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Introduction

The Genealogy and Topography of Twin Peaks

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1.1 THE GENEALOGY OF TWIN PEAKS

The Cambridge Dictionary defines 'genealogy' as 'the study of the history of the past and present members of a family or families'.[1] The word itself traces its roots back to the Greek word *genea*, meaning 'race' or 'generation'. Genealogy therefore focuses attention on the origin or genesis of a family at a fixed point in time and also on the evolution or development of a family over time.

The same dictionary defines 'topography' as 'the physical appearance of the natural features of an area of land, especially the shape of its surface'. The earth's surface – or terrain – is multifaceted and consists of different features, including mountain ranges, peaks and fault lines.

Over the past two decades, an increasing number of jurisdictions have moved towards a model – or family – of financial regulation that is known as Twin Peaks. This model was pioneered in Australia following recommendations by the Wallis Inquiry, which was established in 1996 to review the financial system.[2] The model separates financial regulation into two broad functions: market conduct regulation (which includes consumer protection) and prudential regulation. Each of these functions is vested in a separate 'peak' regulator. The Twin Peaks model has subsequently been adopted by the Netherlands, Belgium, New Zealand, the United Kingdom and South Africa. The model has also been considered in the United States.[3]

There are at least two models with which the Twin Peaks model is generally compared. The first, the 'institutional model', focuses on the form of the regulated institution (e.g., a bank, an insurer or a securities firm), and establishes a separate specialist regulator for that institution. Under this approach, the relevant regulator supervises all activities undertaken by the institution, irrespective of the market or sector in which the activities take place; and the institution is normally regulated by one regulator alone. The institutional approach is often referred to as an

[1] https://dictionary.cambridge.org/dictionary/english/genealogy.

[2] For the recommendations of the Wallis Inquiry, see Financial System Inquiry (1996) Final Report, https://treasury.gov.au/publication/p1996-fsi-fr. The Twin Peaks model was first examined in Michael Taylor, '"Twin Peaks": A Regulatory Structure for the New Century', Centre for the Study of Financial Innovation, London, 1995. See also Michael W. Taylor, 'The Road from Twin Peaks – And the Way Back' (2000) 16 *Connecticut Insurance Law Journal* 61. Since 1998, when the Twin Peaks model was adopted in Australia, almost 80 per cent of OECD countries have changed their regulatory architecture. Marco van Hengel, Paul Hilbers and Dirk Schoenmaker, 'Experiences with the Dutch Twin Peaks Model: Lessons for Europe' in A. Joanne Kellermann, Jacob de Haan and Femke de Vries (eds) *Financial Supervision in the 21st Century* (Springer, 2013), 188. Much of the text in this part is drawn from Andrew Godwin, 'Introduction to Special Issue – The Twin Peaks Model of Financial Regulation and Reform in South Africa' (2017) 11 (4) *Law and Financial Markets Review* 151–3.

[3] See Department of Treasury, Blueprint for a Modernized Financial Regulatory Structure (2008), 13–14, 142–3.

offshoot of the broader sectoral or 'operational' approach, under which institutions are regulated by reference to the sector in which they operate or the business in which they engage. For example, where a financial institution offers banking products and life insurance, it might be regulated by both the banking and insurance regulators.[4] The sectoral or operational model, like the institutional model, becomes increasingly difficult to operate as the complexity of financial products, and of financial institutions, increases – a reality that has become more significant with the rise of financial conglomerates and institutions that operate on a cross-sector basis. The sectoral model can create coordination challenges and regulatory overlap between the relevant regulators, as multiple regulators may end up supervising the same activity. As early as 1996, Michael Taylor presciently argued that 'a regulatory system which presupposes a clear separation between banking, securities and insurance is no longer the best way to regulate a financial system in which these distinctions are increasingly irrelevant'.[5]

The second model – the 'unified', 'super-regulator' or 'integrated' model – attempts to address the problems experienced by the institutional and sectoral approaches by creating a single regulator to supervise both the conduct of market participants and the prudential soundness of financial institutions. This model was championed by the United Kingdom prior to its move to Twin Peaks. One of the perceived problems with this model, however, is that '[p]rudential and conduct of business . . . regulation require[s] fundamentally different approaches and cultures and there may be doubt about whether a single regulator would, in practice, be able to effectively encompass these to the necessary degree'.[6] Another issue with the unified approach is that a single regulator 'might not have a clear focus on the different objectives and rationales of regulation and supervision, and might not make the necessary differentiations between different types of institution and business'.[7]

The Twin Peaks model is considered to have certain advantages over the other two models outlined above. First, the two peak regulators are more likely to have 'dedicated objectives and clear mandates to which they are exclusively committed'.[8] Secondly, there is less danger that one aspect of regulation – such as market conduct regulation – will come to dominate the regulatory landscape.[9] Instead, under the Twin Peaks model, regulatory culture, which encompasses the attitudes, policies and practices adopted by regulators in fulfilling their objectives, can be fostered depending on the function of the regulator and the culture that it needs, to perform its role effectively. This avoids the issue of having multiple 'cultures' under the one roof, as might be the case with a unified regulator, where different cultures arise because of different

[4] Some commentators refer to the sectoral or operational model as a functional approach, under which each type of business is 'overseen by a separate, "functional" regulator'. See Group of Thirty, *The Structure of Financial Supervision – Approaches and Challenges in a Global Marketplace* (6 October 2008). For a thorough analysis of the various models, see D. Llewellyn, 'Institutional Structure of Financial Regulation and Supervision: The Basic Rules' (Paper presented at a World Bank seminar Aligning Supervisory Structures with Country Needs, Washington, DC, 6 and 7 June 2006); E. Wymeersch, 'The Structure of Financial Supervision in Europe: About Single Financial Supervisors, Twin Peaks and Multiple Financial Supervisors' (2007) 8(2) *European Business Organization Review* 237; J. Kremers and D. Schoenmaker, 'Twin Peaks: Experiences in the Netherlands' (LSE Financial Markets Group Paper Series Paper 196, December 2010); E. Pan 'Structural Reform of Financial Regulation' (2011) 19 *Transnational Law and Contemporary Problems* 796; Andrew D. Schmulow, 'The Four Methods of Financial System Regulation: An International Comparative Survey' (2015) 26(3) *Journal of Banking and Finance Law and Practice* 169.

[5] M. Taylor, Peak Practice: How to Reform the UK's Regulator System. London, Centre for Study of Financial Innovation' (1996), as cited in Llewellyn (n 4) 19.

[6] See Llewellyn, (n 4) 26.

[7] Ibid 23.

[8] Ibid 27.

[9] As occurred in the United Kingdom prior to the Global Financial Crisis.

regulatory objectives.[10] Thirdly, the model may be better adapted towards keeping pace with the growing complexity of financial markets and the continuing rise of financial conglomerates.[11] Further, the Twin Peaks model may avoid the inherent conflict of interest that arises within a unified regulator. As was noted by the UK Joint Committee on the draft Financial Services Bill (JCFSB) in 2010:

> [T]he evidence of the recent financial crisis suggests that mixing functions can contribute to a lack of focus on rising macro-prudential risk and difficulties in moving to a 'war footing' when that risk becomes substantial. In addition, the incentives are different. For example, consumer protection can be well served by keeping a bank open, while stability is well served by closing it.[12]

There are also perceived disadvantages of the Twin Peaks model. First, it may create regulatory overlap with dual-regulated entities. The model means that it is 'inevitable that two separate regulators would have two separate rule books and two separate systems'.[13] In the United Kingdom, it was noted in 2013 that 'approximately 2,000 firms [would] be subject to dual regulation'.[14] If not carefully managed, this could place a 'considerable burden'[15] on regulated entities and lead to poor information-sharing and coordination.

Secondly, there is a general risk that cooperation and coordination between the regulators will not be sufficient and that potentially serious consequences will ensue. While these risks can be managed through robust coordination and liaison channels, it nevertheless remains a key concern for jurisdictions that have adopted the model.[16] Clear mandates and effective coordination between the regulators are key to making the model work.[17]

Finally, and depending on how the Twin Peaks model is implemented, there may be a conflict of interest within the central bank. This can arise if the central bank is responsible for both prudential regulation and monetary policy, as is the case in New Zealand. Llewellyn has suggested that 'a central bank with responsibility for preventing systemic risk is more likely to loosen monetary policy on occasions of difficulty'.[18] At the same time, this aspect may also be viewed as creating a synergy 'arising from [the central bank's] knowledge of monetary policy and financial market developments'.[19]

Today, and in the aftermath of the lessons learned during the Global Financial Crisis (GFC), Twin Peaks has come to be widely regarded as the optimal approach to regulating the financial

[10] It has also been noted that conduct regulators tend to be staffed by lawyers, who take a more prescriptive and ex post view of enforcement, and prudential regulators tend to be staffed by economists, who take more of a guidance role and a more ex ante view.

[11] One of the core innovations of Twin Peaks is the conglomerate view it takes to oversight.

[12] House of Commons, Treasury Committee, *Financial Regulation: A Preliminary Consideration of the Government's Proposals*, Seventh Report of Session 2010–11 (Vol 1), [83].

[13] Ibid.

[14] Financial Stability Board, Peer Review of the United Kingdom (Report, 2013), 7–8.

[15] Joint Committee on the Draft Financial Services Bill (JCFSB), *Report, Together with Formal Minutes and Appendices*, HL Paper 236, HC 1447, [285].

[16] See New Zealand Treasury, Financial Sector Regulatory Agencies – Regulatory Impact Statement (2010), https://treasury.govt.nz/publications/risa/regulatory-impact-statement-financial-sector-regulatory-agencies.

[17] For further discussion of this issue, see Andrew Godwin and Ian Ramsay, 'Twin Peaks – The Legal and Regulatory Anatomy of Australia's System of Financial Regulation' (2015) 26 *Journal of Banking and Finance Law and Practice* 240; Andrew Godwin, Timothy Howse and Ian Ramsay, 'A Jurisdictional Comparison of the Twin Peaks Model of Financial Regulation' (2016) 18(2) *Journal of Banking Regulation* 103.

[18] Llewelyn (n 6) 29.

[19] Van Hengel, Hilbers and Schoenmaker (n 2) 186.

system.[20] Of the four models in use,[21] Twin Peaks is alone in recognising that good market conduct and consumer protection have equal importance with prudential regulation.[22]

The separation of conduct oversight and prudential regulation defines Twin Peaks, and represents its greatest strength as compared to other regulatory models. This conclusion is supported by two central lessons derived from the GFC: the subprime industry in the United States was an instance of market misconduct and consumer abuse writ large. In the analysis of that event, and supported by the findings of the US Senate Inquiry, we now understand more fully that conduct issues can also represent a catalyst for a financial crisis.[23] From the findings produced in the United Kingdom, and in particular the Turner Review of the culpability of the FSA, and the collapse of Northern Rock, HBOS and RBS, we now also better understand that conduct and prudential regulation are inherently a 'pushmepullme',[24] and as such cannot be enforced by the same agency.[25] 'When prudential and consumer protection regulation are combined in a single agency, at least one of them is likely to be done badly.'[26]

To address this deficiency, the best solution would appear to be to separate conduct and prudential regulation and create them as equals. It is this solution that Twin Peaks offers that has been driving its adoption internationally. Because Australia adopted Twin Peaks first,[27] Australia's experience with the model is longer and more comprehensive, and so has served as a template for subsequent adopters and for those countries contemplating adoption in the future.

1.2 THE TOPOGRAPHY OF TWIN PEAKS

1.2.1 *Design Choices*

Previous research has suggested that at least four questions are fundamental to the topography or design of the Twin Peaks model:[28] (1) Where should the prudential regulator be housed? (2) How should the functions and objectives of the Twin Peaks regulators be defined? (3) How should the relationship between each regulator and the government be structured? (4) How

[20] Financial Markets Authority (FMA), 'Presentation by Sean Hughes to the New Zealand Capital Markets Forum', News, Speeches, 2011; John Manley, 'Dutch Regulator Says "Twin Peaks" Supervision Best' (Financial Regulatory Forum, Reuters, United States ed, 2009); Erika Botha and Daniel Makina, 'Financial Regulation and Supervision: Theory and Practice in South Africa' (2011) 10(11) *International Business & Economics Research Journal* 35.

[21] Schmulow (n 4).

[22] Joseph J. Norton, 'Global Financial Sector Reform: The Single Financial Regulator Model Based on the United Kingdom FSA Experience – A Critical Reevaluation' (2005) 39(1) *International Lawyer* 45; Treasury Committee House of Commons, 'Financial Regulation: A Preliminary Consideration of the Government's Proposals', series edited by Commons Select Committees, in *Seventh Report of Session 2010–11* (Vol I: Report, together with formal minutes, No HC 430–I, Vol 1, House of Commons, Parliament of the United Kingdom, 27 January 2011), 32.

[23] The Financial Crisis Inquiry Commission, *The Financial Crisis Inquiry Report* (Final Report of the National Commission on the Causes of the Financial and Economic Crisis in the United States, January 2011), xviii, 113, 125–6, 160, 227–30, www.govinfo.gov/content/pkg/GPO-FCIC/pdf/GPO-FCIC.pdf.

[24] A Llama-like creature with two heads, one at each end of its body; a creation from the *Doctor Dolittle* series of children's books.

[25] See n 23 at 159, 171, 307–8; Adair Turner, *The Turner Review: A Regulatory Response to the Global Banking Crisis* (March 2009), 92, www.actuaries.org/CTTEES_TFRISKCRISIS/Documents/turner_review.pdf; FSA, *The Failure of the Royal Bank of Scotland* (Financial Services Authority Board Report, December 2011), § 28 at 27, www.fca.org.uk/publication/corporate/fsa-rbs.pdf.

[26] Michael W. Taylor, '"Twin Peaks" Revisited . . . A Second Chance for Regulatory Reform' (Centre for the Study of Financial Innovation, No 89, September 2009).

[27] Recommendation 1: Wallis Inquiry, 31 March 1997, 31, and Recommendation 31 (n 2) at 42.

[28] For a detailed discussion of these questions, see Godwin, Howse and Ramsay (n 17), from which much of the analysis in this chapter is drawn.

should coordination between the regulators be achieved? Each of these questions is discussed below.

1.2.1.1 Where Should the Prudential Regulator Be Housed?

The first question is where the prudential regulator should be housed. Three options are relevant in this regard: (1) the prudential regulator is an entirely distinct entity that sits outside of the central bank; (2) the prudential regulator is a subsidiary of the central bank; and (3) the prudential regulator exists as a department within the central bank.

Australia stands alone in adopting the first option. Prior to 2016, the United Kingdom operated a model in which its Prudential Regulation Authority (PRA) was a subsidiary of the Bank of England (BoE). Legislation passed in 2016[29] ended the PRA's status as a subsidiary and constituted the BoE as the PRA, the functions of which are now exercised by the BoE acting through the Prudential Regulation Committee. The purpose of this reform was to 'maximise the synergies of having monetary policy, macro-prudential policy and micro-prudential policy under the aegis of one institution'.[30] In addition to the United Kingdom, following the 2016 reforms, the Netherlands, Belgium and New Zealand have adopted the third option. South Africa has also adopted the third option, although its prudential regulator exists within the central bank as a separate juristic person.[31]

1.2.1.2 How Should the Functions and Objectives of the Twin Peaks Regulators Be Defined?

The second question is how the functions and objectives of the Twin Peaks regulators should be defined. Adequately demarcating the responsibilities of the market conduct regulator and prudential regulator is critical to the success of a Twin Peaks model.[32] The necessity of regulators having clear responsibilities and objectives is reflected in the Basel 'Core Principles for Effective Banking Supervision'[33] ('Basel Core Principles') and the 'Insurance Core Principles'.[34]

The Twin Peaks jurisdictions are broadly consistent in relation to the functions and objectives of the market conduct regulators. There are, however, some differences in terms of whether the objectives are prioritised – often reflected in whether there is a 'main objective' or a 'strategic objective' – and whether the market conduct regulator is required to have regard to competition. For example, the legislation governing the UK Financial Conduct Authority (FCA) provides for two types of high-level objectives: a 'strategic' objective of ensuring that 'the relevant markets function well'[35] and the 'operational' objective of consumer protection, integrity and competition.[36] In addition, the FCA has a 'competition objective' as one of its operational objectives.[37] The market conduct regulator in Australia, the Australian Securities and Investments Commission, was also recently given a competition mandate.[38]

[29] *The Bank of England and Financial Services Act 2016*.
[30] HM Treasury Bank of England Bill: Technical Consultation (2015), 3.
[31] See Chapter 9.
[32] See the discussion in Godwin, Howse and Ramsay (n 17).
[33] Basel Committee on Banking Supervision, Core Principles for Effective Banking Supervision (2012), 21.
[34] International Association of Insurance Supervisors, Insurance Core Principles (2011), 1. See also IOSCO, Objectives and Principles of Securities Regulation (2010), Principle 1: 'The responsibilities of the Regulator should be clear and objectively stated.'
[35] *Financial Services Act 2012* (FS Act), Part 2 amendments to the FSM Act, s 1B(2).
[36] FS Act, Part 2 amendments to the FSM Act, s 1B(3).
[37] FS Act, Part 2 amendments to the FSM Act, s 1E.
[38] See Chapter 5.

The variations in the functions and objectives of the prudential regulators are greater than in the case of the market conduct regulators, although there is overlap in terms of references to prudential supervision and financial stability. The legislation in both Australia and the United Kingdom provides that the prudential regulator must have regard to competition.[39]

The United Kingdom appears to be unique because the BoE, acting as the PRA, has the power to prevent the FCA from acting in limited circumstances. This is effectively a veto power, and will be used where 'an action to be taken by the FCA . . . is likely to threaten the stability of the UK financial system'.[40]

1.2.1.3 How Should the Relationship between Each Regulator and the Government Be Structured?

The third question concerns the structure of the relationship between each regulator and the government. This is a question that is relevant to all regulatory models, and goes to the issue of operational independence. One supplementary question that is directly relevant to the Twin Peaks model, however, is whether the government can determine which regulator is the lead regulator. This is relevant because a key challenge for Twin Peaks jurisdictions is how they manage 'dual-regulated entities'; namely, entities that are regulated by both the market conduct regulator and prudential regulator. The UK Treasury has the power to establish the 'boundaries' between the two regulators:

> [Section] 3G Power to establish boundary between FCA and PRA responsibilities
>
> (1) The Treasury may by order specify matters that, in relation to the exercise by either regulator of its functions relating to PRA-authorised persons, are to be, or are to be primarily, the responsibility of one regulator rather than the other.
> (2) The order may –
>   (a) provide that one regulator is or is not to have regard to specified matters when exercising specified functions;
>   (b) require one regulator to consult the other.[41]
>
> Where this power is exercised, a draft order must be laid before Parliament unless it is a matter of urgency.[42]

The ability to determine who is the 'lead supervisor' or 'primary regulator' has been said to '[create] problems in terms of coordinating supervisory action, information flows and, ultimately, crisis intervention'.[43] When the PRA's veto power in relation to the FCA is taken into account, it is clear that the United Kingdom has deliberately built features into its twin peaks model to ensure that only one regulator will act where necessary. This provides an interesting point of difference with Australia. While both Australian regulators are subject to a general ministerial directions power, this falls short of the minister being able to determine which regulator is to take primary responsibility for a matter.[44] It remains to be seen to what extent

[39] Subsection 8(2) of the APRA Act; FS Act, Part 2 amendments to the FSM Act, s 2H.

[40] Explanatory Note, FS Act, para 10. The provision is set out in FS Act, Part 2 amendments to the FSM Act, s 3I. In 2011 the IMF raised concerns about this veto power, and stated that 'without appropriate safeguards, this arrangement [had] the potential to limit FCA independence and also to cause uncertainty in decision making'. International Monetary Fund, United Kingdom: IOSCO Objectives and Principles of Securities Regulation: Detailed Assessment of Implementation. Report No 11/232, July 2011, 23.

[41] FS Act, Part 2 amendments to the FSM Act.

[42] FS Act, Part 2 amendments to the FSM Act, s 3H.

[43] Wymeersch (n 4) 262.

[44] See APRA Act, s 12 and ASIC Act, s 12.

the 'power to establish boundaries' in the UK undermines the independence of the regulators, and whether it evinces a lack of faith in the ability of the regulators to coordinate matters effectively between themselves.

1.2.1.4 How Should Coordination between the Regulators Be Achieved?

The fourth question is how coordination between the regulators should be achieved. Coordination is often seen as an element of broader cooperation, which includes information-sharing and consultation.[45]

Coordination between the regulators in a Twin Peaks jurisdiction is critical to the model's success. As has been noted with respect to the United Kingdom, the model is 'unlikely to function effectively if the different parts . . . operate in a silo manner'.[46] The chief difficulty is recognising what is necessary for effective coordination, and how this is best achieved. Some jurisdictions establish a formalised regime for coordination. For example, the United Kingdom imposes a prescriptive statutory duty on the regulators to cooperate in discharging their functions.[47] This is expressed as a duty of the market conduct regulator – the FCA – and the PRA to ensure the coordinated exercise of their functions.[48] The FCA and PRA must coordinate by obtaining information from each other in matters of 'common regulatory interest'.[49] This only applies to the extent that it is compatible with the advancement of each regulator's objectives, and the burden of compliance is not unduly disproportionate to the benefit.[50] For the purposes of the FCA, 'objectives' means 'operational objectives'.[51] The Memorandum of Understanding between the FCA, BoE and PRA echoes this duty by stating that 'the FCA, the Bank and the PRA, will share information related to markets and markets infrastructure where materially relevant to another of them both at their own initiative and upon each other's request, where legally permissible'.[52] A separate duty to cooperate exists between the Treasury, the BoE and the PRA to coordinate the discharge of their functions 'so far as they . . . relate to the stability of the UK financial system . . . and affect the public interest'.[53] By contrast, other jurisdictions such as Australia see 'coordination among the agencies [being] . . . a largely informal arrangement'.[54]

A widely used mechanism to help facilitate coordination between the regulators is the preparation of Memoranda of Understanding. These typically detail the arrangements between the regulators regarding areas such as the exchange of information, coordination, sharing of fees and dispute resolution. For example, in the United Kingdom the PRA and FCA are under a duty

45 NBB Report 2013 – Preamble, Economics and financial developments, Prudential Regulation and Supervision, 227–8.
46 Financial Stability Board, Peer Review of the United Kingdom (Report, 2013), 7–8.
47 See also the Netherlands, where both the AFM and DNB are under general statutory duties to cooperate. One translation of the general duty reads 'the supervisor shall collaborate closely with a view to laying down generally binding regulations and policy rules, in order to ensure that these are equivalent wherever possible insofar as they relate to matters that are both subject to prudential supervision and supervision of conduct.' AFS Act, s 1:46(1).
48 *Financial Services Act 2012* (FS Act), Part 2 amendments to the *Financial Services and Markets Act 2000* (FSM Act), s 3D.
49 FS Act, Part 2 amendments to the FSM Act, s 3D(1)(b).
50 FS Act, Part 2 amendments to the FSM Act, s 3D(2)(a), (b).
51 Ibid s 3D(4). The operation of this provision was explained in the Explanatory Note to the *Financial Services Act 2012*: Explanatory Note, FS Act, para 168.
52 Memorandum of Understanding between the Financial Conduct Authority and the Bank of England, including the Prudential Regulation Authority (March 2015) para 8.
53 FS Act, s 64.
54 International Monetary Fund, Australia: Financial System Stability Assessment (IMF Country Report No 12/308, November 2012), 28. See the discussion in Chapter 5.

to 'prepare and maintain a memorandum which describes in general terms . . . the role of each regulator in relation to the exercise of functions conferred by or under this Act'.[55] This Memorandum of Understanding (MoU) must be reviewed at least once a year, given to the Treasury, and tabled before Parliament.[56] This provision is prescriptive about the types of information that must be contained in the MoU vis-à-vis coordination between the regulators. Another MoU is required to be prepared and maintained between the Treasury, BoE and PRA with respect to crisis management.[57] This is designed to set out 'who is in charge of what and when between HM Treasury and the Bank (including the PRA) in a financial crisis'.[58] The approach in the United Kingdom can be contrasted with the approach to financial crisis management in Australia, where the relevant MoU provides that each member of the Council of Financial Regulators is responsible for any decisions that fall directly within its remit.[59] As a result, the framework of coordination essentially involves collective responsibility for managing a financial crisis on the part of the financial regulators, the central bank and the government.

A common element of Twin Peak jurisdictions is the existence of a 'coordinating body'. This body may be a creature of statute or it may be an informal forum for representatives of the regulators to meet. The membership of the body (and whether it includes representatives of government) varies from jurisdiction to jurisdiction.

1.2.2 *Surveying Twin Peak Terrains*

The outline of the different topography and design choices given above indicates that there are many variations in designing a Twin Peaks model. There is no 'one size fits all' model and there is no rulebook about how a jurisdiction should approach the task. Looking at the design choices, and considering why they were made, leads to a couple of observations.

First, there are different approaches in terms of the role and functions of the central bank, particularly in relation to prudential supervision. Australia, for example, stands alone in housing its prudential regulator completely outside of its central bank. In the United Kingdom, the BoE acts as the prudential regulator through the Prudential Regulation Committee. The Netherlands and Belgium rely on their central bank, which has diminished responsibility for monetary policy as a result of their membership of the EU, while the central bank in New Zealand has complete responsibility for monetary policy and prudential regulation. As noted above, the prudential regulator in South Africa operates as a separate juristic person within the central bank. Two key observations emerge from these choices. The first is that achieving synergies is considered by some jurisdictions to be important. The second is that there appears to be a trend towards giving the central bank more power, not less.

The notion of achieving synergies is captured by the view that the central bank – with its highly specialised set of skills, processes and experience – is best situated to undertake the task of prudential supervision. There is great sway in the argument that the central bank would be the most obvious choice, particularly given the interconnected nature of monetary policy and

55 FS Act, Part 2 amendments to the FSM Act, s 3E(1)(a).
56 FS Act, Part 2 amendments to the FSM Act, s 3E(4),(5) & (6).
57 FS Act, s 65.
58 Bank of England, Memoranda of Understanding on financial crisis management (2015) para 4, www.bankofengland.co.uk/-/media/boe/files/memoranda-of-understanding/mou%20between%20the%20bank%20including%20the%20pra%20and%20hm%20treasury%20re%20financial%20crisis%20management.
59 Memorandum of Understanding on Financial Distress Management between the Members of the Council of Financial Regulators, para 5.2.

prudential regulation. The counter-argument is that this in itself creates potential conflict because the differences between prudential supervision and monetary policy are important and at times contradictory. Moreover. there is evidence indicating that each entity performs either a macro- or microprudential role; the prudential regulator usually the latter. It is clear from the experience in the Netherlands, Belgium, New Zealand, the United Kingdom and South Africa that synergies are considered desirable. On the other hand, the Australian experience has so far demonstrated that it is possible to conduct prudential supervision outside of the central bank.

The trend towards giving the central bank more power is important because it contradicts global patterns prior to the Global Financial Crisis, whereby a central bank conducting prudential supervision was more representative of a developing country than a developed one.

In 2010 the European Central Bank, after conducting a survey of various EU jurisdictions, made reference to this apparent trend. It noted:

> [T]he survey confirms the departure from the sectoral model and highlights a clear tendency towards further enhancing the role of central banks in supervisory activities. The latter development is underpinned by the experience during the financial crisis, which highlighted the information-related synergies between the central banking and the prudential supervisory function. This rationale may explain another important finding of the survey, namely that the involvement of the central bank in financial supervision seems to be increasingly strengthened through the adoption of the 'twin peaks' model.[60]

It follows that a trend may be underway towards giving the central bank more power.

Secondly, there are significant differences in terms of how Twin Peaks jurisdictions achieve regulatory coordination. This is often expressed as a divide between the 'soft law' and 'hard law' approach to regulation. Hard law is seen as giving rise to legally enforceable obligations – such as duties to cooperate arising under statute, or obligations to prepare an MoU. Conversely, soft law relies on persuasive instruments that are themselves not legally binding, such as MoUs, mission statements and informal coordinating bodies.[61]

The IMF, speaking with respect to Belgium's structured product regulation, has discussed the benefits of each approach:

> A 'soft law' approach . . . provides a way for regulators to respond in a significantly more timely way to market change and innovation than may be possible under 'hard law' regulation. A move to 'hard law' on the other hand, provides industry with certainty, reduces opportunities for inconsistent application and interpretation and allows for other regulatory approaches (including rules about product governance) to be applied.[62]

A survey of the terrain in Twin Peaks jurisdictions reveals that there are many different ways of approaching the critical task of regulatory coordination. While coordination is central to the functioning of a Twin Peaks model, this does not mean that it must be enshrined in statute. Each jurisdiction strikes its own unique balance of formal and informal means for achieving effective coordination between the market conduct and prudential regulators.

[60] European Central Bank, 'Recent Developments in Supervisory Structures in the EU Member States (2007–2010)' (2010), 5.
[61] For a fuller discussion of hard law and soft law, see generally Godwin and Ramsay (n 17).
[62] International Monetary Fund (IMF) Financial Sector Assessment Program Update – Technical Note – Securities Markets Regulation and Supervision (Report, 2013), 7–8.

For example, Australia, New Zealand and the Netherlands fall at the 'soft law' end of the spectrum and are largely informal. Belgium, as noted by the IMF, contains a mixture of 'formal and . . . informal' procedures for coordination.[63] The United Kingdom, arguably, reflects a 'hard law' approach to cooperation. It establishes its coordinating body under statute, imposes multiple and overlapping duties to cooperate, creates a procedure for the government to define the lead regulator and sets out a detailed process to enable the prudential regulator to veto the market conduct regulator. A similar approach has been adopted in South Africa.

It is likely that there are disadvantages to both the soft and hard law approach: the soft law approach might be regarded as less transparent and create uncertainty for the regulated community due to a lack of guidance, whereas the hard law approach may create a 'tick-the-box' mentality when it comes to complying with the legislation and discourage cooperation through other means. Ultimately, whether an approach is successful will likely depend more on the culture of the regulators than on the specific mechanism through which they cooperate.

The DNB remarked in 2010 that the 'twin peaks supervisory model . . . that was introduced in the Netherlands in 2004 is increasingly being adopted by other countries'. Given the relatively new nature of the model, it may be difficult to identify the strength of this long-term trend. However, as the actions of Australia, the United Kingdom, Belgium, New Zealand, the Netherlands and South Africa show, there is growing support in favour of the Twin Peaks model. It is telling that no jurisdiction has yet abandoned Twin Peaks in favour of another model. It is likely to remain relevant for some time to come.

1.3 OUTLINE OF CHAPTERS

The chapters in this book present a range of perspectives from academics, regulators and policymakers. Amongst other things, the chapters highlight the extent to which Twin Peaks is as much a journey or trek as it is a destination. There are many themes that the chapters explore. These include the perceived benefits of the Twin Peaks model arising out of its flexibility and adaptability, the importance of the transitional stage for those jurisdictions that adopt the model and the reality that there is no unique or single version of Twin Peaks – each jurisdiction that contemplates a move towards Twin Peaks needs to consider its own circumstances (including regulatory culture) in determining whether the model is appropriate and, if so, how the model should be adapted for its own purposes.

Part I, entitled 'Surveying the Terrain', contains three chapters. The first two chapters, those by Michael Taylor and Jeff Carmichael, examine the origins of the Twin Peaks model and its evolution and development in the United Kingdom and Australia, respectively.

As the author of the seminal research that provided a navigational compass for the Twin Peaks model, Michael Taylor is a fitting person to launch the trek. Chapter 2 examines the three periods or episodes of Twin Peaks to date and traces the evolution of the model in the United Kingdom from an academic concept 'to its post-Global Financial Crisis rehabilitation as an institutional arrangement that is capable of addressing some of the most obvious shortcomings in regulatory structures revealed by the crisis'. As a prelude to the discussion about mainland China in subsequent chapters, Taylor notes that '[t]he decision by the Chinese government in March 2018 to merge the banking and insurance regulators, while keeping the securities regulator as a separate agency, represents a further step towards the adoption of a Twin Peaks structure in a major economy'.

[63] Ibid.