to minimise the cost and impact of regulation on financial markets,[111] identified certain financial activities that at the time were thought to require more intense regulation (prudential regulation) because of their potential impact on financial safety.[112] In accordance with this view, the Australian Twin Peaks Model continues (on an institutional basis) to subject Australian deposit-taking institutions, insurance companies, and superannuation funds to the more intense prudential regulatory authority of APRA, whilst ASIC provides specific market conduct and consumer protection regulation for the financial system.[113]

Where other jurisdictions, spurred on by the perceived regulatory deficiencies identified in their financial systems as a result of the GFC, have engaged in comprehensive reform of regulation, Australian reformers have been less willing to disturb the balance in regulation established by the Wallis Inquiry. The FSI reaffirmed the division of regulatory functions in a manner similar to the Wallis Inquiry as follows:

> The core mandates of the regulators are generally clear. APRA is responsible for maintaining financial stability; protecting the claims of authorised deposit-taking institution depositors and insurance policy-holders; and promoting prudent management of non-SMSF superannuation funds. ASIC is responsible for consumer protection and market integrity. The RBA and Payments System Board (PSB) are responsible for financial stability and controlling risk in the financial system. Each regulator is required to balance these core responsibilities against other objectives, including promoting competition and efficiency, maximising business certainty and minimising compliance costs.[114]

This paper has illustrated that despite this relatively clear division of functions amongst Australia's key financial regulators, the Twin Peaks Model continues to face regulatory challenges in certain areas. The first challenge relates to the coordination mechanisms between Australia's key financial regulators. Although reforms have been made to address challenges identified through collapses such as HIH and Trio Capital, there continues

111. *See Wallis Report*, *supra* note 22, at 177-78, 188-95.
112. *Id.* at 192.
113. *Id.* at 298. As discussed in Part IIIB, in addition to the official Twin Peaks Model agencies, other financial regulators, such as the ATO, also play an important role in financial regulation in Australia. *See* Minter Ellison, *supra* note 27, at 6-7.
114. *FSI Final Report*, *supra* note 15, at 241. But the FSI does note that there are some inconsistencies in how non-core objectives are framed in relation to APRA and ASIC and whether some of the objectives apply at all. *See id.*

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to be a preference for informal bilateral and multilateral coordination mechanisms over formal, statute-based mechanisms.[115] Where coordination has been identified as a problem, regulators have responded by enhancing MoUs and establishing informal information-sharing measures to make sure that each regulator is aware of the role of other regulators in the system. Although it is too early to identify whether the latest measures implemented in response to the Trio Capital collapse will be effective in resolving coordination challenges, it is likely that the regulators will continue to face the difficulty inherent in a multi-agency regulatory structure such as the Twin Peaks Model where the performance of one regulator is often dependent on that of the other regulator.

The second challenge is that of establishing the borders of financial regulation. The example of HIH showed challenges faced by regulators in determining the scope of their regulatory functions. In particular, the uncertainty over ASIC's role, which the HIH Royal Commission believed could include regulation of the safety and soundness of institutions, highlights the challenge relating to the allocation of functions between regulators. The more recent example of SMSF illustrates the ongoing and broader application of this challenge as debate continues over where the prudential perimeters should be set. It appears that the general trend in determining appropriate functional borders has been to leave in place the official regulatory divisions but to expand ASIC's regulatory scope so that its regulatory objectives overlap with, or at least are supportive of, APRA's objectives and the need to achieve systemic stability and effective macroprudential regulation generally. There has also been debate regarding the regulatory tools that ASIC should have and whether these should include tools that have traditionally been associated with prudential regulation, such as the power to impose capital requirements.

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115. *See, e.g.*, Luci Ellis, Head of Fin. Stability Department, Reserve Bank of Austl., Macroprudential Policy: A Suite of Tools or a State of Mind?, Speech at Paul Woolley Centre for the Study of Capital Market Dysfunctionality Annual Conference (Oct. 11, 2012), http://www.rba.gov.au/speeches/2012/sp-so-111012.html. In discussing coordination and systemic risk, Ellis notes that:

> It comes down to the relationship between the agencies and the culture of the supervisor to create that willingness. There doesn't need to be a so-called systemic risk regulator issuing public warnings or directions, telling the supervisor what to do. Some jurisdictions might want to set things up that way, but there are other ways that might be better here. In Australia, we think that a culture of cooperation, dialogue and mutual respect is more important than formalised arrangements. The Council of Financial Regulators has proved itself to be a low-cost, flexible way of coordinating between agencies, alongside bilateral relationships. We think we have the essential elements needed to promote financial stability with a holistic frame of mind. In the end, what is needed is the wisdom to see the problems and the willingness to act in response. No elaborate set of institutional arrangements and rules can manufacture those two things.

Id.

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The challenges explored in this paper provide an opportunity to reflect on Australia's current regulatory framework and its relative strengths and weaknesses. Although Australia did not experience the same negative effects from the GFC as many other jurisdictions, it is important to review the regulatory framework to ensure that it meets the needs of Australia's evolving financial system. The analysis is also useful in highlighting these challenges so that foreign jurisdictions considering implementing a model similar to the Twin Peaks Model are aware of the potential challenges that may arise under such a model.

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