

A comparative statutory analysis of the collaboration and cooperation between the South African Reserve Bank and other financial regulatory bodies under the Financial Sector Regulation Act 9 of 2017

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SOLEMN DECLARATION

I hereby declare that the thesis, titled: **A comparative statutory analysis of the collaboration and cooperation between the South African Reserve Bank and other financial regulatory bodies under the Financial Sector Regulation Act 9 of 2017**, is submitted in fulfilment of the requirements for the Doctor of Laws with Mercantile Law (LLD) degree is the product of my research and opinion with the exception of references of the sources acknowledged herein and that I have not at any prior time submitted it to any university or by any person for any qualification.

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May the Almighty bless you all!

DEDICATION

To my Husband,
And our son, Tariq.

ABSTRACT

The promotion, protection, maintenance and enhancement of financial stability and market integrity in South Africa relies on effective and adequate cooperation and collaboration arrangements between the South African Reserve Bank (SARB) and other financial role players, namely, the Financial Sector Conduct Authority (FSCA), the Prudential Authority (PA), the National Credit Regulator (NCR), the Financial Intelligence Centre (FIC), relevant Cabinet members, the Financial Sector Inter-Ministerial Council (FSIC), the Financial Sector Council of Regulators (FSCR), the Financial Stability Oversight Committee (FSOC) and the Financial Sector Contingency Forum (FSCF). The *Financial Sector Regulation Act (FSR Act)* provides a statutory regulatory framework to regulate cooperation and collaboration between the SARB and other financial role players to promote, protect, enhance and maintain financial stability and market integrity. Several mechanisms were established under the *FSR Act* to foster effective cooperation and collaboration between the SARB and other financial role players. These include the establishment of a statutory duty to cooperate and collaborate, the establishment of the duty to enter into Memorandums of Understanding (MOUs) regarding cooperation and collaboration arrangements and the establishment of forums to facilitate cooperation and collaboration. Cooperation and collaboration between the SARB and other financial role players are essential for promoting financial stability and enhancing financial integrity because they enable the coordination of regulatory functions, regular discussions, consultations, mutual assistance and sharing of information on matters of common interests. Effective and robust cooperation and collaboration between the SARB and other financial role players also ensure transparency of regulatory actions and prevent the duplication of tasks and blurred regulatory boundaries between the SARB and other financial role players. Cumbersome cooperation and collaboration between the SARB and other financial role players may also cause regulatory gaps which threaten financial stability and market integrity in South Africa. It is submitted that international cooperation and collaboration between the SARB and other central banks and cross-border financial role players are also essential for maintaining global financial stability and the integrity of financial markets. International cooperation and collaboration also create important relations between South Africa and other jurisdictions, which are essential for investor

confidence and the investigation of cross-border market misconduct. To this effect, international best practices for cooperation and collaboration between central banks and other financial role players were established and standards were set for member states to follow. This thesis reveals that the regulation of cooperation and collaboration between the SARB and other financial role players under the *FSR Act* is inadequate and is not consistently enforced to promote, protect, enhance and maintain financial stability and market integrity in South Africa. This is due to the fact that there is a lack of measures to consistently enforce compliance with the statutory provisions relating to cooperation and collaboration between the SARB and other financial role players in South Africa. This thesis does a comparative analysis of the regulation of cooperation and collaboration between central banks and other financial role players in the United Kingdom (UK) and Australia to derive lessons that can be used to enhance the regulation of cooperation and collaboration between the SARB and other financial role players in South Africa. The researcher proposes a regulatory model that policymakers can use to ensure the effectiveness of the regulation of cooperation and collaboration between the SARB and other financial role players to promote, protect, enhance and maintain financial stability and market integrity in South Africa.

Keywords: cooperation and collaboration; financial role players; financial stability; market integrity; promote; enhance

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CHAPTER ONE

RESEARCH OUTLINE AND CONTEXT

1.1 Introduction

The outbreak of the global financial crisis (GFC) between August 2007 and September 2008 resulted in a phase of financial regulatory reforms in many jurisdictions.¹ The spread of the GFC in many jurisdictions such as South Africa, Australia and the United Kingdom (UK) was evidence that financial crisis contagion is inevitable.² This gave rise to the need for effective cooperation and collaboration mechanisms between central banks and cross-border financial role players to enable different jurisdictions to assist each other to detect and prevent systemic risks.³ Cooperation and collaboration arrangements between central banks and other financial role players are essential for the optimum operation of any financial system.⁴ The enactment of the *Financial Sector Regulation Act* in South Africa was the first time that cooperation and collaboration between the South African Reserve Bank (SARB) and other financial role players were expressly provided for in statutes in South Africa.⁵ The *FSR Act* provides that the SARB and other financial role

¹ Bollen R "The Slow Journey Towards a Global Regulator" 2008 *Macquarie Journal of Business Law* 255, 256; Jones E and Knaack P "Global Financial Regulation: Shortcomings and Reform Options" 2019 *Global Policy* 193, 199; Buckley RP *International Financial System: Policy and Regulation* (Kluwer Law International 2008) 25; Qumba MF "A Comparative Analysis of the Twin Peaks Model of Financial Regulation in South Africa and the United Kingdom" 2022 *SALJ* 78, 92

² Bollen 2008 *Macquarie Journal of Business Law* 256; Buckley RP "The Institutional Weaknesses in the International Financial System" 2007 *UNSW Law Research Paper* 1, 25; Jensen A and Kingston M "The Australian 'Twin Peaks' Framework of Financial System Regulation: Australia and UK Compared" 2010 *Butterworths Journal of International Banking and Financial Law* 548, 550; Godwin A and Ramsay I "Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation" 2015 *Journal of Banking and Finance Law and Practice* 240, 252.

³ Godwin A, Kourabas S and Ramsay I "Twin Peaks and Financial Regulation: The Challenges of Increasing Regulatory Overlap and Expanding Responsibilities" 2016 *International Lawyer* 273, 274; Kourabas S "Trends and Theory in Financial Regulation and Regulatory Design after the Global Financial Crisis" in Arner D, Wan W, Godwin A, Shen W and Gibson E (eds) *Research Handbook on Asian Financial Law* (Elgar Online 2020) 30, 35; Kourabas S "Improving Australia's Regulatory Framework for Systemic Financial Stability" 2018 *Journal of Banking and Finance Law Practice* 183, 186; Jensen and Kingston 2010 *Butterworths Journal of International Banking and Financial Law* 551.

⁴ Fontecchio J "The General Agreement on Trade in Services: Is it the Answer to Creating a Harmonised Global Securities System?" 1994 *North Carolina Journal of International Law and Commercial Regulation* 115, 119-120; Buckley 2007 *UNSW Law Research Paper* 4; Kourabas "Trends and Theory in Financial Regulation and Regulatory Design after the Global Financial Crisis" 38; Godwin and Ramsay 2015 *Journal of Banking and Finance Law and Practice* 242.

⁵ *Financial Sector Regulation Act* 9 of 2017 (*FSR Act*), sections 26 and 76; Van Niekerk G and Van Heerden G "The Importance of a Legislative Framework for Cooperation and Collaboration In the

players, namely, the Financial Sector Conduct Authority (FSCA), the Prudential Authority (PA), the Financial Intelligence Centre (FIC), the National Credit Regulator (NCR), the Financial Stability Oversight Committee (FSOC), the Financial System Council of Regulators (FSCR), the Financial Sector Inter-Ministerial Council (FSIC), the Financial Sector Contingency Forum (FSCF) and the Ombud Council should cooperate and collaborate with each other to fulfil their mandates.⁶

This research focuses on the regulation of cooperation and collaboration between the SARB and other role players to promote, protect, maintain and enhance financial stability and market integrity under the *FSR Act* in South Africa.⁷ In this context, financial stability refers to a financial system that inspires confidence through its resilience to systemic risks and its ability to efficiently intermediate funds.⁸ For the purpose of this research, market integrity refers to financial markets with low financial crime, strong enforcement mechanisms, fairness, efficiency and transparency of financial products.⁹ The provision of express cooperation and collaboration regulations between the SARB and other financial role players under the *FSR Act* entails that financial stability and market integrity cannot be fulfilled in isolation. Therefore, there is a need for regulatory coordination. Effective cooperation and collaboration between the SARB and other financial role

Twin Peaks Model of Financial Regulation" 2020 *SALJ* 108, 113; Llewellyn DT "Institutional Structure of Financial Regulation and Supervision: The Basic Issues" *World Bank seminar Aligning Supervisory Structures with Country Needs* (Washington DC, 6-7 June 2006) 28; Godwin A and Schmulow A "The Financial Sector Regulation Bill in South Africa, Second Draft: Lessons from Australia" 2015 *SALJ* 752, 756; Schmulow A "Financial Regulatory Governance in South Africa: The Move Towards Twin Peaks" 2017 *African Journal of International and Comparative Law* 390, 393.

⁶ See sections 20, 25, 26, 32, 56, 76, 79 and 83 of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 113; Godwin and Schmulow 2015 *SALJ* 765; Godwin A "Introduction to Special Issue – The Twin Peaks Model of Financial Regulation and Reform in South Africa" 2018 *Law and Financial Markets Review* 151, 153.

⁷ Section 26 and 76 of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 113; Godwin and Schmulow 2015 *SALJ* 765; Qumba 2022 *SALJ* 119.

⁸ Section 4 of the *FSR Act*; see related comments by Van Heerden G and Van Niekerk G "Twin Peaks: The Role of the South African Central Bank in Promoting and Maintaining Financial Stability" 2017 *Journal of Contemporary Roman-Dutch Law* 636, 643; Van Heerden G and Van Niekerk G "Twin Peaks in South Africa: A New Role for the Central Bank" 2018 *Law and Financial Markets Review* 154, 154; Schinasi GJ "Defining Financial Stability" 2006 *IMF Working Paper* 2, 4.

⁹ Austin J "What Exactly Is Market Integrity: An Analysis of One of the Core Objectives of Securities Regulation" 2017 *William and Mary Business Law Review* 215, 219; Schwartz RA, Byrne JA and Stempel E *Market Integrity* (Springer International Publishing 2018) 14; Fodor B "Measuring Market Integrity: A Proposed Canadian Approach" 2008 *Journal of Financial Crime* 261, 262.

players can be achieved through robust compliance and enforcement measures to foster regulatory coordination. The GFC and the recent coronavirus disease of 2019 (COVID-19) pandemic pointed to the importance of cooperation and collaboration between financial role players to protect and restore financial stability and market integrity. The lesson that can be carried over from the GFC is that due to the globalisation of financial markets, a crisis in one economy can easily spread to other jurisdictions and this requires proactive cooperation and collaboration between central banks and cross-border financial role players to manage such crisis.¹⁰

Such cooperation and collaboration in South Africa are discussed in comparison with two other jurisdictions, Australia and the UK. The choice of comparators was influenced by the progress that has been made in Australia and the UK in relation to the regulation of cooperation and collaboration between the central bank and other financial role players. For example, Australia fared well through the GFC and the UK established a statutory regulatory framework for regulatory coordination.¹¹ Accordingly, the researcher also looks into the immutable aspects and enforcement of cooperation and collaboration under international best practices such as the Basel Committee on Banking Supervision (BCBS),¹² the International Organisation of Securities Commissions (IOSCO),¹³ the Committee of Insurance, Securities and Non-Banking Financial Authorities (CISNA),¹⁴ the

¹⁰ See related comments by Cali M, Massa I and Te Velde W "The Global Financial Crisis: Financial Flows to Developing Countries Set to Fall by One Quarter" 2008 *Research Reports and Studies* 1, 5; Norgren C "The causes of the Global Financial Crisis and their Implications for Supreme Audit Institutions: 2010 *INTOSAI Report* 8, 24; Debelle G "Some Effects of the Global Financial on Australian Financial Markets" 2009 Finance Professionals Forum 5, 8; Van Niekerk and Van Heerden 2020 *SALJ* 115.

¹¹ Qumba 2022 *SALJ* 93; Van Niekerk and Van Heerden 2020 *SALJ* 115; Schmulow 2017 *African Journal of International and Comparative Law* 393; Godwin 2018 *Law and Financial Markets Review* 184.

¹² The Basel Committee on Banking Supervision (BCBS) is the primary global standard setter for the prudential regulation of banks and provides a forum for regular cooperation on banking supervisory matters. Its 45 members comprise central banks and bank supervisors from 28 jurisdictions. See <http://www.bis.org/bcbs/> accessed 25 March 2022.

¹³ The IOSCO sets international standards for securities markets. Its 110 member countries regulate more than ninety percent of the international regulatory benchmarks for all securities markets. See <https://www.iosco.org/about/index.cfm?section=history> accessed 25 March 2022.

¹⁴ The Committee of Insurance, Securities and Non-Banking Financial Authorities (CISNA) is a Southern African Development Community (SADC) Committee that is made of, *inter alia*, regulators and supervisors of capital markets and insurance companies from the different member states. Its main goal is to achieve regional financial stability and market integrity through cooperation and collaboration between non-bank financial intermediaries (NBFIs) and other financial role players.

Financial Action Task Force (FATF) and the International Association of Insurance Supervisors (IAIS).¹⁵

1.2 Background of the Study

In this research, the background of financial regulation in South Africa is traced from the establishment of the SARB in 1921. The SARB was established by the *Currency and Banking Act*,¹⁶ which was later replaced by the *South African Reserve Bank Act*.¹⁷ The main objective of the SARB was to protect the value of the South African currency.¹⁸ It should be noted that, neither the *Currency and Banking Act* nor the *South African Reserve Bank Act* of 1944 made provision for cooperation and collaboration between the SARB and other financial role players to fulfil its mandates. Between 2000 and 2004, the SARB officially assumed the financial stability mandate. Any matters relating to the roles and functions of the SARB were discussed within the SARB, by the Board of Directors.¹⁹ This entails that there were no arrangements relating to the cooperation and collaboration of the SARB and other financial role players to fulfil its financial stability mandate.

The previous silo financial regulatory framework and supervision of financial regulators in South Africa was fairly complex and characterised by several financial role players.²⁰

See related comments by Qumba 2022 *SALJ* 85; see also South African Reserve Bank "Participation in International Forums" <https://www.resbank.co.za/en/home/what-we-do/Prudentialregulation/participation-in-international-forums> accessed 14 June 2022.

¹⁵ The IAIS represents insurance regulators and supervisors of 190 jurisdictions. See <http://www.iaisweb.org/index.cfm?pageID=28> accessed 25 March 2022.

¹⁶ *Currency and Banking Act* 31 of 1920, section 3; Rossouw J "A Selective Reflection on the Institutional Development of the South African Reserve Bank Since 1921" 2011 *Economic History of Developing Regions* 3, 4; Fourie J "Macroeconomic History in South Africa: The South African Reserve Bank Centennial Special Issue" 2021 *Economic History of Developing Regions* 117, 118.

¹⁷ *South African Reserve Bank Act*, 1944, section 2; Rossouw 2011 *Economic History of Developing Regions* 4; Fourie 2021 *Economic History of Developing Regions* 118; De Jager J "The South African Reserve Bank: An Evaluation of the Origin, Evolution and Status of a Central Bank (part 1)" 2006 *South African Mercantile Law Journal* 159, 162.

¹⁸ Constitution of the Republic of South Africa, 1996, section 224; section 3 of the *South African Reserve Bank Act*; Fourie 2021 *Economic History of Developing Regions* 118; Bradley B, Padayachee V and Rossouw J "Two of the Most Eventful Years in the History of the South African Reserve Bank: William Henry Clegg and Johannes Postmus and the 1931–1932 Crisis" 2021 *Economic History of Developing Regions* 194, 195.

¹⁹ Section 4 of the *South African Reserve Bank Act*; Bradley, Padayachee and Rossouw 2021 *Economic History of Developing Regions* 199; Fourie 2021 *Economic History of Developing Regions* 120; Rossouw 2011 *Economic History of Developing Regions* 8.

²⁰ Van Niekerk and Van Heerden 2020 *SALJ* 109; see also Van Niekerk GM and Van Heerden CM "Twin Peaks in South Africa: A New Role for the Central Bank" 2018 *SALJ* 154, 156. The silo regulatory approach included many financial regulators, such as; the Financial Services Board that

Some of the key role players were the Bank Supervision Department (BSD) of the SARB, the National Credit Regulator (NCR), the National Consumer Commission (NCC) and the Financial Services Board (FSB).²¹ The FSB was tasked with the regulation and supervision of the insurance sector, securities and fund managers.²² The FSB and the Johannesburg Stock Exchange (JSE) jointly supervised market intermediaries to ensure safe markets for buying and selling securities.²³ The BSD was responsible for prudential regulation and supervision of banks, and promoting the soundness of the banking system.²⁴ Despite the fragmented nature of the financial regulatory framework in South Africa, which was disjointed, complex and susceptible to regulatory arbitrage, there were no cooperation and collaboration arrangements between the SARB, the FSB, the BSD, the NCR and other financial role players.²⁵ The lack of comprehensive cooperation and collaboration arrangements between the SARB and other financial role players might have been influenced by the efforts to ensure that the SARB remains an independent entity.²⁶ Notwithstanding the fact that the roles of the SARB as lender of last resort, implementer of monetary policy and provider of emergency liquidity were unique to the

was established under the *Financial Services Board Act* 97 of 1990, section 2; the Banks Supervision Department under the *Banks Act* 94 of 1990, section 4(4); see related comments by Rossouw 2011 *Economic History of Developing Regions* 12; Fourie 2021 *Economic History of Developing Regions* 119.

²¹ Bordo C "A Brief History of Central Banks" Economic Commentary, Federal Reserve Bank of Cleveland (December 2007) available at <https://ideas.repec.org>fip>fedcec.pdf> accessed on 12 March 2021; National Treasury "Red Book" 2011 8; Rossouw 2011 *Economic History of Developing Regions* 12; Fourie 2021 *Economic History of Developing Regions* 119.

²² *Financial Services Board Act* 97 of 1990 (*FSB Act*), section 2; Bordo 2007 <https://ideas.repec.org>fip>fedcec.pdf>; Goodhart C "The Past Mirror: Notes, Surveys, Debates - The Changing Role of Central Banks" 2011 *Financial History Review* 142, 153; Botha and Makina 2011 *International Business and Economics Research Journal* 25; De Jager 2013 *South African Mercantile Law Journal* 504.

²³ Section 12 of the *FSB Act*; see also De Jager "The South African Reserve Bank: Blowing Winds of Change (Part 1)" 2013 *South African Mercantile Law Journal* 342, 353; Botha and Makina 2011 *International Business and Economics Research Journal* 25; De Jager 2013 *South African Mercantile Law Journal* 504.

²⁴ Van Niekerk and Van Heerden 2020 *SALJ* 109; Van Heerden and Van Nikekerk 2018 *THRHR* 649; Van Heerden and Van Niekerk 2018 *Law and Financial Market Review* 156; Godwin 2018 *Law and Financial Markets Review* 154.

²⁵ Rajendaran D "Approaches to Financial Regulation and the Case of South Africa" *IFMR Finance Foundation* (6 March 2012) 3; Schmulow 2020 *The International Review of Financial Consumers* 5; Botha and Makina 2011 *International Business and Economics Research Journal* 25; De Jager 2013 *South African Mercantile Law Journal* 504.

²⁶ De Jager 2013 *South African Mercantile Law Journal* 504; section 244 of the Constitution; Botha and Makina 2011 *International Business and Economics Research Journal* 25; Fourie 2021 *Economic History of Developing Regions* 119.

SARB only, the financial stability mandate involves several other institutions and cannot be fulfilled in isolation.²⁷ As such, there was an imminent need for the SARB to cooperate and collaborate with other financial role players to fulfil its roles adequately.

The previous institutional approach to financial regulation regarded banking institutions, insurance institutions and capital markets as separate institutions.²⁸ However, there were no express cooperation and collaboration arrangements between the SARB, the FSB, the NCR and the NCC to fulfil their different mandates. According to Van Niekerk and Van Heerden, the mandate to protect, promote, maintain and enhance financial stability and market integrity in South Africa requires effective cooperation and collaboration arrangements between the SARB and other role players whose actions have an impact on the financial markets of South Africa.²⁹ Nonetheless, there were no comprehensive cooperation and collaboration arrangements between the SARB and other financial role players to promote financial stability and enhance market integrity. Before the enactment of the *FSR Act*, the *Banks Act*, the *Financial Markets Act*, the *National Credit Act*, the *Financial Services Board Act* and the *SARB Act* did not provide an effective and adequate regulatory framework for cooperation and collaboration to promote, protect, enhance and maintain financial stability in South Africa.³⁰

The *Banks Act* provided that only The Registrar of Banks was required to enter into an MOU regarding cooperation and collaboration arrangements between the SARB and any financial institution supervisor that the Registrar deemed fit.³¹ However, such cooperation

²⁷ De Jager 2013 *South African Mercantile Law Journal* 504; see related comments by Rossouw 2011 *Economic History of Developing Regions* 12; also see Fourie 2021 *Economic History of Developing Regions* 119.

²⁸ Schmulow 2017 *African Journal of International and Comparative Law* 405; Rajendaran D "Approaches to Financial Regulation and the Case of South Africa" IFMR Finance Foundation (6 March 2016) 4; De Jager 2013 *South African Mercantile Law Journal* 504; Bradley, Padayachee, and Rossouw 2021 *Economic History of Developing Regions* 201.

²⁹ Van Niekerk *The Role of the Central Bank* 88; Van Heerden and Van Niekerk 2020 *SALJ* 111; Schmulow 2017 *African Journal of International and Comparative Law* 405; Van Heerden and Van Niekerk 2017 *THRHR* 645.

³⁰ Section 4(3) of the *Banks Act*, Section 33 of the *SARB Act*; Van Zyl *et al Understanding South African Financial Markets* 34; Botha and Makina 2011 *International Business and Economics Research Journal* 28.

³¹ Section 4 of the *Banks Act*; International Monetary Fund "South Africa: Financial System Stability Assessment" 2014 *IMF Staff Country Reports* 24; see related comments by Botha and Makina 2011 *International Business and Economics Research Journal* 25; De Jager 2013 *South African Mercantile Law Journal* 504.

and collaboration were only done in relation to supervisory matters and not financial stability or market integrity.³² The Registrar of Banks was also required to share information relevant to the proper functioning and performance of other regulators.³³ Be that as it may, cooperation and collaboration between the SARB and other regulatory bodies were not extensively regulated and were not to maintain and promote financial stability and market integrity in South Africa, as in the *FSR Act*. In this regard, the researcher submits that cooperation and collaboration before the *FSR Act* was enacted were restricted to selected functions such as supervisory matters and there were no measures to facilitate nor foster cooperation and collaboration between the SARB and other financial regulators. The researcher argues the lack of cooperation and collaboration arrangements resulted in regulatory gaps and overlaps that led to the ineffectiveness of the previous silo regulatory framework in South Africa.

According to the International Monetary Fund - South Africa: Financial System Stability Assessment Report of 2014, cooperation and collaboration between the SARB and other financial role players were only operational for supervisory purposes.³⁴ The *SARB Act* and the *Banks Act* stipulated that financial regulatory bodies should only share confidential information when necessary for supervisory purposes unless specified otherwise or required by a court order.³⁵ This entails that cooperation and collaboration between the SARB and other financial role players were not to protect and maintain financial stability and market integrity, rather, it was for supervisory purposes. Despite the lack of express provisions on cooperation and collaboration, the FSB was able to cooperate and collaborate with other relevant regulatory bodies, such as the BSD, Financial Sector Contingency Forum (FSCF), the SARB and other insurance groups to

³² Van Niekerk *The Role of the Central Bank* 89; International Monetary Fund 2014 *IMF Staff Country Reports* 24; see related comments by Botha and Makina 2011 *International Business and Economics Research Journal* 25; De Jager 2013 *South African Mercantile Law Journal* 504.

³³ Section 4 of the *SARB Act*; Van Zyl *et al Understanding South African Financial Markets* 35; Falkena H, Bamber R, Llewellyn D and Store T *Financial Regulation in South Africa* 2nd ed (SA Financial Sector Forum 2001) 19; De Jager 2013 *South African Mercantile Law Journal* 495.

³⁴ International Monetary Fund 2014 *IMF Staff Country Reports* 78; Falkena *et al Financial Regulation in South Africa* 23; De Jager 2013 *South African Mercantile Law Journal* 495; see related comments by Rossouw 2011 *Economic History of Developing Regions* 12.

³⁵ Section 33(2) of the *SARB Act*; see related comments by Rossouw 2011 *Economic History of Developing Regions* 12; see related comments by Fourie 2021 *Economic History of Developing Regions* 119.

facilitate insurance supervision.³⁶ This is evidenced by the International Organisation of Securities Commission (IOSCO) Multilateral MOU that was concluded by the FSB and the IOSCO, to share information on systemic risks affecting the financial markets in South Africa.

In 2007, a review of the South African financial sector was initiated by the National Treasury.³⁷ The National Treasury suggested financial regulatory reforms that focused on financial stability and market integrity and the regulation of robust cooperation and collaboration between the SARB and other role players.³⁸ This research examines the measures introduced by the *FSR Act* to enhance cooperation and collaboration between the SARB and other regulatory bodies to maintain, promote and enhance financial stability and market integrity in South Africa.³⁹ The statutory measures introduced in South Africa by the *FSR Act* are compared to those in use in Australia and the UK, to draw lessons and make recommendations regarding the cooperation and collaboration between the SARB and other role players.

The enactment of the *FSR Act* introduced the regulation of cooperation and collaboration between the SARB and other financial role players to promote, protect, enhance and maintain financial stability in South Africa.⁴⁰ This is the first time that cooperation and collaboration between the SARB and other role players have been expressly mentioned in South African legislation. Accordingly, no other extensive research has been done on the regulation of cooperation and collaboration between the SARB and other financial role players. Therefore, this research is the first to analyse whether cooperation and

³⁶ International Monetary Fund 2014 *IMF Staff Country Reports* 78; *Financial Markets Act* 19 of 2012, section 63; De Jager 2013 *South African Mercantile Law Journal* 495; also see Bradley, Padayachee, and Rossouw 2021 *Economic History of Developing Regions* 201.

³⁷ Van Niekerk and Van Heerden 2020 *SALJ* 110; De Jager 2013 *South African Mercantile Law Journal* 495; A Safer Financial Sector to Serve South Africa Better 2011 (The Red Book) 12; Godwin 2018 *Law and Financial Markets Review* 153.

³⁸ A Safer Financial Sector to Serve South Africa Better 2011 (The Red Book) 12; De Jager 2013 *South African Mercantile Law Journal* 495; Van Heerden and Van Niekerk 2017 *THRHR* 642.

³⁹ Sections 26, 27, 76 and 77 of the *FSR Act*; Schmulow 2017 *African Journal of international and Comparative Law* 392; Godwin and Ramsay 2015 *Journal of Banking and Finance Law and Practice* 242; Godwin 2018 *Law and Financial Markets Review* 153.

⁴⁰ Crotty B "Structural Causes of the Global Financial Crisis: A Critical Assessment of the 'New Financial Architecture'" 2009 *Cambridge Journal of Economics* 560, 563; see also De Jager 2013 *SA Merc LJ* 495; Van Niekerk and Van Heerden 2020 *SALJ* 115; see related comments by Van Heerden and Van Niekerk 2017 *THRHR* 645.

collaboration between the SARB and other role players are robust enough to promote and maintain financial stability and market integrity in the South African financial markets.

1.3 Problem Statement

The research provides an analysis of the regulatory approaches and regulatory requirements of cooperation and collaboration, including estimates of the benefits and disadvantages of such cooperation and collaboration, and the requirements for the promotion of financial stability and market integrity as well as viable and competitive financial markets in South Africa.⁴¹ South Africa follows a hard law approach to the regulation of cooperation and collaboration between the SARB and other financial role players.⁴² This means that cooperation and collaboration arrangements between the SARB and other financial role players such as the PA, the FSCA, the NCR and the FIC are regulated by legislation, namely the *FSR Act*.⁴³ The *FSR Act* established a duty for the SARB and other financial role players to cooperate and collaborate to fulfil their mandates.⁴⁴ However, the *FSR Act* does not provide for the immutable aspects of this duty. Instead, the *FSR Act* provides that cooperation and collaboration arrangements between the SARB and other financial role players should be established in non-binding Memorandums of Understanding (MOUs).⁴⁵ The MOUs regarding cooperation and collaboration are non-binding and are regarded as mere gentlemen's agreements which cannot be legally enforced. This entails that the duty to cooperate and collaborate under the *FSR Act* is legally unenforceable. Accordingly, the researcher submits that the lack of

⁴¹ See related comments by Botha and Makina 2011 *International Business and Economics Research Journal* 28; Van Niekerk and Van Heerden 2020 *SALJ* 109; Godwin and Ramsay 2015 *Journal of Banking and Finance Law and Practice* 242; Godwin 2018 *Law and Financial Markets Review* 153.

⁴² Kelly CR "The Sociological Pull of Soft Law" 2012 *American Society of International Law Proceedings* 322, 327; Ferran E and Alexander K "Can Soft Law Bodies be Effective? Soft Systemic Risk Oversight Bodies and the Special Case of European Systemic Risk Board" 2011 *Legal Studies Research Paper Series* 6; Godwin and Schmulow 2015 *SALJ* 756; Kourabas 2018 *Journal of Banking and Finance Law and Practice* 199; Van Niekerk and Van Heerden 2020 *SALJ* 128.

⁴³ See sections 26 and 76 of the *FSR Act*, Godwin and Schmulow 2015 *SALJ* 756; Godwin 2018 *Law and Financial Markets Review* 156; Qumba 2022 *SALJ* 115.

⁴⁴ See sections 26 and 76 of the *FSR Act*, Godwin and Schmulow 2015 *SALJ* 756; Godwin 2018 *Law and Financial Markets Review* 184; Qumba 2022 *SALJ* 115, Van Heerden and Van Niekerk 2018 *Law and Financial Market Review* 155.

⁴⁵ Section 27 and 77 of the *FSR Act*, Schmulow 2017 *African Journal of International and Comparative Law* 394; Godwin and Schmulow 2015 *SALJ* 767; see related comments by Godwin 2018 *Law and Financial Markets Review* 184.

measures to enforce cooperation and collaboration arrangements between the SARB and other financial role players could render the arrangements ineffective.

The *FSR Act* provides that the SARB and other financial role players, namely, the FSCA, the PA, the NCR and the FIC should enter into MOUs to establish cooperation and collaboration arrangements to promote, protect, enhance and maintain financial stability and market integrity in South Africa.⁴⁶ However, the *FSR Act* also provides that the requirement to enter into MOUs regarding cooperation and collaboration is not mandatory and a financial role player will not be affected by failure to enter into any MOU for this purpose.⁴⁷ This entails that the SARB or any other financial role player maybe be incentivised for failing to fulfil the duty to conclude MOUs regarding cooperation and collaboration. Accordingly, the researcher argues that, whilst the *FSR Act* fails to capture immutable aspects of cooperation and collaboration arrangements between the SARB and other financial role players in legislation and leaves such arrangements to be established in MOUs, the *FSR Act* also provides that the duty to conclude MOUs regarding regulatory coordination is not mandatory. This entails that the SARB or any other financial role players may neglect the duty to cooperate and collaborate without any penalties or effects on its roles and functions. This shows that there is a lack of consistent enforcement of cooperation and collaboration between the SARB and other financial role players in South Africa. The inconsistency may result in cumbersome cooperation and collaboration between the SARB and the FSCA, the PA, the NCR and the FIC and could threaten financial stability and market integrity in South Africa.

The regulation of cooperation and collaboration between the SARB and other financial role players under the *FSR Act* does not provide for arrangements to manage a financial crisis.⁴⁸ The researcher acknowledges that the SARB is authorised to compel a financial

⁴⁶ Sections 27 and 77 of the *FSR Act*; Godwin and Schmulow 2015 *SALJ* 765; Godwin and Ramsay 2015 *Journal of Banking and Finance Law and Practice* 242; see related comments by Godwin A, Li G, Ramsay I "Is Australia's Twin Peaks System of Financial Regulation a Model for China (Part 2)" 2016 *Hong Kong Law Journal* 935, 948.

⁴⁷ Section 27(4) and 77(4) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 141; see related comments by Qumba 2022 *SALJ* 116; also see Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 952.

⁴⁸ Sections 76 and 26 of the *FSR Act*; see related comments by Georgosouli A "The FCA-PRA Coordination Scheme and the Challenge of Policy Coherence" 2013 *Capital Markets Law Journal* 62, 65; also see Hong-Bum K "Cooperation and Coordination between the Financial Authorities:

regulator to provide particular information and to act or not act in a particular manner to manage systemic risks.⁴⁹ Nonetheless, this is not adequate to manage a financial crisis. Like in the UK and Australia where the central banks concluded MOUs which stipulate cooperation and collaboration arrangements to manage financial crises, there is also a need for cooperation and collaboration arrangements between the SARB and other financial role players to manage financial crises in South Africa.⁵⁰ As Van Niekerk and Van Heerden denote, "crisis times are not times for regulatory stand-offs," the researcher submits that it is important to establish prior cooperation and collaboration arrangements to manage a financial crisis.⁵¹ The lack of express demarcations of responsibilities and objectives between the SARB and other financial role players during a financial crisis will likely result in regulatory arbitrage and overlaps.⁵² When this occurs, financial stability and market integrity are threatened.

The *FSR Act* establishes different committees and bodies, namely, the FSCR, the FSIC, the FSOC and the FSCF, to facilitate cooperation and collaboration between different financial role players in South Africa.⁵³ These committees and bodies were established to create a platform for the SARB and other financial role players to discuss and share

⁴⁹ A Review of the Experiences of the United Kingdom, Norway, Sweden, and Korea" 2009 *Seoul Journal of Economics* 409, 416; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 952.
Section 12(2) of the *FSR Act*; see related comments by Godwin and Schmulow 2015 *SALJ* 765; Godwin and Ramsay 2015 *Journal of Banking and Finance Law and Practice* 242; Qumba 2022 *SALJ* 119.

⁵⁰ See related comments by Qumba 2022 *SALJ* 118; Van Niekerk and Van Heerden 2020 *SALJ* 142; Kallasidou N "The United Kingdom's Response to Crisis: A Critical Examination of the New Regulatory Structure of Financial Services Supervision" 2013 *Bristol Law Review* 117, 129; North G and Wilson T "Has the Australian Prudential Regulation Authority Done Enough to Meet its Legislated Objectives and Prepare Australia for the Next Financial Crisis?" 2020 *University of New South Wales Law Journal* 552, 559.

⁵¹ Van Niekerk and Van Heerden 2020 *SALJ* 141; Van Heerden and Van Niekerk 2018 *Law and Financial Markets Review* 156; see related comments by Kallasidou 2013 *Bristol Law Review* 131; also see North and Wilson 2020 *University of New South Wales Law Journal* 560.

⁵² Schmulow A "Explainer: Who Will be Doing What under South Africa's New 'Twin Peaks' Model" 2018 *SAST* 3; Van Heerden CM and Van Niekerk GM "Two Takes on Twin Peaks: A Comparative Appraisal of the Model of Financial Regulation in the Netherlands and South Africa" 2020 *THRHR* 491, 495; Van Heerden and Van Niekerk 2018 *Law and Financial Markets Review* 156; Schmulow 2017 *African Journal of International and Comparative Law* 401.

⁵³ Sections 20(2)(b), 25(2)(b), 79(2) and 83(2) of the *FSR Act*; Godwin and Schmulow 2015 *SALJ* 762; Godwin A, Howse T, Ramsay I "Twin Peaks with South African Characteristics – South Africa's New Model of Financial Regulation" 2016 *CIFR Working Paper* 8; Qumba 2022 *SALJ* 107.

information relating to matters of common interest.⁵⁴ It should be noted that these bodies and committees, namely the FSCR, the FSIC, the FSCF and the FSOC, do not have any powers or authorities that go beyond the roles and functions of their member institutions. This entails that, despite the duty to facilitate cooperation and collaboration, these bodies do not have the authority to enforce cooperation and collaboration between the SARB and other financial role players. The FSCR was established as the main coordinating body, but its membership is restricted to some financial role players and excludes the key financial role players such as the SARB, the FSCA and the PA. More so, the FSCR lacks the powers and authority to enforce and oversee compliance with the duty to cooperate and collaborate.⁵⁵ The researcher argues that the membership of the FSCR should be extended to include key financial role players so as to promote high-level coordination. Also, the substantive powers and functions of the FSCR should not be limited to facilitating cooperation and collaboration but should be extended to enforcement objectives. This will ensure effective and proactive cooperation and collaboration between the SARB and other financial role players in South Africa.

The researcher also argues that the lack of cooperation and collaboration arrangements between the SARB, other financial role players, the courts and law enforcement authorities such as the South African Police Service (SAPS) is problematic. The role of the courts and the SAPS in prosecuting and investigating market misconduct that threatens market integrity and financial stability should not be overlooked. As such, it is important to have cooperation and collaboration arrangements between the SARB, financial role players and law enforcement authorities. This is a significant gap in the cooperation and collaboration arrangements under the *FSR Act*.

In light of the problems identified above, the researcher analyses the robustness and effectiveness of the regulation of cooperation and collaboration between the SARB and other financial role players under the *FSR Act*. It should be noted that this is a relatively

⁵⁴ Sections 20(2)(b), 25(2)(b), 79(2) and 83(2) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 118; Godwin and Schmulow 2015 *SALJ* 762; Godwin, Howse and Ramsay 2016 *CIFR Working Paper* 8; Qumba 2022 *SALJ* 107.

⁵⁵ See related comments by Godwin and Schmulow 2015 *SALJ* 769; Ferran and Alexander 2011 *Legal Studies Research Paper Series* 6; also see Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 952; Kelly 2012 *American Society of International Law Proceedings* 327.

new area for South African law and there is limited literature and case law in this regard. The researcher makes recommendations that should be considered to ensure the effective and robust regulation of cooperation and collaboration between the SARB and other financial role players in South Africa.

1.4 Aims and Objectives

1.4.1 Aims

In this research, aims refer to the main overall goals and/or targets that are generally expected to be achieved by the researcher at the end of the research. In this regard, this research seeks to:

- a. explore the importance of cooperation and collaboration between the SARB and other financial role players such as PA, FSCA, FIC, FSOC and NCR in the current regulatory framework to ensure financial stability and market integrity in South Africa;
- b. examine the relevant provisions of the *FSR Act* to determine whether they outline sufficient measures to promote cooperation and collaboration between the SARB and other role players to ensure financial stability and market integrity and competitiveness in the South African financial markets;
- c. compare the regulation of cooperation and collaboration between central banks and other financial role players in South Africa with Australia and the UK in order to bring to light the regulatory gaps and flaws in the current statutory framework of South Africa and recommend possible measures that can be implemented to enhance cooperation and collaboration in South Africa.

1.4.2 Objectives

For the purposes of this research, the objectives include any measures or specific stages that are undertaken by the researcher to achieve the overall goals and aims of the research. To achieve the aforesaid aims, the researcher:

- a. examines the cooperation and collaboration measures between the SARB and other role players to promote, protect, enhance and maintain financial stability and market integrity in South Africa. This is done so as to come up with measures that could be used to improve and enhance regulatory coordination in South Africa, and prevent regulatory gaps and overlaps;
- b. comparatively analyses the regulation and implementation of cooperation and collaboration mechanisms between central banks and other financial role players in the UK and Australia so as to draw lessons on how their cooperation and collaboration have promoted and maintained financial stability and market integrity in their respective countries to date; and
- c. recommends measures that can be implemented by the South African policymakers to enhance the regulation of cooperation and collaboration between the SARB and other financial role players in order to promote, protect, enhance and maintain financial stability and market integrity in South Africa.

1.5 Research Question

Is the regulatory framework under the *FSR Act* able to foster cooperation and collaboration between the SARB and other relevant role players to promote, maintain and enhance financial stability and market integrity in South African financial institutions and financial markets?

1.6 Rationale for the Study

The enactment of the *FSR Act* triggered radical changes in the South African financial regulatory framework.⁵⁶ In terms of this new financial regulatory framework, all financial role players have been placed under the supervision of the PA and the FSCA.⁵⁷ The

⁵⁶ Section 7(1) of the *FSR Act*, Osode P "Two Heads are Better than One: Assessing South Africa's 'Twin Peaks' Financial Regulation Model" 2021 *Interdisciplinary Journal of Economics and Business Law* 9, 10; Schmulow 2020 *International Review of Financial Consumers* 4; see related comments by Schmulow AD "Twin Peaks: An Analysis of the Australian Architecture" in SKK University *Global Forum for Financial Consumers Conference* (South Korea 4-5 November 2016) 12.

⁵⁷ Sections 34 and 58 of the *FSR Act*, Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 10; see related comments by Chitimira *Market Abuse Regulation in SADC* 46;

National Treasury was convinced that this paradigm shift in the financial regulatory framework is the most relevant and robust enough for securing financial stability and market integrity, sound financial markets, combatting financial crime and promoting financial inclusion in South Africa.⁵⁸ According to Osode, the current financial regulatory architecture in South Africa is characterised by high levels of interconnectedness between the SARB and other role players.⁵⁹ As such, there is a need for proactive cooperation and collaboration between the SARB and other financial role players. It is also equally important that the cooperation and collaboration between the SARB and other financial role players be consistently enforced to promote, protect, enhance and maintain financial stability and market integrity in South Africa. As such, this research investigates and analyses the regulation of cooperation and collaboration between the SARB and other financial role players to determine its adequacy and robustness.

According to Godwin, Li and Ramsay, the promotion of financial stability and the enhancement of market integrity largely depends on effective cooperation and collaboration mechanisms in each jurisdiction.⁶⁰ An environment that enables cooperation and collaboration, and proactive information sharing between financial role players encourages financial role players to effectively fulfil their roles and function together.⁶¹ The advantage of effective cooperation and collaboration between the central bank and other financial role players is that it creates a platform for financial role players to identify important regulatory issues and harmonise their regulatory functions to resolve any issues

58 Chitimira H and Ncube M "The Role of Regulatory Bodies and other Role-Players in the Promotion of Financial Inclusion in South Africa" 2020 *Acta Universitatis Danubius Juridica* 25, 32.
Section 7(1) of the *FSR Act*; National Treasury *A Safer Financial Sector to Serve South Africa Better* (Red Book) 2011 5; Godwin 2017 *Law and Financial Markets Review* 189; Millard D "Further Along the Road to Twin Peaks and a Fair Insurance Industry" 2018 *Journal for Contemporary Roman-Dutch Law* 374, 378; Schmulow A, Fairweather K and Tarrant J "Reforming Australia's Financial Regulatory Regime in Light of Failings Exposed by the Banking Royal Commission" 2018 *Law and Financial Markets* 193, 194.

59 Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 10; National Treasury *Red Book* 5; Godwin and Schmulow 2015 *SALJ* 758; Qumba 2022 *SALJ* 98.

60 Godwin, Li and Ramsay 2017 *Law and Financial Markets Review* 183; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 952; Van Niekerk and Van Heerden 2020 *SALJ* 111; Llewellyn DT "Institutional Structure of Financial Regulation and Supervision: The Basic Issues" 15.

61 Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 952; Van Niekerk and Van Heerden 2020 *SALJ* 111; see related comments by Jensen and Kingston 2010 *Butterworths Journal of International Banking and Financial Law* 549; Kourabas "Trends and Theory in Financial Regulation and Regulatory Design after the Global Financial Crisis" 38.

threatening financial stability and market integrity.⁶² Accordingly, it is important to establish effective cooperation and collaboration mechanisms to ensure the promotion, protection, enhancement and maintenance of financial stability and market integrity in South Africa. The researcher analyses the cooperation and collaboration mechanisms established under the *FSR Act* to determine their robustness, effectiveness and adequacy to promote financial stability and market integrity in South Africa. For example, the researcher investigates the effectiveness of MOUs regarding cooperation and collaboration and whether the duty to cooperate and collaborate under the *FSR Act* is consistently enforced.

This analysis is done to recommend plausible measures that may be adopted to ensure robust cooperation and collaboration between the SARB and other financial role players in South Africa. Robustness is measured by how the legislation is enforced to achieve its intended objectives, and purpose and also how it complies with international best practices. Although it might be too early to decide on effectiveness considering that the *FSR Act* is fairly new, the researcher also identifies regulatory flaws in the regulation of cooperation and collaboration in South Africa. Recommendations are made to address the flaws and enhance the regulation of cooperation and collaboration between the SARB and other financial role players to protect, promote, enhance and maintain financial stability and market integrity in South Africa. The researcher hopes that the findings and recommendations made in this research will be used by policymakers to enhance the regulation of cooperation and collaboration between the SARB and other financial role players, such as the FSCA, the PA, the NCR, the FIC, the courts and law enforcement authorities.

⁶² Godwin and Schmulow 2015 *SALJ* 768; see related comments by Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 279; Schmulow A "The Four Methods of Financial System Egluation: An International Comparative Survey" 2015 *Journal of Banking and Finance Law and Practice* 294, 299; Schmulow AD "Twin Peaks: A Theoretical Analysis" 2015 *Centre For International Finance and Regulation (CIFR) Research Working Paper Series* 8, 12.

1.7 Literature Review

According to Van Niekerk and Van Heerden,⁶³ for the SARB to effectively execute its mandate of ensuring and maintaining financial stability in South Africa, it is necessary to have statutory regulations that promote cooperation and collaboration between the central bank, other regulatory bodies and state organs whose roles and functions influence the regulation of financial institutions and financial markets. This is essentially important when one considers the interconnectedness of the role and functions of the SARB and other financial role players. For example, the SARB and the PA share the financial stability mandate, and each relies on the other to effectively fulfil their mandates. As such, it is important to prevent overlaps and regulatory gaps between the SARB and the PA by establishing express cooperation, collaboration and information sharing arrangements, clearly stating the objectives and demarcations of each financial role player.

Godwin, Li and Ramsay⁶⁴ submit that the effectiveness of any financial regulatory framework requires robust measures to foster cooperation and collaboration between the central bank and other role players. The researcher submits that cooperation and collaboration arrangements between the SARB and other financial role players create a platform for regular discussions on matters of common interests.⁶⁵ Such discussions are relevant for providing imminent responses to potential systemic events and assisting each other to resolve any issues threatening financial stability and market integrity. Accordingly, the *FSR Act* provides for cooperation and collaboration between the SARB and other role players to effectively pursue the mandate of the SARB to protect, promote,

⁶³ Van Niekerk and Van Heerden 2020 *SALJ* 110; see related comments by Van Heerden CM and Van Niekerk GM "Two Takes on Twin Peaks: A Comparative Appraisal of the Models of Financial Regulation in the Netherlands and South Africa" 2020 *THRHR* 491, 513; Kourabas "Trends and Theory in Financial Regulation and Regulatory Design after the Global Financial Crisis" 32; Armour J, Awrey D, Davis P *et al Principles of Financial Regulation* (Oxford University Press 2016) 895.

⁶⁴ Godwin, Li and Ramsay 2017 *Law and Financial Markets Review* 183; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 952; see related comments by Godwin A and Ramsay I "Twin Peaks – The Legal Regulatory Anatomy of Australia's System of Financial Regulation" 2015 *Centre for International Finance and Regulation Research Working Paper Series* 2, 28; Llewlyn DT "Institutional Structure of Financial Regulation and Supervision: The Basic Issues" 20.

⁶⁵ See related comments by Godwin, Li and Ramsay 2017 *Law and Financial Markets Review* 183; Van Niekerk and Van Heerden 2020 *SALJ* 115; Godwin, Howse and Ramsay 2017 *SALJ* 701.

maintain and enhance financial stability and market integrity in South Africa.⁶⁶ Godwin and Schmulow⁶⁷ argue that despite the establishment of regulatory measures to foster effective cooperation and collaboration between the central bank and other role players, a culture of coordination is more effective and the relationships of the relevant personnel at an informal level. However, the researcher argues that a culture of coordination alone will not suffice. This follows the fact that it cannot be enforced, and it cannot be reviewed to determine its effectiveness. As such, it is submitted that it is essential to have enforceable measures for cooperation and collaboration to enable consistency and compliance.

Schmulow⁶⁸ compares the Australian cooperation and collaboration regulatory framework to South Africa's. He suggests that a flexible and soft law approach is ideal for effective cooperation and collaboration between the central bank and other financial role players.⁶⁹ The researcher argues that achieving a balance between soft law and hard law is a better approach to ensure effective cooperation and collaboration between the SARB and other financial role players in South Africa.⁷⁰ Thus, express statutory provisions that establish the nature and scope of regulatory coordination and bilateral MOUs regarding cooperation and collaboration can be easily amended to incorporate the changing needs and requirements of global financial standards.

⁶⁶ Sections 26 and 76 of the *FSR Act*; see related comments by Hong-Bum 2009 *Seoul Journal of Economics* 412; 2018 *Journal of Banking and Finance Law Practice* 183, 186; Jensen and Kingston 2010 *Butterworths Journal of International Banking and Financial Law* 551.

⁶⁷ Godwin and Schmulow 2015 *SALJ* 768-769; Godwin 2018 *Law and Financial Markets Review* 155; see related comments by Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 281; Arner D, Wan W, Godwin A, Shen W and Gibson E (eds) *Research Handbook on Asian Financial Law* (Elgar Online 2020) 115.

⁶⁸ Schmulow 2017 *African Journal of International Comparative Law* 410; Schmulow and Godwin 2015 *SALJ* 758; Kourabas 2018 *Journal of Banking and Finance Law and Practice* 205; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 952.

⁶⁹ Schmulow and Godwin 2015 *SALJ* 758; see related comments by North and Wilson 2020 *University of New South Wales Law Journal* 561; Godwin, Howse and Ramsay 2016 *Journal of Banking Regulation* 110; Godwin 2018 *Law and Financial Markets Review* 156.

⁷⁰ Kelly 2012 *American Society of International Law Proceedings* 322; Ferran and Alexander 2011 *Legal Studies Research Paper Series* 6; see related comments by Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 952; Qumba 2022 *SALJ* 112.

Chitimira⁷¹ states that South Africa relies on the cooperation and collaboration between the FSCA and the courts to curb market misconduct that threatens financial stability and market integrity. The researcher argues that the lack of express cooperation and collaboration arrangements between the FSCA and the courts could result in cumbersome and ineffective cooperation and collaboration between the FSCA and the courts. This is due to the lack of established arrangements to this effect. There are currently no formally binding cooperation and collaboration arrangements between financial role players and the SAPS regarding the promotion, protection, enhancement and maintenance of financial stability and market integrity in South Africa. The researcher submits that there is a need for express regulations relating to the cooperation and collaboration between financial role players, law enforcement agencies and the South African courts. This follows the fact that the SAPS and the South African courts play a significant role in the detection, investigation and prosecution of financial crimes that threaten market integrity and financial stability.

Osode denotes that “mandatory institutional cooperation and collaboration are carefully woven into the design of South Africa’s financial regulatory architecture and the prescribed mechanisms appear to be robust and highly plausible.”⁷² However, the researcher is of a different view. The regulatory framework for cooperation and collaboration in South Africa is too flexible to promote effective cooperation and collaboration. This is due to the fact that the duty to cooperate and collaborate under the *FSR Act* is unenforceable and the duty to conclude MOUs regarding cooperation and collaboration is not mandatory.⁷³ The *FSR Act* leaves room for non-compliance where it

⁷¹ Chitimira H *Market Abuse Regulation in SADC: South Africa, Namibia, Botswana and Zimbabwe* (Juta Cape Town 2022) 43; Chitimira H "Overview of Selected Role-Players in the Detection and Enforcement of Market Abuse Cases and Appeals in South Africa" 2014 *Speculum Juris* 108, 115; *Financial Markets Act* 19 of 2012, section 84(10); also see Chitimira H and Lawack VA "Overview of the Role Players in the Investigation, Prevention and Enforcement of Market Abuse Provisions in South Africa" 2013 *Obiter* 200, 210.

⁷² Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 10; see related comments by Godwin, Li and Ramsay 2017 *Law and Financial Markets Review* 183; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 952; Van Niekerk and Van Heerden 2020 *SALJ* 111.

⁷³ Sections 27 and 77 of the *FSR Act*; see related comments by Van Niekerk and Van Heerden 2020 *SALJ* 141; Qumba 2022 *SALJ* 109; Godwin, Howse and Ramsay 2017 *SALJ* 701.

provides that the failure to adhere to cooperation and collaboration provisions does not jeopardise or compromise the actions or conduct of that regulator.⁷⁴

According to Qumba,⁷⁵ effective cooperation and collaboration between the SARB and other financial role players rely on the effective flow of information across, *inter alia*, markets operations and financial stability departments. Secondly, regular meetings between the SARB and other financial role players also enhance information sharing which is essential for effective cooperation and collaboration to promote, protect, enhance and maintain financial stability and market integrity.⁷⁶ The researcher agrees with this submission and argues that the *FSR Act* deprives the financial role players of regular meetings to discuss matters of common interest. For example, the *FSR Act* provides that the FSCR member institutions should meet once every six months or twice a year.⁷⁷ In this regard, the researcher argues that there is a need for the provision of more regular meetings between the SARB and other financial role players to enhance information sharing arrangements.

1.8 Premises, Assumptions and Hypotheses

1.8.1 Assumptions and Premises

This research is premised on the following assumptions:

- a. the promotion, protection, enhancement and maintenance of financial stability and market integrity in South Africa relies on effective cooperation and collaboration between the SARB and other financial role players, namely, the FSCA, the PA, the NCR and the FIC;

⁷⁴ Section 26(4) of the *FSR Act*, also see Van Niekerk and Van Heerden 2020 *SALJ* 140; Qumba 2022 *SALJ* 109; Godwin, Howse and Ramsay 2016 *CIFR Working Paper* 9.

⁷⁵ Qumba 2022 *SALJ* 108; Schmulow 2017 *African Journal of International and Comparative Law* 394; Godwin and Schmulow 2015 *SALJ* 767; see related comments by Godwin 2018 *Law and Financial Markets Review* 184.

⁷⁶ Qumba 2022 *SALJ* 108; Schmulow 2017 *African Journal of International and Comparative Law* 394; Godwin and Schmulow 2015 *SALJ* 767; see related comments by Godwin 2018 *Law and Financial Markets Review* 184.

⁷⁷ Section 80(1) of the *FSR Act*, Van Niekerk and Van Heerden 2020 *SALJ* 141; also see Godwin 2018 *Law and Financial Markets Review* 184; Van Heerden and Van Niekerk 2018 *Law and Financial Markets Review* 156.

- b. the lack of measures to enforce cooperation and collaboration between the SARB and other financial role players in South Africa may result in ineffective cooperation and collaboration between the SARB and other financial role players, and may also result in regulatory gaps;
- c. the new financial regulatory framework regarding cooperation and collaboration between the SARB and other financial role players under the *FSR Act* is likely to cause a considerable burden on regulatory bodies which could hinder smooth cooperation and collaboration between the SARB and other role players.⁷⁸

1.8.2 Hypothesis

The statutory regulation of cooperation and collaboration between the central bank and other financial role players results in ineffective coordination due to stringent requirements and arrangements that cannot be easily altered or changed to meet the continuously changing needs of the global financial markets.

1.9 Limitations of the study

This research refers to the *FSR Act* as the primary legislation regulating the financial sector of South Africa. However, references to other statutes such as the *SARB Act*, *Banks Act*, *Financial Services Act* and *Australian Prudential Regulation Authority Act*⁷⁹ that are relevant for historical and comparative purposes will be made.

This research focuses on the statutory regulation of cooperation and collaboration between the SARB and other financial role players such as the FSCA, the PA, the NCR and the FIC to enhance and promote financial stability and market integrity in South Africa. In this regard, the researcher only focuses on the roles and functions of the SARB that relate to the promotion, protection, enhancement and maintenance of financial stability and market integrity only. Thus, discussions on the roles and functions of the SARB as the lender of last resort, macro-prudential supervision and monetary stability fall

⁷⁸ Schmulow *Global Economy* 10; De Jager 2013 *South African Mercantile Law Journal* 496; see related comments by Godwin and Schmulow 2015 *SALJ* 771; also see Schmulow *Journal of Banking and Finance Law and Practice* 301.

⁷⁹ Section 4 of the *SARB Act*; *Australian Prudential Regulation Authority Act* 50 of 1989 (*APRA Act*), section 10A; *Financial Services Act* 2012 Chapter 21, section 6.

outside the scope of this research. The research focuses on the regulation of cooperation and collaboration between the SARB and other financial role players such as the FSCA, the PA, the NCR and the FIC to promote, protect, enhance and maintain financial stability and market integrity in South Africa. This is done to determine the effectiveness and robustness of the current regulatory framework for cooperation and collaboration between the SARB and other financial role players. For the purposes of this research, only financial role players closely linked to the SARB, such as the FSCA, PA, FIC, NCR and FSOC are discussed. Other financial role players are only mentioned where relevant.

This is a comparative study and selected legislation relevant to the statutory regulation of cooperation and collaboration between central banks and other role players in Australia and the UK are discussed. Australia has relied on a soft law approach to regulate cooperation and collaboration between the RBA, the APRA and the ASIC for more than two decades now and has experienced flaws which it is currently addressing. As such, several lessons can be drawn for South Africa from the Australian example because Australia has been addressing and uprooting flaws from its regulation of cooperation and collaboration between the RBA and the APRA, the ASIC and the CFR. Unlike Australia, the UK has enacted express statutory regulations on cooperation and collaboration between the BOE and other role players.⁸⁰ As such, South Africa can extract some relevant lessons from the statutory regulation of cooperation and collaboration in the UK.

1.10 Justification of Comparative Analysis

The research compares the regulation of cooperation and collaboration provided under the *FSR Act* with that of Australia and the UK.

Australia has accumulated more experience regarding cooperation and collaboration between the RBA, the APRA, and the ASIC since the establishment about two decades ago.⁸¹ Although inter-agency cooperation and collaboration in Australia have not been

⁸⁰ Godwin, Li and Ramsay *CIFR* 34; Georgosouli 2013 *Capital Markets Law Journal* 67; Kallasidou 2013 *Bristol Law Review* 118; Qumba 2022 *SALJ* 92.

⁸¹ Pan E "Structural Reform of Financial Regulation" 2011 *Transnational Law and Contemporary Problems* 796, 797; see related discussion by Armstrong A and Francis R "Loss of Integrity: The True Failure of the Corporate Sector" 2008 *Journal of Business System Governance and Ethics* 254, 256; also see Jones E "The Crisis and the Australian Financial Sector" 2009 *Journal of Australian Political Economy* 86, 90; Wallis Inquiry 1997

smooth and experienced regulatory failures, several lessons can be drawn from Australia as a country that is making efforts to correct flaws and uproot problems.⁸² Australia follows a soft law regulatory approach that is based on bilateral MOUs and a culture of coordination between the RBA, the ASIC and the APRA.⁸³ Despite the regulatory provisions for cooperation and collaboration between the SARB and other financial role players under the *FSR Act*, South Africa also relies on MOUs to establish cooperation, collaboration and information sharing arrangements between the SARB and the FSCA, the PA, the FIC and the NCR. In addition, Australia established a coordinating body that has consultative and facilitation roles and functions with regard to inter-agency coordination, a body with no equivalent in the UK. Similarly, South Africa also established the FSCR to facilitate cooperation and collaboration between the SARB and other financial role players. Accordingly, the choice of Australia as a relevant comparator for South Africa was also influenced by the similarities that can be found in both jurisdictions and provide a substantive basis for comparison. The researcher draws lessons from the Australian experience which will be used to provide recommendations to enhance the regulation of cooperation and collaboration between the SARB and other financial role players later in this research.⁸⁴

The UK developed a statutory regulatory framework for cooperation and collaboration between the BOE and other financial role players such as the FCA and the PRA.⁸⁵ The *Financial Services Act* creates a statutory duty for cooperation and collaboration between the BOE and other financial role players.⁸⁶ In South Africa, the same approach is followed.

<http://fsi.treasury.gov.au/content/downloads/FinalReport/overview.pdf> (the "Wallis Report") accessed on 13 November 2021.

⁸² Schmulow 2017 *Journal of International and Comparative Law* 410; Van Niekerk and Van Heerden 2020 *SALJ* 140; Jensen and Kingston 2010 *Butterworths Journal of International Banking and Financial Law* 550; North and Wilson 2020 *University of New South Wales Law Journal* 560.

⁸³ Godwin and Schmulow 2015 *SALJ*; Ferran and Alexander 2011 *Legal Studies Research Paper Series* 6; also see Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 952; Kelly 2012 *American Society of International Law Proceedings* 327.

⁸⁴ See Chapter 9 of this research.

⁸⁵ Georgosouli 2013 *Capital Markets Law Journal* 67; Kallasidou 2013 *Bristol Law Review* 118; Goodhart CAE "The Macro-Prudential Authority: Powers, Scope and Accountability" 2011 *OECD Journal* 97, 99; Qumba 2022 *SALJ* 92.

⁸⁶ Section 6 of the *Financial Services Act*; Buiter WH "Lessons from the 2007 Financial Crisis" 2008 *Centre for Economic Policy Research* 1, 3; Schoenmaker D and Veron N "A 'Twin Peaks' Vision for Europe" in Godwin A and Schmulow A (eds) *The Cambridge Handbook of Twin Peaks Financial Regulation* (Cambridge University Press 2018) 62, 65; see related comments by Schoenmaker D

The *FSR Act* provides a statutory framework for cooperation and collaboration between the SARB and other financial role players. It should be noted that the UK has more experience than South Africa and has already made efforts to correct its flaws and regulatory challenges with regard to cooperation and collaboration between the BOE and other financial role players.⁸⁷ In this regard, considering that both the UK and South Africa follow a hard law approach, the researcher seeks to compare and contrast the statutory regulation of inter-agency coordination in South Africa and the UK to draw lessons for South Africa.

The *Financial Services Act* also requires the BOE and other financial role players to enter into MOUs with regard to cooperation and collaboration arrangements. In addition, the UK has also established cooperation and collaboration arrangements to manage financial crises, a feature that is still lacking in South Africa. As such, the researcher submits that lessons can be drawn from the UK to enhance the regulation of cooperation and collaboration between the SARB and other financial role players to promote, protect, enhance and maintain financial stability and market integrity in South Africa.

It is against this background that the UK has been selected as a relevant comparator in this research. The principles governing cooperation and collaboration between the central banks and other role players are essentially similar in the UK and South Africa. As such, relevant and practical lessons can be drawn from the UK to correct and enhance cooperation and collaboration in South Africa.

1.11 Research methodology

This research utilises a qualitative research methodology study based on a literature review and the following research methods are used:

and Veron N "A 'Twin Peaks' Vision for Europe" 63; Ferran 2011 *University of Cambridge Faculty of Law Research Paper* 14.

⁸⁷ See related comments by Yuan K, Paech P, Lou D and Zhou H "A Financial Regulatory Regime Reform Template to Ensure Financial Stability for the Chinese Economy" 2022 *China and World Economy* 1, 14; Alsharqawi A and Younes AS "Regulating the UK Financial System Post Crisis under the Financial Services and Markets Act 2000 as Amended" 2020 *Journal of Legal, Ethical and Regulatory Issues* 1, 3; Melecky M and Podpiera AC "Institutional Structures of Financial Sector Supervision, their Drivers and Historical Benchmarks" 2013 *Journal of Financial Stability* 420, 428; Kallasidou 2013 *Bristol Law Review* 127.

a. Primary and Secondary Sources

Primary sources are sources that are legally binding, for example, constitutions, statutes and case law. Secondary sources restate, discuss or explain the law and they are not legally binding, for example, journal articles and books. The researcher accessed relevant books, statutes, case law, journal articles and other relevant materials from the library. The researcher provides the dates on which websites were accessed on all Internet sources. The North West University *Potchefstroom Electronic Law Journal* Referencing style was used in this research.

b. Relevant Case Law

This research area is still fairly new and there has not been any decided court cases relating to the cooperation and collaboration between the SARB and other financial role players at the time the research is submitted.

c. Relevant Legislation

This research focuses on the regulation of cooperation and collaboration between the SARB and other financial role players under the *FSR Act*. Other relevant statutes such as the *FICA*, the *NCA*, the *Banks Act*, the *Financial Services Act*, the *Financial Services and Markets Act* and the *APRA Act* are referred to where relevant and for comparative purposes.

d. Legal Historical

Chapter two of this research provides a historical analysis. The chapter gives the background on cooperation and collaboration between the SARB and other financial role players in South Africa from 1921 when the SARB was established to 2018 when the *FSR Act* was became effective. The researcher analyses how cooperation and collaboration between the SARB and other role players were done in South Africa prior to the *FSR Act*.

e. Comparative Analysis

The researcher makes use of a comparative analysis of the regulation of cooperation and collaboration between central banks and other financial role players in the UK and

Australia to draw lessons from other jurisdictions. In this regard, the South African financial regulatory framework is compared to that of Australia and the UK.

1.12 Statement Regarding Ethics

This research utilised qualitative research methodology and all primary and secondary sources that were used were referenced. No individual or group interviews and questionnaires were used as instruments of research to hold discussions concerning any topics or issues that might be sensitive, embarrassing or upsetting to any person. No criminal or other disclosures requiring legal action and having potentially adverse effects, risks or hazards for research participants were made in the course of the study. Therefore, there was no need for arrangements to be made in respect of insurance and/or indemnity to meet the potential legal liability of the North-West University for harm to participants arising from the conduct of the research.

1.13 Relevance for the Research Unit

This research focuses on the regulation of cooperation and collaboration between the SARB and other financial role players, namely the PA, the FSCA, the NCR, the FIC, the FSCR, the FSCF, the FSOC and the FSIC, to promote, protect, enhance and maintain financial stability and market integrity in South Africa. Accordingly, the research falls under the Finance, Trade and Innovation Research Unit of the faculty of law. Moreover, the research falls under the banking law and Securities and Financial Markets Law ancillary modules under the Doctor of Laws (LLD) in Mercantile Law department of the faculty of law. In relation with the motivation of the study, the research exposes the shortcomings in the *FSR Act* so as to recommend some measures that could be employed to ensure better cooperation and collaboration between the SARB and other role players in order to promote and maintain financial stability and market integrity in South Africa. The researcher hopes that the findings of this research and/or some parts of this research will be published as book chapters or journal articles.

1.14 Framework of the Thesis

The research comprises of nine chapters including this one:

Chapter One is the introduction and background of the research. In this chapter, the researcher provides the aims, objectives, research question, literature review, scope and limitations of the research, statement of the problem, rationale of the study and the research methodology.

Chapter Two provides the historical aspects of the cooperation and collaboration between the SARB and other role players to promote, protect, enhance and maintain financial stability and market integrity in South Africa, before the introduction of the *FSR Act*. The chapter establishes whether the concepts of cooperation and collaboration between the SARB and other role players were effective and consistently enforced to promote financial stability and market integrity in the South African institutions and financial markets.

Chapter Three discusses the current statutory regulation of the cooperation and collaboration between the SARB and other financial role players to promote and maintain financial stability and market integrity in South African financial institutions and financial markets. The chapter also analyses the statutory measures introduced by the *FSR Act* to foster and to facilitate adequate cooperation and collaboration between the SARB and other role players.

Chapter Four is an analysis of the role and functions of other role players under the *FSR Act* in South Africa to maintain and promote financial stability and market integrity in the South African financial markets. The researcher discusses the roles of the PA, the FIC, FSCA, NCR, FSOC, NCC, the Financial Stability Oversight Committee, the Financial Sector Contingency Forum, the Financial System Council of Regulators, the Financial Services Tribunal and the Ombud Council. In this chapter, the researcher also discusses how the coronavirus (COVID-19) global pandemic has affected financial stability and market integrity in the South African financial markets.

Chapter Five analyses the regulation of cooperation and collaboration between the RBA and other relevant role players such as the APRA and ASIC to promote, protect, enhance and maintain financial stability and market integrity in Australian financial institutions and financial markets.

Chapter Six analyses the cooperation and collaboration between the BOE and other relevant role players to promote and maintain financial stability and market integrity in UK financial institutions and financial markets.

Chapter Seven investigates whether there are international instruments that provide for cooperation and collaboration amongst financial regulatory bodies. The researcher examines International Best Practices on cooperation and collaboration amongst financial regulators. For example, the Basel Committee on Banking Supervision (BIS), the Basel Core Principles, the International Organisation for Securities Commissions' Objectives and Principles for Securities Regulation and the International Financial Reporting Standards, as well as regional standards developed by regional cooperation mechanisms.

Chapter Eight is an overall comparative analysis of the cooperation and collaboration of the central banks and other role players in South Africa, Australia and the UK.

Chapter Nine provides recommendations regarding cooperation and collaboration between the SARB and other role players in South Africa. The chapter also provides recommendations on how the cooperation and collaboration between the SARB and other role players can be regulated and enforced to promote, protect, maintain and enhance financial stability and market integrity in South Africa.

CHAPTER TWO

HISTORICAL ASPECTS OF THE COOPERATION AND COLLABORATION BETWEEN THE SOUTH AFRICAN RESERVE BANK AND OTHER ROLE PLAYERS

2.1 Introduction

This chapter traces the regulation of the cooperation and collaboration between the South African Reserve Bank (SARB) and other relevant role players such as the Financial Services Board (FSB), the Bank Supervision Department (BSD), the National Credit Regulator (NCR) and the National Consumer Commission (NCC) from 1921 when the SARB was established to 2018. Prior to the enactment of the *Financial Sector Regulation Act*⁸⁸ which established express provisions to regulate cooperation and collaboration between the SARB and other financial role players, the regulation of inter-agency coordination was provided under the *Banks Act*.⁸⁹ However, it should be noted that such cooperation and collaboration was not done to protect, promote, enhance and maintain financial stability and market integrity in South Africa.⁹⁰ Instead, cooperation and collaboration between the SARB, the FSB and the BSD were to harmonise supervisory actions and for sharing relevant information for operational purposes. Despite the lack of express cooperation and collaboration regulations between the SARB and the BSD, the FSB, the NCR and the NCC to promote and protect financial stability between 1921 and 2018, this chapter analyses inter-agency coordination prior to the *FSR Act*.

⁸⁸ *Financial Sector Regulation Act (FSR Act)* 9 of 2017, sections 32 and 56; Shipalana P "Macroeconomic Policy Development: Lessons Learnt from South Africa during COVID-19" 2021 *African Portal* 1, 8; Schmulow A "Retail Market Conduct Reforms in South Africa Under Twin Peaks" 2017 *Law and Financial Markets Review* 164; Van Niekerk G and Van Heerden C "The Importance of a Legislative Framework for Co-operation and Collaboration in the Twin Peaks Model of Financial Regulation" *South African Law Journal* 2020 108, 111.

⁸⁹ Van Zyl C, Botha Z, Skerritt P and Goodspeed I *Understanding South African Financial Markets* 3rd ed (Van Schaik Publishers 2009) 12; Botha E and Makina D "Financial Regulation and Supervision: Theory and Practice in South Africa" 2011 *International Business and Economics Research Journal* 27, 28; Schmulow A "Who Will Be Doing What Under South Africa's New 'Twin Peaks' Model" 2018 *Finweek* 34, 34; Qumba MF "A Comparative Analysis of the Twin Peaks Model of Financial Regulation in South Africa and the United Kingdom" 2022 *South African Law Journal* 78, 80.

⁹⁰ *Banks Act* 94 of 1990, section 4(3); Van Zyl *et al* *Understanding South African Financial Markets* 35; Falkena H, Bamber R, Llewellyn D and Store T *Financial Regulation in South Africa* 2nd ed (SA Financial Sector Forum 2001) 19; De Jager 2013 *South African Mercantile Law Journal* 495.

2.2 The Regulation of the Cooperation and Collaboration between the SARB and Relevant Role Players from 1921 to 2018

2.2.1 The Regulation of Cooperation and Collaboration between the SARB and other Financial Role Players under the Currency and Banking Act

The SARB was established by the *Currency and Banking Act* as a private institution tasked with the right to issue banknotes and coins, uphold the credit markets of South Africa, and prepare measures to manage systemic risks and financial crises in South Africa.⁹¹ In 1944, the *Currency and Banking Act* was later replaced by the *South African Reserve Bank Act*,⁹² whose main mandate was broadening the freedom and powers of the SARB by granting the SARB powers to issue currency indefinitely, protect the value of the South African currency and any other matter incidental hereto.⁹³ However, it appears that the *Currency and Banking Act* made no provision for cooperation and collaboration between the SARB and other financial role players to fulfil its mandates. In other words, at this stage, there were no legislative provisions in the *Currency and Banking Act* as well as the *Banks Act* regulating cooperation and collaboration between the SARB and other role players to promote, protect and enhance financial stability and market integrity in South Africa.

⁹¹ *Currency and Banking Act* 31 of 1920 (*Currency and Banking Act*), section 3; Strakosch H "The South African Reserve Bank" 1921 *The Economic Journal* 172, 174; see related discussion by Ojo TA "Impact of Institutional Quality and Governance on Financial Inclusion for Women in South Africa: A Case of Gauteng Women Entrepreneurs" 2021 *Strategic Review for Southern Africa* 59, 60; see also related discussion by Miyajima K and Yetman J "Assessing Inflation Expectations Anchoring for Heterogeneous Agents: Analysts, Businesses and Trade Unions" 2019 *Applied Economics* 4499, 4505.

⁹² *South African Reserve Bank Act* 29 of 1944 (*SARB Act of 1944*), section 2; Vermeulen C "One Hundred Years of Private Shareholding in the South African Reserve Bank" 2021 *Economic History of Developing Regions* 245, 252; Rossouw J and Rossouw C "Forcing the Few: Issues from the South African Reserve Bank's Legal Action Against its Delinquent Shareholders" 2017 *Southern African Business Review* 1, 6.

⁹³ Bradley B, Padayachee V and Rossouw J "Two of the Most Eventful Years in the History of the South African Reserve Bank: William Henry Clegg and Johannes Postmus and the 1931–1932 Crisis" 2021 *Economic History of Developing Regions* 194, 195; see related comments by Crockett A "The Theory and Practice of Financial Stability" 1996 *De Economist* 531, 533; Schulze WG "The Sources of South African Banking Law - A Twenty-First Century Perspective (Part 1)" 2002 *South African Mercantile Law Journal* 438, 440.

2.2.2 *The Regulation of Cooperation and Collaboration between the SARB and other Financial Role Players under the Banks Act*

The *Banks Act* authorised the Registrar of Banks to conclude written arrangements relating to cooperation and collaboration between the SARB and other financial role players.⁹⁴ The Registrar of Banks was required to conclude written arrangements regarding cooperation and collaboration with any financial institution that the Registrar deemed fit for cooperation and collaboration.⁹⁵ These agreements were required to be in writing and presented in the form of Memorandums of Understanding (MOUs). However, it should be noted that the scope and ambit for the required cooperation and collaboration between the SARB and other role players were limited to supervisory matters only.⁹⁶ This means that the *Banks Act* did not provide for cooperation and collaboration between SARB and other financial role players to promote, protect, enhance and maintain financial stability and market integrity.⁹⁷

According to the *Banks Act*, cooperation and collaboration arrangements between the SARB and other financial role players such as the FSB, the BSD, the NCR and the NCC also entailed sharing relevant information with each other.⁹⁸ The *Banks Act* provides that the Registrar had to be convinced that such information shared by the SARB was

⁹⁴ Section 4(3) of the *Banks Act* provided for cooperation between the SARB and a banking institution's host supervisor for purposes of, *inter alia*, conducting on-site inspections and information sharing on matters of the financial status of the banking institution in question; section 33 of the *SARB Act*; Constitution of the Republic of South Africa, 1996, section 224; section 3 of the *South African Reserve Bank Act*; Fourie 2021 *Economic History of Developing Regions* 118; Bradley B, Padayachee V, and Rossouw J "Two of the Most Eventful Years in the History of the South African Reserve Bank: William Henry Clegg and Johannes Postmus and the 1931–1932 Crisis" 2021 *Economic History of Developing Regions* 194, 195.

⁹⁵ Section 4(3) of the *Banks Act*, see related comments by Malan and Pretorius 2001 *South African Mercantile Law Journal* 39; Bordo 2021 *Open Economies Review* 589; De Jager 2013 *South African Mercantile Law Journal* 499;

⁹⁶ Bradley, Padayachee and Rossouw 2021 *Economic History of Developing Regions* 199; Fourie 2021 *Economic History of Developing Regions* 120; Rossouw 2011 *Economic History of Developing Regions* 8.

⁹⁷ Van Niekerk *The Role of the Central Bank* 88; De Jager 2013 *South African Mercantile Law Journal* 499; Van Heerden and Van Niekerk 2020 *SALJ* 109.

⁹⁸ Section 89 of the *Banks Act*; Bradley, Padayachee and Rossouw 2021 *Economic History of Developing Regions* 197; Bordo 2021 *Open Economies Review* 589; De Jager 2013 *South African Mercantile Law Journal* 499.

essential for the other financial role players to fulfil their roles and objectives.⁹⁹ For example, the SARB could only share information relating to financial credit markets with the NCR. The researcher submits that, it seems as though the Registrar had the powers and authority to determine when and how the SARB can cooperate and collaborate with other financial role players. The advantage of this was to safeguard against cumbersome coordination that could affect the roles and functions of the SARB. This was also essential to ensure that cooperation and collaboration between the SARB and other financial role players such as the FSB, the NCC and the NCR were relevant and adequate for the fulfilment of their regulatory functions.

To give effect to the provisions of the *Banks Act*, the SARB concluded an MOU to establish cooperation, collaboration and information sharing arrangements with the FSB.¹⁰⁰ The MOU regarding cooperation and collaboration between the SARB and the FSB provided that the SARB and the FSB should meet regularly to discuss systemic issues.¹⁰¹ The two role players agreed to converge regularly and discuss systemic issues. The MOU between the BSD and the FSB provided arrangements for shared supervisory mandates and sharing information relating to threatening systemic events. The BSD and the FSB also agreed on coordinating the supervision of financial conglomerates such as banks, mutual banks and other financial institutions.¹⁰² It is submitted that this was one of the tacit ways through which cooperation between the SARB and prudential institutions was regulated. It should also be noted that cooperation and collaboration between the SARB and other role players in the past were not expressly prescribed to maintain,

⁹⁹ Section 89 of the *Banks Act*; Bradley, Padayachee and Rossouw 2021 *Economic History of Developing Regions* 197; Bordo 2021 *Open Economies Review* 589; De Jager 2013 *South African Mercantile Law Journal* 499.

¹⁰⁰ See related comments by Rossouw 2011 *Economic History of Developing Regions* 12; also see Fourie 2021 *Economic History of Developing Regions* 11; Botha and Makina 2011 *International Business and Economics Research Journal* 25.

¹⁰¹ International Monetary Fund "South Africa: Financial System Stability Assessment" 2014 *IMF Staff Country Reports* 24; South African Reserve Bank Webpage – Publication and Notices - Publication detail (8 December 1998) <https://www.resbank.co.za/Publications/Detail-Item-View/Pages/Publications.aspx?sarbweb=3b6aa07d-92ab-441f-b7bf-bb7dfb1bedb4&sarblast=21b5222e-7125-4e55-bb65-56fd3333371e&sarbitem=4452> accessed 29 March 2021.

¹⁰² Van Niekerk *The Role of the Central Bank* 88; International Monetary Fund 2014 *IMF Staff Country Report* 78; Rossouw 2011 *Economic History of Developing Regions* 12; also see Fourie 2021 *Economic History of Developing Regions* 119.

promote and enhance financial stability and market integrity in South Africa as it is under the *FSR Act*.¹⁰³ This can be attributed to the fact that no express provisions conferring the duty to promote, maintain and enhance financial stability in South Africa on the SARB and other financial role players were made.¹⁰⁴ This resulted in the dominance and overburdening of other role players which led to poor information sharing and cooperation amongst the role players.¹⁰⁵ As such, it can be said that cooperation and collaboration provisions under the *Banks Act* were not adequate enough to promote, maintain and enhance financial stability and market integrity in South Africa.

2.2.3 *The Regulation of Cooperation and Collaboration between the SARB and other Financial Role Players under the Financial Services Board Act*

The *Financial Services Board Act*¹⁰⁶ authorised the FSB to discuss any matters of common interest with other financial role players, mutually assist other financial role players and participate in any proceedings to fulfil its roles and functions. The *FSB Act* also empowered the FSB to enter into bilateral MOUs regarding cooperation and collaboration with other financial role players.¹⁰⁷ It should be noted that the *FSB Act* provided that cooperation and collaboration between the FSB and other financial role players were done to promote financial stability, enhance the safety and soundness of financial institutions, coordinate supervisory actions and share information relevant to the fulfilment of its roles and functions. In this regard, the researcher submits that it seems that the FSB was also tasked with assisting the SARB to promote and maintain financial stability in South Africa. However, the researcher argues that the regulations relating to cooperation and collaboration under the *FSB Act* were not adequate enough to promote,

¹⁰³ Sections 26 and 76 of the *FSR Act*; see related comments by Van Niekerk and Van Heerden 2020 *SALJ* 118; Godwin 2017 *Law and Financial Markets Review* 155.

¹⁰⁴ De Jager 2013 *South African Mercantile Law Journal* 499; Van Heerden and Van Niekerk 2020 *SALJ* 109; see related comments by Rajendaran *IFMR Finance Foundation* 6.

¹⁰⁵ Davies and Green *Global Financial Regulation* 67; Collocot "Financial Regulation in South Africa" 4; Rossouw 2011 *Economic History of Developing Regions* 15; De Jager 2013 *South African Mercantile Law Journal* 504.

¹⁰⁶ *Financial Services Board Act* 97 of 1990 (*FSB Act*), section 12; Ferhani and Sayeh 2008 *International Monetary Fund* 15; see related comments by Collocot "Financial Regulation in South Africa" 4; Rossouw 2011 *Economic History of Developing Regions* 15.

¹⁰⁷ Section 12 of the *FSB Act*; see related comments by Bradley, Padayachee and Rossouw 2021 *Economic History of Developing Regions* 199; Bordo 2021 *Open Economies Review* 585; De Jager 2013 *South African Mercantile Law Journal* 501.

protect and maintain financial stability. There was a need for comprehensive arrangements to establish how the FSB could effectively cooperate and collaborate with the SARB to promote, protect and enhance financial stability and market integrity in South Africa.

2.2.4 The Regulation of Cooperation and Collaboration between the SARB and other Financial Role Players under the Financial Markets Act

The *Financial Markets Act*¹⁰⁸ provided that the FSB through the Registrar of Securities Services, should make necessary arrangements to cooperate and collaborate with the Governor of the SARB to monitor and mitigate systemic risks that threaten market integrity. The *Financial Markets Act* also provided that the cooperation and collaboration arrangements between the SARB and the FSB should include an arrangement to share information regarding any potential or actual systemic risks that threaten the integrity of the financial markets.¹⁰⁹ The researcher submits that the regulation of cooperation and collaboration between the SARB and the FSB under the *Financial Markets Act* was focused on promoting market integrity in South Africa. In this regard, the regulation of cooperation and collaboration between the SARB and other financial role players under the *Financial Markets Act* was not effective and adequate enough to promote financial stability in South Africa. This could have been due to the roles and functions of the FSB which did not include the promotion and maintenance of financial stability. It should also be noted that prior to the *FSR Act*, the SARB's financial stability mandate was not expressly provided in the statute.¹¹⁰ Nonetheless, the researcher submits that the regulation of cooperation and collaboration between the SARB and other financial role

¹⁰⁸ *Financial Markets Act* 19 of 2012, section 30; see related comments by Bradley, Padayachee and Rossouw 2021 *Economic History of Developing Regions* 199; Bordo 2021 *Open Economies Review* 585.

¹⁰⁹ Section 30(2) of the *Financial Markets Act*, Swart L and Lawack V "Understanding the South African Financial Markets: An Overview of Regulators" 2010 *Obiter* 619, 626; Van Zyl *et al* *Understanding South African Financial Markets* 5; Goodspeed I "Twin Peaks" 2013 *South African Financial Market Journal* 2, 6.

¹¹⁰ De Jager 2013 *South African Mercantile Law Journal* 489; Van Heerden and Van Niekerk 2017 *Law and Financial Markets Review* 154; Van Niekerk and Van Heerden 2020 *SALJ* 110; see related comments by Godwin 2017 *Law and Financial Markets Review* 186.

players was effective but not adequate enough to promote and enhance market integrity in South Africa.

2.2.5 The Regulation of Cooperation and Collaboration between the SARB and other Financial Role Players under the National Credit Act

The *National Credit Act* established the NCR to regulate consumer credit provider institutions in South Africa.¹¹¹ The *NCA* provides that the NCR should cooperate and collaborate with the SARB and other financial role players in matters of common interest.¹¹² The *NCA* also provides that, the NCR should conclude MOUs regarding cooperation and collaboration to establish cooperation, collaboration and information sharing arrangements between the NCR and the relevant financial role player.¹¹³ It should be noted that the NCR is required to consult and discuss with the SARB or other relevant financial role players before it takes action against a credit provider. The researcher submits that this provision ensures that there is mutual assistance, prior consultation and coordinated decision making to promote transparency and consistency of action. It should be noted that the regulation of cooperation and collaboration between the SARB and other financial role players under the *NCA* is only mentioned for the purposes of enhancing the credit markets. However, the researcher argues that a stable and viable credit market promotes the integrity of financial markets by improving the accessibility of financial resources to consumers.¹¹⁴ Accordingly, it can be said that the regulation of cooperation and collaboration under the *NCA* promotes market integrity and there is a need for consistent enforcement to ensure its effectiveness and adequacy.

¹¹¹ *National Credit Act* 34 of 2005 (NCA), section 2; Chitimira H and Ncube M "The Role of Regulatory Bodies and other Role-Players in the Promotion of Financial Inclusion in South Africa" 2020 *Acta Universitatis Danubius Juridica* 25, 28; Chitimira H and Magau P "A Legal Conspectus of Some Role-Players in the Development of Financial Education in South Africa" 2022 *EIRP Proceedings* 360, 368.

¹¹² Sections 37 and 38 of the *NCA*; see related comments by Van Niekerk and Van Heerden 2020 *SALJ* 118; also see Chitimira and Ncube 2020 *Acta Universitatis Danubius. Juridica* 28; Chitimira and Magau 2022 *EIRP Proceedings* 369.

¹¹³ Sections 17 and 57 of the *NCA*.

¹¹⁴ See related comments by Chitimira H and Ncube M "Overview Legislative Flaws Hampering the Promotion of Financial Inclusion for the Poor and Low-Income Earners in South Africa" 2021 *Interdisciplinary Journal of Economics and Business Law* 67, 71; Chitimira and Ncube 2020 *Acta Universitatis Danubius. Juridica* 28; Chitimira and Magau 2022 *EIRP Proceedings* 369.

2.2.6 *The Establishment of Coordinating Bodies to Promote Coordination between the SARB and Other Financial Role Players*

The Financial Sector Contingency Forum (FSCF) was established in 2003 to coordinate arrangements, plans and structures to manage financial crises in South Africa.¹¹⁵ The member institutions of the FSCF were the SARB, the National Treasury, the FSB, the Banking Association South Africa, the South African Insurance Association, the JSE, the Payments Association of South Africa, SA Bankers Services Company, South Africa's Central Securities Depository (Strate Limited) and the Association for Savings and Investment South Africa. The member institutions of the FSCF concluded a MOU to establish the roles and functions of each member institution to promote the optimum operation of the FSCF.¹¹⁶ The MOU also established information sharing arrangements between member institutions in relation to the execution of agreed actions to ensure the optimum operation of the whole financial system. The researcher submits that the establishment of the FSCF was a relevant mechanism to foster cooperation and collaboration between the SARB and other financial role payers in South Africa. Nonetheless, the FSCF did not specifically focus on promoting either financial stability or market integrity. Instead, the FSCF focused on ensuring regulatory coordination to ensure the effective operation of the whole financial system.

It should also be noted that in 2010, plans to establish a Council of Financial Regulators came underway. The purpose of the council was to enhance cooperation and collaboration between financial role players including the BSD, FSB, NCR, FSAP and FIC.¹¹⁷ However, the project to establish the Council of Financial Regulators did not progress because it was considered 'less urgent'. The SARB began publishing financial stability reviews every six months to improve reporting and information sharing in South

¹¹⁵ See related comments by Godwin A, Howse T and Ramsey I "Twin Peaks: South Africa's Financial Sector Regulatory Framework" 2017 *SALJ* 665, 670; Van Niekerk and Van Heerden 2020 *SALJ* 120; International Monetary Fund "South Africa: Financial System Stability Assessment" 13.

¹¹⁶ Goodspeed 2013 *South African Financial Market Journal* 6; Rossouw 2011 *Economic History of Developing Regions* 12; also see Fourie 2021 *Economic History of Developing Regions* 119.

¹¹⁷ Ferhani and Sayeh 2008 *International Monetary Fund* 26; Oosterloo S and De Haan J "Central Banks and Financial Stability: A Survey" 2004 *Journal of Financial Stability* 256, 258; Schoombee D "The Stals Era of Monetary Policy in South Africa" 2003 *South African Journal of Economic History* 31, 33.

Africa. In 2011, the Ministry of Finance published a document, *A Safer Financial Sector to Serve South Africa Better* (the Red Book), that suggested some considerations regarding cooperation and collaboration between the SARB and other role players in order to enhance the promotion and protection of financial stability and market integrity in South Africa.¹¹⁸ Although the FSB and the SARB took measures to enhance cooperation and collaboration through sharing of information to contribute to effective oversight of financial conglomerates, cooperation and collaboration were not effectively and uniformly enforced in South Africa.¹¹⁹ Accordingly, it can be said that despite the efforts to enhance cooperation and collaboration between the SARB and the FSB, the BSD, the NCC and the NCR, the lack of comprehensive arrangements and measures to foster cooperation and collaboration in South Africa resulted in poor and ineffective cooperation and collaboration between the SARB and other financial role players.

In 2008, a Financial Sector Assessment Program (FSAP) was performed by the IMF and the World Bank in South Africa.¹²⁰ The program assessed the South African financial regulatory framework and outlined aspects of the framework that required reform.¹²¹ Amongst other things that needed reform, the FSAP found that there was a need to prioritise and strengthen cooperation, collaboration and information sharing arrangements between the SARB and other financial role players in South Africa.¹²² It was also found that there was need to identify regulatory gaps and overlaps and establish

¹¹⁸ Millard 2016 *PER/PELJ* 2; see also Van Niekerk *The Role of the Central Bank* 73; Van Zyl *et al Understanding South African Financial Markets* 34; Botha and Makina 2011 *International Business and Economics Research Journal* 28.

¹¹⁹ Ferhani and Sayeh 2008 *International Monetary Fund* 26; see related comments by Angel and McCabe 2001 *Journal of Business Ethics* 591; Shefrin and Statman 1993 *Financial Analyst Journal* 25; Oosterloo and De Haan 2004 *Journal of Financial Stability* 259.

¹²⁰ Ferhani and Sayeh 2008 *International Monetary Fund* 1 and 15; Botha and Makina 2011 *International Business and Economics Research Journal* 32; Bradley, Padayachee, and Rossouw 2021 *Economic History of Developing Regions* 201.

¹²¹ Ferhani and Sayeh 2008 *International Monetary Fund* 7, 23-24; Botha and Makina 2011 *International Business and Economics Research Journal* 32. Rossouw 2011 *Economic History of Developing Regions* 12; also see Fourie 2021 *Economic History of Developing Regions* 119.

¹²² Ferhani and Sayeh 2008 *International Monetary Fund* 7; Rossouw J "A Selective Reflection on the Institutional Development of the South African Reserve Bank Since 1921" 2011 *Economic History of Developing Regions* 3, 4; Fourie J "Macroeconomic History in South Africa: The South African Reserve Bank Centennial Special Issue" 2021 *Economic History of Developing Regions* 117, 118.

clear demarcations of the roles and mandates of each regulator.¹²³ The FSAP noted that the lack of mechanisms to resolve policy disagreements amongst financial role players was a result of poor cooperation and collaboration amongst financial role players.¹²⁴ To address these shortcomings, the National Treasury set out proposals for a new financial regulatory approach that prioritised cooperation and collaboration between the SARB and other financial role players in South Africa.

2.3 The Cooperation and Collaboration between the SARB and the FSB to Protect Financial Stability and Market Integrity in South Africa

The FSAP made recommendations to strengthen the cooperation, coordination and sharing of information between the SARB, the FSB and the NCR to protect, promote and enhance financial stability and market integrity in South Africa.¹²⁵ Accordingly, the BSD, as housed by the SARB, and the FSB entered into an MOU to formalise their cooperation, collaboration and information sharing arrangements.¹²⁶ Therefore, the MOU outlined mechanisms for cooperation and collaboration between the SARB and the FSB.¹²⁷ The SARB and the FSB agreed to meet quarterly and discuss matters relating to unprecedented events which might threaten financial stability, the effective functioning of the financial markets, supervisory issues and interrelated regulatory issues regarding

¹²³ Ferhani and Sayeh 2008 *International Monetary Fund* 23; De Jager "The South African Reserve Bank: Blowing Winds of Change (Part 1)" 2013 *South African Mercantile Law Journal* 342, 353; Botha and Makina 2011 *International Business and Economics Research Journal* 25; De Jager 2013 *South African Mercantile Law Journal* 504.

¹²⁴ Ferhani and Sayeh 2008 *International Monetary Fund* 23-24; see related comments by Malan and Pretorius "The Reserve Bank, Banks and Clearing Houses in South African Law: Part 1" 2001 *South African Mercantile Law Journal* 34, 35; Malan and Pretorius "The Reserve Bank, Banks and Clearing Houses in South African Law: Part 2" 2001 *South African Mercantile Law Journal* 62, 63; Bordo MD "Monetary Policy Cooperation/Coordination and Global Financial Crises in Historical Perspective" 2021 *Open Economies Review* 587, 591.

¹²⁵ Viñals J and Brook PJ "The Financial Sector Assessment Program After Ten Years: Experience and Reforms for the Next Decade" *IMF-World Bank* 28 August 2009 5; Ferhani and Sayeh 2008 *International Monetary Fund* 7; Schooner HM "The Role of Central Banks in Bank Supervision in the United States and the United Kingdom" 2002 *Brooklyn Journal of International Law* 411, 412.

¹²⁶ Thomas R "Trade in Financial Services in Southern Africa: What Room for Negotiators Post-2008 Financial Crisis?" 2011 *South African Institute of International Affairs Research Report* 8 42; Godwin, Howse and Ramsey 2017 *South African Law Journal* 696; Ferhani and Sayeh 2008 *International Monetary Fund* 23-24.

¹²⁷ International Monetary Fund Monetary and Markets Department "Basel Core Principles for Effective Banking Supervision: Detailed Assessment of Compliance" October 2010 4; Ferhani and Sayeh 2008 *International Monetary Fund* 25.

effective cooperation and collaboration with other financial role players.¹²⁸ The MOU also clearly outlined the mandates and duties of each party to avoid duplication of tasks and regulatory overlaps in relation to the regulation and supervision of financial markets in South Africa.¹²⁹ In 2010, the SARB and the FSB hosted several supervisory meetings to enhance information sharing mechanisms, curb regulatory gaps within group supervision and help each regulator to identify potential regulatory arbitrages and systemic risks that may threaten financial stability and the functioning of the financial markets.¹³⁰

The FSB and the SARB also conducted regular meetings to resolve policy disagreements and matters involving the roles and responsibilities of the BSD, the NCR, the FIC and the NCC.¹³¹ This entails that the SARB and the FSB worked together to resolve disputes relating to financial sector regulation. Given this background, it shows that cooperation and collaboration between the SARB and the FSB were not done to enhance, maintain and promote financial stability and market integrity in South Africa. Also, such cooperation and collaboration were not regulated in terms of any formal legislative provision and was not adequate enough to promote, protect, enhance and maintain financial stability and market integrity in South Africa as evidenced by regulatory gaps and overlaps that occurred in the previous silo regulatory framework.¹³² The lack of a robust regulatory framework can be said to be one of the reasons why cooperation and collaboration between the SARB, the BSD, the FSB, the NCC and the NCR was not consistent.

¹²⁸ Viñals and Brook IMF-World Bank 5; Ferhani and Sayeh 2008 *International Monetary Fund* 26; Shefrin H and Statman H "Ethics, Fairness and Efficiency in Financial Markets" 1993 *Financial Analyst Journal* 21, 22; Angel JJ and McCabe D "Fairness in Financial Markets: The Case of High Frequency Trading" 2001 *Journal of Business Ethics* 585, 592-593.

¹²⁹ Ferhani and Sayeh 2008 *International Monetary Fund* 26; see related comments by Angel and McCabe 2001 *Journal of Business Ethics* 591; Shefrin and Statman 1993 *Financial Analyst Journal* 25;

¹³⁰ Ferhani and Sayeh 2008 *International Monetary Fund* 26; Thomas 2011 *South African Institute of International Affairs Research Report* 44; also see Cooke P *The Future of Financial Regulation: The Financial Regulator* (Central Banking Publications: London 1999) 23.

¹³¹ Swart and Lawack 2010 *Obiter* 619, 626; Van Zyl *et al Understanding South African Financial Markets* 5; Botha and Makina 2011 *International Business and Economics Research Journal* 28; Goodspeed 2013 *South African Financial Market Journal* 6.

¹³² Botha and Makina 2011 *International Business and Economics Research Journal* 28; De Jager 2013 *South African Mercantile Law Journal* 498; Angel and McCabe 2001 *Journal of Business Ethics* 589.

2.4 Cooperation and Collaboration between the SARB and the BSD to Promote, Protect, Enhance and Maintain Financial Stability and Market Integrity in South Africa

The SARB was divided into different departments and each department had specific duties and functions to ensure effective regulation and supervision of financial institutions.¹³³ The BSD cooperated with the SARB to regulate and supervise banking institutions to ensure financial stability and protect the interests of the customers.¹³⁴ The BSD was also tasked with ensuring that the SARB complies with the relevant anti-money laundering and financing terrorism (AML/CFT) to combat money laundering activities that could threaten financial stability. This was effective to promote market integrity and financial stability by preventing money laundering activities that threaten market integrity and financial stability. For example, in 2014 the BSD fined four banks in South Africa to the value of R125 million for failure to comply with the AML/CFT laws in South Africa.¹³⁵ In this regard, it is submitted that the cooperation and collaboration between the SARB and the BSD contributed to the promotion and protection of financial stability and market integrity in South Africa.

2.5 The Regulation of the Cooperation and Collaboration between the SARB and Relevant Regulatory Bodies Post 2018

The *FSR Act* came into effect in 2017 as the primary legislation for financial sector regulation. The *FSR Act* introduced a new financial regulatory architecture that is embedded in effective cooperation and collaboration to promote, protect, maintain and enhance financial stability and market integrity in South Africa.¹³⁶ The *FSR Act*

¹³³ Swart and Lawack 2010 *Obiter* 626; Van Zyl *et al Understanding South African Financial Markets* 5; Botha and Makina 2011 *International Business and Economics Research Journal* 28; Goodspeed 2013 *South African Financial Market Journal* 6.

¹³⁴ Swart and Lawack 2010 *Obiter* 626; Goodspeed 2013 *South African Financial Market Journal* 6; see related comments by De Jager 2013 *South African Mercantile Law Journal* 495; Malan FR and Pretorius JT "Contemporary Issues in South African Banking Law" 2001 *THRHR* 64, 66; Crockett A "The Theory and Practice of Financial Stability" 1996 *De Economist* 531, 533; Schulze WG "The Sources of South African Banking Law - A Twenty-First Century Perspective (Part 1)" 2002 *South African Mercantile Law Journal* 438, 440.

¹³⁵ *Financial Intelligence Centre Act* 38 of 2001 (*FICA*), section 21; see related comments by Swart and Lawack 2010 *Obiter* 630; also see De Jager 2013 *South African Mercantile Law Journal* 499.

¹³⁶ Section 26 and 76 of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 110; Godwin and Schmulow 2015 *SALJ* 759; Godwin 2017 *Law and Financial Markets Law* 184.

established two key financial role players, the Prudential Authority (PA) for prudential regulation and the Financial Sector Conduct Authority (FSCA) to regulate market conduct.¹³⁷ The *FSR Act* also expressly conferred the duty to promote, protect, enhance and restore financial stability on the SARB.¹³⁸ The *FSR Act* established several mechanisms to foster cooperation and collaboration between the SARB and other financial role players to promote, protect, enhance and maintain financial stability and market integrity in South Africa.¹³⁹ For example, a statutory duty to cooperate and collaborate, a statutory duty to conclude MOUs regarding cooperation and collaboration and the establishment of bodies and forums to facilitate cooperation and collaboration between the SARB and other financial role players to promote, protect, enhance and maintain financial stability and market integrity in South Africa.¹⁴⁰ The current statutory regulatory framework for cooperation and collaboration between the SARB and other financial role players in South Africa is discussed in detail in the next chapter of this thesis.

2.7 Conclusion

The researcher submits that the regulation of cooperation and collaboration between the SARB and other financial role players between 1921 and 2018 was characterised by the lack of detailed arrangements and effective measures to foster cooperation and collaboration between the SARB and other financial role players. The *Banks Act*, the *Financial Markets Act*, the *FSB Act* and the *NCA* made provisions for cooperation and

¹³⁷ Sections 32 and 56 of the *FSR Act*; Sithole A "Regulatory Strategy of the Financial Sector Conduct Authority: October 2018 to September 2021" 2018 *Financial Sector Conduct Authority Publications* 1, 3; Godwin, Howse and Ramsay 2017 *SALJ* 665.

¹³⁸ Section 12 of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 115; Van Heerden and Van Niekerk 2017 *Law and Financial Markets Review* 156; Van Heerden C and Van Niekerk GM "Twin Peaks in South Africa: A New Role for the Central Bank" 2017 *Journal of Contemporary Roman Dutch Law* 636, 638; see related comments by Llewellyn DT "Institutional Structure of Financial Regulation and Supervision: The Basic Issues" in World Bank Seminar *Aligning Supervisory Structures with Country Needs Seminar* (6-7 June 2006 Washington DC) 6;

¹³⁹ Qumba MF "A Comparative Analysis of the Twin Peaks Model of Financial Regulation in South Africa and the United Kingdom" 2022 *SALJ* 78, 108; Schmulow A "Financial Regulatory Governance in South Africa: The Move Towards Twin Peaks" 2017 *African Journal of International and Comparative Law* 393, 395; Godwin A, Li G and Ramsay I "Is Australia's Twin Peaks System of Financial Regulation a Model for China (Part 2)" 2016 *Hong Kong Law Journal* 935, 957.

¹⁴⁰ Qumba 2022 *SALJ* 108; Osode P "Two Heads are Better than One: Assessing South Africa's 'Twin Peaks' Financial Regulation Model" 2021 *Interdisciplinary Journal of Economics and Business Law* 9, 27; Godwin, Howse and Ramsay 2017 *SALJ* 668; Van Niekerk and Van Heerden 2020 *SALJ* 115.

collaboration but the provisions were not adequate enough to foster effective inter-agency coordination. This follows the fact that inter-agency coordination was not done to promote financial stability and enhance market integrity but to fulfil supervisory roles and functions. The lack of adequate cooperation and collaboration arrangements to promote, protect, enhance and maintain financial stability and market integrity gave rise to regulatory gaps and overlapping functions in the financial sector. It should also be noted that the establishment of coordinating forums and committees at this time was ineffective due to the lack of underpinning regulations.¹⁴¹ Accordingly, the researcher submits that the regulation of cooperation and collaboration between the SARB and other financial role players prior to the enactment of the FSR Act was not robust and adequate enough to protect, promote, enhance and maintain financial stability and market integrity in South Africa.¹⁴²

The first time that cooperation and collaboration were comprehensively regulated in South Africa was in 2018 when the *FSR Act* came into effect. The *FSR Act* introduced the statutory duty to cooperate and collaborate between the SARB and other financial role players to promote financial stability, enhance market integrity and fulfil their regulatory roles and functions. Accordingly, the researcher submits that the establishment of clear roles and functions for the SARB and other financial role players was the first step in promoting effective coordination between the SARB and other financial role players in South Africa.¹⁴³ Cooperation, collaboration, information sharing, transparency and accountability are key aspects of promoting, protecting, enhancing and maintaining financial stability.¹⁴⁴ As such, the decision to provide for comprehensive cooperation and collaboration between the SARB and other financial role players is highly commendable.

¹⁴¹ Van Zyl *et al* *Understanding South African Financial Markets* 35; Falkena, Bamber, Llewellyn and Store *Financial Regulation in South Africa* 28; see related comments by De Jager 2013 *South African Mercantile Law Journal* 495.

¹⁴² Section 33(2) of the SARB Act; see related comments by Rossouw 2011 *Economic History of Developing Regions* 12; see related comments by Fourie 2021 *Economic History of Developing Regions* 119; Botha and Makina 2011 *International Business & Economics Research Journal* 40

¹⁴³ Schmulow 2017 *African Journal of International and Comparative Law* 399; see related comments by Godwin Li and Ramsay 2016 *Hong Kong Law Journal* 952; Van Heerden and Van Niekerk 2018 *THRHR* 645; Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 23.

¹⁴⁴ Van Niekerk and Van Heerden 2020 *SALJ* 115; see related comments by Van Heerden and Van Niekerk 2017 *Law and Financial Markets Review* 156; also see Van Heerden and Van Niekerk

The next chapter analyses the current regulatory framework for cooperation and collaboration between the SARB and other financial role players to promote, protect, enhance and maintain financial stability and market integrity in South Africa. This is done to determine whether the regulatory framework for cooperation and collaboration established under the *FSR Act* is robust and adequate enough to protect, promote, enhance and maintain financial stability and market integrity in South Africa.

2017 *Journal of Contemporary Roman Dutch Law* 640; Llewellyn "Institutional Structure of Financial Regulation and Supervision: The Basic Issues" 21.

CHAPTER THREE

THE CURRENT STATUTORY REGULATION OF THE COOPERATION AND COLLABORATION BETWEEN THE SARB AND OTHER FINANCIAL ROLE PLAYERS IN SOUTH AFRICA

3.1 Introduction

The enactment of the *Financial Sector Regulation Act* established a statutory duty of cooperation and collaboration between the South African Reserve Bank (SARB) and other financial role players to promote and protect financial stability and market integrity in South Africa.¹⁴⁵ The *FSR Act* confers an express mandate on the SARB to cooperate and collaborate with other financial role players in fulfilling its financial stability mandate.¹⁴⁶ The *FSR Act* also mandates other financial role players such as the Prudential Authority (PA), the Financial Sector Conduct Authority (FSCA), the National Credit Regulator (NCR) and the Financial Intelligence Centre (FIC), to cooperate and collaborate with the SARB and other financial role players to fulfil their mandates.¹⁴⁷ To ensure effective cooperation and collaboration between the SARB and other financial role players, several mechanisms have been introduced by the *FSR Act*.¹⁴⁸ For example, several committees and bodies were established under the *FSR Act* to facilitate cooperation and collaboration

¹⁴⁵ *Financial Sector Regulation Act* 9 of 2017 (*FSR Act*), sections 26 and 76; Van Niekerk GM and Van Heerden CM "The Importance of a Legislative Framework for Co-operation and Collaboration in the Twin-Peaks Model of Financial Regulation" 2020 *SALJ* 108, 116; Godwin A and Schmulow A "The Financial Sector Regulation Bill in South Africa, Second Draft: Lesson from Australia" 2015 *SALJ* 756, 762; Schmulow A "Financial Regulatory Governance in South Africa: The Move Towards Twin Peaks" 2017 *African Journal of International and Comparative Law* 393, 395.

¹⁴⁶ See section 26 of the *FSR Act*; Van Heerden C and Van Niekerk GM "Twin Peaks in South Africa: A New Role for the Central Bank" 2017 *Journal of Contemporary Roman Dutch Law* 636, 638; see related comments by Schmulow A "The Four Methods of Financial System Regulation: An International Comparative Survey" 2015 *Journal of Banking and Finance Law and Practice* 151, 169; also see Qumba MF "A Comparative Analysis of the Twin Peaks Model of Financial Regulation in South Africa and the United Kingdom" 2022 *SALJ* 78, 108.

¹⁴⁷ See section 76 of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 116; Qumba 2022 *SALJ* 108; see related comments by Godwin A "Introduction to Special Issue – The Twin Peaks Model of Financial Regulation and Reform in South Africa" 2018 *Law and Financial Markets Review* 151, 152.

¹⁴⁸ Sections 26(2), 27(1), 20(1), 77(1), 79(2) and 83(1) of the *FSR Act*; Godwin and Schmulow 2015 *SALJ* 765-770; see related comments by Godwin A, Kourabas S and Ramsay I "Twin Peaks and Financial Regulation: The Challenges of Increasing Regulatory Overlap and Expanding Responsibilities" 2016 *The International Lawyer* 273, 275; Qumba 2022 *SALJ* 107.

in the South African financial sector.¹⁴⁹ The importance of these mechanisms is to ensure that effective cooperation and collaboration are maintained between the SARB and other financial role players in order to promote, protect and maintain financial stability and market integrity in South Africa.¹⁵⁰ It should be noted that the *FSR Act* is the only legislation that comprehensively regulates cooperation and collaboration between the SARB and other financial role players in South Africa.¹⁵¹ However, the *Financial Markets Act*¹⁵² and the *Banks Act*¹⁵³ also make reference to the importance of cooperation and collaboration between the FSCA and law enforcement authorities and between the SARB and the PA, respectively.

This chapter analyses the measures and mechanisms that were implemented to foster cooperation and collaboration between the SARB and other financial role players to determine whether they are robust enough to safeguard effective and proactive coordination in South Africa.

3.2 The Statutory Regulation of the Cooperation and Collaboration between the SARB and other Financial Role Players under the FSR Act in South Africa

The regulation of cooperation and collaboration between the SARB and other financial role players is based on a hard-law approach.¹⁵⁴ This means that the regulation of

¹⁴⁹ See sections 20(1), 25(1), 79(2) and 83(1) of the *FSR Act*; also see Godwin and Schmulow 2015 *SALJ* 769; see related comments by Osode PC "Two Heads are Better than One: Assessing South Africa's 'Twin Peaks' Financial Regulation Model" 2021 *Interdisciplinary Journal of Economics and Business Law* 9, 17.

¹⁵⁰ See related comments by Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 18; Qumba 2022 *SALJ* 112; Van Niekerk and Van Heerden 2020 *SALJ* 115; Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 278.

¹⁵¹ Sections 26, 27, 76 and 77 of the *FSR Act*; Godwin and Schmulow 2015 *SALJ* 769; Van Niekerk and Van Heerden 2020 *SALJ* 110; Qumba 2022 *SALJ* 112.

¹⁵² *Financial Markets Act* 19 of 2012, section 6(3)(o), section 84(2)(b); see related comments by Chitimira H *Market Abuse Regulation in SADC: South Africa, Namibia, Botswana and Zimbabwe* (Juta Cape Town 2022) 45; see related comments by Chitimira H "Overview of Selected Role-Players in the Detection and Enforcement of Market Abuse Cases and Appeals in South Africa" 2014 *Speculum Juris* 108, 118; also see Chitimira H and Lawack VA "An Analysis of the General Enforcement Approaches to Combat Market Abuse (Part 1)" 2012 *Obiter* 548, 553.

¹⁵³ *Banks Act* 94 of 1990, section 4(3); see related comments by De Jager J "The South African Reserve Bank: An Evaluation of the Origin, Evolution and Status of a Central Bank (part 1)" 2006 *South African Mercantile Law Journal* 159, 162; Falkena H, Bamber R, Llewellyn D and Store T *Financial Regulation in South Africa* 2nd ed (SA Financial Sector Forum 2001) 19.

¹⁵⁴ Sections 26(1) and 76(1) of the *FSR Act*; Godwin A, Howse T and Ramsay I "Twin Peaks: South Africa's Financial Sector Regulatory Framework" 2017 *SALJ* 665, 689; see related comments by Kallasidou N "The United Kingdom's Response to Crisis: A Critical Examination of the New

cooperation and collaboration between the SARB and other financial role players is enshrined in binding legislation, namely, the *FSR Act*.¹⁵⁵ Although the *FSR Act* also requires the SARB and other financial role players to conclude bilateral Memorandums of Understanding (MOUs) to establish their cooperation and collaboration arrangements, the regulation of inter-agency coordination in South Africa relies on statutory provisions.¹⁵⁶ A hard law approach in this regard is often criticised for being prescriptive rather than outcome-focused, and also inflexible to adapt to continuously changing standards in the global financial markets.¹⁵⁷ However, the researcher argues that statutory regulation of cooperation and collaboration between the central bank and other financial role players under the *FSR Act* enables enforcement of the duty to coordinate, which is a feature that cannot be found in a soft-law approach.¹⁵⁸ This follows the fact that when a particular duty is established, it becomes a necessity to put in place enforcement measures to ensure compliance and accountability.¹⁵⁹ It is essential for statutory provisions on inter-agency coordination to be supplemented by other measures to enhance their effectiveness and robustness.¹⁶⁰ As such, the *FSR Act* establishes other

Regulatory Structure of Financial Services Supervision" 2013 *Bristol Law Review* 117, 125; Van Niekerk and Van Heerden 2020 *SALJ* 115.

¹⁵⁵ Section 26(1) and 76(1) of the *FSR Act*; Ferran E and Alexander K "Can Soft Law Bodies be Effective? Soft Systemic Risk Oversight Bodies and the Special Case of the European Systemic Risk Board" 2011 *Legal Studies Research Paper Series* 2, 6; Kelly CR "The Sociological Pull of Soft Law" 2012 *American Society of International Law Proceedings* 325, 327; see related comments by Kourabas S "Trends and Theory in Financial Regulation and Regulatory Design after the Global Financial Crisis" in Arner D, Wan W, Godwin A, Shen W and Gibson E (eds) *Research Handbook on Asian Financial Law* (Elgar Online 2020) 30, 41; also see Kourabas S "Improving Australia's Regulatory Framework for Systemic Financial Stability" 2018 *Journal of Banking and Finance Law Practice* 183, 187.

¹⁵⁶ See sections 26, 27(1), 76 and 77(1) of the *FSR Act*; Qumba 2022 *SALJ* 108; Godwin, Howse and Ramsay 2017 *SALJ* 690; Niekerk and Van Heerden 2020 *SALJ* 119.

¹⁵⁷ Godwin and Schmulow 2015 *SALJ* 769; Kourabas 2018 *Journal of Banking and Finance Law Practice* 187; Godwin, Howse and Ramsay 2017 *SALJ* 689; Schmulow 2017 *African Journal of International and Comparative Law* 396.

¹⁵⁸ Ferran and Alexander 2011 *Legal Studies Research Paper Series* 6; Kelly 2012 *American Society of International Law Proceedings* 327; see related comments by Kourabas "Trends and Theory in Financial Regulation and Regulatory Design after the Global Financial Crisis" 43; Kourabas 2018 *Journal of Banking and Finance Law Practice* 188.

¹⁵⁹ Godwin and Schmulow 2015 *SALJ* 769; see related comments by Godwin A, Li G, Ramsay I "Is Australia's Twin Peaks System of Financial Regulation a Model for China (Part 2)" 2016 *Hong Kong Law Journal* 935, 957; Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 280; Godwin A and Ramsay I "Twin Peaks – The Legal and Regulatory Anatomy of Australia's System of Financial Regulation" 2015 *Journal of Banking and Finance Law and Practice* 235, 240.

¹⁶⁰ Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 957; see related comments by Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 280; Ferran E and Alexander K "Can Soft Law Bodies Be Effective? Soft Systemic Risk Oversight Bodies and the Special Case of the

measures to facilitate cooperation and collaboration between the SARB and other financial role players to complement the statutory duty to coordinate. For example, the *FSR Act* provides for the duty to enter into MOUs concerning cooperation and collaboration and it also established committees and bodies, namely, the FSCR, the FSIC and the FSOC to facilitate cooperation and collaboration between the SARB and other financial role players.¹⁶¹ These measures are discussed in detail below.

3.2.1 The statutory duty to cooperate and collaborate between the SARB and other financial role players under the FSR Act

The *FSR Act* requires the SARB to cooperate and collaborate with other financial role players to fulfil its financial stability mandate.¹⁶² It should be noted that the *FSR Act* also provides for a general duty for financial sector regulators to cooperate and collaborate to fulfil their mandates.¹⁶³ The objectives and functions of the PA and the FSCA under the *FSR Act* include the duty to cooperate with the SARB to protect, promote, enhance and maintain financial stability and the promotion of market integrity.¹⁶⁴ The *FSR Act* also provides that the duty to cooperate and collaborate between the SARB and other financial role players includes establishing information sharing arrangements on matters of common interest.¹⁶⁵ This means that the SARB is authorised to access or request access

European Systemic Risk Board” 2010 *European Law Review* 751, 775; also see Camacho AE and Glicksman RL “Functional Government in 3-D: A Framework for Evaluating Allocations of Government Authority” 2014 *Harvard Journal on Legislation* 19, 56.

¹⁶¹ See sections 20(1), 25(1), 27(1), 77(1), 79(2) and 83(1) of the *FSR Act*; Godwin and Schmulow 2015 *SALJ* 770; Van Niekerk and Van Heerden 2020 *SALJ* 119; Qumba 2022 *SALJ* 103; see related comments by Guzman AT and Meyer TL “International Soft Law” 2010 *Journal of Legal Analysis* 165, 171.

¹⁶² Section 26(1)(a) of the *FSR Act*; Godwin, Howse and Ramsay 2017 *SALJ* 691; Van Heerden CM and Van Niekerk GM “Twin Peaks in South Africa: A New Role for the Central Bank” 2017 *Law and Financial Markets Law Review* 154, 156; see related comments by De Jager JJ “The South African Reserve Bank: Blowing Winds of Change (Part 2)” 2013 *South African Mercantile Law Journal* 490, 496.

¹⁶³ Section 26(1)(a) of the *FSR Act*; see related comments by Schmulow 2017 *African Journal of International and Comparative Law* 396; Godwin, Howse and Ramsay 2017 *SALJ* 691; see related comments by Kallasidou 2013 *Bristol Law Review* 120.

¹⁶⁴ See sections 33(d) and 57(c) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 118; Van Heerden and Van Niekerk 2017 *Law and Financial Markets Review* 156; see related comments by De Jager 2013 *South Africa Mercantile Law Journal* 496.

¹⁶⁵ See section 26(1)(a) read with 57(1)(a) of the *FSR Act*; Llewellyn DT “Institutional Structure of Financial Regulation and Supervision: The Basic Issues” in World Bank Seminar *Aligning Supervisory Structures with Country Needs Seminar* (6-7 June 2006 Washington DC) 6; Godwin A “Introduction to Special Issue – The Twin Peaks Model of Financial Regulation and Reform in South Africa” 2017 *Law and Financial Markets Review* 151, 152; Van Heerden CM and Van Niekerk GM

to information withheld by another financial role player to fulfil its mandates. The researcher argues that this may result in a conflict of interest between the SARB and the FSCA. This follows the fact that the customer information withheld by the FSCA should be handled with confidentiality and giving the SARB access to such information may infringe on the required confidentiality.¹⁶⁶ Accordingly, the researcher suggests that there should be regulations in place to control and monitor the use of the information accessed by the SARB, in this regard.

The duty to cooperate and collaborate under the *FSR Act* is more qualified and specific.¹⁶⁷ The *FSR Act* specifically provides that the SARB should cooperate and collaborate with other financial role players to fulfil its financial stability mandate.¹⁶⁸ The researcher argues that when a statutory duty is imposed for inter-agency coordination, it is essential to also establish whether the duty to cooperate and collaborate is general or specific.¹⁶⁹ South Africa chose the latter. The problem with generalising the statutory duty to cooperate and collaborate is that it creates regulatory gaps due to the lack of substantive provisions and fails to provide clear and certain instructions relating to how such coordination should be achieved.¹⁷⁰ On the other hand, a specific duty to cooperate and collaborate is ascertainable and detailed with regard to what the duty entails and how the financial role players should execute it procedurally.¹⁷¹ Nonetheless, it can also be argued that a

"Twin Peaks: The Role of the South African Central Bank in Promoting and Maintaining Financial Stability" 2017 *THRHR* 636, 639.

¹⁶⁶ See related comments by Georgosouli A "The FCA-PRA Coordination Scheme and the Challenge of Policy Coherence" 2013 *Capital Market Law Journal* 62, 73; Kallasidou 2013 *Bristol Law Review* 125; see related comments by Godwin and Schmulow 2015 *SALJ* 765; also see Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 957.

¹⁶⁷ Section 26(1)(a) of the *FSR Act*; see Kallasidou 2013 *Bristol Law Review* 120; also see Georgosouli 2013 *Capital Market Law Journal* 64; Smethurst J "Twin Peaks: Bridging the Gap. Co-ordination under the New Regulatory Framework" 2012 *Journal of International Banking and Financial Law* 33, 35.

¹⁶⁸ Section 26 of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 115; Van Heerden and Van Niekerk 2017 *THRHR* 642; Qumba 2022 *SALJ* 103.

¹⁶⁹ See related comments by Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 957; also see Guzman and Meyer 2010 *Journal of Legal Analysis* 171; Smethurst 2012 *Journal of International Banking and Financial Law* 38; Ferran and Alexander 2010 *European Law Review* 758.

¹⁷⁰ See Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 281; see related comments by Godwin and Schmulow 2015 *SALJ* 760; also see Kourabas 2018 *Journal of Banking and Finance Law Practice* 188; Georgosouli 2013 *Capital Market Law Journal* 65.

¹⁷¹ Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 957; also see Guzman and Meyer 2010 *Journal of Legal Analysis* 171; Smethurst 2012 *Journal of International Banking and Financial Law* 38; Ferran and Alexander 2010 *European Law Review* 758.

specific duty, in this instance, could encourage a limited approach to cooperation and collaboration between the SARB and other financial role players by restricting such coordination to specified circumstances and promoting a box-ticking approach.¹⁷² For example, the *FSR Act* restricts cooperation and collaboration between the SARB, the PA, the FSCA, the NCR and the FIC to matters relating to financial stability and their statutory functions but fails to specifically stipulate how such cooperation and collaboration may be executed.¹⁷³ The researcher argues that the failure of the *FSR Act* to stipulate how the duty to cooperate and collaborate should be executed and leaving it for the SARB and the relevant financial role players to establish through cooperation and collaboration MOUs is problematic.¹⁷⁴ This is because MOUs regarding cooperation and collaboration between the SARB and other financial role players are not compulsory and are unenforceable. Accordingly, the researcher submits that the current position regarding the regulation of cooperation and collaboration under the *FSR Act* creates a gap that may render cooperation and collaboration between the SARB and other financial role players ineffective. This follows the fact that the *FSR Act* makes the duty to cooperate and collaborate unenforceable by failing to provide the threshold and scope of regulatory coordination and also incentivise the SARB and other financial role players for not concluding MOUs regarding such cooperation and collaboration.¹⁷⁵

¹⁷² See related comments by Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 957; also see Godwin and Schmulow 2015 *SALJ* 769; Guzman and Meyer 2010 *Journal of Legal Analysis* 171; Kourabas 2018 *Journal of Banking and Finance Law Practice* 189.

¹⁷³ Van Niekerk and Van Heerden 2020 *SALJ* 108; also see Godwin and Schmulow 2015 *SALJ* 769; Qumba 2022 *SALJ* 108; Group of 30 "The Structure of Financial Supervision Approaches and Challenges in a Global Marketplace" https://group30.org/images/uploads/publications/G30_StructureFinancialSupervision2008.pdf, accessed on 7 March 2021.

¹⁷⁴ Sections 27(1) and 77(1) of the *FSR Act*; also see Basel Committee on Banking Supervision "Basel Committee on Banking Supervision Principles for Effective Supervisory Colleges" <https://www.bis.org/publ/bcbs287.pdf> accessed 15 July 2021; see a related discussion by Kourabas 2018 *Journal of Banking and Finance Law Practice* 188; Van Heerden and Van Niekerk 2017 *THRHR* 641.

¹⁷⁵ Sections 26 and 76 of the *FSR Act*; see related comments by Van Niekerk and Van Heerden 2020 *SALJ* 115; also see Qumba 2022 *SALJ* 103; Godwin and Schmulow 2015 *SALJ* 767.

3.2.2 *The duty to conclude MOUs regarding cooperation and collaboration between the SARB and other financial role players under the FSR Act*

The *FSR Act* requires the SARB to enter into MOUs with other financial role players to establish cooperation and collaboration and information sharing arrangements to promote, protect, enhance and maintain financial stability and market integrity.¹⁷⁶ The MOUs establish how the SARB and other financial role players will fulfil their duty to cooperate and collaborate, share information, delegate powers between the PA and the FSCA and stipulate how conflicts shall be resolved between the PA and the FSCA.¹⁷⁷ It should be noted that MOUs regarding cooperation and collaboration are mere gentlemen's agreements, not legally binding and therefore, unenforceable in law. The *FSR Act* provides that the failure of a financial role player to comply with the provision to conclude an MOU does not affect the functions and powers of the financial role player.¹⁷⁸ The researcher argues that this provision creates room for boycotting and non-compliance with the duty to cooperate and collaborate by the financial role players. It also limits the extent of accountability measures that can be implemented to ensure the effectiveness of cooperation and collaboration between the SARB and other financial role players.

According to Godwin and Schmulow,¹⁷⁹ consistency and accountability underpin the effectiveness of cooperation and collaboration between the central bank and other financial role players. The researcher submits that the lack of stringent provisions to compel the SARB and other financial role players to conclude MOUs regarding

¹⁷⁶ Sections 27(1) and 77(1) of the *FSR Act*; Godwin A, Li G and Ramsay I "Is Australia's 'Twin Peaks' System of Financial Regulation a Model of China?" 2016 *CIFR Research Working Paper* 1, 14; see related comments by Xu X "China State Council Launched New Financial Coordination Mechanism" 2013 *National Law Review* 5, 7; see related comments by Kourabas 2018 *Journal of Banking and Finance Law Practice* 187.

¹⁷⁷ Sections 27(1) and 77(1) of the *FSR Act*; Godwin and Schmulow 2015 *SALJ* 767; Van Niekerk and Van Heerden 2020 *SALJ* 125; see related comments by Godwin A "Surveying the Twin Peaks of Australia's Financial System" in McCracken S and Griffiths S (eds) *Making Banking and Finance Law: A Snapshot* (Sydney: Ross Parsons, 2015) 11.

¹⁷⁸ Sections 27(4) and 77(4) of the *FSR Act*; Godwin and Schmulow 2015 *SALJ* 767; Kourabas 2018 *Journal of Banking and Finance Law Practice* 187; Georgosouli 2013 *Capital Market Law Journal* 65.

¹⁷⁹ Godwin and Schmulow 2015 *SALJ* 758; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 953; see related comments by Godwin, Howse and Ramsay 2017 *SALJ* 691; also see Kallasidou 2013 *Bristol Law Review* 120.

cooperation and collaboration under the *FSR Act* is problematic.¹⁸⁰ This follows the fact that the *FSR Act* does not provide comprehensive details regarding how the SARB and other financial regulators should coordinate with each other, and such arrangements should be made in bilateral MOUs. Concurrently, the conclusion of these MOUs is not mandatory and the failure to enter into an MOU regarding cooperation and collaboration does not affect the functions of the financial role player.¹⁸¹ Consequently, the failure of any financial role player to enter into an MOU concerning cooperation and collaboration could result in ineffective coordination, non-compliance and may threaten financial stability and market integrity due to a lack of coordination arrangements and clear demarcation of responsibilities. Accordingly, the researcher submits that there exists a gap in the regulation of the duty to conclude bilateral MOUs concerning cooperation and collaboration between the SARB and other financial role players. The researcher submits that there is a need for provisions to compel the SARB and other financial role players to conclude MOUs regarding cooperation and collaboration. Such provisions will promote compliance, transparency and consistent enforcement of the duty to cooperate and collaborate between the SARB and other financial role players.

To date, the SARB has concluded several MOUs regarding cooperation and collaboration arrangements with other financial role players such as the PA, the FSCA, the FIC and the NCR. It should be noted that these MOUs were concluded in terms of financial sector laws such as the *FSR Act*, the *Financial Intelligence Centre Act*, the *Banks Act*, the *Financial Markets Act* and the *National Credit Act*.¹⁸²

¹⁸⁰ See sections 27(4) and 77(4) of the *FSR Act*; also see Van Niekerk and Van Heerden 2020 SALJ 110; see related comments by Qumba 2022 SALJ 108; Kourabas 2018 *Journal of Banking and Finance Law Practice* 187.

¹⁸¹ Sections 27 and 77 of the *FSR Act*; Van Niekerk and Van Heerden 2020 SALJ 125; see related comments by Godwin 2018 *Law and Financial Markets Review* 157; also see Qumba 2022 SALJ 110.

¹⁸² See section 27(1) and 77(1) of the *FSR Act*; *Financial Intelligence Centre Amendment Act 1 of 2017 (FICA)*, section 4(b); *National Credit Act 34 of 2005*, section 17; section 6(3)(o) of the *Financial Markets Act*; section 4 of the *Banks Act*.

3.2.2.1 MOU Regarding Cooperation, Collaboration and Information Sharing Arrangements between the SARB and the PA

The MOU concluded between the SARB and the PA in 2018 embodies cooperation, collaboration, information sharing, support and mutual assistance arrangements between the SARB and the PA in fulfilling their mandates.¹⁸³ In this MOU, the SARB and the PA establish their intention to promote a good relationship so as to enhance coordination, mutual assistance and common understanding when their responsibilities overlap.¹⁸⁴ The acknowledgement that overlaps may occur between the SARB and the PA in this MOU is concerning. It is more concerning to note that the MOU also fails to establish measures that can be implemented to prevent potential regulatory overlaps between the SARB and the PA.¹⁸⁵ Regulatory overlaps between the SARB and the PA may affect the promotion and maintenance of financial stability and cause cumbersome cooperation and collaboration between the SARB and other financial role players.¹⁸⁶

The researcher argues that more could have been done to enhance cooperation and collaboration between the SARB and the PA in this MOU.¹⁸⁷ The MOU regarding cooperation and collaboration between the SARB and the PA is not legally binding and is unenforceable. Considering that the PA and the SARB have a close relationship because they share the same administration, and the PA is housed by the SARB, regulatory overlaps and blurred boundaries are likely to occur. As such, the MOU between the SARB

¹⁸³ SARB and PA "Memorandum of Understanding between the South African Reserve Bank and the Prudential Authority" 26 September 2018 <https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/8792/PA-SARB%20Memorandum%20of%20Understanding.pdf> accessed 18 August 2021; see related comments by Van Niekerk and Van Heerden 2020 *SALJ* 125.

¹⁸⁴ See SARB and PA "Memorandum of Understanding between the South African Reserve Bank and the Prudential Authority" para 2.1-2.4; Van Heerden and Van Niekerk 2017 *Law and Financial Markets Review* 158; see related comments by De Jager 2013 *South Africa Mercantile Law Journal* 496; also see Avgouleas E and Goodhart C "Critical Reflections on Bank Bail-ins" 2015 *Journal of Financial Regulation* 1, 3.

¹⁸⁵ See SARB and PA "Memorandum of Understanding between the South African Reserve Bank and the Prudential Authority" para 5; Van Niekerk and Van Heerden 2020 *SALJ* 126; Schmulow 2017 *African Journal of International and Comparative Law* 393.

¹⁸⁶ Schmulow and Godwin 2015 *SALJ* 762; see a related discussion by Kourabas 2018 *Journal of Banking and Finance Law Practice* 191; Van Heerden and Van Niekerk 2017 *THRHR* 645; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 953.

¹⁸⁷ See related comments by Schmulow and Godwin 2015 *SALJ* 762; see a related discussion by Kourabas 2018 *Journal of Banking and Finance Law Practice* 191; Van Heerden and Van Niekerk 2017 *THRHR* 645; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 953.

and the PA needed to include measures to prevent potential regulatory overlaps rather than make *post facto* arrangements to deal with such overlaps after they occur. In this regard, the researcher submits that the MOU regarding cooperation between the SARB and the PA is not adequate enough to promote effective coordination between the SARB and the PA.

3.2.2.2 MOU Regarding Cooperation, Collaboration and Information Sharing Arrangements between the SARB and the FSCA

In 2018, the SARB and the FSCA concluded an MOU to formally establish a relationship of mutual assistance, information sharing and cooperation and collaboration to fulfil their objectives as required by the *FSR Act*.¹⁸⁸ However, the MOU is non-binding and cannot be legally enforced. In this MOU, the SARB and the FSCA identify specific areas in which they intend to cooperate and collaborate to minimise duplication of tasks and regulatory gaps.¹⁸⁹ Unlike the *FSR Act*, the MOU regarding cooperation and collaboration between the SARB and the FSCA stipulates express provisions regarding the responsibilities of the SARB and the FSCA to promote and protect financial stability and market integrity.¹⁹⁰ This MOU promotes cooperation and collaboration between the SARB and the FSCA by stating that the two should meet regularly to discuss and share information relating to matters of common interest upon request by the other.¹⁹¹ However, it should be noted that the MOU does not stipulate how the SARB and the FSCA should cooperate and collaborate to manage financial crises.¹⁹² The researcher submits that the lack of

¹⁸⁸ Section 58(1)(b) of the *FSR Act*; SARB and FSCA "Memorandum of Understanding between the South African Reserve Bank and the Financial Sector Conduct Authority" 28 September 2018 <https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/8828/Signed%20MOU%20-%20SARB%20and%20FSCA> accessed on 15 August 2021, para 2.1.1.

¹⁸⁹ SARB and FSCA "Memorandum of Understanding between the South African Reserve Bank and the Financial Sector Conduct Authority" para 5; see related comments by Van Niekerk and Van Heerden 2020 *SALJ* 127.

¹⁹⁰ See sections 57 and 58(1)(b) of the *FSR Act*; SARB and FSCA "Memorandum of Understanding between the South African Reserve Bank and the Financial Sector Conduct Authority" para 6; see related comments by Schmulow 2017 *African Journal of International and Comparative Law* 394; Van Heerden and Van Niekerk 2017 *Law and Financial Markets Review* 159.

¹⁹¹ SARB and FSCA "Memorandum of Understanding between the South African Reserve Bank and the Financial Sector Conduct Authority" para 5; see related comments by Van Niekerk and Van Heerden 2020 *SALJ* 127; also see section 6(3)(o) of the *Financial Markets Act*; section 251 of the *FSR Act*.

¹⁹² See related comments by Moloney N, Ferran E, Payne J *et al The Oxford Handbook of Financial Regulation* (Oxford London 2015) 110; Godwin, Kourabas and Ramsay 2016 *International Lawyer*

cooperation and collaboration arrangements to manage systemic risks in South Africa could result in ineffective coordination between the SARB and other financial role players, especially during financial crises. The researcher submits that it is important for the SARB and the FSCA to establish cooperation and collaboration arrangements to avoid cumbersome coordination during a financial crisis. This MOU also fails to establish cooperation and collaboration arrangements with law enforcement authorities to deter, detect, investigate and remedy identified criminal acts that may affect financial stability and market integrity. The researcher suggests that the MOU between the SARB and the FSCA should incorporate measures regarding cooperation and collaboration with the SAPS and the courts to manage and prevent criminal conduct that threatens financial stability and market integrity in South Africa.

3.2.2.3 MOU Regarding Cooperation and Collaboration between the European Securities and Markets Authority (ESMA), the SARB, the FSCA and the PA

The Basel Committee on Banking Supervision (BCBS) recommends cross-border cooperation and collaboration between central banks and financial role players.¹⁹³ The BCBS Core Principles for Effective Banking Supervision provides principles for international cooperation and collaboration between central banks and other financial role players.¹⁹⁴ As such, the SARB, the FSCA and the PA concluded a MOU with the ESMA

276; Godwin A and Schmulow A (eds) *The Cambridge Handbook of Twin Peaks Financial Regulation* (Cambridge University Press 2018) 115; Godwin A "Australia's Trek towards Twin Peaks - Comparisons with South Africa" 2017 *Routledge* 183, 192; see related discussion by North G and Wilson T "Has the Australian Prudential Regulation Authority Done Enough to Meet its Legislated Objectives and Prepare Australia for the Next Financial Crisis?" 2020 *University of New South Wales Law Journal* 552, 563.

¹⁹³ Basel Committee on Banking Supervision "Core Principles for Effective Banking Supervision" 2012 Bank for International Settlements, principle 3; Basel Committee on Banking Supervision "Guidance on the Application of the Core Principles for Effective Banking Supervision to the Regulation and Supervision of Institutions Relevant to Financial Inclusion" 2016 *Consultative Document* 6; see related comments by Lee LL "Integration of International Banking Supervisory Standards: A Blueprint for the Taiwanese Banking System" 2000 *Annual Review of Banking Law* 455, 536; Keenan PJ "A New Chapter to Meet the Growing Need to Regulate Cross-Border Insolvencies" 2006 *Norton Journal of Bankruptcy Law and Practice* 128, 135; Bordo MD and Schwartz AJ "Under What Circumstances, Past and Present, Have International Rescues of Countries in Financial Distress been Successful" 1999 *Journal of International Money and Finance* 683, 692.

¹⁹⁴ Section 3(1) of the BCBS Core Principles for Effective Banking Supervision; Armour J, Awrey D, Davis P *et al Principles of Financial Regulation* (Oxford London 2016) 22; Moloney, Ferran, Payne *et al The Oxford Handbook of Financial Regulation* 68; Brunnermeier M, Crocket A, Goodhart C,

to establish cooperation and collaboration and information sharing arrangements with regards to Covered Central Counterparties (Covered CCPs).¹⁹⁵ South Africa's efforts to comply with international best practices on cooperation and collaboration in this regard are commendable. The purpose of this MOU is to promote market integrity by creating a platform for the ESMA and the South African financial regulatory authorities to share information, assess compliance and perform ongoing monitoring of established CCPs.¹⁹⁶ However, it should be noted that this MOU does not create legally binding obligations on the parties. This MOU can also be viewed as an establishment of a relationship between the ESMA and the South African financial regulatory authorities. It is important for South Africa to actively participate in promoting global market integrity because it also stands the risk of being affected by global financial markets trends or financial crises.¹⁹⁷ This MOU was recently concluded, and it remains to be seen whether it is adequate enough to enhance the protection and promotion of market integrity in South Africa. Nonetheless, the researcher submits that this MOU is important for the South African financial regulatory authorities as it provides an opportunity for cross-border cooperation and also enhances the promotion of market integrity.

Persaud AD and Shin H *The Fundamental Principles of Financial Regulation* (Centre for Economic Policy Research London 2009) 59.

¹⁹⁵ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC Derivatives, Central Counterparties and Trade Repositories (EMIR), article 25; ESMA, SARB, FSCA and PA "Memorandum of Understanding between ESMA and South Africa's Financial Sector Conduct Authority, Prudential Authority and the South African Reserve Bank Related to CCPs Established in South Africa" 03 August 2022 https://www.esma.europa.eu/sites/default/files/library/revised_mou_esma_south_african_authorities.pdf accessed 25 August 2022.

¹⁹⁶ Article 25(2)(c) and 25(7) of the EMIR; ESMA, SARB, FSCA and PA "Memorandum of Understanding between ESMA and South Africa's Financial Sector Conduct Authority, Prudential Authority and the South African Reserve Bank Related to CCPs Established in South Africa" article 3(1).

¹⁹⁷ See related comments by Chitimira *Market Abuse Regulation in SADC* 46; also see Chitimira 2014 *Speculum Juris* 118; Chitimira and Lawack 2012 *Obiter* 552; section 84(2)(b) of the *Financial Markets Act*; Chitimira 2014 *Speculum Juris* 112.

3.2.3 *The Establishment of Bodies and Committees to Facilitate Cooperation and Collaboration between the SARB and Other Financial Role Players under the FSR Act*

The *FSR Act* established four committees and bodies to facilitate cooperation and collaboration between the SARB and other financial role players to promote, protect, enhance and maintain financial stability.¹⁹⁸ The Financial Stability Oversight Committee (FSOC) was established to facilitate cooperation and collaboration between the SARB and financial sector regulators in all matters relating to financial stability.¹⁹⁹ The Financial Sector Inter-Ministerial Council (FSIC) was also established to facilitate cooperation and collaboration between Cabinet members administering financial sector regulation and supervision laws.²⁰⁰ South Africa also borrows from Australia in terms of establishing the Financial System Council of Regulators (FSCR), a structure with no equivalent in the case of the UK.²⁰¹ The purpose of the Australian body is to facilitate inter-agency coordination and create a platform for dialogue between the central bank and the most important financial regulators in Australia.²⁰² Similarly, the FSCR facilitates cooperation and collaboration, consultation and consistency of action by creating a forum for discussion of all matters of common interests between senior officers of its constituent institutions.²⁰³

¹⁹⁸ Sections 20(2)(b), 25(2)(b), 79(2) and 83(2) of the *FSR Act*; Godwin and Schmulow 2015 *SALJ* 762; Godwin A, Howse T, Ramsay I "Twin Peaks with South African Characteristics – South Africa's New Model of Financial Regulation" 2016 *CIFR Working Paper* 8; Qumba 2022 *SALJ* 107.

¹⁹⁹ Section 20(2)(b) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 113; National Treasury "A Safer Financial Sector to Serve South Africa Better" *National Treasury Policy Document* (23 February 2011) 2.

²⁰⁰ Section 83(2) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 113; National Treasury *National Treasury Policy Document* 35; see related comments by Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 935.

²⁰¹ See section 79(2) of the *FSR Act*; also see Godwin and Schmulow 2015 *SALJ* 763; Jensen A and Kingston M "The Australian 'Twin Peaks' Framework of Financial System Regulation: Australia and UK Compared" 2010 *Butterworths Journal of International Banking and Financial Law* 548, 552; Godwin and Ramsay 2015 *Journal of Banking and Finance Law and Practice* 235.

²⁰² Jensen and Kingston 2010 *Butterworths Journal of International Banking and Financial Law* 553; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 935; see related comments by Huang H "Institutional Structure of Financial Regulation in China: Lessons from the Global Financial Crisis" 2010 *Journal of Corporate Law Studies* 219, 245; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 935.

²⁰³ Section 79(2) of the *FSR Act*; Godwin and Schmulow 2015 *SALJ* 763; Godwin and Ramsay 2015 *Journal of Banking and Finance Law and Practice* 238; Van Niekerk and Van Heerden 2020 *SALJ* 113.

The FSCR comprises senior officials from the Department of Trade and Industry (DTI), the Department of Health, the NCR, the FIC, the Council for Medical Schemes, the National Consumer Commission (NCC) and the Competition Commission.²⁰⁴ The membership of the FSCR raises some queries, especially considering that it is the coordinating body in South Africa. By contrast, the CFR in Australia comprises the “most important” financial role players in Australia, the RBA, the APRA, the ASIC and the Australian Treasury.²⁰⁵ The researcher argues that the same approach could have been adopted in South Africa. The SARB, the PA and the FSCA should have been included as constituent institutions of the FSCR to ensure high-level cooperation and collaboration between the SARB and other financial role players. The current membership of the FSCR could have been a platform for the most important financial role players to meet, share information, discuss matters of common interest and coordinate responses to potential systemic risks.²⁰⁶ As it stands, there is no forum or platform for the SARB, the PA, the FSCA and the National Treasury to meet, share information and discuss financial regulation matters in South Africa. In this regard, the researcher argues that the membership of the FSCR limits the adequacy and effectiveness of the body to facilitate cooperation and collaboration between the SARB and other financial role players as it fails to bring together the key financial role players in South Africa. This should be revisited to ensure optimum cooperation and collaboration between the SARB and other financial role players to promote, protect, enhance and maintain financial stability and market integrity.

²⁰⁴ Section 79(3) of the *FSR Act*.

²⁰⁵ Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 280; Kourabas 2018 *Journal of Banking and Finance Law Practice* 187; see related comments by Godwin A; Li G; Ramsay I “Is Australia’s Twin Peaks System of Financial Regulation a Model for China (Part 1)” 2016 *Hong Kong Law Journal* 621, 635; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 935.

²⁰⁶ Section 79(3) of the *FSR Act*; see related comments by Camacho AE and Glicksman RL “Functional Government in 3-D: A Framework for Evaluating Allocations of Government Authority” 2014 *Harvard Journal on Legislation* 19, 56; Schmulow A “The Four Methods of Financial System Regulation: An International Comparative Survey” 2015 *Journal of Banking and Finance Law and Practice* 294, 299; Godwin and Schmulow 2015 *SALJ* 765.

The FSCR has a statutory basis.²⁰⁷ However, the *FSR Act* does not stipulate any other substantive powers and functions of the FSCR except for its role to facilitate cooperation and collaboration.²⁰⁸ Whether a coordinating body should have legal powers and functions that are separate from its member institutions depends on the preferences and the financial regulatory architecture of each country.²⁰⁹ The researcher submits that express statutory provisions on the duties and functions of the FSCR could increase transparency and accountability.²¹⁰ However, establishing express responsibilities for the FSCR in the statute may also cause blurry boundaries between the FSCR and its member institutions.²¹¹ This follows the fact that establishing legal powers and functions for the FSCR entails transferring some powers and functions of its member institutions to the FSCR, with the risk of causing blurry boundaries and regulatory overlaps.²¹² Be that as it may, the researcher argues that there is a need for a coordinating body to possess legal functions to promote the enforceability of the financial role players' duty to cooperate and collaborate to fulfil their objectives.²¹³ The researcher also submits that, to ensure effective cooperation and collaboration between the SARB and other financial role

²⁰⁷ Godwin and Schmulow 2015 *SALJ* 765; Kourabas 2018 *Journal of Banking and Finance Law Practice* 187; Schmulow 2015 *Journal of Banking and Finance and Practice* 300; Godwin, Howse and Ramsay 2016 *CIFR Working Paper* 10.

²⁰⁸ See section 79(3) of the *FSR Act*.

²⁰⁹ See Fisk A and Pollari I "Financial System Inquiry KPMG Submission" *Financial Services* (23 March 2014) 6; Correia de Brito, A, Kauffmann C and Pelkmans J "The Contribution of Mutual Recognition to International Regulatory Co-operation" 2016 *OECD Regulatory Policy Working Papers* 15; Jensen and Kingston 2010 *Butterworths Journal of International Banking and Financial Law* 553; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 958.

²¹⁰ See related comments by Fisk and Pollari *Financial Services* 6; Godwin, Howse and Ramsay 2016 *CIFR Working Paper* 10; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 949; Godwin and Schmulow 2015 *SALJ* 769.

²¹¹ See related comments by Fisk and Pollari *Financial Services* 6; Godwin, Howse and Ramsay 2016 *CIFR Working Paper* 10; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 949; Godwin and Schmulow 2015 *SALJ* 769.

²¹² Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 949; Godwin and Schmulow 2015 *SALJ* 769; see related comments by Jensen and Kingston 2010 *Butterworths Journal of International Banking and Financial Law* 556; also see Fisk and Pollari *Financial Services* 7.

²¹³ See related comments by Godwin and Schmulow 2015 *SALJ* 770; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 949; Godwin, Howse and Ramsay 2016 *CIFR Working Paper* 10; Fisk and Pollari *Financial Services* 7.

players, the coordinating body must be viewed as a facilitator for inter-agency coordination and not the only channel for coordination.²¹⁴

3.3 Flaws and Challenges Affecting Effective Cooperation and Collaboration between the SARB and other Financial Role Players in South Africa

The regulation of cooperation and collaboration between the SARB and other financial role players is not flawless. The *FSR Act* is still fairly new such that it is much too soon to determine whether the regulatory framework for cooperation and collaboration under the *FSR Act* is robust and effective enough to promote, protect, enhance and maintain financial stability and market integrity in South Africa.²¹⁵ However, the researcher submits that several flaws can be pronounced from the statutory regulation of cooperation and collaboration between the SARB and other financial role players in South Africa. These flaws are discussed in detail below and suggested recommendations, drawn from the lessons from Australia and the UK are discussed later in this thesis.

3.3.1 The Lack of Detailed Cooperation and Collaboration Arrangements to Manage Financial Crises

According to Van Niekerk and Van Heerden, a financial crisis may cause confusion, especially regarding the powers, roles and functions of each financial role player.²¹⁶ As such, it is important to establish cooperation and collaboration arrangements that stipulate the roles and functions of each financial role player with regard to managing a financial crisis, according to the nature of the crisis. In this regard, the researcher argues that the lack of detailed provisions regarding cooperation and collaboration between the SARB

²¹⁴ See related comments by Godwin and Schmulow 2015 *SALJ* 770; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 949; Godwin, Howse and Ramsay 2016 *CIFR Working Paper* 10; Fisk and Pollari *Financial Services* 7.

²¹⁵ See sections 26, 27, 76 and 77 of the *FSR Act*; Osode P "Two Heads are Better than One: Assessing South Africa's 'Twin Peaks' Financial Regulation Model" 2021 *Interdisciplinary Journal of Economics and Business Law* 9, 27; Collocott C "Financial Regulation in South Africa – Brief II-II" 04 July 2019 <https://hsf.org.za/publications/hsf-briefs/financial-regulation-in-south-africa-2013-brief-ii-of-ii#sdfootnote8anc> accessed 25 April 2022; Godwin 2018 *Law and Financial Markets Review* 152.

²¹⁶ Van Niekerk and Van Heerden 2020 *SALJ* 141; see related comments by Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 23; Qumba 2022 *SALJ* 98.

and other financial role players to manage systemic risks is problematic.²¹⁷ Although the FSCF was established to identify systemic risks and manage crisis, the *FSR Act* does not provide how the SARB and other financial role players should coordinate to manage a financial crisis.²¹⁸ More so, there is no MOU regarding cooperation, collaboration, information sharing and mutual assistance arrangements between the SARB and other financial role players for crisis management. In this regard, the researcher submits that the lack of detailed statutory provisions and arrangements on cooperation and collaboration between the SARB and other financial role players to manage a crisis could result in cumbersome and ineffective coordination during a crisis. There is a need for a MOU that establishes cooperation and collaboration arrangements between the SARB and other financial role players to manage a financial crisis.

3.3.2 The Lack of Cooperation and Collaboration Arrangements between the SARB, Other Financial Role Players and the Law Enforcement Agencies

The lack of cooperation and collaboration arrangements between the SARB, financial sector regulators and law enforcement agencies under the *FSR Act* could threaten market integrity and financial stability in South Africa. Law enforcement agencies such as the South African Police Service (SAPS), the Hawks and the National Prosecuting Authority (NPA) do not have established responsibilities in relation to the protection and promotion of financial stability and market integrity in South Africa.²¹⁹ The effect of this regulatory gap could lead to an increase in financial crime due to a lack of adequate enforcement measures, and this may threaten market integrity and financial stability in South Africa. South Africa currently stands a chance of being grey-listed by the Financial Action Task Force (FATF) due to strategic deficiencies in combating money laundering and terrorist

²¹⁷ See Van Niekerk and Van Heerden 2020 *SALJ* 141; Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 23; Schmulow, Fairweather and Tarrant 2018 *Law and Financial Markets Review* 197; Qumba 2022 *SALJ* 102.

²¹⁸ Section 25(2) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 143; see related comments by Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 23; Qumba 2022 *SALJ* 102.

²¹⁹ See related comments by Van Heerden M "The National Prosecuting Authority: Hosting a Scorpion Without a Sting" 2008 *Journal of Public Administration* 291, 298; also see *Investigation of Serious Economic Offences Act* 117 of 1991; see related comments by Montesh M "An Analysis of the Role of the South African Asset Forfeiture Unit in the Special Investigating Unit" 2009 *Acta Criminologica: African Journal of Criminology and Victimology* 31, 35.

financing.²²⁰ The grey-listing of South Africa by the FATF could affect the integrity of South African financial markets due to the loss of mutual trust and investor confidence in South Africa by other international financial market participants.²²¹ The researcher submits that the lack of coordination arrangements between the SARB and law enforcement agencies could have contributed to the current position, considering the statistics of reported financial crime matters in South African courts.²²² It is evident that there is a limited working relationship between South African financial institutions and law enforcers. The *FSR Act* could have promoted a relationship between the SARB, financial role players and law enforcement agencies by providing express regulations on cooperation and collaboration in this regard.

In the recent case of *South African Reserve Bank and Another In re Michael Johannes Jooste N.O and Others*, the lack of cooperation and collaboration between the SARB, other financial role players and law enforcement authorities was evident.²²³ Views have been shared on the SARB's move to attach Jooste's assets as the NPA was expected to make this move, rather than the SARB.²²⁴ The unfolding of events in this matter reiterates a lack of proactive cooperation and collaboration between the SARB and the law enforcement agencies in South Africa. Therefore, the researcher submits that there is a need for measures to foster cooperation and collaboration between the SARB, the FIC,

²²⁰ Kempen A and Botha A "Money Laundering Terrorist financing T-H-R-E-A-T-S T-H-R-E-A-T-S South Africa Has Urgent Work To Do" *Servamus Community-Based Safety and Security Magazine* (28 September 2022) 24, 25; see related comments by Mekpor ES "Anti-Money Laundering and Combating the Financing of Terrorism Compliance: Are FATF Member States Just Scratching the Surface?" 2019 *Journal of Money Laundering Control* 451, 468; Murrar F and Barakat K "Role of FATF in Spearheading AML and CFT" 2021 *Journal of Money Laundering Control* 77, 83.

²²¹ See related comments by Kempen and Botha *Servamus Community-Based Safety and Security Magazine* 25; Mekpor 2019 *Journal of Money Laundering* 470; Murrar and Barakat 2021 *Journal of Money Laundering Control* 86.

²²² Swanepoel AP and Meiring J "Adequacy of Law Enforcement and Prosecution of Economic Crimes in South Africa" 2018 *Journal of Financial Crime* 450, 458; De Koker L "Financial Crime in South Africa" 2007 *Economic Affairs* 34, 34; De Koker L "The Prosecution of Economic Crime in South Africa – Some Thoughts on Problems and Solutions" in De Koker L, Rider BAK and Henning JJ (eds) *Victims of Economic Crime* (Transactions of the Centre for Business Law 1999) 79.

²²³ *South African Reserve Bank and Another In re Michael Johannes Jooste N.O and Others* 16823/dd 6 October 2022; also see Moonstone Information Refinery "Did Grey-Listing Threat Hasten SARB to Act Against Markus Jooste?" 20 October 2022 www.citizen.co.za accessed 22 October 2022 Page Anon; also see Exchange Control Regulations 1961, regulation 22C.

²²⁴ Moonstone Information Refinery "Did Grey-Listing Threat Hasten SARB to Act Against Markus Jooste?" Page Anon; Ndedze B "South African Reserve Bank to Attach Ex-Steinhoff CEO Jooste's Assets" *Eye Witness News* (18 October 2022) 1.

the NPA, the SAPS and the Asset Forfeiture Unit (AFU) to promote, protect, enhance and maintain financial stability and market integrity in South Africa.

3.3.3 *The Lack of Consistent Provisions to Enforce the Duty to Cooperate, Collaborate and Conclude MOUs Regarding Cooperation and Collaboration Arrangements between the SARB and Other Financial Role Players*

The *FSR Act* expressly confers a duty to cooperate and collaborate upon the SARB and other financial role players.²²⁵ The *FSR Act* further provides that the SARB should conclude MOUs regarding cooperation and collaboration with other financial role players to establish coordination and information sharing arrangements.²²⁶ However, there are no provisions relating to the enforcement of these duties under the *FSR Act*. The FSIC, the FSOC and the FSCR are only tasked with facilitating cooperation and collaboration between the SARB and other financial role players, and this does not entail a duty to enforce.²²⁷ Instead, the *FSR Act* provides that the failure to comply with the duty to conclude MOUs regarding cooperation and collaboration will not affect the functions and actions of the SARB or any financial role player.²²⁸ The researcher argues that this provision does not encourage consistency and compliance with the duty to coordinate between the SARB and other financial role players and should be reconsidered. The *FSR Act* incentivises non-compliance by not enforcing penalties when the SARB or other financial role players fails to comply with the duty to coordinate.²²⁹ Accordingly, the researcher submits that the *FSR Act* should provide regulations to enforce the duty to cooperate and collaborate between the SARB and other financial role players.

²²⁵ Sections 26 and 76 of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 113; Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 23; Schmulow, Fairweather and Tarrant 2018 *Law and Financial Markets Review* 197; Qumba 2022 *SALJ* 105.

²²⁶ Sections 27 and 77 of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 119; Godwin and Schmulow 2015 *SALJ* 761; see related comments by Kourabas 2018 *Journal of Banking and Finance Law Practice* 187; also see Godwin 2017 *Routledge* 183.

²²⁷ See Sections 20(2)(b), 25(2)(b), 79(2) and 83(2) of the *FSR Act*; Godwin and Schmulow 2015 *SALJ* 762; Godwin A, Howse T, Ramsay I "Twin Peaks with South African Characteristics – South Africa's New Model of Financial Regulation" 2016 *CIFR Working Paper* 8; Qumba 2022 *SALJ* 107.

²²⁸ Sections 27(4) and 77(4) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 121; see related comments by Qumba 2022 *SALJ* 107.

²²⁹ Sections 27(4) and 77(4) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 129; see related comments by Godwin, Howse and Ramsay 2016 *CIFR Working Paper* 15; also see Kourabas 2018 *Journal of Banking and Finance Law Practice* 188.

The *FSR Act* authorises the SARB to mandate compliance with the duty to cooperate and collaborate in all matters relating to financial stability only.²³⁰ This means that the SARB has powers to mandate other financial role players to coordinate, share information and adhere to arrangements established in a MOU as far as financial stability is concerned.²³¹ However, the SARB's powers in this regard do not extend to general cooperation and collaboration nor cooperation and collaboration for the purposes of market integrity.²³² This follows the fact that the *FSR Act* specifically provides that the SARB may compel a financial regulator to cooperate and share information regarding financial stability only.²³³ Accordingly, there is a lack of general enforcement measures of the duty to cooperate and this may affect the effectiveness and robustness of the statutory regulation of cooperation and collaboration between the SARB and other financial role players to protect, promote, enhance and maintain financial stability and market integrity in South Africa.

3.4 The Statutory Regulation of Cooperation and Collaboration between the SARB and other Financial Sector Role Players under the Financial Markets Act and the Banks Act

3.4.1 Banks Act

The *Banks Act* does not provide comprehensive regulations relating to regulatory cooperation and collaboration between the SARB and other financial sector role players. The *Banks Act* only provides that the PA may cooperate and collaborate with any financial role player that the PA deems fit.²³⁴ The *Banks Act* provides that the PA may enter into written cooperation arrangements or conclude MOUs with any financial institution to

²³⁰ Section 18 of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 141; see related comments by Kourabas 2018 *Journal of Banking and Finance Law Practice* 188; Qumba 2022 *SALJ* 107.

²³¹ Section 18 of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 141; see related comments by Godwin, Howse and Ramsay 2016 *CIFR Working Paper* 17; Godwin 2017 *Routledge* 183.

²³² Section 18 of the *FSR Act*; see related comments by Van Niekerk and Van Heerden 2020 *SALJ* 141; Qumba 2022 102; also see Godwin, Howse and Ramsay 2016 *CIFR Working Paper* 17.

²³³ Section 18 of the *FSR Act*; see related comments by Van Niekerk and Van Heerden 2020 *SALJ* 141; Qumba 2022 102; also see Godwin, Howse and Ramsay 2016 *CIFR Working Paper* 17.

²³⁴ Section 4(3) of the *Banks Act*; see related comments by De Jager 2013 *South African Mercantile Law Journal* 496.

establish cooperation and collaboration arrangements.²³⁵ It should be noted that the *Banks Act* provides no further provisions relating to inter-agency coordination. As such, it can be said that the regulation of cooperation and collaboration between the SARB and other financial role players relies on the provisions under the *FSR Act*.²³⁶

3.4.2 *Financial Markets Act*

The *Financial Markets Act* provides that the FSCA must make adequate arrangements for effective cooperation and collaboration with the SARB to monitor and manage systemic risks.²³⁷ It should be noted that the *Financial Markets Act* expressly provides that such cooperation and collaboration must be effective enough to promote and enhance market integrity. However, the *Financial Markets Act* does not provide further regulations regarding cooperation and collaboration between the FSCA and the SARB. As such, the researcher submits that the *FSR Act* is the only legislation that comprehensively regulates cooperation and collaboration between the SARB and other financial role players in South Africa.

3.5 Cooperation and Collaboration between the SARB and other Financial Role Players during the COVID-19 Pandemic

The enactment of the *FSR Act* brought about a new financial regulatory architecture that requires high-level cooperation and collaboration between the SARB and other financial role players to promote, protect, enhance and maintain financial stability and market integrity in South Africa.²³⁸ In this regard, cooperation and collaboration between the

²³⁵ Section 4(3) of the *Banks Act*; see related comments by De Jager 2013 *South African Mercantile Law Journal* 496.

²³⁶ See sections 26, 27, 76 and 77 of the *FSR Act*; see related comments by Van Niekerk and Van Heerden 2020 *SALJ* 113; Godwin and Schmulow 2015 *SALJ* 758; Godwin 2018 *Law and Financial Markets Review* 158; Van Heerden and Van Niekerk 2018 *THRHR* 642.

²³⁷ Section 6(3)(o) of the *Financial Markets Act*; see related comments by Chitimira *Market Abuse Regulation in SADC* 46; also see Chitimira 2014 *Speculum Juris* 118; Chitimira and Lawack 2012 *Obiter* 552; also see Chitimira H and Ncube M "The Role of Regulatory Bodies and other Role-Players in the Promotion of Financial Inclusion in South Africa" 2020 *Acta Universitatis Danubius. Juridica* 32.

²³⁸ De Jager 2013 *South African Mercantile Law Journal* 496; Godwin 2017 *Law and Financial Markets Review* 151; see related comments by Llewellyn DT "Institutional Structure of Financial Regulation and Supervision: The Basic Issues" in World Bank Seminar *Aligning Supervisory Structures with Country Needs Seminar* (6-7 June 2006 Washington DC) 16; Van Niekerk and Van Heerden 2020 *SALJ* 115.

SARB and other financial role players needed to remain proactive during the COVID-19 pandemic. Such cooperation and collaboration were essential during the pandemic to enable the SARB and other financial role players to coordinate their response towards the potential threats posed by the pandemic on financial stability and market integrity.²³⁹ Financial institutions experienced unusual pressure due to the increased demands and needs of financial customers during the pandemic, and there was a need for coordination to provide supervisory and regulatory relief to financial customers and the financial system.²⁴⁰ The researcher submits that there was proactive cooperation and collaboration between the SARB, the FSCA and the PA during the pandemic.²⁴¹

3.5.1 Cooperation and Collaboration between the SARB, the PA and the NCR during the COVID-19 Pandemic

The COVID-19 pandemic directly and indirectly affected financial stability and the integrity of financial markets globally.²⁴² For example, the COVID-19 pandemic gave rise to the need to re-price and re-position financial products in South Africa. To provide immediate supervisory and regulatory relief, the PA collaborated with the SARB to lower the liquidity coverage ratio, reduce capital requirements and offer capital relief on restructured loans by reducing interest rates.²⁴³ The SARB, the PA and the NCR cooperated and collaborated on matters relating to credit markets and services by lowering interest rates

²³⁹ See related comments by Godwin and Schmulow 2015 *SALJ* 764; Brown G and Susskind D "International Cooperation during the COVID-19 Pandemic" 2020 *Oxford Review of Financial Policy Journal* 64, 70; Susskind D and Vines D "The Economics of the COVID-19 Pandemic: An Assessment" 2020 *Oxford Review of Economic Policy Journal* 1, 9; Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 23.

²⁴⁰ Prudential Authority "Annual Report 2020/21" <https://www.resbank.co.za/en/home/publications/publication-detail-pages/reports/pa-annual-reports/2021/PrudentialAuthority-Annual-Report-2020-2021> accessed 25 August 2022; Prudential Authority "Regulatory Strategy 2021-2024" <https://www.resbank.co.za/content/dam/sarb/what-we-do/prudential-regulation/PA%20Regulatory%20and%20Supervisory%20Strategy%202021.pdf> accessed 25 August 2022; see related comments Brown and Susskind 2020 *Oxford Review of Economic Policy* 9; also see Bank of England 2021 *England's Citizens Panel* 3.

²⁴¹ Prudential Authority "Annual Report 2020/21" 7; see related comments by Qumba 2022 *SALJ* 105.
²⁴² Chitimira *Market Abuse Regulation in SADC* 176; Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 17; Qumba 2022 *SALJ* 103; Susskind and Vines 2020 *Oxford Review of Economic Policy Journal* 5.

²⁴³ Prudential Authority "Annual Report 2020/21" 8; Prudential Authority "Regulatory Strategy 2021-2024" 15; see related comments by Brown and Susskind 2020 *Oxford Review of Economic Policy* 9; Susskind and Vines 2020 *Oxford Review of Economic Policy Journal* 7.

and restructuring credit payment plans.²⁴⁴ This ensured that financial institutions and consumers did not incur more debt than they could afford as a result of the pandemic.

3.5.2 Cooperation and Collaboration between the FSCA, the FIC and the PA during the COVID-19 Pandemic

The PA collaborated with the FSCA to implement temporary regulatory and supervisory measures to alleviate the financial stress experienced by other financial institutions in the insurance industry.²⁴⁵ The cooperation and collaboration between the PA and the FSCA during the COVID-19 pandemic protected and maintained financial stability and market integrity by allowing financial institutions to continue with their operations without regulatory action when their solvency coverage ratio dropped as a result of the pandemic.²⁴⁶ However, it should be noted that cooperation and collaboration between the FIC and other financial role players with regard to reporting and detecting unusual transactions were difficult to maintain. This was a result of continuously re-priced and re-structured financial services which made it difficult to detect transaction irregularities during the period of the pandemic.²⁴⁷ Nonetheless, the researcher submits that there was proactive cooperation and collaboration between the SARB, the PA, the NCR and the FSCA to promote, protect and enhance financial stability and market integrity during the COVID-19 pandemic in South Africa.²⁴⁸

²⁴⁴ Prudential Authority "Regulatory Strategy 2021-2024" 28.

²⁴⁵ Prudential Authority "Annual Report 2020/21" 8; Prudential Authority "Regulatory Strategy 2021-2024" 15; see related comments by Brown and Susskind 2020 *Oxford Review of Economic Policy* 9; Susskind and Vines 2020 *Oxford Review of Economic Policy Journal* 8.

²⁴⁶ Prudential Authority "Annual Report 2020/21" 8; Prudential Authority "Regulatory Strategy 2021-2024" 15; Qumba 2022 *SALJ* 103; Cordray R, Thompson DE and Peterson CL "Consumer Financial Protection in the COVID-19 Crisis: An Emergency Agenda" 2020 <https://ssrn.com/abstract=3569357> accessed 18 April 2022; Hafiz H, Oei S, Ring D and Schnitser N "Regulating in Pandemic: Evaluating Economic and Financial Policy Responses to the Coronavirus Crisis" 2020 <https://ssrn.com/abstract=3569357> accessed 12 April 2021.

²⁴⁷ Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 25; see related comments by Cordray, Thompson and Peterson "Consumer Financial Protection in the COVID-19 Crisis: An Emergency Agenda" 5; Prudential Authority "Regulatory Strategy 2021-2024" 28; Brown and Susskind 2020 *Oxford Review of Economic Policy* 9;

²⁴⁸ See related comments by Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 25; see related comments by Cordray, Thompson and Peterson "Consumer Financial Protection in the COVID-19 Crisis: An Emergency Agenda" 5.

3.6 Conclusion

From the discussion above, it can be asserted that the *FSR Act* is the key legislative tool that regulates cooperation and collaboration between the SARB and other financial role players in South Africa.²⁴⁹ The *Banks Act* and the *Financial Markets Act* merely make reference to the duty to cooperate and collaborate, but do not comprehensively regulate cooperation and collaboration between the SARB and other financial role players. The researcher concludes that the statutory regulation of cooperation and collaboration between the SARB and other financial role players provided under the *FSR Act* is not flawless. Several flaws and challenges that were identified above affect the effectiveness and adequacy of the statutory regulation of cooperation and collaboration between the SARB and other financial role players to protect, promote and enhance financial stability and market integrity. The *FSR Act* fails to provide for the consistent enforcement of the duty to cooperate and collaborate. The provision that the failure by a financial role player to conclude a MOU regarding cooperation and collaboration does not affect its functions should be reconsidered. The resilience and success of the current financial regulatory framework in South Africa rely on effective cooperation and collaboration between the SARB and other financial role players to promote financial stability and to enhance market integrity. Accordingly, it is important that the flaws and challenges identified in this research be adequately addressed to promote, protect, enhance and maintain financial stability in South Africa. The non-binding nature of the MOUs regarding cooperation and collaboration between the SARB and other financial role players should also be reconsidered to ensure the enforceability of the duty to cooperate and collaborate. The researcher recommends measures that can be implemented by policymakers to ensure the adequacy and enhanced effectiveness of cooperation and collaboration between the SARB and other financial role players.²⁵⁰

The next chapter critically discusses the roles and functions of the SARB and other financial role players to promote, protect, enhance and maintain financial stability and

²⁴⁹ See sections 20, 25, 26, 27, 76, 77, 79 and 83 of the *FSR Act*; also see Van Niekerk and Van Heerden 2020 *SALJ* 113; Godwin and Schmulow 2015 *SALJ* 758; Godwin, Howse and Ramsay 2017 *SALJ* 70.

²⁵⁰ See chapter 9 of this thesis.

market integrity in South Africa. This is done to determine how the financial role players should fulfil their roles and responsibilities in cooperation and collaboration.

CHAPTER FOUR

THE ROLES AND FUNCTIONS OF THE SOUTH AFRICAN RESERVE BANK AND OTHER FINANCIAL SECTOR ROLE PLAYERS IN THE PROMOTION AND PROTECTION OF FINANCIAL STABILITY AND MARKET INTEGRITY IN SOUTH AFRICA

4.1 Introduction

Cooperation and collaboration between the South African Reserve Bank (SARB) and other financial role players such as the Prudential Authority (PA), the Financial Sector Conduct Authority (FSCA), the National Credit Regulator (NCR), the Financial Intelligence Centre (FIC), the Financial Stability Oversight Committee (FSOC), the Financial Sector Contingency Forum (FSCF), the Financial Sector Council of Regulators (FSCR), the Financial Sector Inter-Ministerial Council (FSIC) and relevant Cabinet Ministers are essential for the promotion, protection, enhancement and maintenance of financial stability and market integrity in South Africa.²⁵¹ This follows the fact that the roles and functions of the financial sector regulators are interconnected and can be achieved through optimum coordination with each other.²⁵² Several measures have been established under the *Financial Sector Regulation Act*²⁵³ to foster regulatory cooperation and collaboration in the South African financial sector. For example, the *FSR Act* established the duty to cooperate and collaborate between the SARB and other financial

²⁵¹ Van Niekerk G and Van Heerden G "The Importance of a Legislative Framework for Cooperation and Collaboration In the Twin Peaks Model Of Financial Regulation" 2020 *SALJ* 108, 113; Llewellyn David T "Institutional Structure of Financial Regulation and Supervision: The Basic Issues" *World Bank seminar Aligning Supervisory Structures with Country Needs* (Washington DC, 6-7 June 2006) 28; Godwin A and Schmulow A "The Financial Sector Regulation Bill in South Africa, Second Draft: Lessons from Australia" 2015 *SALJ* 752, 756; Schmulow A "Financial Regulatory Governance in South Africa: The Move Towards Twin Peaks" 2017 *African Journal of International and Comparative Law* 390, 393.

²⁵² Llewellyn "Institutional Structure of Financial Regulation and Supervision: The Basic Issues" 28; see related comments by Chitimira H "Overview of Selected Role-Players in the Detection and Enforcement of Market Abuse Cases and Appeals in South Africa" 2014 *Speculum Juris* 108, 110; Chitimira H and Ncube M "The Role of Regulatory Bodies and Other Role-Players in the Promotion of Financial Inclusion in South Africa" 2020 *Acta Universitatis Danubius. Juridica* 25, 27; Godwin and Schmulow 2015 *SALJ* 755.

²⁵³ *Financial Sector Regulation Act* 9 of 2017 (*FSR Act*), sections 26 and 76; Godwin and Schmulow 2015 *SALJ* 755; Qumba MF "A Comparative Analysis of the Twin Peaks Model of Financial Regulation in South Africa and the United Kingdom" 2022 *SALJ* 78, 92; Godwin A "Australia's Trek towards Twin Peaks – Comparisons with South Africa" 2017 *Law and Financial Markets Review* 182, 183; Schmulow 2017 *African Journal of International and Comparative Law* 392.

role players, the duty to conclude Memorandums of Understanding (MOUs) regarding cooperation and collaboration arrangements and established bodies to facilitate cooperation and collaboration between the SARB and other financial role players.²⁵⁴ To ensure effective cooperation and collaboration between the SARB and other financial role players, it is important to ensure that the roles and functions of the financial sector role players do not overlap by providing clear regulatory boundaries for each role player.²⁵⁵ This chapter analyses the roles and functions of the SARB and other relevant financial role players to determine whether these financial role players have adopted adequate measures to consistently cooperate and collaborate to fulfil their mandates.²⁵⁶

4.2 The Roles and Functions of the SARB to Promote, Protect, Enhance and Maintain Financial Stability and Market Integrity under the FSR Act

Financial stability refers to a financial system that inspires general confidence through its resilience to systemic risks and its ability to efficiently offer financial services and financial products, and to perform its roles and functions without interruption.²⁵⁷ Market integrity refers to financial markets with low financial crime, strong enforcement mechanisms, fairness, efficiency and transparency of financial products.²⁵⁸ The *FSR Act*

²⁵⁴ Sections 20(1), 27, 77, 79(2) and 83(1) of the *FSR Act*; Godwin and Schmulow 2015 *SALJ* 755; Van Niekerk and Van Heerden 2020 *SALJ* 118; Godwin A "Introduction to Special Issue – The Twin Peaks Model of Financial Regulation and Reform in South Africa" 2018 *Law and Financial Markets Review* 151, 155; see related comments by Godwin A, Li G, Ramsay I "Is Australia's Twin Peaks System of Financial Regulation a Model for China (Part 2)" 2016 *Hong Kong Law Journal* 935, 938.

²⁵⁵ Godwin 2017 *Law and Financial Markets Review* 184; Godwin and Schmulow 2015 *SALJ* 756; Schmulow 2017 *African Journal of International and Comparative Law* 393; Godwin A, Li G and Ramsay I "Is Australia's Twin Peaks System of Financial Regulation a Model for China (Part 1)" 2016 *Hong Kong Law Journal* 621, 630.

²⁵⁶ Sections 26 and 76 of the *FSR Act*; Van Heerden G and Van Niekerk G "Twin Peaks: The Role of the South African Central Bank in Promoting and Maintaining Financial Stability" 2017 *Journal of Contemporary Roman-Dutch Law* 636, 643; Godwin A, Howse T and Ramsay I "Twin Peaks: South Africa's Financial Sector Regulatory Framework" 2017 *SALJ* 665, 667; Van Heerden G and Van Niekerk G "Twin Peaks in South Africa: A New Role for the Central Bank" 2018 *Law and Financial Markets Review* 154, 154.

²⁵⁷ Section 4 of the *FSR Act*; see related comments by Van Heerden G and Van Niekerk G "Twin Peaks: The Role of the South African Central Bank in Promoting and Maintaining Financial Stability" 2017 *Journal of Contemporary Roman-Dutch Law* 636, 643; Van Heerden and Van Niekerk 2018 *Law and Financial Markets Review* 154; Schinasi GJ "Defining Financial Stability" 2006 *IMF Working Paper* 2, 4.

²⁵⁸ Austin J "What Exactly Is Market Integrity: An Analysis of One of the Core Objectives of Securities Regulation" 2017 *William and Mary Business Law Review* 215, 219; Schwartz R.A, Byrne JA and Stempel E *Market Integrity* (Springer International Publishing 2018) 14; Fodor B "Measuring Market Integrity: A Proposed Canadian Approach" 2008 *Journal of Financial Crime* 261, 262.

establishes the roles and functions of the SARB in relation to the promotion, protection, enhancement and maintenance of financial stability in South Africa.²⁵⁹ The *FSR Act* provides that the SARB is the primary guardian of financial stability in South Africa.²⁶⁰ It should be noted that the *FSR Act* does not provide express provisions on the SARB's roles and functions in relation to market integrity. However, the researcher argues that the SARB plays a role in promoting, protecting and enhancing market integrity through cooperating and collaborating with other financial role players such as the NCR and the FSCA to fulfil their mandates.²⁶¹

The *FSR Act* provides that the primary mandate of the SARB is to protect and promote financial stability.²⁶² This means that the SARB is responsible for making the final decisions in matters relating to financial stability in South Africa. This mandate also entails the duty to restore or maintain financial stability in case of a systemic event or financial crisis.²⁶³ The SARB's financial stability mandate also gives rise to other roles and functions. For example, to protect and promote financial stability, the SARB is required to monitor any risks to financial stability, the duty to conduct financial stability reviews and perform the duty to cooperate and collaborate with other financial sector role players.²⁶⁴

²⁵⁹ Section 12 of the *FSR Act*; Constitution of the Republic of South Africa, 1996, section 255; Van Heerden and Van Niekerk 2018 *Law and Financial Markets Review* 156; De Jager JJ "The South African Reserve Bank: Blowing Winds of Change (Part 2)" 2013 *South African Journal of Mercantile Law* 490, 496.

²⁶⁰ Section 12 of the *FSR Act*; section 255 of the Constitution; Van Heerden and Van Niekerk 2017 *Journal of Contemporary Roman-Dutch Law* 643; Van Heerden and Van Niekerk 2018 *Law and Financial Markets Review* 156

²⁶¹ See section 76 of the *FSR Act*; see related comments by Chitimira and Ncube 2020 *Acta Universitatis Danubius* 13; Van Heerden and Van Niekerk 2018 *Law and Financial Markets Review* 156.

²⁶² Section 11 of the *FSR Act*; Reserve Bank Act 90 of 1989, section 3; National Treasury "A Safer Financial Sector to Serve South Africa Better" 2011 <http://www.treasury.gov.za> accessed on 8 July 2021; Schmulow 2017 *African Journal of International and Comparative Law* 393; De Jager 2013 *South African Journal of Mercantile Law* 499.

²⁶³ Section 12 of the *FSR Act*; see related comments by Osode PC "Two Heads are Better than One: Assessing South Africa's 'Twin Peaks' Financial Regulation Model" 2021 *Interdisciplinary Journal of Economics and Business Law* 9, 12; Godwin A, Kourabas S and Ramsay I "Twin Peaks and Financial Regulation: The Challenges of Increasing Regulatory Overlap and Expanding Responsibilities" 2016 *International Lawyer* 273, 275; also see Chitimira and Ncube 2020 *Acta Universitatis Danubius* 13.

²⁶⁴ Sections 12, 15, 20 and 26 of the *FSR Act*; Van Heerden and Van Niekerk 2018 *Law and Financial Markets Review* 157; see related comments by Allen HJ "What is 'financial stability'? The Need for Some Common Language in International Financial Regulation" (2014) *Georgetown Journal of International Law* 929, 934; also see Taylor MW "The Road from 'Twin Peaks' – And The Way Back" 2009 *Connecticut Insurance Law Journal* 64, 66.

The *FSR Act* requires the SARB to cooperate and collaborate with PA, the FSCA, other financial regulators and state organs to fulfil its financial stability mandate.²⁶⁵ This shows that the SARB does not fulfil its mandates in isolation, instead, the SARB cooperates and collaborates with other financial role players such as the PA, the FSCA and relevant state organs. Accordingly, the *FSR Act* establishes platforms to foster cooperation and collaboration between the SARB and other financial role players through discussion and consultation. Unlike with market integrity, the *FSR Act* specifically provides measures to foster cooperation and collaboration between the SARB and other financial role players to promote, protect, enhance and maintain financial stability.

The *FSR Act* establishes two bodies, namely, the Financial Stability Oversight Committee (FSOC) and the Financial Sector Contingency Forum (FSCF) to facilitate the SARB's financial stability objective.²⁶⁶ The roles and functions of the FSOC and the FSCF are discussed in more detail later in this chapter. The SARB does not have the freedom to make decisions regarding how it will fulfil its financial stability mandate because it is required to act in a manner determined by the Minister of Finance and the Governor of the SARB.²⁶⁷ This shows that the SARB's roles and functions also rely on extensive consultation and coordination with the National Treasury. The *FSR Act* provides that the SARB should take into consideration the views and information shared by other financial regulators when fulfilling its financial stability mandate.²⁶⁸ The *FSR Act* also requires other financial role players to assist and share information relating to maintaining or restoring financial stability with the SARB and the FSOC.²⁶⁹ This shows that the SARB does not

²⁶⁵ Section 26 of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 115; Godwin and Schmulow 2015 *SALJ* 759; Schmulow 2017 *African Journal of International and Comparative Law* 396; Qumba 2022 *SALJ* 95.

²⁶⁶ Sections 20 and 25 of the *FSR Act*; South African Reserve Bank "A New Macroprudential Policy Framework for South Africa" November 2016 <http://www.resbank.co.za> accessed 15 July 2021; Van Heerden and Van Niekerk 2018 *Law and Financial Markets Review* 156; Godwin, Howse and Ramsay 2017 *SALJ* 665.

²⁶⁷ Section 11(2)(a) of the *FSR Act*; Van Heerden and Van Niekerk 2018 *Law and Financial Markets Review* 157; see related comments by Van Niekerk and Van Heerden 2020 *SALJ* 116; also see De Jagger 2013 *South African Journal of Mercantile Law* 497.

²⁶⁸ Section 26(2) of the *FSR Act*; see related comments by Allen 2014 *Georgetown Journal of International Law* 935; Godwin and Schmulow 2015 *SALJ* 768; Van Heerden and Van Niekerk 2018 *Law and Financial Markets Review* 158.

²⁶⁹ Section 27(1) of the *FSR Act*; see related comments by Chitimira and Ncube 2020 *Acta Universitatis Danubius* 12; also see Schwarz SL "Systemic Risk" 2008 *Georgetown Law Journal*

perform its roles and functions in isolation, it cooperates and collaborates with other financial role players to fulfil its mandates.

The SARB is required to enter into an MOU to establish cooperation, collaboration and information sharing arrangements with other financial role players in relation to their financial stability roles and functions.²⁷⁰ The SARB relies on the information gathered by the FIC to detect and monitor unusual transactions concluded by financial crime perpetrators and are likely to threaten financial stability and the integrity of financial markets.²⁷¹ The SARB also fulfils its financial stability mandate by gathering information relating to financial stability from other financial role players such as the PA, the FSCA, the FIC and the NCR. During the COVID-19 pandemic, the SARB cooperated and collaborated with the FSCA, the PA and the NCR to protect financial stability and market integrity by offering supervisory and regulatory relief to financial customers.²⁷² This shows that the SARB fulfils its roles and functions in cooperation and collaboration with other financial role players such as the PA, the FSCA, the FIC and the NCR.

As noted earlier, the SARB does not have an express mandate to promote, protect, enhance and maintain market integrity in South Africa. However, the SARB may use its legislative powers and authority as the central bank to promote market integrity by monitoring risks that may weaken the financial sector.²⁷³ For example, the SARB may use its duty to monitor risks and detect systemic events that may threaten market integrity. Also, the SARB's duty to cooperate and collaborate with the FSCA implies a role in the promotion, protection and enhancement of market integrity by assisting the FSCA to fulfil

190, 193; South African Reserve Bank "A New Macro-Prudential Policy Framework for South Africa" 31.

²⁷⁰ Section 27(1) of the FSR Act; Van Niekerk and Van Heerden 2020 *SALJ* 119; Godwin 2017 *Law and Financial Markets Review* 182; Schmulow 2017 *African Journal of International and Comparative Law* 401.

²⁷¹ Section 21 of the FICA; see related comments by Chitimira and Ncube 2020 *Acta Universitatis Danubius* 12; Van Niekerk and Van Heerden 2020 *SALJ* 108-114; Sharrock R *The Law of Banking and Payment in South Africa* (Juta: Cape Town 2016) 41

²⁷² Prudential Authority "Prudential Authority Regulatory Strategy 2021-2024" <https://www.resbank.co.za/content/dam/sarb/what-we-do/prudential-regulation/PA%20Regulatory%20and%20Supervisory%20Strategy%202021.pdf> accessed 21 June 2022; see related comments by Chitimira *Market Abuse Regulation in SADC* 178.

²⁷³ Section 11(2)(a) of the *FSR Act*; Van Heerden and Van Niekerk 2018 *Law and Financial Markets Review* 157; see related comments by Van Niekerk and Van Heerden 2020 *SALJ* 116; also see De Jagger 2013 *South African Journal of Mercantile Law* 497.

its mandates which relate to market integrity.²⁷⁴ The SARB is also required to have regard for other state organs whose roles and functions affect market integrity by offering the relevant financial institutions' liquidity assistance to achieve their market integrity roles and functions.²⁷⁵ For instance, the Department of Trade and Industry (DTI) whose functions include the determination of interest rates on credit agreements regulated by the *National Credit Act*.²⁷⁶ Accordingly, the researcher submits that the SARB also plays an implicit role in the promotion, protection, enhancement and maintenance of market integrity through its cooperation and collaboration with other financial role players such as the FSCA and the NCR.

4.3 The Roles and Functions of the PA to Promote, Protect, Enhance and Maintain Financial Stability and Market Integrity under the FSR Act

The *FSR Act* also established the PA²⁷⁷ to oversee prudential supervision and regulation in South Africa. The PA operates within the administration of the SARB but as an independent juristic person, separate from the SARB.²⁷⁸ The roles and functions of the PA include the promotion and enhancement of the safety and soundness of financial institutions in South Africa; the promotion and enhancement of market integrity; the protection of consumers from the risks posed by financial institutions which fail to fulfil their obligations; and cooperation and collaboration with the SARB to promote, protect and maintain financial stability.²⁷⁹ It should be noted that the *FSR Act* does not expressly

²⁷⁴ Sections 12, 26 and 76 of the *FSR Act*; see related comments by Chitimira H and Magau P "A Legal Conspectus of Some Role-Players in the Development of Financial Education in South Africa" 2022 *EIRP Proceedings* 360; also see Sharrock *The Law of Banking and Payment in South Africa* 41; Chitimira and Ncube 2020 *Acta Universitatis Danubius* 12; Van Niekerk and Van Heerden 2020 *SALJ* 108-114.

²⁷⁵ Prudential Authority "Prudential Authority Regulatory Strategy 2021-2024" 27.

²⁷⁶ Section 11(2)(b) of the *FSR Act*; *National Credit Act* 34 of 2005, section 103; Van Heerden and Van Niekerk 2018 *Law and Financial Markets Review* 157; see related comments by Goodspeed I "Twin Peaks" 2013 *South African Financial Markets Journal* 12, 15.

²⁷⁷ Section 32 of the *FSR Act*; 2013 *South African Financial Markets Journal* 15; Van Heerden and Van Niekerk 2018 *Law and Financial Markets Review* 159; Godwin 2017 *Law and Financial Markets Review* 185.

²⁷⁸ Section 32 of the *FSR Act*; Chitimira and Magau 2022 *EIRP Proceedings* 366; Chitimira and Ncube 2020 *Acta Universitatis Danubius* 12; Van Niekerk and Van Heerden 2020 *SALJ* 118.

²⁷⁹ Section 33 of the *FSR Act*; see related comments by Van Heerden G and Van Niekerk G "Twin Peaks: The Role of the South African Central Bank in Promoting and Maintaining Financial Stability" 2017 *THRHR* 636, 642; Van Heerden and Van Niekerk 2018 *Law and Financial Markets Review* 159.

confer a duty to protect, promote, enhance and maintain market integrity on the PA. However, the researcher submits that the PA implicitly promotes market integrity through its duty to promote and enhance the safety and soundness of market infrastructures.²⁸⁰

To achieve its mandates, the PA is required to assist, share information, cooperate and collaborate with the SARB, FSCA, NCR, FIC, the Competition Commission and other relevant financial role players to promote financial stability and enhance market integrity.²⁸¹ The PA is expressly required to support sustainable competition by cooperating and collaborating with the Competition Commission.²⁸² This entails that the PA plays a role in enhancing the integrity of financial markets by ensuring healthy competition for sustainability in the South African financial markets. Also, the PA is required to cooperate and collaborate with the FSCA in fulfilling its mandates. The powers and functions of the FSCA include the promotion and enhancement of market efficiency and market integrity and the PA is required to assist and support the FSCA in this regard.²⁸³ Accordingly, the researcher submits that the PA also plays an implicit role in promoting and enhancing market integrity through its duty to cooperate and collaborate with other financial role players such as the FSCA and the Competition Commission to fulfil their mandates. However, the researcher argues that the *FSR Act* should be amended to provide explicit provisions relating to the PA's duty to promote and enhance market integrity in South Africa. This will enable enforcement of this duty and also prevent regulatory gaps and overlaps through the provision of clear regulatory objectives and coordination arrangements between the PA and other financial role players.

²⁸⁰ Section 33(b) of the *FSR Act*; see related comments by Godwin 2017 *Law and Financial Markets Review* 185; Godwin, Howse and Ramsay 2017 *SALJ* 670; Chitimira and Ncube 2020 *Acta Universitatis Danubius* 12.

²⁸¹ Sections 34(1)(a)-(b) and 26 of the *FSR Act*; Chitimira and Magau 2022 *EIRP Proceedings* 366; Van Niekerk and Van Heerden 2020 *SALJ* 118; Lawack V and Visagie-Swart L "An Overview of the First Draft of the Conduct of Financial Institutions Bill and the Potential Impact on the National Payment System in South Africa" 2020 *South African Mercantile Law Journal* 129, 148.

²⁸² Section 34(1)(d) of the *FSR Act*; Chitimira and Ncube 2020 *Acta Universitatis Danubius* 12; Chitimira and Magau 2022 *EIRP Proceedings* 366.

²⁸³ Section 57(a)-(b)(i) of the *FSR Act*; Chitimira H *Market Abuse Regulation in SADC: South Africa, Namibia, Botswana and Zimbabwe* (Juta Cape Town 2022) 41; see related comments by Van Niekerk and Van Heerden 2020 *SALJ* 119; also see Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 13; Lawack and Visagie-Swart 2020 *South African Mercantile Law Journal* 132.

The *FSR Act* imposes an obligation to promote and enhance sustainable competition in the financial sector on the PA.²⁸⁴ On this aspect, the PA's role is similar to its United Kingdom (UK) counterpart, the Prudential Regulatory Authority (PRA), and is contrasted with the Australian Prudential Regulatory Authority (APRA).²⁸⁵ In the UK, the PRA plays a significant role in promoting market integrity by ensuring viable competition, and the same cannot be said about the Australian APRA.²⁸⁶ The *FSR Act* intended that the PA should fulfil this mandate through cooperation and collaboration with the Competition Commission.²⁸⁷ However, the relevant provision in the *FSR Act* does not expressly establish this role as it creates room for the PA to fulfil its competition objective without the required cooperation, collaboration, support or consent from the Competition Commission.²⁸⁸ Osode submits that this provision is justifiable as it is consistent with the legislative intent to make the PA a separate regulatory body, independent from other regulatory bodies.²⁸⁹ However, considering the significance and importance of cooperation and collaboration between the promotion of competition initiatives and the enhancement of market integrity, it is desirable for the PA to consistently cooperate and collaborate with the Competition Commission in fulfilling this mandate.

²⁸⁴ Section 34(1)(d) of the *FSR Act*, Osode PC "Two Heads are Better than One: Assessing South Africa's 'Twin Peaks' Financial Regulation Model" 2021 *Interdisciplinary Journal of Economics and Business Law* 9, 14.

²⁸⁵ Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 14; Godwin A, Howse T and Ramsay I "A Jurisdictional Comparison of the Twin Peaks Model of Financial Regulation" 2016 *Journal of Banking Regulation* 103, 106; Godwin A., Kourabas S and Ramsay I "Twin Peaks and Financial Regulation: The Challenges of Increasing Regulatory Overlap and Expanding Responsibilities" 2016 *International Lawyer* 273, 283; Jensen A and Kingston M "The Australian 'Twin Peaks' Framework of Financial System Regulation: Australia and UK Compared" 2010 *Butterworths Journal of International Banking and Financial Law* 548, 549.

²⁸⁶ Qumba 2022 *SALJ* 105; Godwin A and Ramsay I "Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation" 2015 *Journal of Banking and Finance Law and Practice* 240, 252; Godwin A, Li G and Ramsay I "Is Australia's Twin Peaks System of Financial Regulation Model for China (Part 1)" 2016 *Hong Kong Law Journal* 621, 628; Jensen and Kingston 2010 *Butterworths Journal of International Banking and Financial Law* 556.

²⁸⁷ Section 34(1)(d) of the *FSR Act*, Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 14; see related comments by Goodspeed 2013 *South African Financial Markets Journal* 14; also see Manguzvane M and Muteba Mwamba JW "Modelling Systemic Risk in the South African Banking Sector Using CoVaR" 2019 *International Review of Applied Economics* 624, 327.

²⁸⁸ Section 34(1)(d) of the *FSR Act*

²⁸⁹ Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 14; see related comments by Botha E and Makina D "Financial Regulation and Supervision: Theory and Practice in South Africa" 2011 *International Business and Economic Research Journal* 27, 30; Godwin and Schmulow 2015 *SALJ* 756; Schmulow 2011 *African Journal of International and Comparative Law* 401.

The PA also has roles and functions relating to the promotion and enhancement of financial stability in South Africa. The *FSR Act* provides that the PA should assist in maintaining financial stability and participate in the mitigation of risks threatening financial stability by following the steps recommended by the SARB.²⁹⁰ The PA and the National treasury cooperate and collaborate to develop policies on any matters relating to the financial sector.²⁹¹ In the last three years, the PA has cooperated and collaborated with the SARB through, *inter alia*, the designation of systemically important financial institutions and the designation of regulatory instruments to supervise financial institutions.²⁹² To alleviate the effects of the COVID-19 measures on financial stability and market integrity, the PA collaborated with the NCR to provide credit to PA-regulated financial institutions and develop regulatory instruments.²⁹³ Therefore, the researcher submits that the PA has to date managed to cooperate and collaborate with the SARB and other financial role players to adequately fulfil its roles and functions to protect financial stability and to enhance market integrity in South Africa.²⁹⁴ The *FSR Act* grants the PA authority to do anything it deems necessary in fulfilling its objectives.²⁹⁵ This includes cooperating with its counterparts from other jurisdictions and participating in

²⁹⁰ Section 34(1)(f) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 118; Van Heerden and Van Niekerk 2017 *THRHR* 642; Van Heerden and Van Niekerk 2018 *Law and Financial Markets Review* 159; Chitimira and Ncube 2020 *Acta Universitatis Danubius* 12; Chitimira and Magau 2022 *EIRP Proceedings* 366.

²⁹¹ Prudential Authority "Prudential Authority Regulatory Strategy 2021-2024" 29; Lawack and Visagie-Swart 2020 *South Africa Mercantile Law Journal* 132.

²⁹² Prudential Authority "Prudential Authority Regulatory Strategy 2021-2024" 29; see related comments by Chitimira and Ncube 2020 *Acta Universitatis Danubius* 14; Chitimira and Magau 2022 *EIRP Proceedings* 367.

²⁹³ Prudential Authority "Prudential Authority Regulatory Strategy 2021-2024" 28; see related comments by Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 23; also see Susskind D and Vines D "The Economics of the COVID-19 Pandemic: An Assessment" 2020 *Oxford Review of Economic Policy Journal* 1, 6.

²⁹⁴ Sections 33(d) and 34(b) of the *FSR Act*; see related comments by Van Niekerk and Van Heerden 2020 *SALJ* 118; Van Heerden and Van Niekerk 2017 *THRHR*, 642; Van Heerden and Van Niekerk 2018 *Law and Financial Markets Review* 159; Chitimira and Ncube 2020 *Acta Universitatis Danubius* 12; Chitimira and Magau 2022 *EIRP Proceedings* 366.

²⁹⁵ Section 34 of the *FSR Act*; see related comments by Chitimira and Ncube 2020 *Acta Universitatis Danubius* 12; Chitimira and Magau 2022 *EIRP Proceedings* 366; see related comments by Van Niekerk and Van Heerden 2020 *SALJ* 121.

relevant international bodies towards the protection, promotion, maintenance and enhancement of financial stability and market integrity in South Africa.²⁹⁶

4.4 The Roles and Functions of the FSCA to Promote, Protect, Enhance and Maintain Financial Stability and Market Integrity under the FSR Act

The *FSR Act* established the FSCA as an independent market conduct regulator.²⁹⁷ The FSCA was established as a separate regulatory body with an express mandate to cooperate and collaborate with the SARB, the PA, the FIC, the NCR, the Competition Commission and relevant state organs to protect, promote, maintain and enhance financial stability and market integrity in South Africa.²⁹⁸ The *FSR Act* provides that the roles and functions of the FSCA include the duty to promote and enhance market integrity and market efficiency through protecting and promoting the fair treatment of financial customers and promoting financial literacy programs.²⁹⁹ The *FSR Act* also provides that the FSCA should assist in maintaining financial stability.³⁰⁰

It should be noted that the FSCA plays a significant role as the enforcement authority of anti-market abuse laws designed to protect and enhance the integrity of South African financial markets.³⁰¹ To fulfil this mandate, the FSCA cooperates and collaborates with the FIC and the law enforcement authorities to curb market misconduct and related financial crimes in South Africa. However, there has not been significant cooperation and

²⁹⁶ Section 34(3) of the *FSR Act*; see related comments by Chitimira and Ncube 2020 *Acta Universitatis Danubius* 12; Chitimira and Magau 2022 *EIRP Proceedings* 366.

²⁹⁷ Section 56 of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 115; Godwin and Schmulow 2015 *SALJ* 759; Schmulow 2011 *African Journal of International and Comparative Law* 398; Govender S "A Fintech Take on the Conduct of the Financial Institutions Bill" 2019 *Without Prejudice* 6, 6.

²⁹⁸ See sections 57 and 58 of the *FSR Act*; Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 18; Qumba 2022 *SALJ* 99; Van Niekerk and Van Heerden 2020 *SALJ* 118; Van Heerden and Van Niekerk 2017 *THRHR* 636.

²⁹⁹ Section 57(a)-(b) of the *FSR Act*; Chitimira *Market Abuse Regulation in SADC: South Africa, Namibia, Botswana and Zimbabwe* 41; Chitimira and Ncube 2020 *Acta Universitatis Danubius* 9; Chitimira and Magau 2022 *EIRP Proceedings* 366.

³⁰⁰ Section 57(c) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 119; Chitimira and Ncube 2020 *Acta Universitatis Danubius* 9; Chitimira and Magau 2022 *EIRP Proceedings* 366.

³⁰¹ Sections 32-34 and 167-174 of the *FSR Act*; Chitimira *Market Abuse Regulation in SADC: South Africa, Namibia, Botswana and Zimbabwe* 41; Van Wyk JS "A Comparative Analysis of the Regulatory Independence of the Financial Sector Conduct Authority and the National Credit Register" 2019 *THRHR* 392, 395; Schmulow A "Retail Market Conduct Reforms in South Africa under Twin Peaks" 2017 *Law and Financial Markets Review* 163, 165.

collaboration between the FSCA, the South African courts, law enforcement agencies and other financial role players to this effect.³⁰² The FSCA lacks the powers and authority to prosecute any matters relating to market conduct compliance or irregularities. As such, there is a need for cooperation and collaboration arrangements between the FSCA, South African courts and law enforcement authorities such as the South African Police Services (SAPS) to ensure the effective prosecution of matters relating to market conduct laws and regulations.³⁰³ To date, there have been very few successfully prosecuted matters in this regard, and this reflects on the inadequacy of the cooperation and collaboration arrangements between the FSCA and the FIC, the SAPS and other relevant role players.³⁰⁴ Accordingly, the researcher submits that there is a need for express provisions in the *FSR Act*, to give effect to and foster cooperation and collaboration between the FSCA, the FIC, the courts, the SAPS and other relevant role players to promote and enhance market integrity in South Africa.

To achieve its objectives, the *FSR Act* also requires the FSCA to participate in relevant international bodies, cooperate and collaborate with its international counterparts.³⁰⁵ Cross-border cooperation and collaboration between the FSCA and other international regulatory bodies are essential for combating financial crimes that affect market integrity and threaten financial stability.³⁰⁶ The FSCA has taken steps to collaborate with

³⁰² See related comments by Chitimira H and Lawack VA "Overview of the Role-Players in the Investigation, Prevention and Enforcement of Market Abuse Provisions in South Africa" 2013 *Obiter* 200, 212; Chitimira H and Lawack VA "An Analysis of the General Enforcement Approaches to Combat Market Abuse (Part 1)" 2012 *Obiter* 548, 552; Chitimira *Market Abuse Regulation in SADC: South Africa, Namibia, Botswana and Zimbabwe* 160.

³⁰³ Chitimira *Market Abuse Regulation in SADC: South Africa, Namibia, Botswana and Zimbabwe* 45; see related comments by Luiz SM "Market Abuse and the Enforcement Committee" 2011 *South Africa Mercantile Law Journal* 151, 163; Osode PC "The Regulation of Insider Trading in South Africa: A Public Choice Perspective" 1999 *AJICL* 688, 705; Chitimira H "The Gaps and Flows in the Current South African Anti-Market Abuse Enforcement Framework in Relation to Selected Aspects of the Financial Markets" 2014 *Mediterranean Journal of Social Sciences* 236, 245.

³⁰⁴ See related comments by Luiz 2011 *South Africa Mercantile Law Journal* 162; also see Chitimira H "Overview Analysis of the Anti-Insider Trading Enforcement Measures in Namibia and South Africa" 2019 *Interdisciplinary Journal of Economics and Business Law* 103, 110; Schmulow 2017 *Law and Financial Markets Review* 168.

³⁰⁵ Section 58(4) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 120; Qumba 2022 *SALJ* 101; see related comments by Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 18.

³⁰⁶ Schmulow 2017 *African Journal of International and Comparative Law* 395; Basel Committee on Banking Supervision "Core Principles for Effective Banking Supervision" 2012 Bank for International Settlements, principle 3; see related comments by Keenan PJ "A New Chapter to

international organisations such as the United States Securities and Exchange Commission (SEC) to enhance the monitoring, detection, investigation and control of cross-border market misconduct that affects market integrity and financial stability in South Africa.³⁰⁷ The FSCA is also a signatory of the International Organisation of Securities Commissions (IOSCO).³⁰⁸ The IOSCO assists the FSCA with relevant equipment to enforce, detect and investigate market misconduct in South Africa.³⁰⁹ This shows that the FSCA has so far made considerable efforts to cooperate and collaborate with other financial role players to fulfil its financial stability and market integrity mandates. On this note, it can be said that the participation of the FSCA in international forums should be promoted to ensure the combating and investigation of cross-border market misconduct.

The FSCA has regulatory powers to request information from other regulatory bodies³¹⁰ and investigative authorities which allows it to investigate any issue or financial institution if it suspects non-compliance.³¹¹ It can be said that market integrity relies, *inter alia*, on fair customer treatment, sound financial institutions, prevention of financial crime and financial literacy. Accordingly, the FSCA may make conduct standards on relevant financial role players to promote market integrity through ensuring financial literacy,

Meet the Growing Need to Regulate Cross-Border Insolvencies" 2006 *Norton Journal of Bankruptcy Law and Practice* 128, 135; Bordo MD and Schwartz AJ "Under What Circumstances, Past and Present, Have International Rescues of Countries in Financial Distress been Successful" 1999 *Journal of International Money and Finance* 683, 686.

³⁰⁷ Chitimira *Market Abuse Regulation in SADC* 46; Chitimira and Lawack 2012 *Obiter* 552; see related comments by 2019 *Interdisciplinary Journal of Economics and Business Law* 103, 110; Schmulow 2017 *Law and Financial Markets Review* 168.

³⁰⁸ Marcacci A "IOSCO: The World Standard Setter for Globalized Financial Markets" 2012 *Richmond Journal of Global Law and Business* 23, 24; IOSCO "Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information" 2002 <http://www.iosco.org> accessed 21 May 2022; IOSCO Board "A Compilation of Authorities' Experience with Cooperation" 2019 www.bis.org accessed 14 July 2022.

³⁰⁹ Marcacci 2012 *Richmond Journal of Global Law and Business* 26; IOSCO MMOU "Cross-border Cooperation" 16 February 2015 <https://www.sc.com.my/development/international/cross-border-co-operation/list-of-iosco-multilateral-mou-signatories> accessed 13 February 2022; see related comments by Chitimira and Lawack 2013 *Obiter* 108.

³¹⁰ Section 58 of the *FSR Act*; see related comments by Qumba 2022 *SALJ* 104; Van Niekerk and Van Heerden 2020 *SALJ* 117; Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 18; Chitimira *Market Abuse Regulation in SADC* 42.

³¹¹ Section 134-139 of the *FSR Act*; see related comments by Chitimira and Ncube 2020 *Acta Universitatis Danubius* 10; Sithole A "Regulatory Strategy of the Financial Sector Conduct Authority: October 2018 to September 2021" *Financial Sector Conduct Authority* 1, 22.

reducing risks to combat financial crimes, encouraging the fair treatment of customers and assisting the SARB to maintain financial stability.³¹² The FSCA may also require specific action from a financial institution if it reasonably believes that the actions or conduct of the institution pose a risk to market integrity or when the financial institution or financial role players contravene any financial sector laws.³¹³ This is applicable if such actions, conduct or contravention is committed within the scope of the objectives of the FSCA and may or has affected market integrity and financial stability.³¹⁴ However, the FSCA may not issue directives relating to financial stability without prior consultation and approval of the SARB as the primary guardian of financial stability in South Africa. The SARB and the FSCA concluded a MOU to establish cooperation and collaboration arrangements in matters relating to, *inter alia*, combating anti-money laundering (AML) and the financing of terrorism; the SARB's financial stability objectives, information exchange and monitoring financial stability risks.³¹⁵

It is apposite to allude that although the FSCA is an independent juristic person, it does not perform its roles and functions in isolation. The emphasis on cooperation and collaboration when fulfilling regulatory duties under the *FSR Act* ensures that the FSCA constantly consults, assists and discusses matters relating to common interests with other financial role players such as the SARB, the FIC, the PA and the NCR. The *FSR Act* also obliges other financial role players such as the PA to cooperate, collaborate and assist the FSCA in fulfilling its objectives.³¹⁶ This shows the relevance and significance of

³¹² Section 106(2)(a)-(e) of the *FSR Act*; Viljoen A, Lallo V and Bunge S "Financial Sector Regulation Act: Implementing Twin Peaks and the Impact on the Industry" 2018 *Ernest and Young Publications* 1, 8; Chitimira and Ncube 2020 *Acta Universitatis Danubius* 10; Schmulow 2017 *Law and Financial Markets Review* 169.

³¹³ Section 144(1) and (4) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 118; see related comments by Godwin and Schmulow 2015 *SALJ* 761; Van Wyk 2019 *THRHR* 396.

³¹⁴ Section 144(4) of the *FSR Act*; Van Niekerk and Van Heerden 2017 *THRHR* 647; Van Niekerk and Van Heerden 2020 *SALJ* 119; Van Wyk 2019 *THRHR* 395; Schmulow 2017 *Law and Financial Markets Review* 169.

³¹⁵ South African Reserve Bank and the Financial Sector Conduct Authority "Memorandum of Understanding between the SARB and the FSCA" 28 September 2022 https://www.fsc.co.za/Regulatory%20Liaison/MOU_FSCA%20and%20SARB.pdf accessed 21 June 2021; see related comments by Van Niekerk and Van Heerden 2020 *SALJ* 119; also see Qumba 2022 *SALJ* 102.

³¹⁶ Section 34(1)(b) of the *FSR Act*; Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 18; Qumba 2022 *SALJ* 99; Van Niekerk and Van Heerden 2020 *SALJ* 118; Van Heerden and Van Niekerk 2017 *THRHR* 636.

cooperation and collaboration between the SARB and other financial role players in protecting, promoting, maintaining and enhancing financial stability and market integrity in South Africa. However, the *FSR Act* fails to provide express regulations relating to cooperation and collaboration between the FSCA, the FIC, the SAPS and the courts to detect, investigate and prosecute matters relating to financial markets misconduct. The *FSR Act* must make this provision considering the need to combat financial crime and promote the integrity of South Africa's financial markets. The FSCA and the SAPS should conclude cooperation and collaboration arrangements to enhance the prevention and investigation of market misconduct that threatens financial stability and market integrity in South Africa.³¹⁷

4.5 The Roles and Functions of the FSOC to Promote, Protect, Enhance and Maintain Financial Stability and Market Integrity under the FSR Act

The FSOC is a committee established by the *FSR Act* as the apex committee in all matters relating to financial stability.³¹⁸ The FSOC supports the SARB in fulfilling its financial stability mandate. The FSOC was also established to facilitate cooperation and collaboration between the SARB and other financial regulators such as the PA, the FSCA, the FIC and the NCR to protect, promote, maintain and enhance financial stability.³¹⁹ The main function of the FSOC is to facilitate cooperation and coordination between the SARB and other financial role players for financial stability. It should be noted that there are no express provisions relating to the FSOC's duty to promote market integrity in South Africa.³²⁰ It can be implied that the FSOC has an implicit duty to maintain market integrity

³¹⁷ See related comments by Chitimira Market Abuse Regulation in SADC 44; Chitimira and Lawack 2013 *Obiter* 112; Chitimira and Lawack 2012 *Obiter* 552; Luiz 2011 *South Africa Mercantile Law Journal* 163.

³¹⁸ Section 20 of the *FSR Act*; see related comments by Godwin and Schmulow 2015 *SALJ* 769; Qumba 2022 *SALJ* 112; also see Van Heerden and Van Niekerk 2018 *Law and Financial Markets Review* 157.

³¹⁹ Section 20(2)(b) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 117; Godwin 2017 *Law and Financial Markets Review* 182; Van Heerden and Van Niekerk 2018 *Law and Financial Markets Review* 158.

³²⁰ See section 21 of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 117; see related comments by Hollander H, Van Lill D "A Review of the South African Reserve Bank's Financial Stability Policies" 2019 Stellenbosch University, Department of Economic Working Paper 12; also see Godwin, Howse and Ramsay 2017 *SALJ* 67.

through its duty to prevent and manage risks to financial stability.³²¹ This is so because a threat to financial stability may also adversely affect the integrity of the financial markets.

The FSOC serves as a forum for discussion between the SARB and other financial role players in all matters relating to financial stability. Essentially, it can be said that the purpose of the FSOC is to foster cooperation and collaboration between the SARB and other financial role players such as the PA, the FSCA, the FIC and the NCR to promote and enhance financial stability by creating a platform for discussions and information sharing.³²² The FSOC also serves as an advisory committee as it is tasked with the duty to advise the SARB and the Minister of Finance on measures to protect, promote, and maintain financial stability, and mitigate and manage systemic risks or potential risks that threaten financial stability.³²³ The establishment of the FSOC is a reflection of the importance of cooperation and collaboration between the SARB and other financial role players to fulfil their mandates.³²⁴

The FSOC comprises senior officials of financial role players such as the SARB, the PA, the FSCA, the FIC and the NCR. The researcher submits that the membership of the FSOC fosters high-level coordination through information sharing, consultation and discussions on matters of common interest between SARB and the key financial role players in South Africa.³²⁵ The roles and functions of the FSOC include: recommending the designation of systemically important financial institutions (SIFIs); advising the relevant Minister and the SARB on mechanisms regarding the promotion, protection,

³²¹ Section 21(c) of the *FSR Act*; see related comments by Schmulow A “Twin Peaks: A Theoretical Analysis” *CIFR Paper Series* 1, 6; Goodspeed 2013 *South African Financial Markets Journal* 8; Van Heerden and Van Niekerk 2018 *Law and Financial Markets Review* 158.

³²² Van Heerden and Van Niekerk 2018 *Law and Financial Markets Review* 158; Van Heerden and Van Niekerk 2017 *THRHR* 645; see related comments by Qumba 2022 *SALJ* 116; also see Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 635.

³²³ Section 21(c)(i)-(ii) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 117; see related comments by Qumba 2022 *SALJ* 116; Schmulow 2017 *African Journal of International and Comparative Law* 398; also see Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 18.

³²⁴ Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 630; Llewellyn “Institutional Structure of Financial Regulation and Supervision: The Basic Issues” 28; Godwin, Howse and Ramsay 2017 *SALJ* 701; Godwin and Schmulow 2015 *SALJ* 758.

³²⁵ See related comments by Schmulow 2017 *African Journal of International and Comparative Law* 398; also see Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 18; Godwin and Schmulow 2015 *SALJ* 761.

maintenance or enhancement of financial stability, prevention of risks, crisis management and prevention; and recommending mechanisms to protect, promote, maintain and enhance financial stability to relevant state organs, management or prevention of risks to financial stability and any other relevant function imposed by financial sector laws.³²⁶ These duties are fulfilled through consultation and discussions between the member institutions. The committee is supposed to meet every six months to discuss matters relating to financial stability and share information.³²⁷ The purpose of regular FSOC meetings is to foster cooperation and collaboration between the SARB and the member institutions, such as the FSCA, the PA, the FIC and the NCR. Accordingly, it can be said that the FSOC performs its roles and function in a manner that facilitates cooperation and collaboration between the SARB, and other regulators to promote, protect, maintain and enhance financial stability and market integrity in South Africa.

Having regard to the roles and functions of the FSOC, the researcher submits that the FSOC was established to create a platform for the SARB and other financial role players to make decisions relating to the SARB's financial stability mandate. The FSOC is a platform that enables the financial role players to cooperate and collaborate to protect and maintain financial stability through regular meetings, consultations and discussions. However, the researcher submits that the roles and functions of the FSOC are limited to facilitating cooperation and collaboration and do not extend to the enforcement of regulatory coordination in South Africa. As such, there remains a gap in relation to the enforcement of consistency in inter-agency coordination to promote, protect, enhance and maintain financial stability and market integrity in South Africa.

4.6 The Roles and Functions of the FSCF to Promote, Protect, Enhance and Maintain Financial Stability and Market Integrity under the FSR Act

The FSCF was established under the *FSR Act* to assist the FSOC with the discovery of potential systemic risk events, and measures and structures to mitigate the identified

³²⁶ Section 21 of the *FSR Act*; see related comments by Godwin, Howse and Ramsay 2017 *SALJ* 681; Van Heerden and Van Niekerk 2017 *SALJ* 652; see related comments by Chitimira H "Historical Aspects of the Statutory Regulation of Financial Inclusion for the Poor and Low-Income Earners in South Africa" 2020 *Acta Universitatis Danubius* 269, 280.

³²⁷ Section 24 of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 118; see related comments by Godwin and Schmulow 2015 *SALJ* 761;

risks.³²⁸ The main function of the FSCF is to assist the FSOC with the implementation of measures to mitigate identified systemic risks. The establishment of the FSCF and its duty to assist the FSOC to fulfil its objectives was a measure to foster cooperation and collaboration between the member institutions of the FSOC and the FSCF to fulfil their mandates.³²⁹ It should be noted that FSCF does not have mandates separate from the roles and functions of the FSOC. Thus, like the FSOC, the FSCF does not have an express duty to promote or enhance market integrity in South Africa. The FSCF ensures that the FSOC effectively and efficiently fulfils its mandates by providing the FSOC with relevant information to execute its mandates.³³⁰

To achieve its mandates, the FSCF receives administrative support from the SARB.³³¹ The researcher submits that the relationship between the FSCF and the FSOC is founded on cooperation and collaboration of mandates. The primary objective of the FSCF is to assist the FSOC to identify potential risks and cooperate and collaborate to establish plans and mechanisms to mitigate risks that threaten financial stability and market integrity.³³² This shows that there is no direct coordination between the SARB and the FSCF, instead cooperation and collaboration between the SARB and the FSCF is done through the FSOC. However, the *FSR Act* does not establish cooperation and collaboration arrangements between the FSCF and the FSOC to curb overlaps and regulatory gaps between the two committees. The FSCF and the FSOC have seemingly overlapping functions and the lack of express cooperation and collaboration arrangements, and demarcation of functions might result in overlaps between the

³²⁸ Section 25(2) of the *FSR Act*; Schmulow 2017 *African Journal of International and Comparative Law* 393; Godwin, Howse and Ramsay 2017 *SALJ* 670; Godwin, Kourabas and Ramsay 2016 *International Lawyer* 279.

³²⁹ See related comments by Chitimira 2020 *Acta Universitatis Danubius* 280; Godwin, Howse and Ramsay 2017 *SALJ* 681; Van Niekerk and Van Heerden 2020 *SALJ* 118; Van Heerden and Van Niekerk 2017 *THRHR* 652.

³³⁰ Section 25(1) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 118; see related comments by Schmulow 2017 *African Journal of International and Comparative Law* 398; also see Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 18; Godwin and Schmulow 2015 *SALJ* 761.

³³¹ Section 25(6) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 118; Van Heerden and Van Niekerk 2017 *THRHR* 652; see related discussion by Chitimira 2020 *Acta Universitatis Danubius* 280; Godwin, Howse and Ramsay 2017 *SALJ* 681.

³³² Section 25(2) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 118; see related comments by Godwin, Howse and Ramsay 2017 *SALJ* 681; Godwin 2018 *Law and Financial Markets Law* 159.

functions of the FSOC and the FSCF.³³³ This follows the fact that both the FSCF and the FSOC are headed by the same personnel, the Deputy Governors of the SARB. Accordingly, the researcher cautions against potential overlaps and regulatory gaps between the roles and functions of the FSCF and the FSOC which could threaten financial stability and market integrity in South Africa.

4.7 The Roles and Functions of the FSCR to Promote, Protect, Enhance and Maintain Financial Stability and Market Integrity under the FSR Act

The *FSR Act* established the FSCR to facilitate cooperation, collaboration and consistency of action between the SARB and the member institutions of the FSCR, namely, the Department of Trade and Industry (DTI), the Department of Health, the NCR, the FIC, the Medical Schemes, the National Consumer Commission and the Competition Commission.³³⁴ The establishment of FSCR was an idea borrowed from Australia, which also established the Council of Financial Regulators (CFR), a body with no equivalent in the UK.³³⁵ The function of the FSCR is to facilitate cooperation, collaboration, coordination, consultation and consistency of action by creating a forum for its constituent institutions to discuss and share information relating to matters of common interest.³³⁶ However, the researcher argues that membership of the FSCR raises an area of difficulty when compared to that of the Australian CFR.³³⁷ The membership of the FSCR is problematic when it is taken into consideration that the FSCR functions as a coordinating body to facilitate general cooperation and collaboration between the SARB and other financial role players.³³⁸ The membership of the FSCR does not include the main financial

³³³ See related comments by Van Heerden C M, Van Niekerk GM and Huls NJH “Two Takes on Twin Peaks: A Comparative Appraisal of the Models of Financial Regulation in the Netherlands and South Africa” 2020 *THRHR* 491, 510; Van Niekerk and Van Heerden 2020 *SALJ* 118.

³³⁴ Section 79 of the *FSR Act*.

³³⁵ Section 79(2) of the *FSR Act*; Godwin and Schmulow 2015 *SALJ* 768; Van Niekerk and Van Heerden 2020 *SALJ* 123; Van Heerden, Van Niekerk and Huls 2020 *THRHR* 511.

³³⁶ Section 79(2) of the *FSR Act*; Godwin and Schmulow 2015 *SALJ* 768; Van Niekerk and Van Heerden 2020 *SALJ* 123; Qumba 2022 *SALJ* 115; Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 20.

³³⁷ Schmulow 2017 *African Journal of International and Comparative Law* 401; Godwin, Howse and Ramsay 2017 *SALJ* 665; see related comments by Godwin, Kourabas and Ramsay 2016 *International Lawyer* 282.

³³⁸ Section 79(3) of the *FSR Act*; Godwin and Schmulow 2015 *SALJ* 769; see related comments by Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 635; Godwin 2017 *Law and Financial Markets Review* 182.

role players in South Africa, namely, the SARB, the PA and the FSCA. As such, it is difficult to imagine the effectiveness of the functions of the FSCR to promote financial stability and enhance market integrity without the input of the PA and the FSCA. In this regard, the researcher submits that there is a need to amend and reconsider the membership of the FSCR to include the main financial role players, namely the PA and the FSCA, as in the case of Australia. This will enhance the discussions, coordination, transparency, mutual assistance and good relationships between the SARB and other financial role players to promote, protect, enhance and maintain financial stability and market integrity in South Africa.

The FSCR does not have other functions and powers outside of its facilitating and coordinating role. The researcher submits that this approach might have been implemented as a measure to prevent the roles and functions of the FSCR from cutting across the objectives and functions of its member institutions.³³⁹ This means that the FSCR is not authorised to enforce the duty to cooperate and collaborate between the SARB and its member institutions.³⁴⁰ Nonetheless, the researcher argues that the lack of enforcement powers and responsibilities on the FSCR affects transparency and compliance with the duty to cooperate, collaborate and conclude MOUs to this effect. A coordinating body should have the duty and powers to consistently enforce and compel cooperation and collaboration between financial role players.

The FSCR was established as a body and a forum for discussing and resolving matters that could threaten financial stability and market integrity.³⁴¹ The *FSR Act* provides that

³³⁹ Section 79(4) of the *FSR Act*; see related comments by Kourabas S “Trends and Theory in Financial Regulation and Regulatory Design after the Global Financial Crisis” in Arner D, Wan W, Godwin A, Shen W and Gibson E (eds) *Research Handbook on Asian Financial Law* (Elgar Online 2020) 30, 35; Kourabas S “Improving Australia’s Regulatory Framework for Systemic Financial Stability” 2018 *Journal of Banking and Finance Law Practice* 183, 187; Godwin and Schmulow 2015 *SALJ* 770.

³⁴⁰ Section 79(2) of the *FSR Act*; Kourabas 2018 *Journal of Banking and Finance Law Practice* 187; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 635; also see Godwin 2017 *Law and Financial Markets Review* 185.

³⁴¹ Section 79 of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 118; Schmulow 2017 *African Journal of International and Comparative Law* 401; Godwin, Howse and Ramsay 2017 *SALJ* 665.

the FSCR should meet at least twice a year.³⁴² The researcher argues that, considering the roles and functions of a coordinating body, which include ensuring effective and adequate coordination for promoting financial stability and enhancing market integrity, two meetings in a year are not sufficient to effectively fulfil this purpose. In Australia, the CFR meets at least four times a year to identify, discuss, and assist each other in matters of common interest.³⁴³ As such, the researcher submits that there is a need for regular FSCR meetings for harmonising regulatory actions and ensuring adequate cooperation and collaboration between the SARB and other financial role players through the FSCR.

The researcher also submits that, the FSCR should not be regarded as the only forum for inter-agency coordination between financial sector role players. This means that the powers and functions of the FSCR should not limit the powers and functions of its member institutions in relation to cooperation and collaboration.³⁴⁴ In addition to the roles and functions of the FSRC to facilitate cooperation and collaboration, the researcher submits that there is a need for the FSCR to be granted powers to enforce the duty to coordinate and mediate the resolution of differences between financial role players in relation to fulfilling their mandates. As such, the researcher submits that the roles and functions of the FSCR should be reconsidered.

4.8 The Roles and Functions of the FIC in Promoting, Protecting, Enhancing and Maintaining Financial Stability and Market integrity under the FSR Act

The FIC is established under the *Financial Intelligence Centre Act (FICA)*.³⁴⁵ The FIC is responsible for customer verification, keeping transaction records, monitoring customer

³⁴² Section 80(1) of the *FSR Act*; Godwin and Schmulow 2015 *SALJ* 768; Van Niekerk and Van Heerden 2020 *SALJ* 118; see related comments by Kourabas 2018 *Journal of Banking and Finance Law Practice* 188.

³⁴³ Hanrahan P “Twin Peaks after Hayne: Tensions and Trade-Offs in Regulatory Architecture” 2019 *Law and Financial Markets Review* 13, 23; Schmulow A, Fairweather K and Tarrant J “Twin Peaks 2.0: Reforming Australia’s Financial Regulatory Regime in Light of Failings Exposed by the Banking Royal Commission” 2018 *Law and Financial Markets Review* 193, 195; Godwin A and Ramsay I “Twin Peaks - The Legal and Regulatory Anatomy of Australia’s System of Financial Regulation” 2015 *Journal of Banking and Finance Law and Practice* 240, 251; Jensen and Kingston 2010 *Butterworths Journal of International Banking and Financial Law* 545, 549

³⁴⁴ See related comments by Godwin and Schmulow 2015 *SALJ* 77; Kourabas 2018 *Journal of Banking and Finance Law Practice* 188; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 635.

³⁴⁵ *Financial Intelligence Centre Act (FICA)* 38 of 2001; Chitimira H and Munedzi S “Selected Challenges Associated with the Reliance on Customer Due Diligence Measures to Curb Money

account activities, reporting suspicious transactions and facilitating risk assessment programs to combat financial crime in South Africa.³⁴⁶ It should be noted that the FIC does not have express roles and mandates to promote, protect, enhance or maintain financial stability and market integrity under the *FSR Act* or the *FICA*. However, the FIC is required to monitor transactions and report unusual transactions to enable the detection of financial crimes such as money laundering that may threaten market integrity and financial stability.³⁴⁷ The *FSR Act* requires the FIC to cooperate, collaborate and assist the SARB, the FSOC, the FSCA, the PA and the NCR to fulfil their mandates.³⁴⁸ This entails that the FIC also plays a role in promoting, protecting, enhancing and maintaining financial stability and market integrity in South Africa by assisting other financial role players to fulfil their mandates which relate to financial stability and market integrity.³⁴⁹ To fulfil its objectives, the FIC entered into a MOU which establishes cooperation, collaboration and information sharing arrangements with the PA and the SARB.³⁵⁰ In this MOU, the FIC agrees to protect and enhance financial stability by participating in the FSOC, the FSCR and the FSCF.³⁵¹ This entails that the FIC agrees to cooperate and collaborate with the member institutions of the FSCR, the FSOC and the FSCF to promote

Laundering in South African Banks and Related Financial Institutions” 2021 *Journal of Comparative Law in Africa* 42, 43; Chitimira H “An Exploration of the Current Regulatory Aspects of Money Laundering in South Africa” 2021 *Journal of Money Laundering Control* 789, 790.

³⁴⁶ Chitimira and Munedzi 2021 *Journal of Comparative Law in Africa* 44; Burchell J “Organised Crime and Proceeds of Crime Law in South Africa” 2010 *South African Journal of Criminal Justice* 177, 178; De Koker L “Money Laundering Trends in South Africa” 2002 *Journal of Money Laundering Control* 27, 29; see related comments by Chitimira and Ncube 2020 *Acta Universitatis Danubius* 16.

³⁴⁷ Section 21 of the *FICA*; see related comments by Chitimira 2021 *Journal of Money Laundering Control* 790; Schlenther B “The Taxing Business of Money Laundering: South Africa” 2013 *Journal of Money Laundering Control* 126, 131; Chitimira and Munedzi 2021 *Journal of Comparative Law in Africa* 44.

³⁴⁸ Section 76 of the *FSR Act*; see related comments by Chitimira *Market Abuse Regulation in SADC* 42; Van Niekerk and Van Heerden 2020 *SALJ* 118; Godwin 2017 *Law and Financial Markets Review* 182; Van Heerden and Van Niekerk 2017 *Law and Financial Markets Review* 158.

³⁴⁹ Section 76 of the *FSR Act*; sections 4 and 5 of the *FICA*; See related comments by Van Niekerk and Van Heerden 2020 *SALJ* 125; also see Chitimira *Market Abuse Regulation in SADC* 46.

³⁵⁰ See section 77 of the *FSR Act*; see related comments by Van Niekerk and Van Heerden 2020 *SALJ* 125; Financial Intelligence Centre and the South African Reserve Bank and the Prudential Authority “Memorandum of Understanding between the FIC and the SARB and the PA” 03 October 2018 [https://www.fic.gov.za/Documents/MOU%20-%20SARB%20%20FIC%20\(Combined\).pdf](https://www.fic.gov.za/Documents/MOU%20-%20SARB%20%20FIC%20(Combined).pdf) accessed 23 June 2021.

³⁵¹ Sections 76 and 77 of the *FSR Act*; Financial Intelligence Centre and the South African Reserve Bank and the Prudential Authority “Memorandum of Understanding between the FIC and the SARB and the PA” para 5.2.

financial stability and enhance market integrity. The FIC fulfils its financial stability and market integrity functions by providing relevant information relating to the promotion and protection of financial stability with the SARB and other financial role players.

The researcher argues that the lack of cooperation and collaboration arrangements between the FIC, the courts and law enforcement agencies such as the SAPS, should be reconsidered. There is a need for cooperation and collaboration arrangements between the FIC and the SAPS to enhance the detection and prosecution of market misconduct matters in South Africa. The researcher submits that such cooperation and collaboration should enable the SAPS to access information withheld by the FIC so that the SAPS may also assist in the detection of market misconduct which threatens financial stability and market integrity. The courts should also assist with the prosecution of market misconduct reported by the FIC to ensure that the perpetrators are punished.

4.9 The Roles and Functions of the NCR to Promote, Protect, Enhance and Maintain Financial Stability and Market Integrity under the FSR Act

The NCR was established under the *National Credit Act*³⁵² with the primary purpose of monitoring and regulating the South African credit industry.³⁵³ It should be noted that the NCR does not have express roles and functions relating to the promotion and protection of financial stability or market integrity in South Africa. However, the NCR is tasked with ensuring that the credit market is accessible to all consumers and monitoring the credit market to promptly detect, prosecute, investigate and where possible, prevent credit market misconduct.³⁵⁴ The NCR performs these mandates to promote and protect the integrity of the financial markets. As such, it can be said that the NCR has implicit roles and functions to promote and protect market integrity in South Africa. However, the NCR

³⁵² *National Credit Act* 34 of 2005, section 12 of the; Vessio ML "What Does the National Credit Regulator Regulate" 2008 *South African Mercantile Law Journal* 227, 228; Chitimira and Ncube 2020 *Acta Universitatis Danubius* 13; Van Heerden C "Section 85 of the National Credit Act 34 of 2005: Thoughts on its Scope and Nature" *De Jure* 968, 969.

³⁵³ Section 12(2) of the *National Credit Act*; Chitimira and Ncube 2020 *Acta Universitatis Danubius* 13; Simpson B "The Hidden Teeth of the National Credit Act: Financial Law" 2013 *Without Prejudice* 8, 9; Vessio 2008 *South African Mercantile Law Journal* 228.

³⁵⁴ Sections 13(a)-(d), 14-15 and 16-25 of the *National Credit Act*; Chitimira and Ncube 2020 *Acta Universitatis Danubius* 13; see related comments by Van Heerden C and Coetzee H "Wesbank v Deon Winston Papier and National Credit Regulator" 2011 *De Jure Law Journal* 463, 465.

does not fulfil these roles and functions in isolation. The *FSR Act* provides that the financial sector regulators should cooperate and collaborate with the SARB and with each other to fulfil their mandates.³⁵⁵

To date, the NCR has entered into several MOUs which establish cooperation, collaboration and information sharing arrangements with the SARB, the FSCA, the PA and the Credit Ombud.³⁵⁶ The purpose of the MOUs is to, inter alia, formalise and strengthen relationships, appropriate coordination and assist each other in performing regulatory mandates. The researcher submits that the MOUs regarding cooperation and collaboration arrangements between the NCR and the FSCA and the Credit Ombud plays a significant role in preventing overlaps and regulatory gaps by providing express mandates for each party. This is essential for effective cooperation and collaboration to promote, protect, enhance and maintain market integrity in South Africa. The NCR also entered into an MOU with the SARB and the PA to cooperate and collaborate to promote financial stability.³⁵⁷ Although the NCR does not have an express mandate to promote and protect financial stability, it agrees to cooperate and collaborate with the SARB to maintain, protect and enhance financial stability.³⁵⁸ The NCR fulfils this duty by providing assistance and sharing relevant information with the SARB and the FSOC to protect and restore financial stability. In this regard, it is submitted that considerable efforts have been made by the NCR to cooperate and collaborate with the SARB and other financial role players to promote, protect, enhance and maintain financial stability and market integrity in South Africa. The NCR adequately fulfils its mandates as evidenced by the manner in

³⁵⁵ Sections 26, 27, 76 and 77 of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 119; Chitimira *Market Abuse Regulation in SADC* 41; Godwin, Howse and Ramsay 2017 *SALJ* 668.

³⁵⁶ Financial Sector Conduct Authority and National Credit Regulator “Memorandum of Understanding between FSCA and NCR” 28 September 2018 https://www.fsca.co.za/Regulatory%20Liaison/MoU_%20FSCA%20and%20NCR.pdf accessed 25 June 2022, para 2.1.

³⁵⁷ South African Reserve Bank, Prudential Authority and National Credit Regulator “Memorandum of Understanding between the SARB, the PA and the NCR” 29 September 2018 <https://www.resbank.co.za/content/dam/sarb/publications/prudential-authority/pa-financial/sector-regulation-act/2018/8803/PA-SARB-NCR-Memorandum-of-Understanding.pdf> accessed 26 June 2021.

³⁵⁸ See South African Reserve Bank, Prudential Authority and National Credit Regulator “Memorandum of Understanding between the SARB, the PA and the NCR” para 4.1.2.1-4.1.2.2; see related comments by Van Heerden and Van Niekerk 2017 *THRHR* 652; Van Heerden, Van Niekerk and Huls 2020 *THRHR* 511; Godwin, Howse and Ramsay 2017 *SALJ* 668.

which the NCR collaborated with the SARB during the COVID-19 pandemic to re-structure and re-position credit interest rates to ensure that financial customers do not become over-indebted.

4.10 The Roles and Functions of the FSIC to Promote, Protect, Enhance and Maintain Financial Stability and Market Integrity under the FSR Act

The roles and functions of state organs and Cabinet members in promoting, protecting, maintaining and enhancing financial stability and market integrity in South Africa cannot be overemphasised. The *FSR Act* established the FSIC to facilitate cooperation and collaboration between Cabinet members who are responsible for administering financial sector laws.³⁵⁹ The FSIC was established as a forum for cabinet members to discuss matters of common interest such as policy objectives, and domestic and international regulatory challenges.³⁶⁰ Therefore, the FSIC is a platform that fosters cooperation and collaboration between the relevant Cabinet members and other financial role players such as the SARB, the FSCA and the PA. The FSIC comprises the Minister of Finance, the Minister of Trade and Industry, the Minister of Health and the Minister of Economic Development.³⁶¹ The researcher submits that membership of the FSIC entails a high-level decision making forum with a significant role to promote, protect, enhance and maintain financial stability and market integrity in South Africa.

The objective of the FSIC under the *FSR Act* is to facilitate cooperation and collaboration between the SARB, financial regulators and relevant government officials. The FSIC ensures that financial sector legislation, policies and cabinet decisions do not jeopardise financial stability and market integrity objectives, as well as other matters relating to financial sector regulation.³⁶² The FSIC is also tasked with evaluating the cooperation and

³⁵⁹ Section 83(2) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 118; Godwin, Howse and Ramsay 2017 *SALJ* 692; see related comments by Qumba 2022 *SALJ* 115; see related comments by Van Heerden and Van Niekerk 2017 *THRHR* 652.

³⁶⁰ Section 83 of the *FSR Act*; Godwin, Howse and Ramsay 2017 *SALJ* 692; Van Niekerk and Van Heerden 2020 *SALJ* 118; National Treasury “A Safer Financial Sector to Serve South Africa Better” 18.

³⁶¹ Section 83(3) of the *FSR Act*; Schulze W “Financial Institutions” 2016 *Annual Survey of South African Law* 379, 384; Godwin and Schmulow 2015 *SALJ* 768; Godwin, Howse and Ramsay 2017 *SALJ* 692.

³⁶² Section 83 of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 143.

collaboration mechanisms established in South Africa every two years.³⁶³ The researcher argues that the decision to assign the FSIC the duty to evaluate cooperation and collaboration mechanisms should be reconsidered. This follows the fact that the members of the FSIC are politically exposed persons (PEPs) who are regarded as high risk customers.³⁶⁴ PEPs are natural persons who hold prominent public offices and are regarded as high risk customers due to their ability to abuse the power vested in them to commit financial crimes such as bribery, corruption and embezzlement.³⁶⁵ Accordingly, the researcher cautions against the decision to make Cabinet members actively involved in matters relating to financial stability, market integrity and financial sector regulation as a whole.

4.11 The Roles and Functions of the SAPS and the Courts to Promote, Protect, Enhance and Maintain Financial Stability and Market Integrity under the FSR Act

Notwithstanding the fact that the *FSR Act* does not provide any provisions relating to the roles and functions of the SAPS and the South African courts to promote, protect, enhance and maintain financial stability and market integrity in South Africa, the *FICA* provides that the FIC may refer suspected market misconduct matters to the SAPS or any other law enforcement authority.³⁶⁶ The SAPS plays a significant role in the investigation of matters threatening financial stability and market integrity, whilst the National Prosecuting Authority has the mandate to prosecute the perpetrators.³⁶⁷ This shows that the SAPS and the courts play an important role in protecting and promoting financial stability in South Africa. Be that as it may, there are no established arrangements

³⁶³ Sections 86(1)(a) and (b) and 86(5) of the *FSR Act*.

³⁶⁴ Choo K "Politically Exposed Persons (PEPs): Risks and Mitigation" 2008 *Journal of Money Laundering Control* 371, 372; Choo K "Challenges in Dealing with Politically Exposed Persons" 2010 *Trends and Issues in Crime and Criminal Justice* 1, 2; Menz M "Show Me the Money-Managing Politically Exposed Persons (PEPs) Risk in UK Financial Services" 2020 *Journal of Financial Crime* 968, 969.

³⁶⁵ Choo 2008 *Journal of Money Laundering Control* 373; Choo 2010 *Trends and Issues in Crime and Criminal Justice* 2; Menz 2020 *Journal of Financial Crime* 969.

³⁶⁶ Sections 44-45 of the *FICA*; Chitimira and Ncube 2020 *Acta Universitatis Danubius* 16; see related comments by Chitimira *Market Abuse Regulation in SADC* 41; also see Jooste R "Insider Dealing in South Africa – The Criminal Aspects" 1990 *De Ratione* 21, 25; Jooste R "A Critique of the Insider Trading Provisions of the 2004 Securities Services Act" 2006 *SALJ* 437, 452.

³⁶⁷ Jooster 1990 *De Ratione* 25; Jooste 2006 *SALJ* 452; Chitimira *Market Abuse Regulation in SADC* 46; Chitimira and Lawack 2013 *Obiter* 112.

to facilitate cooperation and collaboration between the SARB, financial role players and law enforcement authorities to protect financial stability and enhance market integrity.³⁶⁸ In this regard, the researcher submits that there is a need for express provisions to regulate cooperation and collaboration between the SARB and the law enforcement authorities in South Africa to detect, investigate and combat financial crimes that threaten financial stability and market integrity.

4.12 Conclusion

The promotion, protection, enhancement and maintenance of financial stability and market integrity in South Africa rely on effectively fulfilling the roles and functions discussed in this chapter. The researcher established that the roles and functions of financial role players such as the SARB, the FSCA, the FIC, the PA, the NCR, the FSIC, the FSCR, the FSIC and the FSCF cannot be fulfilled in isolation. There is a need for adequate and consistently enforced cooperation and collaboration measures between the SARB and other financial role players to promote, protect, enhance and maintain financial stability and market integrity in South Africa.³⁶⁹ This follows the fact that the roles and functions of the SARB and other financial role players are interconnected. In this regard, the researcher submits that to promote, protect, enhance and maintain financial stability and market integrity in South Africa, the SARB and other financial role players should cooperate with each other to fulfil their mandates.³⁷⁰ As such, there is a need for regular reviews of the MOUs relating to cooperation and collaboration between the SARB and other financial role players to ensure their effectiveness and relevance for their purpose. The researcher submits that there is also a need for optimum cooperation and collaboration between financial role players and law enforcement authorities to ensure

³⁶⁸ Jooster 1990 *De Ratione* 25; Jooste 2006 *SALJ* 452; Chitimira *Market Abuse Regulation in SADC* 46; Chitimira and Lawack 2013 *Obiter* 112.

³⁶⁹ Van Niekerk and Van Heerden 2020 *SALJ* 112; Llewellyn "Institutional Structure of Financial Regulation and Supervision: The Basic Issues" 28; Schmulow and Godwin 2015 *SALJ* 758; Godwin 2017 *Law and Financial Markets Review* 185; Godwin, Howse and Ramsay 2017 *SALJ* 670.

³⁷⁰ Van Niekerk and Van Heerden 2020 *SALJ* 112; Llewellyn "Institutional Structure of Financial Regulation and Supervision: The Basic Issues" 28; Schmulow and Godwin 2015 *SALJ* 758; Godwin 2017 *Law and Financial Markets Review* 185; Godwin, Howse and Ramsay 2017 *SALJ* 670.

proactive detection, investigation and prosecution of any act or conduct that may threaten financial stability and market integrity in South Africa.

In the next chapter, the researcher discusses the regulation of cooperation and collaboration between the Reserve Bank of Australia and other financial role players such as the ASIC and the APRA. This is done to draw relevant lessons from Australia that may be used to enhance the regulation of cooperation and collaboration between the SARB and other financial role players in South Africa. Australia has been undergoing regulatory reforms to enhance the coordination between financial regulatory agencies to promote financial stability, enhance market integrity and uproot flaws and challenges in this regard. As such, the researcher contends that South Africa may learn useful lessons from the Australian experience in this regard.

CHAPTER FIVE

THE COOPERATION AND COLLABORATION BETWEEN THE RESERVE BANK OF AUSTRALIA AND OTHER FINANCIAL ROLE PLAYERS IN AUSTRALIA

5.1 Introduction

The current South African financial regulatory model was reiterated from the Australian experience.³⁷¹ As such, several similarities and lessons can be drawn by South Africa from the Australian experience. Australia's current financial regulatory framework was influenced by the need for a regulatory framework that fostered effective inter-agency cooperation and collaboration arrangements to prevent regulatory arbitrages and the risk of regulatory overlaps between the Reserve Bank of Australia (RBA) and other financial role players.³⁷² Australia follows a soft law approach towards the regulation of inter-agency cooperation and collaboration between the RBA and other financial role players such as the Australian Prudential Regulation Authority (APRA) and Australian Securities and Investments Commission (ASIC).³⁷³ In Australia, detailed provisions regarding cooperation and collaboration between the RBA and other financial role players are found

³⁷¹ Van Niekerk G and Van Heerden G "The Importance of a Legislative Framework for Cooperation and Collaboration in the Twin Peaks Model of Financial Regulation" 2020 *SALJ* 108, 129; Van Heerden C and Van Niekerk G "Twin Peaks in South Africa: A New Role for the Central Bank" 2017 *Law and Financial Markets Review* 154, 159; Godwin AJ and Schmulow AD "The Financial Sector Regulation Bill in South Africa, Second Draft: Lessons from Australia" 2015 *SALJ* 756, 757; Schmulow A "Financial Regulatory Governance in South Africa: The Move Towards Twin Peaks" 2017 *African Journal of International and Comparative Law* 393, 398.

³⁷² Godwin A, Howse T and Ramsay I "A Jurisdictional Comparison of the Twin Peaks Model of Financial Regulation" 2016 *Journal of Banking Regulation* 103, 106–109; Wallis Inquiry, see <http://fsi.treasury.gov.au/content/downloads/FinalReport/overview.pdf> (the "Wallis Report") accessed on 13 November 2021; Godwin A "Australia's Trek towards Twin Peaks – Comparisons with South Africa" 2017 *Law and Financial Markets Review* 182, 183; E Pan, "Structural Reform of Financial Regulation" 2011 *Transnational Law and Contemporary Problems* 796, 797; see related discussion by Armstrong A and Francis R "Loss of Integrity: The True Failure of the Corporate Sector" 2008 *Journal of Business System Governance and Ethics* 254, 256; also see Jones E "The Crisis and the Australian Financial Sector" 2009 *Journal of Australian Political Economy* 86, 90; Godwin A and Ramsay I "Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation" 2015 *Journal of Banking and Finance Law and Practice* 240, 252.

³⁷³ Wallis Report "Overview" Recommendation 112; Godwin A., Kourabas S and Ramsay I "Twin Peaks and Financial Regulation: The Challenges of Increasing Regulatory Overlap and Expanding Responsibilities" 2016 *International Lawyer* 273, 283; Ferran E and Alexander K "Can Soft Law Bodies be Effective? Soft Systemic Risk Oversight Bodies and the Special Case of European Systemic Risk Board" 2011 *Legal Studies Research Paper Series* 1, 6; also see Kelly CR "The Sociological Pull of Soft Law" 2012 *American Society of International Law Proceedings* 318, 327.

in Memorandums of Understanding (MOUs) as opposed to statutory provisions.³⁷⁴ Although the *Australian Prudential Regulation Authority Amendment Act*³⁷⁵ provides a general reference to cooperation and collaboration between the RBA and the APRA, the *APRA Act* does not regulate the nature of such collaboration nor how it should be achieved.³⁷⁶ This chapter analyses the regulation of cooperation and collaboration between the RBA and other financial role players to promote, protect, enhance and maintain financial stability and market integrity in Australia. This is done to extract lessons and recommendations regarding the regulation and enforcement of cooperation and collaboration between the central bank and other financial role players, for South Africa in this regard.

5.2 The Roles and Functions of Selected Australian Financial Sector Role Players to Protect, Promote, Enhance and Maintain Financial Stability and Market Integrity in Australia

The Australian financial regulatory framework comprises three key financial role players namely, the RBA, the APRA and the ASIC.³⁷⁷ The RBA, the APRA and the ASIC have separate roles and functions. However, it should be noted that the roles and functions of

³⁷⁴ Schmulow and Godwin 2015 *SALJ* 759; Godwin A, Li G and Ramsay I "Is Australia's Twin Peaks System of Financial Regulation Model for China (Part 2)" 2016 *Hong Kong Law Journal* 935, 940; Godwin A, Li G and Ramsay I "Is Australia's Twin Peaks System of Financial Regulation Model for China (Part 1)" 2016 *Hong Kong Law Journal* 621, 628; Jensen A and Kingston M "The Australian 'Twin Peaks' Framework of Financial System Regulation: Australia and UK Compared" 2010 *Journal of International Banking and Financial Law* 548, 549.

³⁷⁵ *Australian Prudential Regulation Authority Amendment Act* 1998 Chapter 50 (*APRA Act*), section 10A; Jensen and Kingston 2010 *Journal of International Banking and Financial Law* 550; Pearson G *Financial Services Law and Compliance in Australia* (Port Melbourne: Cambridge University Press 2019) 56; International Monetary Fund *Australia: Financial System Stability Assessment* (IMF Country Report No 12/308 November 2012) 28.

³⁷⁶ Section 10A of the *APRA Act*; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 944; see related comments by Camacho AE and Glicksman RL "Functional Government in 3-D: A Framework for Evaluating Allocations of Government Authority" 2014 *Harvard Journal on Legislation* 19, 56; Jones 2009 *Journal of Australian Political Economy* 90; also see Basel Committee on Banking Supervision "Core Principles for Effective Banking Supervision" (September 2012) principle 3.

³⁷⁷ Godwin A and Ramsay I "Twin Peaks – The Legal and Regulatory Anatomy of Australia's System of Financial Regulation" 2015 *CIFR Research Working Paper* 2, 4; Van Niekerk and Van Heerden 2020 *SALJ* 129; Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 280; Godwin and Schmulow 2015 *SALJ* 760.

the RBA, the ASIC and the APRA are fulfilled in cooperation and collaboration.³⁷⁸ The cooperation and collaboration between the RBA and other financial role players rely on informal bilateral coordination mechanisms and the Council of Financial Regulators (CFR), an informal body that was established to oversee and facilitate inter-agency coordination.³⁷⁹ This means that cooperation and collaboration between the RBA, the APRA and the ASIC are not regulated by statute, it relies on informal arrangements established by the financial role players.

5.2.1 The Roles and Functions of the RBA to Promote, Protect, Enhance and Maintain Financial Stability and Market Integrity in Australia

The RBA is the central bank of Australia and it assumed an express financial stability mandate in 1998 after the establishment of the APRA.³⁸⁰ The roles and functions of the RBA are to maintain financial stability, regulate payment systems, manage interest rates and monetary policy.³⁸¹ However, the RBA does not fulfil its financial stability mandate in isolation. The APRA is mandated to assist the RBA to maintain financial stability in Australia.³⁸² The RBA and the APRA are required to inform each other regarding any potential systemic risks that may threaten financial stability.³⁸³ To this effect, the RBA and the APRA concluded an MOU to establish information sharing arrangements to promote

³⁷⁸ Godwin and Ramsay 2015 *CIFR Research Working Paper 4*; Van Niekerk and Van Heerden 2020 *SALJ* 129; Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 280; Godwin and Schmulow 2015 *SALJ* 760.

³⁷⁹ Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 280; Council of Financial Regulators “About CFR” <http://www.cfr.gov.au/about-cfr/> accessed 30 July 2021; Godwin and Schmulow 2015 *SALJ* 759; Van Niekerk and Van Heerden 2020 *SALJ* 131.

³⁸⁰ See Godwin and Schmulow 2015 *SALJ* 756-768; Godwin and Ramsay 2015 *CIFR Research Working Paper 5*; Pearson *Financial Services Law and Compliance in Australia* 56; Jensen and Kingston 2010 *Journal of International Banking and Financial Law* 549.

³⁸¹ Van Niekerk and Van Heerden 2020 *SALJ* 129; Schmulow A “Twin Peaks: An Analysis of the Australian Architecture” in Jung HJ (ed) *Proceedings of the 2016 Global Forum for Financial Consumers* (Cambridge University Press 2016) 9; Schmulow A “Approaches to Financial System Regulation: An International Comparative Survey” 2015 *CIFR Research Working Paper 5*, 41.

³⁸² Van Niekerk and Van Heerden 2020 *SALJ* 133; Schmulow A “Twin Peaks: An Analysis of the Australian Architecture” 9; Schmulow 2015 *CIFR Research Working Paper 41*; Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 280.

³⁸³ IMF Country Report 06/415 “Australia: Financial Sector Assessment Program — Detailed Assessment of Observance of Standards and Codes” 12 November 2006 <https://www.imf.org/en/Publications/CR/Issues/2016/12/31/> accessed 28 July 2021; Godwin and Schmulow 2015 *SALJ* 766; Godwin and Ramsay 2015 *CIFR Research Working Paper 10*; Jensen and Kingston 2010 *Journal of International Banking and Financial Law* 549.

and protect financial stability in Australia.³⁸⁴ The RBA and the APRA also set up other informal and formal structures to ensure effective cooperation and collaboration to fulfil their shared roles and functions. For example, the Coordination Committee was established as a formal structure to create a forum for regular discussions, consultations, liaison meetings and high-level coordination between the RBA and the APRA in matters relating to financial stability.³⁸⁵ The researcher submits that cooperation and collaboration arrangements between the RBA and the APRA have been effective in promoting financial stability and preventing turf wars between the RBA and the APRA.

The RBA also plays a role in promoting and protecting market integrity in Australia by ensuring the stability and competitiveness of the payment systems as well as implementing monetary policy that promotes the functioning of financial markets' payment infrastructure.³⁸⁶ The RBA cooperates with the ASIC to assist the ASIC to fulfil its mandates relating to the promotion and enhancement of market integrity. In this regard, the RBA concluded an MOU with the ASIC in which they agree to share information relating to potential risks that may threaten financial stability and market integrity.³⁸⁷ As such, it can be said that the RBA fulfils its roles and functions in cooperation and collaboration with other financial role players to promote financial stability and enhance market integrity.

³⁸⁴ RBA and APRA "Memorandum of Understanding between the RBA and the APRA" 12 October 1998 <http://www.apra.gov.au/AboutAPRA/Documents/MoU-RBA-Reserve-Bank-of-Australia.PDF> accessed 12 July 2022, para 5-10.

³⁸⁵ Ellis L and Littrell C "Financial Stability in a Low Interest Rate Environment: An Australian Case Study" in Hambur J and Simon J Monetary Policy and Financial Stability in a World of Low Interest Rates, Reserve Bank of Australia (eBook 2017) 5; Van Niekerk and Van Heerden 2020 *SALJ* 134; Schmulow 2015 CIFR Research Working Paper 41; Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 281.

³⁸⁶ See related comments by Ellis and Littrell "Financial Stability in a Low Interest Rate Environment: An Australian Case Study" 15; also see Huang RH "The Regulation of Shadow Banking in China: International and Comparative Perspectives" 2015 *Banking and Finance Law Review* 490, 496; Schmulow A "Twin Peaks: An Analysis of the Australian Architecture" 9.

³⁸⁷ RBA and ASIC "Memorandum of Understanding between the RBA and the ASIC" 12 October 1998 <http://www.asic.gov.au/AboutASIC/Documents/MoU-RBA-Reserve-Bank-of-Australia.PDF> accessed 12 July 2022, para 5-10; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 945.

5.2.2 *The Roles and Functions of the APRA to Promote, Protect, Enhance and Maintain Financial Stability and Market Integrity in Australia*

The APRA is an independent financial regulator with express roles and functions provided under the *Australian Prudential Regulation Authority Act*.³⁸⁸ The APRA is tasked with the prudential regulation and supervision of banking institutions in Australia.³⁸⁹ The APRA also has the mandate to assist the RBA to maintain financial stability. In this regard, the APRA is required to cooperate and collaborate with the RBA to ensure effective information sharing in matters relating to financial stability policy and strategy implementation.³⁹⁰ The MOU between the RBA and the APRA establishes cooperation and collaboration arrangements between the two parties in fulfilling the financial stability mandate. The researcher submits that the MOU regarding cooperation and collaboration between the APRA and the RBA also establishes the roles and functions of each party to prevent confusion and duplication of tasks when fulfilling their mandates. This is essential for effective cooperation and collaboration to promote, protect, enhance and maintain financial stability and market integrity in Australia.

The APRA does not have express roles and functions relating to the promotion of market integrity. However, the APRA and the ASIC share supervision and monitoring powers and responsibilities for some financial institutions.³⁹¹ In this regard, the APRA cooperates and collaborates with the ASIC to ensure complete supervision of prudential institutions and financial markets.

³⁸⁸ *Australian Prudential Regulation Authority Act (APRA Act) 1998*, section 8; Schmulow A “Twin Peaks: An Analysis of the Australian Architecture” 9; Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 283.

³⁸⁹ Van Niekerk and Van Heerden 2020 *SALJ* 129; Godwin and Ramsay 2015 *CIFR Working Paper* 14; section 8(2) of the *APRA Act*.

³⁹⁰ Section 10A of the *APRA Act*; Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 283; Van Niekerk and Van Heerden 2020 *SALJ* 129; Godwin and Ramsay 2015 *CIFR Working Paper* 14.

³⁹¹ Ellis and Littrell “Financial Stability in a Low Interest Rate Environment: An Australian Case Study” 15; Huang 2015 *Banking and Finance Law Review* 498; Van Niekerk and Van Heerden 2020 *SALJ* 133.

5.2.3 *The Roles and Functions of the ASIC to Promote, Protect, Enhance and Maintain Financial Stability and Market Integrity in Australia*

The ASIC was established to ensure fairness, transparency and confidence in Australian capital markets and financial services.³⁹² The ASIC's main responsibility is market conduct and consumer protection.³⁹³ The *ASIC Act* provides that the ASIC should perform its mandates in a manner that protects, promotes, maintains and enhances financial system performance and improves the development and the efficiency of the Australian economy.³⁹⁴ The ASIC is also expected to safeguard investor confidence and informed participation.³⁹⁵ The ASIC has an express mandate to protect, promote, maintain and enhance market integrity in Australia.³⁹⁶ The ASIC does not have express roles and functions relating to financial stability. However, it should be noted that the ASIC has to cooperate and collaborate with the RBA to minimise systemic risks that threaten financial stability and the fulfilment of its roles and functions.³⁹⁷

The RBA and the ASIC concluded an MOU to establish cooperation and collaboration arrangements to fulfil their mandates.³⁹⁸ The MOU provides clear responsibilities for the RBA and the ASIC to avoid duplication of tasks between the parties. This entails that, the

³⁹² Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 286; Van Niekerk and Van Heerden 2020 *SALJ* 138; Godwin and Ramsay 2015 *CIFR Working Paper* 6; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 945.

³⁹³ Schmulow "Twin Peaks: An Analysis of the Australian Architecture" 13; Godwin and Ramsay 2015 *CIFR Working Paper* 6; see related comments by Godwin 2018 *Law and Financial Markets Review* 184; Van Niekerk and Van Heerden 2020 *SALJ* 138.

³⁹⁴ Section 1(2) of the *ASIC Act*; see related comments by Ellis and Littrell "Financial Stability in a Low Interest Rate Environment: An Australian Case Study" 15; Huang 2015 *Banking and Finance Law Review* 498; Van Niekerk and Van Heerden 2020 *SALJ* 133.

³⁹⁵ Cooper J "The Integration of Financial Regulatory Authorities – The Australian Experience" in *Assessing the Present, Conceiving the Future 30th Anniversary Conference* (4-5 September 2006 Rio de Janeiro) 7; Schmulow "Twin Peaks: An Analysis of the Australian Architecture" 13; Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 286.

³⁹⁶ Section 12A(2) of the *ASIC Act*; Schmulow "Twin Peaks: An Analysis of the Australian Architecture" 13; Cooper J "The Integration of Financial Regulatory Authorities – The Australian Experience" 14.

³⁹⁷ Medcraft G "Systemic Risk: The Role of the Securities Regulators" 28 June 2011 <http://download.asic.gov.au/media/1347818/Systemic-Risk-Role-of-Securities-Regulators-1.pdf> accessed 25 August 2021; Van Niekerk and Van Heerden 2020 *SALJ* 136; Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 286; Godwin and Ramsay 2015 *CIFR Working Paper* 6; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 945.

³⁹⁸ RBA and ASIC "Memorandum of Understanding between the RBA and the ASIC" 12 October 1998 <http://www.asic.gov.au/AboutASIC/Documents/MoU-RBA-Reserve-Bank-of-Australia.PDF> accessed 12 July 2022, para 5-10; Van Niekerk and Van Heerden 2020 *SALJ* 139; see related comments by Huang 2015 *Banking and Finance Law Review* 499.

MOU was also concluded as a measure to prevent regulatory gaps and duplication of mandates which may affect the roles and functions of the RBA and the ASIC. The RBA and the ASIC have to proactively share information to detect and manage systemic events. In this regard, the researcher submits that cooperation and collaboration between the ASIC and the RBA are essential for fulfilling their mandates through the timely detection of systemic risks which may threaten financial stability and market integrity.

5.3 The Regulation of Cooperation and Collaboration between the RBA and other Financial Role Players in Australia

Cooperation and collaboration between the RBA, the APRA and the ASIC rely on soft-law mechanisms such as MOUs regarding cooperation and collaboration and informal protocols between the RBA, the APRA and the ASIC.³⁹⁹ The Council of Financial Regulators (CFR) was established to oversee cooperation and collaboration arrangements among its members, thus the RBA, the APRA and the ASIC.⁴⁰⁰ Cooperation and collaboration between the RBA and other financial role players are based on a policy framework and informal arrangements between the RBA and other financial role players in Australia.⁴⁰¹ Australia does not follow a statutorily prescriptive approach with regard to cooperation and collaboration between the RBA and the APRA and ASIC.⁴⁰² Thus, cooperation and collaboration between the RBA and other financial

³⁹⁹ Schmulow and Godwin 2015 *SALJ* 759; Schmulow A “Financial Regulatory Governance in South Africa: The Move towards Twin Peaks” 2017 *African Journal of International and Comparative Law* 393, 401; Schmulow A “The Four Methods of Financial System Eglution: An International Comparative Survey” *Journal of Banking and Finance Law and Practice* 294, 299; Ferran and Alexander 2011 *Legal Studies Research Paper Series* 6.

⁴⁰⁰ Council of Financial Regulators “Memorandum of Understanding on Financial Distress Management between Members of the Council of Financial Regulators” September 2008 <http://www.cfr.au/> accessed 24 October 2021; Camacho and Glicksman 2014 *Harvard Journal on Legislation* 56; Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 283; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 945.

⁴⁰¹ Schmulow AD “Twin Peaks: A Theoretical Analysis” 2015 *Centre For International Finance and Regulation (CIFR) Research Working Paper Series* 8, 12; Schmulow AD “Approaches to Financial System Regulation: An International Comparative Survey” 2015 *Centre For International Finance and Regulation (CIFR) Research Working Paper Series* 45, 48; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 945; Schmulow AD “Twin Peaks: An Analysis of the Australian Architecture” in SKK University *Global Forum for Financial Consumers Conference* (South Korea 4-5 November 2016) 12.

⁴⁰² Jensen and Kingston 2010 *Journal of International Banking and Financial Law* 550; Van Niekerk and Van Heerden 2020 *SALJ* 130; see related discussion by Godwin A, Howse T and Ramsay I “Twin Peaks: South Africa’s Financial Sector Regulatory Framework” 2017 *SALJ* 665, 701; also see Guzman AT and Meyer LT “International Soft Law” 2010 *Journal of Legal Analysis* 165, 171.

role players rely on the MOUs regarding cooperation and collaboration and regular meetings between the RBA, the APRA, the ASIC and the CFR to discuss matters of common regulatory interest.⁴⁰³ According to Schmulow, the advantage of the approach taken by Australia in this regard is that it promotes a culture of cooperation, mutual support and regulatory performance as opposed to merely upholding the regulatory structure.⁴⁰⁴ The researcher submits that a soft law approach is flexible and renders it easy for adjustments to be made as and when they are necessary, considering the frequently changing global standards.⁴⁰⁵

The soft law approach to cooperation and collaboration between the RBA, the APRA and the ASIC in Australia entails that the nature and ambit of cooperation and collaboration arrangements between the RBA and other financial role players are established in the MOUs.⁴⁰⁶ It should be noted that, unlike in South Africa, MOUs regarding cooperation and collaboration between the RBA and other financial role players in Australia are not prescribed by statute.⁴⁰⁷ It is also apposite to allude that the MOUs regarding cooperation and collaboration between the RBA, the APRA and the ASIC are not legally binding on

⁴⁰³ Schmulow 2015 *CIFR Research Working Paper Series* 49; Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 285; see related discussion by Qumba MF “A Comparative Analysis of the Twin Peaks Model of Financial Regulation in South Africa and the United Kingdom” 2022 *SALJ* 78, 109; Schmulow A “Doing it the Australian way, “Twin Peaks” and the Pitfalls in between” 31 March 2016 <http://clsbluesky.law.columbia.edu/2016/03/31/doing-it-the-australian-way-twin-peaks-and-the-pitfalls-in-between-2/>, accessed on 3 October 2022.

⁴⁰⁴ Schmulow “Twin Peaks: An Analysis of the Australian Architecture” 12; Godwin and Schmulow 2015 *SALJ* 760; see related comments by Denters E “Regulation and Supervision of the Global Financial System. A Proposal for Institutional Reform” 2009 *Amsterdam Law Forum* 63, 78; also see Arner DW “Adaptation and Resilience in Global Financial Regulation” 2011 *North Carolina Law Research* 1579, 1595.

⁴⁰⁵ See related comments by Godwin and Schmulow 2015 *SALJ* 760; see related comments by Denters 2009 *Amsterdam Law Forum* 70; Cooper J “The Integration of Financial Regulatory Authorities – The Australian Experience” in *Assessing the Present, Conceiving the Future 30th Anniversary Conference* (4-5 September 2006 Rio de Janeiro) 7; Ferran and Alexander 2011 *Legal Studies Research Paper Series* 6.

⁴⁰⁶ See related comments by Alexander K “The Role of Soft Law in the Legalization of International Banking Supervision: A Conceptual Approach” 2011 *ESRC Centre for Business Research University of Cambridge Working Paper* 1, 15; Guzman AT and Meyer TL “International Soft Law” 2010 *Journal of Legal Analysis* 165, 171; Van Niekerk and Van Heerden 2020 *SALJ* 130; Qumba 2022 *SALJ* 107.

⁴⁰⁷ Schmulow A “Doing it the Australian way, “Twin Peaks” and the Pitfalls in Between” Page Anon; Godwin and Schmulow 2015 *SALJ* 760; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 938; Van Niekerk and Van Heerden 2020 *SALJ* 130.

the parties.⁴⁰⁸ The purpose of these MOUs is to establish cooperation and collaboration mechanisms, information sharing arrangements, outline clear mandates of each financial role player and measures to prevent duplication of tasks between the RBA and other financial role players.⁴⁰⁹ As such, the researcher submits that these MOUs form the cornerstone of inter-agency cooperation and collaboration between the RBA and other financial role players in Australia.

This approach has been useful for Australia, despite being met with a few challenges along the way. For example, the soft law approach requires the establishment of informal relationships between the personnel involved. The researcher argues that this is only effective for a period of time until the personnel retire or are moved to other offices and the relationships are dissolved. Although good working relationships would have been established, it may seem difficult to continue working based on past relationships.⁴¹⁰ In this regard, the researcher submits that it is important to implement both formal and informal cooperation and collaboration measures to achieve a balanced formal and flexible regulatory framework. The researcher also argues that an inquiry held by the Financial System Inquiry regarding the effectiveness of the informal cooperation and collaboration approach between the RBA and other financial role players showed that the soft-law approach adopted in Australia is not adequate to achieve desired outcomes.⁴¹¹

⁴⁰⁸ Schmulow A “Doing it the Australian way, “Twin Peaks” and the Pitfalls in Between” Page Anon; Godwin and Schmulow 2015 *SALJ* 760; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 938; Van Niekerk and Van Heerden 2020 *SALJ* 130.

⁴⁰⁹ See related discussion by Llewlyn DT “Institutional Structure of Financial Regulation and Supervision: The Basic Issues” in World Bank *Aligning Supervisory Structures with Country Needs Seminar* (6-7 June 2006) Washington DC 1, 25; Kourabas S “Trends and Theory in Financial Regulation and Regulatory Design after the Global Financial Crisis” in Arner D, Wan W, Godwin A, Shen W and Gibson E (eds) *Research Handbook on Asian Financial Law* (Elgar Online 2020) 30, 35; Debelle G “Some Effects of the Global Financial Crisis on Australian Financial Markets” 2009 *Finance Professionals Forum* 4, 9; Van Heerden CM and Van Niekerk GM “Two Takes on Twin Peaks: A Comparative Appraisal of the Models of Financial Regulation in the Netherlands and South Africa” 2020 *THRHR* 491, 513.

⁴¹⁰ See related comments by Ellis L and Littrell C “Financial Stability in a Low Interest Rate Environment: An Australian Case Study”¹⁰; also see Huang 2015 *Banking and Finance Law Review* 496; Van Niekerk and Van Heerden 2020 *SALJ* 135.

⁴¹¹ Reserve Bank of Australia “Submission to the Financial System Inquiry” March 2014 <https://www.rba.gov.au/publications/submissins/financial-sector/financial-system-inquiry/> accessed 29 July 2021; See Fisk A and Pollari I “Financial System Inquiry KPMG Submission” *Financial Services* (23 March 2014) 6; Wallis, Beerworth, Carmichael *et al The Treasury* 4; see related discussion by Reserve Bank of Australia “Submission to the Financial System Inquiry”

Accordingly, the researcher suggests a combination of formal and informal regulations of cooperation and collaboration between the RBA and other financial role players in Australia. This can be achieved by establishing clear provisions relating to the nature and scope of regulatory coordination and maintaining bilateral MOUs to ensure sufficient flexibility to easily adapt to the continuously changing financial markets' global standards.

Several MOUs regarding cooperation and collaboration have been concluded between the RBA, the APRA and the ASIC to promote and protect financial stability and market integrity in Australia and these are discussed below.

5.4 Cooperation and Collaboration Mechanisms between the RBA and Other Financial Role Players in Australia

According to Godwin *et al*, there are four paramount aspects of cooperation and collaboration between the RBA and other financial role players in Australia.⁴¹² These are information-sharing arrangements; mutual assistance; reasonable measures to foster and facilitate inter-agency coordination; and the establishment of a coordinating body.⁴¹³ To promote these aspects of cooperation and collaboration between the RBA and other financial role players in Australia measures to promote and enhance coordination between the RBA and other financial role players were established.⁴¹⁴ These measures include the duty of the RBA to conclude MOUs regarding cooperation and collaboration, information sharing arrangements, regular CFR meetings and the establishment of a

Financial Services (23 March 2014) 67; also see Financial System Inquiry "Financial System Inquiry Report" *Financial Services* (23 March 2014) 92.

⁴¹² Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 30; Van Niekerk MG *A Comparative Analysis of the Role of the Central Bank in Promoting and Maintaining Financial Stability in South Africa* 195; Qumba 2022 *SALJ* 108; Godwin 2017 *Law and Financial Markets Review* 185.

⁴¹³ Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 30; Van Niekerk MG *A Comparative Analysis of the Role of the Central Bank in Promoting and Maintaining Financial Stability in South Africa* 195; Godwin A and Ramsay I "Twin Peaks – The Legal Regulatory Anatomy of Australia's System of Financial Regulation" 2015 *Centre for International Finance and Regulation Research Working Paper Series* 2, 28; Llewlyn DT "Institutional Structure of Financial Regulation and Supervision: The Basic Issues" 20.

⁴¹⁴ Van Niekerk and Van Heerden 2020 *SALJ* 129; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 938; Godwin and Schmulow 2015 *SALJ* 760; Schmulow A "Twin Peaks: An Analysis of the Australian Architecture" 17.

coordination body to create a platform to facilitate cooperation and collaboration between the RBA, the APRA, the ASIC and the Treasury.⁴¹⁵

5.4.1 *The RBA's duty to conclude MOUs regarding cooperation and collaboration with other financial role players*

Cooperation and collaboration arrangements between the RBA and other financial role players in Australia are not regulated by statute but by several bilateral MOUs between the RBA, the APRA and the ASIC.⁴¹⁶ These MOUs contain the details relating to cooperation and collaboration and information sharing arrangements between the RBA and other financial role players to protect, promote, maintain and enhance financial stability and market integrity in Australia.⁴¹⁷ According to Schmulow and Godwin,⁴¹⁸ empirical evidence shows that the MOUs regarding cooperation and collaboration between the RBA, the APRA and the ASIC do not have any practical effect towards achieving the required outcomes because neither the APRA nor the ASIC strictly relies on the provisions of the MOUs. Thus, the MOUs regarding cooperation and collaboration between the RBA, the APRA and the ASIC only notify the relevant stakeholders of the RBA's intention to achieve effective and proactive cooperation and collaboration with the APRA and the ASIC.⁴¹⁹ This follows the fact that cooperation and collaboration between

⁴¹⁵ Van Niekerk and Van Heerden 2020 *SALJ* 131; Godwin, Li and Ramsay 2015 *Hong Kong Law Journal* 641; see related discussion by Sun J "Study on the Financial Supervision and Anti-Monopoly Regulation of Integration of Industry and Finance" 2011 *Frontiers of Law in China* 284, 297; also see Xiao'an Q "A Panorama of an Integrated Financial Administrative and Supervisory System in China" 2002 *Finance and Economics* 6, 8.

⁴¹⁶ Van Niekerk and Van Heerden 2020 *SALJ* 131; Schmulow 2015 *Journal of Banking and Finance Law and Practice* 151, 155; Schmulow "Doing it the Australian Way, "Twin Peaks" and the Pitfalls in between" Page Anon; see related comments by Armour J, Awrey D, Davis P *et al Principles of Financial Regulation* (Oxford University Press 2016) 895.

⁴¹⁷ Godwin and Schmulow 2015 *SALJ* 763; see related comments by Ferran and Alexander 2011 *Legal Studies Research Paper Series 7*; see related comments by Alexander 2011 *ESRC Centre for Business Research University of Cambridge Working Paper 15*; Guzman and Meyer 2010 *Journal of Legal Analysis* 171.

⁴¹⁸ Godwin and Schmulow 2015 *SALJ* 769; Wallis S, Beerworth B, Carmichael J *et al* "Financial System Inquiry" *The Treasury* (31 March 1997) 3-4; Black J "Managing Regulatory Risks and Defining the Parameters of Blame: A Focus on the Australian Prudential Regulation Authority" 2006 *Law and Policy* 4-5; Schmulow 2017 *African Journal of International Comparative Law* 399.

⁴¹⁹ Schmulow 2017 *African Journal of International Comparative Law* 399; Godwin and Ramsay 2015 *CIFR Working Paper* 36; Godwin and Schmulow 2015 *SALJ* 769; Black 2006 *Law and Policy* 5.

the RBA, the APRA and the ASIC rely more on a culture that focuses on achieving effective outcomes rather than compliance with prescribed regulations.⁴²⁰

This soft-law approach has been effective in Australia, as evidenced by the way Australia managed to address systemic risks and challenges arising from the global financial crisis (GFC) of 2007-2008 and the 2010 Sovereign Debt Crisis.⁴²¹ The soft law approach to cooperation and collaboration between the RBA and other financial role players prevents over-prescription and formalisation which may stifle flexibility.⁴²² A flexible approach to inter-agency coordination has the advantage of easy adaptation to the continuously changing global financial markets standards and can be easily adjusted to deal with arising systemic risks.⁴²³ The researcher argues that although the Australian approach is commendable for its flexibility, it is difficult to enforce, especially when one takes into consideration that the CFR does not bear any regulatory authority outside of those of its members.⁴²⁴ As such, the lack of enforcement of cooperation and collaboration measures between the RBA and other financial role players renders this approach problematic and flawed.⁴²⁵ This submission was confirmed in the Interim Report of the Australian Financial

⁴²⁰ Armour, Awrey, Davis *et al Principles of Financial Regulation* 894; see related comments by Hong-Bum K “Cooperation and Coordination between the Financial Authorities: A Review of the Experiences of the United Kingdom, Norway, Sweden, and Korea” 2009 *Seoul Journal of Economics* 409, 412; Godwin A and Schmulow A “The Financial Sector Regulation Bill in South Africa, First Draft: Lessons from Australia” 2015 *SALJ* 36, 41; also see Georgosouli A “The FCA-PRA Coordination Scheme and the Challenge of Policy Coherence” 2013 *Capital Markets Law Journal* 62, 65.

⁴²¹ Swagel P “The Financial Crisis: An Inside View” 2009 *Brookings Papers on Economic Activity* 1, 5; Cali M, Massa I and Te Velde DW “The Global Financial Crisis: Financial Flows to Developing Countries Set to Fall by One Quarter” 2008 *Research Reports Studies* 1, 8; Norgren C “The Causes of the Global Financial Crisis and the Implications for Supreme Audit Institutions” *INTOSAI Report* (23 November 2010) 8, 15; Debelle G “Some Effects of the Global Financial Crisis on Australian Financial Markets” *Finance Professionals Forum* (31 March 2009) 5.

⁴²² Godwin and Schmulow 2015 *SALJ* 763; see related comments by Ferran and Alexander 2011 *Legal Studies Research Paper Series 7*; see related comments by Alexander 2011 *ESRC Centre for Business Research University of Cambridge Working Paper* 15; Guzman and Meyer 2010 *Journal of Legal Analysis* 171.

⁴²³ Ferran and Alexander 2011 *Legal Studies Research Paper Series 7*; Swagel 2009 *Brookings Papers on Economic Activity* 6; see related comments by Georgosouli 2013 *Capital Markets Law Journal* 69; also see Kallasidou N “The United Kingdom’s Response to Crisis: A Critical Examination of the New Regulatory Structure of Financial Services Supervision” 2013 *Bristol Law Review* 117, 129.

⁴²⁴ See related comments by Qumba 2022 *SALJ* 109; Van Niekerk and Van Heerden 2020 *SALJ* 133; Kallasidou 2013 *Bristol Law Review* 129; Hong-bum 2009 *Seoul Journal of Economics* 415; Guzman and Meyer 2010 *Journal of Legal Analysis* 171.

⁴²⁵ See related discussion by Godwin and Schmulow 2015 *SALJ* 765; Van Niekerk and Van Heerden 2020 *SALJ* 132; Kallasidou 2013 *Bristol Law Review* 130; Qumba 2022 *SALJ* 110.

System Inquiry where concerns were raised by several stakeholders to strengthen the regulatory powers of the CFR so that it may possess enforcement authority.⁴²⁶ The following MOUs regarding cooperation and collaboration have been concluded between the RBA and other financial role players to protect, promote, enhance and maintain financial stability and market integrity in Australia.⁴²⁷

5.4.1.1 MOU regarding cooperation and collaboration between the RBA and the APRA

The RBA and the APRA concluded an MOU to set out cooperation and collaboration arrangements to promote financial stability in Australia in October 1998.⁴²⁸ The APRA and the RBA share a financial stability mandate which entails the need for high-level coordination between the RBA and the APRA.⁴²⁹ The purpose of the MOU between the RBA and the APRA is to establish complementary roles and responsibilities between the RBA and the APRA to fulfil their financial stability mandates.⁴³⁰ The MOU also provides that the RBA and the APRA should fully and timely exchange information with each other regarding any matters of common interest.⁴³¹ The Assistant Governor of the RBA attributed the effectiveness of cooperation and collaboration arrangements between the RBA and other financial role players to an effective flow of information between the RBA

⁴²⁶ See Fisk and Pollari *Financial Services* 6; Wallis, Beerworth, Carmichael *et al The Treasury* 4; see related discussion by Reserve Bank of Australia *Financial Services* 67; also see Financial System Inquiry *Financial Services* 92.

⁴²⁷ See discussion by Van Niekerk and Van Heerden 2020 *SALJ* 125; see related comments by Godwin and Schmulow 2015 *SALJ* 767; Schmulow A “Twin Peaks: An Analysis of the Australian Architecture” 17.

⁴²⁸ RBA and APRA “Memorandum of Understanding Reserve Bank of Australia and Australian Prudential Regulation Authority” 12 October 1998 <http://www.apra.gov.au/AboutAPRA/Documents/MoU-RBA-Reserve-Bank-of-Australia.PDF> accessed 24 August 2021; Godwin and Ramsay 2015 *CIFR Research Working Paper Series* 33; Australian Prudential Regulation Authority “Chapter 5: Co-operation and Liaison” May 2015 <http://www.apra.gov.au/AboutAPRA/Publications/Pages/ar2012_web_chapter5.aspx accessed 22 August 2021.

⁴²⁹ Godwin and Ramsay 2015 *CIFR Research Working Paper Series* 35; Van Niekerk and Van Heerden 2020 *SALJ* 132; Australian Prudential Regulation Authority “Annual Report 2013 – 14” *Annual Report* (12 November 2014) 45.

⁴³⁰ RBA and APRA “Memorandum of Understanding Reserve Bank of Australia and Australian Prudential Regulation Authority” para 1; Van Niekerk and Van Heerden 2020 *SALJ* 132; Godwin and Ramsay 2015 *CIFR Research Working Paper Series* 35.

⁴³¹ RBA and APRA “Memorandum of Understanding Reserve Bank of Australia and Australian Prudential Regulation Authority” para 5; Godwin and Schmulow 2015 *SALJ* 760; see related comments by Schmulow A “The Four Methods of Financial System Regulation: An International Comparative Survey” 2015 *Journal of Banking and Finance Law and Practice* 151, 171; Schmulow 2017 *African Journal of International Comparative Law* 399.

and other regulatory agencies in Australia.⁴³² The researcher submits that the efficacy of information sharing arrangements between the RBA and other financial role players under this MOU could be influenced by the regular CFR meetings where the RBA, the APRA and the ASIC meet to discuss matters of common interest.⁴³³ Unlike in South Africa where the Financial Sector Council of Regulators (FSCR) meets only twice, the CFR meets at least four times a year.⁴³⁴ In addition, the working committees were established to foster cooperation and collaboration in Australia. For example, the Coordination Committee, also meets at least once every six weeks to ensure transparency and a constant flow of information between the RBA and other financial role players.⁴³⁵ As such, the researcher submits that the MOU regarding cooperation and collaboration between the RBA and the APRA fosters high-level cooperation and collaboration between the RBA and the APRA by encouraging timeous and constant sharing of information.

The MOU regarding cooperation and collaboration between the RBA and APRA also establishes arrangements for international cooperation and collaboration between the RBA, the APRA and relevant international organisations or bodies.⁴³⁶ This comports with the Basel Committee Principles on Banking Supervision, which recommends cooperation and collaboration between central banks and other financial role players to protect global financial stability and market integrity.⁴³⁷ This shows that Australia has made attempts to

⁴³² See Edey M “Macroprudential Supervision and the Role of Central Banks” in Financial Stability Institute *Regional Policy Forum on Financial Stability and Macroprudential Supervision* (28 September 2012 Beijing) 3; also see Nel H “Expanded Mandate of Central Banks” ASTD American Society for Training & Development Conference (26-28 March 2018 Washington DC) 28.

⁴³³ Schmulow 2017 *African Journal of International Comparative Law* 399; Schmulow and Godwin 2015 *SALJ* 760; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 944; Godwin and Ramsay 2015 *CIFR Research Working Paper Series* 39.

⁴³⁴ See *Financial Sector Regulation Act 9 of 2017 (FSR Act)*, section 84; Van Niekerk and Van Heerden 2020 *SALJ* 130; Godwin and Schmulow 2015 *SALJ* 764; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 944.

⁴³⁵ RBA and APRAN MOU 1998 para 5-10. Ellis L and Littrell C “Financial Stability in a Low Interest Rate Environment: An Australian Case Study” in: Hambur J and Simon J (eds) *Monetary Policy and Financial Stability in a World of Low Interest Rates* (Reserve Bank of Australia 2017) 2.

⁴³⁶ RBA and APRAN MOU 1998 para 15; see related comments by Jensen A and Kingston M “Australian “Twin Peaks” Framework of Financial System Regulation: Australia and UK Compared” 2010 *Butterworths Journal of International Banking and Financial Law* 545, 549; Godwin, Li and Ramsay 2016 *Centre for International Finance Regulation (CIFR) Paper* 33.

⁴³⁷ Basel Committee on Banking Supervision *Core Principles for Effective Banking Supervision* 2012, Principle 3; see related comments by Correia de Brito, A, Kauffmann C and Pelkmans J “The Contribution of Mutual Recognition to International Regulatory Co-operation” 2016 *OECD Regulatory Policy Working Papers* 15; Satragno L *Monetary Stability as a Common Concern in*

comply with the recommendation to engage in international coordination between the central banks and other financial role players to promote financial stability and enhance market integrity.⁴³⁸ Cross-border coordination enables the RBA and the APRA to detect, manage and investigate cross-border market misconduct that could threaten financial stability and market integrity. Although MOUs are generally non-binding, the researcher submits that the cooperation and collaboration MOUs concluded by the RBA and other financial role players foster a culture of cooperation and collaboration in the Australian financial sector. This follows the fact that the MOUs establish express cooperation and collaboration arrangements which require the RBA and the APRA to meet regularly, consult with each other and establish working relationships. Such coordination is essential for the promotion, protection, enhancement and maintenance of financial stability and market integrity.

The researcher submits that the MOU between the RBA and the APRA entails that the RBA and the APRA commit to fulfil their roles and functions in cooperation and collaboration. This is essential for achieving effective regulatory outcomes. Although this MOU does not directly promote market integrity, it establishes information sharing arrangements to detect and manage potential systemic risks that may threaten financial stability and consequently, market integrity. The non-binding nature of the MOU entails that it can be easily amended to adapt to new circumstances but cannot be enforced to compel the RBA and the APRA to fulfil their responsibilities. The researcher argues that the lack of enforceability could affect the effectiveness of the MOU in the case that either of the parties neglects the duty to cooperate. Accordingly, it is suggested that the MOUs relating to cooperation and collaboration in Australia be formalised to enhance their effectiveness.

International Law: Policy Cooperation and Coordination of Central Banks (Brill Singapore 2022) 92; Moloney N, Ferran E, Payne J *et al The Oxford Handbook of Financial Regulation* (Oxford London 2015) 74.

⁴³⁸ Principle 3 of the Basel Committee on Banking Supervision *Core Principles for Effective Banking Supervision*; see related comments by Correia de Brito Kauffmann and Pelkmans 2016 *OECD Regulatory Policy Working Papers* 15; Satragno *Monetary Stability as a Common Concern in International Law: Policy Cooperation and Coordination of Central Banks* 92; Moloney, Ferran, Payne *et al The Oxford Handbook of Financial Regulation* 74.

5.4.1.2 MOU regarding cooperation and collaboration between the RBA and the ASIC

The RBA and the ASIC concluded an MOU that establishes cooperation and collaboration arrangements between the RBA and the ASIC in 2002.⁴³⁹ The purpose of the MOU concluded by the RBA and the ASIC is to promote transparency, prevent duplication of tasks and promote cooperation and collaboration between the RBA and the ASIC in fulfilling their mandates.⁴⁴⁰ The MOU between the RBA and the ASIC provides a framework for cooperation and collaboration between the RBA and the ASIC in matters of common interest for the effective performance of their responsibilities.⁴⁴¹ The MOU further provides for mutual assistance and information sharing arrangements between the RBA and the ASIC.⁴⁴² The researcher submits that these provisions are essential to prevent duplication of tasks, overlaps or regulatory gaps that could arise should there be no clear provisions which establish each financial role player's responsibilities in the financial sector.⁴⁴³ For example, the MOU provides clear arrangements regarding the procedures to be taken by the RBA and the ASIC when collecting information from licensing and settlement financial institutions to prevent the RBA and the ASIC from collecting the same information.⁴⁴⁴

⁴³⁹ RBA and ASIC "Memorandum of Understanding between the Australian Securities and Investments Commission" 18 March 2002 <http://download.asic.gov.au/media/1340888/MOU-ASICandRBA.pdf> accessed 25 November 2021, para 1-2; see related comments by Medcraft G "Systemic Risk: The Role of Securities Regulators" 2012 *Journal of Banking and Finance* 115, 118; also see Acharya V "Measuring Systemic Risk – Systemic Risk and Financial Regulation" in KPMG Headquarters The Systemic Risk, Basel III, Financial Stability and Regulation Conference (7 June 2011 Sydney) 2, 5.

⁴⁴⁰ RBA and ASIC "Memorandum of Understanding between the Australian Securities and Investments Commission" para 2; Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 280; Kourabas S "Improving Australia's Regulatory Framework for Systemic Financial Stability" 2018 *Journal of Banking and Finance Law Practice* 183, 187; Van Niekerk and Van Heerden 2020 *SALJ* 130.

⁴⁴¹ RBA and ASIC "Memorandum of Understanding between the Australian Securities and Investments Commission" para 3; see related comments by Kourabas 2018 *Journal of Banking and Finance Law Practice* 206; Van Niekerk and Van Heerden 2020 *SALJ* 130.

⁴⁴² RBA and ASIC "Memorandum of Understanding between the Australian Securities and Investments Commission" para 5.

⁴⁴³ See related comments by Kourabas 2018 *Journal of Banking and Finance Law Practice* 206; Jensen and Kingston 2010 *Butterworths Journal of International Banking and Financial Law* 545, 549; Godwin, Li and Ramsay 2016 *Centre for International Finance Regulation (CIFR) Paper* 33

⁴⁴⁴ RBA and ASIC "Memorandum of Understanding between the Australian Securities and Investments Commission" para 7.1; also see *Corporations Act* of 2001, section 823E.

However, the researcher argues that the lack of conflict resolution arrangements between the RBA and the ASIC in the MOU raises an area of difficulty should conflict arise between the RBA and the ASIC. It is also argued that the CFR could have been the relevant body to perform conflict resolution between financial role players or resolve cases where regulatory mandates cause tension, but nothing is said to this effect.⁴⁴⁵ The MOU states that prior to submitting annual assessment reports to the relevant Minister, the RBA and the ASIC should exchange copies of their reports to ensure that there are no issues that may affect the mandates and functions of the other to avoid turf wars between the RBA and the ASIC.⁴⁴⁶ However, the MOU fails to provide how the RBA and the ASIC should resolve any conflicting issues relating to their regulatory functions. The researcher submits that the lack of dispute resolution arrangements between the ASIC and the RBA in the MOU could affect their roles and functions, should there be any misunderstandings between them. The researcher suggests that conflict resolution arrangements should be established between them to ensure that any conflicts between the RBA and the ASIC are resolved internally and do not affect the roles and functions of other financial role players in Australia.

The MOU between the RBA and the ASIC is intended to prevent duplication of tasks and minimise the regulatory burden on financial institutions. However, the MOU is non-binding and unenforceable. The researcher argues that the non-binding nature of this MOU may affect its effectiveness and its overall purpose in the case that one party fails to fulfil their responsibility. This could result in duplication of tasks or regulations which may affect financial stability and market integrity. Accordingly, the researcher submits that, to ensure the adequacy and effectiveness of the MOU, its non-binding nature should be reconsidered.

⁴⁴⁵ See related comments by Kourabas 2018 *Journal of Banking and Finance Law and Practice* 207; also see Australian Securities and Investment Commission “Financial System Inquiry: Submission by the Australian Securities and Investments Commission” April 2014 <http://fsi.gov.au/publications/final-report/chapter-5/> accessed 28 September 2022.

⁴⁴⁶ RBA and ASIC “Memorandum of Understanding between the Australian Securities and Investments Commission” para 15; Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 281; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 946; Van Niekerk and Van Heerden 2020 *SALJ* 128.

5.4.1.3 MOU regarding international cooperation and collaboration between the RBA and other financial role players

The BCBS Core Principles on Banking Supervision provide for cross-border cooperation and collaboration between central banks, financial role players and relevant international organisations to promote global financial stability and market integrity.⁴⁴⁷ Accordingly, Australia has implemented measures to cooperate with other central banks and international organisations to protect financial stability and market integrity. For example, the RBA concluded an MOU for cooperation, collaboration and exchange of information with the European Securities Market Authority (ESMA) and the ASIC with regard to the supervision and regulation of Central Counterparty (CCP).⁴⁴⁸ The MOU between the RBA, the ASIC and the ESMA fulfils the provisions of Regulation No. 648/2012 of the European Union which requires the RBA, the ASIC and the ESMA to establish cooperation and collaboration arrangements to enhance the resilience of the Australian financial markets.⁴⁴⁹ This MOU also establishes information sharing arrangements between the RBA, the ASIC and the ESMA as a measure of detecting and responding to systemic risks that might threaten the stability of the European Union's financial system and the integrity of financial markets.⁴⁵⁰

It should be noted that the MOU between the RBA, the ASIC and the ESMA is non-binding and holds no legal effect on the concluding parties. The researcher denotes that, this could have been motivated by the Australian authorities' determination to build a culture

⁴⁴⁷ Principle 3 of the BCBS Core Principles; see related comments by Correia de Brito, Kauffmann and Pelkmans 2016 *OECD Regulatory Policy Working Papers* 15; Satragno *Monetary Stability as a Common Concern in International Law: Policy Cooperation and Coordination of Central Banks* 64.

⁴⁴⁸ ESMA, ASIC and RBA "Memorandum of Understanding between ESMA, ASIC and RBA Related to CCPs Established in Australia" 9 February 2022 https://www.esma.europa.eu/sites/default/files/library/20220127_memorandum_of_understanding_between_rba_asic_and_esma.pdf accessed 25 July 2022; see related comments by Qumba 2022 *SALJ* 113.

⁴⁴⁹ Regulation (EU) No 648/2012 of the European Parliament and of the Council of 4 July 2012 on OTC Derivatives, Central Counterparties and Trade Repositories (EMIR), see article 25(2)(c); ESMA, ASIC and RBA "Memorandum of Understanding between ESMA, ASIC and RBA Related to CCPs Established in Australia" article 1.

⁴⁵⁰ ESMA, ASIC and RBA "Memorandum of Understanding between ESMA, ASIC and RBA Related to CCPs Established in Australia" article 3(5); Article 25(f) of the EMIR; see related comments by Kourabas S "Trends and Theory in Financial Regulation and Regulatory Design after the Global Financial Crisis" in Arner D, Wan W, Godwin A, Shen W and Gibson E (eds) *Research Handbook on Asian Financial Law* (Elgar Online 2020) 30, 33.

of coordination rather than prescriptive obligations which are rigid.⁴⁵¹ Although this might be advantageous for flexibility reasons, considering the continuously changing global financial standards, the researcher argues that it limits enforceability and compliance with the provisions of the MOU. The lack of enforcement and compliance could result in cumbersome cooperation and collaboration between the RBA, the ASIC and the ESMA. Nonetheless, the RBA's participation in international cooperation and collaboration and exchange of information echoes the importance of coordination towards the protection and promotion of global financial stability and market integrity.⁴⁵²

The researcher submits that cross-border cooperation and collaboration is essential for monitoring and investigating cross-border market misconduct which could threaten market integrity and financial stability.⁴⁵³ Accordingly, this MOU entails that Australia and the ESMA assist each other in regulating and enhancing resilience in the Australian markets. This MOU also plays a significant role in establishing a working relationship between the RBA, the ASIC and their international counterparts which is essential should either party require assistance during crises.

5.4.2 The establishment of a coordinating body to facilitate cooperation and collaboration between the RBA and other financial role players in Australia

The CFR is a coordinating body established to facilitate cooperation and collaboration between the RBA, the APRA, the ASIC and the Australian Treasury.⁴⁵⁴ The CFR

⁴⁵¹ See related comments by Godwin and Schmulow 2015 *SALJ* 758; Van Niekerk and Van Heerden 2020 *SALJ* 128; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 948; Schmulow 2017 *African Journal of International and Comparative Law* 397.

⁴⁵² Godwin A and Ramsay I "Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation" 2015 *Journal of Banking and Finance Law and Practice* 240, 251; North G and Wilson T "Has the Australian Prudential Regulation Authority Done Enough to Meet its Legislated Objectives and Prepare Australia for the Next Financial Crisis?" 2020 *University of New South Wales Law Journal* 552, 559; Godwin, Howse and Ramsay 2016 *Journal of Banking Regulation* 109.

⁴⁵³ See related comments by Chitimira H *Market Abuse Regulation in SADC: South Africa, Namibia, Botswana and Zimbabwe* (Juta: Cape Town 2022) 46; also see Schmulow A, Fairweather K and Tarrant J "Reforming Australia's Twin Peaks to Better Protect Consumers and Deter Misconduct" 2019 *Consumer Interests Annual* 1, 3; Schmulow A, Fairweather K and Tarrant J "Twin Peaks 2.0: Reforming Australia's Financial Regulatory Regime in Light of Failings Exposed by the Banking Royal Commission" 2018 *Law and Financial Markets Review* 193, 195.

⁴⁵⁴ Jensen and Kingston 2010 *Butterworths Journal of International Banking and Financial Law* 549; Van Niekerk and Van Heerden 2020 *SALJ* 132; Schmulow "Twin Peaks: An Analysis of the

comprises the RBA, the APRA, the ASIC and the Australian Treasury.⁴⁵⁵ According to Godwin, the CFR is the most crucial mechanism established to promote cooperation and collaboration between the RBA, the APRA, the ASIC and the Australian Treasury.⁴⁵⁶ The objectives of the CFR are to promote and safeguard the efficiency and effectiveness of cooperation and collaboration between the RBA and other role players, and to promote the stability and integrity of the Australian financial markets.⁴⁵⁷ The CFR does not have a statutory basis or regulatory functions separate from those of its members.⁴⁵⁸ This means that the CFR does not have substantive powers or authority beyond its coordinating and consultative functions. Unlike in South Africa where the FSCR has a statutory basis, the CFR is not statute-based and only creates a platform for inter-agency cooperation and collaboration in Australia.⁴⁵⁹ Concerns have been raised in Australia, to give the CFR statutory recognition and a more formal structure.⁴⁶⁰ However, Schmulow argues that formalising the roles and mandates of the CFR by giving it statutory recognition might affect the flexible nature of cooperation and collaboration arrangements in Australia.⁴⁶¹ On the contrary, the researcher argues that statutory recognition could strengthen the CFR's role in enforcing compliance and accountability on the RBA's duty to cooperate

Australian Architecture" 15; Kourabas 2018 *Journal of Banking and Finance Law and Practice* 206; Godwin 2017 *Law and Financial Markets Review* 186.

⁴⁵⁵ Kourabas 2018 *Journal of Banking and Finance Law and Practice* 206; Godwin 2017 *Law and Financial Markets Review* 186; Godwin and Schmulow 2015 *SALJ* 760; Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 30.

⁴⁵⁶ Godwin 2017 *Law and Financial Markets Review* 186; Godwin and Schmulow 2015 *SALJ* 760; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 941; Van Niekerk and Van Heerden 2020 *SALJ* 128.

⁴⁵⁷ Kourabas 2018 *Journal of Banking and Finance Law and Practice* 206; Godwin and Schmulow 2015 *SALJ* 760; Godwin and Ramsay 2015 *Journal of Banking and Finance Law and Practice* 244; Schmulow 2017 *African Journal of International Comparative Law* 395.

⁴⁵⁸ Council of Financial Regulators "About the CFR (2013-2014)" www.cfr.au/ accessed 25 November 2021; Reserve Bank of Australia "Submission to the Financial System Inquiry" *Financial System Inquiry Interim Report* (March 2014) 66; see related comments by Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 125.

⁴⁵⁹ See section 79(2) of the *FSR Act*; Godwin and Schmulow 2015 *SALJ* 763; Fisk and Pollari *Financial Services* 5; CFR "Council of Financial Regulators Charter" 13 January 2004 <https://www.cfr.gov.au/about-cfr/charter.html>. Accessed 25 November 2021.

⁴⁶⁰ See Fisk and Pollari *Financial Services* 5; National Australia Bank "NAB Submission to the Financial System Inquiry" *Financial System Inquiry Interim Report* (March 2014) 4; see related comments by Van Niekerk and Van Heerden 2020 *SALJ* 133; also see Schmulow 2017 *African Journal of International Comparative Law* 395.

⁴⁶¹ Schmulow "Twin Peaks: An Analysis of the Australian Architecture" 12; Godwin and Schmulow 2015 *SALJ* 760; Godwin and Ramsay 2015 *Journal of Banking and Finance Law and Practice* 246; Schmulow 2017 *African Journal of International Comparative Law* 398.

and collaborate with other financial role players to promote, protect, enhance and maintain financial stability and market integrity.

The CFR promotes cooperation and collaboration between the RBA and other financial role players by providing a forum for discussions relating to matters of common interest between the RBA, the APRA, the ASIC and the Australian Treasury.⁴⁶² The members of the CFR meet at least four times a year and as often as may be required to, inter alia: identify important issues and trends that may affect financial stability in Australia; ensure that there are effective and appropriate cooperation and collaboration and information sharing arrangements to promote financial stability, market integrity and resolve overlaps; and to respond to actual or potential systemic risks threatening financial stability and market integrity.⁴⁶³ The CFR provides a platform to resolve matters relating to overlapping functions between the RBA, the APRA, the ASIC and the Australian Treasury as a way of ensuring robust cooperation and collaboration between the RBA and other financial role players.⁴⁶⁴ This shows that the CFR is also a forum for dispute resolution. However, the CFR Charter expressly mentions the resolution of disputes relating to overlapping functions only, which leaves a gap in the resolution of disputes relating to regulatory conflicts amongst the financial role players in Australia.⁴⁶⁵ In this regard, the researcher argues that the scope and ambit of the CFR's roles and responsibilities should be extended to cover any matters that may affect the effectiveness of cooperation and collaboration between the RBA and other financial role players.

⁴⁶² Godwin and Schmulow 2015 *SALJ* 760; Godwin and Ramsay 2015 *Journal of Banking and Finance Law and Practice* 244; Schmulow 2017 *African Journal of International Comparative Law* 395; Council of Financial Regulators "Memorandum of Understanding on Financial Distress Management between the Members of the Council of Financial Regulators" 18 September 2008 www.cfr.au/ accessed 25 November 2021.

⁴⁶³ Kourabas 2018 *Journal of Banking and Finance Law and Practice* 206; Godwin and Schmulow 2015 *SALJ* 760; Reserve Bank of Australia "Submission to the Financial System Inquiry" 66; Van Niekerk and Van Heerden 2020 *SALJ* 132.

⁴⁶⁴ Kourabas 2018 *Journal of Banking and Finance Law and Practice* 206; Godwin and Schmulow 2015 *SALJ* 760; Reserve Bank of Australia "Submission to the Financial System Inquiry" 66; Van Niekerk and Van Heerden 2020 *SALJ* 132.

⁴⁶⁵ CFR "Council of Financial Regulators Charter" 12; see related comments by Cooper J "The Integration of Financial Regulatory Authorities – The Australian Experience" in *Assessing the Present, Conceiving the Future 30th Anniversary Conference* (4-5 September 2006 Rio de Janeiro) 7; Bhati S "An Analysis of the Financial Services Regulations of Australia" 2008 *International Review of Business Research Papers* 13; Jensen and Kingston 2010 *Butterworths Journal of International Banking and Financial Law* 546.

To date, the CFR has been considerably successful in promoting cooperation and collaboration between the RBA and other financial role players, especially during the GFC where cooperation and collaboration between the RBA and other financial role players were effectively proactive.⁴⁶⁶ However, the researcher argues that the collapse of the HIH Insurance in Australia is evidence that inter-agency coordination in Australia is not flawless.⁴⁶⁷ The fall of the HIH Insurance has been attributed to, *inter alia*, cumbersome cooperation and collaboration between the APRA and the ASIC which resulted in regulatory gaps and overlaps. The Royal Commission found that this could have been a result of a lack of enforceable measures to foster inter-agency cooperation and collaboration in Australia.⁴⁶⁸ To this effect, the *APRA Act* was amended to impose a statutory duty to cooperate and collaborate on the APRA.⁴⁶⁹ Despite several inquiries held to assess the effectiveness of cooperation and collaboration arrangements between the RBA and other financial role players in Australia, there are still reservations about formalising the functions of the CFR. The weight of the opinions raised provides that regulatory performance is more important than regulatory structure. Formal arrangements may also distract a low-cost approach, the robustness and flexibility of the coordination arrangements between the RBA and other financial role players in Australia.⁴⁷⁰ However, the researcher argues that formal arrangements for cooperation and collaboration between the RBA and other financial role players could increase compliance and

⁴⁶⁶ Godwin 2017 *Law and Financial Markets Review* 186; see related comments by Schmulow, Fairweather and Tarrant 2019 *Consumer Interests Annual* 3; Schmulow, Fairweather and Tarrant 2018 *Law and Financial Markets Review* 195.

⁴⁶⁷ Commonwealth, HIH Royal Commission “The Failure of HIH” *HIH Royal Commission Report* (28 March 2003) 15; see related comments by Schmulow, Fairweather and Tarrant 2018 *Law and Financial Market Review* 199; also see Osode P “Two Heads are Better than One: Assessing South Africa’s ‘Twin Peaks’ Financial Regulation Model” 2021 *Interdisciplinary Journal of Economics and Business Law* 9, 24; Cooper J “The Integration of Financial Regulatory Authorities – The Australian Experience” 11.

⁴⁶⁸ Commonwealth, HIH Royal Commission HIH Royal Commission Report 35; Kourabas 2018 *Journal of Banking and Finance Law and Practice* 205; see related comments by Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 24; also see Guzman AT and Meyer TL “International Soft Law” 2010 *Journal of Legal Analysis* 169, 171.

⁴⁶⁹ See section 10A of the *APRA Act*; Harper IR “The Wallis Report: An Overview” 2002 *The Australian Economic Review* 288, 290; Godwin 2017 *Law and Financial Markets Review* 185; Godwin and Schmulow 2015 *SALJ* 762.

⁴⁷⁰ Godwin and Schmulow 2015 *SALJ* 756; Kourabas 2018 *Journal of Banking and Finance Law and Practice* 205; Schmulow, Fairweather and Tarrant 2018 *Law and Financial Market Review* 199; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 951.

enforcement, which are essential for effective cooperation and collaboration between central banks and other financial role players.⁴⁷¹

In September 2008, members of the CFR concluded an MOU that establishes cooperation and collaboration arrangements between the RBA, the APRA, the ASIC and the Australian Treasury to manage financial distress that may threaten financial stability and market integrity.⁴⁷² The purpose of this MOU is to foster effective and efficient cooperation and collaboration between the RBA and other financial role players to manage systemic risks or potential threats to financial stability and market integrity.⁴⁷³ The CFR MOU regarding cooperation and collaboration to manage financial distress outlines the duties and responsibilities of the RBA, the APRA, the ASIC and the Australian Treasury should financial distress occur.⁴⁷⁴ Previous experience has shown that cooperation and collaboration between central banks and other financial role players are often neglected during a financial crisis and this is likely to result in regulatory gaps and overlaps.⁴⁷⁵ Therefore, it is important to establish comprehensive cooperation, collaboration and information sharing arrangements to manage financial crises before they arise.

⁴⁷¹ Godwin 2017 *Law and Financial Markets Review* 186; see related comments by Schmulow, Fairweather and Tarrant 2019 *Consumer Interests Annual* 3; Schmulow, Fairweather and Tarrant 2018 *Law and Financial Markets Review* 195.

⁴⁷² Council of Financial Regulators “Memorandum of Understanding on Financial Distress Management between the Members of the Council of Financial Regulators” 18 September 2008 <http://www.apra.gov.au/AboutAPRA/Documents/MOU-CoFR-Council-of-Financial-Regulators-on-Financial-Distress-Management.pdf> accessed 24 November 2021; Kourabas 2018 *Journal of Banking and Finance Law and Practice* 206; Van Niekerk and Van Heerden 2020 *SALJ* 131; Cooper “The Integration of Financial Regulatory Authorities - The Australian Experience” 11.

⁴⁷³ Council of Financial Regulators “Memorandum of Understanding on Financial Distress Management between the Members of the Council of Financial Regulators” para 2.1; Jensen and Kingston 2010 *Butterworths Journal of International Banking and Financial Law* 549; Schmulow 2015 *Journal of Banking and Finance Law and Practice* 171; Schmulow A “Doing it the Australian Way, “Twin Peaks” and the Pitfalls in between” Page Anon.

⁴⁷⁴ Council of Financial Regulators “Memorandum of Understanding on Financial Distress Management between the Members of the Council of Financial Regulators” para 3.2-3.5; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 944; Cooper “The Integration of Financial Regulatory Authorities - The Australian Experience” 12; Van Niekerk and Van Heerden 2020 *SALJ* 133.

⁴⁷⁵ See related comments by Van Niekerk and Van Heerden 2020 *SALJ* 137; Hill J “Why Did Australia Fare So Well in the Global Financial Crisis?” 2012 *Legal Research Paper No 12/35* 1, 21; Jensen and Kingston 2010 *Butterworths Journal of International Banking and Financial Law* 550; Qumba 2022 *SALJ* 95.

The researcher submits that the establishment of the CFR as a forum for high-level cooperation and collaboration between the RBA, the APRA, the ASIC and the Australian Treasury is commendable. A coordinating body is an effective measure that can be employed to enforce and promote cooperation and collaboration between central banks and other financial role players. Despite the lack of regulatory authority and powers, the CFR plays an important role by creating a platform for financial role players to discuss and address matters relating to financial stability and market integrity.⁴⁷⁶ A coordinating body, with specific mandates, focusing on facilitating cooperation and collaboration between the central bank and other financial role players enables transparency, accountability, compliance and enforcement of the duty to cooperate and collaborate.⁴⁷⁷

5.4.3 A soft law approach to cooperation and collaboration between the RBA and other financial role players

Australia follows a soft law approach to cooperation and collaboration between the RBA, the APRA and the ASIC.⁴⁷⁸ Soft law is embodied in bilateral MOUs and informal arrangements, as opposed to hard law which comprises express statutory regulations found in binding legislation.⁴⁷⁹ Soft law is non-binding, more flexible and cheaper to establish.⁴⁸⁰ The framework for cooperation and collaboration between the RBA, the APRA and the ASIC is well known for its flexibility and Schmulow submits that Australia's success during the GFC and the Sovereign Debt Crisis is attributable to the flexible nature

⁴⁷⁶ Godwin and Schmulow 2015 *SALJ* 768; Schmulow 2017 *African Journal of International Comparative Law* 401; Kourabas 2018 *Journal of Banking and Finance Law and Practice* 199; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 944.

⁴⁷⁷ Godwin and Schmulow 2015 *SALJ* 768; Schmulow 2017 *African Journal of International Comparative Law* 401; Kourabas 2018 *Journal of Banking and Finance Law and Practice* 199; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 944.

⁴⁷⁸ Godwin and Schmulow 2015 *SALJ* 757; Van Niekerk and Van Heerden 2020 *SALJ* 129; Schmulow "Twin Peaks: An Analysis of the Australian Architecture" 9; Schmulow 2017 *African Journal of International Comparative Law* 394.

⁴⁷⁹ Schmulow 2015 *Journal of Banking and Finance Law and Practice* 171; Jensen and Kingston 2010 *Butterworths Journal of International Banking and Financial Law* 543; Guzman AT and Meyer TL "International Soft Law" 2010 *Journal of Legal Analysis* 169, 171; Kourabas 2018 *Journal of Banking and Finance Law and Practice* 199.

⁴⁸⁰ Kelly CR "The Sociological Pull of Soft Law" 2012 *American Society of International Law Proceedings* 322, 327; Ferran E and Alexander K "Can Soft Law Bodies be Effective? Soft Systemic Risk Oversight Bodies and the Special Case of European Systemic Risk Board" 2011 *Legal Studies Research Paper Series* 6; Godwin and Schmulow 2015 *SALJ* 756; Kourabas 2018 *Journal of Banking and Finance Law and Practice* 199; Van Niekerk and Van Heerden 2020 *SALJ* 128.

of regulatory coordination.⁴⁸¹ Nonetheless, the researcher argues that the collapse of the HIH Insurance is attributable to the soft law approach to regulatory coordination which was a result of, *inter alia*, ineffective coordination between the APRA and the ASIC. This shows that the soft-law approach is not adequate enough to promote effective cooperation and collaboration between the central bank and other financial role players.⁴⁸²

A flexible nature to regulatory coordination enables the RBA and other financial role players to easily adjust to changing circumstances of global financial markets and to implement the required changes to manage systemic risks.⁴⁸³ Accordingly, a culture of coordination, as opposed to a statutory regulatory approach, was also established in Australia to foster cooperation and collaboration between the RBA, the APRA, the ASIC and the Australian Treasury.⁴⁸⁴ Central to this approach is RBA's submission that, legislation cannot be relied upon to promote cooperation and collaboration, mutual support and trust between the central bank and domestic financial role players.⁴⁸⁵ According to Schmulow, a culture of coordination, trust and mutual support are essential for the protection, promotion, enhancement and maintenance of financial stability and market integrity.⁴⁸⁶ However, the researcher argues that a culture of coordination alone is not sufficient for adequate cooperation and collaboration between the RBA and other

⁴⁸¹ Schmulow "Twin Peaks: An Analysis of the Australian Architecture" 10; Godwin and Schmulow 2015 *SALJ* 759; Godwin A, Li G and Ramsay I "Is Australia's 'Twin Peaks' System of Financial Regulation a Model for China?" 2016 *Centre for International Finance Regulation (CIFR) Paper* 12.

⁴⁸² Kourabas 2018 *Journal of Banking and Finance Law and Practice* 199; Van Niekerk and Van Heerden 2020 *SALJ* 128; Godwin and Schmulow 2015 *SALJ* 772; see related comments by Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 946.

⁴⁸³ Kourabas 2018 *Journal of Banking and Finance Law and Practice* 198; Ferran and Alexander 2011 *Legal Studies Research Paper Series* 6; Godwin, Li and Ramsay 2016 *CIFR Paper* 12; Kelly 2012 *American Society of International Law Proceedings* 327.

⁴⁸⁴ Godwin 2018 *Law and Financial Markets Review* 184; Van Niekerk and Van Heerden 2020 *SALJ* 135; Kourabas 2018 *Journal of Banking and Finance Law and Practice* 198; Ferran and Alexander 2011 *Legal Studies Research Paper Series* 6.

⁴⁸⁵ Reserve Bank of Australia "Financial System Inquiry Interim Report" *Financial System Inquiry Reports Series* (24 July 2014) 3, 78; Godwin and Schmulow 2015 *SALJ* 763; Edey "Macroprudential Supervision and the Role of Central Banks" 3; Schmulow 2017 *African Journal of International Comparative Law* 395.

⁴⁸⁶ Schmulow "Twin Peaks: An Analysis of the Australian Architecture" 15; Godwin and Schmulow 2015 *SALJ* 763; Schmulow 2017 *African Journal of International Comparative Law* 395; Kourabas 2018 *Journal of Banking and Finance Law and Practice* 198.

financial role players. There is a need for enforceable measures that also create legal certainty.

The researcher submits that despite its flexibility, the soft-law approach to cooperation and collaboration between the RBA and other financial role players leaves a lot to be desired.⁴⁸⁷ This follows the fact that a statutory approach enables enforcement of the duty to coordinate, which is essential for effective cooperation and collaboration between central banks and domestic financial role players.⁴⁸⁸ It is also submitted that like in South Africa and the UK, the flexibility of cooperation and collaboration arrangements can still be achieved by incorporating both statutory provisions and bilateral MOUs.⁴⁸⁹ The recent findings of cumbersome coordination and regulatory overlaps between the APRA and the ASIC can be attributed to the lack of stringent statutory regulatory provisions, enforcement measures and clear functions between the APRA and the ASIC.⁴⁹⁰ In this regard the researcher submits that Australia might need to consider implementing a hard law approach to foster cooperation and collaboration between the RBA and other financial role players to promote enforcement, compliance and transparency.

5.5 Cooperation and Collaboration between the RBA and other Financial Role Players during and post-COVID-19 pandemic and the Russo-Ukrainian War

Cooperation and collaboration between the central bank and other financial role players are essential for protecting, promoting, enhancing and maintaining financial stability and

⁴⁸⁷ See related comments by Ferran and Alexander 2011 *Legal Studies Research Paper Series* 6; Godwin, Li and Ramsay 2016 CIFR Paper 12; Kelly 2012 *American Society of International Law Proceedings* 327.

⁴⁸⁸ Schmulow "Twin Peaks: An Analysis of the Australian Architecture" 15; Godwin and Schmulow 2015 *SALJ* 763; Schmulow 2017 *African Journal of International Comparative Law* 395; Kourabas 2018 *Journal of Banking and Finance Law and Practice* 198.

⁴⁸⁹ Van Niekerk and Van Heerden 2020 *SALJ* 142; Qumba 2020 *SALJ* 102; see related comments by Godwin and Schmulow 2015 *SALJ* 763.

⁴⁹⁰ Kourabas 2018 *Journal of Banking and Finance Law and Practice* 198; Schmulow, Fairweather and Tarrant 2018 *Law and Financial Markets Review* 195; Hanrahan P "Twin Peaks after Hayne: Tensions and Trade-Offs in Regulatory Architecture" 2019 *Law and Financial Markets Review* 13, 23; Schmulow A, Fairweather K and Tarrant J "Twin Peaks 2.0: Reforming Australia's Financial Regulatory Regime in Light of Failings Exposed by the Banking Royal Commission" 2018 *Law and Financial Markets Review* 193, 195.

market integrity in any jurisdiction.⁴⁹¹ Between 2019 and 2020, global financial stability and market integrity were greatly affected by the outbreak of the COVID-19 pandemic and the Russo-Ukrainian war in 2022.⁴⁹² For example, the global gross domestic product (GDP) was reduced by about 1.5 percent and the inflation rate rose by about 1.3 percent as a result of the Russo-Ukrainian war.⁴⁹³ To curb the effects of the COVID-19 pandemic and the Russo-Ukrainian war on financial stability and market integrity in Australia, the CFR was tasked to closely monitor the effects of these systemic events for regulatory coordination purposes.⁴⁹⁴ In this regard, the CFR effectively coordinated regulatory and policy activities between the RBA, the APRA, the ASIC and the Australian Treasury to prevent duplication of tasks and regulatory gaps as the economy was already under threat.⁴⁹⁵ Such coordination included ensuring proactive cooperation and collaboration and information sharing arrangements between the RBA and other financial role players to mitigate the financial risks caused by the COVID-19 pandemic and the Russo-Ukrainian war. Although the RBA, the APRA and the ASIC had limited exposure to Russian financial institutions, the CFR played a significant role in ensuring that its

⁴⁹¹ Van Heerden and Van Niekerk 2020 *THRHR* 513; Hong-bum 2009 *Seoul Journal of Economics* 412; Ferran E “The Break-up of the Financial Services Authority” 2011 *Oxford Journal of Legal Studies* 455, 459; Georgosouli 2013 *Capital Markets Law Journal* 68.

⁴⁹² Caldara D, Conlisk S, Iacoviello M and Penn M “The Effect of the War in Ukraine on Global Activity and Inflation” 27 May 2022 <https://www.federalreserve.gov/econres/notes/feds-notes/the-effect-of-the-war-in-ukraine-on-global-activity-and-inflation-20220527.html> accessed 10 October 2022; Caldara D and Iacoviello M “Measuring Geopolitical Risk” 2022 *American Economic Review* 1194, 1196; Reserve Bank of Australia “Financial Stability Review – April 2022: Domestic Regulatory Developments” April 2022 <https://www.rba.gov.au/publications/fsr/2022/apr/regulatory-developments.html> accessed 9 October 2022.

⁴⁹³ Caldara, Conlisk, Iacoviello and Penn “The Effect of the War in Ukraine on Global Activity and Inflation” Page Anon; Caldara and Iacoviello 2022 *American Economic Review* 1196; Ferdele J, Meier A, Muller G and Sehn V “Proximity to War: The Stock Market Response to the Russian Invasion of Ukraine” 2022 *CEPR Discussion Paper* 85, 92.

⁴⁹⁴ Reserve Bank of Australia “Financial Stability Review – April 2022: Domestic Regulatory Developments” Page Anon; Kennedy S “A Tale of Two Crises: Reflections on Macroeconomic Policy Responses to the GFC and the Pandemic” 27 July 2022 https://treasury.gov.au/speech/2022-sir-leslie-melville-lecture#_ftn15 accessed 6 October 2022; see related comments by Brown G and Susskind D “International Cooperation during the COVID-19 Pandemic” 2020 *Oxford Review of Financial Policy Journal* 64, 66; Susskind D and Vines D “The Economics of the COVID-19 Pandemic: An Assessment” 2020 *Oxford Review of Economic Policy Journal* 1, 7.

⁴⁹⁵ Reserve Bank of Australia “Financial Stability Review – April 2022: Domestic Regulatory Developments” Page Anon; Kennedy “A Tale of Two Crises: Reflections on Macroeconomic Policy Responses to the GFC and the Pandemic” 5; see related comments by Financial Stability Board “US Dollar Funding and Emerging Market Economy Vulnerabilities” 26 April 2022 <https://www.fsb.org/2022/04/us-dollar-funding-and-emerging-market-economy-vulnerabilities/> accessed 6 October 2022.

members maintained close monitoring of the developments of the war which could affect financial stability and the integrity of Australian financial markets.⁴⁹⁶

The APRA is responsible for macro-prudential regulation in Australia. However, the decisions made by the APRA in this regard during the COVID-19 pandemic had to involve all members of the CFR in the decision making process.⁴⁹⁷ Thus, the CFR created a forum for the APRA to consult, discuss and analyse macro-prudential policies with the RBA, the ASIC and the Australian Treasury before making financial decisions during the COVID-19 pandemic. This follows the fact that residential mortgage lending increased financial stability risks during the COVID-19 pandemic as consumers were failing to pay their mortgages due to financial constraints caused by the pandemic.⁴⁹⁸ As such, it was important that the RBA and other financial role players actively coordinate and support each other in making decisions that had a significant influence on the protection of financial stability and market integrity in Australia.

To this end, the RBA, the ASIC, the APRA and the Australian Treasury established a domestic cyber-attack protocol to enhance inter-agency coordination in mitigating cyber threats and systemic risks in Australia.⁴⁹⁹ The researcher submits that the functions of the CFR to protect and maintain financial stability and market integrity during the COVID-19 pandemic and the Russo-Ukrainian war are commendable. Also, this shows the importance of cooperation and collaboration arrangements to manage financial crises and

⁴⁹⁶ Caldara and Iacoviello 2022 *American Economic Review* 1196; Ferdele, Meier, Muller and Sehn 2022 *CEPR Discussion Paper* 92; see related comments by Brown and Susskind 2020 *Oxford Review of Financial Policy Journal* 66; Susskind and Vines 2020 *Oxford Review of Economic Policy Journal* 7.

⁴⁹⁷ Caldara and Iacoviello 2022 *American Economic Review* 1196; Ferdele, Meier, Muller and Sehn” 2022 *CEPR Discussion Paper* 92; Reserve Bank of Australia “Financial Stability Review – April 2022: Domestic Regulatory Developments” Page Anon.

⁴⁹⁸ Reserve Bank of Australia “Financial Stability Review – April 2022: Domestic Regulatory Developments” Page Anon; Kennedy “A Tale of Two Crises: Reflections on Macroeconomic Policy Responses to the GFC and the Pandemic” 5; Caldara and Iacoviello 2022 *American Economic Review* 1195.

⁴⁹⁹ Ferdele, Meier, Muller and Sehn 2022 *CEPR Discussion Paper* 92; Financial Stability Board “US Dollar Funding and Emerging Market Economy Vulnerabilities” Page Anon; see related comments by Susskind and Vines 2020 *Oxford Review of Economic Policy Journal* 6.

a coordinating body to facilitate inter-agency coordination during a crisis. This is an important lesson for South Africa.⁵⁰⁰

5.6 Conclusion

To conclude, the researcher submits that several lessons can be drawn for South Africa from the Australian experience and the regulation of cooperation and collaboration between the RBA and other financial role players. For example, the importance of an overarching coordinating body and a culture for coordination to promote and enhance cooperation and collaboration between the central bank and other financial role players. The CFR serves as a forum for cooperation, coordination, information sharing and discussion on matters of common interest between the RBA, the APRA, the ASIC and the Australian Treasury.⁵⁰¹ It can be argued that the Australian experience provides insights into the challenges that regulatory coordination presents and ways to overcome such challenges. The key lesson that can be drawn from Australia in this regard is that a hard law approach to cooperation and collaboration is necessary, but not sufficient to achieve desired outcomes.⁵⁰² A culture of coordination, that is focused on performance, rather than regulatory structure and a balanced combination of flexible and formal regulations are essential for effective and robust cooperation and collaboration between the central bank and other financial role players.⁵⁰³

The next chapter is an analysis of the regulation of cooperation and collaboration between the Bank of England and other financial role players in the UK. This is done to enable the

⁵⁰⁰ Reserve Bank of Australia “Financial Stability Review – April 2022: Domestic Regulatory Developments” Page Anon; Kennedy “A Tale of Two Crises: Reflections on Macroeconomic Policy Responses to the GFC and the Pandemic” 5; Caldara and Iacoviello 2022 *American Economic Review* 1195.

⁵⁰¹ Jensen and Kingston 2010 *Butterworths Journal of International Banking and Financial Law* 549; Van Niekerk and Van Heerden 2020 *SALJ* 132; Schmulow “Twin Peaks: An Analysis of the Australian Architecture” 15; Kourabas 2018 *Journal of Banking and Finance Law and Practice* 206; Godwin 2017 *Law and Financial Markets Review* 186.

⁵⁰² Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 943; Godwin and Schmulow 2020 *SALJ* 772; see related comments by Van Niekerk and Van Heerden 2020 *SALJ* 141; Qumba 2022 *SALJ* 101.

⁵⁰³ Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 943; Godwin and Schmulow 2020 *SALJ* 772; see related comments by Van Niekerk and Van Heerden 2020 *SALJ* 141; Qumba 2022 *SALJ* 101.

researcher to draw lessons regarding the regulation of regulatory coordination for South Africa to enhance its current regulatory framework.

CHAPTER SIX

THE COOPERATION AND COLLABORATION BETWEEN THE BANK OF ENGLAND AND OTHER FINANCIAL ROLE PLAYERS IN THE UNITED KINGDOM

6.1 Introduction

The Global Financial Crisis (GFC) that occurred between 2007 and 2009 crippled many economies including the United Kingdom (UK).⁵⁰⁴ The UK encountered challenges of increasingly fragmented financial markets and blurred demarcations in the banking, insurance and securities financial institutions.⁵⁰⁵ To alleviate the effects of the GFC, the Group of Thirty Countries (G30) recommended member states to re-evaluate their financial regulatory frameworks to curb overlaps and gaps, and to remove potential regulatory arbitrage by improving regulatory cooperation and collaboration between central banks and other financial role players.⁵⁰⁶ The G30's recommendation to restructure the UK's financial regulatory framework was relevant, especially following the failure of the previous tripartite financial regulatory system to prevent the effects of the GFC due to poor cooperation and collaboration mechanisms between the Bank of England (BOE), the Financial Services Authority and the Treasury Department.⁵⁰⁷ Some effects of the GFC, such as the collapse of the Northern Rock Bank and other financial

⁵⁰⁴ Lastra RM and Wood G "The Crisis of 2007-2009: Nature, Causes and Reactions" 2013 *Journal of International Economic Law* 529, 531; Zimmermann *CD A Contemporary Concept of Monetary Sovereignty* (Oxford University Press 2013) 231; Lastra RM *International Financial and Monetary Law* 2nd ed (Oxford University Press 2015) 365; Michael TW "Regulatory Reform in the U.K." 2013 *North Carolina Banking Institute* 227, 229.

⁵⁰⁵ Schooner HM and Taylor M "United Kingdom and United States Responses to the Regulatory Challenges of Modern Financial Markets" 2003 *Texas International Law Journal* 317, 327-29; Michael TW "Regulatory Reform in the U.K." 2013 *North Carolina Banking Institute* 227, 229; Taylor 2009 *Connecticut Insurance Law Journal* 64; Lui A "Single or Twin? The UK Financial Regulatory Landscape After the Financial Crisis of 2007-2009" 2012 *Journal of Banking Regulation* 24, 27.

⁵⁰⁶ Group of Thirty 2009 *Financial Reform: A Framework for Financial Stability* 10 at <http://www.group30.org/pubs/recommendations.pdf> accessed 10 January 2022; Ackemann J "The New Architecture of Financial Regulation: Will it Prevent Another Crisis" 2010 *Special Paper* 190, 194; Cox L *et al* "United Kingdom Regulatory Reform: Emergence of the Twin Peaks" 2012 *COB* 1, 5; see related comments by Breuss F "The Crisis in Retrospect: Causes, Effects and Policy Responses" in Badinger H and Nitsch V (eds) *Routledge Handbook of the Economics of European Integration* (Routledge 2015) 331, 339.

⁵⁰⁷ Godwin A, Kourabas S and Ramsay I "Twin Peaks and Financial Regulation: The Challenges of Increasing Regulatory Overlap and Expanding Responsibilities" 2016 *International Lawyer* 273, 285; Taylor 2009 *Connecticut Insurance Law Journal* 66; see related comments by Qumba MF "A Comparative Analysis of the Twin Peaks Model of Financial Regulation in South Africa and the United Kingdom" 2022 *SALJ* 78, 91.

institutions, exacerbated the realisation that there was a need for a new regulatory structure that promoted effective cooperation and collaboration between the BOE and other financial role players in the UK.⁵⁰⁸ Consequently, the Financial Services Authority was replaced by two separate financial role players, the Prudential Regulation Authority (PRA) and the Financial Conduct Authority (FCA).⁵⁰⁹ The establishment of the PRA and the FCA as two separate regulatory authorities entailed the need for robust coordination and comprehensive cooperation and collaboration mechanisms between the BOE, the PRA, the FCA and other financial role players to promote, protect and enhance financial stability and market integrity.⁵¹⁰ It is against this background that the *Financial Services Act*⁵¹¹ was enacted to, *inter alia*, improve regulatory cooperation and collaboration between the BOE and other financial role players to protect, promote, maintain and enhance financial stability and market integrity in the UK.⁵¹²

⁵⁰⁸ Goodhart CAE “The Macro-Prudential Authority: Powers, Scope and Accountability” 2011 *OECD Journal of Financial Market Trends* 97, 99; Kallasidou N “The United Kingdom’s Response to Crisis: A Critical Examination of the New Regulatory Structure of Financial Services Supervision” 2013 *Bristol Law Review* 117, 119; Michael 2013 *North Carolina Banking Institute* 235; Godwin, Kourabas and Ramsay 2016 *International Lawyer* 273.

⁵⁰⁹ Georgosouli A “The FCA-PRA Coordination Scheme and the Challenge of Policy Coherence” 2013 *Capital Market Law Journal* 62, 64; Ferran E “The Reorganisation of Financial Services Supervision in the UK: An Interim Progress Report” 2011 *University of Cambridge Faculty of Law Research Paper* 12, 15; see related comments by Ford C “Principles-Based Securities Regulation in the Wake of the Global Financial Crisis” 2010 *McGill Law Journal* 55, 59; Lastra and Wood 2013 *Journal of International Economic Law* 532.

⁵¹⁰ See related comments by Lastra RM and Wood G “The Crisis of 2007-09: Nature, Causes and Reactions” 2010 *Journal of International Economic Law* 528, 531; Kallasidou 2013 *Bristol Law Review* 118; Mayes DG, Halme L and Liuksila A *Improving Banking Supervision* (Palgrave Macmillan Books 2001) 65; Cameron D and Clegg N “The Coalition: Our Programme for Government” 2010 *HM Government* 9, 12.

⁵¹¹ *Financial Services Act* 2012 (FSA), section 6; Georgosouli A “The FCA, the PRA and the Idea of Resilience as a Narrative for Policy Coherence” 2012 *SSRN Working Paper Series* 5, 17; Georgosouli 2013 *Capital Market Law Journal* 65; see related comments by Gadbow M “Systemic Regulation of Global Trade and Finance: A Tale of Two Systems” 2010 *Journal of International Economic Law* 551, 572-573.

⁵¹² Georgosouli 2013 *Capital Market Law Journal* 72; Qumba 2022 *SALJ* 79; see related comments by Schmulow A “The Four Methods of Financial System Regulation: An International Comparative Survey” 2015 *Journal of Banking and Finance and Practice* 151, 158; Moloney N, Ferran E, Payne J *et al The Oxford Handbook of Financial Regulation* (Oxford University Press 2015) 68.

6.2 The Roles and Functions of the BOE and other Financial Role Players to Promote, Protect, Enhance and Maintain Financial Stability and Market Integrity in the UK

The UK financial regulatory architecture comprises several financial role players that have complementary mandates, for example, the BOE, the PRA and the FCA.⁵¹³ The enactment of the *FSA* gave effect to a new financial regulatory framework and new financial role players such as the PRA, the FCA and the Financial Policy Committee (FPC).⁵¹⁴ It can be argued that a regulatory architecture that comprises several role players requires comprehensive and effective cooperation and collaboration mechanisms to ensure the passing and sharing of relevant information so as to safeguard against regulatory gaps on matters requiring regulatory oversight.⁵¹⁵ To ensure the optimum operation of the UK financial markets, the *FSA* imposes a duty on the BOE to cooperate and collaborate with the FCA, the PRA, the FPC, the HM Treasury and other international organisations to promote, protect and enhance financial stability and market integrity in the UK.⁵¹⁶ Therefore, it is important to discuss how the BOE, the PRA, the FCA and the FPC fulfil their roles and functions to promote and protect financial stability and market integrity in cooperation and collaboration with the BOE and other financial role players in the UK.

⁵¹³ Mwenda KK “The Regulatory and Institutional Framework for Unified Financial Services Supervision in the United Kingdom and Zambia” 2005 *Michigan State Journal of International Law* 347, 351; see related comments by Godwin A, Howse T and Ramsay I “A Jurisdictional Comparison of the Twin Peaks Model of Financial Regulation” 2016 *Journal of Banking Regulation* 103, 112; Qumba 2022 *SALJ* 93; Black J and Hopper M “Breaking Up is Hard to Do: The Future of the UK Financial Regulation?” 2011 *London School of Economics and Political Science* 36, 39.

⁵¹⁴ Section 6 of the *FSA*; see related comments by Godwin, Howse and Ramsay 2016 *Journal of Banking Regulation* 113; Schmulow 2015 *Journal of Banking and Finance and Practice* 151; Georgosouli 2013 *Capital Market Law Journal* 72.

⁵¹⁵ Qumba 2022 *SALJ* 93; Llewellyn D “Institutional Structure of Financial Regulation and Supervision: The Basic Issues” *Aligning Supervisory Structures with Country Needs Conference* (6-7 June 2006 Washington DC) 36; see related comments Goodhart CAE “Some Regulatory Concerns” 1996 *Swiss Journal of Economics and Statistics* 96, 98.

⁵¹⁶ Sections 3D and 64 of the *FSA*; *Bank of England Act* 1998, section 2A(1); James S and Quaglia L *The UK and Multi-level Financial Regulation: From Post-crisis Reform to Brexit* (Oxford University Press 2020) 72; Black and Hopper 2011 *London School of Economics and Political Science* 39.

6.2.1 *The roles and functions of the BOE in promoting and protecting financial stability and market integrity in the UK*

The BOE's primary mandate is to protect and promote financial stability as the central bank in the UK.⁵¹⁷ Due to the continuously changing standards in global financial markets, it remains difficult to come up with an overall definition of financial stability.⁵¹⁸ As such, the FSA does not provide a definition for financial stability to avoid the risk of setting in stone a definition that may become unfit and inflexible over time.⁵¹⁹ The BOE has the duty to cooperate and collaborate with the HM Treasury, the FCA and the PRA to fulfil its financial stability mandate.⁵²⁰ For instance, the BOE is supposed to collaborate with the FPC in monitoring financial risks that may threaten financial stability and to request any information relevant to its financial stability mandate from other financial role players.⁵²¹ It should also be noted that the BOE's decisions regarding financial stability are reviewed by the sub-committee of the Court of Directors before they are finalised.⁵²² This shows that although the BOE's primary mandate is the protection and promotion of financial stability, the BOE does not fulfil its financial stability mandates in isolation. The BOE cooperates and collaborates with other financial role players such as the Court of Directors, FPC and the HM Treasury to fulfil this mandate.

Despite its primary financial stability primary mandate, the BOE also plays a role in the promotion of market integrity in the UK. The BOE takes an active role in ensuring the effectiveness of financial markets by enhancing the resilience of market infrastructure and

⁵¹⁷ Section 2A of the *Bank of England Act*; section 2(2) of the *FSA*; Kallasidou 2013 *Bristol Law Review* 118; Treasury Committee *Financial Regulation: A Preliminary Consideration of the Government's Proposals* 2010/11 para 11.

⁵¹⁸ Treasury Committee, *Financial Regulation: A Preliminary Consideration of the Government's Proposals* 2010/11 para 11; Michael 2013 *North Carolina Banking Institute* 235; Godwin, Kourabas and Ramsay 2016 *International Lawyer* 273.

⁵¹⁹ Ferran 2011 *University of Cambridge Faculty of Law Research Paper* 15; Healey J "Financial Stability and the Central Bank: International Evidence" in Brealey RA *et al Financial Stability and Central Banks* (Routledge London 2001) 54; Oosterloo S and De Haan J "A Survey of International Frameworks for Financial Stability" 2003 *Occasional Studies* 47, 50.

⁵²⁰ Section 3D of the *FSA*; Murphy E and Senior S "Changes to the Bank of England" 2013 *Quarterly Bulletin* 20, 24; Georgosouli 2013 *Capital Market Law Journal* 72; Qumba 2022 *SALJ* 93.

⁵²¹ Section 3D of the *FSA*; Murphy and Senior 2013 *Quarterly Bulletin* 24; Ferran 2011 *University of Cambridge Faculty of Law Research Paper* 15; Qumba 2022 *SALJ* 108.

⁵²² Section 3 of the *FSA*; section 3A of the *Bank of England Act*; see related comments by Ferran 2011 *University of Cambridge Faculty of Law Research Paper* 21; Murphy and Senior 2013 *Quarterly Bulletin* 24.

supervising financial institutions to operate in a safe and sound state.⁵²³ The BOE is authorised to request information from the FCA in relation to liquidity and payment services to ensure optimum functioning of the financial markets.⁵²⁴ Significantly, the interaction between the BOE and the FCA towards the promotion of market integrity is inevitable and requires comprehensive cooperation and collaboration arrangements to ensure its effectiveness, and prevent regulatory gaps and overlaps between the BOE and the FCA in this regard.

6.2.2 *The roles and functions of the FPC in promoting and protecting financial stability and market integrity in the UK*

The primary statutory mandate of the FPC is to coordinate with the BOE in fulfilling its financial stability mandate.⁵²⁵ To fulfil this mandate, the FPC identifies, monitors and takes action to prevent and detect systemic risks that may affect financial stability and market integrity in the UK.⁵²⁶ The FPC also has an objective to promote and enhance market integrity through ensuring the growth of the economy and the financial markets by detecting and preventing financial crime.⁵²⁷ The FPC comprises the Governor of the BOE, Deputy Governors of the BOE, the chief executive of the FCA, one bank executive director appointed by the Governor, four external members appointed by the Chancellor and a non-voting representative of the Treasury.⁵²⁸ The membership and expertise of this committee entail that the FPC is responsible for monitoring the stability of the UK financial

⁵²³ Lopez C and Saeidinezhad E “UK Financial Reforms: Bank of England 2.0” 2016 *Milken Institute Publications* 3, 5; Healey J “Financial Stability and the Central Bank: International Evidence” 55; Lastra and Wood 2010 *Journal of International Economic Law* 535; Murphy and Senior 2013 *Quarterly Bulletin* 23.

⁵²⁴ Lopez and Saeidinezhad 2016 *Milken Institute Publications* 5; Lastra and Wood 2010 *Journal of International Economic Law* 535; Georgosouli 2013 *Capital Market Law Journal* 72; Qumba 2022 *SALJ* 89.

⁵²⁵ Section 9C(1)(a) of the *FSA*; Murphy and Senior 2013 *Quarterly Bulletin* 24; Taylor MW “Regulatory Reform in the U.K.” 2013 *North Carolina Banking Institute* 227, 234; see related comments by Ellinger EP, Lomnicka E and Hare C *Ellinger’s Modern Banking Law* 5th ed (Cambridge University Press 2012) 26.

⁵²⁶ Section 9C(2) of the *FSA*; Taylor 2013 *North Carolina Banking Institute* 234; Ellinger, Lomnicka and Hare *Ellinger’s Modern Banking Law* 26; Kallasidou 2013 *Bristol Law Review* 118; Ferran E “The Break-up of the Financial Services Authority” 2011 *Oxford Journal of Legal Studies* 450, 455.

⁵²⁷ See section 9D of the *FSA*; Ferran 2011 *Oxford Journal of Legal Studies* 455; Taylor 2013 *North Carolina Banking Institute* 235; Kallasidou 2013 *Bristol Law Review* 118.

⁵²⁸ Section 4 of the *FSA*; section 9A of the *Bank of England Act*; see related comments by Zimmermann *A Contemporary Concept of Monetary Sovereignty* 231; Lastra *International Financial and Monetary Law* 365.

system as well as the resilience of its financial markets.⁵²⁹ The FPC is a committee of the BOE which makes it directly involved in all financial stability matters.⁵³⁰ This arrangement can be said to have been influenced by the need to ensure an effective flow of information between the BOE and the FPC. The FPC is also required to cooperate and collaborate with the PRA and the FCA by making regulatory recommendations on matters of mutual interest.⁵³¹ The researcher submits that the UK financial regulatory architecture is structured in a manner that makes financial role players interdependent. Such interdependence requires a high level of inter-agency cooperation and collaboration to an extent that the failure thereof could affect financial stability and market integrity in the UK.

The FPC has the authority to give directions and recommendations to the PRA and the FCA regarding their statutory mandates.⁵³² An example of the directions that the FPC may give include that the PRA and the FCA share information regarding a matter of common interest.⁵³³ The researcher submits that the tasks of the FPC to make recommendations and give directions to the PRA and the FCA in the promotion and protection of financial stability and market integrity can be viewed as a strategy by the HM Treasury to foster cooperation and collaboration between the BOE, the FPC and other financial role players through information sharing arrangements. This follows the fact that the FPC requires the functions of other financial role players such as the BOE, the PRA, the FCA and the HM Treasury to fulfil its statutory mandates.⁵³⁴ The FPC is required to

⁵²⁹ Noked N “Financial Services Act 2012: A New UK Financial Regulatory Framework” *HLS Forum on Corporate Governance and Financial Regulation* (24 March 2013) 3; Georgosouli 2013 *Capital Market Law Journal* 63; Kallasidou 2013 *Bristol Law Review* 118; Qumba 2022 *SALJ* 83.

⁵³⁰ Section 4 of the *FSA*; Section 9C(1) of the *Bank of England Act*; see related comments by Rawlings P “Reform of Bank Regulation in the United Kingdom: The Opening Salvo” 2010 *Journal of International Banking Law and Regulation* 522, 523; Qumba 2022 *SALJ* 83.

⁵³¹ Kallasidou 2013 *Bristol Law Review* 124; Georgosouli 2013 *Capital Market Law Journal* 63; see related comments by Michael 2013 *North Carolina Banking Institute* 239; Godwin, Kourabas and Ramsay 2016 *International Lawyer* 278.

⁵³² See sections 9F(1)(b) and 9G of the *FSA*; see related comments by Noked N “Financial Services Act 2012: A New UK Financial Regulatory Framework” 6; Taylor 2013 *North Carolina Banking Institute* 235; Kallasidou 2013 *Bristol Law Review* 118.

⁵³³ Section 9G of the *FSA*; see related comments by Noked N “Financial Services Act 2012: A New UK Financial Regulatory Framework” 6; Taylor 2013 *North Carolina Banking Institute* 235; Kallasidou 2013 *Bristol Law Review* 118.

⁵³⁴ HM Treasury “A New Approach to Financial Regulation: Judgement, Focus and Stability” para 1.26; Treasury Committee *Financial Regulation: A Preliminary Consideration of the Government’s Proposals 2010/11* para 11; Section 4 of the *FSA*; section 9C(1) of the *Bank of England Act*; Noked *HLS Forum on Corporate Governance and Financial Regulation* 3

take recommendations that relate to its mandates from the HM Treasury.⁵³⁵ However, the recommendations of the Treasury are not binding on the FPC to ensure that the FPC remains independent of the HM Treasury and political influence. The FPC is also required to submit financial stability reports to the Parliament. The researcher submits that this might have been a measure to foster cooperation and collaboration between the BOE, the FPC and relevant state organs in matters relating to financial stability and market integrity in the UK.⁵³⁶ Accordingly, it can be said that the roles and mandates of the FPC are subject to effective cooperation and collaboration with the BOE and other financial role players to promote, protect, maintain and enhance financial stability in the UK.

6.2.3 The roles and functions of the PRA in promoting and protecting financial stability and market integrity in the UK

The PRA was established as a subsidiary of the BOE.⁵³⁷ It has two main statutory mandates. These include the promotion of the safety and soundness of the financial institutions it supervises, for example, banks and investment firms, and the protection of insurance policyholders.⁵³⁸ The PRA is responsible for the supervision of financial institutions that are regarded as “more important” in the UK, whilst the rest of the financial institutions are supervised by the FCA, for both prudential and conduct regulation.⁵³⁹ The PRA is responsible for ensuring that the financial institutions under its supervision do not engage in activities that may threaten financial stability and the integrity of the financial

⁵³⁵ Section 4 of the *FSA*; section 9D and 9E of the *Bank of England Act*; HM Treasury “A New Approach to Financial Regulation: Judgement, Focus and Stability” para 3; Georgosouli 2013 *Capital Market Law Journal* 67.

⁵³⁶ Section 4 of the *FSA*; section 9A of the *Bank of England Act*; Goodhart CAE “The Macro-Prudential Authority: Powers, Scope and Accountability” 2011 *OECD Journal of Financial Market Trends* 97, 99; Qumba 2022 *SALJ* 87; Georgosouli 2013 *Capital Market Law Journal* 74.

⁵³⁷ Section 2A of the *FSA*; Ferran 2011 *University of Cambridge Faculty of Law Research Paper* 22; Haill O “Why the FSA was Split into Two Bodies” *Financial Times London* (8 May 2013) 2; Kallasidou 2013 *Bristol Law Review* 124.

⁵³⁸ Section 2B of the *FSA*; Qumba 2022 *SALJ* 80; Georgosouli 2013 *Capital Market Law Journal* 63; Smethurst J “Twin Peaks: Bridging the Gap. Co-ordination under the New Regulatory Framework” 2012 *Journal of International Banking and Financial Law* 33, 35.

⁵³⁹ Haill *Financial Times London* 2; HM Treasury “A New Approach to Financial Regulation: Judgement, Focus and Stability” 2012 www.bsa.org.uk accessed 14 June 2022; Murphy and Senior 2013 *Quarterly Bulletin* 22; James and Quaglia *The UK and Multi-level Financial Regulation: From Post-crisis Reform to Brexit* 25.

markets.⁵⁴⁰ The researcher submits that the interconnectedness of the roles and mandates of the PRA and the FCA in promoting financial stability and market integrity requires effective information sharing arrangements between the PRA and the FCA. Also, considering that the PRA is a subsidiary of the BOE and is housed by the BOE, the shared objectives between the PRA and the FCA foster cooperation and collaboration and the sharing of information between the BOE and other financial role players such as the FPC, the PRA and the FCA.⁵⁴¹ Accordingly, the researcher submits that the roles and mandates of the PRA are not fulfilled in isolation as the PRA has shared mandates with the FCA and operates from inside the BOE to promote, protect, enhance and maintain financial stability and market integrity in the UK. The researcher is of the view that the statutory role and obligations of the FPC cannot be fulfilled without collaboration with the BOE and other financial role players. This follows the fact that the roles of the FPC are interdependent with the roles and functions of other financial role players such as the BOE, the FCA and the PRA.

6.2.4 The role and mandates of the FCA in promoting and protecting financial stability and market integrity in the UK

The FCA was established as a market conduct regulator and also a prudential regulator for firms that are not covered by the PRA.⁵⁴² The main objectives of the FCA are micro-prudential regulation of firms, market conduct regulation and the promotion of market integrity through regulation of effective competition in the UK.⁵⁴³ As such, the FCA plays a significant role in the promotion of both financial stability and market integrity. The FCA is obliged to contribute to financial stability through its market integrity mandate, by

⁵⁴⁰ James and Quaglia *The UK and Multi-level Financial Regulation: From Post-crisis Reform to Brexit* 25; see related comments by Ford 2010 *McGill Law Journal* 60; Lastra and Wood 2013 *Journal of International Economic Law* 530; Zimmermann *A Contemporary Concept of Monetary Sovereignty* 56.

⁵⁴¹ Section 22A of the *FSMA*; Prudential Regulation Authority "The Prudential Regulation Authority's Approach to Banking Supervision" 2013 *Bank of England* 25; Georgosouli 2013 *Capital Market Law Journal* 64; Sections 5 and 2B of the *FSA*.

⁵⁴² Section 1A of the *FSA*; Murphy and Senior 2013 *Quarterly Bulletin* 22; Kallasidou 2013 *Bristol Law Review* 129; see related comments by Norton JJ "Global Financial Sector Reform: The Single Financial Regulator Model Based on the United Kingdom FSA Experience - A Critical Reevaluation" 2005 *International Lawyer* 15, 58.

⁵⁴³ Sections 1C-E of the *FSA*; Michael 2013 *North Carolina Banking Institute* 230; see related comments by Taylor 2009 *Connecticut Insurance Law Journal* 64; Lui 2012 *Journal of Banking Regulation* 29.

ensuring soundness, stability and resilience in the UK's financial system.⁵⁴⁴ The *FSA* provides that the FCA should ensure that the markets function well.⁵⁴⁵ The researcher submits that the role of the FCA as the prudential regulator of some financial institutions is complementary to the objectives of the PRA as the prudential regulator. This entails that cooperation and collaboration between the PRA and the FCA are essential for the fulfilment of their statutory mandates. To ensure effective and robust cooperation and collaboration between the FCA and the PRA, adequate information sharing arrangements are also essential and this has been achieved through several MOUs regarding cooperation and collaboration that have been concluded between the FCA and the PRA.

The researcher argues that the duty of the FCA to promote competition may cause “turf wars” between the FCA and the PRA and affect cooperation and collaboration arrangements between the FCA, the BOE and the PRA. For example, in some instances, the PRA is required to invoke its veto power to ensure that the FCA does not act in a manner that threatens financial stability or affects its functions.⁵⁴⁶ Although this might seem like a measure to control and regulate the conduct of the FCA to an extent that protects financial stability and market integrity, the researcher argues that this position affects the relationship between the PRA and the FCA as the PRA is granted more regulatory powers. Consequently, cooperation and collaboration and information sharing arrangements between the PRA and the FCA are affected to the effect of threatening financial stability and market integrity in the UK.

To ensure robust and effective cooperation and collaboration between the BOE and other financial role players in the UK, several measures have been established in the UK.

⁵⁴⁴ Georgosouli 2013 *Capital Market Law Journal* 64; Kallasidou 2013 *Bristol Law Review* 129; Murphy and Senior 2013 *Quarterly Bulletin* 22; James and Quaglia *The UK and Multi-level Financial Regulation: From Post-crisis Reform to Brexit* 25.

⁵⁴⁵ Section 6 of the *FSA*; HM Treasury “A New Approach to Financial Regulation: Judgement, Focus and Stability” para 34; Michael 2013 *North Carolina Banking Institute* 232; Kallasidou 2013 *Bristol Law Review* 129.

⁵⁴⁶ Ferran 2011 *University of Cambridge Faculty of Law Research Paper* 14; Kallasidou 2013 *Bristol Law Review* 130; section 3D-E of the *FSMA*; Georgosouli 2013 *Capital Market Law Journal* 65.

6.3 Cooperation and Collaboration Measures between the BOE and other Financial Role Players in the UK

The implementation of express regulations on cooperation and collaboration measures between the BOE and other financial role players in the UK might have been influenced by the failures of the past.⁵⁴⁷ The shift from a single regulator to two regulators gave rise to the need for effective and comprehensive cooperation and collaboration mechanisms between the BOE and other financial role players such as the FPC, the PRA and the FCA in the UK.⁵⁴⁸ In this regard, express statutory regulatory measures for cooperation and collaboration between the BOE and other financial role players were incorporated in the *FSA*.⁵⁴⁹ Unlike Australia, the UK has a statutorily regulated framework for cooperation and collaboration between the central bank and other financial role players as a measure of ensuring compliance with the duty to “coordinate”, as provided by the *FSA*.⁵⁵⁰ The advantage of having express statutory provisions for cooperation and collaboration between the central bank and other financial role players is enforceability and legal certainty and the same cannot be said about a soft law approach in this regard.⁵⁵¹ Accordingly, several mechanisms have been implemented to foster cooperation and collaboration between the BOE and other financial role players such as the HM Treasury, the PRA and the FCA.⁵⁵² For example, the FCA and the PRA have a statutory duty to

⁵⁴⁷ Buiter WH “Lessons from the 2007 Financial Crisis” 2008 *Centre for Economic Policy Research* 1, 3; Schoenmaker D and Veron N “A ‘Twin Peaks’ Vision for Europe” in Godwin A and Schmulow A (eds) *The Cambridge Handbook of Twin Peaks Financial Regulation* (Cambridge University Press 2018) 62, 65; see related comments by Schoenmaker D and Veron N “A ‘Twin Peaks’ Vision for Europe” 63; Ferran 2011 *University of Cambridge Faculty of Law Research Paper* 14.

⁵⁴⁸ See related comments by Godwin, Kourabas and Ramsay 2016 *International Lawyer* 282; Van Niekerk G and Van Heerden C “The Importance of a Legislative Framework for Co-operation and Collaboration in the Twin Peaks Model of Financial Regulation” 2020 *SALJ* 108, 111; Godwin A, Li G and Ramsay I “Is Australia’s Twin Peaks System of Financial Regulation a Model for China (Part 1)” 2016 *Hong Kong Law Journal* 621, 625.

⁵⁴⁹ Section 6 of the *FSA*; section 3D-E of the *FSMA*; Georgosouli 2013 *Capital Market Law Journal* 63; Kallasilidou 2013 *Bristol Law Review* 131; Walker GA “UK Regulatory Revision – A New Blueprint for Reform” 2012 *International Lawyer* 787, 792.

⁵⁵⁰ Van Niekerk and Van Heerden 2020 *SALJ* 115; Qumba 2022 *SALJ* 83; Godwin A “Australia’s Trek towards Twin Peaks - Comparisons with South Africa” 2017 *Routledge* 183, 185; Godwin A, Howse T and Ramsay I “A Jurisdictional Comparison of the Twin Peaks Model of Financial Regulation” 2017 *Journal of Banking Regulation* 103, 110.

⁵⁵¹ See related comments by Godwin, Kourabas and Ramsay 2016 *International Lawyer* 282; Van Niekerk and Van Heerden 2020 *SALJ* 118; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 628.

⁵⁵² Sections 1ZA and 3D-E of the *FSA*; Georgosouli 2013 *Capital Market Law Journal* 65; HM Treasury “A New Approach to Financial Regulation: Judgement, Focus and Stability” para 32.

prepare MOUs that establish cooperation and collaboration arrangements between the BOE and other financial role players, share relevant information and ensure the cross-membership of boards of directors.⁵⁵³ Unlike Australia and South Africa, there is no coordinating body to facilitate or oversee cooperation and collaboration between the central bank and other financial role players in the UK.⁵⁵⁴ This means that the BOE, the PRA, the FCA and the FPC also carry the duty to ensure the existence of effective cooperation and collaboration arrangements between the central bank and other financial role players. The researcher argues that this is likely to result in ineffective coordination as it is highly unlikely that the BOE or any other financial role players can diligently perform this function. Therefore, the lack of a coordinating body in the UK may impinge effective cooperation and collaboration between the BOE and other financial role players due to, *inter alia*, unmonitored coordination.

Despite establishing the duty to cooperate and collaborate, the *FSA* does not detail the scope and ambit of cooperation and collaboration between the BOE and other role players.⁵⁵⁵ According to Georgosouli, the lack of detailed cooperation and collaboration measures under the *FSA* may result in cumbersome cooperation and collaboration between the BOE and other financial role players.⁵⁵⁶ However, the researcher submits that it is probably impossible to capture all the immutable aspects of cooperation and collaboration between the BOE and other financial role players such as the PRA and the FCA in one *Act*.⁵⁵⁷ This follows the fact that the BOE and other financial role players are

⁵⁵³ Section 3E of the *FSA*; Georgosouli 2013 *Capital Market Law Journal* 64; Treasury Committee *Financial Conduct Authority 2010-2012* para 90; Kallasidou 2013 *Bristol Law Review* 130.

⁵⁵⁴ Kallasidou 2013 *Bristol Law Review* 125; Georgosouli 2013 *Capital Market Law Journal* 81; Godwin A and Schmulow A “The Financial Sector Regulation Bill in South Africa, Second Draft: Lessons from Australia” 2015 *SALJ* 756, 762; Qumba 2022 *SALJ* 108.

⁵⁵⁵ Section 3E of the *FSA*; Yuan K, Paech P, Lou D and Zhou H “A Financial Regulatory Regime Reform Template to Ensure Financial Stability for the Chinese Economy” 2022 *China and World Economy* 1, 14; Alsharqawi A and Younes AS “Regulating the UK Financial System Post Crisis under the Financial Services and Markets Act 2000 as Amended” 2020 *Journal of Legal, Ethical and Regulatory Issues* 1, 3.

⁵⁵⁶ Georgosouli 2013 *Capital Market Law Journal* 65; Kallasidou 2013 *Bristol Law Review* 130; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 628; see related comments by Niekerk and Van Heerden 2020 *SALJ* 125; Qumba 2022 *SALJ* 83.

⁵⁵⁷ Georgosouli 2013 *Capital Market Law Journal* 65; Kallasidou 2013 *Bristol Law Review* 130; Kourabas S “Trends and Theory in Financial Regulation and Regulatory Design after the Global Financial Crisis” in Arner D, Wan W, Godwin A, Shen W and Gibson E (eds) *Research Handbook on Asian Financial Law* (Elgar Online 2020) 30, 35; see related comments Wilson S and Wilson G

also required to provide detailed arrangements of how they will cooperate and collaborate in the MOUs they are required to conclude.⁵⁵⁸ As such, providing all the details in one piece of legislation is relatively impossible. The discussion below outlines the mechanisms implemented to foster cooperation and collaboration between the BOE and other financial role players in the UK. These include the statutory duty to cooperate, the requirement to enter into MOUs with each other, cross-membership of boards and the obligation to share relevant information between the BOE and other role players.

6.3.1 *The statutory duty to cooperate and collaborate under the FSA*

According to the *FSA*, the BOE has a duty to “coordinate” with the HM Treasury, the PRA and the FCA to promote, protect, enhance and maintain market integrity and financial stability in the UK.⁵⁵⁹ The BOE’s objectives to promote financial stability and market integrity cannot be fulfilled in isolation as these objectives are complementary to the mandates of the FCA, the PRA, the FPC and the HM Treasury. As such, the *FSA* requires the BOE to fulfil its mandate in cooperation and collaboration with the HM Treasury, the PRA, the FCA and other relevant financial role players.⁵⁶⁰ To establish the cooperation and collaboration arrangements between the BOE and other financial role players, the *FSA* provides a duty to conclude MOUs to this effect.⁵⁶¹ It should be noted that the BOE is not restricted to cooperate and collaborate with other financial role players on matters relating to financial stability or market integrity only. The *FSA* provides that the BOE may cooperate and collaborate with other financial role players on any other matters relating

Banking and Regulation Post-crisis: The Significance of “Culture” in the UK and Experiences from Australia (Sweet and Maxwell 2016) 48.

⁵⁵⁸ Section 3E(4)-(6) of the *FSMA*; Kourabas “Trends and Theory in Financial Regulation and Regulatory Design after the Global Financial Crisis” 41; Spicer A *et al* “Cultural Change in the FCA, PRA & Bank of England: Practising What they Preach?” 2016 *City, University of London Institutional Repository* 1, 124.

⁵⁵⁹ Sections 64(1)(a) and 65(6) of the *FSA*; Georgosouli 2013 *Capital Market Law Journal* 65; Kallasidou 2013 *Bristol Law Review* 129; Lui 2012 *Journal of Banking Regulation* 26.

⁵⁶⁰ Wilson and Wilson *Banking and Regulation Post-crisis: The Significance of “Culture” in the UK and Experiences from Australia* 26; Murphy and Senior 2013 *Quarterly Bulletin* 23; Lui 2012 *Journal of Banking Regulation* 26.

⁵⁶¹ See section 65 of the *FSA*; The details of this MOU are discussed in paragraph 6.3.2 below; Ellinger EP, Lomnicka E and Hare C *Ellinger’s Modern Banking Law* 5th ed (Cambridge University Press 2012) 26; see related comments by Melecky M and Podpiera AC “Institutional Structures of Financial Sector Supervision, their Drivers and Historical Benchmarks” 2013 *Journal of Financial Stability* 420, 428.

to their mandates, for example, crisis management.⁵⁶² Unlike Australia which relies on a soft law approach, the UK imposes a statutory duty on the central bank to cooperate and collaborate with other financial role players to promote and protect financial stability and market integrity.⁵⁶³ To fulfil this duty, the BOE has concluded an MOU with the HM Treasury and the PRA to establish cooperation and collaboration arrangements on resolution planning and management of a financial crisis.⁵⁶⁴

It is important, however, to note that the MOU regarding cooperation and collaboration between the BOE, the PRA and the HM Treasury is not legally binding on the parties and does not create any legal obligations. What is more apparent is that the effectiveness of this MOU is determined by the reviews conducted by the senior executives of the parties to the MOU.⁵⁶⁵ The researcher argues that this arrangement is highly likely to result in flawed cooperation and collaboration between the BOE, the PRA and the HM Treasury. There are greater chances that the concluding parties may not be able to identify any miscellaneous provisions considering that they drafted the MOUs. Instead, the researcher suggests that the appointment of a third party to conduct a review of the MOU could be more effective in this instance. The BOE also established cooperation and collaboration arrangements to promote market integrity with the FCA and the PRA in another MOU.⁵⁶⁶

⁵⁶² Section 3D of the *FSMA*; Borio *et al* “Central Bank Involvement in Safeguarding Financial Stability: Facts and Some Outstanding Issues” at Bank for International Settlements *Background Document for an ad hoc Meeting of Central Banks* (February 9-10 1999); see related comments by Hong-Bum K “Cooperation and Coordination between the Financial Authorities: A Review of the Experiences of the United Kingdom, Norway, Sweden, and Korea” 2009 *Seoul Journal of Economics* 409, 410.

⁵⁶³ Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 119; Melecky and Podpiera 2013 *Journal of Financial Stability* 428; see related comments by Kourabas S “Trends and Theory in Financial Regulation and Regulatory Design after the Global Financial Crisis” 42.

⁵⁶⁴ BOE, PRA and HM Treasury “Memorandum of Understanding on Resolution Planning and Financial Crisis Management” October 2017; Wilson and Wilson *Banking and Regulation Post-crisis: The Significance of “Culture” in the UK and Experiences from Australia* 62; Murphy and Senior 2013 *Quarterly Bulletin* 25.

⁵⁶⁵ BOE, PRA and HM Treasury “Memorandum of Understanding on Resolution Planning and Financial Crisis Management” para 41; Hong-bum 2009 *Seoul Journal of Economics* 425; Borio *et al* “Central Bank Involvement in Safeguarding Financial Stability: Facts and Some Outstanding Issues” 12; see related comments by Kourabas S “Trends and Theory in Financial Regulation and Regulatory Design after the Global Financial Crisis” 42.

⁵⁶⁶ BOE, PRA and the FCA “Memorandum of Understanding between the Financial Conduct Authority and the Bank of England, including the Prudential Regulation Authority” March 2015 www.gov.uk/government/publications accessed 18 June 2022; see related comments by Melecky and Podpiera 2013 *Journal of Financial Stability* 431; see related comments by Kourabas S “Trends and Theory in Financial Regulation and Regulatory Design after the Global Financial Crisis” 28.

Godwin and Schmulow argue that the demerits of a hard-law approach to inter-agency cooperation and collaboration is that the financial role players become more concerned with complying with the duty to cooperate, than with achieving the intended outcomes of such coordination.⁵⁶⁷ Although there is evidence that the BOE complies with the duty to cooperate and collaborate with other financial role players as regulated by the *FSA*, it remains to be answered whether it is robust enough to promote, protect, enhance and maintain financial stability and market integrity in the UK. Senior representatives of the BOE, the PRA, the FCA and the PSR have acknowledged that the cooperation and collaboration arrangements between the BOE, the PRA, the FCA and the HM Treasury are “working well”.⁵⁶⁸

The *FSA* also provides an express duty to “co-ordinate” on the PRA and the FCA.⁵⁶⁹ The *FSA* provides that the PRA and the FCA must consult with other role players regarding any proposed actions that may have adverse effects on any other role player or their functions.⁵⁷⁰ This means that the PRA and the FCA are also under a duty to cooperate and collaborate with the BOE whenever their functions may affect the objectives of the BOE.⁵⁷¹ The researcher submits that, this provision makes cooperation and collaboration between the FCA and the PRA optional and conditional on functions that may have adverse effects on any other role player or their functions only.⁵⁷² In Australia and in South Africa, the central banks are required to cooperate and collaborate with other financial role players in all matters relating to the stability and integrity of the financial markets.⁵⁷³

⁵⁶⁷ Godwin and Schmulow 2015 *SALJ* 756; see related comments by Qumba 2022 *SALJ* 105; also see Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 120; Lui 2012 *Journal of Banking Regulation* 26.

⁵⁶⁸ Author Anon “Bank of England, FCA, PRA and PSR Conduct 2021 Review of Memorandum of Understanding for Payment Systems in the UK” 15 August 2022 <https://www.fca.org.uk/news/statements> accessed 25 August 2022.

⁵⁶⁹ See sections 3D and 64 of the *FSA*; Qumba 2022 *SALJ* 85; see related comments by Melecky M and Podpiera 2013 *Journal of Financial Stability* 430; Kallasidou 2013 *Bristol Law Review* 117.

⁵⁷⁰ Section 3D(1)(a) of the *FSA*; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 120; Kallasidou 2013 *Bristol Law Review* 117; Georgosouli 2013 *Capital Market Law Journal* 68.

⁵⁷¹ Kallasidou 2013 *Bristol Law Review* 117; Georgosouli 2013 *Capital Market Law Journal* 68; see related comments by HM Treasury “A New Approach to Financial Regulation: Securing Stability, Protecting Consumers” 55; Qumba 2022 *SALJ* 85.

⁵⁷² Section 3D(1)(a) of the *FSA*; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 120; Kallasidou 2013 *Bristol Law Review* 117; Georgosouli 2013 *Capital Market Law Journal* 68.

⁵⁷³ See *Financial Sector Regulation Act* 9 of 2017, section 26; Godwin and Schmulow 2015 *SALJ* 756; Van Niekerk and Van Heerden 2020 *SALJ* 113; also see *Australian Prudential Regulation Authority Amendment Act* (Cth) 2003, section 10A.

This ensure consistent coordination and promotes a culture of cooperation and collaboration, which might be lacking in the UK. The duty to cooperate also extends to sharing information and advice when the other party is expected to have more information and expertise regarding matters of common interest.⁵⁷⁴ The *FSA* also provides that, despite the duty to cooperate and collaborate with each other, the financial role players should comply with their duties whilst addressing matters of common interest together.⁵⁷⁵ The researcher submits that, this provision cautions the PRA, the FCA and the BOE to avoid blurred boundaries as they cooperate and collaborate with each other to fulfil their duties.⁵⁷⁶

Several regulatory gaps and flaws can be sighted in the statutory regulatory framework for cooperation and collaboration between the BOE and other financial role players in the UK. For instance, the *FSA* provides that the PRA and the FCA may refuse to cooperate with each other and such refusal will not affect the functions of either the PRA or the FCA.⁵⁷⁷ The PRA or FCA may refuse to coordinate with the BOE or other financial role players if such coordination prevents it from fulfilling its ordinary functions or when the burden of cooperation and collaboration defeats its purpose.⁵⁷⁸ The *FSA* fails to provide instances when cooperation and collaboration may be disproportionate and detrimental to the functions of a financial role player and leaves it to the discretion of the PRA and the FCA to decide. Also, unlike in South Africa, there are no committees established to facilitate cooperation and collaboration between the BOE and other financial role players in the UK.⁵⁷⁹ The researcher submits that the flaws undermine the effectiveness and

⁵⁷⁴ Section 3D(1)(b) of the *FSA*; HM Treasury “A New Approach to Financial Regulation: Securing Stability, Protecting Consumers” 25

⁵⁷⁵ Section 3D(1)(c), 1B(5)(a) and 2H(1)(a) of the *FSA*; see related comments by Schmulow 2015 *Journal of Banking and Finance and Practice* 156; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 120.

⁵⁷⁶ See related comments by Kourabas S “Trends and Theory in Financial Regulation and Regulatory Design after the Global Financial Crisis” 45; Van Niekerk and Van Heerden 2020 *SALJ* 128; Godwin A and Schmulow A “The Financial Sector Regulation Bill in South Africa, Second Draft: Lessons from Australia” 2015 *SALJ* 756, 765; Qumba 2022 *SALJ* 75.

⁵⁷⁷ Section 3D(2) of the *FSA*; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 120; Georgosouli 2013 *Capital Market Law Journal* 68; Kallasidou 2013 *Bristol Law Review* 117.

⁵⁷⁸ Section 3D(2) of the *FSA*; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 120; Georgosouli 2013 *Capital Market Law Journal* 68; Kallasidou 2013 *Bristol Law Review* 117.

⁵⁷⁹ Van Niekerk and Van Heerden 2020 *SALJ* 115; Kallasidou 2013 *Bristol Law Review* 132; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 125; see related comments by Kourabas

enforceability of cooperation and collaboration between the BOE and other financial role players in the UK.

6.3.2 *The BOE's duty to conclude cooperation and collaboration MOUs with other financial role players*

The *FSA* provides that, the BOE and other financial role players such as the FCA, the PRA, the HM Treasury and the FPC should conclude MOUs that establish cooperation and collaboration and information sharing arrangements to promote, protect, enhance and maintain financial stability and market integrity.⁵⁸⁰ In this regard, the BOE has concluded several MOUs with the FCA, the PRA, the HM Treasury, the FPC and the PSR.⁵⁸¹ Although the *FSA* requires the BOE to conclude MOUs with other financial role players, the *FSA* gives the BOE and the other financial role players the discretion to decide on the contents of these MOUs.⁵⁸² Considering that there is no coordinating body to facilitate or oversee inter-agency cooperation and collaboration in the UK, the researcher submits that there is a need to revisit this provision. The powers and authority of the financial role players should be monitored in this regard, to ensure effective and robust coordination between the BOE and other financial role players.

In April 2013, the BOE, the FCA and the PRA concluded a MOU (Memorandum of Understanding: Between the Financial Conduct Authority and the Bank of England, including the Prudential Regulation Authority) which establishes how the BOE will coordinate with the FCA and the PRA in fulfilling their mandates in relation to the

"Trends and Theory in Financial Regulation and Regulatory Design after the Global Financial Crisis" 47.

⁵⁸⁰ Sections 3E and 64 of the *FSA*; HM Treasury "A New Approach to Financial Regulation: Securing Stability, Protecting Consumers" 72; Financial Conduct Authority "Bank of England, FCA, PRA and PSR Conduct 2021 Review of Memorandum of Understanding for Payment Systems in the UK" <https://www.fca.org.uk/news/statement> accessed 15 August 2022.

⁵⁸¹ For example, see BOE, PRA and the FCA "Memorandum of Understanding between the Financial Conduct Authority and the Bank of England, including the Prudential Regulation Authority" March 2015 www.gov.uk/government/publications accessed 18 June 2022; also see <http://www.official-documents.gov.uk/> accessed 23 October 2021; Kallasidou 2013 *Bristol Law Review* 130; Georgosouli 2013 *Capital Market Law Journal* 65.

⁵⁸² Sections 3E and 64 of the *FSA*; Qumba 2022 *SALJ* 115; see related comments by Van Niekerk and Van Heerden 2020 *SALJ* 113; also see Godwin and Schmulow 2015 *SALJ* 763; Georgosouli 2013 *Capital Market Law Journal* 70.

supervision of the UK financial markets and market infrastructure.⁵⁸³ This MOU stipulates the “high-level framework” for cooperation and collaboration between the BOE, the FCA and the PRA to promote and protect market integrity in the UK.⁵⁸⁴ The MOU establishes the roles and duties of the BOE, the FCA and the PRA in promoting market integrity. According to this MOU, the FCA is responsible for the regulation of financial markets and the conduct of financial market users to maintain market integrity, whilst the BOE is responsible for the payments settlement system in support of its financial stability objective.⁵⁸⁵ On the other hand, the PRA is responsible for the prudential supervision of all the financial institutions that participate in the UK financial markets.⁵⁸⁶ Consequently, the functions of either the BOE, the PRA or the FCA have implications and effects on the objectives of the other. This MOU clearly outlines the roles and objectives of each party to ensure that each financial role player fulfils its set objectives without causing overlaps and blurred boundaries.⁵⁸⁷

The MOU also stipulates that timely and focused information sharing arrangements will also be essential for effective cooperation and collaboration between the BOE, the FCA and the PRA in this regard.⁵⁸⁸ According to the MOU between the BOE, the FCA and the

⁵⁸³ Dinov S “The Bank of England: A Comparison of the Function of the Bank of England, the Federal Reserve and the European Central Bank” in Dinov S (ed) *Central Banks as a Bank Supervisor: A Comparison of the Functions of the BOE and the Federal Reserve and the European Central Bank* (Cambridge University Press 2018) 27, 35; Government Publications “Memorandum of Understanding: Between the Financial Conduct Authority and the Bank of England, including the Prudential Regulation Authority” March 2015 <http://www.official-documents.gov.uk/> accessed 23 October 2021.

⁵⁸⁴ Article 2(1) of the Memorandum of Understanding: Between the Financial Conduct Authority and the Bank of England, including the Prudential Regulation Authority; Kallasidou 2013 *Bristol Law Review* 139; Georgosouli 2013 *Capital Market Law Journal* 72.

⁵⁸⁵ Government Publications “Memorandum of Understanding: Between the Financial Conduct Authority and the Bank of England, including the Prudential Regulation Authority” para 2 and 3; HM Treasury “A New Approach to Financial Regulation: Securing Stability, Protecting Consumers” 96; *Banking Act* 2009 as amended, section 246; section 57A of the *FSA*.

⁵⁸⁶ Government Publications “Memorandum of Understanding: Between the Financial Conduct Authority and the Bank of England, including the Prudential Regulation Authority” para 4; HM Treasury “A New Approach to Financial Regulation: Judgement, Focus and Stability” para 3; see related comments by Treasury Committee *Financial Regulation: A Preliminary Consideration of the Government’s Proposals 2010/11* para 11.

⁵⁸⁷ See <http://www.official-documents.gov.uk/> accessed 23 October 2021; Kallasidou 2013 *Bristol Law Review* 130; Georgosouli 2013 *Capital Market Law Journal* 65.

⁵⁸⁸ Government Publications “Memorandum of Understanding: Between the Financial Conduct Authority and the Bank of England, including the Prudential Regulation Authority” para 8; see also section 57A(2)-(3) of the *FSA*; section 247 of the *Banking Act*; see related comments by Dinov “The

PRA, the BOE, the FCA and the PRA will share relevant information relating to financial markets conduct and financial markets infrastructure upon each other's request or own initiative considering that it is legally permissible to share such information.⁵⁸⁹ In this regard, the researcher submits that the objectives of the BOE, the FCA and the PRA in relation to the promotion and protection of financial stability and market integrity in the UK are complimentary such that effective cooperation and collaboration and information sharing arrangements between the BOE, the FCA and the PRA are essential for the fulfilment of their mandates.⁵⁹⁰

The duty of the BOE to cooperate and collaborate with other financial role players extends to international or cross-border cooperation and collaboration with other central banks and international organisations.⁵⁹¹ The *FSA* provides that, the BOE, together with the HM Treasury, the PRA and the FCA (UK authorities) must "prepare and maintain" a MOU that establishes how they intend to cooperate and collaborate with European Supervisory Authorities, European Union institutions and other international organisations to promote financial stability and market integrity.⁵⁹² The MOU concerning cooperation and collaboration between the UK authorities, European Supervisory Authorities such as the European Banking Authority, the European Insurance and Occupational Pensions Authority, the European Securities and Markets Authority and other international organisations should also establish a committee to facilitate cooperation and collaboration

Bank of England: A Comparison of the Function of the Bank of England, the Federal Reserve and the European Central Bank" 30.

⁵⁸⁹ Article 4(2) of the Memorandum of Understanding: Between the Financial Conduct Authority and the Bank of England, including the Prudential Regulation Authority; see related comments by Dinov "The Bank of England: A Comparison of the Function of the Bank of England, the Federal Reserve and the European Central Bank" 30; Kallasidou 2013 *Bristol Law Review* 127.

⁵⁹⁰ See related discussion by Llewellyn D "Institutional Structure of Financial Regulation and Supervision: The Basic Issues" 31; James and Quaglia *The UK and Multi-level Financial Regulation: From Post-crisis Reform to Brexit* 45; Van Niekerk and Van Heerden 2020 *SALJ* 121; Schmulow 2015 *SALJ* 760.

⁵⁹¹ Section 66 of the *FSA*; see related discussion by Brown G and Susskind D "International Cooperation during the COVID-19 Pandemic" 2020 *Oxford Review of Financial Policy Journal* 64, 65; Guo Y, Li P and Li A "Tail Risk Contagion between International Financial Markets during COVID-19 Pandemic" 2021 *International Review of Financial Analysis* 25, 28; James and Quaglia *The UK and Multi-level Financial Regulation: From Post-crisis Reform to Brexit* 87.

⁵⁹² Section 66(1) of the *FSA*; see discussion by Brown and Susskind 2020 *Oxford Review of Financial Policy Journal* 65; Guo, Li and Li 2021 *International Review of Financial Analysis* 28; Kallasidou 2013 *Bristol Law Review* 135.

amongst all the parties involved.⁵⁹³ The BOE and the FCA concluded a MOU with the European Central Bank (ECB) in 2021. The purpose of the MOU between the BOE, FCA and the ECB is to establish information sharing arrangements between the BOE, the PRA, the FCA and the ECB to promote market integrity, financial stability and the efficiency of financial systems.⁵⁹⁴ The BOE also concluded a MOU in relation to cooperation and collaboration and sharing information relating to matters of common interests with the FCA and the Czech National Bank (CNB).⁵⁹⁵ The MOU between the BOE, FCA and the CNB also provides arrangements on how the UK and the Czech Republic will collaborate to combat financial crimes such as money laundering and terrorist financing in the promotion of market integrity.⁵⁹⁶ It should be noted that the MOUs regarding cooperation and collaboration between the BOE, other central banks and other international organisations to promote financial stability and market integrity are concluded in line with the Basel Committee on Banking Supervision (BCBS) Principles.⁵⁹⁷ This shows that considerable efforts have been made in the UK to comply with international best practices that require cross-border and international cooperation of

⁵⁹³ Section 66(2) of the *FSA*; Government Publications “Memorandum of Understanding for Supervisory Cooperation between the European Central Bank and the Bank of England and the Financial Conduct Authority” (hereinafter MOU between ECB and the BOE and the FCA) 19 February 2021 https://www.bankingsupervision.europa.eu/legalframework/mous/html/ssm.mou_2019 accessed 25 November 2021.

⁵⁹⁴ Article 1(2) of the MOU between the ECB and the BOE and the FCA; see related comments by Dinov “The Bank of England: A Comparison of the Function of the Bank of England, the Federal Reserve and the European Central Bank” 31; Fang Y *et al* “Institutional Structure and Effectiveness of Central Banks during the Financial Crisis: An Empirical Analysis” in Eijffinger S and Masciandaro D (eds) *Handbook of Central Banking, Financial Regulation and Supervision* (Edward Elgar, Northampton 2011) 185; Geva B “Systemic Risk and Financial Stability: The Evolving Role of the Central Bank” 2013 *Journal of International Banking Law and Regulation* 407, 415.

⁵⁹⁵ Section 66(2) of the *FSA*; Government Publications “Memorandum of Understanding between the Czech National Bank and UK Banking Supervisory Authorities” Date Unknown <https://www.fca.org.uk/publication/mou/mou-czech-national-bank-boe-fca.pdf> accessed 24 October 2021.

⁵⁹⁶ Article 1(3) of the MOU between the CNB and the UK Banking Supervisory Authorities; see related comments by Goodhart C *The Basel Committee on Banking Supervision: A History of the Early Years, 1974–1997* (Cambridge: CUP 2011) 15; also see Gadinis S “The Financial Stability Board: The New Politics of International Financial Regulation” 2013 *Texas Journal of International Law* 151, 157.

⁵⁹⁷ Basel Committee on Banking Supervision “Basel Committee on Banking Supervision Principles for Effective Supervisory Colleges” <https://www.bis.org/publ/bcbs287.pdf> accessed 15 July 2021; see related discussion by Geva 2013 *Journal of International Banking Law and Regulation* 410; Dinov “The Bank of England: A Comparison of the Function of the Bank of England, the Federal Reserve and the European Central Bank” 35.

central banks to promote and protect global financial stability and market integrity.⁵⁹⁸ The BCBS Principles on cooperation and collaboration between central banks and other financial role players are discussed in detail in the next chapter of this thesis.

In light of the preceding discussion, the researcher submits that several measures have been put in place to ensure that the BOE fulfils its objectives in cooperation and collaboration with other financial role players such as the PRA, the FCA, the HM Treasury and international organisations. Such cooperation and collaboration are essential to ensure that there is no duplication of tasks, regulatory gaps and blurred boundaries that may undermine financial stability and market integrity in the UK.⁵⁹⁹ The globalisation of financial markets has made it essential for central banks to make arrangements for international cooperation and collaboration to promote and protect financial stability and market integrity and prevent financial crises that are highly contagious.⁶⁰⁰ More so, the recent corona-virus disease (COVID-19) global pandemic was a test of the resilience of the global financial markets and required central banks and other international organisations to coordinate their objective in the protection of global financial stability and market integrity.⁶⁰¹

⁵⁹⁸ Mwenda KK *Legal Aspects of Financial Services Regulation and the Concept of a Unified Regulator* (World Bank Publications 2006) 87; Mwenda KK “The Regulatory and Institutional Framework for Unified Financial Services Supervision in the United Kingdom and Zambia” 2005 *Michigan State Journal of International Law* 347; see related comments by Correia de Brito, A, Kauffmann C and Pelkmans J “The Contribution of Mutual Recognition to International Regulatory Co-operation” 2016 *OECD Regulatory Policy Working Papers* 2, 18; Satragno L *Monetary Stability as a Common Concern in International Law: Policy Cooperation and Coordination of Central Banks* (Brill Singapore 2022) 52.

⁵⁹⁹ See discussion by Van Niekerk and Van Heerden 2020 *SALJ* 115; Qumba 2022 *SALJ* 83; Schmulow 2015 *SALJ* 760; Llewellyn D “Institutional Structure of Financial Regulation and Supervision: The Basic Issues” 31.

⁶⁰⁰ See discussion by Van Niekerk and Van Heerden 2020 *SALJ* 115; Qumba 2022 *SALJ* 83; Schmulow 2015 *SALJ* 760; Llewellyn D “Institutional Structure of Financial Regulation and Supervision: The Basic Issues” 31.

⁶⁰¹ Brown and Susskind 2020 *Oxford Review of Financial Policy Journal* 65; Susskind D and Vines D “The Economics of the COVID-19 Pandemic: An Assessment” 2020 *Oxford Review of Economic Policy Journal* 1, 10; Akhtaruzzaman MD, Boubaker S and Sensoy A “Financial Contagion during COVID-19 Crisis” 2021 *Finance Research Letters* 1, 3; Guo, Li and Li 2021 *International Review of Financial Analysis* 28.

6.4 Cooperation and Collaboration between the BOE and the UK Government to Promote and Protect Financial Stability and Market Integrity

The government possesses a legitimate interest in the performance of the financial system and its financial role players. This follows the fact that the government is the major law and policy maker, and its influence on financial regulation cannot be ignored.⁶⁰² In the UK, the government has a direct influence on the financial regulators through the HM Treasury which is required to cooperate and collaborate with the BOE in matters relating to financial stability and market integrity.⁶⁰³ The *FSA* imposes a duty on the HM Treasury to cooperate with the BOE and share information relating to matters of common interest.⁶⁰⁴ The *FSA* further provides that the BOE and the HM Treasury should conclude a MOU to establish cooperation and collaboration and information sharing arrangements on resolution planning and financial crisis management.⁶⁰⁵ In this regard, the BOE and the HM Treasury concluded a MOU on resolution planning and financial crisis management in October 2017.⁶⁰⁶ Unlike in South Africa, the UK has established cooperation and collaboration arrangements between the central bank, the government and other financial role players to mitigate and manage a financial crisis.⁶⁰⁷ Such measures are important to ensure that the central bank does not deviate from its financial stability objective. They also ensure that other financial role players do not deviate from

⁶⁰² Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 120; Walker G “U.K. Regulatory Revision – A New Blueprint for Reform” 2012 *The International Lawyer* 828, 830; see related discussion Nesadurai HES “Finance Ministers and Central Banks in East Asian Financial Cooperation” in Diaz M and Woods P (eds) *Networks of Influence?* (Oxford: Oxford University Press 2009) 63, 81.

⁶⁰³ Section 64 of the *FSA*; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 119; Lui 2012 *Journal of Banking Regulation* 28; see related comments by Kwenda 2005 *Michigan State Journal of International Law* 347.

⁶⁰⁴ Section 64(1)(a)-(b) of the *FSA*; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 119; Lui 2012 *Journal of Banking Regulation* 28; Kallasidou 2013 *Bristol Law Review* 130; Georgosouli 2013 *Capital Market Law Journal* 65.

⁶⁰⁵ Section 65(7) of the *FSA*; see related comments by Walker 2012 *The International Lawyer* 830.

⁶⁰⁶ Government Publications “Memorandum of Understanding on Resolution Planning and Financial Crisis Management” 17 October 2017; Qumba 2022 *SALJ* 111;

⁶⁰⁷ See related comments by Moloney, Ferran, Payne *et al* *The Oxford Handbook of Financial Regulation* 110; Godwin, Kourabas and Ramsay 2016 *International Lawyer* 276; Godwin A and Schmulow A (eds) *The Cambridge Handbook of Twin Peaks Financial Regulation* (Cambridge University Press 2018) 115; Godwin A “Australia’s Trek towards Twin Peaks - Comparisons with South Africa” 2017 *Routledge* 183, 192; see related discussion by North G and Wilson T “Has the Australian Prudential Regulation Authority Done Enough to Meet its Legislated Objectives and Prepare Australia for the Next Financial Crisis?” 2020 *University of New South Wales Law Journal* 552, 563.

their respective objectives amidst a crisis to avoid regulatory gaps that may threaten the integrity of the financial markets.⁶⁰⁸ The BOE is required to notify the HM Treasury of any material risks to stability and public funds, as well as monitoring and mitigating risks affecting market integrity through the functions of the PRA.⁶⁰⁹ The researcher argues that the role of the HM Treasury in this regard is problematic and likely to jeopardise the protection and maintenance of financial stability in the UK. The HM Treasury consists of politically exposed persons (PEPs) who pose a high risk to financial stability and market integrity due to their political influence.⁶¹⁰ As such, the requirement that the BOE consults with the HM Treasury on matters relating to financial stability could risk the protection of financial stability in the UK. The researcher submits that the influence of PEPs on the financial sector should be limited and highly monitored to prevent systemic risks that could threaten financial stability and market integrity.

The HM Treasury has the authority to order the BOE, acting on behalf of the PRA, to conduct an investigation on any relevant matter.⁶¹¹ The HM Treasury may make this decision if it considers the investigation to be in the public interest and if it appears that the BOE and the PRA had not undertaken the investigation already.⁶¹² The BOE, acting on behalf of the PRA, is required to report to the HM Treasury regarding any regulatory

⁶⁰⁸ See related discussion by Huang RH and Shoenmaker D “Institutional structure of Financial Regulation: Theories and International Experiences” 2015 *Routledge* 254, 260; Doumpos M, Gaganis C and Pasiouras F “Central Bank Independence, Financial Supervision Structure and Bank Soundness: An Empirical Analysis around the Crisis” 2015 *Journal of Banking and Finance* 69, 72.

⁶⁰⁹ Section 58(1) of the *FSA*; see related comments by Ferran 2011 *Oxford Journal of Legal Studies* 463; Kwenda 2005 *Michigan State Journal of International Law* 347; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 120.

⁶¹⁰ *Financial Intelligent Centre Act* 38 of 2001 as amended (*FICA*), section 21F-21G; Scott KA and Stephenson R “Enhanced Customer Due Diligence for Banks in the UK and the US” 2008 *Journal of International Banking and Financial Law* 86, 89; Tuba M and Van der Westhuizen C “An Analysis of the “Know-Your-Customer Policy as an Effective Tool to Combat Money Laundering: Is it about Who or What to Know that Counts?” 2014 *International Journal Public Law and Policy* 53, 58; De Koker L “Client Identification and Money Laundering Control: Perspectives on the Financial Intelligence Centre Act 38 of 2001” 2004 *TSAR* 715, 735; see also Reg 21 in GN R1062 in GG41154 of 29 September 2017.

⁶¹¹ Section 77(2) of the *FSA*; Kallasidou 2013 *Bristol Law Review* 130; Georgosouli 2013 *Capital Market Law Journal* 65; see related comments by Lui 2012 *Journal of Banking Regulation* 28.

⁶¹² Section 77(1) of the *FSA*; Kallasidou 2013 *Bristol Law Review* 130; Georgosouli 2013 *Capital Market Law Journal* 65; Kwenda 2005 *Michigan State Journal of International Law* 351; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 118.

failures.⁶¹³ In this regard, cooperation and collaboration between the UK government through the HM Treasury and the BOE rely on information sharing arrangements to promote and protect financial stability and market integrity.⁶¹⁴ The decision to establish express cooperation and collaboration arrangements between the government and the BOE is important for preventing overlaps between the objectives of the BOE and those of the government officials who are a high financial crime risk.⁶¹⁵

6.5 Flaws and Challenges Affecting Cooperation and Collaboration between the BOE and other Financial Role Players in the UK

The regulatory framework for cooperation and collaboration in the UK is not novel. Similar arrangements are found in other jurisdictions such as Australia and South Africa.⁶¹⁶ However, several challenges and flaws are prevalent in the UK and have affected robust cooperation and collaboration between the BOE and other financial role players. The *FSA* requires the BOE to cooperate with the PRA, the FCA and the HM Treasury when fulfilling their mandates but fails to provide the threshold for such cooperation and collaboration.⁶¹⁷ The *FSA* leaves it for the BOE and other financial role players to determine the ambit of their cooperation and collaboration on an ad hoc basis in MOUs regarding cooperation and collaboration.⁶¹⁸ The disadvantage of this arrangement is that there are high chances that the BOE and the other financial role players may fail to capture all the immutable

⁶¹³ Sections 73-74 of the *FSA*; Kallidou 2013 *Bristol Law Review* 130; Georgosouli 2013 *Capital Market Law Journal* 65; Hong-Bum 2009 *Seoul Journal of Economics* 421; see related comments by Godwin and Schmulow 2015 *SALJ* 760.

⁶¹⁴ See related by comments Hong-Bum 2009 *Seoul Journal of Economics* 409, 419; Kourabas S “Trends and Theory in Financial Regulation and Regulatory Design after the Global Financial Crisis” 46; see related comments by Kwenda 2005 *Michigan State Journal of International Law* 350; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 125.

⁶¹⁵ See related comments by Njotini MN “The Transaction or Activity Monitoring Process: An Analysis of the Customer Due Diligence Systems of the United Kingdom and South Africa” 2000 *Obiter* 556, 566; De Koker L “The 2012 Revised FATF Recommendations: Assessing and Mitigating Mobile Money Integrity Risks within the New Standards Framework” 2015 *Washington Journal of Law, Technology and Arts* 165, 171;

⁶¹⁶ Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 118; Walker 2012 *The International Lawyer* 825; Shinar “Can the Twin Peaks Model of Financial Regulation Serve as a Model for Israel?” 63; Qumba 2022 *SALJ* 112.

⁶¹⁷ See sections 3D and 64 of the *FSA*; Qumba 2022 *SALJ* 82; see related comments by Lui 2012 *Journal of Banking Regulation* 28; Georgosouli 2013 *Capital Market Law Journal* 75.

⁶¹⁸ See related comments by Shinar “Can the Twin Peaks Model of Financial Regulation Serve as a Model for Israel?” 55; Georgosouli A “Judgement Led Regulation: Some Critical Reflections” 2012 *SSRN Research Paper* 14; Georgosouli 2013 *Capital Market Law Journal* 70.

aspects relevant for effective coordination in these MOUs which could result in cumbersome cooperation and collaboration. Although the MOUs concerning cooperation and collaboration between the BOE and other financial role players are reviewed annually, they are only reviewed *ex post facto*. This means that MOUs regarding cooperation and collaboration between the BOE and other financial role players are only reviewed after being in operation for a year.⁶¹⁹ Thus, if a MOU contains miscellaneous provisions, it can only be rectified after a year of cumbersome cooperation and collaboration between the BOE and other financial role players.⁶²⁰ The researcher argues that this approach could result in ineffective coordination in the UK, and consequently affect the promotion and protection of financial stability and market integrity.

The FSA provides that the PRA and the FCA may refuse to participate in cooperation and collaboration arrangements with the BOE or any other financial role player.⁶²¹ This makes it easier for the PRA or the FCA to abscond from coordinating with the BOE or with each other and this may affect the effectiveness of the established cooperation and collaboration arrangements. The MOU concerning cooperation and collaboration between the BOE, acting on behalf of the PRA, and the FCA also fails to oblige the FCA and the PRA to cooperate and collaborate with the BOE on a “comply or explain” basis.⁶²² The provision of exceptions to the duty to cooperate and collaborate jeopardises the effectiveness of the cooperation and collaboration between the BOE and other financial role players to protect and promote financial stability and market integrity.

⁶¹⁹ See related comments by Van Niekerk and Van Heerden 2020 *SALJ* 125; also see CM Van Heerden, GM Van Niekerk and Huls NJH “Two Takes on Twin Peaks: A Comparative Appraisal of the Models of Financial Regulation in the Netherlands and South Africa” 2020 *THRHR* 491, 510; also see Schmulow A “Financial Regulatory Governance in South Africa: The Move Towards Twin Peaks” 2017 *African Journal of International and Comparative Law* 389, 395.

⁶²⁰ Van Niekerk and Van Heerden 2020 *SALJ* 125; Van Heerden, Van Niekerk and Huls 2020 *THRHR* 510; Schmulow 2017 *African Journal of International and Comparative Law* 395.

⁶²¹ Section 3D(2) of the FSA; see related comments by MacNeil I and Li X “‘Comply or Explain’: Market Discipline and Non-Compliance with the Combined Code” 2006 *CGIR* 486, 490; Qumba 2022 *SALJ* 114.

⁶²² See related comments by Baldwin R and Cave M *Understanding Regulation: Theory Strategy and Practice* (Oxford University Press 1999) 133-7; Coglianese C and Laser D “Management-based Regulation: Prescribing Private Management to Achieve Public Goals” 2003 *Law and Society Review* 691, 693.

Unlike in South Africa and Australia, there is no committee or a cooperation and collaboration body to facilitate cooperation and collaboration between the BOE and other financial role players in the UK.⁶²³ A cooperation and collaboration body facilitates and oversees cooperation and collaboration arrangements between the central bank and other financial role players to ensure its effectiveness and robustness in the protection and promotion of financial stability and market integrity. Accordingly, the lack thereof in the UK may result in cumbersome coordination between the BOE, the FCA, the PRA, the HM Treasury and other financial role players due to a lack of close monitoring and review of conduct. Cooperation and collaboration arrangements between the BOE and other role players are reviewed by the parliament, amongst many of its other duties.⁶²⁴

6.6 The Effects of the COVID-19 Pandemic on Cooperation and Collaboration between the BOE and other Financial Role Players in the UK

The outbreak of COVID-19 threatened global financial stability and market integrity as the measures to curb the spread of the virus greatly affected the financial sector. For example, the closure of businesses and travel bans were some of the measures implemented to curb the spread of COVID-19.⁶²⁵ According to Akhtaruzzaman *et al*, domestic cooperation and collaboration between the BOE and the FCA, the PRA and the HM Treasury in the UK was not very significant during the peak of the pandemic.⁶²⁶ This could have been due to the fact that much focus was shifted to global financial stability and the integrity of global financial markets rather than domestic financial affairs. In this regard, cooperation and collaboration between the BOE and other international organisations and central banks on a broader international level became more dominant

⁶²³ Kallasidou 2013 *Bristol Law Review* 125; Georgosouli 2013 *Capital Market Law Journal* 73; Georgosouli 2012 *SSRN Research Paper* 14; Qumba 2022 *SALJ* 120.

⁶²⁴ See section 65(5) of the *FSA*; See related comments by Baldwin and Cave *Understanding Regulation: Theory Strategy and Practice* 133-137; Georgosouli 2012 *SSRN Research Paper* 14; Georgosouli 2013 *Capital Market Law Journal* 70.

⁶²⁵ Brown and Susskind 2020 *Oxford Review of Financial Policy Journal* 65; Susskind and Vines 2020 *Oxford Review of Economic Policy Journal* 10; Osode P "Two Heads are Better than One: Assessing South Africa's 'Twin Peaks' Financial Regulation Model" 2021 *Interdisciplinary Journal of Economics and Business Law* 9, 25.

⁶²⁶ Akhtaruzzaman, Boubaker and Sensoy 2021 *Finance Research Letters* 3; Guo, Li and Li 2021 *International Review of Financial Analysis* 28; Brown and Susskind 2020 *Oxford Review of Financial Policy Journal* 66; Susskind and Vines 2020 *Oxford Review of Economic Policy Journal* 12.

to prevent an upsurge of another global financial crisis.⁶²⁷ The BOE engaged with international organisations such as the European Securities and Markets Authority to monitor financial markets and adopt measures to mitigate the effects of the pandemic on market integrity.⁶²⁸ Nonetheless, the BOE's Governor cited that, during the COVID-19 pandemic, the interaction between the FCA and the financial consumers became more important as the FCA had to constantly share information relating to financial markets with the BOE.⁶²⁹ This follows the fact that the FCA's reports contributed to the process of policymaking and government response to the economic status of the country amidst the pandemic. Proactive cooperation and collaboration between the BOE and other financial role players during the COVID-19 pandemic can be attributed to the MOU concerning cooperation and collaboration for crisis management between the BOE and other role players.⁶³⁰ The MOU sets clear cooperation and collaboration and information sharing arrangements that could have facilitated effective coordination to promote, protect, maintain and enhance financial stability and market integrity during the pandemic.

The FPC and the FCA also worked together to identify and advise consumers on economic risks such as money laundering and crypto-investments in the protection of market integrity.⁶³¹ The BOE, the FCA and the HM Treasury have also been working together with the FPC to reduce regulatory arbitrage and market fragmentation that could have arisen from economic vulnerabilities, such as lack of housing and unemployment

⁶²⁷ Akhtaruzzaman, Boubaker and Sensoy 2021 *Financial Research Letters* 3; Guo, Li and Li 2021 *International Review of Financial Analysis* 28.

⁶²⁸ Bank of England 2021 *England's Citizens Panel* 45; Akhtaruzzaman, Boubaker and Sensoy 2021 *Finance Research Letters* 3; Susskind and Vines 2020 *Oxford Review of Economic Policy Journal* 9.

⁶²⁹ Bank of England "The UK Economy during Covid-19: Insights from the Bank of England's Citizens' Panels" 2021 *England's Citizens Panel* 1; see related comments by Akhtaruzzaman, Boubaker and Sensoy 2021 *Finance Research Letters* 3; Guo, Li and Li 2021 *International Review of Financial Analysis* 28; Brown and Susskind 2020 *Oxford Review of Financial Policy Journal* 66; Susskind and Vines 2020 *Oxford Review of Economic Policy Journal* 12.

⁶³⁰ Government Publications "MOU between the BOE and the HM Treasury" para 4-6; section 65(7) of the *FSA*; see related comments by Susskind and Vines 2020 *Oxford Review of Economic Policy Journal* 12; also see Guo, Li and Li 2021 *International Review of Financial Analysis* 28; Brown and Susskind 2020 *Oxford Review of Financial Policy Journal* 70.

⁶³¹ Bank of England 2021 *England's Citizens Panel* 45; Susskind and Vines 2020 *Oxford Review of Economic Policy Journal* 9; Article 5(2) of the MOU between the CNB and the UK Banking Supervisory Authorities; see related comments by Guo, Li and Li 2021 *International Review of Financial Analysis* 30.

that became more significant during the COVID-19 pandemic.⁶³² The FPC also strongly supported, led and coordinated the efforts made by the Financial Stability Board (FSB) to develop policies that address the economic challenges that were caused by the pandemic.⁶³³ In this regard, the researcher submits that cooperation and collaboration arrangements between the BOE and other financial role players played a significant role in the protection and maintenance of financial stability and market integrity during the COVID-19 pandemic in the UK.

6.7 Conclusion

To conclude, the researcher submits that the role of cooperation and collaboration between the central bank and other financial role players in any financial framework is important. Unlike Australia, the UK has an established regulatory framework for cooperation and collaboration between the BOE and other financial role players to protect and promote financial stability and market integrity. However, several aspects of this framework should be revisited to ensure a robust regulatory framework for cooperation and collaboration between the BOE, the FCA, the PRA and the HM Treasury. For example, there is a need for stringent provisions that mandate the FCA and the PRA to always fulfil their objective in collaboration with the BOE as their objectives are complementary. It is important to have enforcement mechanisms in place to ensure that the BOE, the PRA, the FCA and the HM Treasury adhere to the duty to cooperate and collaborate in order to avoid gaps, overlaps and arbitrage. According to Schmulow, a culture of cooperation and collaboration is more important than prescriptive regulations.⁶³⁴ Godwin acknowledges that cooperation and collaboration between central banks and other financial role players remains a work in progress as financial markets keep evolving

⁶³² Bank of England 2021 *England's Citizens Panel* 45; James and Quaglia *The UK and Multi-level Financial Regulation: From Post-crisis Reform to Brexit* 87; also see Akhtaruzzaman, Boubaker and Sensoy 2021 *Financial Research Letters* 3.

⁶³³ See related discussion by Qumba 2022 *SALJ* 115; Susskind and Vines 2020 *Oxford Review of Economic Policy Journal* 9; Bank of England 2021 *England's Citizens Panel* 45.

⁶³⁴ Schmulow 2015 *Journal of Banking and Finance and Practice* 158; see related comments by Ferran E and Alexander K "Can Soft Law Bodies be Effective? The Special Case of the European Systemic Risk Board" 2010 *ELR* 751,760.

and new needs arise from time to time.⁶³⁵ Therefore, it remains an ongoing concern to determine whether cooperation and collaboration between the BOE and other financial role players are fit for their purpose and robust enough to protect, promote, maintain and enhance financial stability and market integrity in the UK.

The next chapter analyses the international best practices on cooperation and collaboration between central banks and other financial role players to promote, protect, enhance and maintain financial stability and market integrity.

⁶³⁵ Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 118; Godwin, Kourabas and Ramsay 2016 *International Lawyer* 276; Godwin A and Schmulow AD (eds) *The Cambridge Handbook of Twin Peaks Financial Regulation* 42; Godwin 2017 *Routledge* 192.

CHAPTER SEVEN

THE INTERNATIONAL BEST PRACTICES ON THE COOPERATION AND COLLABORATION BETWEEN CENTRAL BANKS AND OTHER FINANCIAL ROLE PLAYERS

7.1 Introduction

The aftermath of the Global Financial Crisis (GFC) was characterised by regulatory reforms to prevent the recurrence of systemic risks such as excessive lending and overlaps that led to the outbreak of the GFC.⁶³⁶ In this regard, the South African National Treasury noted that there is a need for significant interconnectedness between South Africa and foreign financial institutions to cooperatively curb risks to financial stability and the integrity of financial markets.⁶³⁷ This follows the fact that globalisation has increased the threat of systemic risk contagion from one jurisdiction to the other due to the increased intersection of financial markets. Accordingly, the need for international regulations relating to global financial stability and market integrity became more apparent.⁶³⁸ In this regard, several international organisations have developed standard practices to regulate and monitor cooperation and collaboration between central banks and other financial role players internationally to prevent conflicts and systemic risks that threaten market integrity

⁶³⁶ Schmulow A “Twin Peaks: A Theoretical Analysis” 2015 *Centre for International Finance and Regulation* 1, 3; Coffee CJ Jnr and Sale HA “Redesigning the SEC: Does the Treasury have a better Idea? 2009 *Virginia Law Review* 170, 174; Hovelas A “Twin Peaks: The Envy of the World” 2012 *Wealth Professional* 5, 8; Qumba MF “A Comparative Analysis of the Twin Peaks Model of Financial Regulation in South Africa and the United Kingdom” 2022 *SALJ* 78, 79.

⁶³⁷ National Treasury of the Republic of South Africa “Twin Peaks in South Africa: Response and Explanatory Document Accompanying the Second Draft of the Financial Sector Regulation Bill” 2014 7; National Treasury of the Republic of South Africa “A Safer Financial Sector to Serve South Africa Better” available at www.treasury.gov.za, accessed 15 April 2021; see related comments by Crotty J “Structural Causes of the Global Financial Crisis: A Critical Assessment of the ‘New Financial Architecture’” 2009 *Cambridge Journal of Economics* 563, 564; International Monetary Fund “Basel Core Principles for Effective Banking Supervision: Detailed Assessment of Compliance-South Africa” 2015 *IMF Country Report No 15/55* 5.

⁶³⁸ Lee LL “Integration of International Banking Supervisory Standards: A Blueprint for the Taiwanese Banking System” 2000 *Rev Banking Law* 455, 536; Grabar N *Achieving More Efficient Capital Markets Regulation (An Introduction and Overview of the IIF-SIFMA Work)* (PLI Corporate Law and Practice Course Handbook: US 2008) 447; William AA and Moessner R “The Liquidity Consequences of the Euro Area Sovereign Debt Crisis” 2013 *BIS Working Paper* 45, 51.

and global financial stability.⁶³⁹ The Basel Committee on Banking Supervision (BCBS),⁶⁴⁰ the International Organisation of Securities Commissions (IOSCO),⁶⁴¹ the Committee of Insurance, Securities and Non-Banking Financial Authorities (CISNA),⁶⁴² the Financial Action Task Force (FATF) and the International Association of Insurance Supervisors (IAIS),⁶⁴³ *inter alia*, are international organisations that foster cooperation and collaboration between central banks and other role players such as prudential regulators and market conduct regulators, by establishing international standards for effective cooperation and collaboration. It should be noted that the International Monetary Fund (IMF) and the Financial Stability Board (FSB) have adopted the BCBS principles on cooperation and collaboration between central banks and other financial role players as the standard for effective cooperation and collaboration for their member states.⁶⁴⁴

Several conventions and treaties have been ratified to foster international cooperation and collaboration between central banks and international financial role players in South Africa. For example, the Convention on the Organisation for Economic Co-operation and

⁶³⁹ Griffin PB “The Delaware Effect: Keeping the Tiger in Its Cage: The European Experience of Mutual Recognition in Financial Services” 2001 *Columbia Journal of European Law* 337, 346; Jung NR “The Present and Future of the Financial Services Industry: Convergence, Consolidation, Conglomeration, and Collaboration” 2011 *Quinnipiac Law Review* 729, 732; William AA and Moessner R “Central Bank Co-operation and International Liquidity in the Financial Crisis of 2008-9” 2013 *BIS Working Paper* 78, 81.

⁶⁴⁰ The Basel Committee on Banking Supervision (BCBS) is the primary global standard setter for the prudential regulation of banks and provides a forum for regular cooperation on banking supervisory matters. Its 45 members comprise central banks and bank supervisors from 28 jurisdictions. See <http://www.bis.org/bcbs/> accessed 25 March 2022.

⁶⁴¹ The IOSCO sets international standards for securities markets. Its 110 member countries regulate more than ninety percent of the international regulatory benchmarks for all securities markets. See <https://www.iosco.org/about/index.cfm?section=history> accessed 25 March 2022.

⁶⁴² The Committee of Insurance, Securities and Non-Banking Financial Authorities (CISNA) is a Southern African Development Community (SADC) Committee that is made of, *inter alia*, regulators and supervisors of capital markets and insurance companies from the different member states. Its main goal is to achieve regional financial stability and market integrity through cooperation and collaboration between non-bank financial intermediaries (NBFIs) and other financial role players. See related comments by Qumba 2022 *SALJ* 85; see also South African Reserve Bank “Participation in International Forums” <https://www.resbank.co.za/en/home/what-we-do/Prudentialregulation/participation-in-international-forums> accessed 14 June 2022.

⁶⁴³ The IAIS represents insurance regulators and supervisors of 190 jurisdictions. See <http://www.iaisweb.org/index.cfm?pageID=28> accessed 25 March 2022.

⁶⁴⁴ Cecchetti SG “Monetary Policy Lessons Learned from the Crisis and the Post-Crisis Landscape” 2011 *Bank for International Settlements* 1, 3; Cecchetti SG “Collaboration in Financial Regulatory Reform: The IMF, the Financial Stability Board, and the Standard Setting Bodies” IEO Background Paper (14 December 2018) 13; Cecchetti SG and Tucker P “Is There Macprudential Policy without International Cooperation?” in Glick R and Speigel M (eds) *Policy Challenges in a Diverging Global Economy* (Reserve Bank of San Francisco) 48.

Development,⁶⁴⁵ the OECD-Best Practice Principles on International Regulatory Cooperation,⁶⁴⁶ the FATF Recommendations,⁶⁴⁷ and the Core Principles for Effective Banking Supervision.⁶⁴⁸ However, it should be noted that these conventions are non-binding and that the international regulatory framework for cooperation and collaboration between central banks and other financial role players relies on a soft law approach and the good-will of countries to promote cooperation and collaboration globally.⁶⁴⁹ As such, it can be argued that international cooperation and collaboration between central banks and other financial role players are not easily enforceable and this increases the likelihood of non-compliance and in turn jeopardises the promotion of global financial stability and market integrity.

This chapter discusses the international standards of cooperation and collaboration between central banks and financial regulators at the international level as provided under, *inter alia*, the Basel Framework, the FATF recommendations, the OECD Best Practice Principles, the IOSCO principles, IAIS-Best Practice Principles and the CISNA

⁶⁴⁵ OECD Convention on the Organisation for Economic Co-operation and Development December 1960, article 5(b); see related comments by Mwenda KK *Legal Aspects of Financial Services Regulation and the Concept of a Unified Regulator* (World Bank Publications 2006) 87; Mwenda KK “The Regulatory and Institutional Framework for Unified Financial Services Supervision in the United Kingdom and Zambia” 2005 *Michigan State Journal of International Law* 347, 351; Qumba 2022 *SALJ* 94.

⁶⁴⁶ OECD Best Practice Principles on International Regulatory Co-operation 2021 <https://www.oecd.org/gov/regulatory-policy/international-regulatory-cooperation-best-practice-principles.pdf> accessed 15 June 2022; see related comments by Mwenda *Legal Aspects of Financial Services Regulation and the Concept of a Unified Regulator* 87; Mwenda 2005 *Michigan State Journal of International Law* 351; Qumba 2022 *SALJ* 94.

⁶⁴⁷ FATF Recommendations 2002, recommendation 2; see related comments by Correia de Brito, A, Kauffmann C and Pelkmans J “The Contribution of Mutual Recognition to International Regulatory Co-operation” 2016 *OECD Regulatory Policy Working Papers* 15; Giordani, P, Ruta M and Zhu L “Capital Flow Deflection” 2017 *Journal of International Economics* 102, 109; 2005 *Michigan State Journal of International Law* 347.

⁶⁴⁸ Core Principles for Effective Banking Supervision 2012, principle 3; see related comments by Gadinis S “The Financial Stability Board: The New Politics of International Financial Regulation” 2013 *Texas Journal of International Law* 151, 157; Gadinis S “Three Pathways to Global Standards: Private, Regulator, and Ministry Networks” 2015 *American Journal of International Law* 1, 3; Goodhart C *The Basel Committee on Banking Supervision: A History of the Early Years, 1974–1997* (Cambridge: CUP 2011) 15.

⁶⁴⁹ Satragno L *Monetary Stability as a Common Concern in International Law: Policy Cooperation and Coordination of Central Banks* (Brill Singapore 2022) 92; see related comments by Tietje C “The International Financial Architecture as a Legal Order” 2011 *German Yearbook of International Law* 54, 58; IMF “Modernizing the Legal Framework for Surveillance – An Integrated Surveillance Decision” July 2012 www.imf.org/external/np/pp/eng/2012/071712.pdf accessed 21 April 2022; Gadinis 2015 *American Journal of International Law* 4.

standards. This is done to determine whether South Africa, Australia and the United Kingdom conform their regulatory frameworks with regards to cooperation and collaboration between central banks and other financial role players to the set international standards.

7.2 International Best Practices on the Cooperation and Collaboration between Central Banks and Other Role Players

7.2.1 The Basel Framework Cooperation and Collaboration Principle

The Basel Committee on Banking Supervision - Core Principles for Effective Banking Supervision provides guidelines to foster cooperation and collaboration amongst financial role players such as central banks, prudential regulators and market conduct regulators at the international level.⁶⁵⁰ Principle 3 of the BCBS Core Principles for Effective Banking is the Cooperation and Collaboration principles and it provides that member states should make arrangements and implement domestic laws that foster cooperation and collaboration between domestic financial role players.⁶⁵¹ Principle 3 of the BCBS Core Principles for Effective Banking also provides that cooperation and collaboration arrangements between central banks and other financial role players may be formal or informal, depending on the needs of a particular state.⁶⁵² South Africa adopted formal statutory regulations on cooperation and collaboration between the South African

⁶⁵⁰ Basel Committee on Banking Supervision “Core Principles for Effective Banking Supervision” 2012 Bank for International Settlements, principle 3; Basel Committee on Banking Supervision “Guidance on the Application of the Core Principles for Effective Banking Supervision to the Regulation and Supervision of Institutions Relevant to Financial Inclusion” 2016 *Consultative Document* 6; see related comments by Lee LL “Integration of International Banking Supervisory Standards: A Blueprint for the Taiwanese Banking System” 2000 *Annual Review of Banking Law* 455, 536; Keenan PJ “A New Chapter to Meet the Growing Need to Regulate Cross-Border Insolvencies” 2006 *Norton Journal of Bankruptcy Law and Practice* 128, 135; Bordo MD and Schwartz AJ ““Under What Circumstances, Past and Present, Have International Rescues of Countries in Financial Distress been Successful” 1999 *Journal of International Money and Finance* 683, 692.

⁶⁵¹ Principle 3 of the *Basel Core Principles for Effective Banking Supervision*; see related comments by Holtrop MW “Is a Common Central Bank Policy Necessary within a United Europe?” 1957 *De Economist* 642, 645; Goodhart *The Basel Committee on Banking Supervision: A History of the Early Years, 1974–1997* 21.

⁶⁵² Section 3(1) of the BCBS Core Principles for Effective Banking Supervision; Armour J, Awrey D, Davis P *et al Principles of Financial Regulation* (Oxford London 2016) 22; Moloney N, Ferran E, Payne J *et al The Oxford Handbook of Financial Regulation* (Oxford London 2015) 68; Brunnermeier M, Crocket A, Goodhart C, Persaud AD and Shin H *The Fundamental Principles of Financial Regulation* (Centre for Economic Policy Research London 2009) 59.

Reserve Bank (SARB) and other financial role players such as the Prudential Authority (PA), the Financial Sector Conduct Authority (FSCA), the Financial Intelligence Centre (FIC) and the National Credit Regulator (NCR), regulated by the *Financial Sector Regulation Act*.⁶⁵³ Similarly, in the UK, the *Financial Services Act* makes provision for domestic cooperation and collaboration between the Bank of England (BOE), the Financial Conduct Authority (FCA), the Prudential Regulation Authority (PRA) and other financial role players.⁶⁵⁴ On the other hand, Australia relies on informal arrangements for cooperation and collaboration between the Reserve Bank of Australia (RBA), the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investment Commission (ASIC).⁶⁵⁵ On this note, it can be alluded that South Africa, the UK and Australia comply with principle 3 of the BCBS Core Principles of Effective Banking which requires either formal or informal cooperation and collaboration arrangements between central banks and domestic financial role players.⁶⁵⁶ The researcher argues that despite the discretion to choose between formal and informal arrangements, the UK and South Africa's formal approach is preferable in this regard. Formal cooperation and collaboration arrangements are easier to enforce and also make it easier to compel compliance, unlike informal arrangements.⁶⁵⁷

⁶⁵³ *Financial Sector Regulation Act* 9 of 2017 (*FSR Act*), sections 26 and 76; Qumba 2022 *SALJ* 87; Schmulow A "Financial Regulatory Governance in South Africa: The Move Towards Twin Peaks" 2017 *African Journal of International and Comparative Law* 390, 393; Schmulow 2015 *Centre for International Finance and Regulation* 5

⁶⁵⁴ *Financial Services Act* 2012 Chapter 21, section 3D and 3E; Armour, Awrey, Davis *et al Principles of Financial Regulation* (Oxford London 2016) 85; Moloney, Ferran, Payne *et al The Oxford Handbook of Financial Regulation* (Oxford London 2015) 68; Brunnermeier, Crocket, Goodhart, Persaud and Shin *The Fundamental Principles of Financial Regulation* 78.

⁶⁵⁵ Godwin A "Australia's Trek Towards Twin Peaks — Comparisons with South Africa" 2017 *Law and Financial Markets Review* 179, 183; Van Niekerk G and Van Heerden C "The Importance Of A Legislative Framework for Co-Operation and Collaboration in the Twin Peaks Model of Financial Regulation" 2020 *SALJ* 108, 114; Schmulow AD "Twin Peaks: An analysis of the Australian Architecture" in Joo Jung H (ed) *Proceedings of the 2016 Global Forum for Financial Consumers* (2016) 9; Lastra RM *International Financial and Monetary Law* 2nd ed (Oxford University Press 2015) 345.

⁶⁵⁶ See related comments by Goodhart *The Basel Committee on Banking Supervision: A History of the Early Years, 1974–1997* 85; sections 26 and 76 of the *FSR Act*; section 3E of the *Financial Services Act*; Schmulow A "The Four Methods of Financial System Regulation: An International Comparative Survey" 2015 *Journal of Banking and Finance and Practice* 151, 158; Principle 3(2) of the BCBS Core Principles of Effective Banking.

⁶⁵⁷ Kelly CR "The Sociological Pull of Soft Law" 2012 *American Society of International Law Proceedings* 320, 327; Ferran E and Alexander K "Can Soft Law Bodies be Effective? Soft Systemic Risk Oversight Bodies and the Special Case of the European Systemic Risk Board" 2011

Principle 3(2) of the BCBS Core Principles for Effective Banking Supervision provides that there should be cooperation and collaboration arrangements between domestic and foreign financial role players to enable the sharing of information in matters relating to financial stability and the prevention of financial crimes in order to promote market integrity.⁶⁵⁸ According to this principle, cooperation, collaboration and information sharing arrangements between central banks and other financial role players play a significant role in promoting and maintaining financial stability and market integrity.⁶⁵⁹ South Africa complies with this principle as evidenced by regulations under the *FSR Act* that require financial role players such as the PA, the FSCA, the FIC and the NCR to share information with the SARB and with each other to promote financial stability, market integrity and fulfilling their objectives.⁶⁶⁰ The BCBS Core Principles for Effective Banking Supervision also provides that cooperation and collaboration and information sharing arrangements between central banks and other financial role players should be done at the international level.⁶⁶¹ Effective information sharing arrangements foster transparency which is essential for preventing and managing potential systemic risks that threaten financial

Legal Studies Research Paper Series 4, 6; Godwin A and Schmulow A “Financial Sector Regulation Bill in South Africa, Second Draft: Lessons from Australia” 2015 *SALJ* 756, 766; Kourabas S “Improving Australia’s Regulatory Framework for Systemic Financial Stability” 2018 *Journal of Banking and Finance Law Practice* 183, 192.

⁶⁵⁸ Principle 3(2) of the BCBS Core Principles of Effective Banking; Goodhart *The Basel Committee on Banking Supervision: A History of the Early Years, 1974–1997* 45; Barth JR, Caprio G (Jr) and Levine R “Bank Regulation and Supervision in 180 Countries from 1999 to 2011” 2013 *Journal of Financial Economic Policy* 108, 111; see related comments by see Mehran H, Morrison A and Shapiro J “Corporate Governance and Banks: What Have We Learned from the Financial Crisis?” in Dewatripont M and Freixas X (eds) *The Crisis Aftermath: New Regulatory Paradigms* (CEPR London 2012) 85; See related comments by Bordo and Schwartz 1999 *Journal of International Money and Finance* 698; Dominguez K “When Do Central Bank Interventions Influence Intra Daily and Long-Term Exchange Rate Movements?” 2006 *Journal of International Money and Finance* 1051, 1063; Holtrop 1957 *De Economist* 645

⁶⁵⁹ Principle 3 of the *Core Principles for Effective Banking Supervision* para 1; see related comments by Moessner R and William AA “Banking Crises and the International Monetary System in the Great Depression and Now” 2011 *Financial History Review* 1, 15; Neely C “Central Bank Authorities Beliefs about Foreign Exchange Market Intervention” 2008 *Journal of International Money and Finance* 1, 12.

⁶⁶⁰ See principle 3(2) of the BCBS Core Principles for Effective Banking Supervision; sections 27 and 77 of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 126; see related comments by Jensen A and Kingston M “Australian “Twin Peaks” Framework of Financial System Regulation: Australia and UK Compared” 2010 *Butterworths Journal of International Banking and Financial Law* 543, 549.

⁶⁶¹ Principle 3 of the *Core Principles for Effective Banking Supervision*; see related comments by Neely 2008 *Journal of International Money and Finance* 12; Domingue 2006 *Journal of International Money and Finance* 1062; Bordo and Schwartz 1999 *Journal of International Money and Finance* 698.

stability and market integrity.⁶⁶² In compliance with principle 3(2) of the BCBS Core Principles for Effective Banking Supervision, the *FSR Act* requires the PA and the FSCA to cooperate and collaborate with international organisations and their international counterparts to fulfil their duty to promote financial stability and enhance market integrity.⁶⁶³ The SARB, the PA and the FSCA have concluded a Memorandum of Understanding (MOUs) with the European Securities and Market Authority (ESMA).⁶⁶⁴ The purpose of this MOU is to establish arrangements for sharing information relating to the promotion of market integrity.⁶⁶⁵ It should be noted that the information shared between the financial institutions in this regard should be treated with confidentiality and may not be shared with third parties unless permission thereof has been granted by the providing financial institution.⁶⁶⁶ This ensures that customer data is not misused and is treated with relevant confidentiality to promote customers' confidence in their financial institutions. In light of this context, it can be said that South Africa has made considerable efforts to comply with principle 3(2) of the BCBS Core Principles for Effective Banking Supervision by concluding a MOU regarding cooperation and collaboration between the ESMA, the SARB, the PA and the FSCA.⁶⁶⁷ In the UK, the BOE, the FCA and the PRA

⁶⁶² Godwin and Schmulow 2015 *SALJ* 759; Taylor MW ““Twin Peaks”: A Regulatory Structure for the New Century” 1995 *Centre for the Study of Financial Innovation Report* 1, 3; Cali M, Massa I and Te Velde DW “The Global Financial Crisis and Their Implications for Supreme Audit Institutions” 2010 *INTOSAI Report* 8, 25; also see related discussion by Debelle G “Some Effects of the Global Financial Crisis on Australian Financial Markets” *Finance Professionals Forum* (31 March 2009) 6.

⁶⁶³ Sections 58(4) of the *FSR Act*; Chitimira H *Market Abuse Regulation in SADC: South Africa, Namibia, Botswana and Zimbabwe* (Juta Cape Town 2022) 46; Jensen A and Kingston M “The Australian ‘Twin Peaks’ Framework of Financial System Regulation: Australia and UK Compared” 2010 *Journal of International Banking and Financial Law* 548, 549; Godwin A., Kourabas S and Ramsay I “Twin Peaks and Financial Regulation: The Challenges of Increasing Regulatory Overlap and Expanding Responsibilities” 2016 *International Lawyer* 273, 283.

⁶⁶⁴ Memorandum of Understanding between ESMA and South Africa’s Financial Sector Conduct Authority, Prudential Authority and the South African Reserve Bank signed on 3 August 2022; see Article 25(2)(c) of the European Union Regulations No 648/2012; also see Van Niekerk and Van Heerden 2020 *SALJ* 126.

⁶⁶⁵ See para 2.1 of the MOU between the ESMA and South Africa’s Financial Sector Conduct Authority, Prudential Authority and the South African Reserve Bank; see related comments by James and Quaglia *The UK and Multi-level Financial Regulation: From Post-crisis Reform to Brexit* 165,

⁶⁶⁶ Principle 3 of the *Core Principles for Effective Banking Supervision* para 4; see related discussion by Nesadurai HES “Finance Ministers and Central Banks in East Asian Financial Cooperation” in Diaz M and Woods P (eds) *Networks of Influence?* (Oxford: Oxford University Press 2009) 63, 78; Moessner and William 2011 *Financial History Review* 7; Mwenda 2005 *Michigan State Journal of International Law* 351.

⁶⁶⁷ See related discussion by Rogers C *Basel III and Global Cooperation: Where do we go from Here?* at The Kangaroo Group Virtual Debate 8 September 2021; Viterbo A “The European Union in the

have concluded a MOU regarding cooperation, collaboration and information sharing arrangements with the European Banking Authority (EBA) to improve the detection, investigation and prosecution of financial crimes such as money laundering to promote and enhance market integrity.⁶⁶⁸

The integration of the BCBS Core Principles for Banking Supervision by the IMF and the FSB as accepted standards for regulatory coordination entails the importance of cooperation and collaboration between central banks and other financial role players. However, the BCBS Cooperation and Collaboration principle is unenforceable, and its effectiveness depends on the implementation and incorporation into domestic laws and enforcement policies of each jurisdiction. In the three jurisdictions discussed in this research, the researcher submits that there is a lack of enforcement of cooperation and collaboration standards.⁶⁶⁹ The MOUs relating to cooperation and collaboration do not establish legally binding duties on the parties.⁶⁷⁰ This shows that there is a lack of consistent and effective enforcement of the BCBS Cooperation and Collaboration principle in South Africa, the UK and Australia. The lack of enforcement in this regard may affect the effectiveness and adequacy of cooperation and collaboration between central banks and other financial role players to promote financial stability and enhance market integrity. In this regard, the researcher suggests that the position that failure of any

Transnational Financial Regulatory Arena: The Case of the Basel Committee on Banking Supervision” 2019 *Journal of International Economic Law* 205, 210; also see Nesadurai “Finance Ministers and Central Banks in East Asian Financial Cooperation” 82.

⁶⁶⁸ Memorandum of Understanding on Cooperation and Information Exchange between the European Banking Authority (‘EBA’) and the Bank of England the Financial Conduct Authority 21 July 2015 <https://www.fca.org.uk/publication/mou/mou-bank-fca-eba.pdf> accessed 31 July 2022; see related comments by Rogers *Basel III and Global Cooperation: Where do we go from Here?*; Borio C, Farag M and Tarashev N “Post-Crisis International Financial Regulatory Reforms: A Primer” 2020 *BIS Working Paper* 41, 44; see related comments by Bordo and Schwartz 1999 *Journal of International Money and Finance* 699; James and Quaglia *The UK and Multi-level Financial Regulation: From Post-crisis Reform to Brexit* 101.

⁶⁶⁹ Yaacob H, Markom R, Hakimah A “Coping with the International Standards Of Basel Committee on Core Principles On Effective Banking Supervision (BCBS): Analysis and Reform for Islamic Banking” 2018 *International Journal of Business and Society* 385, 391; Alford DE “Core Principles for Effective Banking Supervision: An Enforceable International Financial Standard” 2005 *BC International and Comparative Law Review* 237, 245; Kalaš B, Milenković N, Andrašić J and Pjanić M “Characteristics of Basel Principles and Standards in Banking” 2016 *European Journal of Economic Studies* 486, 487.

⁶⁷⁰ James and Quaglia *The UK and Multi-level Financial Regulation: From Post-crisis Reform to Brexit* 101; Viterbo 2019 *Journal of International Economic Law* 210; also see Nesadurai “Finance Ministers and Central Banks in East Asian Financial Cooperation” 82.

jurisdiction to adopt the BCBS cooperation and collaboration principle should be reconsidered. There should be stringent measures to ensure compliance with this principle in all member states, to promote, protect, enhance and maintain global financial stability and the integrity of global financial markets.

7.2.2 *International Organisation of Securities Commissions Objectives and Principles of Securities Regulation – Principles for Cooperation in Regulation*

The IOSCO is an international organisation that established principles to promote and protect market integrity through, *inter alia*, ensuring fairness, transparency and efficiency of financial markets.⁶⁷¹ To achieve this, the IOSCO sets out international standards that member states should implement to ensure the safety and soundness of financial markets. The IOSCO established the Principles for Cooperation in Regulation as basic standard principles of cooperation and collaboration between central banks and other financial role players domestically and internationally to promote financial stability and enhance market integrity.⁶⁷² The IOSCO Principles for Cooperation in Regulation are provided in principles 13 to 15 of the IOSCO Objectives and Principles of Securities Regulation. It states that market conduct regulators should be authorised to share information regarding matters of common interest with other financial role players to fulfil their mandates and exercise their powers.⁶⁷³ In this regard, it can be said that in South Africa, the FSCA has concluded several MOUs with the SARB, the PA, the FIC and the NCR to foster coordination and information sharing to protect and promote market

⁶⁷¹ Marcacci A “IOSCO: The World Standard Setter for Globalized Financial Markets.” 2012 *Richmond Journal of Global Law and Business* 23, 24; See also Author Anon Objectives and Principles of Securities Regulation, <https://riskinstitute.ch/144460.html> accessed 1 April 2022; see related comments by Nesadurai HES “Finance Ministers and Central Banks in East Asian Financial Cooperation” 72.

⁶⁷² Technical Committee of the International Organization of Securities Commissions *Principles Regarding Cross-Border Supervisory Cooperation* 2010 3; Nesadurai HES “Finance Ministers and Central Banks in East Asian Financial Cooperation” 72; James and Quaglia *The UK and Multi-level Financial Regulation: From Post-crisis Reform to Brexit* 103; see related comments by Chitimira *Market Abuse Regulation in SADC* 46.

⁶⁷³ See Principles 13-15 of the IOSCO Objectives and Principles of Securities Regulation 2017; see related comments by Gadinis 2013 *Texas Journal of International Law* 161; IOSCO “Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information” 2002 <http://www.iosco.org> accessed 21 May 2022; Tarullo DK *Banking on Basel: The Future of International Banking Regulation* (Peterson Institute for International Economics Washington DC 2008) 38.

integrity.⁶⁷⁴ For example, the FSCA concluded an MOU with the PA to, *inter alia*, strengthen information sharing and coordination with the PA in fulfilling its objectives.⁶⁷⁵ The FSCA is a member of the IOSCO and a signatory of the IOSCO MOU which establishes its membership and coordination arrangements with other member institutions.⁶⁷⁶ The FSCA's membership in the IOSCO assists it to acquire surveillance, investigation and the detection of market misconduct support from other member states.⁶⁷⁷ The support offered to the FSCA enables the detection of financial crimes that threaten financial stability and market integrity and the implementation of measures to curb financial crimes.⁶⁷⁸ Accordingly, it can be submitted that the cooperation and collaboration between the FSCA and other member states through the IOSCO have enabled the FSCA to fulfil its duty to protect and maintain market integrity.

It should also be noted that the IOSCO acknowledges several challenges that may affect effective cooperation and collaboration between central banks and other financial role players internationally.⁶⁷⁹ For example, stringent domestic laws on information sharing, technological limitations, especially in developing countries and the lack of required

⁶⁷⁴ MOU between PA and FSCA “Memorandum of Understanding between the Prudential Authority and the Financial Sector Conduct Authority” 28 September 2018 paras 2.1.1–2.1.4, <https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/8804/PA-FSCA%20Memorandum%20of%20Understanding.pdf>, accessed on 15 October 2021; MOU between SARB and FSCA “Memorandum of Understanding between the South African Reserve Bank and the Financial Sector Conduct Authority” 28 September 2018 para 2.1.1, <https://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/8828/Signed%20MOU%20-%20SARB%20and%20FSCA.pdf> accessed on 15 October 2021.

⁶⁷⁵ See paras 4-12 of the MOU between the FSCA and the PA; see also Van Niekerk and Van Heerden 2020 *SALJ* 128; see related comments by Qumba 2022 *SALJ* 83; see related comments by Marcacci 2012 *Richmond Journal of Global Law and Business* 28.

⁶⁷⁶ See Chitimira *Market Abuse Regulation in SADC* 46; IOSCO “Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information” para 4.2; see related comments by Gadinis 2013 *Texas Journal of International Law* 162; Marcacci 2012 *Richmond Journal of Global Law and Business* 30.

⁶⁷⁷ See Chitimira *Market Abuse Regulation in SADC* 46; IOSCO “Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information” para 4.2; see related comments by Gadinis 2013 *Texas Journal of International Law* 162; Marcacci 2012 *Richmond Journal of Global Law and Business* 30.

⁶⁷⁸ See Chitimira *Market Abuse Regulation in SADC* 46; IOSCO “Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information” para 4.2; see related comments by Gadinis 2013 *Texas Journal of International Law* 162; Marcacci 2012 *Richmond Journal of Global Law and Business* 30.

⁶⁷⁹ Marcacci 2012 *Richmond Journal of Global Law and Business* 31; Gadinis 2013 *Texas Journal of International Law* 162; Neely 2008 *Journal of International Money and Finance* 9; IOSCO “Multilateral Memorandum of Understanding Concerning Consultation and Cooperation and the Exchange of Information” para 10.5.

resources affect effective cooperation and collaboration between central banks and other financial role players.⁶⁸⁰ This shows that there is a need to strengthen and improve cooperation and collaboration mechanisms between central banks and cross-border financial role players in order to promote and maintain market integrity. It should also be noted that the FSCA, the FCA and the ASIC are participating members of the IOSCO and the PA was also accepted as a member in 2019.⁶⁸¹ This reflects on the efforts made by South Africa, the UK and Australia in fostering cross-border cooperation and collaboration between central banks and other financial role players to promote, protect, maintain and enhance global financial stability and market integrity.

Principle 15 of the IOSCO Objectives and Principles of Securities Regulation provides that signatories should consult, cooperate and share information with other financial institutions operating across borders.⁶⁸² The relevant authorities should also undertake to resolve obstacles and problems affecting information sharing arrangements between central banks and cross-border financial role players.⁶⁸³ IOSCO also recommends member states to consult with each other and share information relating to risk analysis assessments and any measures to mitigate such risks.⁶⁸⁴ This also includes sharing information relating to identified potential systemic risks and their possible impact on the

⁶⁸⁰ IOSCO Board “A Compilation of Authorities’ Experience with Cooperation” 2019 www.bis.org accessed 14 July 2022; Marcacci 2012 *Richmond Journal of Global Law and Business* 31; See also Anon “Objectives and Principles of Securities Regulation” 5; see related comments by Goodhart *The Basel Committee on Banking Supervision: A History of the Early Years, 1974–1997* 91.

⁶⁸¹ IOSCO Board “A Compilation of Authorities’ Experience with Cooperation” 54; Roberts J “FSCA Gets a Seat on IOSCO Board” *Money Marketing* (11 May 2018) 4; see also IOSCO MMOU “Cross-border Cooperation” 16 February 2015 <https://www.sc.com.my/development/international/cross-border-co-operation/list-of-iosco-multilateral-mou-signatories> accessed 13 February 2022.

⁶⁸² Technical Committee of the International Organization of Securities Commissions *Principles Regarding Cross-Border Supervisory Cooperation* 2010 4; Nesadurai HES “Finance Ministers and Central Banks in East Asian Financial Cooperation” 76; Neely 2008 *Journal of International Money and Finance* 12; Domingue 2006 *Journal of International Money and Finance* 1065; Bordo and Schwartz 1999 *Journal of International Money and Finance* 701.

⁶⁸³ Technical Committee of the International Organization of Securities Commissions *Principles Regarding Cross-Border Supervisory Cooperation* 2010 4; see related comments by Nesadurai HES “Finance Ministers and Central Banks in East Asian Financial Cooperation” 76; Neely 2008 *Journal of International Money and Finance* 9; Domingue 2006 *Journal of International Money and Finance* 1065; Bordo and Schwartz 1999 *Journal of International Money and Finance* 701.

⁶⁸⁴ See related comments by Harold J “International Cooperation and Central Banks” 2013 *Centre for International Governance Innovation* 1, 28. Technical Committee of the International Organization of Securities Commissions *Principles Regarding Cross-Border Supervisory Cooperation* 2010 4.

financial markets so as to protect global financial stability and market integrity. The IOSCO also provides mechanisms that can be used to foster cooperation and collaboration between central banks and other financial role players to protect, promote, maintain and enhance the integrity of global financial markets. One such measure is concluding MOUs that establish cooperation and collaboration and information sharing arrangements between central banks and other financial role players in its member states.⁶⁸⁵ The FSCA is also a signatory of the IOSCO MMOU for cross-border cooperation to combat financial crime and promote market integrity. It is submitted that South Africa has made considerable efforts to comply with the IOSCO principles and engage in cross-border cooperation and collaboration with its international counterparts. The same can also be said about the UK and Australia as evidenced by the membership of the FCA and the ASIC in the IOSCO. Also, the use of MOUs to establish cooperation, collaboration and information sharing arrangements in South Africa, Australia and the UK show compliance with the IOSCO principles relating to international coordination. Nonetheless, the IOSCO MMOU that was concluded in compliance with the IOSCO Principles for Cooperation in Regulation is not binding on the member states. The researcher submits that this could affect compliance with the IOSCO principles for Cooperation in Regulation and the overall effectiveness of the MMOU regarding cooperation and collaboration between central banks and financial role players. As such, separate measures should be implemented to ensure that the principles are consistently enforced and are legally binding on the member states.

7.2. 3 OECD Best Practice Principles on International Regulatory Co-operation

Having regard to article 5(b) of the OECD's Convention on the Organisation for Economic Cooperation and Development,⁶⁸⁶ the OECD Best Practice Principles on International

⁶⁸⁵ IOSCO MMOU "Cross-border Cooperation" 16 February 2015 <https://www.sc.com.my/development/international/cross-border-co-operation/list-of-iosco-multilateral-mou-signatories> accessed 13 February 2022; Technical Committee of the International Organization of Securities Commissions *Principles Regarding Cross-Border Supervisory Cooperation* 2010 5; Harold J 2013 *Centre for International Governance Innovation* 25; Hong-Bum K "Cooperation and Coordination between the Financial Authorities: A Review of the Experiences of the United Kingdom, Norway, Sweden, and Korea" 2009 *Seoul Journal of Economics* 409, 420.

⁶⁸⁶ Convention on the Organisation for Economic Cooperation and Development 14 December 1960, article 5(b); see related comments by Eatwell J and Taylor L *Global Finance at Risk: The Case for*

Regulatory Cooperation were established to address global financial challenges through effective cooperation and collaboration mechanisms between central banks and other financial role players.⁶⁸⁷ Principle 12 of the OECD Best Practice Principles on International Regulatory Co-operation recommends member states to develop regulatory measures that foster cooperation and collaboration amongst international financial role players to address risks that may threaten global financial stability and market integrity.⁶⁸⁸ In addition, recommendation 3 of the OECD Best Practice Principles on International Regulatory Co-operation to Tackle Global Challenges provides that states should have in place cooperation and collaboration mechanisms between central banks and other financial role players to manage a financial crisis.⁶⁸⁹ This follows the fact that systemic risks that threaten financial stability and/or market integrity require platforms for dialogue on matters of common interest to be resolved.⁶⁹⁰ For example, the recent corona-virus disease of 2019 (COVID-19) pandemic and the climate change challenges have threatened global financial stability and market integrity and there is a need for coordinated resolutions. In this regard, principle 3 of the Best Practice Principles on International Regulatory Co-operation recommends domestic and international cooperation and collaboration regulations that enable central banks and other financial

International Regulation (WW Norton and Co New York 2000) 71; Isakssob M and Çelik S “Who Cares? Corporate Governance in Today’s Equity Markets” 2013 *OECD Corporate Governance Working Paper No 8* 1, 8; Armour *et al Principles of Financial Regulation* 572.

⁶⁸⁷ Metzgen Y, Rossi M and Gajdeczka P “International Cooperation for Financial System Stability” in Omotunde E and Johnson G *Financial Risks, Stability and Globalisation* (International Monetary Fund 2002) 489, 491; Abbott K, Kauffmann C and Lee J “The Contribution of Trans-Governmental Networks of Regulators to International Regulatory Co-operation” 2018 *OECD Regulatory Policy Working Papers* 54, 58; Correia de Brito A, Kauffmann C and Pelkmans J “The Contribution of Mutual Recognition to International Regulatory Co-operation” 2016 *OECD Regulatory Policy Working Papers* 24, 28.

⁶⁸⁸ OECD *Best Practice Principles on International Regulatory Co-operation* (the Best Practice Principles) 2021, principle 12; see related comments by Correia de Brito, Kauffmann and Pelmans 2016 *OECD Regulatory Policy Working Papers* 26; Abbott, Kaufmann and Lee 2018 *OECD Regulatory Policy Working Papers* 56.

⁶⁸⁹ Principle 12 of the *Best Practice Principles*; see related comments by Ostry JD and Ghosh AR “Obstacles to International Policy Coordination, and How to Overcome Them” December 2013 www.imf.org/external/pubs/ft/sdn/2013/sdn1311.pdf accessed 21 February 2022.

⁶⁹⁰ Recommendation 3 of the OECD Best Practice Principles on International Regulatory Co-operation to Tackle Global Challenges; Armour *et al Principles of Financial Regulation* 895; see related comments by Slaughter AM *A New World Order* (Princeton UP 2004) 53; Nolle DE “Who’s in Charge of Fixing the World’s Financial System? The Under Appreciated Lead Role of the G20 and the FSB” 2015 *Financial Markets, Institutions and Instruments* 1, 5.

role players to deliberate on measures to curb the effects of systemic risks on the financial sector.⁶⁹¹

In South Africa, there are no express cooperation and collaboration arrangements to manage a financial crisis.⁶⁹² The researcher submits that the lack of domestic arrangements for cooperation and collaboration between the SARB, the FSCA, the PA, the FIC and the NCR contradicts principle 3 of the Best Practice Principles on International Regulatory Co-operation. The researcher concurs with the recommendation that cooperation and collaboration arrangements between central banks and other financial role players are essential for crisis management, therefore they should be effectively regulated at both domestic and international levels. If recommendation 3 of the OECD Best Practice Principles is anything to go by, South Africa should consider the UK example in this regard. In the UK, the BOE, the FCA and the PRA concluded a MOU that establishes domestic arrangements for cooperation and collaboration during financial crises.⁶⁹³ The researcher submits that, prior arrangements to manage a financial crisis enabled the UK to maintain effective cooperation and collaboration between the BOE and other financial role players during the COVID-19 pandemic.⁶⁹⁴ In the same vein, the RBA, the APRA and the ASIC also concluded a MOU that establishes cooperation, collaboration and information sharing arrangements to manage a financial crisis.⁶⁹⁵ The

⁶⁹¹ Metzgen, Rossi and Gajdeczka “International Cooperation for Financial System Stability” 508; Armour *et al Principles of Financial Regulation* 584; Gadinis 2013 *Texas Journal of International Law* 163; Gadinis 2015 *American Journal of International Law* 6.

⁶⁹² Van Niekerk and Van Heerden 2020 *SALJ* 128; see related comments by Qumba 2022 *SALJ* 113; Van Heerden C M, Van Niekerk GM and Huls NJH “Two Takes on Twin Peaks: A Comparative Appraisal of the Models of Financial Regulation in the Netherlands and South Africa” 2020 *THRHR* 491, 510; also see Susskind and Vines 2020 *Oxford Review of Economic Policy Journal* 9.

⁶⁹³ MOU between BOE, FCA and PRA “Memorandum of Understanding between the Financial Conduct Authority and the Bank of England, including the Prudential Regulation Authority” March 2015, para 28-34; Section 3E of the *Financial Services Act*; Georgosouli A “The FCA–PRA Coordination Scheme and the Challenge of Policy Coherence” 2012 *Capital Markets Law Journal* 62, 71; Qumba 2022 *SALJ* 84.

⁶⁹⁴ See related comments by Bank of England “The UK Economy during Covid-19: Insights from the Bank of England’s Citizens’ Panels” 2021 *England’s Citizens Panel* 1; Akhtaruzzaman, Boubaker and Sensoy 2021 *Finance Research Letters* 3; Susskind and Vines 2020 *Oxford Review of Economic Policy Journal* 9.

⁶⁹⁵ See related comments by Van Niekerk and Van Heerden 2020 *SALJ* 139; Metzgen, Rossi and Gajdeczka “International Cooperation for Financial System Stability” 508; Caldara D, Conlisk S, Iacoviello M and Penn M “The Effect of the War in Ukraine on Global Activity and Inflation” 27 May 2022 <https://www.federalreserve.gov/econres/notes/feds-notes/the-effect-of-the-war-in-ukraine-on-global-activity-and-inflation-20220527.html> accessed 10 October 2022; Caldara D and

arrangements established in this MOU facilitated effective cooperation and collaboration between the RBA, the APRA and the ASIC to promote and maintain financial stability and market integrity during the COVID-19 pandemic and the Russo-Ukrainian war which threatened the integrity of financial markets. Accordingly, the researcher submits that the SARB and other financial role players such as the FSCA, the PA, the FIC and the NCR in South Africa should also establish cooperation and collaboration arrangements to manage a financial crisis in line with the OECD Best Practice Principles on International Regulatory Co-operation.

OECD Best Practice Principles on International Regulatory Co-operation provide general guidance for cross-border cooperation and collaboration between central banks and other financial role players to resolve global financial challenges that threaten market integrity and financial stability. The OECD Best Practice Principles on International Regulatory Co-operation do not create legally binding obligations on its signatories. As such, it remains at the discretion of the OECD member to integrate the principles into their domestic laws and policies to create binding obligations on the respective central banks and financial role players. Therefore, OECD member states should be encouraged to ratify the OECD Best Practice Principles on International Regulatory Cooperation and incorporate them into their domestic laws for consistent compliance.

7.2. 4 IAIS Insurance Core Principles – Supervisory Cooperation and Coordination Principle

ICP 25 of the IAIS Insurance Core Principles (IAIS-ICPs) is the Supervisory Cooperation and Coordination principle which provides that financial institutions and financial role players should cooperate, collaborate and share information with relevant cross-border financial role players to protect, promote, maintain and enhance global financial market integrity.⁶⁹⁶ Although the IAIS ICPs are based on insurance institutions, ICP 25.1 provides

Iacoviello M “Measuring Geopolitical Risk” 2022 *American Economic Review* 1194, 1196; Reserve Bank of Australia “Financial Stability Review – April 2022: Domestic Regulatory Developments” April 2022 <https://www.rba.gov.au/publications/fsr/2022/apr/regulatory-developments.html> accessed 9 October 2022.

⁶⁹⁶ See ICP 25 of the IAIS ICPs; International Association of Insurance Supervisors “Insurance Core Principles and Common Framework for the Supervision of Internationally Active Insurance Groups”

that financial role players, including central banks and market conduct regulators, should coordinate and share information on all matters that may affect market integrity.⁶⁹⁷ In this regard, the IAIS member states, including South Africa, the UK and Australia concluded a MOU that outlines cross-border cooperation, coordination and information sharing arrangements amongst relevant financial role players to promote market integrity.⁶⁹⁸ Essentially, the IAIS-ICPs acknowledge that the cooperation and collaboration arrangements under the IAIS MOU do not oblige member states to make joint decisions with the other parties.⁶⁹⁹ The MOUs can be viewed as arrangements amongst member states, to facilitate and monitor information sharing arrangements whilst fulfilling their roles and functions. Also, the information shared between cross-border financial institutions should remain confidential and may not be shared with other organisations or third parties.

The Supervisory Cooperation and Coordination principle of the IAIS ICPs also recommends the establishment of coordination supervisors to foster and enforce cooperation and collaboration amongst financial role players to promote integrity in the global financial markets.⁷⁰⁰ The mandates of the supervisor include leading cooperation and collaboration between financial role players and also facilitating information sharing.⁷⁰¹ The researcher submits that South Africa has made considerable efforts to

www.iaisweb.org accessed 1 April 2022; see related comments by Hong-Bum 2009 *Seoul Journal of Economics* 420; Harold J 2013 *Centre for International Governance Innovation* 25.

⁶⁹⁷ See ICP 25, para 25.0.1 of the IAIS ICPs; see related comments by Aziz JI and Shin HS *Global Shock, Risks, and Asian Financial Reform* (Edward Elgar 2014) 343; see related comments by Gordon JN and Ringe WG “Bank Resolution in the European Banking Union: A Transatlantic Perspective on What it Would Take” 2015 *Columbia Law Review* 1297, 1308.

⁶⁹⁸ IAIS “IAIS Multilateral Memorandum of Understanding on Cooperation and Information Exchange” (IAIS MMoU) updated 18 May 2022; International Association of Insurance Supervisors “Insurance Core Principles and Common Framework for the Supervision of Internationally Active Insurance Groups” 379; also see related discussion by Armour *et al Principles of Financial Regulation* 584; Gordon and Ringe 2015 *Columbia Law Review* 1305.

⁶⁹⁹ ICP 25.8 of the IAIS; Hong-Bum 2009 *Seoul Journal of Economics* 412; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 119; Lastra *International Financial and Monetary Law* 365.

⁷⁰⁰ See ICP 25 of the IAIS ICPs, para 25.0.3; see related comments by Metzgen, Rossi and Gajdeczka “International Cooperation for Financial System Stability” 508; Armour *et al Principles of Financial Regulation* 584; Gordon and Ringe 2015 *Columbia Law Review* 1305; Metzgen Y, Rossi M and Gajdeczka P “International Cooperation for Financial System Stability” in Omotunde E and Johnson G *Financial Risks, Stability and Globalisation* (International Monetary Fund 2002) 489, 492.

⁷⁰¹ ICP 25.0.3 of the IAIS; see related comments by Colaerts V “European Banking, Securities and Insurance Law: Cutting through Sectoral Lines?” 2015 *Common Market Law Review* 1579, 1584;

incorporate ICP 25. The *FSR Act* establishes several bodies to facilitate cooperation and collaboration between the SARB and other financial role players such as the PA, the FSCA, the FIC, the NCR and relevant cabinet Ministers.⁷⁰² However, the IAIS does not specify the number of coordination supervisors or bodies that are adequate for this purpose. The researcher cautions against having many committees with seemingly overlapping tasks to prevent overlaps and blurred boundaries between central banks and other financial role players.⁷⁰³ In the same context, Australia established a coordinating body to monitor and facilitate cooperation and collaboration between the RBA, the APRA, the ASIC and other financial role players.⁷⁰⁴ However, the same cannot be said about the UK as there is no entity established to facilitate or supervise cooperation and collaboration between the BOE and other financial role players.⁷⁰⁵ The researcher submits that the Australian position is preferred in this regard, thus, the establishment of an overarching coordinating body to facilitate, oversee and enforce cooperation and collaboration between the central bank and other financial role players. The coordinating bodies promote the effectiveness of cooperation and collaboration between central banks and other financial role players by creating a platform for regular meetings to discuss, consult and make decisions regarding matters of common interest.

Hadjiemmanuil C “Financial Stability and Integration in the Banking Union” in Allen F, Carletti E and Gray J (eds) *The New Financial Architecture in the Eurozone* (European University Institute 2015) 55, 72–3; Aziz and Shin *Global Shock, Risks, and Asian Financial Reform* 345.

⁷⁰² Sections 29, 59 and 88 of the *FSR Act*; Schmulow A “Financial Regulatory Governance in South Africa: The Move towards Twin Peaks” 2017 *African Journal of International and Comparative Law* 393, 410; Godwin and Schmulow 2015 *SALJ* 761; Schmulow A “Who Will be Doing What under the South Africa’s New Twin Peaks” 2018 <https://theconversation.com/explainer-who-will-be-doing-what-under-south-africas-newtwin-peaks-model-96191> accessed 17 July 2022.

⁷⁰³ See related comments by Van Niekerk and Van Heerden 2020 *SALJ* 115; Jensen and Kingston 2010 *Butterworths Journal of International Banking and Financial Law* 549; Qumba 2022 *SALJ* 76; Schmulow 2017 *African Journal of International and Comparative Law* 410;

⁷⁰⁴ North G and Wilson T “Has the Australian Prudential Regulation Authority Done Enough to Meet its Legislated Objectives and Prepare Australia for the Next Financial Crisis?” 2020 *University of New South Wales Law Journal* 552, 563; Godwin and Schmulow 2015 *SALJ* 761; Harper RI “The Wallis Report: An Overview” 2002 *The Australian Economic Review* 288, 293; Godwin A, Howse T and Ramsay I “A Jurisdictional Comparison of the Twin Peaks Model of Financial Regulation” 2017 *Journal of Banking Regulation* 103, 110.

⁷⁰⁵ Lui A “Single or Twin? The UK Financial Regulatory Landscape after the Financial Crisis of 2007-2009” 2012 *Journal of Banking Regulation* 24, 33; Hong-Bum K “Cooperation and Coordination between the Financial Authorities: A Review of the Experiences of the United Kingdom, Norway, Sweden, and Korea” 2009 *Seoul Journal of Economics* 409, 421; Georgosouli A “The FCA, the PRA and the Idea of Resilience as a Narrative for Policy Coherence” 2012 *SSRN Working Paper Series* 5; 17.

In addition, the IAIS Supervisory Cooperation and Coordination principle also states that there should be cooperation and collaboration mechanisms between financial role players during financial crises.⁷⁰⁶ Like the OECD Best Practice Principles on International Regulatory Cooperation, the IAIS also emphasises the importance of cooperation and collaboration between central banks and other financial role players to resolve financial crises.⁷⁰⁷ Such cooperation and collaboration also include sharing all relevant information as soon as one institution becomes aware of a systemic risk threatening market integrity. As mentioned earlier in this chapter, there is a lack of cooperation and collaboration arrangements between the SARB and other financial role players for crisis management in South Africa. Therefore, the researcher submits that there is a need for arrangements to incorporate this recommendation in South Africa. The main purpose of cooperation and collaboration during a crisis is to create a platform for member states to analyse, discuss and resolve the systemic event, cooperatively.⁷⁰⁸ South Africa should enhance the cooperation and collaboration between the SARB and other financial role players by incorporating the IAIS Supervisory Cooperation and Coordination principle for crisis management. Recommendations regarding the coordinating body are discussed in detail in chapter 9 of this thesis.

7.2.5 FATF Recommendations – International Cooperation Standards

The FATF recommendations are international standards that were established to curb financial crimes such as money laundering and the financing of terrorism.⁷⁰⁹ The FATF

⁷⁰⁶ ICP 25.8 of the IAIS; see related comments by Brown G and Susskind D “International Cooperation during the COVID-19 Pandemic” 2020 *Oxford Review of Financial Policy Journal* 64, 71; Susskind D and Vines D “The Economics of the COVID-19 Pandemic: An Assessment” 2020 *Oxford Review of Economic Policy Journal* 1, 9; Lui 2012 *Journal of Banking Regulation* 115.

⁷⁰⁷ Recommendation 3 of the OECD Best Practice Principles on International Regulatory Co-operation to Tackle Global Challenges; Armour et al *Principles of Financial Regulation* 895; see related comments by Slaughter *A New World Order* 53; Nolle 2015 *Financial Markets, Institutions and Instruments* 5; Susskind and Vines 2020 *Oxford Review of Economic Policy Journal* 9.

⁷⁰⁸ See ICP 25.8.1 of the IAIS; see related comments by Kahn RB and Meade EE “International Aspects of Central Banking: Diplomacy and Coordination” in Conti-Brown P and Lastra RM (eds) *Research Handbook on Central Banking* (Edward Elgar Publishing 2018) 333, 340; Neely C “Central Bank Authorities Beliefs about Foreign Exchange Market Intervention” 2008 *Journal of International Money and Finance* 1, 17;

⁷⁰⁹ FATF “International Standards on Combating Money Laundering and the Financing of Terrorism and Proliferation” updated March 2022 (The FATF Recommendations); Omar N and Johari ZA “An International Analysis of FATF Recommendations and Compliance by DNFBS” 2015 *Procedia Economics and Finance* 14, 20; De Koker L “The 2012 Revised FATF Recommendations:

established recommendations on international cooperation which state that countries should establish measures to cooperate and coordinate in order to assess and mitigate money laundering.⁷¹⁰ The prevention and detection of money laundering and other financial crimes promote and protect the integrity and fairness of financial markets. As such, the FATF recommends standards to guide central banks and other financial institutions to cooperate and collaborate in order to detect, report, prevent and share information regarding suspected money laundering activities. International cooperation according to the FATF standards entails that central banks and cross-border financial role players should coordinate by sharing information on matters of common interest and central banks should avail resources required to facilitate the mitigation of money laundering and the financing of terrorism.⁷¹¹ This implies that central banks and other financial role players should cooperate and collaborate in detecting, investigating and combating money laundering which threatens the integrity of financial markets and financial stability.

According to the FATF international cooperation standards, countries should implement effective mechanisms which enable financial role players and other relevant authorities to cooperate and collaborate domestically to combat money laundering.⁷¹² In South Africa, the FIC has the primary mandate of detecting, identifying and implementing measures to combat money laundering and terrorist financing activities.⁷¹³ In this regard,

⁷¹⁰ Assessing and Mitigating Mobile Money Integrity Risks within the New Standards Framework” 2015 *Washington Journal of Law, Technology and Arts* 165, 166; Stessens G “The FATF ‘Black List’ of -Cooperative Countries or Territories” 2004 *Leiden Journal of International Law* 199, 201.

⁷¹¹ Recommendation 31 of the FATF Recommendations; Stessens 2004 *Leiden Journal of International Law* 201; see related comments by Ennis J “Cleaning up the Beaches: The Caribbean Response to FATF’s Review to Identify Non-Cooperative Countries or Territories” 2002 *Law and Business Review of the Americas* 637, 639; Johnson J “Blacklisting: Initial Reactions, Responses and Repercussions” 2001 *Journal of Money Laundering Control* 211, 215.

⁷¹² Recommendation 31 of the FATF Recommendations; see related comments by Omar and Johari 2015 *Procedia Economics and Finance* 20; Johnson 2001 *Journal of Money Laundering Control* 215; Stessens 2004 *Leiden Journal of International Law* 201.

⁷¹³ Recommendation 31 of the FATF Recommendations; see related comments by Papadia F “Central Bank Cooperation during the Great Recession” 2013 *Bruegel Policy Contribution* 35, 36; Cecchetti 2011 *Bank for International Settlements* 1, 3.

⁷¹³ *Financial Intelligence Centre Act 38 of 2001 (FICA)*, sections 2-3; see related discussion by Chitimira H “An Exploration of the Current Regulatory Aspects of Money Laundering in South Africa” 2021 *Journal of Money Laundering Control* 789, 793; Njotini MN “The Transaction or Activity Monitoring Process: An Analysis of the Customer Due Diligence Systems of the United Kingdom and South Africa” 2000 *Obiter* 556, 568; De Koker L “Client Identification and Money Laundering Control: Perspectives on the Financial Intelligence Centre Act 38 of 2001” 2004 *TSAR* 715, 718;

the *FSR Act* provides that the FIC should cooperate and collaborate with other financial role players such as the SARB, the PA, the FSCA and the NCR to fulfil its mandates.⁷¹⁴ The researcher submits that the requirement to cooperate and collaborate under the *FSR Act* shows compliance with the FATF international cooperation standards.⁷¹⁵ To fulfil this requirement, the FIC has concluded an MOU with the SARB and the PA, to establish cooperation and collaboration arrangements to fulfil its mandates.⁷¹⁶ The purpose of the MOU between the FIC and the SARB and the PA is to express agreement to cooperate, collaborate, assist each other and share relevant information regarding their regulatory mandates.⁷¹⁷ Interesting to note is that the FIC, the SARB and the PA also agree to cooperate and collaborate to implement relevant international best practices, including the FATF Recommendations.⁷¹⁸ Accordingly, it can be alluded that although compliance and effectiveness of the cooperation and collaboration arrangements between the FIC, the SARB and the PA are yet to be seen, South Africa can be applauded for its efforts to comply with the FATF standards. In Australia, the RBA and the ASIC concluded an MOU which establishes that the RBA and the ASIC will proactively share information relating to potential threats to market integrity and financial stability. In the UK, the BOE, the FPC, the PRA and the FCA also concluded an MOU to detect, investigate and share information relating to financial crime such as money laundering with each other. Although the FATF standards are non-binding, South Africa, the UK and Australia have implemented the

De Koker L “Money Laundering Control: The South African Model” 2003 *Journal of Money Laundering Control* 165, 166.

⁷¹⁴ See section 76(2) of the *FSR Act*; section 40(1)(F) of the *FICA*; see related comments by Van Niekerk and Van Heerden 2020 *SALJ* 153; Qumba 2022 *SALJ* 85; West K “The Financial Intelligence Centre Amendment Act: The Dawn of a New Era” *Without Prejudice* (1 April 2019) 9.

⁷¹⁵ Section 26 and 76 of the *FSR Act*; recommendation 31 of the FATF Recommendations; Godwin and Schmulow 2015 *SALJ* 759; Schmulow 2017 *African Journal of International and Comparative Law* 393; Godwin, Howse and Ramsay 2017 *SALJ* 670.

⁷¹⁶ Memorandum of Understanding “The Financial Intelligence Centre and the South African Reserve Bank & the Prudential Authority” 2018; sections 40(3) and 45(1D) of the *FICA*; sections 27, 77, 251(3)(e) of the *FSR Act*.

⁷¹⁷ Para 5.1 of the Memorandum of Understanding “The Financial Intelligence Centre and the South African Reserve Bank and the Prudential Authority” 2018.

⁷¹⁸ Para 5.5 of the Memorandum of Understanding “The Financial Intelligence Centre and the South African Reserve Bank and the Prudential Authority” 2018.

FATF international cooperation standards in their domestic laws, which are legally binding.⁷¹⁹

In addition, chapter 8 of the Protocol on Finance and Investment was influenced by the FATF recommendations.⁷²⁰ The Protocol on Finance and Investment is a regional set of standards that was ratified to promote the cooperation and collaboration of regional financial role players to combat money laundering in Africa.⁷²¹ Article 5 of the Protocol on Finance and Investment provides that member states should coordinate and share information relating to matters of common interest such as combating money laundering to promote market integrity.⁷²² In this regard, the FIC is required to share information with foreign financial institutions to curb financial crime and promote market integrity in Africa. The researcher submits that regional cooperation and collaboration arrangements play a significant role in the harmonisation of policies and laws that regulate the safety and soundness of the financial markets. In light of this context, it can be said that ratification of the Protocol on Finance and Investment by South Africa fosters effective cooperation and collaboration between the FIC and other regional financial role players to curb financial crime and promote market integrity.

7.3 The Participation of South Africa in Selected Regional Organisations to Promote Cross-Border Cooperation and Collaboration between Central Banks and other Financial Role Players in the African Region

There are no international best practices for cooperation and collaboration between central banks and other financial role players specifically designed for African developing countries. However, several organisations have been established to promote cross-border cooperation and collaboration between central banks and other financial role

⁷¹⁹ Section 26 and 76 of the *FSR Act*, section 6 of the *Financial Services Act*, section 10A of the *APRA Act*.

⁷²⁰ Annexure 12 Anti-Money Laundering to the Protocol on Finance and Investment; see related comments by Schooner HM and Taylor M “United Kingdom and United States Responses to the Regulatory Challenges of Modern Financial Markets” 2003 *Texas International Law Journal* 317, 327-29; also see De Koker 2003 *Journal of Money Laundering Control* 169.

⁷²¹ See article 2 of the Protocol on Finance and Investment; see related comments by De Koker 2004 *TSAR* 730; De Koker 2003 *Journal of Money Laundering Control* 169.

⁷²² See article 5(2) of the Protocol on Finance and Investment; see related comments by Schooner and Taylor 2003 *Texas International Law Journal* 320; Hong-bum 2009 *Seoul Journal of Economics* 412; Stessens 2004 *Leiden Journal of International Law* 201.

players to promote financial stability and enhance market integrity in Africa. In this regard, the SARB, the PA and the FSCA have taken initiatives to participate in some regional organisations to promote cooperation and collaboration between central banks and cross-border financial role players to protect and maintain financial stability and market integrity in Africa.⁷²³ Some of the organisations include the Committee of Insurance, Securities and Non-Banking Financial Authorities (CISNA), the Community of African Banking Supervisors (CABS) and the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG).

The CABS was established to create a platform for member states to share information amongst regional central banks and other banking institutions to enhance financial stability in Africa.⁷²⁴ The PA chairs the Working Group on Cross-border Banking Supervision under the CABS.⁷²⁵ The participatory role played by the PA signifies the efforts made by the South African authorities to cooperate and collaborate with other regional financial role players to promote global financial stability and market integrity.

In addition, the PA and the FSCA also actively participate in fostering cooperation and collaboration amongst financial role players in the SADC region through their membership in CISNA. CISNA is a regional international organisation that promotes financial stability and market integrity in the SADC region through cooperation and collaboration between cross-border financial role players.⁷²⁶ The PA is tasked with ensuring the cooperation and

⁷²³ Soderbaum F *Handbook of Regional Organisations in Africa* (Gotab Sweden 1996) 14; see related comments by Kondo T “A Comparison with Analysis of the SADC FIP before and after Its Amendment” 2017 *PER/PELJ* 1, 8; also see Stessens 2004 *Leiden Journal of International Law* 201.

⁷²⁴ Prudential Authority “Participation in International Forums” 2019 <https://www.resbank.co.za/en/home/what-we-do/Prudentialregulation/participation-in-international-forums> accessed 5 August 2022; Jones E “The Adoption and the Implementation of Basel II and III in Developing Countries” 2019 <https://www.geg.ox.ac.uk/news/emily-jones-presents-research-community-african-banking-supervisors> accessed 28 July 2022; see related comments by Soderbaum *Handbook of Regional Organisations in Africa* 10.

⁷²⁵ Kondo 2017 *PER/PELJ* 9; see related comments by Soderbaum *Handbook of Regional Organisations in Africa* 54; Woolfrey S “Is an Overhaul of the SADC Protocol on Finance and Investment Imminent?” 2014 <https://www.tralac.org/discussions/article/5358-is-an-overhaul-of-the-sadc-protocol-on-finance-and-investment-imminent.html> accessed 26 November 2021.

⁷²⁶ See related comments by Soderbaum *Handbook of Regional Organisations in Africa* 8; Beck T, Fuchs M, Singer D and Makaio W *Making Cross-border Banking Work for Africa* (Eschborn Germany 2014) 75; Born A and Mathieu PH “Continental Reach: African Banking Groups are Expanding Across the Region, Challenging Traditional Players and Supervisors” 2015 *Finance and Development* 52, 55.

collaboration of prudential regulators on all matters of common interest and sharing information regarding potential systemic risks that may threaten financial stability and market integrity.⁷²⁷ Notably, the role played by the PA in CISNA fosters regional cooperation and collaboration between regional financial role players in promoting regional financial stability.

The researcher submits that although there are no express regional guidelines and practices to foster cooperation and collaboration between central banks and other financial role players, several mechanisms and organisations have been established to promote cooperation and collaboration between central banks and other financial institutions in Africa.⁷²⁸ There is a need for African organisations to establish cooperation and collaboration standards between central banks and other financial role players as a measure to protect, promote and enhance financial stability and market integrity in Africa. This will promote regional financial stability and market integrity through high-level coordination and information sharing arrangements to prevent systemic risks and curb financial crime in Africa.⁷²⁹ The cooperation and collaboration of central banks is an immutable aspect of safeguarding regional financial stability and market integrity.⁷³⁰ Therefore, it is important for member states to develop policies and laws that promote cooperation and collaboration of financial role players in Africa. It is highly probable that countries in the same region are exposed to similar systemic risks and consequently

⁷²⁷ See Beck, Fuchs, Singer and Makaio *Making Cross-border Banking Work for Africa* 75; also see Born and Mathieu 2015 *Finance and Development* 52; see related comments by Woolfrey "Is an Overhaul of the SADC Protocol on Finance and Investment Imminent?" Page Anon.

⁷²⁸ Kondo 2017 *PER/PELJ* 9; Fuchs, Singer and Makaio *Making Cross-border Banking Work for Africa* 11; Soderbaum *Handbook of Regional Organisations in Africa* 7; Born and Mathieu 2015 *Finance and Development* 52.

⁷²⁹ Beck, Fuchs, Singer and Makaio *Making Cross-border Banking Work for Africa* 75; also see Born and Mathieu 2015 *Finance and Development* 52; see related comments by Woolfrey "Is an Overhaul of the SADC Protocol on Finance and Investment Imminent?" Page Anon.

⁷³⁰ See related comments by Van Niekerk and Van Heerden 2020 *SALJ* 110; Godwin A and Ramsay I "Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation" 2015 *Journal of Banking and Finance Law and Practice* 240, 252; Jensen A and Kingston M "The Australian 'Twin Peaks' Framework of Financial System Regulation: Australia and UK Compared" 2010 *Journal of International Banking and Financial Law* 548, 549.

important for financial role players to actively collaborate and share information with each other to manage systemic risks and financial crises.⁷³¹

7.4 Cooperation and Collaboration between the Central Banks and other Financial Role Players during the COVID-19 Global Pandemic

Several international bodies convened to deliberate on mechanisms to alleviate the effects of the COVID-19 pandemic on financial stability and market integrity. The G-20 became a forum for central banks and other financial role players to collaborate and share financial policy measures to curb the effects of the pandemic on global stability.⁷³² The member states of the G-20 agreed on an action plan to protect, promote and enhance financial stability and market integrity through international cooperation and collaboration.⁷³³

During the COVID-19 pandemic, the FSB played a significant role by creating a platform for financial role players to share information and implement policy measures to promote financial stability and market integrity.⁷³⁴ The FSB also compiled reports from time to time to update its member states on the effects of the pandemic and possible measures to protect global financial stability and manage the impact of the pandemic.⁷³⁵ It can also be said that the FSB provided a platform for central banks to share information regarding policy responses and the economic recovery post the pandemic.⁷³⁶ On the other hand,

⁷³¹ Kondo 2017 *PER/PELJ* 9; Fuchs, Singer and Makaio *Making Cross-border Banking Work for Africa* 11; Soderbaum *Handbook of Regional Organisations in Africa* 7; Born and Mathieu 2015 *Finance and Development* 52.

⁷³² Reserve Bank of Australia 2021 *RBA Annual Report* 3; see related comments by Borio, Farag and Tarashev 2020 *BIS Working Paper* 48; Satragno L *Monetary Stability as a Common Concern in International Law* 98.

⁷³³ Reserve Bank of Australia 2021 *RBA Annual Report* 3; see related comments by Borio, Farag and Tarashev 2020 *BIS Working Paper* 48; Satragno L *Monetary Stability as a Common Concern in International Law* 98.

⁷³⁴ Reserve Bank of Australia 2021 *RBA Annual Report* 32; Satragno L *Monetary Stability as a Common Concern in International Law* 121; See related comments by Bordo and Schwartz 1999 *Journal of International Money and Finance* 698; Dominguez K "When Do Central Bank Interventions Influence Intra Daily and Long-Term Exchange Rate Movements?" 2006 *Journal of International Money and Finance* 1051, 1063; Holtrop 1957 *De Economist* 645.

⁷³⁵ Reserve Bank of Australia 2021 *RBA Annual Report* 32; ; Satragno L *Monetary Stability as a Common Concern in International Law* 121; Domingues 2006 *Journal of International Money and Finance* 1062; Holtrop 1957 *De Economist* 645.

⁷³⁶ Reserve Bank of Australia 2021 *RBA Annual Report* 32; Satragno L *Monetary Stability as a Common Concern in International Law* 121; Domingues 2006 *Journal of International Money and Finance* 1062; Holtrop 1957 *De Economist* 645.

the BCBS provided guidelines to assist central banks and other banking institutions to manage the financial risks posed by the COVID-19 pandemic.⁷³⁷ The BCBS responded with containment measures such as coordinating prudential regulation in its member states and adjusting banking standards to strengthen resilience.⁷³⁸ The BCBS had an ongoing monitoring task on the risks of the COVID-19 pandemic on the banking sector and provided central banks with relevant information to manage the crisis.⁷³⁹ Accordingly it can be said that, the BCBS ensured that central banks and prudential institutions collaborated and shared information regarding the financial risks of the pandemic in order to promote prudential resilience and prevent regulatory fragmentation.

The researcher submits that, the recent COVID-19 pandemic confirmed the importance of cooperation and collaboration arrangements between central banks and other financial role players during the crisis.⁷⁴⁰ There was an immediate need for coordinated relief and functions to maintain financial stability and market integrity. The OECD Best Practice Principles on International Regulatory Co-operation to Tackle Global Challenges ensured effective cooperation and collaboration between central banks and other financial role players to maintain financial stability and market integrity during the COVID-19 pandemic.⁷⁴¹ In this regard, it can be said that international organisations played an essential role to foster cooperation and collaboration between central banks and other financial role players to promote, protect, maintain and enhance financial stability and market integrity during the COVID-19 pandemic. International best practices on

⁷³⁷ Bank of England 2021 *England's Citizens Panel* 1; Akhtaruzzaman, Boubaker and Sensoy 2021 *Finance Research Letters* 3; Susskind and Vines 2020 *Oxford Review of Economic Policy Journal* 9.

⁷³⁸ Hernández de Cos P "Crossing the Basel III Implementation Line" 3; see related comments by Neely 2008 *Journal of International Money and Finance* 12; Domingue 2006 *Journal of International Money and Finance* 1062; Bordo and Schwartz 1999 *Journal of International Money and Finance* 698.

⁷³⁹ Susskind and Vines 2020 *Oxford Review of Economic Policy Journal* 9; see related comments by Caldara D and Iacoviello M "Measuring Geopolitical Risk" 2022 *American Economic Review* 1194, 1196; Brown and Susskind " 2020 *Oxford Review of Financial Policy Journal* 64, 71.

⁷⁴⁰ Recommendation 3 of the OECD Best Practice Principles on International Regulatory Co-operation to Tackle Global Challenges; Armour *et al* *Principles of Financial Regulation* 895; see related comments by Slaughter *A New World Order* 53; Nolle 2015 *Financial Markets, Institutions and Instruments* 5.

⁷⁴¹ Abbott, Kaufmann and Lee 2018 *OECD Regulatory Policy Working Papers* 56. Principle 12 of the *Best Practice Principles*; see related comments by Ostry and Ghosh "Obstacles to International Policy Coordination, and How to Overcome Them" December 2013 www.imf.org/external/pubs/ft/sdn/2013/sdn1311.pdf accessed 21 February 2022.

cooperation and collaboration between central banks and financial regulators were actively implemented to protect financial stability and market integrity to curb the effects of the COVID-19 pandemic on financial stability and market integrity.

7.5 Conclusion

International best practices on cooperation and collaboration between central banks and other financial role players refer to the widely accepted international standards and principles relating to cross-border coordination between central banks and other financial role players.⁷⁴² The international best practices discussed in this chapter demonstrate the importance of effective cooperation and collaboration between central banks and other financial role players to promote global financial stability and market integrity.⁷⁴³ Cross-border coordination is essential for detecting, investigating and preventing financial market misconduct that threatens financial stability and market integrity. The BCBS, the IAIS, the FATF, the OECD and the IOSCO have established widely accepted international standards to foster international cooperation and collaboration between the central banks and other financial role players. However, the effectiveness of these standards differs from country to country depending on the domestic laws and policies that give effect to these international standards. In this regard, it becomes difficult to determine the adequacy and effectiveness of the international best practices on cooperation and collaboration between central banks and cross-border financial role players. This also follows the fact that the international best practices discussed in this chapter are not legally binding and do not create any legal obligations on the member states.

Accordingly, the researcher submits that there should be legally binding international best practices to regulate cooperation and collaboration between central banks and cross-border financial role players. Cross-border coordination is essential to prevent and manage the risks caused by global financial crises. Therefore, relevant measures should be taken to ensure that central banks and cross-border financial role players cooperate and collaborate to manage the risks. The researcher also submits that international

⁷⁴² Lee 2000 *Annual Review of Banking Law* 536; Rogers *Basel III and Global Cooperation: Where do we go from Here?*; Hossain and Kryzanowski 2019 *Managerial Finance Journal* 910.

⁷⁴³ See paragraph 7.2 of this chapter.

bodies such as the FSB should be empowered to facilitate and review cross-border cooperation and collaboration between central banks and other financial role players to ensure its adequacy and effectiveness to promote global financial stability and market integrity. The researcher acknowledges that although it is difficult or probably impossible to enact universal policies or laws to foster cooperation and collaboration between central banks and other financial role players, establishing binding international standards could be useful.

The next chapter is a comparative discussion on the regulation of cooperation and collaboration between central banks and other role players to protect, promote, maintain and enhance financial stability and market integrity in South Africa, the UK and Australia. The purpose of this comparative discussion is to draw lessons and recommend relevant measures for South Africa to ensure a robust regulatory framework for cooperation and collaboration between the SARB and other financial role players to promote, protect, maintain and enhance financial stability and market integrity.

CHAPTER EIGHT

OVERALL COMPARATIVE ANALYSIS OF THE COOPERATION AND COLLABORATION BETWEEN CENTRAL BANKS AND OTHER FINANCIAL ROLE PLAYERS

8.1 Introduction

The previous chapters discussed cooperation and collaboration mechanisms between central banks and other financial role players in South Africa, Australia and the United Kingdom (UK).⁷⁴⁴ What is common in the three jurisdictions is that cooperation and collaboration between the central banks and other financial role players are aimed at protecting, promoting, maintaining and enhancing financial stability and market integrity.⁷⁴⁵ However, the regulation and implementation of cooperation and collaboration measures between central banks and other financial role players in these jurisdictions differ.⁷⁴⁶ This follows the fact that each jurisdiction has its own unique and distinct needs with regard to regulatory coordination in the financial sector.⁷⁴⁷ This chapter provides a comparative analysis of the cooperation and collaboration between central banks and other financial role players to promote financial stability and market integrity in South Africa, Australia and the UK. This is done to determine whether the regulation of cooperation and collaboration between the central bank and other financial role players

⁷⁴⁴ See chapters 3, 5 and 6 of this thesis.

⁷⁴⁵ See related comments by Qumba MF “A Comparative Analysis of the Twin Peaks Model of Financial Regulation in South Africa and the United Kingdom” 2022 *SALJ* 78, 92; Kavlak Law Firm “Turkey: Twin Peaks Approach To Financial Regulation” 2019 *Mondaq* 3, 3; Huang RH and Shoenmaker D “Institutional structure of Financial Regulation: Theories and International Experiences” 2015 *Routledge* 254, 255; Lui A “Single or Twin? The UK Financial Regulatory Landscape after the Financial Crisis of 2007- 2009” 2012 *Journal of Banking Regulation* 24, 28.

⁷⁴⁶ Hong-Bum K “Cooperation and Coordination between the Financial Authorities: A Review of the Experiences of the United Kingdom, Norway, Sweden, and Korea” 2009 *Seoul Journal of Economics* 409, 411; Jensen A and Kingston M “Australian “Twin Peaks” Framework of Financial System Regulation: Australia and UK Compared” 2010 *Butterworths Journal of International Banking and Financial Law* 545, 546; Qumba 2022 *SALJ* 79; Godwin A, Li G, Ramsay I “Is Australia’s Twin Peaks System of Financial Regulation a Model for China (Part 2)” 2016 *Hong Kong Law Journal* 935, 938.

⁷⁴⁷ Qumba 2022 *SALJ* 79; Doumpos M, Gaganis C and Pasiouras F “Central Bank Independence, Financial Supervision Structure and Bank Soundness: An Empirical Analysis around the Crisis” 2015 *Journal of Banking and Finance* 69, 74; Lui 2012 *Journal of Banking Regulation* 28; Botha E and Makina D “Financial Regulation and Supervision: Theory and Practice in South Africa” 2011 *International Business and Economics Research Journal* 27, 29; Osode PC “Two Heads are Better than One: Assessing South Africa’s ‘Twin Peaks’ Financial Regulation Model” 2021 *Interdisciplinary Journal of Economics and Business Law* 9, 12;

in the selected jurisdictions is robust enough to promote, protect, maintain and enhance financial stability and market integrity.

8.2 Overall Analysis of the Positioning of the Prudential Regulator in South Africa, the UK and Australia

The main purpose of a prudential regulator is the micro-prudential regulation of banking institutions.⁷⁴⁸ The prudential regulator promotes and enhances the safety and soundness of financial institutions by setting standards that financial institutions should adhere to in order to prevent systemic risks that threaten financial stability.⁷⁴⁹ The positioning of the prudential regulator is crucial to avoid conflicts of interest between the central bank as the macro-prudential regulator and the prudential regulator.⁷⁵⁰ The independence of the prudential regulator should be well established to ensure effective coordination with other financial regulators.⁷⁵¹ The UK, Australia and South Africa reveal three different options. Thus:

- a. the prudential regulator as an entirely different and separate entity, outside the central bank;
- b. the prudential regulator housed by the central banks; and
- c. the prudential regulator as a subsidiary of the central bank.

⁷⁴⁸ Section 32 of the *FSR Act*; section 8 of the *APRA Act*; section 136 of the *ASIC Act*; see related comments by Pellegrinaa D, Masciandaroc D and Pansini R “The Central Banker as Prudential Supervisor: Does Independence Matter?” 2013 *Journal of Financial Stability* 415, 416; Thompson D and Abbott M “Australian Financial Prudential Supervision: An Historical View” 2000 *Australian Journal of Public Administration* 75, 77.

⁷⁴⁹ Wallis Inquiry, see <http://fsi.treasury.gov.au/content/downloads/FinalReport/overview.pdf> (the “Wallis Report”) accessed on 13 November 2021; Van Heerden C and Van Niekerk G “Twin Peaks in South Africa: A New Role for the Central Bank” 2017 *Law and Financial Markets Review* 154, 161; Ferran E “The Reorganisation of Financial Services Supervision in the UK: An Interim Progress Report” 2011 *University of Cambridge Faculty of Law Research Paper* 12, 15.

⁷⁵⁰ Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 110; Pellegrinaa, Masciandaroc and Pansini 2013 *Journal of Financial Stability* 419; Thompson and Abott 2000 *Australian Journal of Public Administration* 77; Noia C and Giorgio G “Should Banking Supervision and Monetary Policy Tasks be Given to Different Agencies?” 1999 *International Finance* 361, 367.

⁷⁵¹ Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 110; Pellegrinaa, Masciandaroc and Pansini 2013 *Journal of Financial Stability* 419; Thompson and Abott 2000 *Australian Journal of Public Administration* 77; Noia and Giorgio 1999 *International Finance* 367.

Australia adopted the first approach, thus setting the prudential regulator as an entity different from and outside of the central bank.⁷⁵² The APRA is established as a corporate body, outside of the RBA under the *APRA Act*.⁷⁵³ This setting in Australia was recommended by the Wallis Inquiry which provided that the RBA and the APRA should be separate from each other, but there should be high-level cooperation and collaboration mechanisms to ensure effective coordination and avoid blurred boundaries between the two regulators.⁷⁵⁴ Such measures include regular CFR meetings and express cooperation and collaboration arrangements in bilateral MOUs. The separation of the APRA from the RBA was preferred to ensure that the two regulators focus on their objectives and that there is clarity on the demarcations of accountability for each regulatory task.⁷⁵⁵ This was also influenced by the fact that entrusting deposit taking, insurance and superannuation regulation to the central bank whose primary objectives, skills and culture are related to banking would likely be ineffective and inflexible.⁷⁵⁶ Therefore, the separation of the prudential regulator from the central bank would ensure that there is no guarantee for any financial institution to be assisted by the RBA in the event of insolvency.⁷⁵⁷ This entails

⁷⁵² Harper RI “The Wallis Report: An Overview” 2002 *The Australian Economic Review* 288, 295; Wymeersch E “The Structure of Financial Supervision in Europe: About Single Financial Supervisors, Twin Peaks and Multiple Financial Supervisors” 2007 *European Business Organization Law Review* 237, 254; Hill J “Why Did Australia Fare So Well In The Global Financial Crisis?” 2012 *Legal Research Paper No 12/35* 1, 21.

⁷⁵³ See sections 7 and 13 of the *APRA Act*; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 112; Schmulow 2017 *African Journal of International and Comparative Law* 396; Godwin 2017 *Law and Financial Markets Review* 193; Crotty J “Structural Causes of the Global Financial Crisis: A Critical Assessment of the “New Financial Architecture” 2009 *Cambridge Journal of Economics* 563, 566.

⁷⁵⁴ Recommendation 32 of the Wallis Inquiry; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 112; see related comments by Osode PC “Two Heads are Better than One: Assessing South Africa’s ‘Twin Peaks’ Financial Regulation Model” 2021 *Interdisciplinary Journal of Economics and Business Law* 9, 17; Schmulow 2017 *African Journal of International and Comparative Law* 396.

⁷⁵⁵ Recommendation 32 of the Wallis Inquiry; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 112; Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 17; Schmulow 2017 *African Journal of International and Comparative Law* 396.

⁷⁵⁶ Recommendation 32 of the Wallis Inquiry; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 112; Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 17; Schmulow 2017 *African Journal of International and Comparative Law* 396; Schmulow A “Twin Peaks: An Analysis of the Australian Architecture” Global Forum for Financial Consumers Conference (4-5 November 2016 South Korea) 6; Coffee JC Jr and Sale HA “Redesigning the SEC: Does the Treasury have a better idea?” 2009 *Virginia Law Review* 770, 774.

⁷⁵⁷ Recommendation 32 of the Wallis Inquiry; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 112; Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 17; Schmulow 2017 *African Journal of International and Comparative Law* 396

that the housing of the prudential regulator within the central bank has the risk of compromising the reputation of the central bank and financial stability due to regulatory failures of the prudential regulator and its supervisory institutions.⁷⁵⁸

Previously in Australia, bank supervision was combined with the central bank and experience taught the policymakers that when systemic risks occur, the central banks tend to focus on the monetary policy only and abandon other tasks such as macro-prudential regulation.⁷⁵⁹ Accordingly, the separation of the prudential regulator from the central bank ensures that each regulator focuses on its everyday roles and functions, especially during systemic risks.⁷⁶⁰ The only additional requirement to this approach is efficient cooperation and collaboration mechanisms between the APRA and the RBA since the APRA and the RBA still have shared responsibilities, for example, maintaining financial stability.⁷⁶¹

Unlike in Australia where the APRA is an independent entity,⁷⁶² the PA is a division of the SARB,⁷⁶³ although established as a separate juristic person in the case of South Africa.⁷⁶⁴

⁷⁵⁸ Doumpas, Gaganis and Pasiouras 2015 *Journal of Banking and Finance* 69; Harper 2002 *The Australian Economic Review* 296; Hill 2012 *Legal Research Paper No 12/35* 22; Thompson and Abott 2000 *Australian Journal of Public Administration* 77.

⁷⁵⁹ Dr Edey (Assistant Governor of the Reserve Bank of Australia) *Evidence Presented to the Joint Committee on the Draft Financial Services Bill* 2011 435; see related discussion by Wymeersch 2007 *European Business Organization Law Review* 254; Hill 2012 *Legal Research Paper No 12/35* 21.

⁷⁶⁰ Kallasidou 2013 *Bristol Law Review* 121; Van Niekerk 2020 *SALJ* 110; Schmulow 2017 *African Journal of International and Comparative Law* 395; see related comments by Noia and Giorgio 1999 *International Finance* 365; Godwin A “Australia’s Trek towards Twin Peaks – Comparisons with South Africa” 2017 *Law and Financial Markets Review* 182, 183.

⁷⁶¹ See sections 9 and 10A of the *APRA Act*; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 125; Van Niekerk 2020 *SALJ* 112; Hill 2012 *Legal Research Paper No 12/35* 22.

⁷⁶² Section 7 of the *APRA Act*; Hill 2012 *Legal Research Paper No 12/35* 22; North G and Wilson T “Has the Australian Prudential Regulation Authority Done Enough to Meet its Legislated Objectives and Prepare Australia for the Next Financial Crisis?” 2020 *University of New South Wales Law Journal* 552, 562.

⁷⁶³ Section 24(1), (3)-(4) and 32(2) of the *FSR Act*; see related comments by Millard D “The Impact of the Twin Peaks Model on the Insurance Industry” 2016 *PER/PELJ* 1, 8; Llewlyn DT “Institutional Structure of Financial Regulation and Supervision: The Basic Issues” in World Bank *Aligning Supervisory Structures with Country Needs Seminar* (6-7 June 2006) Washington DC 1, 28; Cranston R, Avgouleas E and Van Zwieten K *et al Principles of Banking Law* 3rd ed (United Kingdom: Oxford University Press 2017) 91.

⁷⁶⁴ Sections 11(2) and 32 of the *FSR Act*; Schmulow 2017 *African Journal of International and Comparative Law* 415; see related discussion by Van Heerden CM and Van Niekerk G “Two Takes on the Twin Peaks Model of Financial Regulation in the Netherlands and South Africa” 2020 *Journal of Contemporary Roman-Dutch Law* 215, 220; Villar A “Macroprudential Frameworks: Objectives, Decisions and Policy Interactions” 2017 *BIS Paper No. 94* 7, 15.

Essentially, South Africa has adopted the second approach, where the prudential regulator is housed by the central bank. Nonetheless, it remains to be seen whether the PA is indeed, practically separate from and independent of the SARB. This follows the fact that PA is housed by the SARB and also receives all its administrative support from the SARB.⁷⁶⁵ In addition to that, the PA is headed by the Deputy Governor of the SARB.⁷⁶⁶ The Deputy Governor of the SARB was appointed as the Chief Executive Officer of the SARB as a measure of ensuring cooperation and collaboration between the SARB and the PA.⁷⁶⁷ More so, the Deputy Governor of the SARB has considerable experience and expertise in prudential regulation which may be essential for the PA's micro-prudential mandates.⁷⁶⁸

Considering that South Africa is a developing economy and it is important to curb costs by all means possible, this approach might be more convenient for South Africa as it enables the SARB and the PA to share resources and save costs.⁷⁶⁹ Another justification for placing the PA inside the SARB is that monetary policy and prudential policy functions are interconnected.⁷⁷⁰ As such placing the PA and the SARB together ensures a closer relationship between the SARB and the PA to achieve the desired regulatory outcomes. Qumba submits that placing the PA inside the SARB also enables coordinated and swift responses which are essential for managing systemic risks.⁷⁷¹ However, the researcher

⁷⁶⁵ Section 32(2)-(3) of the *FSR Act*; Godwin, Howse and Ramsay 2017 *SALJ* 674; Godwin A "Australia's Trek towards Twin Peaks - Comparisons with South Africa" 2017 *Routledge* 183, 186; Van Heerden and Van Niekerk 2017 *Law and Financial Markets Review* 159.

⁷⁶⁶ See section 36(1) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 113; Van Heerden and Van Niekerk 2020 *Journal of Contemporary Roman-Dutch Law* 222; Schmulow 2017 *African Journal of International and Comparative Law* 395.

⁷⁶⁷ See related discussion by Van Niekerk and Van Heerden 2020 *SALJ* 118; Van Heerden and Van Niekerk 2020 *Journal of Contemporary Roman-Dutch Law* 222; Millard 2016 *PER/PELJ* 6; Kallasidou 2013 *Bristol Law Review* 119.

⁷⁶⁸ Van Heerden and Van Niekerk 2017 *Law and Financial Markets Review* 159; see related comments by Kallasidou 2013 *Bristol Law Review* 119; Van Niekerk and Heerden 2020 *SALJ* 110; Georgosouli 2013 *Capital Market Law Journal* 71.

⁷⁶⁹ See related comments by Goodhart C "The Changing Role of Central Banks" 2011 *Financial History Review* 135, 136-7; Kallasidou 2013 *Bristol Law Review* 119; Georgosouli 2013 *Capital Market Law Journal* 71.

⁷⁷⁰ Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 125; Qumba 2022 *SALJ* 94; see related comments by Mwenda KK "The Regulatory and Institutional Framework for Unified Financial Services Supervision in the United Kingdom and Zambia" 2005 *Michigan State Journal of International Law* 347, 351; Kallasidou 2013 *Bristol Law Review* 119.

⁷⁷¹ Qumba 2022 *SALJ* 96; see related comments by Di Noia C and Di Giorgio "Should Banking Supervision and Monetary Policy Tasks be Given to Different Agencies?" 1999 *International*

submits that effective coordination between the SARB and the PA can still be achieved without placing the PA within the SARB. This can be achieved through the implementation of adequate and robust measures for cooperation and collaboration between the SARB and the PA.

Godwin and Schmulow argue that placing the PA with the SARB could result in regulatory overlaps and conflicts of interest arising from competing interests.⁷⁷² The researcher argues that considering the synergy of the administration and leadership between the PA and the SARB, the independence of the PA seems only realistic in theory. It becomes difficult to imagine the PA as an entity separate from the SARB. The researcher submits that the housing of the PA inside the SARB creates a high risk of regulatory overlaps and blurred boundaries which undermine effective cooperation and collaboration between the PA and the SARB. Although the *FSR Act* provides clear objectives for each regulator, the operational requirements of the SARB and the PA make it difficult to maintain a clear distinction between the two. It is highly likely that the risks of, regulatory gaps, blurred boundaries and overlaps, like with the previous financial regulatory framework, will be repeated in the current financial regulatory framework of South Africa.

In the UK, the PRA is a part of the BOE.⁷⁷³ Despite there being separate objectives for each regulator, their tasks are complimentary.⁷⁷⁴ The main decisions of the PRA are made by the Prudential Regulation Committee (PRC) which is headed by the Governor of the BOE.⁷⁷⁵ This approach was adopted in the UK to maximise the cooperation and coordination of monetary policy, macro-prudential policy and micro-prudential policy

Finance 361, 372; also see Ioannidou VP “Does Monetary Policy Affect Central Bank’s Role in Bank Supervision” 2005 *Journal of Financial Intermediation* 54, 60.

⁷⁷² Godwin and Schmulow 2015 *SALJ* 761; see related comments by Mwenda 2005 *Michigan State Journal of International Law* 352; also see Di Noia and Di Giorgio 1999 *International Finance* 374; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 128.

⁷⁷³ Section 6A of the *FSMA*; Walker G “U.K. Regulatory Revision – A New Blueprint for Reform” 2012 *The International Lawyer* 828, 835; Hill 2012 *Legal Research Paper No 12/35* 18.

⁷⁷⁴ Ferran 2011 *University of Cambridge Faculty of Law Research Paper* 15; Kallasidou 2013 *Bristol Law Review* 119; Georgosouli 2013 *Capital Market Law Journal* 71; Mwenda 2005 *Michigan State Journal of International Law* 352.

⁷⁷⁵ Georgosouli 2013 *Capital Market Law Journal* 68; Ferran 2011 *University of Cambridge Faculty of Law Research Paper* 15; see related discussion by Norton J “Global Financial Sector Reform: The Single Financial Regulator Model Based on the United Kingdom FSA Experience: A Critical Re-evaluation” 2005 *American Bar Association* 15, 35; Walker 2012 *The International Lawyer* 835.

under the same institution.⁷⁷⁶ Like in South Africa, the disadvantage of adopting this approach is the risk of regulatory arbitrages, overlaps and blurred boundaries which undermine effective cooperation and collaboration between the central bank and the prudential regulator. In this approach, cooperation and collaboration mechanisms are likely to become ineffective due to the thin line between the objectives of each financial role player. Consequently, cooperation and collaboration between the central bank and the prudential regulator become ineffective because of overlapping tasks and objectives.

Given this background, the researcher submits that contrary to the South African approach that places the PA under the shadow of the SARB,⁷⁷⁷ the Australian approach is to be preferred. The independence of the prudential regulator is essential for effective cooperation and collaboration between financial regulators and the central bank because operational independence and distinct objectives ensure clear boundaries for each regulator.⁷⁷⁸ In Australia, the prudential regulator is separate and independent of the central bank which enables the APRA to make decisions independent of the RBA.⁷⁷⁹ As such, effective cooperation and collaboration between the APRA and the RBA will not blur the boundaries between the RBA and the APRA. Another advantage of placing the prudential regulator outside the central bank is that systemic risks, which mostly affect bigger institutions like central banks, will not spill over and affect other financial institutions regulated by the prudential regulator. This is essential in protecting and maintaining financial stability as it prevents the spread of systemic risks throughout the whole financial system. If one would say, Australia has more experience and has been tested by the GFC and fared considerably well as compared to the UK and South Africa. While there is no

⁷⁷⁶ Haill O “Why the FSA was Split into Two Bodies” *Financial Times London* (8 May 2013) 2; Kallasidou 2013 *Bristol Law Review* 124; Georgosouli 2013 *Capital Market Law Journal* 68.

⁷⁷⁷ See related comments by Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 17; Hollander H and Lill D “A Review of the South African Reserve Bank’s Financial Stability Policies” 2019 *Working Papers* 11/2019 48; Schmulow 2017 *African Journal of International and Comparative Law* 415; Van Niekerk 2020 *SALJ* 113, 129.

⁷⁷⁸ Ioannidou 2005 *Journal of Financial Intermediation* 60; Goodhart C and Schoenmaker D “Institutional Separation between Supervisory and Monetary Agencies” 1992 *Giornale Degli Economisti e Annali di Economia* 359, 361; Norton 2005 *American Bar Association* 14.

⁷⁷⁹ Ferran 2011 *University of Cambridge Faculty of Law Research Paper* 15; Kallasidou 2013 *Bristol Law Review* 119; Georgosouli 2013 *Capital Market Law Journal* 71; Mwenda 2005 *Michigan State Journal of International Law* 352.

absolute answer to the question of whether it is preferable to position the prudential regulator within the central bank, or outside, the balance of probabilities favours the latter.

8.3 Overall Analysis of Regulation of Cooperation and Collaboration between the Central Banks and Other Financial Role Players in South Africa, the UK and Australia

The concept of cooperation and collaboration between the central bank and other financial role players was incorporated into legislation for the first time in South Africa in 2018 under the *FSR Act*.⁷⁸⁰ Like the position in the UK,⁷⁸¹ the *FSR Act* requires financial role players to cooperate and collaborate to protect, promote, maintain and enhance financial stability and market integrity in South Africa.⁷⁸² The question of the most effective way to best achieve effective cooperation and collaboration has received conflicting responses from scholars as different jurisdictions adopt different approaches.⁷⁸³ There is often a division between a hard law and a soft law approach to the regulation of cooperation and collaboration between the central bank and other financial role players. Hard law refers to legally binding and enforceable obligations whilst soft law relies on persuasive instruments that are not legally binding.⁷⁸⁴ The advantage of soft law over hard law is that soft law is flexible, easier to apply and allows for compromise when values and interests are different.⁷⁸⁵ Accordingly, some countries like South Africa and the UK have captured the immutable aspects of cooperation and collaboration between the

⁷⁸⁰ Section 26 of the *FSR Act*; see related comments by Van Niekerk and Van Heerden 2020 *SALJ* 109; Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 17; Schmulow 2017 *African Journal of International and Comparative Law* 395.

⁷⁸¹ Section 6A of the *FSMA*; Norton 2005 *American Bar Association* 15, 35; Walker 2012 *The International Lawyer* 835; Haill *Financial Times London* 2.

⁷⁸² See sections 26 and 76 of the *FSR Act*; Van Heerden CM and Van Niekerk GM “Two Takes on Twin Peaks: A Comparative Appraisal of the Models of Financial Regulation in the Netherlands and South Africa” 2020 *THRHR* 491, 499; Godwin and Schmulow 2015 *SALJ* 761.

⁷⁸³ Qumba 2022 *SALJ* 96; Kallasidou 2013 *Bristol Law Review* 121; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 935, 938; Mwenda 2005 *Michigan State Journal of International Law* 358.

⁷⁸⁴ Abbott KW and Snidal D “Hard Law and Soft Law in International Governance” 2000 *International Organisation* 421, 422; Van Niekerk and Van Heerden 2020 *SALJ* 115.

⁷⁸⁵ Abbott and Snidal 2000 *International Organisation* 423; Shaffer GC and Pollack MA “Hard vs Soft Law: Alternatives, Complements and Antagonists in International Governance” 2010 *Minnesota LR* 706, 716.

central banks and other role players in legislation,⁷⁸⁶ whereas in Australia cooperation and collaboration between the central bank and other financial role players are captured in informal agreements between financial regulators.⁷⁸⁷

In Australia, although the *APRA Act* expressly refers to cooperation between financial regulators, such cooperation and collaboration do not create legal obligations on the financial regulators.⁷⁸⁸ On the other hand, the *ASIC Act* provides no obligation on the ASIC to cooperate or collaborate with other financial role players.⁷⁸⁹ As such, cooperation and collaboration in Australia are founded on a soft-law framework. Australia relies on regular meetings of the Council of Financial Regulators (CFR); a flexible and non-prescriptive framework for cooperation and collaboration;⁷⁹⁰ a close cooperative relationship between the RBA, APRA and ASIC;⁷⁹¹ and a culture of cooperation and collaboration.⁷⁹² The Australian approach articulates a culture of cooperation between the RBA and other regulators that focuses on regulatory performance, as opposed to a regulatory framework with prescriptive rules regarding cooperation and collaboration.⁷⁹³

⁷⁸⁶ Section 6A of the *FSMA*; section 26 and 76 of the *FSR Act*; Van Niekerk 2020 *SALJ* 109; Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 17; Kallasidou 2013 *Bristol Law Review* 123.

⁷⁸⁷ North and Wilson 2020 *University of New South Wales Law Journal* 562; Schmulow A "Doing it the Australian Way, 'Twin Peaks' and the Pitfalls in Between" 2016 *Columbia Law School's Blog on Corporations and the Capital Markets* Page Anon; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 112.

⁷⁸⁸ Section 10A of the *APRA Act*; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 112; Van Niekerk and Van Heerden 2020 *SALJ* 109; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 126.

⁷⁸⁹ Schmulow 2016 *Columbia Law School's Blog on Corporations and the Capital Markets* Page Anon; Doumpas, Gaganis and Pasiouras 2015 *Journal of Banking and Finance* 69; Harper 2002 *The Australian Economic Review* 296.

⁷⁹⁰ Schmulow A "The Four Methods of Financial System Regulation: An International Comparative Survey" 2015 *Journal of Banking and Finance Law and Practice* 151, 171; Van Niekerk and Van Heerden 2019 *SALJ* 131.

⁷⁹¹ Schmulow 2016 *Columbia Law School's Blog on Corporations and the Capital Markets* Page Anon; Thompson and Abbott 2000 *Australian Journal of Public Administration* 81; North Wilson 2020 *University of New South Wales Law Journal* 571; Huang RH and Shoenmaker D "Institutional Structure of Financial Regulation: Theories and International Experiences" 2015 *Routledge* 254, 256.

⁷⁹² Godwin A, Li G and Ramsay I "Is Australia's Twin Peaks System of Financial Regulation a Model for China (Part 1)" 2016 *Hong Kong Law Journal* 621, 643.

⁷⁹³ Section 10A of the *APRA Act*; Schmulow 2015 *Journal of Banking and Finance Law and Practice* 171; Van Niekerk and Van Heerden 2019 *SALJ* 131; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 643.

According to Schmulow, the success of the Australian financial regulatory framework over the past years is highly attributed to this inter-agency cooperation and collaboration approach that resulted in close cooperative relationships, without “turf wars”.⁷⁹⁴ However, in a recent webinar, Godwin mentioned that the culture of coordination in Australia remains a work in progress as challenges keep arising from time to time on matters relating to information sharing and enforcement.⁷⁹⁵ This shows that the Australian approach to cooperation and collaboration between the RBA and other financial regulators is not flawless as evidenced by the reforms recommended by the Royal Commission.⁷⁹⁶ For example, the enactment of a minimalist statutory obligation to cooperate between the APRA and ASIC and a new Memorandum of Understanding (MOU) between the ASIC and the APRA.⁷⁹⁷ The Royal Commission⁷⁹⁸ provided that a statutory provision to the effect of mandating the regulators to cooperate and collaborate when fulfilling their obligations should be inserted in the *ASIC Act*, *APRA Act*⁷⁹⁹ and the *Australian Crime Commission Act*.⁸⁰⁰ It is interesting to note that the Royal Commission makes reference to the *Financial Services and Markets Act*⁸⁰¹ of the UK as an example

⁷⁹⁴ Schmulow 2016 *Columbia Law School's Blog on Corporations and the Capital Markets* Page Anon; see related discussion by Van Niekerk and Van Heerden 2020 *SALJ* 135; Godwin and Schmulow 2015 *SALJ* 762; Van Heerden and Van Niekerk 2020 *THRHR* 491

⁷⁹⁵ Godwin A at *Reviewing the Twin Peaks in Australia and Abroad Webinar* (27 January 2022 University of Melbourne) available at <https://law.unimelb.edu.au/about/mls-video-gallery/public-lectures-and-events/reviewing-twin-peaks-in-australia-and-abroad-27.01.2022> accessed 9 May 2022.

⁷⁹⁶ Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry 2019 (Royal Commission 2019), recommendation 6.3; Commonwealth, HIH Royal Commission “The Failure of HIH” *HIH Royal Commission Report* (28 March 2003) 15; see related comments by Schmulow A, Fairweather K and Tarrant J “Reforming Australia’s Twin Peaks to Better Protect Consumers and Deter Misconduct” 2019 *Consumer Interests Annual* 1, 3.

⁷⁹⁷ Recommendation 6.3 of the Royal Commission; see related comments by Van Niekerk and Van Heerden 2019 *SALJ* 139 and 140; Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 19.

⁷⁹⁸ Recommendation 6.3 of the Royal Commission; see related comments by Van Niekerk and Van Heerden 2019 *SALJ* 139 and 140; Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 19.

⁷⁹⁹ Section 10A of the *APRA Act*; see related comments by Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 628; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 112; Godwin A., Kourabas S and Ramsay I “Twin Peaks and Financial Regulation: The Challenges of Increasing Regulatory Overlap and Expanding Responsibilities” 2016 *The International Lawyer* 273, 283.

⁸⁰⁰ *Australian Crime Commission Act* 2002, section 17; see related comments by Wallis Inquiry, see <http://fsi.treasury.gov.au/content/downloads/FinalReport/overview.pdf> (the “Wallis Report”) accessed on 13 November 2021; Godwin A “Australia’s Trek towards Twin Peaks – Comparisons with South Africa” 2017 *Law and Financial Markets Review* 182, 182.

⁸⁰¹ *Financial Services and Markets Act* 2000, section 3E; Qumba 2022 *SALJ* 74;

that Australia should follow towards the statutory regulation of cooperation and collaboration between the RBA and other financial regulators.⁸⁰²

The researcher submits that a statutory regulatory approach that compels cooperation and collaboration, information sharing and mutual assistance between central banks and other financial role players is preferable and more effective. This follows the fact that statutory provisions are more stringent and provide certainty on what is expected of the financial role players. The Australian example has shown that the lack of statutory provisions that mandate cooperation and collaboration between financial regulators is not as smooth as one would perceive.⁸⁰³ The lack of enforcement mechanisms in Australia resulted in poor information sharing channels between the APRA and the ASIC. The permissive nature of the MOUs should be replaced by stringent obligations that compel financial regulators to cooperate and collaborate. The UK and the South African legislature should be applauded for adopting a mandatory approach to cooperation, collaboration, information sharing and mutual assistance between the central banks and other financial role players.⁸⁰⁴

8.4 Overall Analysis of the Role of a Cooperation and Collaboration Coordinating Body between Central Banks and Other Financial Role Players

The establishment of a coordinating body is a common element of cooperation and collaboration between central banks and other financial role players in many countries, for example, South Africa and Australia. A coordinating body can either be a creature of statute or a platform where member institutions meet to discuss matters of common interest.⁸⁰⁵ The advantage of establishing a coordinating body is that it creates a forum

⁸⁰² See recommendation 6.3 of the Royal Commission 2019; Qumba 2022 *SALJ* 79; Van Niekerk and Van Heerden 2019 *SALJ* 139 and 140; Schmulow, Fairweather and Tarrant 2018 *Law and Financial Market Review* 199.

⁸⁰³ Section 10A of the *APRA Act*; Schmulow 2015 *Journal of Banking and Finance Law and Practice* 163; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 628; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 112.

⁸⁰⁴ Section 6A of the *FSMA*; section 26 and 76 of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 109; Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 18.

⁸⁰⁵ Godwin and Schmulow 2015 *SALJ* 768; Kourabas S “Trends and Theory in Financial Regulation and Regulatory Design after the Global Financial Crisis” in Arner D, Wan W, Godwin A, Shen W and Gibson E (eds) *Research Handbook on Asian Financial Law* (Elgar Online 2020) 30, 33; Kourabas S “Improving Australia’s Regulatory Framework for Systemic Financial Stability” 2018 *Journal of Banking and Finance Law Practice* 183, 186.

for regular discussions, mutual assistance, consultation and proactive information sharing between the central bank and other financial role players.⁸⁰⁶ The powers and authority of the coordinating body differ from one jurisdiction to another. However, the main purpose of a coordinating body is to facilitate effective inter-agency coordination by ensuring appropriate coordination arrangements, identifying important issues in the financial system and harmonising regulatory decisions and responses to potential systemic risks that threaten financial stability and market integrity.⁸⁰⁷ Therefore, a coordinating body is an essential element for the regulation of effective cooperation and collaboration between central banks and other financial role players. Nonetheless, some jurisdictions like the UK do not have a coordinating body.

The Australian coordinating body is the CFR.⁸⁰⁸ The CFR has a non-statutory basis and holds no legal functions or powers separate from its member institutions.⁸⁰⁹ The CFR is a high-level forum for cooperation and collaboration between the key financial role players in Australia.⁸¹⁰ The CFR facilitates cooperation and collaboration between the RBA and other financial role players by creating a platform for regular meetings, consultation, transparency, mutual assistance, decision making and discussion of matters of common interest.⁸¹¹ Although the CFR consists of different member institutions, namely the RBA, the APRA, the ASIC and the Treasury, the Governor of the RBA submits that there have

⁸⁰⁶ Godwin and Schmulow 2015 *SALJ* 768; Kourabas S “Trends and Theory in Financial Regulation and Regulatory Design after the Global Financial Crisis” 33; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 113; Van Niekerk and Van Heerden 2020 *SALJ* 136.

⁸⁰⁷ Kourabas 2018 *Journal of Banking and Finance Law Practice* 192; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 938; Godwin and Schmulow 2015 *SALJ* 768; Schmulow 2015 *Journal of Banking and Finance Law and Practice* 163.

⁸⁰⁸ Recommendation 12 of the Wallis Inquiry; Jensen A and Kingston M “Australian “Twin Peaks” Framework of Financial System Regulation: Australia and UK Compared” 2010 *Butterworths Journal of International Banking and Financial Law* 545, 549; Schmulow AD “Twin Peaks: An Analysis of the Australian Architecture” in SKK University Global Forum for Financial Consumers Conference (South Korea 4-5 November 2016) 11.

⁸⁰⁹ Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 128; Schmulow “Twin Peaks: An Analysis of the Australian Architecture” 11; Jensen and Kingston 2010 *Butterworths Journal of International Banking and Financial Law* 548.

⁸¹⁰ Jensen and Kingston 2010 *Butterworths Journal of International Banking and Financial Law* 548; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 935, 938; Kourabas S “Trends and Theory in Financial Regulation and Regulatory Design after the Global Financial Crisis” 33; Kourabas 2018 *Journal of Banking and Finance Law Practice* 194.

⁸¹¹ Godwin and Schmulow 2015 *SALJ* 768; Kourabas S “Trends and Theory in Financial Regulation and Regulatory Design after the Global Financial Crisis” 33; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 113; Van Niekerk and Van Heerden 2020 *SALJ* 136.

never been conflicting objectives during the CFR meetings since its establishment.⁸¹² The Governor stated that the CFR has functioned effectively because of its existing non-statutory basis which supposedly promoted good working relationships due to its flexibility and adaptability.⁸¹³ It should, however, be noted that there have been calls to formalise the CFR and offer it statutory recognition. The researcher submits that the discussions to formalise and give statutory recognition to the roles and functions of the CFR could promote transparency and accountability for the functions and responsibilities of the CFR. Unlike Australia, the South African coordinating body, the Financial System Council of Regulators (FSCR) was established by statute.⁸¹⁴ Although it may be too soon to determine the effectiveness of the FSCR, it is heartwarming to acknowledge that there have not been regulatory issues with regard to its role to facilitate cooperation and collaboration between its member institutions. This could be a result of clear and express regulations relating to the roles and functions of the FSCR provided under the *FSR Act* as compared to non-binding and informal coordination arrangements in the case of Australia. There is no coordinating body established in the UK and the researcher suggests that this position should be reconsidered to ensure effective cooperation and collaboration between the BOE, the FCA and the PRA.

In this regard, the researcher submits that a coordinating body with a statutory basis is to be preferred. Lessons to support this assertion can be drawn from the Australian example. According to the Royal Commission's findings, cooperation and collaboration between the ASIC and the APRA have not been effective due to a lack of regulatory enforcement mechanisms in Australia. As Carmichael denotes, better regulation is

⁸¹² Council of Financial Regulators "About the CFR" 2015 <http://www.cfr.gov.au/about-cfr/index.html> accessed 11 October 2022; Godwin, Li and Ramsay 2016 *Centre for International Finance Regulation (CIFR) Paper* 12; see related comments by Davis K "Financial Restructuring in Australia" 1997 *Economic Papers* 1, 4; Schmulow "Twin Peaks: An Analysis of the Australian Architecture" 15.

⁸¹³ Council of Financial Regulators "About the CFR" 2015 <http://www.cfr.gov.au/about-cfr/index.html>; Reserve Bank of Australia *Financial System Inquiry* 2014 66; Jensen and Kingston 2010 *Butterworths Journal of International Banking and Financial Law* 550; Schmulow "Twin Peaks: An Analysis of the Australian Architecture" 15.

⁸¹⁴ Section 79 of the *FSR Act*; Godwin AJ and Schmulow AD "The Financial Sector Regulation Bill in South Africa, second draft: Lessons from Australia" 2015 *SALJ* 756, 757; Schmulow 2015 *Journal of Banking and Finance Law and Practice* 171.

influenced by stringent laws and strong enforcement mechanisms.⁸¹⁵ Accordingly, the researcher submits that a coordinating body with statutory recognition and enforcement authority is preferable. The FSCR should be given the power and authority to facilitate, oversee and consistently enforce compliance with the statutory duty to cooperate and collaborate between the SARB and other financial role players in South Africa. In Australia, the CFR should be authorised to enforce effective cooperation and collaboration between the RBA, the APRA and ASIC to prevent duplication of tasks and regulatory gaps which threaten financial stability and market integrity.

8.5 Overall Analysis of the Non-Binding Nature of Cooperation and Collaboration MOUs between Central Banks and Other Financial Role Players

Several lessons can be learnt from the Australian experience as a jurisdiction that has identified its flaws and taken up action to address and curb its regulatory flaws in relation to inter-agency coordination.⁸¹⁶ Cooperation and collaboration between central banks and other financial role players are effected by MOUs on cooperation and collaboration that are concluded by the relevant financial role players.⁸¹⁷ The MOUs stipulate how the financial regulators intend to cooperate, collaborate, share information and assist each other in fulfilling their mandates to promote and protect financial stability and market integrity.⁸¹⁸ Therefore, it is important for the MOUs to be enforceable and legally binding to ensure compliance and effective cooperation and collaboration between the central banks and other financial role players to promote financial stability and market integrity. Considering that the *FSR Act* and the UK *Financial Services Act* do not provide the scope

⁸¹⁵ Carmichael J “Australia’s Approach to Regulatory Reform” at the World Bank Regulation Conference (12 December 2003) 3; see also Fisk A and Pollari I “Financial System Inquiry KPMG Submission” *Financial Services* (23 March 2014) 6; Wallis S, Beerworth B, Carmichael J *et al* “Financial System Inquiry” *The Treasury* (31 March 1997) 3-4; Black J “Managing Regulatory Risks and Defining the Parameters of Blame: A Focus on the Australian Prudential Regulation Authority” 2006 *Law and Policy* 4-5

⁸¹⁶ Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 18; Van Niekerk and Van Heerden 2020 *SALJ* 129; Qumba 2022 *SALJ* 102; Kourabas 2018 *Journal of Banking and Finance Law Practice* 206.

⁸¹⁷ Section 27(1) and 77(1) of the *FSR Act*; Schmulow 2015 *SALJ* 761; Schmulow 2015 *Journal of Banking and Finance Law and Practice* 171; Godwin 2017 *Routledge* 151.

⁸¹⁸ Section 27(1), 77(1) and 251(3)(e) of the *FSR Act*; Schmulow 2015 *SALJ* 761; Schmulow 2015 *Journal of Banking and Finance Law and Practice* 171; Godwin 2017 *Routledge* 151; see also Financial Intelligence Centre Act 38 of 2001, sections 40(3) and 45(1D).

and threshold of cooperation and collaboration between the central banks and other financial role players, it becomes reasonable for the MOUs relating to cooperation and collaboration to be legally binding and enforceable. This follows the fact that binding MOUs could encourage compliance and the enforcement of the embodying cooperation and collaboration arrangements. The challenges relating to ineffective and inadequate cooperation and collaboration between the APRA and the ASIC in Australia were a result of non-binding and unascertained coordination arrangements.⁸¹⁹ MOUs concluded by financial regulators in Australia have brought to light some flaws with regard to the effectiveness and adequacy of MOUs regarding cooperation and collaboration between financial role players that may be useful lessons for South Africa and the UK.

In South Africa, the cooperation and collaboration MOUs concluded between financial regulators are non-binding and are regarded as mere gentlemen's agreements.⁸²⁰ Failure to adhere to the provisions of the MOUs or the failure to comply with the obligation to enter into MOUs regarding inter-agency coordination does not affect the operation and functions of the financial role player.⁸²¹ Despite the MOUs being the cornerstone of cooperation and collaboration in South Africa, financial role players may be incentivised for failing to adhere to the requirement to enter into MOUs or the provisions of the MOUs.⁸²² The *FSR Act* provides that the failure of any financial role player to conclude MOUs regarding cooperation and collaboration does not affect its functions or powers.⁸²³ Also, the *FSR Act* does not stipulate the contents or the threshold of these MOUs and it remains at the discretion of the financial role players to determine the contents of these

⁸¹⁹ Godwin A; Ramsay I and Sayes E "Assessing Financial Regulatory Coordination and Integration with Reference to OTC Derivatives Regulation" 2017 *Capital Markets Law Journal* 38, 52; see related comments by Shinar RP "Can the Twin Peaks Model of Financial Regulation Serve as a Model for Israel?" in Godwin A and Schmulow A (eds) *The Cambridge Handbook of Twin Peaks Financial Regulation* (Cambridge University Press 2020) 45, 52; Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 282.

⁸²⁰ For example the Memorandum of Understanding between the SARB, FIC and the PA, 2018.

⁸²¹ Sections 26(4) and 77(3) of the *FSR Act*; Qumba 2022 *SALJ* 80; Van Niekerk and Van Heerden 2020 *SALJ* 141; Schmulow 2017 *African Journal of International and Comparative Law* 416.

⁸²¹ Sections 26 and 77 of the *FSR Act*; see related comments by Kallasidou 2013 *Bristol Law Review* 130; Georgosouli 2012 *Capital Markets Law Journal* 70.

⁸²² Sections 26(4) and 77(3) of the *FSR Act*; Qumba 2022 *SALJ* 80; Van Niekerk and Van Heerden 2020 *SALJ* 141; Schmulow 2017 *African Journal of International and Comparative Law* 416.

⁸²³ Section 27(4) and 77(4) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 128; see related comments by Godwin and Schmulow 2015 *SALJ* 765.

MOUs.⁸²⁴ Similarly, in the UK, although the duty to cooperate and collaborate is entrenched in legislation, the scope and ambit of cooperation and collaboration between the SARB, the PRA and the FCA were left open for the financial regulators to determine in MOUs.⁸²⁵ The Royal Commission's findings in Australia confirm that the collapse of the Trio Capital Inquiry and the HIH Insurance was caused by inadequate coordination and ineffective information sharing arrangements between the ASIC and the APRA.⁸²⁶ The researcher submits inadequate coordination and poor information sharing arrangements between the APRA and the ASIC were a result of non-compliance, inconsistency and lack of enforcement measures to effect the provisions of the MOUs regarding cooperation and collaboration.⁸²⁷ To alleviate these challenges, the APRA and the ASIC amended their MOU regarding cooperation and collaboration to strengthen regulatory coordination and improve information sharing arrangements.⁸²⁸ Nonetheless, the researcher argues that a legally binding MOU which establishes legally binding objectives would have been a better approach to enhance cooperation, collaboration and information sharing arrangements between the ASIC and the APRA. This follows the fact that binding MOUs promote compliance, transparency, accountability and enforcement of the duty to cooperate and collaborate.⁸²⁹

The researcher submits that cooperation and collaboration MOUs between financial role players in South Africa should be more stringent and legally binding. Thus, to commence with, the requirement to enter into cooperation and collaboration MOUs should be made

⁸²⁴ Sections 26 and 77 of the *FSR Act*;

⁸²⁵ Treasury Committee *Financial Conduct Authority 2010-2012* para 90; Kallasidou 2013 *Bristol Law Review* 130; Georgosouli 2012 *Capital Markets Law Journal* 70; Walker G "U.K. Regulatory Revision – A New Blueprint for Reform" 2012 *The International Lawyer* 828, 830.

⁸²⁶ Recommendation 6.3 of the Royal Commission; see related comments by Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 18; Van Niekerk and Van Heerden 2019 *SALJ* 139 and 140; Schmulow, Fairweather and Tarrant 2018 *Law and Financial Market Review* 199.

⁸²⁷ Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 289; see related comments by Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 18; Schmulow, Fairweather and Tarrant 2018 *Law and Financial Market Review* 199.

⁸²⁸ Section 10A of the *APRA Act*; Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 289; see related comments by Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 18; Schmulow, Fairweather and Tarrant 2018 *Law and Financial Market Review* 199.

⁸²⁹ Godwin A at *Reviewing the Twin Peaks in Australia and Abroad Webinar* (27 January 2022 University of Melbourne) available at <https://law.unimelb.edu.au/about/mls-video-gallery/public-lectures-and-events/reviewing-twin-peaks-in-australia-and-abroad-27.01.2022> accessed 9 May 2022.

mandatory between the SARB and other financial role players. Compliance and enforcement are essential aspects of effective cooperation and collaboration between the central bank and other financial role players. As such, the MOUs should have an effect of enforcing the statutory requirement to coordinate as well as conclude MOUs regarding cooperation and collaboration. The researcher makes the same suggestions for the UK as a measure to enhance cooperation and collaboration between the BOE, the PRA and the FCA. Establishing a statutory obligation for financial role players to conclude and adhere to the provisions of the MOUs is a better approach to ensuring effective cooperation and collaboration between financial role players. There is a need for enforcement of the requirement to enter into MOUs and the MOUs should be legally binding on the financial regulators. It can be further alluded that such provisions should be buttressed by penalties for failure to comply. These measures will ensure that cooperation and collaboration are robust enough to protect, promote, maintain and enhance financial stability and market integrity.

8.6 Reviewing the Effectiveness of Cooperation and Collaboration MOUs

Cooperation and collaboration MOUs are reviewed to assess their effectiveness and adequacy to promote, protect, enhance and maintain financial stability and market integrity. As mentioned earlier in this research,⁸³⁰ in South Africa, Australia and the UK, the threshold of the MOUs regarding cooperation and collaboration between central banks and other financial role players are not prescribed and are determined by the concluding parties. In this regard, it is essential that the MOUs regarding cooperation and collaboration between central banks and other financial role players be constantly reviewed to ensure their adequacy and effectiveness for cooperation and collaboration between central banks and other financial role players.⁸³¹ However, the intervals at which the MOUs are reviewed in the three jurisdictions differ. The researcher argues that it is essential that MOUs regarding cooperation and collaboration between central banks and

⁸³⁰ See para 8.6 above; see related comments by Kallasidou 2013 *Bristol Law Review* 130; Georgosouli 2012 *Capital Markets Law Journal* 70; Schmulow 2017 *African Journal of International and Comparative Law* 416.

⁸³¹ Van Niekerk and Van Heerden 2020 *SALJ* 141; Godwin, Ramsay and Sayes *Capital Markets Law Journal* 59; see related comments by Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 652; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 118.

other financial role players be reviewed and updated regularly to ensure that they remain relevant in the continuously evolving global financial markets.⁸³²

In the UK, the FCA and the PRA are required to account for the effectiveness of their cooperation and collaboration mechanisms at the end of each year.⁸³³ The *FSMA* does not provide how financial regulators should review the MOUs regarding cooperation and collaboration except that they should report what was effective and what was not.⁸³⁴ The maintenance of the MOUs regarding cooperation and collaboration between the BOE and other financial role players is tasked to two senior executives of the PRA and the FCA.⁸³⁵ What becomes problematic about this approach is that the PRA and the FCA are entrusted with conducting a self-assessment regarding the effectiveness of their cooperation and collaboration arrangements.

Notwithstanding that the PRA and the FCA are required to submit a copy of the MOUs regarding cooperation and collaboration to the Treasury twice a year,⁸³⁶ the findings of the Treasury are non-binding and practically do not affect the regulation of cooperation and collaboration between the BOE and other financial role players.⁸³⁷ Moreover, MOUs regarding cooperation and collaboration between the BOE, the PRA and the FCA are reviewed *ex post facto*, which can be after a year of ineffective and inadequate inter-agency coordination. The researcher proposes that the MOUs regarding cooperation and collaboration between central banks and other financial role players be reviewed and assessed prior to being put to use. This ensures that the MOUs are robust enough and

⁸³² Van Niekerk and Van Heerden 2020 *SALJ* 141; Godwin, Ramsay and Sayes *Capital Markets Law Journal* 59; see related comments by Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 652; Godwin, Howse and Ramsay 2017 *Journal of Banking Regulation* 118.

⁸³³ Sections 3E(4)-(6) of the *Financial Services and Markets Act 2000*; Georgosouli 2012 *Capital Markets Law Journal* 70; see related comments by Lui A “Single or Twin? The UK Financial Regulatory Landscape After the Financial Crisis of 2007-2009” 2012 *Journal of Banking Regulation* 24, 31; Norton 2005 *American Bar Association* 42.

⁸³⁴ *Financial Services Act 2012* (FSA), section 6; Norton 2005 *American Bar Association* 42; Lui 2012 *Journal of Banking Regulation* 31; Walker 2012 *The International Lawyer* 850.

⁸³⁵ Sections 3E(4)-(6) of the *Financial Services and Markets Act 2000* (FSMA); Georgosouli 2012 *Capital Markets Law Journal* 70.

⁸³⁶ See section 6 of the *FSA*; see related comments by MacNeil I and Li X “Comply or Explain’: Market Discipline and Non-Compliance with the Combined Code” 2006 *CGIR* 486, 490; Qumba 2022 *SALJ* 114.

⁸³⁷ Section 4 of the *FSA*; section 9D and 9E of the *Bank of England Act*; Georgosouli 2012 *Capital Markets Law Journal* 68; Lui 2012 *Journal of Banking Regulation* 31; Walker 2012 *The International Lawyer* 850.

adequate for cooperation and collaboration between the central bank and other financial role players to promote, protect, enhance and maintain financial stability and market integrity.

Unlike the UK, the MOUs regarding cooperation and collaboration between the SARB and other financial role players in South Africa are reviewed at least once every three years.⁸³⁸ The MOUs regarding cooperation and collaboration between the SARB and other financial role players are reviewed by the SARB, the FSCA, the PA, the NCR and the FIC.⁸³⁹ The Financial Sector Inter-Ministerial Council (FSIC) is required to evaluate the effectiveness of cooperation and collaboration mechanisms between the SARB and other financial role players, including MOUs, once every two years.⁸⁴⁰ Similarly, the MOUs regarding cooperation and collaboration between the RBA, the APRA and the ASIC once every two years.⁸⁴¹ This means that, should there be any inconsistencies or ineffectiveness in the arrangements established by the MOUs regarding cooperation and collaboration, they can only be identified and rectified *ex post facto*, possibly after two years.

The abovementioned arrangement implies that there are chances that cooperation and collaboration arrangements between central banks and other financial role players may be ineffective and can only be detected or addressed after two years. The researcher submits that this may result in cumbersome cooperation and collaboration between the central banks and other financial role players and consequently, regulatory gaps, overlaps, arbitrages and blurred boundaries which threaten financial stability and market integrity. The researcher proposes that MOUs regarding cooperation and collaboration between central banks and other financial role players be reviewed at least twice every year. This enhances the effectiveness and adequacy of the MOUs regarding cooperation

⁸³⁸ Sections 27(2) and 77(4) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 141; Schmulow 2017 *African Journal of International and Comparative Law* 416.

⁸³⁹ Section 77(4) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 141; Godwin, Li and Ramsay 2018 *SALJ* 351; Godwin 2018 *Law and Financial Markets Review* 184.

⁸⁴⁰ Section 86(1)(b) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 132; Qumba 2022 *SALJ* 104.

⁸⁴¹ Memorandum of Understanding between APRA and ASIC 28 November 2019 para 29; North and Wilson 2020 *University of New South Wales Law Journal* 562; Godwin and Schmulow 2015 *SALJ* 767; Kourabas 2018 *Journal of Banking and Finance Law Practice* 189.

and collaboration as they remain up to date to comply with the continuously changing standards of global financial markets. As such, it is important that the arrangements established in the MOUs remain relevant and may address any challenges as they arise.

In this regard, although the UK reviews its cooperation and collaboration MOUs every year, the researcher submits that it is too long a period for possible ineffective cooperation and collaboration to carry on within a financial system. However, in comparison to the two and three-year intervals between the reviewing of cooperation and collaboration MOUs in South Africa and Australia, the UK approach is preferable.⁸⁴² Cooperation and collaboration MOUs must be reviewed regularly to ensure that all the necessary aspects are captured and remain relevant. As mentioned earlier, the MOUs regarding cooperation and collaboration are an essential element of effective cooperation and collaboration between the central bank and other financial role players. Therefore, it is important that the MOUs are properly formulated and that they capture all the relevant immutable aspects of cooperation and collaboration between the SARB and other financial role players to protect, promote, maintain and enhance financial stability and market integrity.

8.7 Overall Analysis of Cooperation and Collaboration Arrangements between Central Banks and Other Financial Role Players to Manage Financial Crisis

The UK's *FSA* provides express provisions regarding cooperation and collaboration between the BOE, PRA and FCA to manage a financial crisis.⁸⁴³ For instance, the *FSA* provides for cooperation and collaboration mechanisms between the BOE, the PRA and the Treasury during a financial crisis.⁸⁴⁴ Cooperation and collaboration arrangements between the central bank and other financial role players to manage a financial crisis are implemented to regulate the actions and conduct of the financial role players when

⁸⁴² Van Niekerk and Van Heerden 2019 *SALJ* 113; Godwin, Howse and Ramsay 2017 *SALJ* 701; Godwin AJ and Schmulow AD "The Financial Sector Regulation Bill in South Africa, Second Draft: Lessons from Australia" 2015 *SALJ* 756, 758.

⁸⁴³ Section 6 of the *FSA*; section 3I of the *FSMA*; Guo Y, Li P and Li A "Tail Risk Contagion between International Financial Markets during COVID-19 Pandemic" 2021 *International Review of Financial Analysis* 25, 28; Bank of England "The UK Economy during Covid-19: Insights from the Bank of England's Citizens' Panels" 2021 *England's Citizens Panel* 1.

⁸⁴⁴ Section 6 of the *FSA*; Georgosouli 2012 *Capital Markets Law Journal* 65; Lui 2012 *Journal of Banking Regulation* 31; Walker 2012 *The International Lawyer* 850.

dealing with addressing the effects of a financial crisis.⁸⁴⁵ Van Niekerk and Van Heerden state that crisis times are not for regulatory stand-offs. As such, it is important to establish cooperation and collaboration arrangements which clearly stipulate the roles and functions of the central bank and each financial role player to manage a financial crisis.⁸⁴⁶ Following the fact that regulatory focus is easily shifted to other functions and the importance of proactive coordination to manage the effects of the crisis on financial stability and market integrity, the establishment of coordination arrangements between the BOE and other financial role players during a financial crisis is highly commendable.⁸⁴⁷ During the COVID-19 pandemic, prior cooperation and collaboration arrangements between the BOE, the FPC, the PRA and the FCA enabled close coordination between the BOE and other regulators to provide capital relief to some financial institutions.⁸⁴⁸

In Australia, cooperation and collaboration arrangements between the RBA and other financial role players to manage financial crises are not captured in legislation. Instead, they are provided in a MOU that was concluded by the CFR members.⁸⁴⁹ The CFR-MOU outlines the roles and responsibilities of each financial role player in case of emerging systemic risk.⁸⁵⁰ Despite the MOU being an informal arrangement, clear provisions are

⁸⁴⁵ Section 3D and 3I of the *FSMA*; Guo, Li and Li 2021 *International Review of Financial Analysis* 30; Susskind and Vines 2020 *Oxford Review of Economic Policy Journal* 6; Akhtaruzzaman, Boubaker and Sensoy 2021 *Financial Research Letters* 3.

⁸⁴⁶ See Van Heerden and Van Niekerk 2020 *THRHR* 499; Van Niekerk and Van Heerden 2020 *SALJ* 141; Van Heerden and Van Niekerk 2018 *Law and Financial Markets Review* 157; also see Susskind and Vines *Oxford Review of Economic Policy Journal* 10.

⁸⁴⁷ Van Niekerk and Van Heerden 2020 *SALJ* 138; Schmulow 2017 *African Journal of International and Comparative Law* 412; see related comments by Bank of England “The UK Economy during Covid-19: Insights from the Bank of England’s Citizens’ Panels” 2021 *England’s Citizens Panel* 1; Brown G and Susskind D “International Cooperation during the COVID-19 Pandemic” 2020 *Oxford Review of Financial Policy Journal* 64, 65; Susskind D and Vines D “The Economics of the COVID-19 Pandemic: An Assessment” 2020 *Oxford Review of Economic Policy Journal* 1, 10.

⁸⁴⁸ Brown and Susskind 2020 *Oxford Review of Financial Policy Journal* 65; Susskind and Vines *Oxford Review of Economic Policy Journal* 10; Akhtaruzzaman MD, Boubaker S and Sensoy A “Financial Contagion during COVID-19 Crisis” 2021 *Finance Research Letters* 1, 3; Guo Y, Li P and Li A “Tail Risk Contagion between International Financial Markets during COVID-19 Pandemic” 2021 *International Review of Financial Analysis* 25. 28.

⁸⁴⁹ Council of Financial Regulators “Memorandum of Understanding on Financial Distress Management between the Members of the Council of Financial Regulators” (18 September 2008) 4; Jensen and Kingston 2010 *Butterworths Journal of International Banking and Financial Law* 549.

⁸⁵⁰ Council of Financial Regulators “MOU on Financial Distress Management between the Members of the Council of Financial Regulators” 6; Godwin 2017 *Law and Financial Markets Review* 186; Cooper J “The Integration of Financial Regulatory Authorities – The Australian Experience” 11.

made regarding cooperation and collaboration between the RBA and other financial role players to manage a financial crisis. However, the same cannot be said about South Africa. The *FSR Act* does not expressly provide for general requirements and arrangements for cooperation and collaboration during a crisis. The *FSR Act* established the Financial Stability Oversight Committee (FSOC)⁸⁵¹ to, *inter alia*, facilitate cooperation and collaboration amongst financial regulators and the SARB.⁸⁵² The FSOC is also tasked with advising the SARB on steps to manage or prevent risks and on any matters relating to financial stability.⁸⁵³ However, there are no specific provisions regarding the cooperation and collaboration between the SARB and other regulatory bodies during financial crises. The *FSR Act* only provides for general cooperation and collaboration during supervisory and regulatory challenges and not during financial crises.⁸⁵⁴ The lack of substantive arrangements for cooperation and collaboration between the SARB and other role players during a financial crisis is likely to affect effective cooperation and collaboration during financial crises in South Africa.⁸⁵⁵ Cooperation and collaboration arrangements to manage a financial crisis could limit confusion and overlapping of functions during a financial crisis.

In this regard, the researcher argues that the sudden outbreak of the COVID-19 pandemic and its threat to financial stability and market integrity is evidence that it is important to make arrangements for cooperation and collaboration between the central bank and other financial role players to manage a financial crisis.⁸⁵⁶ There is a need to adopt express regulations on cooperation and collaboration between the SARB and other financial role

⁸⁵¹ Section 20(1) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 115; see related discussion by Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 25; Qumba 2022 *SALJ* 83.

⁸⁵² Section 20(2)(b) of the *FSR Act*; Godwin 2017 *Law and Financial Markets Review* 188; Van Niekerk and Van Heerden 2020 *SALJ* 120; see related comments by Godwin and Schmulow 2015 *SALJ* 763.

⁸⁵³ Section 21(c) of the *FSR Act*; see related comments by Godwin A “Australia’s Trek towards Twin Peaks – Comparisons with South Africa” 2018 *Law and Financial Markets Review* 183, 189.

⁸⁵⁴ Section 76(1)(c) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 120; Qumba 2022 *SALJ* 82.

⁸⁵⁵ Schmulow 2017 *African Journal of International and Comparative Law* 399; Godwin and Schmulow 2015 *SALJ* 765; Van Niekerk and Van Heerden 2020 *SALJ* 120.

⁸⁵⁶ see related comments by Susskind and Vines 2020 *Oxford Review of Economic Policy Journal* 12; also see Guo, Li and Li 2021 *International Review of Financial Analysis* 28; Brown and Susskind 2020 *Oxford Review of Financial Policy Journal* 70.

players to manage a financial crisis in South Africa. Such arrangements could prevent regulatory gaps and overlapping functions that threaten financial stability and market integrity. Moreover, the researcher submits that South Africa should consider following the Australian approach of facilitating the cooperation and collaboration between the central bank and other financial role players through MOUs to manage financial crises. The researcher suggests that the SARB and other financial role players should enter into a MOU which establishes cooperation and collaboration arrangements to manage a financial crisis. This follows the fact that MOUs are more flexible and can be easily amended, unlike legislation.

8.8 Conclusion

While the policymakers in South Africa chose to follow a hard law approach to the regulation of cooperation and collaboration between the SARB and other financial role players, several lessons can be drawn from the soft law regulation approach followed in Australia. Notwithstanding the fact that the *FSR Act* is a relatively new legislation in South Africa, several flaws and challenges should be addressed to ensure the adequacy and robustness of the regulation of cooperation and collaboration between the SARB and other financial role players to promote, protect, enhance and maintain financial stability and market integrity in South Africa. South Africa should take an initiative to develop a culture of regulatory coordination between the SARB and other financial role players like in Australia. There is a need to establish cooperation and collaboration arrangements to manage a financial crisis in South Africa. South Africa can adopt the UK and Australian approaches in this regard and conclude a MOU regarding cooperation and collaboration arrangements to manage a financial crisis. In the UK, the MOUs regarding cooperation and collaboration are regularly reviewed to ensure their effectiveness and adequacy and South Africa can also follow this example. The establishment of an overarching coordinating body to oversee and facilitate cooperation and collaboration like the CFR in Australia is an essential element for effective cooperation and collaboration between the central bank and other financial role players. The same approach is recommended for the UK and South Africa.

The next chapter is the last chapter of this thesis. The lessons drawn from the UK and Australia regarding the regulation of cooperation and collaboration between the central banks and other financial role players were used to recommend a robust and effective cooperation and collaboration framework for South Africa. The chapter also provides the overall conclusion to this thesis.

CHAPTER NINE

RECOMMENDATIONS AND CONCLUSION

9.1 Introduction

This chapter presents overall conclusions to the preceding discussion and recommendations on how the current regulatory framework for cooperation and collaboration between the South African Reserve Bank (SARB) and other financial role players, namely, the Prudential Authority (PA), the Financial Sector Conduct Authority (FSCA), the Financial Intelligence Centre (FIC), the National Credit Regulator (NCR), relevant Cabinet members, the Financial Sector Inter-Ministerial Council (FSIC), the Financial Sector Council of Regulators (FSCR), the Financial Stability Oversight Committee (FSOC) and the Financial Sector Contingency Forum (FSCF) can be revisited to address the pertinent issues raised earlier in this thesis.⁸⁵⁷ It has been established in this research that effective cooperation and collaboration measures between the SARB and other financial role players promote and maintain financial stability and market integrity.⁸⁵⁸ A new cooperation and collaboration model for effective regulation of cooperation and collaboration between the SARB and other financial role players is also proposed in this chapter. Lessons from Australia and the United Kingdom are drawn to formulate an enhanced cooperation and collaboration framework between the SARB and other financial role players in South Africa.⁸⁵⁹ Possible solutions to uproot the flaws of the

⁸⁵⁷ See paragraph 3.3 of this thesis; see related comments by Godwin A “Introduction to Special Issue – The Twin Peaks Model of Financial Regulation and Reform in South Africa” 2017 *Law and Financial Markets Review* 151, 152; Van Niekerk G and Van Heerden C “The Importance of a Legislative Framework for Cooperation and Collaboration in the Twin Peaks Model of Financial Regulation” 2020 *SALJ* 108, 141; Schmulow A “Financial Regulatory Governance in South Africa: The Move Towards Twin Peaks” 2017 *African Journal of International and Comparative Law* 393, 394.

⁸⁵⁸ Godwin A, Howse T and Ramsay I “Twin Peaks: South Africa’s Financial Sector Regulatory Framework” 2017 *SALJ* 665, 670; Osode PC “Two Heads are Better than One: Assessing South Africa’s ‘Twin Peaks’ Financial Regulation Model” 2021 *Interdisciplinary Journal of Economics and Business Law* 9, 25; see related comments by Gomber P, Clapham B, Haferkorn M, Panz S, Jentsch P “Ensuring Market Integrity and Stability: Circuit Breakers on International Trading Venues” 2016 *The Journal of Trading* 42, 51; Van Niekerk and Van Heerden 2020 *SALJ* 113.

⁸⁵⁹ Qumba MF “A Comparative Analysis of the Twin Peaks Model of Financial Regulation in South Africa and the United Kingdom” 2022 *SALJ* 78, 92; see related comments by Jensen A and Kingston M “The Australian ‘Twin Peaks’ Framework of Financial System Regulation: Australia and UK Compared” 2010 *Journal of International Banking and Financial Law* 548, 549; see related comments by Moloney N, Ferran E, Payne J *et al* *The Oxford Handbook of Financial*

current regulatory framework for cooperation and collaboration between the SARB and other financial role players to protect, promote, enhance and maintain financial stability and market integrity in South Africa are recommended. It is hoped that the recommendations made in this chapter will assist policymakers to implement adequate and enforce robust cooperation and collaboration measures to effectively promote financial stability and market integrity in South Africa.

9.2 General Observations

The primary question this research sought to answer was whether the current regulatory framework under the *Financial Sector Regulatory Act*⁸⁶⁰ can foster effective cooperation and collaboration between the SARB and other relevant role players namely the PA, the FSCA, the NCR, the FIC, the FSCF, the FSIC, the FSOC, the FSCR and relevant Cabinet members to promote, protect, maintain and enhance financial stability and market integrity in the South African financial institutions and financial markets.⁸⁶¹ To address this question, the aims of this research were three-fold. To commence with, this research determined the importance of effective cooperation and collaboration between the SARB and other financial role players to promote, protect, maintain and enhance financial stability and market integrity in South Africa.⁸⁶² The researcher submits that the promotion of financial stability and market integrity depends on the effectiveness and adequacy of cooperation and collaboration mechanisms between the SARB and other financial role players to ensure the optimum operation of all financial role players and curb duplication

Regulation (Oxford London 2015) 65; also see Llewellyn DT “Institutional Structure of Financial Regulation and Supervision: The Basic Issues” in World Bank Seminar *Aligning Supervisory Structures with Country Needs Seminar* (6-7 June 2006 Washington DC) 15.

⁸⁶⁰ *Financial Sector Regulatory Act* 9 of 2017 (*FSR Act*), sections 26 and 76; Godwin A “Introduction to Special Issue – The Twin Peaks Model of Financial Regulation and Reform in South Africa” 2017 *Law and Financial Markets Review* 151, 152; National Treasury Republic of South Africa “A Safer Financial Sector to Serve South Africa Better - Policy Paper” 23 February 2011 <http://www.treasury.gov.za/twinpeaks/20131211%20-20Item%202%20A%20safer%20financial%20sector%20to%20serve%20South%20Africa%20better.pdf>, accessed on 13 November 2021; Van Heerden C and Van Niekerk G “The Twin Peaks in South Africa: A New Role for the Central Bank” 2018 *Law and Financial Markets Review* 154, 156.

⁸⁶¹ Sections 26 and 76 of the *FSR Act*; Godwin A and Schmulow A “The Financial Sector Regulation Bill in South Africa, First Draft: Lessons from Australia” 2015 *SALJ* 36, 39; Michael B “The ‘Twin-Peaks’ Regulatory Model: The Future of Financial Regulation?” 2014 *Banking Today* 3, 4.

⁸⁶² Godwin and Schmulow 2015 *SALJ* 42; Van Heerden and Van Niekerk 2018 *Law and Financial Markets Review* 155; Schmulow 2017 *African Journal of International and Comparative Law* 394.

of tasks and blurred regulatory boundaries.⁸⁶³ This follows the fact that clear and express regulatory roles and functions ensure defined mandates and objectives, limit the risk of dominance of one financial role player over the others and enable transparency and accountability by ensuring that each financial role player performs its designated mandates.⁸⁶⁴ These are some of the elements which underpin effective cooperation and collaboration between the SARB and other financial role players to promote and protect financial stability and market integrity.⁸⁶⁵

The second aim of this research required an examination of the framework for cooperation and collaboration between the SARB and other financial role players provided under the *FSR Act*,⁸⁶⁶ to determine whether it is robust enough to ensure effective cooperation and collaboration between the SARB and other financial role players. In this regard, the researcher submits that the regulation of cooperation and collaboration under the *FSR Act* is not robust and adequate enough to promote, protect and enhance financial stability and market integrity in South Africa. This follows the fact that the lack of consistent enforcement of the duty to cooperate and collaborate is likely to result in overlapping functions between financial role players. The researcher argues that the lack of rigorous and stringent measures to enforce compliance with the duty to

⁸⁶³ See related comments by Hong-Bum K “Cooperation and Coordination between the Financial Authorities: A Review of the Experiences of the United Kingdom, Norway, Sweden, and Korea” 2009 *Seoul Journal of Economics* 409, 415; Metzgen Y, Rossi M and Gajdeczka P “International Cooperation for Financial System Stability” in Omotunde E and Johnson G *Financial Risks, Stability and Globalisation* (International Monetary Fund 2002) 489, 492; Georgosouli A “The FCA-PRA Coordination Scheme and the Challenge of Policy Coherence” 2013 *Capital Markets Law Journal* 62, 65.

⁸⁶⁴ Godwin and Schmulow 2015 *SALJ* 760; see related comments by Denters E “Regulation and Supervision of the Global Financial System. A Proposal for Institutional Reform” 2009 *Amsterdam Law Forum* 63, 78; Van Niekerk G and Van Heerden C “The Importance of a Legislative Framework for Cooperation and Collaboration in the Twin Peaks Model of Financial Regulation” 2020 *SALJ* 108, 110.

⁸⁶⁵ See related comments by De Jager J “The South African Reserve Bank: Blowing Winds of Change (Part 2)” 2013 *SA Merc LJ* 492, 508; Van Niekerk and Van Heerden 2020 *SALJ* 110; Qumba 2022 *SALJ* 92; Schmulow 2017 *African Journal of International and Comparative Law* 395.

⁸⁶⁶ Sections 26 and 76 of the *FSR Act*; Godwin and Schmulow 2015 *SALJ* 39; Godwin and Schmulow 2015 *SALJ* 760; Van Niekerk and Van Heerden 2020 *SALJ* 112; Qumba 2022 *SALJ* 92.

cooperate and collaborate could affect the effectiveness of cooperation and collaboration between the SARB and other financial role players over time.⁸⁶⁷

The third aim of this research was to comparatively analyse the regulation of cooperation and collaboration between central banks and other financial role players in South Africa, the UK and Australia.⁸⁶⁸ In this regard, it was observed that several lessons can be drawn from the Australian example, not only as a jurisdiction with the most experience but also as a jurisdiction that is in the process of rooting out its mistakes and regulatory failures.⁸⁶⁹ Several lessons, some of which form the basis of the recommendations discussed hereunder, were drawn from the Australian and the UK example regarding the regulation of cooperation and collaboration between the central bank and other financial role players.⁸⁷⁰ For example, the implications of housing the PA inside the SARB and the substantive roles and powers of a coordinating body.

It was also noted that South Africa lags behind in enforcing cooperation and collaboration between the central bank and other financial role players.⁸⁷¹ The *FSR Act* and the MOUs regarding cooperation and collaboration between the SARB and other financial role players do not provide measures to prevent financial role players from easily boycotting

⁸⁶⁷ Section 77(3) of the *FSR Act*; See related comments by Schmulow 2017 *African Journal of International and Comparative Law* 394; Van Niekerk and Van Heerden 2020 *SALJ* 115; Qumba 2022 *SALJ* 78.

⁸⁶⁸ See chapters 5 and 6 of this research; also see Qumba 2022 *SALJ* 78; Jensen and Kingston 2010 *Butterworths Journal of International Banking and Financial Law* 550; Schmulow 2017 *African Journal of International and Comparative Law* 401.

⁸⁶⁹ Harper 2002 *The Australian Economic Review* 288; Godwin and Schmulow 2015 *SALJ* 763; Schmulow A, Fairweather K and Tarrant J “Reforming Australia’s Financial Regulatory Regime in Light of Failings Exposed by the Banking Royal Commission” 2018 *Law and Financial Markets Review* 193, 194; North G and Wilson T “Has the Australian Prudential Regulation Authority Done Enough to Meet its Legislated Objectives and Prepare Australia for the Next Financial Crisis?” 2020 *University of New South Wales Law Journal* 552, 560.

⁸⁷⁰ See related discussion by Lui A “Single or Twin? The UK Financial Regulatory Landscape after the Financial Crisis of 2007- 2009” 2012 *Journal of Banking Regulation* 24, 31; Huang RH and Shoemaker D “Institutional Structure of Financial Regulation: Theories and International Experiences” 2015 *Routledge* 254, 255; Schmulow, Fairweather and Tarrant 2018 *Law and Financial Markets Review* 194; Georgosouli 2013 *Capital Markets Law Journal* 65.

⁸⁷¹ Sections 27(2) and 77(2) of the *FSR Act*; see related comments by Kallasidou N “The United Kingdom’s Response to Crisis: A Critical Examination of the New Regulatory Structure of Financial Services Supervision” 2013 *Bristol Law Review* 117, 120; Qumba 2022 *SALJ* 82; Godwin A “Introduction to Special Issue – The Twin Peaks Model of Financial Regulation and Reform in South Africa” 2018 *Law and Financial Markets Review* 151, 155.

the duty to cooperate and collaborate.⁸⁷² In this regard, the policymakers need to reconsider the provision that the failure to comply with the duty to enter into MOUs regarding cooperation and collaboration does not affect the validity of any action by a financial sector regulator.⁸⁷³ Alternatively, the MOUs concerning cooperation and collaboration between the SARB and other financial role players should be legally binding and enforceable to ensure compliance, transparency and accountability.

The international best practices relating to the cooperation and collaboration standards between central banks and other financial role players were also discussed in this research. This was done to determine whether the current regulatory framework for cooperation and collaboration between the SARB and other financial role players conforms to international best practice standards.⁸⁷⁴ Even though there is no international best practices on cooperation and collaboration modelled on developing African countries, the efforts made by South Africa to conform to international cooperation and collaboration standards are commendable. It is in light of these general observations that the recommendations discussed below are made.

9.3 Recommendations

Various recommendations aimed at enhancing effective cooperation and collaboration between the SARB and other financial role players such as the PA, the FSCA, the NCR the FIC, the FSCR, the FSCF, the FSOC and the FSIC are provided below. It is hoped that these recommendations will be utilised by the policymakers to ensure the effective regulation of cooperation and collaboration between the SARB and other financial role

⁸⁷² Sections 27(2) and 77(2) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 141; Schmulow, Fairweather and Tarrant 2018 *Law and Financial Markets Review* 199; North and Wilson 2020 *University of New South Wales Law Journal* 560.

⁸⁷³ Sections 77(3) and 27(4) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 141; see related comments by Godwin A, Li G, Ramsay I "Is Australia's Twin Peaks System of Financial Regulation a Model for China (Part 2)" 2016 *Hong Kong Law Journal* 935, 957; Qumba 2022 *SALJ* 98.

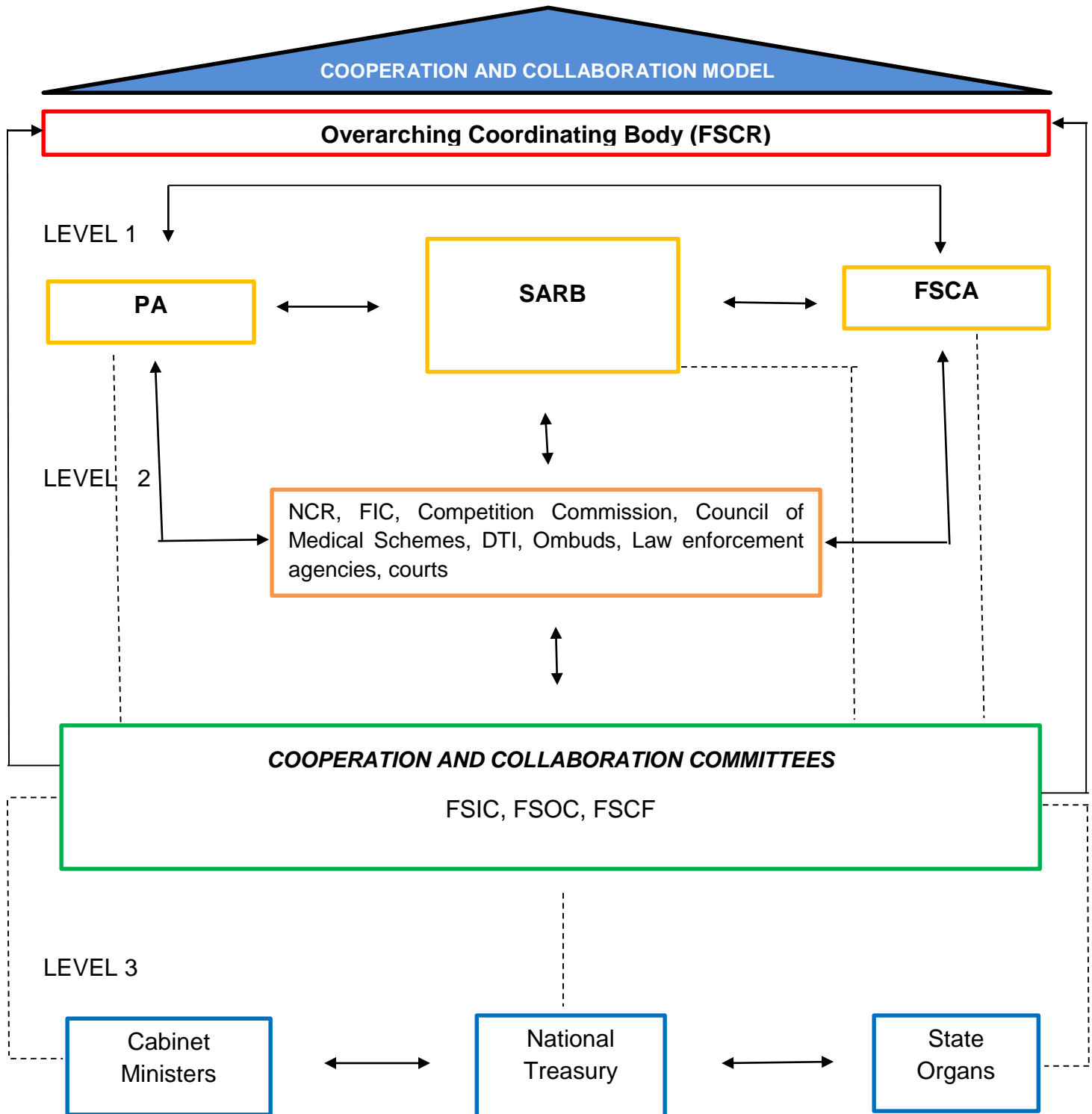
⁸⁷⁴ Kahn RB and Meade EE "International Aspects of Central Banking: Diplomacy and Coordination" in Conti-Brown P and Lastra RM (eds) *Research Handbook on Central Banking* (Edward Elgar Publishing 2018) 333, 345; also see Hong-Bum K "Cooperation and Coordination between the Financial Authorities: A Review of the Experiences of the United Kingdom, Norway, Sweden, and Korea" 2009 *Seoul Journal of Economics* 409, 420; Brown G and Susskind D "International Cooperation during the COVID-19 Pandemic" 2020 *Oxford Review of Financial Policy Journal* 64, 71.

players. The researcher proposes seven recommendations that should be taken into consideration to promote effective and robust cooperation and collaboration between the SARB and other financial role players to promote, protect, maintain and enhance financial stability and market integrity in South Africa.

Figure 1 below illustrates the proposed cooperation and collaboration model for South Africa. The model depicts different levels of cooperation and collaboration between the SARB and other financial role players in the order of their importance towards the protection, promotion, maintenance and enhancement of financial stability and market integrity in South Africa.⁸⁷⁵ Level 1 represents high-level cooperation and collaboration between the SARB and the key financial role players, namely the PA and the FSCA, to promote and protect financial stability and market integrity in South Africa. Level 1 cooperation and collaboration between the central bank and the two peak regulators is of utmost importance for the effective functioning of the South African financial regulatory architecture.

⁸⁷⁵ See Figure 1 under par 9.3.1 above.

Figure 1: The proposed policy framework for cooperation and collaboration between the SARB and other financial role players in South Africa



In Australia, high-level cooperation and collaboration are implemented between the RBA and the key financial regulators, namely the APRA and the ASIC.⁸⁷⁶ Accordingly, the researcher submits that level 1 cooperation and collaboration, between the SARB, the FSCA and the PA, is more important to promote, protect, enhance and maintain financial stability and market integrity.⁸⁷⁷ This follows the fact that the SARB, the PA and the FSCA are the key financial role players in South Africa. For instance, the SARB is tasked with the overall financial stability mandate, working closely with the PA and the FSCA's mandate is to enhance market integrity in South Africa.⁸⁷⁸ In Australia, high-level inter-agency coordination comprises the Reserve Bank of Australia (RBA), the Australian Prudential Regulation Authority (APRA) and the Australian Securities and Investment Commission (ASIC) through the CFR.⁸⁷⁹ Accordingly, level 1 coordination in the cooperation and collaboration model framework above depicts high-level cooperation and collaboration to promote financial stability and enhance market integrity in South Africa.

Level 2 depicts general cooperation and collaboration between the SARB and other financial role players to fulfil the roles and functions discussed in chapter 4 of this research. Level 2 coordination includes other financial role players that are relevant for the optimum operation of South Africa's financial system. For example, the FIC, the NCR, the Competition Commission, and the DTI. Level 2 cooperation and collaboration according to the proposed framework is general cooperation and collaboration between

⁸⁷⁶ Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 957; North and Wilson 2020 *University of New South Wales Law Journal* 560; Godwin A, Howse T and Ramsay I "A Jurisdictional Comparison of the Twin Peaks Model of Financial Regulation" 2016 *Journal of Banking Regulation* 103, 110; Godwin A and Ramsay I "Twin Peaks - The Legal and Regulatory Anatomy of Australia's System of Financial Regulation" 2015 *Journal of Banking and Finance Law and Practice* 240, 251.

⁸⁷⁷ Godwin 2017 *Law and Financial Markets Review* 152; Godwin and Schmulow 2015 *SALJ* 762; Godwin, Howse and Ramsay 2017 *SALJ* 670; Schmulow 2017 *African Journal of International and Comparative Law* 396.

⁸⁷⁸ Sections 20, 32 and 56 of the *FSR Act*, Chitimira and Magau 2022 *EIRP Proceedings* 366; Van Heerden CM and Van Niekerk GM "Two Takes on Twin Peaks: A Comparative Appraisal of the Models of Financial Regulation in the Netherlands and South Africa" 2020 *THRHR* 491, 513; Qumba 2022 *SALJ* 83.

⁸⁷⁹ Godwin, Howse and Ramsay 2016 *Journal of Banking Regulation* 106–109; see related comments by Godwin, Howse and Ramsay 2017 *SALJ* 659; Godwin 2017 *Law and Financial Markets Review* 183; also see Schmulow AD "Twin Peaks: An Analysis of the Australian Architecture" in SKK University Global Forum for Financial Consumers Conference (South Korea 4-5 November 2016) 5.

the SARB and other financial role players to fulfil their roles and functions.⁸⁸⁰ Such cooperation and collaboration are important for effective functioning of the financial regulatory framework, information sharing, and detecting and investigating potential and actual threat to financial stability and market integrity in South Africa.⁸⁸¹ The financial role players involved at this stage have roles and functions that support the SARB, the FSCA and the PA in fulfilling their statutory mandates. For example, the FIC detects and identifies financial crimes and potential risks that may threaten financial stability and market integrity.⁸⁸² As such, level 2 cooperation and collaboration are essential for the SARB, the PA and the FSCA to fulfil their mandates and to promote, protect, enhance and maintain financial stability and market integrity in South Africa. This can be achieved by effective information sharing arrangements, transparency, accountability and the enforcement of regulatory coordination in level 2.

The cooperation and collaboration model proposed by the researcher also introduces a new role for the law enforcement agencies such as the Hawks and the South African Police Services (SAPS) in the financial sector. The researcher also proposes proactive cooperation and collaboration between the South African courts, the National Prosecuting Authority and financial role players to promote, protect, enhance and maintain financial stability and market integrity in South Africa. Law enforcement agencies and the courts play an important role to promote financial stability and market integrity by detecting, investigating and prosecuting financial crime perpetrators timeously. The recent case of *South African Reserve Bank and Another In re Michael Johannes Jooste N.O and Others*⁸⁸³ shows that there is no adequate cooperation and collaboration between the

⁸⁸⁰ See section 76 of the *FSR Act*; also see Schmulow 2017 *African Journal of International and Comparative Law* 395; Qumba 2022 *SALJ* 79; Schmulow, Fairweather and Tarrant 2018 *Law and Financial Markets Review* 199.

⁸⁸¹ Llewlyn DT “Institutional Structure of Financial Regulation and Supervision: The Basic Issues” in World Bank *Aligning Supervisory Structures with Country Needs Seminar* (6-7 June 2006 Washington DC) 23; Godwin 2018 *Law and Financial Markets Review* 153; see related comments by Taylor 2010 *Connecticut Insurance Law Journal* 65.

⁸⁸² *Financial Intelligence Centre Amendment Act* 38 of 2001 (*FICA*) section 21F-G; see related comments by Chitimira H and Ncube M “The Role of Regulatory Bodies and Other Role-Players in the Promotion of Financial Inclusion in South Africa” 2020 *Acta Universitatis Danubius Juridica* 24, 31; Chitimira and Magau 2022 *EIRP Proceedings* 365-366.

⁸⁸³ *South African Reserve Bank and Another In re Michael Johannes Jooste N.O and Others* 16823/dd 6 October 2022; also see Moonstone Information Refinery “Did Grey-Listing Threat

SARB, the NPA and the law enforcement authorities in South Africa. This follows the fact that the prosecution of the matter was stayed for longer than was reasonable and this could have been due to a lack of effective coordination and information sharing arrangements between the SARB, the FSCA and the NPA to address the matter. The researcher contends that proactive cooperation and collaborations between the SAPS, the SARB, the NPA and the FIC could have enabled timely investigations and the prosecution of Marcus Jooste. In this regard, the researcher proposes a policy model that incorporates the roles and functions of the NPA, law enforcement authorities and the courts to cooperate, collaborate and share information relating to matters of common interest with the SARB and other financial role players at level 2. The synergy of the functions of the SAPS and the courts in the financial sector will enhance the detection, investigation and prosecution of market misconduct and other financial crimes that threaten financial stability and market integrity.

Level 3 in the proposed policy framework represents cooperation and collaboration between financial role players and relevant government departments in South Africa, namely the National Treasury, relevant Cabinet members and state officials. The government plays a significant role in structuring the financial regulatory laws and policies in South Africa.⁸⁸⁴ As such, their involvement cannot be overlooked. However, the researcher submits that government officials are politically exposed persons (PEPs) who pose a high risk of financial crime and threaten financial stability and market integrity in South Africa.⁸⁸⁵ In this regard, the researcher proposes a policy framework that controls, closely monitors and minimises the interaction between financial role players and PEPs through a coordinating body that oversees and facilitates cooperation and collaboration

Hasten SARB to Act against Markus Jooste?" 20 October 2022 www.citizen.co.za accessed 22 October 2022 page Anon; also see Exchange Control Regulations 1961, regulation 22C.

⁸⁸⁴ Van Niekerk and Van Heerden 2020 *SALJ* 128; Georgosouli 2013 *Capital Markets Law Journal* 65; Kahn and Meade "International Aspects of Central Banking: Diplomacy and Coordination" 346; Kallasidou 2013 *Bristol Law Review* 123.

⁸⁸⁵ Section 21F-21G of the *FICA*; Scott KA and Stephenson R "Enhanced Customer Due Diligence for Banks in the UK and the US" 2008 *Journal of International Banking and Financial Law* 86, 89; Tuba M and Van der Westhuizen C "An Analysis of the "Know-Your-Customer Policy as an Effective Tool to Combat Money Laundering: Is it about Who or What to Know that Counts?" 2014 *International Journal Public Law and Policy* 53, 58; De Koker L "Client Identification and Money Laundering Control: Perspectives on the Financial Intelligence Centre Act 38 of 2001" 2004 *TSAR* 715, 735; see also Reg 21 in GN R1062 in GG41154 of 29 September 2017.

between the SARB and relevant government officials. The researcher also acknowledges the importance of cooperation and collaboration between the government as policy and law-makers of South Africa and financial role players in the implementation of policy measures to promote and protect financial stability and market integrity in South Africa. Therefore, it is important to establish a robust regulatory framework to ensure effective cooperation and collaboration between the SARB, other financial role players and relevant government officials. The researcher argues that, despite the importance of the role played by the government in this regard, the political influence of Cabinet ministers, state organs and the National Treasury may threaten financial stability and market integrity considering the high rate of corruption in South Africa.⁸⁸⁶ In this regard, the researcher recommends that cooperation and collaboration between relevant government officials, the SARB and other financial role players be reasonably minimal and closely monitored by the proposed coordinating body.

The researcher proposes a new policy framework for cooperation and collaboration between the SARB and other financial role players as depicted in Figure 1 above. The current regulatory framework lacks accountability and cannot be legally enforced. In this regard, the researcher recommends that:

a. the roles and functions of the FSCR under the *FSR Act* should be amended to function as an overarching coordinating body with powers and authority to enforce cooperation and collaboration between the SARB and other financial role players

The researcher recommends the amendment of the roles and functions of the FSCR to become an overarching coordinating body with powers and authority to oversee, monitor and enforce outcome-based coordination between the SARB and all financial role players under the *FSR Act*. The FSCR should have regulatory powers, separate from its member institutions, to compel financial role players to fulfil their duty to cooperate, collaborate and conclude MOUs regarding such coordination. Following the Australian example of

⁸⁸⁶ See related comments by Hope Sr KR “Channels of Corruption in Africa: Analytical Review of Trends in Financial Crimes” 2020 *Journal of Financial Crime* 294, 298; Heath W “South Africa: Public Sector Corruption” 2000 *Journal of Financial Crime* 373, 374; Ines A and Hichem K “Financial Crime, Corruption and Tax Evasion: A Cross-Country Investigation” 2018 *Journal of Money Laundering Control* 545, 548.

the establishment of the Council of Financial Regulators (CFR), which functions as an overarching coordinating body in Australia, the researcher proposes that the FSCR be granted the status of an overarching coordinating body in South Africa.⁸⁸⁷ In contrast to the Australian CFR, the *FSR Act* established the FSCR to facilitate general cooperation and collaboration, consistency of action and to create a platform for its member institutions to discuss matters of common interest.⁸⁸⁸ The FSCR is comprised of senior officials from financial regulatory bodies such as the NCR and the FIC, certain departments such as the Department of Trade and Industry (DTI) and the Department of Health and heads of state organs which the Minister of Finance determines.⁸⁸⁹ Contrarily, the membership of the CFR in the case of Australia is limited to key financial regulatory agencies such as the RBA, the Australian Treasury, the APRA and the ASIC.⁸⁹⁰

The researcher argues that the nature of the membership of the FSCR raises an area of difficulty considering that its objective is to facilitate cooperation and collaboration in the South African financial sector.⁸⁹¹ The exclusion of the SARB, the PA, the FSCA and the National Treasury in the FSCR limits the scope and functions of the FSCR in promoting and protecting market integrity and financial stability in South Africa. This follows that the current membership of the FSCR does not create a forum for high-level coordination and discussion as it excludes the key financial role players tasked with promoting, protecting,

⁸⁸⁷ See related discussion by Godwin 2018 *Law and Financial Markets Review* 156; Godwin and Schmulow 2015 *SALJ* 772; see related comments by Fisk A and Pollari I “Financial System Inquiry, KPMG Submission” 2014 *Financial Services* 6; also see Ferran E and Alexander K “Can Soft Law Bodies be Effective? Soft Systemic Risk Oversight Bodies and the Special Case of the European Systemic Risk Board” 2011 *Legal Studies Research Paper Series* 6; Kelly CR “The Sociological Pull of Soft Law” 2012 *American Society of International Law Proceedings* 320, 327.

⁸⁸⁸ Section 79(1) of the *FSR Act*; Godwin and Schmulow 2015 *SALJ* 772; Van Niekerk and Van Heerden 2020 *SALJ* 116; see related comments by Godwin, Howse and Ramsay 2017 *SALJ* 701.

⁸⁸⁹ Section 79(3) of the *FSR Act*; Godwin and Schmulow 2015 *SALJ* 772; Van Niekerk and Van Heerden 2020 *SALJ* 116; see related discussion by Schmulow 2017 *African Journal of International and Comparative Law* 396.

⁸⁹⁰ Godwin A, Howse T and Ramsay I “A Jurisdictional Comparison of the Twin Peaks Model of Financial Regulation” 2016 *Journal of Banking Regulation* 103, 106–109; see related comments by Godwin, Howse and Ramsay 2017 *SALJ* 659; Godwin 2017 *Law and Financial Markets Review* 183; also see Schmulow AD “Twin Peaks: An Analysis of the Australian Architecture” in SKK University Global Forum for Financial Consumers Conference (South Korea 4-5 November 2016) 5.

⁸⁹¹ Georgosouli 2013 *Capital Markets Law Journal* 72; Kallasidou 2013 *Bristol Law Review* 117; see related discussion by Lui 2012 *Journal of Banking Regulation* 24, 31; also see Huang and Shoenmaker 2015 *Routledge* 265.

enhancing and maintaining financial stability and market integrity in South Africa.⁸⁹² As such, the researcher argues that the FSCR, in contrast with the Australian CFR which functions as a high-level council for cooperation and collaboration between the central bank and other financial role players, lacks the capacity and authority to facilitate, oversee and enforce cooperation and collaboration between the SARB and other financial role players in South Africa. This is due to the constituent membership of the FSCR, which excludes the key financial role players, namely the SARB, the PA and the FSCA.

In this regard, the researcher recommends the amendment of the *FSR Act* to the effect of qualifying the FSCR as an overarching coordinating body as in the case of Australia. The researcher proposes the establishment of powers and authority that enables the FSCR to not only facilitate but also oversee and consistently enforce cooperation and collaboration between the SARB and all other financial role players, namely, the PA, the FSCA, the National Treasury, the FIC, the NCR, the SAPS, the South African courts and relevant state organs to promote and protect market integrity and financial stability in South Africa. The purpose of an overarching body is to enhance the enforcement of the duty to cooperate under the *FSR Act* through a body with regulatory authority to compel coordination. The proposed amendments will also confer the duty to monitor and control the interaction between financial regulatory agencies and government officials who are politically exposed and pose a high risk of financial crimes that threaten financial stability and market integrity.⁸⁹³

The researcher acknowledges the establishment of other forums to facilitate cooperation and collaboration in the South African financial sector.⁸⁹⁴ For example, the Financial Sector Inter-Ministerial Council (FSIC), the Financial Sector Contingency Forum (FSCF)

⁸⁹² Godwin and Schmulow 2015 *SALJ* 764; Godwin, Howse and Ramsay 2016 *Journal of Banking Regulation* 103; Kourabas S “Improving Australia’s Regulatory Framework for Systemic Financial Stability” 2018 *Journal of Banking and Finance Law Practice* 183, 195; Schmulow 2017 *African Journal of International and Comparative Law* 402.

⁸⁹³ Section 21F-21G of the *FICA*; Scott and Stephenson 2008 *Journal of International Banking and Financial Law* 89; Tuba and Van der Westhuizen 2014 *International Journal Public Law and Policy* 58; De Koker 2004 *TSAR* 735; see also Reg 21 in GN R1062 in GG41154 of 29 September 2017.

⁸⁹⁴ See Godwin 2017 *Law and Financial Markets Review* 185; Van Niekerk and Van Heerden 2020 *SALJ* 115; see related discussion by Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 25; also see Qumba 2022 *SALJ* 83.

and the Financial Stability Oversight Committee (FSOC).⁸⁹⁵ However, the researcher argues that, despite having potentially overlapping functions, the FSIC, the FSCF and the FSOC do not create a platform for high-level cooperation and collaboration due to their member institutions which fail to convene the key financial role players such as the SARB, the PA and the FSCA.⁸⁹⁶ Also, the roles and functions of the FSIC, FSCF and FSOC are restrictively limited to cooperation and collaboration relating to specific matters. For example, the FSOC, assisted by the FSCF, facilitates cooperation and collaboration on matters relating to financial stability only, whilst the FSIC focuses on the coordination of Cabinet members responsible for establishing financial sector laws only.⁸⁹⁷ Accordingly, the researcher argues that there is a need for a coordinating body that harmonises regulatory coordination and creates a forum for high-level coordination, mutual assistance, consultation and information sharing to promote financial stability and enhance market integrity in South Africa.

According to Godwin and Schmulow, the purpose of establishing a coordinating body is to, *inter alia*, promote working relationships between the central bank and the key financial role players, create an effective channel for the flow of information and promote the cooperation and collaboration of financial regulatory agencies.⁸⁹⁸ However, the forums established by the *FSR Act* to facilitate cooperation and collaboration under the South African financial regulatory architecture fall short of these characteristics and are not adequate enough to foster effective cooperation and collaboration to promote, protect, enhance and maintain financial stability and market integrity.⁸⁹⁹ In light of this, the researcher argues that there is a need for a coordinating body that comprises key financial

⁸⁹⁵ Sections 20(1), 25(1) and 83(1) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 115; Qumba 2022 *SALJ* 84; Godwin 2018 *Law and Financial Markets Review* 155.

⁸⁹⁶ See sections 22(1), 25(3) and 84 of the *FSR Act*; see related discussion by Godwin and Schmulow 2015 *SALJ* 763; see also Godwin and Schmulow 2015 *SALJ* 356; Godwin 2018 *Law and Financial Markets Review* 155.

⁸⁹⁷ See related discussion by Godwin 2017 *Law and Financial Markets Review* 185; Van Niekerk and Van Heerden 2020 *SALJ* 118; Godwin, Howse and Ramsay 2016 *Journal of Banking Regulation* 108.

⁸⁹⁸ Godwin and Schmulow 2015 *SALJ* 763; see related comments by Godwin, Howse and Ramsay 2016 *Journal of Banking Regulation* 109; also see Schmulow "Twin Peaks: An Analysis of the Australian Architecture" 8; Godwin 2018 *Law and Financial Markets Review* 151.

⁸⁹⁹ See sections 20(1), 71(2) and 83(1) of the *FSR Act*; Godwin and Schmulow 2015 *SALJ* 765; Van Niekerk and Van Heerden 2020 *SALJ* 132; Qumba 2022 *SALJ* 98.

regulatory agencies to ensure optimum cooperation and collaboration between the SARB, the PA, the FSCA, the National Treasury, the FIC, the NCR and other financial role players to promote and protect market integrity and financial stability in South Africa.⁹⁰⁰

The preamble of the *FSR Act* expressly provides that one of its objectives is to promote consistency, cooperation, collaboration, coordination and consultation amongst all financial regulatory authorities in South Africa.⁹⁰¹ The researcher submits that the starting point to achieving these objectives would be an establishment of an overarching coordinating body with express functions and mandates to ensure effectiveness, transparency, accountability and enforcement of the statutory duty to cooperate and collaborate. The researcher recommends that instead of overburdening the financial system with more bodies with seemingly overlapping functions to facilitate cooperation and collaboration, the status, roles and functions of the FSCR should be amended to qualify it as an overarching coordinating body in South Africa.

b. the *FSR Act* should be amended to enact provisions that provide that cooperation and collaboration committees and working groups should be accountable to the proposed overarching coordinating body

The *FSR Act* established committees and working groups to facilitate cooperation and collaboration between the SARB, state organs and other financial role players to protect financial stability, promote market integrity and detect systemic risks in the financial system.⁹⁰² For example, the FSOC facilitates cooperation and collaboration between the SARB and other financial sector regulators, namely the PA, the FSCA and the NCR, in

⁹⁰⁰ See related discussion by Van Niekerk and Van Heerden 2020 *SALJ* 143-144; also see Godwin, Kourabas and Ramsay 2016 *The International Lawyer* 37; Schmulow "Twin Peaks: An Analysis of the Australian Architecture" 21; Ferran and Alexander 2011 *Legal Studies Research Paper Series* 6.

⁹⁰¹ See preamble of the *FSR Act*; see related comments by Van Heerden and Van Niekerk 2020 *THRHR* 513; also see Godwin, Howse and Ramsay 2017 *SALJ* 701; Godwin 2018 *Law and Financial Markets Review* 151.

⁹⁰² Sections 20(2), 79(2) and 83(2)(b) of the *FSR Act*; see related comments by Godwin and Schmulow 2015 *SALJ* 761; Van Niekerk and Van Heerden 2020 *SALJ* 128; Schmulow 2017 *African Journal of International and Comparative Law* 396.

matters relating to financial stability.⁹⁰³ The FSIC facilitates cooperation and collaboration between Cabinet ministers who are responsible for enacting financial sector laws.⁹⁰⁴ The FSCF was also established to assist the FSOC in fulfilling its mandates of detecting systemic risks.⁹⁰⁵ The FSIC also has an overall mandate of reviewing and evaluating the effectiveness of the cooperation and collaboration mechanisms between the SARB and other financial role players in South Africa.⁹⁰⁶ Contrary to the position in Australia, the coordinating body has the mandate of ensuring and evaluating the effectiveness of cooperation and collaboration arrangements between the RBA and other financial role players and not any other subcommittees.⁹⁰⁷ The Australian position guarantees consistency, accountability and transparency by placing the objective in the CFR rather than other bodies.

The abovementioned cannot be said about the current position in South Africa. The *FSR Act* confers the duty to evaluate and review cooperation and collaboration mechanisms between the SARB and other financial role players on the FSIC.⁹⁰⁸ The researcher argues that the duty to review and assess cooperation and collaboration mechanisms should be conferred on the coordinating body. This entails that, the coordinating body should receive reports relating to cooperation and collaboration from the FSOC, the FSCF and the FSIC for review. The researcher submits that the powers and functions of the coordinating body should entail the duty to assess and review the cooperation and

⁹⁰³ Section 20(2)(b) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 117; Van Heerden and Van Niekerk 2020 *THRHR* 508; see related comments by Goodhart A “A Framework for Assessing Financial Stability” 2006 *Journal of Banking and Finance* 3410, 3415.

⁹⁰⁴ Section 83(2) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 117; Van Heerden and Van Niekerk 2020 *THRHR* 508; Schmulow 2017 *African Journal of International and Comparative Law* 395.

⁹⁰⁵ Section 25(2) of the *FSR Act*; see related discussion by Qumba 2022 *SALJ* 87; Van Niekerk and Van Heerden 2020 *SALJ* 117.

⁹⁰⁶ Section 86(3) of the *FSR Act*; see related comments by Godwin and Schmulow 2015 *SALJ* 761; also see Godwin, Li and Ramsay 2016 *Centre for International Finance and Regulation* 36; Schmulow “Twin Peaks: An Analysis of the Australian Architecture” 27.

⁹⁰⁷ Godwin A “Australia’s Trek towards Twin Peaks – Comparisons with South Africa” 2017 *Law and Financial Markets Review* 182, 185; Schmulow 2015 *Journal of Banking and Finance Law and Practice* 163; Jensen and Kingston 2010 *Butterworths Journal of International Banking and Financial Law*, 549; Cooper J “The Integration of Financial Regulatory Authorities – The Australian Experience” 11.

⁹⁰⁸ Section 86(3) of the *FSR Act*; see related comments by Godwin and Schmulow 2015 *SALJ* 761; also see Godwin, Li and Ramsay 2016 *Centre for International Finance and Regulation* 36; Schmulow “Twin Peaks: An Analysis of the Australian Architecture” 27.

collaboration arrangements implemented by the facilitating committees to ensure their relevancy, adequacy, effectiveness, transparency and accountability.⁹⁰⁹ Therefore, the researcher submits that the FSCF, the FSIC and the FSOC should periodically report to the coordinating body regarding the fulfilment of their roles and functions to facilitate cooperation and collaboration. The purpose of this is to ensure that there is adequate and proactive cooperation and collaboration at each level of the financial system to promote, protect, enhance and maintain financial stability and market integrity in South Africa.

The FSIC comprises Cabinet members who are politically exposed and are regarded as high risk to market integrity due to their powers and exposure to financial crimes such as money laundering and embezzlement. As mentioned earlier in this research, it is recommended that the interaction between the central bank and state organs should be limited to avoid the risks that come with PEPs such as financial crime, which affects market integrity and threaten financial stability.⁹¹⁰ In this regard, the researcher submits that, there is a need to closely monitor the relationship between SARB, the financial role players and the FSIC to ensure transparency of action and accountability.⁹¹¹ This safeguards against the risk of financial crime and state capture that comes with PEPs. In this regard, the researcher proposes that the FSIC should regularly report to the coordinating body regarding its regulatory actions and decisions to ensure accountability and transparency.

More so, the researcher recommends that the FSIC and other committees should be required to report and account to the proposed overarching coordinating body to ensure consistency of action. The researcher also argues that conferring the duty to review and evaluate the effectiveness of cooperation and collaboration measures on the FSIC will

⁹⁰⁹ See related comments by Godwin and Schmulow 2015 *SALJ* 761; also see Godwin, Li and Ramsay 2016 *Centre for International Finance and Regulation* 36; Schmulow "Twin Peaks: An Analysis of the Australian Architecture" 27.

⁹¹⁰ Leppan D "Refining the PEP Definition" 2005 *World-Check White Paper* 9; De Klerk A "The Importance and Relevance of Financial Institutions Doing Business With Politically Exposed Persons In The Global Fight Against Money Laundering" 2007 *SALJ* 368, 375; De Koker 2004 *TSAR* 735; Choo K "Politically Exposed Persons (PEPs): Risks and Mitigation" 2008 *Journal of Money Laundering Control* 371, 375.

⁹¹¹ See related discussion by Godwin 2017 *Law and Financial Markets Review* 187; Schmulow 2015 *Journal of Banking and Finance Law and Practice* 163; Jensen and Kingston 2010 *Butterworths Journal of International Banking and Financial Law* 545, 549; Cooper "The Integration of Financial Regulatory Authorities – The Australian Experience" 11.

consequently create blurred boundaries and overlaps between the proposed coordinating body and the FSIC, hence the duty should be renounced. The coordinating body should assume the role and function of evaluating the effectiveness of cooperation and collaboration mechanisms. The recommended amendments to the *FSR Act* will prevent overlapping functions, consistent enforcement of cooperation and collaboration and also limit and manage the interference of state organs and PEPs with the SARB to prevent risks that threaten market integrity and financial stability in South Africa.⁹¹²

c. there should be regular meetings for the member institutions of the proposed coordinating body

The purpose of a coordinating body is to, *inter alia*, create a platform for member institutions to discuss matters of common interest and resolve any matters that may threaten financial stability and market integrity.⁹¹³ The researcher proposes that the coordinating body should consist of the SARB, the PA, the FSCA, the FIC and the NCR. In Australia, the CFR meets at least four times a year and as frequently as may be required.⁹¹⁴ Regular CFR meetings in Australia also nurture good working relationships amongst its members, which is an essential element for effective coordination amongst its constituent members.⁹¹⁵ However, in South Africa, the *FSR Act* requires the FSCR members to meet at least twice a year. The researcher argues that two meetings annually are not sufficient for the coordinating body to fulfil its mandates. This follows the fact that regular meetings between the FSCR member institutions strengthen effective information sharing, consistency of action and harmonised responses to regulatory issues whenever they arise. In this regard, the researcher recommends that the proposed coordinating body member institutions should meet more regularly and as often as may be

⁹¹² Section 86 of the *FSR Act*; See related comments by Van Heerden and Van Niekerk 2020 *THRHR* 508; Kallasidou 2013 *Bristol Law Review* 120; Godwin and Schmulow 2015 *SALJ* 761.

⁹¹³ Godwin and Schmulow 2015 *SALJ* 768; Kallasidou 2013 *Bristol Law Review* 129; Godwin, Li, Ramsay 2016 *Hong Kong Law Journal* 957.

⁹¹⁴ Godwin 2017 *Law and Financial Markets Review* 186; Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 950; Cooper "The Integration of Financial Regulatory Authorities – The Australian Experience" 18; Jensen and Kingston 2010 *Butterworths Journal of International Banking and Financial Law* 549.

⁹¹⁵ Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 949; Kourabas 2018 *Journal of Banking and Finance Law Practice* 187; Godwin 2017 *Law and Financial Markets Review* 188.

necessary.⁹¹⁶ Regular meetings will create a platform for member institutions to identify, discuss and resolve potential threats to financial stability and market integrity through proactive information sharing. As such, the *FSR Act* should be amended to provide for more meetings of the coordinating body. An example may be drawn from the Australian experience where the CFR meets at least four times a year.⁹¹⁷

d. the PA should be housed outside the SARB to ensure effective cooperation and collaboration and prevent overlapping functions between the SARB and the PA

The positioning of the prudential regulator influences on the effectiveness of cooperation and collaboration mechanisms between the central bank and the prudential regulator.⁹¹⁸ This follows the fact that the priorities of monetary policy and prudential supervision can be contradictory and may lead to conflicts of interest between the central bank and the prudential authority. This is principal because the positioning of the prudential regulator correlates to the overall competitiveness of the banking system and macro-economic outcomes which are essential for the maintenance of financial stability and market integrity.⁹¹⁹ The three jurisdictions considered in this research follow different approaches with regard to the positioning of the prudential regulator. In Australia, the APRA is a stand-alone regulator that is completely independent of the RBA.⁹²⁰ In the UK, the Prudential Regulation Authority (PRA) is part of the Bank of England (BOE) and is fully owned by

⁹¹⁶ Godwin and Schmulow 2015 *SALJ* 768; see Van Niekerk and Van Heerden 2020 *SALJ* 142; see related comments by Godwin, Howse and Ramsay 2017 *SALJ* 697; Godwin A, Li G and Ramsay I “Is Australia’s “Twin Peaks” System of Financial Regulation a Model for China?” 2016 *Centre for International Finance and Regulation* 10, 30.

⁹¹⁷ Reserve Bank of Australia “Submission to the Financial System Inquiry” 66; Godwin and Schmulow 2015 *SALJ* 768; Godwin, Li and Ramsay 2016 *Centre for International Finance and Regulation* 34; Cooper “The Integration of Financial Regulatory Authorities – The Australian Experience” 25.

⁹¹⁸ See related discussion by Di Noia C and Di Giorgio G “Should Banking Supervision and Monetary Policy Tasks be given to Different Agencies?” 1999 *International Finance* 361, 372-6; also see Goodhart C and Schoenmaker D “Institutional Separation between Supervisory and Monetary Agencies” 1992 *Giornale Degli Economisti e Annali di Economia* 361; Qumba 2022 *SALJ* 95; Kallasidou 2013 *Bristol Review* 121.

⁹¹⁹ Di Noia and Giorgio 1999 *International Finance* 365; Godwin and Schmulow 2015 *SALJ* 761; Cooper J “The Integration of Financial Regulatory Authorities – The Australian Experience” 11; Qumba 2022 *SALJ* 95.

⁹²⁰ See section 3 of the *Australia Prudential Authority Act*; also see Godwin and Schmulow 2015 *SALJ* 765; Ioannidou VP “Does Monetary Policy Affect the Central Bank’s Role in Bank Supervision?” 2005 *Journal of Financial Intermediation* 55, 60; Qumba 2022 *SALJ* 95.

the BOE.⁹²¹ In South Africa, the PA is housed by the SARB and shares the same administration and management as the SARB.⁹²² Several views have been shared for and against each approach.⁹²³ The researcher recommends the Australian approach, thus a stand-alone prudential regulator, which operates separately from the central bank and the Basel Committee in Principles on Banking Supervision makes the same recommendation.⁹²⁴ This follows the fact that a stand-alone prudential regulator promotes operational independence between the SARB and the PA.⁹²⁵ A stand-alone prudential regulator also prevents the likelihood of turf wars and conflicts of interest that may arise due to competing priorities between the roles and functions of the SARB and the PA.⁹²⁶ For example, the SARB may decide to liquidate a particular banking institution to lower the costs of a systemic event, whilst on the other hand, a bank liquidating policy may compromise the PA's objective to protect financial customers.⁹²⁷ Circumstances like these could give rise to turf wars between the central bank and the prudential regulator which may threaten financial stability and market integrity as the central bank and the prudential authority may abandon their other objectives to pay more attention to such

⁹²¹ *Financial Services Act* of 2012, schedule 1ZB; Kallasidou 2013 *Bristol Law Review* 121; Llewlyn DT "Institutional Structure of Financial Regulation and Supervision: The Basic Issues" in World Bank *Aligning Supervisory Structures with Country Needs Seminar* (6-7 June 2006) Washington DC 1, 25; Georgosouli 2013 *Capital Markets Law Journal* 6; Black J and Hopper M "Breaking Up is Hard To Do: The Future of the UK Financial Regulation?" 2011 *London School of Economics and Political Science Research Paper* 19, 21.

⁹²² See section 32(2) of the *FSR Act*; Godwin and Schmulow 2015 *SALJ* 750; Van Niekerk and Van Heerden 2020 *SALJ* 121; Godwin, Howse and Ramsay 2017 *SALJ* 674.

⁹²³ For example, see Di Noia and Di Giorgio 1999 *International Finance* 372; Tuya J and Zamalloa "Issues on Placing Banking Supervision in the Central Bank" in *Frameworks for Monetary Stability: Policy Issues and Country Experiences Sixth Seminar on Central Banking* (22 March 1994 Washington DC) 680; Ioannidou 2005 *Journal of Financial Intermediation* 60.

⁹²⁴ See Principle 2 of the Basel Committee Principles on Banking Supervision; Goodhart and Schoenmaker 1992 *Giornale Degli Economisti e Annali di Economia* 361; Godwin and Schmulow 2015 *SALJ* 766; Van Niekerk and Van Heerden 2020 *SALJ* 131; Godwin, Howse and Ramsay 2017 *SALJ* 674.

⁹²⁵ Qumba 2022 *SALJ* 94; Black and Hopper 2011 *London School of Economics and Political Science Research Paper* 23; Godwin and Schmulow 2015 *SALJ* 766; Van Niekerk and Van Heerden 2020 *SALJ* 131.

⁹²⁶ Goodhart and Schoenmaker 1992 *Giornale Degli Economisti e Annali di Economia* 361; Godwin and Schmulow 2015 *SALJ* 766; Van Niekerk and Van Heerden 2020 *SALJ* 131; Godwin, Howse and Ramsay 2017 *SALJ* 674.

⁹²⁷ See section 12 of the *FSR Act*; Ioannidou 2005 *Journal of Financial Intermediation* 60; Kallasidou 2013 *Bristol Law Review* 121; Llewlyn DT "Institutional Structure of Financial Regulation and Supervision: The Basic Issues" 14; Black and Hopper 2011 *London School of Economics and Political Science Research Paper* 23.

conflicts.⁹²⁸ The situation worsens when both financial role players operate within the same administration and under the same personnel, as in the case of South Africa.⁹²⁹

A stand-alone prudential regulator requires efficient cooperation and collaboration mechanisms between the central bank and the prudential regulator to promote and protect financial stability and market integrity.⁹³⁰ In this regard, the researcher has recommended a new cooperation and collaboration model framework in Figure 1 above to safeguard optimum cooperation and collaboration between the SARB and the PA.⁹³¹ The researcher argues that the independence of the PA from the SARB ensures clear and separate regulatory objectives between the SARB and the PA, and in turn prevents regulatory duplications and overlapping functions between the PA and the SARB.⁹³² Regulatory gaps and overlapping functions result in cumbersome cooperation and collaboration between the SARB and the PA, the result of which may threaten financial stability and market integrity in South Africa due to poor and ineffective regulatory performance.⁹³³ Accordingly, the PA must obtain a theoretically and practically independent presence from the SARB. The housing of the PA within the SARB also entails continuous support by the SARB towards failing banks to maintain liquidity.⁹³⁴ This follows the concern regarding the adverse effects of bank failures on the SARB's

⁹²⁸ Godwin, Howse and Ramsay 2017 *SALJ* 674; Van Niekerk and Van Heerden 2020 *SALJ* 133; Di Noia and Di Giorgio 1999 *International Finance* 361; Goodhart and Schoemaker 1992 *Giornale Degli Economisti e Annali di Economia* 361.

⁹²⁹ Di Noia and Di Giorgio 1999 *International Finance* 361; Qumba 2022 *SALJ* 96; Pellegrinaa D, Masciandaroc D and Pansini R "The Central Banker as Prudential Supervisor: Does Independence Matter?" 2013 *Journal of Financial Stability* 412, 416; Kallasidou 2013 *Bristol Law Review* 120.

⁹³⁰ Hong-bum 2009 *Seoul Journal of Economics* 42; Kallasidou 2013 *Bristol Law Review* 120; Qumba 2022 *SALJ* 78; Pellegrinaa, Masciandaroc and Pansini 2013 *Journal of Financial Stability* 416.

⁹³¹ See paragraph 9.3.1 of this thesis.

⁹³² Pellegrinaa, Masciandaroc and Pansini 2013 *Journal of Financial Stability* 416; Llewlyn DT "Institutional Structure of Financial Regulation and Supervision: The Basic Issues" 25; Schmulow "Twin Peaks: A Theoretical Analysis" 15; Qumba 2022 *SALJ* 95.

⁹³³ Pellegrinaa, Masciandaroc and Pansini 2013 *Journal of Financial Stability* 416; Llewlyn DT "Institutional Structure of Financial Regulation and Supervision: The Basic Issues" 22; Kallasidou 2013 *Bristol Review* 121; Qumba 2022 *SALJ* 83; see related comments by Taylor 2010 *Connecticut Insurance Law Journal* 67.

⁹³⁴ Godwin and Schmulow 2015 *SALJ* 63; Qumba 2022 *SALJ* 96; See Principle 2 of the Basel Committee Principles on Banking Supervision; see related comments by Black and Hopper 2011 *London School of Economics and Political Science Research Paper* 23; Kallasidou 2013 *Bristol Review* 123; Georgosouli 2013 *Capital Markets Law Journal* 66.

reputation and its financial stability mandate.⁹³⁵ This entails that the SARB's financial stability could be undermined if its competence is undermined by the failures of the PA.

Therefore, it is recommended that the PA should be housed outside of and independent of the SARB and operate under a separate administration system and separate personnel to ensure effective cooperation and collaboration and information sharing arrangements between the SARB and the PA to promote, protect, maintain and enhance financial stability and market integrity in South Africa.⁹³⁶ This will prevent potential turf wars between the SARB and the PA, especially considering the lack of oversight arrangements to resolve turf wars in the MOUs relating to cooperation and collaboration between the SARB and the PA.

e. the *FSR Act* should be amended to enact provisions that mandate financial role players to enter into cooperation and collaboration MOUs with each other

The *FSR Act* requires the SARB and other financial role players to enter into MOUs which will stipulate cooperation and collaboration and information sharing arrangements between the SARB and other financial role players to fulfil their financial stability and market integrity objectives.⁹³⁷ However, the *FSR Act* also provides that the failure to adhere to this requirement does not affect the functions or conduct of the non complying regulator.⁹³⁸ This provision encourages boycotting the duty to enter into MOUs regarding cooperation and collaboration arrangements between the SARB and other financial role players. To date, the SARB and the PA, the FSCA, the FIC and the NCR have concluded several MOUs concerning cooperation and collaboration to establish coordination and information sharing arrangements. For example, the SARB concluded an MOU concerning cooperation and collaboration with the PA and the FIC in 2018, which

⁹³⁵ See section 12 of the *FSR Act*; Pellegrinaa, Masciandaroc and Pansini 2013 *Journal of Financial Stability* 416; Llewlyn DT "Institutional Structure of Financial Regulation and Supervision: The Basic Issues" 25; Schmulow "Twin Peaks: A Theoretical Analysis" 15.

⁹³⁶ Qumba 2022 *SALJ* 99; Goodhart and Schoenmaker 1992 *Giornale Degli Economisti e Annali di Economia* 365; Goodhart 2006 *Journal of Banking and Finance* 3418.

⁹³⁷ Section 27(1) and 77(1) of the *FSR Act*; see related comments by De Jagger 2013 *SA Merc LJ* 508; Schmulow 2017 *African Journal of International and Comparative Law* 394; Godwin and Schmulow 2015 *SALJ* 761.

⁹³⁸ Sections 27(3) and 77(3) of the *FSR Act*; Godwin and Schmulow 2015 *SALJ* 758; Van Niekerk and Van Heerden 2020 *SALJ* 120; Qumba 2022 *SALJ* 97.

establishes instances whereby the SARB, the PA and the FIC should share information and collaborate to fulfil their statutory objective.⁹³⁹ As mentioned earlier, like Australia, South Africa follows a soft law approach in the form of MOUs between the SARB and other financial role players to outline cooperation and collaboration arrangements.⁹⁴⁰ Although the *FSR Act* does not stipulate the content of these MOUs, it requires the SARB and other financial role players to enter into MOUs that stipulate their cooperation and collaboration arrangements.⁹⁴¹ As such, the researcher argues that the MOUs concerning cooperation and collaboration between the SARB and the PA, the FSCA, the FIC and the NCR are an essential element to effective cooperation and collaboration between the SARB and other financial role players.⁹⁴² Accordingly, the SARB, the PA, the FSCA, the FIC and other financial role players should be mandated to conclude these MOUs. Concluding MOUs relating to cooperation and collaboration gives effect to the statutory duty to cooperate and collaborate to promote and protect financial stability and market integrity.⁹⁴³

Accordingly, the researcher recommends that the *FSR Act* should be amended to mandate the SARB and other financial role players to conclude MOUs concerning cooperation and collaboration and information sharing arrangements.⁹⁴⁴ Generally, hard law brings about enforceable obligations, therefore it should be irrefutable and predictable enough to enable enforcement.⁹⁴⁵ Therefore, the *FSR Act* should be amended to compel

⁹³⁹ SARB and PAN MOU “Memorandum of Understanding between the South African Reserve Bank and the Prudential Authority” 26 September 2018 paras 2.1–2.4; also see SARB and FSCAN MOU “Memorandum of Understanding between the South African Reserve Bank and the Financial Sector Conduct Authority” 28 September 2018 para 2.1.1.

⁹⁴⁰ Ferran and Alexander 2011 *Legal Studies Research Paper Series* 6; Kelly 2012 *American Society of International Law Proceedings* 327; Godwin and Schmulow 2015 *SALJ* 756; Godwin, Howse and Ramsay 2017 *SALJ* 669.

⁹⁴¹ Section 77(3) of the *FSR Act*; Godwin and Schmulow 2015 *SALJ* 758; Van Niekerk and Van Heerden 2020 *SALJ* 120; Qumba 2022 *SALJ* 97.

⁹⁴² See sections 27 and 77 of the *FSR Act*; Godwin and Schmulow 2015 *SALJ* 758; Van Niekerk and Van Heerden 2020 *SALJ* 120; Qumba 2022 *SALJ* 97.

⁹⁴³ Godwin, Howse and Ramsay 2017 *SALJ* 669; Qumba 2022 *SALJ* 97; Georgosouli 2013 *Capital Markets Law Journal* 83; Godwin, Li and Ramsay 2017 *Hong Kong Law Journal* 942.

⁹⁴⁴ Sections 27(3) and 77(3) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 131; see related comments by Georgosouli 2013 *Capital Markets Law Journal* 79; see related comments by Godwin, Li, and Ramsay 2016 *Hong Kong Law Journal* 957.

⁹⁴⁵ Ferran and Alexander 2011 *Legal Studies Research Paper Series* 6-7; Kelly 2012 *American Society of International Law Proceedings* 326-327; see related discussion by Financial System Inquiry “Financial System Inquiry Interim Report” 78; Godwin and Schmulow 2015 *SALJ* 760.

the SARB and other financial role players must be mandated to conclude cooperation and collaboration MOUs with each other to ensure transparency, compliance, accountability and enforceability of the duty to cooperate and collaborate. This will enhance effective cooperation and collaboration between the SARB and other financial role players to protect, promote, enhance and maintain financial stability and market integrity in South Africa.

It is further recommended that the *FSR Act* should also impose penalties for financial role players who do not adhere to the requirement to conclude MOUs on cooperation and collaboration.⁹⁴⁶ This will ensure that there is active cooperation and collaboration between the SARB and other financial role players and also enables the coordinating body to enforce cooperation and collaboration measures in South Africa. Penalties will also enhance the accountability on the duty to cooperate and collaborate to promote, protect, maintain and enhance financial stability and market integrity. For example, the *FSR Act* could provide that the failure of the SARB's other financial role players to adhere to the duty to cooperate and collaborate or enter into cooperation and collaboration MOUs will attract a penalty. Such penalties may include invalidation of some functions of the non complying financial role player or limiting the functions of the particular financial role player. The purpose of these penalties will be to compel financial role players to consistently fulfil the duty to conclude MOUs regarding cooperation and collaboration and maintain proactive coordination to fulfil their mandates. Accordingly, the provision that the SARB, the FSCA, the PA, the NCR, the FIC and other financial role players will be incentivised for failing to enter into MOUs regarding cooperation and collaboration should be reconsidered.

f. the *FSR Act* should be amended to provide for cooperation and collaboration arrangements between the SARB and other financial role players to manage a financial crisis

⁹⁴⁶ See related comments by Chitimira H Market Abuse Regulation in SADC: South Africa, Namibia, Botswana and Zimbabwe (Juta: Cape Town 2022) 166; also see Van Niekerk and Van Heerden 2020 *SALJ* 141; Godwin, Howse and Ramsay 2017 *SALJ* 669; Qumba 2022 *SALJ* 101.

Unlike the UK and Australia, there are no express cooperation and collaboration arrangements between the SARB and other financial role players during a financial crisis in South Africa.⁹⁴⁷ The *FSR Act* only provides for general cooperation and collaboration during supervisory and regulatory challenges and not to manage financial crises.⁹⁴⁸ This entails that there are no express provisions relating to regulatory coordination during crises and could result in cumbersome coordination during crises. Regulatory challenges are not the same as financial crises. A financial crisis can be simplified as a systemic event that threatens financial stability and market integrity in a financial sector.⁹⁴⁹ There is a gap regarding cooperation and collaboration mechanisms between the SARB and other financial role players during a financial crisis in South Africa.⁹⁵⁰ The *FSR Act* is silent about how the SARB and other financial role players should cooperate and collaborate to protect financial stability and market integrity should a financial crisis emerge.

The recent outbreak of the corona-virus disease of 2019 (COVID-19) threatened financial stability and market integrity.⁹⁵¹ According to Osode, effective cooperation and collaboration between the SARB and other financial role players were difficult to maintain

⁹⁴⁷ See paragraph 8.7 of this research; The Council of Financial Regulators “Memorandum of Understanding on Financial Distress Management between Members of the Council of Financial Regulators” September 2008 <https://www.rba.org/publ/counciloffinancialregulators/mou/htm> accessed 14 June 2022; Government Publications “Memorandum of Understanding on Resolution Planning and Financial Crisis Management” 17 October 2017; Kourabas S “Trends and Theory in Financial Regulation and Regulatory Design after the Global Financial Crisis” in Arner D, Wan W, Godwin A, Shen W and Gibson E (eds) *Research Handbook on Asian Financial Law* (Elgar Online 2020) 30, 35.

⁹⁴⁸ Section 76(1)(c) of the *FSR Act*; Van Niekerk and Van Heerden 2020 *SALJ* 141; see related comments by Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 955; Kourabas 2018 *Journal of Banking and Finance Law Practice* 192.

⁹⁴⁹ Schmulow 2017 *African Journal of International and Comparative Law* 399; Godwin and Schmulow 2015 *SALJ* 765; Qumba 2022 *SALJ* 83; see related comments by Kourabas 2018 *Journal of Banking and Finance Law Practice* 192.

⁹⁵⁰ See related comments by Van Niekerk and Van Heerden 2020 *SALJ* 141; also see Godwin, Li and Ramsay 2016 *Hong Kong Law Journal* 955; Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 17.

⁹⁵¹ Brown and Susskind 2020 *Oxford Review of Financial Policy Journal* 70; Susskind D and Vines D “The Economics of the COVID-19 Pandemic: An Assessment” 2020 *Oxford Review of Economic Policy Journal* 1, 3; see related comments by Hossain AT and Kryzanowski L “Global Financial Crisis after Ten Years: A Review of the Causes and Regulatory Reactions” 2019 *Managerial Finance Journal* 904, 916; Breuss F “The Crisis in Retrospect: Causes, Effects and Policy Responses” in Badinger H and Nitsch V (eds) *Routledge Handbook of the Economics of European Integration* (Routledge 2015) 331, 335.

during the COVID-19 pandemic.⁹⁵² This could have been because of the lack of clear cooperation and collaboration arrangements between the SARB and other financial role players to manage a financial crisis. The lack of cooperation and collaboration arrangements between the SARB and other financial role players during a crisis could result in overlapping functions and regulatory gaps during a financial crisis due to the lack of clear objectives. The lack of immutable aspects for cooperation and collaboration during a crisis in South Africa undermines the effectiveness of cooperation and collaboration between the SARB and other financial regulators during crises.⁹⁵³ In Australia, the immutable aspects of cooperation and collaboration during crises are captured in MOUs and in the UK they are statutorily regulated.⁹⁵⁴ However, the same cannot be said about South Africa. This follows the fact that there is no MOU or legislative provisions under the *FSR Act* that regulates cooperation and collaboration between the SARB and other financial role players to manage a financial crisis.

According to Susskind and Vines⁹⁵⁵ cooperation and collaboration between the BOE, the Financial Conduct Authority, the Prudential Authority and the Financial Policy Committee during the COVID-19 pandemic was functional and effective enough to address financial regulatory challenges that were caused by the pandemic in the UK. This follows the fact that there were prior cooperation and collaboration arrangements to manage systemic risks between the BOE and other financial role players in the UK which contributed to the effective flow of information during the COVID-19 crisis.⁹⁵⁶ On the other hand, Schmulow

⁹⁵² Osode PC “Two Heads are Better than One: Assessing South Africa’s ‘Twin Peaks’ Financial Regulation Model” 2021 *Interdisciplinary Journal of Economics and Business Law* 9, 25; Breuss “The Crisis in Retrospect: Causes, Effects and Policy Responses” 335

⁹⁵³ See related comments by Brown and Susskind 2020 *Oxford Review of Financial Policy Journal* 70; Susskind and Vines 2020 *Oxford Review of Economic Policy Journal* 5; Georgosouli 2013 *Capital Markets Law Journal* 79; Kallasidou 2013 *Bristol Law Review* 119.

⁹⁵⁴ Section 65(7) of the *FSA: The Council of Financial Regulators* “Memorandum of Understanding on Financial Distress Management between Members of the Council of Financial Regulators”; Government Publications “Memorandum of Understanding on Resolution Planning and Financial Crisis Management” para 5.4; Kourabas “Trends and Theory in Financial Regulation and Regulatory Design after the Global Financial Crisis” 35.

⁹⁵⁵ Brown and Susskind 2020 *Oxford Review of Financial Policy Journal* 70; Susskind and Vines 2020 *Oxford Review of Economic Policy Journal* 5; Hossain and Kryzanowski 2019 *Managerial Finance Journal* 908.

⁹⁵⁶ Section 65(7) of the *FSA*; Bank of England “The UK Economy during Covid-19: Insights from the Bank of England’s Citizens’ Panels” 2021 *England’s Citizens Panel* 1; Georgosouli A “The FCA, the PRA and the Idea of Resilience as a Narrative for Policy Coherence” 2012 *SSRN Working Paper Series* 5, 17.

alludes that Australia fared considerably well during the Global Financial Crisis (GFC) that threatened global stability and the integrity of global financial markets between 2007 and 2008.⁹⁵⁷ The researcher submits that express cooperation and collaboration arrangements for crisis management is one of the elements that contributed to the resilience of the Australian financial regulatory framework during the GFC.⁹⁵⁸

The UK and Australian approaches regarding the establishment of cooperation and collaboration arrangements to manage financial crisis are recommended in this regard. The researcher recommends that the *FSR Act* should be amended to provide for express cooperation and collaboration arrangements between the SARB and other financial role players during a financial crisis. The proposed overarching coordinating body will be tasked with enforcing cooperation and collaboration arrangements between the SARB and other financial role players to manage financial crises.⁹⁵⁹ This will ensure that the SARB and other financial role players protect financial stability and market integrity through effective cooperation, collaboration, and information sharing, and assist each other to fulfil their mandates through a financial crisis.

g. the *FSR Act* should be amended to regulate cooperation and collaboration between the SARB, other financial role players, namely the PA, the FSCA, the FIC, NCR, the FCSR, the FSIC, the FSOC and the FSCF, South African courts and law enforcement authorities such as the South African Police Services and the Hawks

The importance of cooperation and collaboration between financial role players and law enforcement authorities cannot be overemphasised. It is important that law enforcement authorities such as the South African Police Services (SAPS), the Hawks and the National

⁹⁵⁷ Godwin and Schmulow 2015 *SALJ* 757; Swagel P “The Financial Crisis: An Inside View” 2009 *Brookings Papers on Economic Activity* 1, 2, 5-8; Debelle G “Some Effects of the Global Financial Crisis on Australian Financial Markets” 2009 *Finance Professionals Forum* 4, 9; Norgren C “The Causes of the Global Financial Crisis and their Implications for Supreme Audit Institutions” 2010 *INTOSAI Report* 1, 25.

⁹⁵⁸ Swagel 2009 *Brookings Papers on Economic Activity* 8; Financial System Inquiry “Financial System Inquiry Interim Report” 78; see related comments by Osode 2021 *Interdisciplinary Journal of Economics and Business Law* 25; Schmulow 2017 *African Journal of International and Comparative Law* 399.

⁹⁵⁹ See related comments by Brown and Susskind 2020 *Oxford Review of Financial Policy Journal* 70; Susskind and Vines 2020 *Oxford Review of Economic Policy Journal* 5; Georgosouli 2013 *Capital Markets Law Journal* 79; Kallasidou 2013 *Bristol Law Review* 119.

Prosecuting Authority (NPA), cooperate and collaborate with financial role players to promote, protect, enhance and maintain financial stability and market integrity.⁹⁶⁰ Such cooperation and collaboration enhance the detection of financial crimes that may threaten market integrity and the timeous prosecution of these crimes. The recent case of *South African Reserve Bank and Another In re Michael Johannes Jooste N.O and Others*⁹⁶¹ echoes the lack of adequate cooperation and collaboration arrangements between the SARB, financial role players, the NPA and other law enforcement authorities. In this case, the former Steinhoff International Holdings Chief Executive Officer (CEO), Markus Jooste, is linked to contraventions of the Exchange Control Regulations to the value of R4.836 billion in alleged financial misconduct.⁹⁶² The stay of prosecution proceedings in *South African Reserve Bank and Another In re Michael Johannes Jooste N.O and Others* could have been a result of a lack of effective cooperation and collaboration and information sharing arrangements between the SARB, the NPA, the FIC and law enforcement authorities.⁹⁶³ There has not been sufficient evidence to officially charge Mr Markus Jooste with the crimes he committed since 2017. The researcher submits that the delays in this matter could be due to a lack of adequate cooperation and collaboration mechanisms between the NPA, the SARB and law enforcement agencies to investigate and prosecute the matter. In this regard, the researcher recommends that the *FSR Act* be amended to include regulations on cooperation and collaboration between the SARB, other financial role players, law enforcement authorities and the South African courts to promote and protect financial stability and market integrity in South Africa.

⁹⁶⁰ See related comments by *Chitimira Market Abuse Regulation in SADC* 46; also see Chitimira H “Overview of Selected Role-Players in the Detection and Enforcement of Market Abuse Cases and Appeals in South Africa” 2014 *Speculum Juris* 108, 121; Luiz SM “Market Abuse and the Enforcement Committee” 2011 *South African Mercantile Law Journal* 151, 163.

⁹⁶¹ *South African Reserve Bank and Another In re Michael Johannes Jooste N.O and Others* 16823/dd 6 October 2022; also see Moonstone Information Refinery “Did Grey-Listing Threat Hasten SARB to Act Against Markus Jooste?” 20 October 2022 www.citizen.co.za accessed 22 October 2022 Page Anon; also see Exchange Control Regulations 1961, regulation 22C.

⁹⁶² Moonstone Information Refinery “Did Grey-Listing Threat Hasten SARB To Act Against Markus Jooste?” Page Anon; Ndedze B “South African Reserve Bank to Attach Ex-Steinhoff CEO Jooste’s Assets” *Eye Witness News* (18 October 2022) 1; see related comments by Chitimira Market Abuse Regulation in SADC 7.

⁹⁶³ Moonstone Information Refinery “Did Grey-Listing Threat Hasten SARB To Act Against Markus Jooste?” Page Anon; Ndedze *Eye Witness News* 1; see related comments by *Chitimira Market Abuse Regulation in SADC* 7.

9.4 Conclusion

The statutory regulation of cooperation and collaboration between the SARB and other financial role players under the *FSR Act* was a positive initiative to ensure optimum and effective coordination for the first time in South Africa.⁹⁶⁴ This follows the fact that the cooperation and collaboration of the SARB and other financial role players is arguably the bedrock and cornerstone of the success of the South African financial regulatory architecture.⁹⁶⁵ The establishment of two major regulatory bodies that should operate in tandem exacerbated the need for effective cooperation and collaboration measures between the SARB, and other financial role players to promote, protect, maintain and enhance financial stability and market integrity.⁹⁶⁶ However, the preceding discussion has shown that the current regulatory framework for cooperation and collaboration between the SARB and other financial role players is not adequate and robust enough to protect and promote financial stability and market integrity in South Africa.⁹⁶⁷ Several flaws and regulatory gaps were identified in this regard.

The lack of express measures to enforce cooperation and collaboration between the SARB and other financial role players, the lack of coordination arrangements to manage financial crises, the lack of coordination and information sharing arrangements between law enforcement agencies, the SARB and other financial role players are some of the flaws identified in this research. To address these flaws, the researcher recommends a new cooperation and collaboration model framework to regulate inter-agency coordination in South Africa. The FSCR should be positioned as an overarching coordinating body with powers and authority to consistently enforce the duty to coordinate, oversee regulatory coordination, review and assess cooperation and collaboration mechanisms implemented in South Africa and facilitate cooperation and collaboration to promote, protect, enhance and maintain financial stability and market

⁹⁶⁴ Sections 26 and 76 of the *FSR Act*; see related comments by Qumba 2022 *SALJ* 78; Godwin and Schmulow 2015 *SALJ* 760; Georgosouli 2013 *Capital Markets Law Journal* 65.

⁹⁶⁵ Fairweather and Tarrant 2018 *Law and Financial Markets Review* 194; Qumba 2022 *SALJ* 79; Van Heerden and Van Niekerk 2020 *THRHR* 513; Van Niekerk and Van Heerden 2020 *SALJ* 110.

⁹⁶⁶ Fairweather and Tarrant 2018 *Law and Financial Markets Review* 194; Qumba 2022 *SALJ* 79; Van Heerden and Van Niekerk 2020 *THRHR* 513; Van Niekerk and Van Heerden 2020 *SALJ* 110.

⁹⁶⁷ See related comments by Van Heerden and Van Niekerk 2020 *THRHR* 513; Van Niekerk and Van Heerden 2020 *SALJ* 141; Godwin and Schmulow 2020 *SALJ* 765; Qumba 2022 *SALJ* 96.

integrity in South Africa. To achieve these objectives, the FSCR should meet regularly with the committees and councils established to facilitate coordination relating to specific regulatory functions, namely the FSOC, the FSCF and the FSIC. The researcher also recommends that the MOUs regarding cooperation and collaboration between the SARB and other financial role players should be made mandatory to ensure transparency and consistent compliance with the duty to conclude MOUs regarding cooperation and collaboration arrangements. The researcher also recommends the establishment of cooperation and collaboration arrangements between the SARB, other financial role players, the courts and law enforcement agencies to enhance the detection, investigation and prosecution of financial misconduct that threatens financial stability and market integrity in South Africa.

The researcher hopes that the recommendations made in this thesis will be taken into consideration by policymakers to provide a robust, effective, adequate and consistently enforced regulatory framework for cooperation and collaboration between the SARB and other financial role players to promote, protect, enhance and maintain financial stability and market integrity in South Africa.

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List of Abbreviations

AML/CFT	Anti-Money Laundering and Counter Terrorism Financing
APRA	Australian Prudential Regulatory Authority
ASIC	Australian Securities and Insurance Commission
BCBS	Basel Committee on Banking Supervision
BOE	Bank of England
CABS	Community of African Banking Supervisor
CFR	Council of Financial Regulators
CISNA	Committee of Insurance, Securities and Non-Banking Financial Authorities
COVID-19	corona-virus disease of 2019
DTI	Department of Trade and Industry
ESAAMLG	Eastern and Southern Africa Anti-Money Laundering Group
FATF	Financial Action Task Force
FCA	Financial Conduct Authority
FIC	Financial Intelligence Centre
FPC	Financial Policy Committee

FSA	Financial Services Act
FSB	Financial Stability Board
FSB	Financial Services Board South Africa
FSCA	Financial Sector Conduct Authority
FSCF	Financial Sector Contingency Forum
FSCR	Financial Sector Council of Regulators
FSIC	Financial Sector Inter-Ministerial Committee
FSOC	Financial Stability Oversight Committee
FSR ACT	Financial Sector Regulation Act
GFC	Global Financial Crisis
IAIS	International Association of Insurance Supervisors
ICP	Insurance Core Principles
IMF	International Monetary Fund
IOSCO	International Organisation of Securities Commissions
MOU	Memorandum of Understanding
NCR	National Credit Authority
OECD	Organization for Economic Cooperation and Development
PA	Prudential Authority
PEP	Politically Exposed Persons
PRA	Prudential Regulation Authority
RBA	Reserve Bank of Australia

SARB South African Reserve Bank

UK United Kingdom

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