Twin Peaks 2.0: Avoiding Influence Over an Australian Financial Regulator Assessment Authority

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Abstract

Globally, financial system regulators are susceptible to deliberate and inadvertent influence by the industry that they oversee and, hence, are also susceptible to acting to benefit the industry rather than the public interest – a phenomenon known as "regulatory capture". Australia, arguably, has an optimal model of financial system regulation (a "Twin Peaks" model) comprising separate regulators for prudential soundness on the one hand, and market conduct and consumer protection on the other. However, the current design of the Twin Peaks model has not been sufficient to prevent and address prolonged and systemic misconduct that culminated in a public Royal Commission of Inquiry into misconduct in the industry. Subsequent to the Royal Commission and other inquiries, the Department of Treasury has proposed legislation to establish an Assessment Authority to assess the effectiveness of the Twin Peaks regulators. The proposal includes enquiries by an Assessment Authority into the regulators' independence, so as to identify instances of, and thereby mitigate, their capture. As with all financial system regulators, the Assessment Authority itself may be susceptible to regulatory capture, either by the Twin Peaks regulators, or by the financial industry. Thus, this paper poses the question: how can the new Assessment Authority be optimally constituted by legislation, and operated, to effectively oversee the effectiveness of the regulators, but itself remain insulated from the influence of the regulators and industry? We analyse the primary sources of influence over financial system regulators that the Assessment Authority will likely face and recommend ways in which a robust design of the Assessment Authority can mitigate those sources of influence. In doing so we adopt an inter-disciplinary approach, drawing upon not only regulatory theory, but also, for the first time in relation to this question, organisational psychology. Our findings address gaps in the proposed legislation currently before Federal Parliament and propose methods by which those gaps may be filled, in order to ensure that this important reform to Australia's financial regulatory regime has the greatest chance of success.

I Background and Research Objective

Australia is currently emerging from a crisis in its financial industry – including a financial regulatory crisis – borne of ten years of what has emerged as systemic misconduct, fraud and dishonesty.

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Examples are too numerous to list and are not within the purview of this paper. Much of this misconduct was known to the financial industry regulators: the Australian Prudential Regulation Authority (APRA), and the Australian Securities and Investments Commission (ASIC). The culmination of this sustained misconduct was the establishment of a Royal Commission of Inquiry to investigate misconduct in the Australian financial industry. Included in the Royal Commission's terms of reference was an investigation of the role of Australia's financial industry watchdogs: ASIC and APRA. That investigation determined that both agencies had succumbed to capture, and recommended that a new oversight authority be established "to assess the effectiveness of each regulator in discharging its functions and meeting its statutory objects".[1] That recommendation has been reflected in proposed legislation currently before Australia's Federal Parliament: the *Financial Regulator Assessment Authority Bill (*"the Bill"*)*.[2] This article explores the recent and ground-breaking development in the legislative architecture of the Australian financial system. The Authority's task will be to watch over Australia's financial industry regulators, and enhance their efficacy, principally by mitigating the phenomenon of 'regulatory capture'.

This Australian initiative can trace its roots to American scholarship going back some 160 years. Indeed, the earliest well-springs of this initiative are based upon the writings of Charles Francis Adams Jnr who, writing in the 1860s, put forth the idea – in the words of Thomas K. McCraw – of a "Sunshine Commission",[3] the purpose of which would have been to exercise oversight over, and mitigate the capture of, the Railroad Commissions in the United States by the *railroad barons*.[4] As such, we assert that this initiative in Australia is of significance, not just domestically, but indeed the world over: wherever regulators regulate the financial industry, and wherever they are susceptible to capture.

Of further significance to scholars of financial industry regulatory architecture, consumer rights academics and proponents, and scholars of public policy, is that this is an important reform of the Australian "Twin Peaks" model of financial system regulation – a model slowly gaining adherents internationally.[5] It has been argued elsewhere that the Australian Twin Peaks model is the optimal model for the regulation of the financial industry, in that it is the only model that resolves the observed shortcomings of the remaining three alternative models of financial system regulation.[6] In particular, it is the only model that separates the regulation of prudential soundness (in Australia's case, by APRA) and market conduct and consumer protection (in Australia's case, by ASIC) into two separate, peak Federal agencies, where each agency has a comprehensive jurisdiction (largely) irrespective of the type of entity it regulates (e.g. banks versus insurers), and in which each peak is created equal to the other.

The Twin Peaks architecture mitigates against regulatory overlap or underlap, against issues "falling between the cracks", and crucially, recognises that the two functions (prudential and conduct) are at times opposed to one another in their goals and their responses. But while Twin Peaks has an arguably superior architecture when viewed through the lens of financial regulatory theory, there have been shortcomings in its effectiveness in Australia. Those, in turn, speak to flaws in the design. Specifically, Australia's regulators have been observed as susceptible to capture.

Existing accountability mechanisms have not been enough to ensure that the regulation of the financial system in Australia is robust, as evidenced by both the findings of the 2014 Financial System Inquiry (hereafter FSI)[7] and, four years later, the need for the establishment of a Royal Commission[8] (FSRC) (hereafter "the Commission"). Among the findings of the Commission were that Australia's regulators had been susceptible to capture,[9] and in need of independent, arms-length, and recurring reviews.[10] The Commission recommended at 6.14 of its Final Report that a "Board of Oversight" be established to monitor and report on the efficacy of Australia's Twin Peaks, including mitigate regulatory capture affecting enforcement.[11] The FSI, four years prior to that, recommended the establishment of a "Financial Regulator Assessment Board" (FRAB).[12] However, this recommendation from the FSI was not implemented at the time. Indeed, of the 44 recommendations

made by the FSI, the establishment of a board to oversee Australia's Twin Peaks was the only recommendation rejected by the Australian government.[13]

The FSI recommended that the government receive reports on regulator performance from the FRAB annually, which would be independent,[14] and that the reports would be made public.[15] To that end the FSI sought to address flaws in parliamentary scrutiny, which was *ad hoc*, and focused on discrete issues. Considering the complexity of the task to which regulators were set, the methods by which their performance was reviewed was not, as a consequence, adequate under existing arrangements, according to the FSI report.[16]

The subsequent recommendation provided by the Commission – establish a Board of Oversight – is now reflected in the *Financial Regulator Assessment Authority Bill*, 2020, which is the principal focus of this paper.

In analysing this development we seek to determine whether the proposed legislation establishing an Assessment Authority is fit for purpose, whether it will create an Authority with the ability, resources, powers, remit and internal "habitat", capable of assessing the efficacy of the Twin Peaks against their mandates, of exposing, and therefore mitigating, capture, while at the same time ensuring that the Assessment Authority is itself adequately insulated against regulatory capture in its various forms, including materialist capture and cognitive capture which we discuss in detail, below.

Templates for such assessments already exist, in the form of the capability review conducted of APRA in the aftermath of the Commission,[17] in previous inquiries, such as the 2014 Senate Inquiry into the performance of ASIC,[18] and in recommendations by scholars for the measurement of ASIC's strategic mission.[19] Such reviews would improve the capacity of both APRA and ASIC to foresee systemic patterns of misconduct, and prepare for events that could undermine the stability of the financial system – what Ford describes as the ability to "[see] around corners."[20]

Our objective in undertaking this research is to examine the risk that the Assessment Authority – intended as a bulwark to capture – itself falls prey to regulatory capture. We seek to do so by constructing a framework for both its effective operation and insulation from capture. Specifically, this paper poses the question: how can this new Assessment Authority be constituted and managed in order to be effective, and remain independent and at arms-length from both the regulators and the industry itself? In undertaking this analysis, we adopt an inter-disciplinary approach, drawing upon not only financial regulatory theory and capture theory, but also, for the first time in relation to this question, organisational psychology. These disciplines often suggested similar conclusions, but used different paradigms and sources of evidence to arrive at them. Our findings seek to address gaps in the proposed legislation currently before Federal Parliament and propose methods by which those gaps may be filled, in order to ensure that this important reform to Australia's financial regulatory regime has the greatest chance of success. Whilst, as noted, a discussion and analysis of the capture of Australia's Twin Peaks is not within the purview of this paper it must, nonetheless, be held as a touchstone for the purposes of the reforms outlined in the Bill.

Consequently we provide in this section, below, a brief synopsis of regulatory capture theory, and thereafter the key provisions of the Bill. In section II we discuss the potential sources of influence on regulators, which includes potential sources of influence over the envisaged Assessment Authority. In section III we make recommendations on Assessment Authority Board structure and function to mitigate against the sources of influence identified. Finally, in section IV, we draw conclusions and make final recommendations.

A Theoretical understandings of regulatory capture

This study adopts the theoretical framework of regulatory capture, which explains the propensity for a regulatory agency to be "captured" by a regulated entity or industry. These influential organisations are often large corporations, industry associations or political interest groups. The capture of the

regulatory agency is typically to the detriment of the constituency the agency is charged to protect, and therefore violates the public benefit objective that regulators are meant to uphold.

Engstrom[21] classifies regulatory capture into cognitive (which includes ideological) and materialist capture. A regulator's motive under materialist capture is that of material gain. This is due either to subordination, influence from political contributions, or the desire to retain or increase public funding. Cognitive capture, on the other hand, occurs when a regulator's attitudes and philosophies are formed by the regulated entity or industry. This is a type of normative influence through pressure to conform to a social norm – the common or accepted practices inside a group.[22] It manifests as regulatory capture when the regulator mistakenly believes that the practices that they commonly observe, or that the regulated entities commonly approve of, are appropriate. While the term cognitive capture is more often used in the economics literature, the mechanisms of cognitive capture have underpinnings in the field of psychology (such as the formation of attitudes and the influence of group identities and social norms).

Regulatory capture can arise from several sources, such as lobbying; institutional influence; knowledge asymmetry between industry and the regulator; political influence and contributions; and the phenomenon known as the "revolving door". Each source of capture, as it may apply to the Assessment Authority and, in some cases, the Twin Peaks authorities, will be examined in the following sections.

In so doing, this study applies a critical analysis methodology, identifying the potential influences on a regulatory agency which may result in regulatory capture. It is able to highlight the social and political perspectives to explicate capture, the potential dangers thereof, and identify the perpetrators, and targets of, influence.[23]

In formulating approaches to combat regulatory capture a substantial body of scholarship has been developed over the past 160 years. Principally this scholarship addresses the need for, and optimal method of, oversight over regulatory agencies. The most recent and significant contribution to the literature is that of Barth, Caprio and Levine, developed in response to the regulators' failures observed prior to the advent of the global financial crisis. Their proposal was termed a "Sentinel".[24] Specifically, they recommended an agency that would be authoritative and independent of short-term politics and the financial services industry; empowered to extract the necessary information to make assessments; possessed of the necessary expertise to make such assessments; prominent enough to inform the public and the public's representatives; and capable of influencing financial regulatory policies.[25]

For Levine the advantages of a Sentinel were clear: "the Sentinel's reports to legislators would help reduce the influence of special interests" and "help inform … and … augment public influence over financial regulation" by being "both politically independent and independent of financial markets", and senior members "would be appointed for staggered terms to limit political influence".[26]

Moreover, by placing a time-limit – a non-compete clause if you will – between the end of public service and the commencement of service in an Assessment Authority, a sufficient degree of insulation would be created, thereby preventing the "revolving door".[27] Levine asserts that the goal to be pursued "is to create an institution in which the personal motives, ambitions, and prestige of its employees are inextricably connected to accurately assessing the impact of financial regulations on the public."[28] These sentiments were reflected in Australia in both the 2014 FSI, at Recommendation 27: "establish a Financial Regulator Assessment Board, which would provide annual assessments of the performance of APRA and ASIC",[29] and Recommendation 6.14 of the 2018/2019 Royal Commission of Inquiry: establish a "Board of Oversight".[30] Both proposals envisage, specifically, evaluating the efficacy of the two financial sector regulators.[31] Crucially, the recommendations made by the Royal Commission were based upon findings that capture of Australia's regulators was evident.[32]

B Key provisions of the Bill

We provide an account of the key provisions of the *Financial Regulator Assessment Authority Bill* (2020) and, where appropriate, analysis.

(i) Section 10 provides for the appointment of four members, one of whom is a Treasury departmental member.

This conflicts with the recommendations of both the FSI and the Commission in respect of number of members,[33] and independence from government.[34] In their response to the Bill, three leading Australian independent consumer advocacy groups, Choice, the Consumer Action Law Centre and the Financial Rights Legal Centre expressed concerns on aspects of the Bill. Their main recommendations relate to protections for consumers, and measures to ensure that the overall objective of Australia's regulatory regime be clearly focused on the public benefit.[35] This advocacy group specifically recommended measures to mitigate regulatory capture. They highlighted the need for stronger guidelines relating to appointees "to ensure that they are independent and have the necessary expertise to assess regulator performance". Accordingly, all three members of this advocacy group objected to the Board comprising of any members of the Treasury, or other government departments, and preferred that any government employee be assigned to an advisory capacity only.

(ii) Section 12 (1) (a) and (b): the Assessment Authority's function will be to assess the effectiveness of ASIC and APRA and report to the Minister.

This misses the opportunity to contextualise 'effectiveness'. The risk exists that efficacy could be interpreted to mean, or to include, serving the needs of the industry. We argue that effectiveness should be explicitly defined as ensuring that the industry serves the interests of multiple stakeholders in the Australian community – including within it the interests of consumers, businesses and investors. Doing so would also recognise that the establishment of such a Board was a recommendation made by a Commission established precisely because the financial industry had lost sight of the need to fulfill its obligations under its social contract.

(iii) Section 17 requires that reports be tabled in Parliament, thereby putting them into the public domain.

This comports with the arguments for, and scholarship on, the value of a "Sunshine Commission": "Sunlight is said to be the best of disinfectants".[36]

(iv) Section 13 defines effectiveness by reference to the enabling legislation for the creation of both ASIC and APRA.

However, analysis of the relevant sections indicates only a cursory reference to the goals of consumer outcomes and a financial system that serves society. For example, the ASIC Act states that ASIC's purposes include ensuring the following: "promote the confident and informed participation of investors and consumers in the financial system". But concomitant with that are obligations that skew towards the industry's needs: "maintain, facilitate and improve the performance of entities within [the financial] system in the interests of commercial certainty, reducing business costs, and the efficiency and development of the economy".[37] In APRA's case, although one may infer that an indirect social benefit exists in promoting financial system stability, its mandate makes no direct reference to an industry serving society: "APRA is to balance the objectives of financial safety and efficiency, competition, contestability and competitive neutrality and, in balancing these objectives, is to promote financial system stability in Australia."[38]

(v) Section 13 requires the Assessment Authority to enquire into the independence of both APRA and ASIC in the performance of their tasks.

This will, it is hoped, put capture squarely within the Authority's sights. So too with s 15, which requires that the Assessment Authority take account of any other assessments done by other entities (for example assessments done by the Productivity Commission).[39] These provisions are, in our view, encouraging.

(vi) Sections 18 and 19 give the Authority unfettered discretion in how to perform its functions.

This provides a degree of independence from government interference and cedes to the Authority whatever powers it deems necessary to perform its functions. This too is encouraging.

(vii) Sections 20 and 21 direct all employees of ASIC and APRA to cooperate with the Authority.

ASIC and APRA employees must cooperate with the Assessment Authority and supply whatever information it seeks, including information that would otherwise by covered by legal professional privilege.

(viii) Section 25 provides for Board member terms of five years and a maximum of two terms.

We support this provision for the manner in which it will mitigate some of the issues identified in "Process for appointing Board members", below. Missing though are the advantages that stem from staggered appointments.

(ix) Section 24.

This simply empowers the Minister to appoint Board members. It provides no direction, for example on mitigating conflicts of interest, or ensuring that appointees are sufficiently remote from the regulators or from regulated entities. Nor does it mandate appropriate qualifications or experience. We are of the view that this is a significant deficiency, opening as it does the door to capture, or political fealty to the agenda of the government of the day. We support the call made by Choice that at least one member should have credentials as a consumer rights advocate.[40]

(x) Sections 30 and 33.

Conflicts of interest in respect of other paid work are left to the "Minister's opinion". We are of the view that conflicts of interest should, at a minimum, be defined to include external paid work for either of the regulators, The Treasury, or a financial services provider.

(xi) Section 44.

Empowers a member of the Authority to convey "protected information" (for example information obtained subject to the secrecy provisions of the *Banking Act (Cth)*, (1959)) to an "enforcement authority" (for example the Australian Federal Police, Director of Public Prosecutions, or Crown Prosecutor). We commend the inclusion of this power as it may prove to be a valuable circuit-breaker to the possibility of regulator inaction or collusion.

In a significant and very recent development, the United Kingdom's House of Commons House of Lords All Party Parliamentary Group (APPG) for Personal Banking and Fairer Financial Services[41] provided a response to two inquiries into failures by the UK Financial Conduct Authority:[42] one conducted by Dame Elizabeth Gloster,[43] the other by Raj Parker.[44] In their as yet unpublished position paper,[45] the APPG has recommended the establishment of a Financial Regulation Supervisory

Council (FRSC), along the same lines as the proposed Australian Assessment Authority. Noteworthy as this development is, what is of greater significance is the extent to which the APPG drafters have gone further than the Australian initiative. They propose investing the FRSC with the power to appoint or dismiss, jointly with HM Treasury, the Chair and Chief Executive of the UK's equivalent of ASIC, the FCA and, solely to appoint or dismiss, two non-executive directors of the FCA. This alternative is, in our view, worthy of careful consideration.

II Analysis of Potential Influences on Regulators

A Legislature and Agency Lobbying

Engstrom[46] suggests that lobbying can lead to regulatory capture. Lobbying by industry can result in the enactment or enforcement of legislation favouring the lobbyist. In such cases, the complicity of the regulator represents a miscarriage of its' duties.[47] Igan, Mishra and Tressel[48] describe lobbying as "a legal activity aimed at changing existing rules or policies or procuring individual benefits". One danger faced by an Assessment Authority arises from unreasonable or excessive lobbying from either the Twin Peaks regulators – the subject of oversight – or the banks and corporations which are, ultimately, the focus of the Twin Peaks regulators. The latter can exert influence on the Assessment Authority either directly, or through the conduit of the Twin Peaks regulators.

Literature on lobbying can be divided between that which focuses on attempts to influence rules which have an impact on industries,[49] and that which focuses on organisations which attempt to gain advantage for themselves.[50] Capture of the legislative process – the rules – implies the capture of the prescriptive powers within legislation, and therefore the limits of enforcement. The extent to which an enforcement agency applies regulations is subject to its own biases and available resources. The inherent tension between industry and their regulators has been described "as an ongoing cat-and-mouse game between regulators, whose job is to rein in excesses…and business leaders, who push back against regulatory strictures in order to promote flexibility and innovation."[51]

Although not as entrenched as in the US, the lobbying process in Australia is primarily targeted towards federal or state politicians who have influence over either the legislative process or budgetary allocations. Views of many industries are communicated through industry representative bodies. These bodies are able to guide policy debate and programs which either advantage their sponsor's cause or oppose unwanted legislation. This naturally creates a potential for legislation or regulation to be skewed in favour of industry instead of the public benefit. Although the public are lawful participants when engaging government, their influence, unless highly organised, often bears less pressure, as it is likely to be misdirected, or lack the necessary resources.[52]

Lobbyists play an integral part in representing the finance sector in Australia. For example, the Australian Banking Association (ABA) is the banking industry's representative body. Membership comprises 22 banks from across Australia and is presided over by a council consisting of the chief executive officers of member banks. According to the ABA,[53] "the ABA addresses a large range of public policy issues to help build a regulatory environment that promotes growth in the banking industry and the wider economy." It therefore openly acknowledges its role as an organisation intent on "building" a regulatory environment conducive to a successful banking industry, which infers its role as a lobbyist. Although ABA lobbying efforts are generally directed towards the legislators, its objectives can also be served by encouraging a "light touch" approach to enforcement from the Twin Peaks regulators. Penalties for breaches of the Corporations Law or banking regulations can range from mere reprimands to substantial fines, capital penalties and even imprisonment. These can have a negative impact on many facets of organisational performance (e.g. increased costs; additional license conditions; diverted resources; and reputational damage), as well as on executives personally.

Therefore, banks and their lobbyists may be motivated to maintain pressure on the enforcers to accept a "light touch" approach. In discharging its mandate an Assessment Authority would, at times, be required to challenge and displace such an approach.

B Institutional Influence

The Assessment Authority would also be subject to institutional influence, which stems from the forces described in New Institutional Theory, developed by sociologists Berger and Luckmann,[54] and later expanded by sociologists DiMaggio and Powell.[55] These pioneers of the theory advanced the concept of "institutionalised isomorphism" which describes how "organisations incorporate operational structures, policies and practices which are similar within a particular field".[56] The resultant conformity attracts legitimacy to those structures, policies and practices, regardless of any breaches adversely affecting the public benefit. An example of this conformity has been well demonstrated in an experimental study that examined the behaviour of individuals when their industry membership was made salient. Cohn, Fehr and Maréchal,[57] found that reminding bankers about their membership to the banking industry caused them to tell the truth less often, when they had a financial incentive to be dishonest. Bankers who were not reminded of their industry membership were significantly more likely to tell the truth, which was perhaps more reflective of their personal values than their perceived industry norms. No such pattern was observed for control groups who belonged to other industries where dishonesty is not perceived as an industry norm. The findings are illustrative of how identification with an industry can cause individuals to accept the norms of the industry, even when it may conflict with their personal values. The Assessment Authority and its secretariat, if comprised of industry insiders who identify with the industries they are intended to regulate are, therefore, at risk of institutional isomorphism, holding as they do the same values and beliefs as those within industry.

Institutional isomorphism may have particular implications for the enforcement strategies of the Twin Peaks regulators, such as their response to regulatory breaches. A belief system where a cooperative enforcement strategy (that may be perceived as "light touch") is preferred, and can be socially justified, could render either or both of the Twin Peaks regulators – and the Assessment Authority – ineffective against deliberate misconduct and complacency, and damage their respective credibility. A similar argument can be made for a belief system where a legalistic or deterrence-based enforcement style (that may be perceived as "heavy handed") is preferred and can be socially or politically justified. This could cause the Assessment Authority and the Twin Peaks regulators to be less effective, by reducing the cooperation and agency that may be required from the industry. While many views exist on the optimal strategies and style of enforcement, evidence suggests that deterrence strategies are required to a point of industry maturity, and that cooperative strategies play a crucial role in regulatory and compliance outcomes.[58] An Assessment Authority that is subject to the influence of external parties regarding the preferred style and strategies of enforcement may compromise regulatory outcomes, by overweighting one style or strategy, or by not adopting the style or strategy that is most effective in a particular context.

C Knowledge Asymmetry

Any significant knowledge asymmetry between the regulator and the regulated, in which the regulator's knowledge is considered inferior, can lead to a reversal of power in the relationship. Possession of superior knowledge by the regulated can facilitate a circumvention of regulations and enable the regulated to "stay one step ahead". This type of knowledge asymmetry, often driven through innovative practices by the regulated, can subjugate the regulator, and lead to an acquiescence to an "industry knows best" belief system. This tactic was epitomised in another

regulatory failure: the certification of Boeing's 737 MAX aircraft before its accidents in 2018 and 2019. Internal communications boasted that Boeing staff used "mind tricks" to persuade their regulator to approve the plane.[59] Lobbyists also commonly emphasise industry's innovative thinking, so as to instil doubt in the minds of regulators when considering the prospective regulation of complex market practices.[60]

Knowledge asymmetry may potentially affect the Assessment Authority, as well as the Twin Peaks regulators. The Assessment Authority needs to demonstrate, or have access to regulatory experience and a best practice regulatory knowledge-base, that is capable of understanding the circumstances of the Twin Peaks regulators, as well as challenging them. Whether this is achieved through the Assessment Authority or the secretariat depends on the efficacy of the transmission of expert knowledge between the two. In turn, the Twin Peaks regulators also need, at least, to share a similar knowledge base with their respective regulated sectors. A challenge for the Assessment Authority lies in dealing with two incongruous elements. On the one hand it needs to possess sufficient knowledge of the regulatory field, so as to effectively carry out its remit. On the other hand, it needs to protect itself from any institutional normative influence resulting from its members' association with the regulatory field.

D Financial and Non-Financial Inducements

Opportunities exist for political and external influences to be exerted upon the Assessment Authority either directly, or indirectly through three channels: political and regulator contributions and gifts; the appointment and termination of members; and through regular communication with politicians and bureaucrats, culminating in biased reporting to parliament. Political influence is often linked to the failure of regulations in the finance industry[61] and should, therefore, specifically be addressed in any proposed legislation relating to the Assessment Authority.

Political contributions from the finance industry are a common practice in Australia, and many other jurisdictions. For example, in the 2019 Australian election cycle, contributions to all political parties contesting the Federal election amounted to $A435 million.[62] Politicians require funding to contest elections and, are therefore, receptive to financial contributions. Kroszner and Stratmann,[63] for example, found that political contributions in the banking sector were routinely connected to creating advantages for the donor. This phenomenon coalesces into a potential risk to the efficacy of the Assessment Authority, where donations to politicians are used to induce legislators to undermine the work of the Assessment Authority by, for example, budget cuts or limiting the remit of the Assessment Authority.

Regulatory agencies are generally discouraged from accepting financial or other gifts from those whom they regulate due to the potential to create conflicts of interest, or the perception of conflicts of interest. Commonly, financial and other gifts are limited in value and publicly disclosed. However, evidence exists that providing hospitality to regulators by regulated institutions has occurred in Australia. For example, in 2016 ASIC employees were dined by executives of a large integrated energy generator, subsequently justified by ASIC on the basis that no enforcement actions were being pursued against that regulated institution at that time. Within 12 months of the dinner, the Australian government announced an inquiry into the pricing structure of the electricity industry.[64] In 2017, ASIC staff and commissioners were revealed to have accepted generous hospitality from an Australian bank while it was subject to multiple investigations.[65] Since APRA began publicising a gift register in July 2019, staff have continued to receive gifts, valued at over $A12,000 as at time of writing.[66] The acceptance of gifts and hospitality, as well as the timing of their acceptance, can create both actual influence and the perception of influence. If these practices are extended to members of the Assessment Authority, they could threaten its credibility.

E Appointment of Board Members

The Bill currently before Australia's Federal Parliament proposes that the Assessment Authority will comprise of four members, three of which, including the Chair, will be part-time, and appointed by the Treasurer.[67] These provisions also state that any member's paid work "must not in the Minister's opinion, conflict or could conflict with the proper performance of the member's duties" (s 30). This provision defers judgment of effective member independence to the Minister. It does not explicitly preclude members from concurrently, or previously, having worked in government or for a regulated institution. Therefore, the possibility exists that the "Minister's opinion" may overlook potential conflicts of interest.

In Australia, the most senior parliamentarians in government are also cabinet ministers. Consequently, when lobbyists capture parliamentarians at the stage where legislation is drafted, they also lay the groundwork for the capture of individual parliamentarians at the execution stage of the legislation, when later some become ministers. As a result, in exercising his or her prerogative, the Minister may also favour candidates that are agreeable to industry.

The fourth member of the Board is to be a Departmental member, which will be the Secretary of the Department of the Treasury, or a nominated Senior Executive Service employee (SES). The Assessment Authority, it is envisaged, will also be supported by a secretariat, staffed by the Department of the Treasury.[68] Through the Departmental member and the Secretariat, the Assessment Authority is exposed to employees who likely mix within government circles, and are potentially exposed to political influence through their various interactions. These interactions create an ideal environment for a normative influence to permeate the Board and Secretariat, given the similar backgrounds, practices and norms of government bureaucrats.

The Bill requires the Assessment Authority to be independent (s 17). As the board is responsible to parliament and required to uphold the legislation by which it is created, there exists an agency relationship between the Assessment Authority and the political body that is parliament. This relationship, in particular with the Minister – whereby the latter can appoint and terminate any Board member – concentrates power with the Minister and departmental advisors. Any transparent criteria for the appointment of a member is omitted from the Bill. This grants the Minister complete discretion over appointments, and risks producing a sense of obligation towards the Minister, from chosen members. In turn, members are exposed to potential political influence. To diffuse this problem of a concentration of power, appointments and terminations should be delegated to a non-partisan political committee.

Further, in relation to Board appointments, the Bill (ss 25-33) covers the following provisions: periods of appointment; acting appointments; remuneration; leave; terms and conditions; other paid work; disclosures of interest; resignations; and terminations of appointment. None of these sections offer guidance regarding the desired competencies, professional backgrounds or qualifications needed in order to achieve actual or perceived independence (s 30). The Bill includes provisions for disclosing members' interests, precluding members from any paid work, and allowing members to use discretion in carrying out their duties. But it offers no other guidance regarding the preservation of members' independence, for example, limitations on the types of exposure and communications permitted between members of the Assessment Authority and the executives of the Twin Peaks authorities.

It is important that the Assessment Authority be *perceived* to be independent, in order to retain credibility in the public domain. Problematic in the design of the Bill is the requirement for the Assessment Authority to be treated as part of the Department of the Treasury, for the purposes of the *Public Governance, Performance and Accountability Act (Cth)* (2013).[69] According to the Act,[70] members of the Assessment Authority are deemed to have the same accountability obligations as other officials of the Department of the Treasury. Further, budget allocations for the Assessment Authority will be controlled by the Secretary of the Department of the Treasury, as the accountable

authority. Perceptions of independence may suffer as a result of this common treatment of the Assessment Authority and the Department of the Treasury, which includes provisions covering general duties under the Act.

In light of the importance that independence plays – and in particular that it both be done and be seen to be done – our findings are of the view that the proposed legislation is, in this respect, inadequate.

F Revolving Door

The "revolving door" phenomenon refers to employees moving between employers in the government/legislative/regulatory sectors, and regulated industry. Often the switching of roles occurs between the regulator and the industry being regulated. This can lead to individual biases, beliefs and values being carried over from one employer to another, and creates a potential mechanism for regulatory capture, by the industry. McDowell[71] found that high-profile private institutions offering relatively higher salaries, such as investment banks, prefer to recruit top-tier university students. Similarly, these students tend to seek out high-paying jobs, commonly found in the banking, finance, accounting and legal professions. As these employees gain experience and connections within industry, they become valuable candidates for competitor institutions and senior government roles. The broader choice of employment opportunities for high performing employees generally leads to higher staff mobility, thereby "revolving" employees between senior positions in industry, government and regulatory authorities.[72] Therefore, ex-government employees can subsequently find themselves in industry, occupying advisory, consulting and lobbying roles, and bring their values, assumptions and biases with them. The opposite is also possible, whereby employees from industry are attracted to key government positions, thereby importing the same set of characteristics. The constant switching, of like-minded professionals between private and public sectors, has a tendency to spread common values and exert influence by the industry on the regulator over time.

A possible mitigant to the revolving door is the implementation of a careful – transparent – selection process for senior executives and Board members of the Assessment Authority, which includes screening for conflicts of interest and independence.

G Revolving Door – A Warning from the US

As mentioned above, in the US the need for oversight authorities was identified as early as the 1860s. More recently, however, following the ENRON crisis and other financial reporting frauds, the *Sarbanes-Oxley Act* of 2002 was passed by the US Congress to address a loss of investor confidence in financial reporting. As part of that regulatory reform, the Public Company Accounting Oversight Board (PCAOB) was established. Its stated purpose is "to oversee the audits of public companies in order to protect investors and the public interest by promoting informative, accurate, and independent audit reports".[73] The PCAOB Board comprises five members, including the chair, who are appointed to terms of five years on a staggered basis. Appointments are made by the Securities and Exchange Commission, after consultation with the chair of the Board of Governors of the Federal Reserve System and the secretary of the Treasury.[74] The SEC has oversight authority over the PCAOB, including the approval of the Board's rules, standards and budget.

The effectiveness, corporate governance structure and integrity of PCAOB has recently been criticised. In 2018, PCAOB senior staff provided confidential information to KPMG on planned PCAOB inspections of their audits. The breach was fostered by the close relationships between at least three partners of the firm (at least one of whom was a managing partner), a former PCAOB employee who had recently been employed by KPMG, and other close associates working at the PCAOB. The case also revealed a practice in which two board members of the PCAOB routinely met

with accounting firm partners to present their personal views of the proposed PCAOB inspection agendas. This practice was in contravention of s EC9 of the PCAOB's code of ethics. The case resulted in a number of convictions of PCAOB and KPMG personnel, and a $US50 million fine levied against KPMG.[75]

The scandal may be at least partly attributable to the revolving door phenomenon. The Project on Government Oversight (POGO), a nonpartisan independent watchdog over the US government and its agencies, conducted an investigation and found that the PCAOB was intimately involved with the industry it is meant to oversee. The POGO investigation found that, as of November 2019, over 40 per cent of PCAOB employees had been employed by the four major US accounting firms which, as a group, conduct a large percentage of large US corporate audits. The investigation also found that the four major US firms employed more than 160 former PCAOB employees.[76]

The capture of the PCAOB – an oversight body created to prevent corrupt practices in the entities over which it had oversight – serves as a warning to those who support the call for an Assessment Authority in Australia, of the risks of capture that such oversight mechanisms face.

III Recommendations on Board Structure and Function to Mitigate Influence

A Board Purpose

For the Assessment Authority to be effective in assessing and influencing the regulation of the financial system, it will need to ensure that its mandate is broad enough to assess all aspects of the performance of APRA and ASIC, including forming an opinion on whether the regulators are adequately supported through legislation. While a strong mandate is necessary, the Board of the Assessment Authority is likely to benefit from a translation of their mandate into a statement of purpose. Indeed, evidence largely drawn from corporate and not-for-profit Boards suggests that purpose statements increase effectiveness within organisations, provided certain preconditions are met.[77] Findings from corporate and not-for-profit Boards on purpose statements are likely to be relevant to the Board of the Assessment Authority, due to the similarities in duties to oversee regulators. The Board of the Assessment Authority, however, needs to be aware that a purpose statement can also introduce different ideologies that can begin a process of regulatory capture.

A review of purpose statements[78] found that they generally involve three components. These include: (1) a long-term and comprehensive vision of the future of the organisation; (2) the central tasks and duties that may reference external stakeholders (e.g. regulators, government, and the general public); and (3) the organisation's philosophy and values that intend to guide attitudes, behaviour and decision-making. Components of purpose statements relating to external stakeholders, and internal philosophy and values specifically, may increase the risks of regulatory capture. However, the value of these components to the potential effectiveness of the Assessment Authority suggests it ought to consider how external stakeholders and internal philosophy and values can be incorporated within the bounds of actual independence, and the perception of independence, for the Assessment Authority.

In a review article of 44 studies on organisational purpose statements, Braun and colleagues[79] found that more effective purpose statements were partially derived from the expected interactions with external stakeholders. In terms of increasing the risk of regulatory capture, the Board would need to ensure that a purpose statement does not favour particular stakeholders or stakeholder objectives, as is implicit for APRA and ASIC. One method by which organisations have linked their purpose with external stakeholders is through communicating a desired public perception, which has been found to positively correlate with organisational performance.[80] The Board may consider

including an appropriate and desirable public perception goal – such as being trustworthy, or providing essential value – as part of their purpose statement, which could circumvent any perceived favouritism of particular regulators or regulatory objectives.

Similar to purpose statements that reference external stakeholders, those that include the organisation's philosophy are also positively correlated with higher performance.[81] The Board would also need to ensure that its philosophy and values do not favour particular intervention styles at the disposal of the regulators (or government). As an example, translation of a strong mandate into a purpose statement on strong enforcement and prosecution could be interpreted as favouring regulatory intervention to achieve desired objectives. Commentary in Australia has at times selectively criticised other regulatory strategies, such as self-regulation and co-regulation with financial services institutions:[82] the Assessment Authority needs to ensure that its assessments are not biased by preconceived ideologies. The efficacy of different regulatory strategies ought to be part of the Assessment Authority's independent assessment of APRA and ASIC, not something that is determined prior to the assessments taking place. Philosophies centred on independent and objective assessment, and the expected attitudes, behaviours and decisions consistent with those attributes, may help to avoid actual and perceived capture of the Assessment Authority by the regulators and industry.

One theoretical solution aimed at preventing the introduction of ideological capture in a purpose statement, would be for the statement to be constructed outside the Assessment Authority. An externally prescribed purpose statement would be uninfluenced by Board members, and could, theoretically, be ideologically neutral. Our literature review suggests, however, that this would not be an optimal solution, as it would detract from the effectiveness of the purpose statement. Generally, more effective purpose statements are constructed with involvement of the Board and the organisation's members.[83] Bart and Bontis[84] found that perceived awareness and involvement of the Board regarding the purpose statement predicted commitment to the purpose by members of the organisation, and was positively correlated with the organisation's performance. Furthermore, other research in the public sector suggests that low involvement of organisational members in the construction of a purpose statement may have a negative effect. Specifically, organisational members may have a perception that the purpose statement is intended to meet an external need, rather than guiding internal attitudes, behaviours and decision making.[85] Thus, the purpose statement should be constructed and approved within the Assessment Authority, in order to have the intended effect on the Board's performance, notwithstanding the risks of regulatory capture that need to be mitigated.

B Process of appointing Board members

The Financial System Inquiry (FSI) recommended the Assessment Authority be comprised of between five and seven part-time members with industry and regulatory expertise,[86] the Royal Commission recommended three part-time members.[87] The process of selecting members plays a significant role in avoiding or minimising the chance of regulatory capture. The Financial System Inquiry[88] noted that undue influence from one stakeholder group could be mitigated (at least partially) through a code of conduct, and diversity in Board membership. The process of appointing members to the Assessment Authority should also address the subtle ways in which the Board may be influenced; the inherent benefits and conflicts of appointing members with regulatory experience; and members' tenure on the Assessment Authority itself. Valid processes for assessment and selection of candidates can be mitigated through measures that are well understood in the field of organisational psychology.

One way in which the Board could expose itself to a greater chance of regulatory capture is through prioritising certain competencies in the selection of Board members. Over time, prioritising certain skills, experience, or knowledge can lead to homogenous Board composition and a Board that may

over- or under-value aspects of the performance of the regulators in its assessment. This prioritisation of competencies may come about through formal means, such as the competency requirements for Board members, and informal means, such as the value or weighting of each competency assessed in an overall selection recommendation. It is therefore important that the process of appointing Board members be sufficiently comprehensive and structured, so as to minimise the chance that critical competencies are undervalued.

The competencies of the Board members can be separated into three categories: (1) generic competencies of board members; (2) context-specific competencies; and (3) board member role-specific competencies. Dulewicz and Herbert[89] analysed and consolidated generic competencies of board members, then tested the validity of the generic competencies of their sample seven years later. Dulewicz and Herbert's 12 competencies can broadly be categorised into business acumen (strategic perspective, business sense, planning and organising and analysis and judgement); interaction quality (managing staff, persuasiveness, assertiveness and decisiveness, and interpersonal sensitivity); and motivation (resilience and adaptability, energy and initiative, and achievement-motivation). As generic competencies, these could be adapted as one potential framework for the selection of members of the Assessment Authority.

The process of selecting members for the Assessment Authority should follow existing external guidance, such as the recommendations of the Walker Review for improving corporate governance in the UK.[90] For the Assessment Authority, this process may not differ significantly from the selection of members of non-regulator boards. Briefly, the generic competencies, role-based competencies and context-based competencies can be used as a basis for objective competency assessments. The review highlighted that the competencies that should be assessed include informal and relationship skills – capability to challenge other members and influence the outcomes of the Board and stakeholders. The Walker Review, additionally, suggests that these assessments also be used for Board member knowledge induction, and to formulate strategies for the Board to work effectively and contribute to a constructive dynamic.

C Independence of Board members

Members of the Assessment Authority, specifically, will need to be possessed of depth of regulatory expertise and, (after time) collective Assessment Authority experience, while mitigating the actual and perceived conflicts that this may cause. Notwithstanding the benefits of local financial services regulatory experience, the length of the preclusion period of appointments following experience at APRA or ASIC ought to be explicitly addressed. At a minimum, the Financial System Inquiry[91] recommended that appointments should exclude current employees of regulated entities – a recommendation that is well supported by the literature.

A significant amount of behavioural research exists illustrating that decision-makers succumb to biases when needing to objectively evaluate decisions which they had been involved in making.[92] This is important when considering the possible appointment of past APRA and ASIC members to the Assessment Authority, as well as the lengths of terms of all of its members. In particular, evidence suggests that individuals tend to increase (rather than question) their commitment to their prior decisions, when they are not achieving their desired outcomes.[93] This is supported by research into confirmation bias, showing that individuals tend to seek or interpret evidence in a way that confirms their prior beliefs, and discount evidence that disconfirms their prior beliefs.[94] Thus, if Board members of the Assessment Authority were involved in prior ARPA or ASIC decisions, that may be an impediment to the independence of their assessments. Similarly, a long tenure for any member on the Assessment Authority may limit their objective evaluation of the Assessment Authority's past decisions, actions or inaction.

To select individual Board members without pre-existing beliefs or ideologies would be unrealistic (or if possible, will come at the expense of regulatory expertise). Members appointed will, unavoidably, have prior beliefs regarding the right objectives of APRA and ASIC, and their current performance against those objectives. However, research in organisational psychology suggests that with appropriate Board composition and dynamics, the chance of regulatory capture can be minimised, for the group. Specifically, diversity among members will be required in the way in which problems are interpreted and solved (there are also types of diversity that may be desirable for other reasons, but do not help to minimise regulatory capture). This type of diversity can introduce task conflict, which may seem counterproductive on the surface. However, a review of 116 empirical studies found that task conflict (rather than team cohesion) tends to create a constructive dynamic: it is related to greater quality of decisions.[95] Furthermore, other studies have shown that a moderate level of task conflict can encourage the discussion of different perspectives,[96] and that dissent contributes to improved detection of the truth.[97] This may help Board members to avoid assumptions based on their past regulatory experience and other forms of ideological capture, and form more accurate assessments of APRA and ASIC. Appointments to the Assessment Authority need to take into consideration the benefits of deep regulatory expertise and tenure on the Assessment Authority, with the increasing chance of regulatory capture that may result. Mitigation strategies that should be considered include selecting Board members from different regulatory backgrounds, while limiting the number of appointments with experience from a single regulator. Appointments of non-regulators, retired regulators and international appointments may present less of a direct and immediate risk of regulatory capture by APRA and ASIC. Fixed terms on the Board may also help to ensure that the Assessment Authority acts independently as a group, and is not overly committed to its past decisions and evaluations. Staggering appointments (after time), we argue, will support the goal of ensuring that the evaluations and decisions of the Assessment Authority are not dominated by one Board member's views or, by collective but narrow views, while at the same time preserving continuity and collective memory and experience. Levine[98] also recommended appointments of Board members for staggered terms, so as to mitigate the chances of political influence over time.

Another practical mitigation strategy, helpful in identifying problems of independence, is to require Board members to provide a periodic (e.g. annual) public certification, listing all other positions or appointments, details of other sources of remuneration, and note any potential conflicts of interest. Publishing this information in a publicly available manner would not only assist in identifying potential conflicts of interest and aid in promulgating the perception of independence, but would also hold the Board members' to public scrutiny, by encouraging full disclosure.

D Knowledge Asymmetries

The establishment of the Assessment Authority will involve the establishment of the norms and group dynamics of a new board. Possible knowledge and power asymmetries within the Board, and between the Board and regulators, could contribute to group dynamics that place too great a weight on the perspectives of individuals. The establishment of the Assessment Authority should consider both the capability of Board members to influence the Board and regulators, as well as the capability of Board members to understand and adjust to other perspectives. Knowledge and power asymmetries can make this challenge more difficult, and more likely that the Board is overly influenced by individual members. In particular, Aldag and Fuller[99] found in a review of the psychology literature on "groupthink" (where group members' motivation for unanimity interferes with effective decision making) that many groupthink characteristics may result from the influence of a powerful leader.

Knowledge asymmetries may arise both from Board members' levels of experience with APRA and ASIC, as well as tenure on the Board itself, particularly in relation to other members. Power asymmetries may arise from Board members' quality and extent of board experience relative to other

members, their past positions relative to other members, and their position on the Board itself. Knowledge and power asymmetries often co-occur and can have two main implications for the overall effectiveness of the Board, its norms, and the group dynamics required of it.

First, "perspective-taking" – the ability to consider alternate points of view – will be important for the diagnostic capability of the Board, because it will aid in understanding concerns raised at Board level, and concerns in relation to the performance of APRA and ASIC. However, a series of social psychology experiments by Galinsky and colleagues[100] found power asymmetries can cause those who feel powerful to be less likely to understand and adopt another person or stakeholder's perspective. Furthermore, those in the study who felt powerful were also more likely to make assumptions that others know what they know (because they did not accurately assess their counterpart's level of knowledge). Power asymmetries within the Board of the Assessment Authority would make bridging different perspectives and levels of knowledge particularly challenging. Unless members on the Assessment Authority, who possess deeper knowledge, are able to prevent this associated power asymmetry, their greater knowledge may be unlikely to produce greater overall results.

Secondly, as part of its assessment of the regulators' performance, it is important that the Assessment Authority recognises any constraints on the regulators' performance, such as regulatory powers and legislation. These could indicate systemic issues that need to be addressed. Another social psychology study, by Whitson and colleagues[101], suggests that power asymmetries can cause members to be less able to think of constraints to achieving goals, and less able to recall constraints that are conveyed to them. The implications of this study, for the Assessment Authority, is that members who create perceived power asymmetries with the regulators may be inaccurate assessors of the regulators' performance, because they are less able to consider the regulators' circumstances and constraints in their assessments of performance.

While the selection and composition of the Assessment Authority may mitigate foreseeable asymmetries, these dynamics may become more apparent once Board members are nominated for different responsibilities and, through their interactions with APRA and ASIC, from their positions of authority. The Board should regularly monitor the dynamics and potential asymmetries between members, as well as seek reviews of their own effectiveness by an external party.

E Agency and Board member lifecycles

There is the ever-present danger that an oversight authority can become another layer of bureaucracy and that its efficacy can be diminished over time. For example, there is evidence that regulatory agencies have a lifecycle. Bernstein, for example, observed the tendency of commissions that he studied to initially go from being something akin to a policeman, to becoming a cheer-leader for the industries over which they had authority during their lifecycle.[102] During this lifecycle regulators would tend increasingly towards safeguarding the health of the industry over which they had jurisdiction, and the standards they imposed would increasingly reflect the desires of the regulated.[103] Ultimately, he observed, "a desire to avoid conflicts and to enjoy good relations with the regulated groups".[104] By old age, regulatory agencies were observed to decline into debility, in a process that Graham describes as "administrativitis".[105] As McCraw stated, agencies begin with "determination and youthful exuberance [but] pass inexorably into middle-age and finally senescence".[106] This problem can, at least partly, be addressed by the staggering of board appointments, and limiting the tenure of each appointee.

Literature varies as to the optimum tenure of a director, however there is a dearth of literature recommending a limitless tenure. Katz[107] finds that organisations risk board member complacency and poor internal communication between directors the longer the average tenure of directors. Katz[108] also finds that a director's contribution to an organisation's performance is greater in the early years

of tenure, as a director's learning curve is steeper, than in the latter years of their appointment. Stobaugh[109] recommends that a maximum tenure of 10 years enables a director to maintain a sufficient level of innovation and critical thinking in order to support positive performance. Lipton and Lorsch[110] support the notion of a limit to a Director's tenure to avoid relationship issues with senior executives. Vafeas[111] also warns of the risks to director independence from excessive tenure. Long tenures tend to encourage social relationships with management, which may influence support for management decisions without the requisite level of questioning required by directors, as part of their fiduciary duties. "Independent directors or not, if you've been on the board for a while, there is a possibility that some of the directors do get closer to management".[112]

One of the reasons that the optimum tenure of a director is difficult to prescribe is that, while shorter tenure can help to avoid complacency, longer tenure can help to avoid groupthink. An experimental study by Leana[113] suggests that members of a fairly cohesive board, in its mature stage, are likely to be sufficiently secure in their roles to challenge one another and provide alternative perspectives. Early in a board member's tenure, when they are less secure in their role, the social pressure to conform to the position of the group may be greater. This risk will be magnified in the early development of the Board of the Assessment Authority. We suggest that a maximum of two terms of five years proposed by the Bill[114] will assist in minimising the likelihood of regulatory capture, stemming from board member tenures that are too short or long.

IV Conclusion

The benefits to Australia of the establishment of an Assessment Authority are clear, and would include enhanced accountability, increased assurance of regulators' independence and pursuit of mandate, and enhanced capacity to prevent financial crises. Enhanced levels of regulator accountability that this reform could bring would be a crucial advantage and would speak to the core of the democratic and parliamentary endeavour. As Levine states in respect of a very similar proposal — that of a Sentinel — it would shine a disinfecting light on to the financial system and improve regulator efficacy. He states further that:

> …no existing entity has the prominence, information and expertise to challenge major regulatory agencies on financial policy matters. A monopoly on regulatory power and information is dangerous … particularly … when it is housed in … [an] … entity that is … independent of the public and elected representatives. A monopoly on financial information, regulatory expertise, and regulatory power in [unaccountable] hands … breaks the democratic lines of influence running from the public to the design and execution of policies that determine the allocation of capital.[115]

Regulator accountability is, therefore, a vital component of efficacy – not only, but indeed especially where regulators forbear in the exercise of their power, as is typical in conditions of regulatory capture.[116] Finally, there is benefit to be derived from a formalised mechanism of independent, arms-length, and recurrent assessment of regulator efficacy which could disrupt the predictable lifecycle of regulatory agencies, referred to above.[117]

Oversight from highly experienced individuals, appointed for a fixed-term, and independent of the regulators or their regulated populations, would be able to provide recursive reviews that would continually measure regulators against their mandates and, in so doing, provide a more fixed benchmark against which to make that measurement.

Accordingly, the introduction of an Assessment Authority in Australia could serve as a timely and highly effective adjunct to the current Australian Twin Peaks financial regulatory architecture. But in order to give this new entity the greatest prospects of success, the shortcomings we identify, not

just in specific legislative provisions, but also in the design of the Assessment Authority, in the ways in which it is conceived, must be addressed. In so doing regard should be had, again, not just of the legislative provisions, but rather for the totality of the task set for the Assessment Authority: to address an insidious problem as old as the regulatory craft itself: capture.

Notes

[1] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, "Final Report", Vol. 1, Financial Services Royal Commission, 1 February 2019., 41.

[2] The terms “Board of Oversight”, “Financial Regulator Assessment Board” and “Financial Regulator Assessment Authority” are synonymous, reflecting the nomenclature chosen by various inquiries and proposed reforms. Henceforth “Assessment Authority” will be used as this reflects the proposed legislation.

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[4] Charles Francis Adams, *Railroads: Their Origin and Problems*, 1878, 138; Adams, Jr., Charles Francis, "Art. I. - Boston", *The North American Review*, Vol. 106, no. 218 (January, 1868).

[5] Andrew Godwin, Steve Kourabas & Ian Ramsay, "Twin Peaks and Financial Regulation: The Challenges of Increasing Regulatory Overlap and Expanding Responsibilities", *The International Lawyer*, Vol. 49, no. 3 (Winter, 2016), 275/6; United States, Department of the Treasury, "The Department of the Treasury Blueprint for a Modernized Financial Regulatory Structure", US Department of the Treasury, March 2008, 143ff.

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[8] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, "Home", Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, 2018, accessed: 11 January, 2018 <https://financialservices.royalcommission.gov.au/Pages/default.aspx>.

[9] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, "Final Report", 1 February, 2019, above n 1, 422; 428; Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, "Interim Report", Vol. 1, Financial Services Royal Commission, 28 September 2018, 277ff.

[10] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, "Final Report", 1 February, 2019, above n 1, 41.

[11] ibid, 41/443.

[12] Financial System Inquiry, "Financial System Inquiry Final Report", November, 2014, above n 7, 239.

[13] Australian Government, "Improving Australia’s Financial System, Government response to the Financial System Inquiry", series edited by The Treasury of the Australian Government, The Treasury, Commonwealth Government of Australia, 2015, 9-25.

[14] Financial System Inquiry, "Financial System Inquiry Final Report", November, 2014, above n 7, 240.

[15] ibid., 239.

[16] ibid., 241. See also: Stefano Pagliari, "How Can We Mitigate Capture in Financial Regulation?", in *Making Good Financial Regulation. Towards a Policy Response to Regulatory Capture*, edited by Stefano Pagliari, series editor: ICFR (International Centre for Financial Regulation), 2012, 39.

[17] Graeme Samuel, Diane Smith-Gander & Grant Spencer, "Australian Prudential Regulation Authority. Capability Review", series edited by Australian Government The Treasury, 28 June 2019.

[18] Senator Mark Bishop (Chair), Senator David Bushby (Deputy Chair), Senator Sam Dastyari, Senator Louise Pratt, Senator John Williams, Senator Nick Xenophon, Senator David Fawcett & Senator Peter Whish-Wilson, "Performance of the Australian Securities and Investments Commission", series edited by Economics References Committee, Economics References Committee, Parliament of Australia, The Senate, June 2014.

[19] Justin O'Brien, "Measuring Regulation and Regulatory Performance: Benchmarking Through Key Performance Indicators", *Economic Papers: A Journal of Applied Economics and Policy*, Vol. 27, no. S1 (June, 2008).

[20] Cristie Ford, "Macro- and Micro-Level Effects on Responsive Financial Regulation", *University of British Columbia Law Review*, Vol. 44, no. 3 (2011), 589.

[21] D. F. Engstrom, "Corralling Capture", *Harvard Journal of Law & Public Policy*, Vol. 36, no. 1 (Winter, 2013), 32.

[22] P. J. DiMaggio & W. W. Powell, "The Iron Cage Revisited: Institutional Isomorphism and Collective Rationality in Organizational Fields", *American Sociological Review*, Vol. 48, no. 2 (April, 1983), 149; Robert B. Cialdini, Carl A. Kallgren & Raymond R. Reno, "A Focus Theory of Normative Conduct: A Theoretical Refinement and Reevaluation of the Role of Norms in Human Behavior", in *Advances in Experimental Social Psychology*, Vol. 24, edited by Mark P. Zanna, 1991, 203.

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[25] ibid., 204.

[26] Ross Levine, "The governance of financial regulation: reform lessons from the recent crisis", series edited by Monetary and Economic Department, in *BIS Working Paper*, Vol. 329, Bank for International Settlements, November 2010.

[27] ibid. The Korean method for combatting the revolving door is contained in the *Public Service Ethics Act, No 13796 of 2016, (Republic of Korea), (enacted: 1 September 2016)* ("PSEA"), which requires a three-year cooling-off period between employment in government, and a regulated entity. Youkyung Huh & Hongjoo Jung, "Regulatory Structure and the Revolving Door Phenomenon in South Korea: Evidence from the 2011 Savings Bank Crisis", in *The Cambridge Handbook of Twin Peaks Financial Regulation*, edited by Andrew J. Godwin & Andrew D. Schmulow, forthcoming March 2021.

[28] Ross Levine, "The governance of financial regulation: reform lessons from the recent crisis", November, 2010, above n 26, 2.

[29] Financial System Inquiry, "Financial System Inquiry Final Report", November, 2014, above n 7, 239.

[30] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, "Final Report", 1 February, 2019, above n 1, 41.

[31] Financial System Inquiry, "Financial System Inquiry Final Report", November, 2014, above n 7, 239; Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, "Final Report", 1 February, 2019, above n 1, 41.

[32] Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, "Final Report", 1 February, 2019, above n 1, 422/428; Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, "Interim Report", 28 September, 2018, above n 9, 277ff.

[33] See: Process of appointing Board members, below.

[34] See: Independence of Board members, below.

[35] Erin Turner (on behalf of CHOICE), Katherine Temple (on behalf of the Consumer Action Law Centre) & Karen Cox (on behalf of the Financial Rights Legal Centre), Re: Financial Regulator Assessment Authority Bill 2020 to The Treasury, Commonwealth of Australia, 28 February, 2020.

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