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Transnational Peer Review for Regulating Financial Stability

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Abstract

The article examines the role of transnational peer review in shaping financial market regulation in Australia in pursuit of financial stability. Transnational regulatory networks have become an important source of standards and enforcement practices in financial regulation. In the aftermath of the financial crises of the 2000s, global initiatives to strengthen financial supervision have reinforced peer review mechanisms to monitor the national implementation of transnational standards. Through such peer review, regulatory networks can influence domestic rules and practices, as well as the exercise of discretion by national regulatory authorities. The article studies the interaction between transnational peer review and regulatory choices in Australian financial supervision through three case studies. Notwithstanding concerns in the literature about the efficacy and legitimacy of regulatory networks, the case studies demonstrate the scope for productive dialogue between the transnational and national level in making regulatory choices.

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I Introduction

Transnational peer review of national policy-making and regulation is increasingly common in global governance. It involves public decision-making in one state being reviewed by a committee of peers from other states, who can be policy-makers, national regulators, international organisation officials or academic experts. Apparently pioneered by the Organisation for Economic Cooperation and Development ('OECD') in the 1990s,[1] the use of peer review has grown substantially. Efforts to cope with important global challenges — including strengthening financial stability in the face of

1. Fabricio Pagani, 'Peer Review as a Tool for Co-operation and Change: An Analysis of an OECD Working Method' (2002) 11(4) *African Security Review* 15.

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crisis,[2] climate change,[3] terrorism[4] and even the handling of a pandemic[5] — have employed variants of transnational peer review.[6] As a result, Australia has been subject to transnational peer review in different fields, has participated in peer review of other jurisdictions and has even financed regulatory peer review frameworks in our region through development assistance.

This article traces the influence of transnational peer reviews on the regulation of financial markets in Australia in pursuit of financial stability. Despite its growing ubiquity, transnational peer review is relatively opaque as a governance tool, 'strikingly underdeveloped in law' and empirically understudied by scholars.[7] One reason that peer review is insufficiently addressed in the legal literature is that it does not fit neatly into the hierarchies of domestic and international law. Since transnational peer review is neither very visible from a domestic perspective,[8] nor does it purport to have a binding effect, it can be easy to overlook its existence or effects. Moreover, because it is often unclear to whom precisely peer review recommendations are addressed, it may be difficult to appreciate whether and how peer reviews influence substantive decision-making by regulatory or other public actors. And yet, understanding the extent of such influence is important because of the significant role of transnational standards in financial regulation and the fact that such regulation is principally implemented by independent national authorities.

The regulation of the financial sector in pursuit of financial and macroeconomic stability has had a transnational dimension at least since the creation of the 'Bretton Woods' institutions (including the International Monetary Fund ('IMF') and the World Bank) in the aftermath of World War II. In more recent times, an alphabet soup of transnational financial regulatory fora have been created, particularly since the worldwide deregulation of finance and capital flows, specifically to address concerns about the cross-border effects of financial instability.[9]

Since the global financial crises of the late 2000s, transnational standard-setting has only accelerated.[10] Apart from elaborating standards, transnational regulatory networks have also enhanced peer oversight of domestic implementation of transnational standards, as well as the overall structure and decision-making of domestic financial authorities.[11] Thus, the Financial Stability Board ('FSB') was established by a decision of the G20 in 2009 to broaden the membership and strengthen the mandate of the G7's informal Financial Stability Forum.[12] The FSB was charged with pursuing 'much greater consistency and systematic cooperation' and a 'framework of

2. Financial Stability Board, 'FSB Framework for Strengthening Adherence to International Standards' (Working Paper, 9 January 2010).
3. *United Nations Framework Convention on Climate Change*, COP Decision 1/CP.16, 16th sess, FCCC/CP/2010/7/Add.1 (15 March 2011).
4. Raphael Bossong, 'Peer Reviews in the Fight Against Terrorism: A Hidden Dimension of European Security Governance' (2012) 47(4) *Cooperation and Conflict* 519.
5. World Health Organisation, *Seventy-Third World Health Assembly COVID-19 Response*, WHA Res 73.1, 73rd session, 2nd plen mtg, Agenda Item 3, WHA Doc A73/VR/2 (19 May 2020) 7.
6. See generally Yane Svetiev, *Experimentalist Competition Law and The Regulation of Markets* (Hart, 2020).
7. William Simon, 'Where is the "Quality Movement" in Law Practice?' [2012] 2 *Wisconsin Law Review* 387, 398.
8. Greg Weeks, 'The Use and Enforcement of Soft Law by Australian Public Authorities' (2014) 42(1) *Federal Law Review* 181.
9. Already after the deregulation of the financial sector in the US, concerns about the cross-border effects of foreign bank failures triggered the push for global prudential standards through the informal G10 grouping: John Braithwaite and Peter Drahos, *Global Business Regulation* (Cambridge University Press, 2000).
10. Daniel Tarullo, 'Macroprudential Regulation' (2014) 31(3) *Yale Journal on Regulation* 505.
11. Andrew Godwin, Steve Kourabas, and Ian Ramsay, 'Twin Peaks and Financial Regulation: The Challenges of Increasing Regulatory Overlap and Expanding Responsibilities' (2016) 49(3) *The International Lawyer* 273, 274.
12. See Ross P Buckley, 'The G20's Performance in Global Financial Regulation' (2014) 37(1) *UNSW Law Journal* 63.

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internationally agreed high standards, that a global financial system requires' by coordinating the work of national agencies and international standard-setting bodies.[13] A key mechanism within the FSB's mandate is the conduct of country and thematic peer reviews focusing on the implementation and effectiveness of international standards and policies agreed within the FSB. Under Article 6, participating in peer review is a requirement of FSB membership, one with which Australia volunteered to comply already in 2011.[14] While the FSB is not a treaty-based organisation with binding rule-making powers, authors both in Australia[15] and internationally identified its potential as 'the most significant change' in the structure of global financial regulation.[16]

Gadinis has argued that 'the presence of … politicians' distinguishes the FSB from other international financial bodies,[17] yet FSB peer reviews are conducted principally by technocrats. Furthermore, FSB reviews also draw on prior reporting and expert evaluation exercises, including the IMF's Financial Sector Assessment Program ('FSAP') and Reports on the Observance of Standards and Codes ('ROSCs').[18] As such, in financial regulation we observe a set of cascading frameworks of transnational reviews of national regulatory frameworks and choices. Such reviews assess individual jurisdictions by reference to international standards developed by transnational regulatory networks (such as the Basel Committee on Banking Supervision)[19] or transnational private standard-setting bodies (such as the International Accounting Standards Board). Finally, these standard-setting bodies, the Basel Committee for example, have in recent years themselves established peer review mechanisms to oversee the domestic implementation of such standards.[20]

Turning the focus to Australian domestic practice, in the immediate aftermath of the 2008 Global Financial Crisis, Aronson decried the Commonwealth government's strategies to bolster financial sector stability, modelled on foreign templates, for their deleterious effect on Australian public law.[21] He expressed concerns about the delegation of seemingly arbitrary powers on executive and regulatory actors, combined with the stifling of democratic checks on the administrative state. A key concern was that the promulgated legislation would enable executive actors to intervene in the financial sector with little accountability for such interventions to Parliament. Surveying the template for emergency interventions in jurisdictions such as Australia, the US and UK, Aronson observed how the apparent need for urgent technical responses triggered accumulation of executive

13. G20 Leaders, *Leaders' Statement*, London, 2 April 2009; *FSB Charter* art 1.
14. *FSB Charter* art 6.
15. Douglas Arner and Michael W Taylor, 'The Global Financial Crisis and the Financial Stability Board: Hardening the Soft Law of International Financial Regulation?' (2009) 32(2) *UNSW Law Journal* 488.
16. Julia Black, 'Restructuring Global and EU Regulation' in Eddy Wymeersch, Klaus J Hopt, and Guido Ferrarini (eds), *Financial Regulation and Supervision: A Post-Crisis Analysis* (Oxford University Press, 2012) 4, 19. See also Chris Brummer, *Soft Law and the Global Financial System: Rule Making in the 21st Century* (Cambridge University Press, 1st ed, 2011).
17. Stavros Gadinis, 'The Financial Stability Board: The New Politics of International Financial Regulation' (2013) 48(2) *Texas International Law Journal* 157, 167.
18. Douglas W Arner and Ross P Buckley, 'Redesigning the Architecture of the Global Financial System' (2010) 11(2) *Melbourne Journal of International Law* 185.
19. The Basel Committee is a transgovernmental institution elaborating internationally agreed upon standards for bank regulation: Kevin Young, 'The Basel Committee on Banking Supervision' in Thomas Hale and David Held (eds), *Handbook of Transnational Governance: Institutions and Innovations* (Polity Press, 2011) 39.
20. Bank for International Settlements, 'Implementation and Evaluation of the Basel Standards', *Basel Committee on Banking Supervision* (Web Page) <https://www.bis.org/bcbs/implementation.htm?m=3%7C14%7C656>.
21. Mark Aronson, 'The Great Depression, This Depression, and Administrative Law' (2009) 37(1) *Federal Law Review* 165.

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power and over-reliance on subordinate legislation, creating risks of both unconstrained discretion and arbitrary rights deprivation:

> [R]esponses to the current crisis include measures that should rekindle some of administrative law's deepest concerns about the democratic legitimacy of the administrative state. New banking laws … have transferred enormous discretionary powers to central government's regulatory authorities [posing] real issues about protection from arbitrary power, and about the very process of making laws and holding … administration to account.[22]

In fact, given the growing importance of regulatory agencies and their networking at a global level, the regulatory oversight problem may be much deeper. Financial stability in Australia is principally pursued by three largely independent statutory authorities, including the Australian Prudential Regulation Authority ('APRA'), the Reserve Bank of Australia, and, to some extent, the Australian Securities and Investments Commission ('ASIC'). These authorities are subject to limited direction from politically accountable actors, they exercise their functions in close coordination and cooperation with financial institutions, including the four major banks (the instability of any of which would amount to a regulatory nightmare), and rarely end up in litigation before the courts.[23]

Thus, if the rules and techniques for crisis management to promote financial stability with a transnational — rather than domestic — provenience were introduced and implemented by the executive,[24] at the very least such implementation would rely on politically and democratically accountable actors. But based on our earlier discussion, Australian financial regulatory practice may also follow transnational 'best practices' incorporated through rule-making or the exercise of discretion by independent financial regulators.

Three stylised observations about contemporary Australian financial regulatory practice follow from the above discussion and illustrate the significance of transnational peer review vis-à-vis the weakness of traditional mechanisms of domestic oversight of regulatory activity through the executive, legislature, and courts. First, many 'soft' international financial standards — formulated by informal transnational regulatory networks ('TRNs') or private standard-setting organisations ('SSOs') and verified through transnational peer review — are incorporated into Australian law via regulations by national authorities, such as APRA or ASIC, often without significant parliamentary scrutiny. Second, Australian financial regulators' actions can be directly inspired or informed by actions taken by regulators in other countries when proposing regulatory changes. For example, in proposing new rules for residential mortgage lending, APRA has assessed available alternatives by reference 'to measures that had been taken by regulators internationally at the time'.[25] Third, both APRA and ASIC are independent from government and in fulfilling their mandate these agencies aim to work directly with financial institutions to resolve identified supervisory problems, which explains the relative paucity of litigation within this regulatory space.[26]

22. Ibid 165.
23. The Banking Royal Commission specifically criticised financial regulators, such as ASIC, for their close relationship with the banking industry and the failure to litigate cases: *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 1, 3–4, 37–8.
24. Aronson (n 21) 192–8.
25. Australian Prudential Regulation Authority, *Information Paper: Review of APRA's Prudential Measures for Residential Mortgage Lending Risks* (Report, 29 January 2019) 8.
26. *Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry* (Final Report, February 2019) vol 2, 278. Cf Rory V Loo, 'Regulatory Monitors: Policing Firms in the Compliance Era' (2019) 119(2) *Columbia Law Review* 369.

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In such circumstances, the article argues that transnational peer review holds both peril and promise for the oversight of domestic regulatory decision-making, given the challenges that independent regulatory authorities present for democracy and the rule of law. Section II draws on the literature on global governance to outline reasons for the emergence and growing importance of peer review in various areas of market regulation. The discussion highlights concerns about agency escape, whereby transnational networking makes regulators more autonomous and disembedded from national actors, but it also shows that it can provide a potential substitute or complement to local political and judicial oversight of regulators.

To disentangle the effects of transnational peer review in Australian regulatory practice, Section III presents three case studies of conflict, whereby peer recommendations have been resisted in Australia's domestic regulatory framework. These case studies temper some of the concerns expressed about the effects of peer review on domestic regulatory practice. In particular, they illustrate the scope for a productive dialogue between the transnational and domestic regulatory actors, rather than the scenarios of global imposition or parochial resistance. Peer review recommendations are not always or automatically adopted into national practice. In those circumstances, such recommendations can trigger deliberation about the efficacy of Australia's current rules and available alternatives. Such deliberation can reveal inadequacies in domestic mechanisms of financial regulation and regulatory oversight. Interestingly, in the Australian context, domestic deliberation about the adoption of transnational peer review recommendations takes place in specialised fora (such as commissions of inquiry) rather than in the ordinary political and legislative process. Finally, contrary to the concerns about industry capture of TRNs, peer recommendations appear to favour more dispersed interests, such as those of consumers or taxpayers, as opposed to the concentrated interests of financial institutions.

II The Promise and Peril of Regulatory Peer Review

The growing use of transnational peer review is explained by two features of modern regulation in an era of 'regulatory capitalism'.[27] At the domestic level, the growth of the regulatory state over much of the 20th century proceeded through functional differentiation via broad delegations to specialised decision-makers that exercise discretion on the basis of expertise.[28] The need for speedy responses to emergencies, such as war, natural and economic crises,[29] as well as the growing technicality of regulation requiring expertise,[30] make it impracticable to rely on the legislative process to provide specific rules or even meaningful constraints on regulatory delegation and discretion.[31] The complexity and technicality of regulatory tasks — that drive the functional disaggregation of the state[32] — also make it difficult for legislators, the executive and the judiciary to effectively oversee regulatory decision-making. Writing long ago, one of the pre-eminent scholars of bureaucracy observed that in the light of the growth of administration, separation of

27. David Levi-Faur, 'The Global Diffusion of Regulatory Capitalism' (2005) 598 (March) *ANNALS of the American Academy of Political and Social Science* 12; John Braithwaite, 'The Regulatory State?' in Sarah A Binder, R A W Rhodes and Bert A Rockman (eds), *The Oxford Handbook of Political Institutions* (Oxford University Press, 2008) 407 ('Regulatory State').
28. Saskia Sassen, *Territory, Authority, Rights: From Medieval to Global Assemblages* (Princeton University Press, 2008).
29. Aronson (n 21).
30. Sassen (n 28); Cristie Ford, *Innovation and the State* (Cambridge University Press, 2017).
31. Michael Taggart, 'From "Parliamentary Powers" to Privatization: The Chequered History of Delegated Legislation in the Twentieth Century' (2005) 55(3) *University of Toronto Law Journal* 575.
32. See Julia Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1, 4.

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powers theories developed in the national context would be 'unhelpful' in controlling administrative decision-making (at least in the absence of a reversal of broad delegations, which he thought unlikely).[33]

At the global level, the fragmentation of law and regulation from general towards specialised rules and institutions[34] has resulted in a 'new world order' of cooperation through direct networking of specialised agencies, which sidesteps the touchstone of state consent in international relations.[35]

The foregoing trends have been amplified by the privatisation and outsourcing of formerly public service provision over recent decades.[36] The resulting form of 'regulatory capitalism' is marked by a separation of commercial and regulatory functions of former public service providers and creation of independent regulatory authorities, deliberately isolated from political and even public law control.[37] This leads to further 'decentering' of regulatory activity away from the state and democratically legitimated actors,[38] relying on regulatory agencies independent from government maintaining close relationships with the corporate entities they regulate.[39]

The transnational networking of independent regulatory agencies represents the external dimension of the fragmentation of law and regulation from general towards specialised rules and institutions, and the global diffusion of regulatory capitalism. Agency networking may be triggered by an effort to improve compliance with international rules,[40] but it can also be done to coordinate regulation of the transnational activities of global firms, to learn through direct exchange of views and experiences[41] and even to bolster the independence of national agencies.[42] Common regulatory norms and practices can help attract international investment and trade by having compatible policies with major trading partners.[43] Moreover, where agencies exercise broadly delegated powers to regulate markets and receive limited normative guidance from domestic actors (legislatures, executives or courts), their officials need to learn from their peers in other jurisdictions about how to solve common regulatory problems.

In networks, regulatory cooperation takes place largely outside of the confines of either international or domestic law. The absence of formally binding obligations means that jurisdictions remain notionally free to make independent domestic policy choices, but regulatory networks

33. James Q Wilson, 'The Rise of the Bureaucratic State' (1975) 41 (Fall) *The Public Interest* 77, 102.
34. Gunther Teubner and Andreas Fischer-Lescano, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law' (2004) 25(4) *Michigan Journal of International Law* 999.
35. Anne-Marie Slaughter, *A New World Order* (Princeton University Press, 2004). See Nico Krisch, 'The Decay of Consent: International Law in an Age of Global Public Goods' (2014) 108(1) *American Journal of International Law* 1.
36. Taggart (n 31); Steven K Vogel, *Freer Markets, More Rules: Regulatory Reform in Advanced Industrial Countries* (Cornell University Press, 1998).
37. Iain Ramsay, 'Consumer Law, Regulatory Capitalism and the "New Learning" in Regulation' (2006) 28(1) *Sydney Law Review* 9.
38. Julia Black, 'Decentering Regulation: Understanding the Role of Regulation and Self-Regulation in a "Post-Regulatory" World' (2001) 54(1) *Current Legal Problems* 103.
39. Regulation through large multinational firms and industry associations eases both information problems and logistical difficulties of 'monitoring a galaxy of small firms': Braithwaite (n 27) 422.
40. David Zaring, *The Globalized Governance of Finance* (Cambridge University Press, 2019).
41. André Dao, Andrew Godwin and Ian Ramsay, 'From Enforcement to Prevention: International Cooperation and Financial Benchmark Reform', (2016) 10(2) *Law and Financial Markets Review* 83.
42. Chad Damro and Terrence Guay, 'Transatlantic Merger Relations: The Pursuit of Cooperation and Convergence' (2012) 34(6) *Journal of European Integration* 643.
43. David Lazer, 'Regulatory Capitalism as a Networked Order: The International System as an Informational Network' (2005) 598(1) *ANNALS of the American Academy of Political and Social Science* 52; Beth A Simmons and Zachary Elkins, 'The Globalization of Liberalization: Policy Diffusion in the International Political Economy' (2004) 98(1) *American Political Science Review* 171.

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(though lacking coercive power and generating non-binding output) can contribute to the diffusion of similar regulatory practices across national borders.[44] Peer review through regulatory networks may be viewed as a mechanism that can aid informal diffusion towards common norms and practices. The limited literature on transnational peer review follows Slaughter's claim that regulatory networks are a more effective and legitimate form of global governance than the traditional treaty/organisation model.[45] On this view, even in the absence of binding obligations, TRNs lead to better compliance with transnational standards through informal mechanisms,[46] such as peer pressure, reputation and socialisation.[47] However, key constraints on purely informal convergence include the facts that day-to-day agency decision-making is not easily observable to their transnational peers[48] and may be influenced by domestic actors.[49] Precisely, by providing a monitoring tool for the regulatory practices and decisions of national agencies, transnational peer review can aid diffusion and soft convergence to common norms. By making agencies' practices and decisions more easily observable and understandable to their peers, peer review enhances informal mechanisms of peer pressure, socialisation and reputation.[50]

If, however, peer review enhances soft convergence to common transnational norms and practices, this raises legitimacy concerns about such diffusion through regulatory networks.[51] Specifically, where a national agency adopts transnational norms and recommendations in its decision-making, such adoption may take place beyond national controls on delegation and discretion. Such import of transnational norms into domestic regulation can result in the adoption of transplanted rules and institutions that are a poor fit with local problems or policy preferences.[52]

The foregoing concerns about the legitimacy of diffusion of practices through regulatory networks are exacerbated if participation in transnational networks and peer review is more difficult for a broad spectrum of stakeholders compared to national parliamentary hearings, administrative rule-making or judicial review.[53] The opaque adoption of analytical or enforcement practices among

44. Zachary Elkins and Beth Simmons, 'On Waves, Clusters, and Diffusion: A Conceptual Framework' (2005) 598(1) *ANNALS of the American Academy of Political and Social Science* 33.
45. Slaughter (n 35).
46. David Zaring, 'Informal Procedure, Hard and Soft, in International Administration' (2005) 5(2) *Chicago Journal of International Law* 547.
47. Chris Brummer, 'How International Financial Law Works (and How It Doesn't)' (2011) 99(2) *Georgetown Law Journal* 257.
48. Yane Svetiev, 'The Limits of Informal Law-Making: Enforcement, Norm-generation and Learning in the International Competition Network' in Joost Pauwelyn, Ramses A Wessel and Jan Wouters (eds), *Informal International Lawmaking* (Oxford University Press, 2012) 272.
49. Pierre-Hugues Verdier, 'Transnational Regulatory Networks and Their Limits' (2009) 34(1) *Yale Journal of International Law* 113.
50. Thomas Conzelmann, 'Beyond the Carrot and the Stick: State Reporting Procedures in the World Trade Organization and the Organization of Economic Cooperation and Development' in Jutta Joachim, Bob Reinalda and Bertjan Verbeek (eds), *International Organizations and Implementation: Enforcers, Managers, Authorities?* (Routledge, 2007) 35; Steven V Uystel, 'The International Competition Network, Its Leniency Best Practice and Legitimacy: An Argument for Introducing a Review System' in Mark Fenwick, Steven V Uystel and Stefan Wrbka (eds), *Networked Governance, Transnational Business and the Law* (Springer, 2014) 185; Georgios Dimitropoulous, 'Compliance Through Collegiality: Peer Review in International Law' (2016) 37(3) *Loyola of Los Angeles International and Comparative Law Review* 275.
51. Verdier (n 49) 113; Julia Black, 'Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes' (2008) 2(2) *Regulation & Governance* 137.
52. Elkins and Simmons (n 44).
53. Richard Stewart, 'Remedying Disregard in Global Regulatory Governance: Accountability, Participation, and Responsiveness' (2014) 108(2) *American Journal of International Law* 211.

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regulatory peers through informal TRN deliberations fuels the criticisms about unaccountable technocracy and 'agency escape' from domestic oversight.[54]

One response to such concerns is to point to the fact that transnational peer review is heterogeneous in its operational forms and functions, and so it need not necessarily be a tool of informal convergence to common norms.[55] Transnational peer review can be used as a tool of technocratic governance to promote adoption of regulatory best practices that do not involve distributive effects or policy trade-offs.[56] Alternatively, peer review can be used to broaden scientific input, to strengthen the basis for agency decisions relying on scientific expertise beyond national borders, without necessarily leading to normative convergence or a common regulatory approach.[57] Similarly, peer review can be a mechanism of global administrative law, to ensure that decision-making of national authorities — particularly in the exercise of functions that have transnational impact — complies with public law principles of legality, transparency, participation and rationality.[58] Finally, peer review is a key component of experimentalist governance, used to cope with regulatory uncertainty by granting autonomy to local actors to tailor local interventions in pursuit of commonly-identified goals, combined with monitoring and review of those interventions.[59]

While the above functionalities are sometimes treated as mutually interchangeable,[60] they have quite different implications about the efficacy and legitimacy of peer review as a global governance mechanism. Most of them do not require convergence in rules, decisions or practices. From the point of view of legitimacy, the above functionalities of peer review define appropriate limits[61] on the scope and intended effects of review so as to ensure its legitimacy, such as by limiting review respectively to technocratic, scientific or procedural issues or by explicitly recognising that local regulators, legislators and courts retain decision-making responsibility for crafting and overseeing domestic interventions.

Moreover, in light of concerns about the decentering of market regulation away from traditional state actors, transnational networking of regulatory agencies could complement — or even substitute for — domestic oversight of regulatory decision-making.[62] Peer review by other expert agency peers provides independent evaluation of the substance of regulatory decisions. It could help legislators to understand the regulatory options available, or how a national agency exercises discretion compared to its international peers, as well as the reasons for domestic regulatory choices and failures. Similarly, peer review can assess agency compliance with procedural rule of law

54. Stephen Wilks, 'Agency Escape: Decentralization or Dominance of the European Commission in the Modernization of Competition Policy?' (2005) 18(3) *Governance* 431; Sol Picciotto, 'Networks in International Economic Integration: Fragmented States and the Dilemmas of Neo-Liberalism' (1997) 17 (Winter–Spring) *Northwestern Journal of International Law and Business* 1014.
55. Svetiev (n 6) ch 3.
56. Giandomenico Majone, 'Two Logics of Delegation Agency and Fiduciary Relations in EU Governance' (2001) 2(1) *European Union Politics* 103.
57. JB Ruhl and James Salzman, 'In Defense of Regulatory Peer Review' (2006) 84(1) *Washington University Law Review* 1; Torbjørn Gundersen, 'Scientists as Experts: A Distinct Role?' (2018) 69 *Studies in History and Philosophy of Science* 52.
58. Benedict Kingsbury, Nico Krisch and Richard B Stewart, 'The Emergence of Global Administrative Law' (2005) 68(3–4) *Law and Contemporary Problems* 15.
59. Charles F Sabel and Jonathan Zeitlin (eds), *Experimentalist Governance in the European Union: Towards a New Architecture* (Oxford University Press, 2010); Daniel E Ho, 'Does Peer Review Work? An Experiment of Experimentalism' (2017) 69(1) *Stanford Law Review* 1.
60. Dimitropoulous (n 50).
61. Gunther Teubner, 'The Project of Constitutional Sociology: Irritating Nation State Constitutionalism' (2013) 4(1) *Transnational Legal Theory* 44.
62. Martino Maggetti, 'Legitimacy and Accountability of Independent Regulatory Agencies: A Critical Overview' (2010) *Living Reviews in Democracy* 1.

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criteria typically protected by judicial review. On this view, transnational peer review can augment and make more effective domestic regulatory oversight.

III The Local Touchdown of Transnational Peer Review in Australian Financial Regulation

In light of the promise and peril of transnational peer review of regulatory decision-making, this part provides an account of the interactions between transnational standards and peer review recommendations with local regulatory choices in Australia.

A review of the peer assessment reports of the transnational forums mentioned in the Introduction reveals an extensive scanning of Australia's regulatory architecture and the domestic mechanisms for pursuing financial stability delivering specific recommendations.[63] The present aim is to identify how those transnational recommendations have affected local deliberation about regulatory choices, including the extent to which such recommendations have been adopted, modified or rejected in domestic practice. The three case studies presented trace the local touchdown of specific recommendations made to Australian regulators and policy-makers in the aftermath of the financial crisis.[64]

The first case study relates to the legal guarantees of the independence of the Australian prudential regulator, APRA. As will be apparent, the transnational recommendation for the independence of the prudential regulator assailed the Commonwealth's mechanism of incorporating statutory authorities within the Australian system of responsible government. As such, it allows us to study the extent to which transnational requirements for regulatory autonomy *require* disembedding local regulators from domestic oversight and control. The other two case studies focus on recommendations related to the incorporation of financial institutions in the financial stability framework. They allow us to explore the extent to which the interests of financial institutions are over-emphasised in the recommendations of transnational review fora, compared to more disparate domestic interest groups, such as depositors, borrowers or retail investors.[65]

Importantly, all three are case studies of conflict, involving questions on which there has been ongoing dissonance between transnational recommendations and local solutions in Australia. As such, they illustrate that while transnational recommendations are salient to local regulatory deliberations, they have not been uniformly adopted in the rules, regulatory frameworks or decision-making practices in Australia. Resistance to transnational recommendations in the first case study reflects the Commonwealth's insistence on pre-existing local mechanisms of regulatory oversight, even if those mechanisms have not been particularly effective. In the other two case studies, Australia's resistance to transnational recommendations was principally driven by opposition from vested interests in the banking sector, without much or any input from a broader set of more diffuse interests affected by the rules and practices under consideration.

63. As such, these peer reviews go beyond the mere benchmarking or ranking of jurisdictions: Ramsay (n 37).
64. Pascal Vennesson, 'Case Studies and Process Tracing: Theories and Practices' in Donatella Della Porta and Michael Keating (eds) *Approaches and Methodologies in the Social Sciences: A Pluralist Perspective* (Cambridge University Press, 2008) 223. Process tracing identifies mechanisms linking causes to outcomes to understand the drivers behind the results of discourse and bargaining processes.
65. Braithwaite and Drahos (n 9) suggest that business influence in transnational regulation is disproportionate as compared to the influence of consumers: at 620.

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A *APRA's Independence from the Executive and Legislature*

The first case study focuses on the conflict between the IMF's financial sector assessment recommendations and the Commonwealth Government over the legal framework establishing and regulating the powers of APRA as Australia's prudential regulator. FSAP reports have consistently criticised the Australian Government about APRA's insufficient operational independence from the executive. Successive FSAPs have assessed Australia as non-compliant with at least one of the Basel Core Principles for Effective Banking Supervision. In its turn, the Commonwealth Government has repeatedly rejected this criticism and has taken no steps to change the legal framework establishing APRA to follow this recommendation.

The IMF's February 2019 FSAP report assessed Australia to be 'materially non-compliant' with Principle 2 of the Basel Committee's Core Principles for Effective Banking Supervision relating to 'independence, accountability, resourcing and legal protection for supervisors'.[66] Material non-compliance means that there are 'severe shortcomings' in the implementation of international standards.[67] Principle 2 requires regulators to have 'operational independence, transparent processes, sound governance, budgetary processes that do not undermine autonomy, and adequate resources'. While observing that APRA had operational independence, was generally free from government and industry interference and had sufficient discretion to take supervisory action,[68] the 2019 FSAP found that APRA's legal framework was non-compliant with principle 2 because of two features of APRA's relationship with the executive and legislature.[69] The first concerned independence from the government because of a power granted to the Treasurer under the *Australian Prudential Regulation Authority Act 1998* (Cth) ('APRA Act') to issue directions to APRA. The FSAP Report recognised that the directions power had never been exercised and was conferred to deal with exceptional circumstances, but it also emphasised that the ministerial directions power is not expressly limited in this way. As a result, in circumstances where APRA's and the Treasurer's views conflict, the directions power would allow the Treasurer to interfere with APRA's decisions. The report further suggested that an extreme scenario could occur in which the minister prevents APRA from introducing prudential standards, constraining it from carrying out its functions relating to financial stability and limiting APRA's independence.[70]

A second concern related to APRA's relationship with Parliament, given the Commonwealth Parliament's disallowance powers regarding prudential standards.[71] The disallowance powers are also not ordinarily used to prevent APRA's adoption of transnational standards and are a feature of the general checks on regulation-making powers in Australia. The FSAP suggested that such powers could constrain APRA in achieving its primary supervisory objectives.[72]

The foregoing concerns had been expressed in prior FSAP reports,[73] followed by the Commonwealth's failure to change APRA's operational framework. The 2019 Report suggested that the

66. International Monetary Fund, *Australia: Financial Sector Assessment Program-Detailed Assessment of Observance-Basel Core Principles for Effective Banking Supervision* (IMF Country Report No 19/53, 21 February 2019) 42–58.
67. Ibid 10.
68. Ibid 42.
69. Ibid 57.
70. Ibid 57–8.
71. Ibid 33, 58.
72. Ibid 33, 42.
73. International Monetary Fund, *Australia: Financial Sector Assessment Program — Detailed Assessment of Observance of Standards and Codes* (IMF Country Report No 06/415, 21 November 2006) 41; International Monetary Fund, *Australia: Basel Core Principles for Effective Banking Supervision — Detailed Assessment of Observance* (IMF Country Report No 12/213, 21 November 2012) 24–8.

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issue regarding APRA's independence from the legislature was a lesser concern[74] and APRA itself has stated that it accepts parliamentary overview of its formulation and implementation of prudential standards.[75]

On APRA's relationship with the executive, section 12 of the APRA Act provides that the 'Minister may give APRA a written direction about policies it should pursue, or priorities it should follow, in performing or exercising any of its functions or powers'. It also requires notice to be given to APRA that a direction is to be made and an opportunity be given to APRA's chairperson to discuss it. Such a direction must be made formally, as it must also be published in the Commonwealth Government Gazette and tabled in Parliament.

The above provision was introduced in its current form in 2003 to replace a provision for consultation between the Treasurer and APRA in case of disagreements regarding policy issues. This provision empowered the Treasurer acting alone to issue a direction to APRA on policy matters, turning it into a personal power of a minister rather than a direction of the government collectively as was the case before 2003. The 2003 amendments were intended to align the government's powers with respect to APRA with provisions that apply to other independent statutory agencies,[76] including the equivalent provision applying to ASIC under section 12 of the *Australian Securities and Investments Commission Act 2001* (Cth). In other words, it appears that the ministerial directions power in APRA's governing Act reflects a common template provision in Commonwealth legislation applying to independent statutory authorities[77] and to the decision-making powers of Commonwealth government officials more generally.[78]

The Australian Government repeatedly disagreed with the FSAP concerns about risks to APRA's independence, given that the governing framework for APRA is common to that for similar authorities that operate independently, but are subject to oversight. The Wallis Inquiry report into the financial sector, which recommended the establishment of APRA, endorsed the independence of each of Australia's financial regulators.[79] The Treasurer accepted that APRA should be independent when the establishing Act was promulgated. The Explanatory Memorandum provided that:

> APRA will be an authority that will have a high degree of independence and operational autonomy. This level of independence from executive government is in line with the Basle Committee's Core Principles of Effective Bank Supervision.[80]

The Explanatory Memorandum went on to point out that the Commonwealth Government has a legitimate interest in APRA's policies and their application and that provisions were included in the Act to ensure the Government is informed and that it can intervene when it disagrees with APRA.[81]

74. International Monetary Fund, *Australia: Financial Sector Assessment Program-Detailed Assessment of Observance-Basel Core Principles for Effective Banking Supervision* (IMF Country Report No 19/53, 21 February 2019) 42, 58.
75. Australian Prudential Regulatory Authority, Submission to the Financial System Inquiry Committee, *Financial System Inquiry* (31 March 2014) 30.
76. Explanatory Memorandum, Australian Prudential Regulation Authority Amendment Bill 2003 (Cth) [1.4], [3.18]–[3.20].
77. See, eg, *Fisheries Administration Act 1991* (Cth) s 10C; *Australian Communications and Media Authority Act 2005* (Cth) s 14; *Civil Aviation Act 1988* (Cth) s 12. I thank Andrew Edgar for this point.
78. See, eg, *Migration Act 1958* (Cth) s 499; *Archives Act 1983* (Cth) s 7(3).
79. Commonwealth Treasury, *Financial System Inquiry Final Report* (Report, March 1997) 'Overview & Recommendations' 28. See also Godwin, Kourabas, and Ramsay (n 11) 279.
80. Explanatory Memorandum, Australian Prudential Regulation Authority Bill 1998 (Cth) [4.12].
81. Ibid [4.15]–[4.16].

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The Government has repeatedly stated that the ministerial directions power enables APRA's 'operational independence' while also facilitating the minister's responsibility to ensure agencies implement parliament's policy intentions,[82] points reiterated following the 2012 and 2019 FSAP reports.[83] By contrast, on the question of its relationship with the executive, APRA has aligned with the FSAP assessment, criticising the Government for maintaining a ministerial directions power into APRA's legislative framework. In the subsequent 2014 financial system inquiry, APRA submitted that,

> the ministerial directions powers and the circumscribing of its role in prudential regulation policy have diminished the clarity around APRA's prudential authority. APRA accepts that it is necessary and appropriate for the Government to decide matters of financial system policy, such as those affecting the structure of the financial industry and how it best serves the needs of the Australian community. Nonetheless, the original APRA Act recognised APRA's authority to develop and implement prudential policies that it has judged as necessary to meet its statutory objectives, and restoration of that authority would be consistent with the independence of a prudential regulator envisaged by the Wallis Inquiry.[84]

It follows that APRA preference would be to limit the Government's power to direct with respect to systemic matters regarding the structure of the financial industry, while giving APRA sole independent role to develop and implement prudential policies. The ministerial directions power under s 12, by contrast, enables the Treasurer to intervene in prudential policies as well.

This persisting conflict between transnational peer recommendations and Australian domestic practice takes us to the heart of the operation of independent regulators within a Westminster parliamentary democracy. In particular, under Australia's system of responsible government Ministers have formal responsibility to oversee regulatory agencies, even when established as independent regulatory authorities. One reading of this conflict might be that, while transnational recommendations favour the autonomy of independent regulators and seek to more fully disembed them from domestic political controls, the Australian government insists on the power to oversee regulators for which it is ultimately accountable to both Parliament and the electorate. At the same time, however, this persisting conflict is illuminating about the function and form of regulatory independence,[85] as well as the efficacy of domestic oversight of independent authorities in the Australian context in at least three respects.

First, with respect to the function and form of prudential authority independence, the relevant Basle core principle requires that the prudential regulators' discretion should be exercised free of 'interference that compromises' its judgment.[86] This specifically includes political or industry influence on the regulator's decision-making. However, neither the transnational standard of independence, nor the reviews that assess its implementation, reveals much about the reasons that such independence is desirable for the promotion of financial stability or how such independence

82. International Monetary Fund, *Australia: Financial System Stability Assessment, including Reports on the Observance of Standards and Codes on the following topics: Banking Supervision, Insurance Regulation, Securities Regulation, and Payment Systems* (IMF Country Report No 06/372, 23 October 2006) 30 [65]–[66].
83. International Monetary Fund, *Australia: Financial System Stability Assessment* (IMF Country Report No 12/308, 15 November 2012) 26–7; International Monetary Fund, *Australia: Financial System Stability Assessment* (IMF Country Report No 19/54 21 February 2019) 81–2.
84. Australian Prudential Regulatory Authority (n 75) 30.
85. Levi-Faur (n 27).
86. *Australia: Financial Sector Assessment Program-Detailed Assessment of Observance-Basel Core Principles for Effective Banking Supervision*, IMF Country Report No. 19/53 (21 February 2019) 42.

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should be implemented. The latter question is particularly important, given that any decision-maker — even if independent — requires input from, and coordination with, other actors to be able to regulate effectively.[87] Further, independent agencies should in principle be subject to domestic constitutional requirements of oversight and accountability.[88]

With respect to the purpose of agency independence in regulatory capitalism, Gilardi explains that independent authorities have been implemented principally to improve credible policy commitments when liberalising and privatising public utilities, including to reduce political uncertainty about the legal framework resulting from changes in government.[89] On this view, to encourage substantial investments by private firms necessary to enter sectors such as telecoms and energy, independent regulatory authorities constrain subsequent arbitrary public action that could effectively expropriate or devalue such investments.[90] However, even if we accept this argument with respect to network utilities, it has been suggested that the same rationale does not apply in financial regulation given that financial institutions are much more flexible and their investments are not necessarily specific to a particular activity or jurisdiction.[91] Accordingly, the independence of regulatory institutions for prudential supervision has been contested and needs to be supported by a different rationale from the one in utilities regulation.[92]

Furthermore, a key objective of financial regulation is to supervise financial innovation in novel and complex products that may appear to satisfy the needs of customers, but may also lead to financial instability through excessive risk-taking.[93] The need to assess the effects of financial innovation as a threat to financial stability typically requires financial supervisory authorities to engage in closely collaborative relationships with financial institutions and iterative forms of regulation through on-going monitoring.[94] Both of these aspects of financial supervision suggest that ministerial intervention may be a lesser concern compared to the authority's inherent lack of distance from the financial institutions that it monitors. In fact, as will become apparent, in Australia's case the financial agencies' proximity with the banks may be of much greater concern than the risk of political interference.

Second, even if there is a valid justification for technocratic delegation to an expert prudential authority, the Australian ministerial directions powers criticised in the FSAP reports offers some advantages over other forms of government intervention in the operation of regulatory agencies. Specifically, in reflecting on the institutional design of technocratic agencies charged with a well-defined dimension of

87. Andrew Godwin, Timothy Howse and Ian Ramsay, 'A Jurisdictional Comparison of the Twin Peaks Model of Financial Regulation' (2017) 18(2) *Journal of Banking Regulation* 103, 114–18.
88. Martin Lodge, 'Accountability and Transparency in Regulation: Critiques, Doctrines and Instruments' in Jacint Jordana and David Levi-Faur (eds), *Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar, 2004) 124.
89. Fabrizio Gilardi, 'The Institutional Foundations of Regulatory Capitalism: The Diffusion of Independent Regulatory Agencies in Western Europe' (2005) 598(1) *ANNALS of the American Academy of Political and Social Science* 84.
90. Agency independence in utility regulation is typically combined with the separation of commercial and regulatory functions of public entities. Pablo T Spiller, 'Institutions and Commitment' in Glenn R Carroll and David J Teece (eds), *Firms, Markets and Hierarchies: The Transaction Cost Economics Perspective* (Oxford University Press, 1999) 279, 308; Heikki Marjosola, 'The Problem of Regulatory Arbitrage: A Transaction Cost Economics Perspective' (2019) 15(2) *Regulation & Governance* 388.
91. Marjosola (n 90).
92. Stavros Gadinis, 'From Independence to Politics in Financial Regulation' (2013) 101 California Law Review 327.
93. Hilary Allen, 'The Pathologies of Banking Business As Usual' (2015) 17(3) *University of Pennsylvania Journal of Business Law* 861; Ford (n 30).
94. See, eg, Yane Svetiev and Annetje Ottow, 'Financial Supervision in the Interstices Between Private and Public Law' (2014) 10(4) *European Review of Contract Law* 496; Ford (n 30); Marjosola (n 90).

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the public interest (such as financial stability), Majone has suggested that elected officials in a democracy should have the power to override the policies or decisions of such agencies in specific cases that involve political considerations.[95] These are cases that have distributional consequences or involve trading off different public policy objectives. However, Majone also argues that to ensure that political interventions are limited to such instances, they should be transparent and require onerous formal procedures of justification that impose costs on the relevant minister as a political decision-maker.[96] The Treasurer's directions power in the APRA Act appears to satisfy these criteria of transparency and deliberation.[97] As discussed, the law requires the Minister to give notice of a proposed direction, provide an opportunity to APRA to respond to the proposal, and if ultimately made, the Treasurer's direction must be formally published and tabled in Parliament.

The third point that emerges from this contestation between the transnational and local levels relates to the effectiveness of oversight of statutory authorities in Australia. While, as both Finn[98] and Goldring[99] have pointed out, independent statutory authorities and boards have a long history in Australian administration at both federal and state level, the question of how to connect such authorities within existing structures of oversight through responsible government and judicial review remains open.[100] On one view, the doctrine of responsible government as enshrined in the Constitution 'does not countenance the existence of government officials for whom no one is accountable or responsible in the Parliament',[101] which is said to limit the power to create independent regulatory agencies.[102] The alternative view is that independent authorities are not 'a challenge to the true principles of responsible government but a legitimate evolution in governance arrangements', which the Constitution permits.[103] But even on the latter view — that independent agencies are constitutionally permissible — it is important to ensure that such agencies' decision-making is subject to effective oversight by the executive, legislature and the courts.

In responding to the FSAP findings, the Commonwealth has highlighted that APRA's powers are checked by politically legitimated actors through means that are common in Australian public law. These include the Commonwealth executive and legislative oversight of APRA's powers to make prudential standards under s 11AF of the *Banking Act 1959* (Cth) and the ministerial directions power under s 12 of the APRA Act. At the same time, however, the Commonwealth has also argued that the ministerial directions power has never been used and that transnational prudential standards are typically incorporated into Australian law through regulations made by APRA, notwithstanding the parliamentary disallowance power. This argument suggests that the *formal* public law mechanisms through which independent agencies are overseen by the executive and legislature in Australia do not have a particularly strong bite. In other words, as a practical matter, if APRA, or other independent regulators, are subject to constraints in the exercise of their powers and

95. Giandomenico Majone, 'The Regulatory State and its Legitimacy Problems' (1999) 22(1) *West European Politics* 1, 15
96. Ibid. See also John Goldring, Accountability of Commonwealth Statutory Authorities and 'Responsible Government' (1980) 11(4) *Federal Law Review* 353, 381.
97. On Majone's view, the override power would be appropriate even with respect to a specific decision, rather than just with respect to policy matters, something that s 12 of the APRA Act does not allow.
98. Paul Finn, *Law and Government in Colonial Australia* (Oxford University Press, 1987).
99. Goldring (n 96).
100. Benjamin B Saunders, 'Responsible Government Statutory Authorities and the Australian Constitution' (2020) 48(1) *Federal Law Review* 4.
101. Geoffrey Lindell, *Responsible Government and the Australian Constitution: Conventions Transformed into Law?* (Federation Press, 2004) 18.
102. Goldring (n 96).
103. Saunders (n 100).

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discretions, such constraints are more likely to arise from cultural values and practices of its officials,[104] APRA's embeddedness into domestic[105] and international regulatory networks,[106] and through dedicated sectoral inquiries into financial regulation, such as the Wallis and Murray commissions of inquiry, or the more recent Banking Royal Commission.

B *Regulating Domestic Systemically Important Banks*

The global financial crises also brought into sharp relief the regulatory challenges posed by systemically important banks to financial stability at the domestic level, as well as internationally due to cross-border contagion.[107] Any bank failure can have systemic consequences by weakening depositor confidence in the financial system, however systemically important banks present a particular challenge because of their size and their significant local and global interconnectedness.

In the aftermath of the financial crisis, concerns were expressed at the G20 about the contagion effects of bank failures, given the seizing up of the global financial system that resulted from actual or feared failures of large multinational banks. At the domestic level, the failure of a large bank also has significant consequences for financial system stability, and for the economy as a whole.[108] Given the potentially large systemic and economic consequences of their failure, these banks have come to be known as too-big-to-fail ('TBTF'). In other words, to avoid catastrophic financial and broader economic consequences, there is an expectation that a national government would step in to bail out such a bank using taxpayer funds. Such bailouts lead to deterioration of the government's net fiscal position, as happened in a number of European countries where national governments stepped in to salvage important local banks. A further negative effect of the expectation of public bailouts is the moral hazard problem, whereby systemically important institutions are incentivised to take excessive and unsustainable risks in their activities, thereby increasing the likelihood of failure and instability.[109]

For the above reasons, the G20 proposed developing a Globally Systemically Important Banks ('G-SIB') regime to impose additional capital requirements on large banks, above those required under the Basel III framework.[110] At the September 2009 Pittsburgh Summit, the G20 tasked the

104. Aronson (n 21) 201.
105. For example, the Council of Financial Regulators 'provides a forum for facilitating coordination among the members [APRA, ASIC and the RBA] … to ensure prompt and effective identification of, and responses to, developments that pose a threat to the stability of the financial system': *Memorandum of Understanding on Financial Distress Management between the Members of the Council of Financial Regulators*, signed 18 September 2008, 1 <https://www.cfr.gov.au/financial-institutions/crisis-management-arrangements/pdf/mou-financial-distress-management.pdf>.
106. Edward Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* (Princeton University Press, 2005) ch 2.
107. See Federico Lupo-Pasini and Ross P Buckley, 'Global Systemic Risk and International Regulatory Coordination: Squaring Sovereignty and Financial Stability' (2015) 30(4) *American University International Law Review* 665.
108. Allen (n 93).
109. Rosa Lastra and Geoffrey Wood, 'The Crisis of 2007–09: Nature, Causes, and Reactions' (2010) 13(3) *Journal of International Economic Law* 531, 539.
110. Basel Committee on Banking Supervision, *Risk-based Capital Requirements* (15 December 2019) <https://www.bis.org/basel_framework/chapter/RBC/20.htm>. Basel III was introduced following the financial crisis to increase the quality and quantity of capital held by banks: Peter King and Heath Tarbert, 'Basel III: An Overview' (2011) 30(5) *Banking & Financial Services Policy Report* 1.

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FSB with developing a policy framework to address the TBTF problem,[111] leading to an FSB interim report[112] and a proposal to develop concrete policies.[113]

As a result, the Group of Governors and Heads of Supervision, the oversight body of the Basel Committee on Banking Supervision ('BCBS'), agreed that systemically important banks should have loss absorbing capacities beyond the generally applicable Basel III minimums.[114] By October 2010, the FSB published a recommended policy framework to address risks associated with systemically important financial institutions.[115] This framework recommended higher loss-absorbency capacity, a resolution planning system, further coordinated supervision, a timeline for further study, consultation and peer review. Yet another recommendation was that all FSB jurisdictions should develop a framework for managing domestic, not just global systemically important banks. Thus, while none of Australia's banks (including the big four) are deemed sufficiently large and globally interconnected to be designated as a G-SIB, the G20 proposed a special regime for banks that — though not globally significant — could significantly adversely impact domestic, as well as neighbouring economies.

At the 2011 Cannes summit the G20 leaders tasked the FSB and the BCBS to report on extending the framework to domestically systemically important banks ('D-SIBs').[116] The April 2012 progress report to the G20 suggested a domestic framework that was complementary to the global one, allowing local authorities to assess and identify systemically important banks at the domestic level.[117] The BCBS final report of October 2012[118] set out the expectation that national authorities would introduce D-SIB requirements into domestic regulations by 1 January 2016.

Thus, the onus of assessing domestic systemic importance under the proposed framework was placed on local prudential authorities. The aim was to strike a balance by giving local authorities sufficient discretion, while ensuring minimum principles to avoid domestic turmoil spilling over to other economies.[119] The transnational D-SIB framework allows substantial discretion to local supervisory authorities as best placed both to identify domestically significant banks and to set the additional capital requirements for such banks. It does not specify a level or formula for the capital and loss-absorbency capacities of locally significant banks, but — consistently with the experimentalist approach outlined in Section II — sets out key framework objectives that must guide local decision-makers, including:

- The loss-absorbency requirement should be commensurate with the financial entity's systemic importance;
- The domestic requirements should be compatible with the global requirements; and
- The loss-absorbency requirement should be met with Common Equity of Tier 1 (a measure of good quality, tangible and liquid capital).

111. See Buckley (n 12) 67–8.
112. Financial Stability Board, *Reducing the moral hazard posed by systemically important financial institutions* (Report, 18 June 2010) <https://www.fsb.org/wp-content/uploads/r_100627b.pdf>.
113. G-20, *The G-20 Toronto Summit Declaration* (27 June 2010) para [18]–[20].
114. Basel Committee on Banking Supervision, *The Basel Committee's Response to the Financial Crisis: Report to the G20* (Report, 19 October 2010) <https://www.bis.org/publ/bcbs179.pdf>.
115. Financial Stability Board, *Reducing the Moral Hazard Posed by Systemically Important Financial Institutions* (Report, 20 October 2010) <https://www.fsb.org/wp-content/uploads/r_101111a.pdf?page_moved=1>.
116. G-20, *Cannes Summit Final Declaration* (Report, 4 November 2011) [29].
117. Financial Stability Board, *Extending the G-SIFI Framework to Domestically Systemically Important Banks* (Report, 16 April 2012) <https://www.fsb.org/wpcontent/uploads/r_120420b.pdf>.
118. Basel Committee on Banking Supervision, *A Framework for Dealing with Domestic Systemically Important Banks* (Report, October 2012) <https://www.bis.org/publ/bcbs233.pdf>.
119. Ibid [5].

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The report also proposed to monitor implementation of the domestic bank measures through a transnational peer review process, combining it with the BCBS' Basel III regulatory consistency assessment programme ('RCAP').[120] By September 2013, the FSB released a progress report noting that the BCBS was developing a peer review program for the D-SIB to commence by mid-2015,[121] though Australia has not been peer reviewed within this framework thus far.[122]

In Australia, the above global framework led to an APRA announcement regarding local requirements for the big four banks and a December 2013 information paper on D-SIB regulation. It identified ANZ, CBA, NAB and Westpac as domestically significant banks and imposed an additional one percent capital requirement to be met from 1 January 2016.[123] This was at the lower-end of the 1% to 5.5% range imposed in other countries implementing similar measures.[124] APRA's information paper noted that proactive supervision is likely more effective at managing the risks posed by domestic big banks than higher capital requirements, observing that the BCBS itself had emphasised the importance of other policy tools such as supervisory monitoring.[125]

APRA's introduction of the above requirements coincided with the government's announcement of the second Financial Services Inquiry ('FSI') led by David Murray, which was tasked to consider this issue as well.[126] The Murray Inquiry invited local financial market stakeholders to make their own submissions on regulating Australia's big four systemically important banks. In a recommendation that was ultimately endorsed by the government, the Murray Inquiry suggested implementing 'minimum loss absorbing and recapitalisation capacity in line with emerging international practice'.[127]

To understand the nature of local deliberation in Australia on this key regulatory question, it is worth pointing out that in its July 2014 interim report, the Murray FSI specifically invited submissions on increasing capital requirements for domestic big banks.[128] From among local stakeholders, the principal submissions on this issue were made by financial institutions providing two opposing perspectives:

120. Ibid [9].
121. Financial Stability Board, *Progress and Next Steps Towards Ending 'Too-Big-To-Fail' ('TBTF'): Report of the Financial Stability Board to the G-20* (Report, 2 September 2013) 16 <https://www.fsb.org/wp-content/uploads/r_130902.pdf>.
122. Bank for International Settlements, *RCAP on Consistency: Jurisdictional Assessments* (Web Page, 12 April 2023) <https://www.bis.org/bcbs/implementation/rcap_jurisdictional.htm>.
123. Australian Prudential Regulation Authority, 'APRA Released Framework for Domestic Systemically Important Banks in Australia' (Media Release, 23 December 2013) <https://www.apra.gov.au/media-centre/media-releases/apra-releases-framework-domestic-systemically-important-banks-australia>.
124. Australian Prudential Regulation Authority, *Information Paper: Domestic Systemically Important Banks in Australia* (Report, December 2013) 19 <https://www.apra.gov.au/sites/default/files/information-paper-domestic-systemically-important-banks-in-australia-december-2013.pdf>.
125. Ibid 7.
126. Commonwealth Treasury, 'Financial System Inquiry' (Media Release, 20 December 2013) <https://ministers.treasury.gov.au/ministers/joe-hockey-2015/media-releases/financial-system-inquiry-0>.
127. Commonwealth Treasury, *Financial System Inquiry Final Report* (Report, 28 November 2014) 97.
128. Ibid 3–16.

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- The big four banks, such as ANZ[129] and Westpac,[130] submitted that they had enough capital and further increases in capital requirements would ultimately be passed on to customers in the form of higher banking costs.[131]
- The smaller regional banks, such as Bendigo and Adelaide Bank, Bank of Queensland, ME Bank and Suncorp Bank, in a joint submission, argued that the big four banks receive a two-notch credit rating upgrade from implicit government support due to their size. The regional banks argued that additional requirements for large banks should be set at a level that eliminates their competitive advantage.[132]

APRA's submission explained the process and reasons for its decision to impose an additional 1% capital requirement on the big four banks in December 2013 as follows:

> APRA conducted a range of quantitative and qualitative analyses to inform the establishment of this requirement for Australia, but acknowledges that there is significant room for judgement in calibrating a capital surcharge for a D-SIB. The one per cent surcharge adopted by APRA is in line with peer countries such as Canada but, as noted in the Interim Report, is at the lower end of the global spectrum. On the one hand, it is clear that the largest Australian banks are more systemic in a domestic context than the largest G-SIBs are in an international context. On the other hand, a key factor in determining the level of the surcharge was APRA's more conservative approach to the measurement of capital adequacy relative to international minimum standards.[133]

In its final report, the FSI referred to the G20 and FSB initiatives and concluded that '[a]s a small, open, capital-importing economy, Australia cannot stand outside international practice'.[134] Its findings reiterated the importance of removing the perception of an implicit government guarantee to avoid market distortions and improve competition in the banking sector, as suggested by the regional banks' submissions.[135] As such, it recommended that the government '[i]mplement a framework for minimum loss absorbing and recapitalisation capacity in line with emerging international practice, sufficient to facilitate the orderly resolution of Australian authorised deposit-taking institutions and minimise taxpayer support'.[136]

While the FSI final report highlighted the policy and distributional trade-offs involved in choosing different mechanisms for ensuring stability of domestic banks, it did not provide any specific recommendations as to what specific rules should be adopted and how the balance should be struck. In its response, the Commonwealth Government also did not provide any further detail. It simply endorsed the FSI's recommendation and suggested that 'APRA as Australia's prudential

129. ANZ, Submission to the Financial System Inquiry Committee, *Financial System Inquiry* (26 August 2014) 19.
130. Westpac, Submission to the Financial System Inquiry Committee, *Financial System Inquiry* (August 2014) 78–9.
131. Ibid 81–2.
132. Regional Banks, Submission to the Financial System Inquiry Committee, *Financial System Inquiry* (August 2014) 12–3.
133. Australian Prudential Regulatory Authority, Submission to the Financial System Inquiry Committee, *Financial System Inquiry* (Report, 26 August 2014) 41. APRA also suggested minimum Tier 2 capital requirements for D-SIBs to meet minimum loss absorbing and recapitalisation capacity. This proposal also apparently diverges from the Basel/D-SIB framework; at 36.
134. *Financial System Inquiry* (Final Report, November 2014) 69.
135. Ibid.
136. Ibid 67.

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regulator' should 'implement this recommendation in line with emerging international practice'.[137]

As such, it was left to APRA itself to determine the details of Australia's D-SIB regime in consultation with market stakeholders and taking into account the practices of international peer prudential authorities. APRA published a further information paper on the additional capital required for the Australian banking system to be 'unquestionably strong'.[138] While there was speculation that APRA could further increase the domestic bank requirements, no changes were made immediately. In November 2018, APRA released a discussion paper dealing with the FSI's Recommendation on this point. Among the envisaged regulatory proposals was to increase the total capital requirement of D-SIBs by four to five percentage points within four years, with the increase to be satisfied predominantly by Tier 2 Capital.[139]

Once again, the submissions to APRA on increasing capital requirements for domestically significant banks came only from the Australian banking sector.[140] The big four banks' position was that additional capital requirements are onerous and unnecessary.[141] Smaller banks, by contrast, expressed the view that APRA should require more Tier 1 (rather than Tier 2) capital from the big four banks.[142] Notably, from a total of seven submissions to APRA, three were designated as confidential, which is somewhat puzzling given that these deliberations were a prelude to public rule-making.

Given the lengthy process of rule-making described above, Australia was one of the last industrialised countries to implement a regime for domestically significant banks following the FSB's recommendations. APRA ultimately decided to require the big Australian banks to hold an additional 3% of capital and has been criticised for not disclosing the motives for its decision given that the ultimate requirement is less than APRA's original proposal (4–5%), and that it also does not follow the additional capital thresholds adopted in Europe.[143]

C *Ex Ante Deposit Insurance versus Ex Post Bailouts for Bank Failures*

The final case study is based on a conflict over another stability mechanism intended to deal with bank failures, namely deposit insurance. Such insurance is regarded as one 'of the most important components of a credible financial system safety net for preserving financial system stability' by protecting depositors from losses on their bank deposits.[144] The IMF has long criticised Australia for not establishing a deposit insurance scheme that is funded ex ante. The point was repeated in the

137. Commonwealth Government, *Improving Australia's Financial System: Government Response to the Financial System Inquiry* (Report, 2015) 10.

138. Australian Prudential Regulation Authority, *Information Paper: Strengthening Banking System Resilience — Establishing Unquestionably Strong Capital Ratios* (Report, 19 July 2017).

139. Australian Prudential Regulation Authority, 'Increasing the Loss-Absorbing Capacity of ADIs to Support Orderly Resolution' (Discussion Paper, 8 November 2018) 4–5.

140. Australian Policy Online, *Information Paper: APRA'S Policy Priorities* (Paper, 28 February 2019) <https://apo.org.au/sites/default/files/resource-files/2019-02/apo-nid224646.pdf> ; Australian Prudential Regulation Authority, *Response to Submissions — Loss-Absorbing Capacity* (Letter, 9 July 2019) <https://www.apra.gov.au/response-to-submissions-%E2%80%94-loss-absorbing-capacity>.

141. Jonathan Shapiro, 'Banks Push APRA to $75b Debt Burden', *Australian Financial Review* (Sydney, 14 January 2019) 13.

142. Customer Owned Banking Association, 'Increasing the Loss-Absorbing Capacity of ADIs' (Discussion Paper, 11 February 2019) <http://www.customerownedbanking.asn.au/images/stories/submissions/2019/20190211_COBAsubmission_TLAC.pdf>.

143. Sam Wylie, 'APRA Too Coy When it Comes to its Bank Capital Motives', *Australian Financial Review* (Sydney, 15 July 2019) 29.

144. Angus Chan, Andrew Godwin and Ian Ramsay, 'Depositor Preference and Deposit Insurance Schemes — Challenges for Regulatory Convergence and Regulatory Coordination in Asia' (2018) 12(2) *Law and Financial Markets Review* 71, 73.

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2012 and 2019 FSAP review reports, which highlighted that Australia relied on ex post taxpayer funded measures to address bank failures. While successive Australian governments have considered the FSAP recommendation favouring ex ante funded deposit insurance,[145] they have ultimately maintained pre-existing arrangements. In maintaining the existing arrangements, governments have arguably acted consistently with the views of the banking industry against the recommendations of both transnational peer assessments and domestic regulators.

Beginning with the transnational perspective, the FSAP reviews rely on the standards elaborated by the International Association of Deposit Insurers ('IADI') in the 'Core Principles for Effective Deposit Insurance Systems' (October 2014), as well as the FSB's 'Key Attributes of Effective Resolution Regimes for Financial Institutions' (October 2014). The IADI report explains that the global financial crisis highlighted the important role of deposit insurance in maintaining depositors' confidence in crisis circumstances.[146] The Core Principles were motivated by the concern that while deposit insurance as a safety net supports financial stability, it does so at the risk of moral hazard if the scheme is poorly designed.[147] One purpose of the Core Principles is to support the design of deposit insurance schemes that mitigate against banks' moral hazard.[148]

Unlike most other FSB members, Australia still does not have an ex ante funded deposit insurance scheme.[149] The existing ex post funded scheme was introduced into the *Banking Act 1959* (Cth) following the global financial crisis in 2008 through a reform of the bank insolvency and resolution provisions. While depositors were already given priority in bank resolution processes, it was recognised in 2008 that such processes are likely to be protracted and that timely access to deposits is particularly important in times of crisis to bolster confidence and avoid systemic contagion.[150] The solution was to provide depositors with an advance payment funded by the government and administered by APRA. APRA would then recover the amount through the liquidation process from the assets of the failed bank.[151] The problem arises if there are insufficient funds obtained from the liquidation of the failed bank's assets. While the government can impose a levy on other banks to recover such funds, this levy will necessarily exclude any failed bank. As such, the Australian arrangements contain an implicit government guarantee that leads to the concern about moral hazard stimulating excessive risk-taking by banks, potentially imposing a cost on Australian taxpayers in cases of insolvency.

By 2017, the Government did impose a major banks levy on the five largest Australian banks, with liabilities over the threshold amount of $100 billion.[152] The Government explained that the

145. International Monetary Fund, *Australia: Financial System Stability Assessment* (Country Report No 12/308, 15 November 2012) 6–7, 30; International Monetary Fund, *Australia: Financial Sector Assessment Program-Technical Note-Bank Resolution and Crisis Management* (Country Report No 19/48, 21 February 2019) 5, 28.

146. International Association of Deposit Insurers, *Core Principles for Effective Deposit Insurance Systems* (October 2014) 5–6.

147. International Monetary Fund, *Australia: Financial Sector Assessment Program-Technical Note-Bank Resolution and Crisis Management* (Country Report No. 19/48, 21 February 2019) 25–8. See also International Monetary Fund, *Australia: Financial System Stability Assessment* (Country Report No 12/308, 15 November 2012) 30.

148. International Association of Deposit Insurers, *Core Principles for Effective Deposit Insurance Systems* (Report, October 2014) 11.

149. Financial Stability Board, *Thematic Review on Deposit Insurance Systems Peer Review* (Report, 8 February 2012) 6; Commonwealth Treasury, *Post-Implementation Review and Regulation Impact Statement: Financial Claims Scheme* (August 2011) [205].

150. Ibid [1.4].

151. Ibid [1.7].

152. *Major Bank Levy Act* 2017 (Cth) s 4.

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purpose of the levy was for 'budget repair' and to 'contribute to strengthening the structural position of the budget for the long term — providing greater fiscal capacity to accommodate shocks such as those seen in the global financial crisis'.[153] Notably, this levy did not constitute an ex ante funded insurance deposit scheme as the levy payments were not designated for a special fund to compensate depositors in case a participating financial institution fails.

Following the 2012 FSAP report noting that Australia's arrangements were inconsistent with best practice and recommending an ex ante scheme, in 2013 the adoption of such a scheme was supported by Australia's Council of Financial Regulators.[154] Given national regulators' alignment with transnational recommendations, the then Labor Government announced it was considering the establishment of an ex ante scheme.[155] Again, however, this consequential policy choice for financial stability was apparently not an issue of political or parliamentary contest. Instead, the Treasurer of the subsequent Liberal-National government submitted the question of whether to establish an ex ante Financial Stability Fund for consideration by the above-mentioned FSI chaired by David Murray.[156]

Contrary to the views expressed in transnational reviews and by national regulators, the FSI ultimately recommended against the establishment of an ex ante deposit insurance fund.[157] Such a fund was said to involve on-going costs for all financial institutions (and their customers), whereas the existing ex post funded regime only involves levies if liquidation of a failed financial institution is insufficient to recover sufficient funds to compensate depositors. The FSI also reasoned that other measures in the Australian financial system reduced both the risk of bank failure and the need for establishing an ex ante funded scheme, without explicitly addressing the FSAP concern about moral hazard. Following the FSI's recommendations, the Government decided that it would not go ahead with an ex ante funded scheme.[158]

Notably, the Murray Inquiry's recommendation against an ex ante scheme again drew on submissions made by the banking industry. On this issue, all banking industry representatives aligned against the proposal. The Australian Banking Association, representing the major Australian banks (including the big four banks), argued that the existing ex post scheme was sufficient, that there was no justification for introducing an additional measure which would add to banking costs, and that the costs of such a scheme outweigh its benefits.[159] The Customer Owned Banking Association, representing credit unions, mutual banks and building societies, made similar arguments, pointing out that an ex ante funded scheme would affect smaller financial institutions more

153. Explanatory Memorandum, Major Bank Levy Bill 2017 and Treasury Laws Amendment (Major Bank Levy) Bill 2017 (Cth) para [1.5].
154. Phillip Coorey and John Kehoe, 'Banks Slam Deposit "Tax"', *Australian Financial Review* (Sydney, 2 August 2013) 1.
155. Treasurer Chris Bowen, Transcript Press Conference (2 August 2013) 2 <https://parlinfo.aph.gov.au/parlInfo/download/media/pressrel/2643179/upload_binary/2643179.pdf>; Treasurer Chris Bowen and Senator Penny Wong, Economic Statement (August 2013) 33–4 <https://archive.budget.gov.au/2013-14/economic_statement/2013_EconomicStatement.pdf>.
156. Commonwealth Treasury, 'Financial System Inquiry' (Media Release, 20 December 2013) <https://ministers.treasury.gov.au/ministers/joe-hockey-2015/media-releases/financial-system-inquiry-0>; Commonwealth Treasury, *Mid-Year Economic and Fiscal Outlook 2013–14* (December 2013) 257. Notably, the chair of the FSI, David Murray, was a former CEO of the Commonwealth Bank.
157. Commonwealth Treasury, *Financial System Inquiry Final Report* (28 November 2014) 82–3.
158. Treasurer Joe Hockey and Prime Minister Tony Abbott, Press Conference (1 September 2015) <http://ministers.treasury.gov.au/ministers/joe-hockey-2015/transcripts/joint-press-conference-tony-abbott-prime-minister-parliament>.
159. Australian Bankers' Association, Submission to the Financial System Inquiry Committee, *Financial System Inquiry* (March 2014) 34; Australian Bankers' Association, Submission to the Financial System Inquiry Committee, *Financial System Inquiry* (August 2014) 34.

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heavily that the large institutions, further reducing their competitiveness.[160] As in the previous case, there were apparently no submissions to the Murray Inquiry from more dispersed stakeholder interests, such as depositors or other bank customers (including borrowers), let alone the wider community that could be affected by the introduction of an ex ante funded scheme or by financial instability (such as taxpayers).

The 2019 FSAP of Australia noted the FSI's recommendation, emphasising that Australia's ex post scheme continues to 'fall short; of the Deposit Insurance Core Principles and Key Attributes'.[161] The report went on to state that:

> [g]iven the high concentration of the Australian banking system and that [authorised deposit-taking institutions] are not required to pay ex ante or ex post premiums, the government-funded [scheme] effectively increases moral hazard in the financial sector. It should be also noted that it may take years for the Government to recover the funds, plus interest, from the banks under the current arrangement.[162]

This case study involves another key policy mechanism for ensuring financial stability and controlling excessive risk-taking by financial institutions. As Chan, Godwin and Ramsey point out, deposit insurance has a consumer protection objective (to conserve depositors' interests), as well as a financial stability objective[163] (in turn protecting many other dispersed interests negatively affected by financial instability).[164] On this issue, we observe an alignment in the position of the national financial regulators and their international peers in favour of an ex ante funded deposit insurance scheme, which would both reduce moral hazard and ensure sufficient funds were available to compensate depositors of a failing bank, thus ameliorating contagion effects of financial instability.

The position of the national regulators and their transnational peers apparently protects dispersed interests, including Australian depositors and even taxpayers. However such a scheme can also lead to an increase in banking costs, thereby potentially increasing prices for bank customers, including depositors or borrowers, especially in a concentrated banking sector such as the Australian one. Thus, as with the earlier case studies, the adoption of the scheme is not a purely technocratic issue as it involves distributional and policy trade-offs. And yet, it remains the case that the adoption of ex ante deposit insurance was never a matter of significant political contest either in the legislature or electorally. While it was treated as an apparently technical issue, it could not simply be delegated to APRA given the need for legislative change, so it was instead outsourced to the sectoral Murray Inquiry, where submissions were principally advanced by the banking sector. This allowed the government to hide behind the cover of the FSI recommendation for not introducing an ex ante funded deposit insurance scheme as preferred by the banking industry.

160. Customer Owned Banking Association, Submission to the Financial System Inquiry Committee, *Financial System Inquiry* (March 2014) 36; Customer Owned Banking Association, Submission to the Financial System Inquiry Committee, *Financial System Inquiry* (August 2014) 42–3. See also Regional Banks, Submission to the Financial System Inquiry Committee, *Financial System Inquiry* (August 2014) 13.

161. The core principles and key attributes are the International Association of Deposit Insurers, *Core Principles for Effective Deposit Insurance Systems* (October 2014) and Key Attribute 6 of the Financial Stability Board, *Key Attributes of Effective Resolution Regimes for Financial Institutions* (15 October 2014) 12.

162. International Monetary Fund, *Australia: Financial Sector Assessment Program-Technical Note-Bank Resolution and Crisis Management* (Country Report No. 19/48, 21 February 2019) 28.

163. Chan, Godwin and Ramsay (n 144) 73.

164. Allen (n 93).

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IV Conclusions

In light of the functionalities of peer review presented in Part II, the transnational peer recommendations discussed in the three case studies are generally framed and legitimated in technocratic terms, identifying national divergences from identified international 'best practices' for the pursuit of financial stability. One possible exception to this is the FSB recommendation on the capital requirements for domestic large banks, which reflects the experimentalist approach of identifying common objectives, while allowing national regulators and policy-makers leeway in choosing appropriate means to pursue that objective tailored to local conditions.

Even where transnational peer recommendations are framed in technocratic terms, local contestation of such recommendations can not only challenge the suggested optimality of international 'best practices', but it can also reveal the extent to which technically-framed recommendations have a political dimension by involving distributional and policy trade-offs.[165] On the question of prudential authority independence, the ongoing conflict highlights the point that the standard of independence used as the basis for review in FSAP reports is not defined either by reference to the function or the appropriate form of agency independence combined with oversight. The contest on capital requirements for large banks and the funding of the deposit insurance scheme reveals that there are winners and losers from implementing international best practices and that there are alternative policy mechanisms to achieve the identified financial stability objectives.

At the same time, such contestation also reveals shortcomings in pre-existing policy settings at national level. For example, Australia's insistence on the ministerial directions power as an appropriate and transparent mechanism to connect independent authorities into the constitutional and political requirements of responsible government highlighted the fact that the directions power, as well as the parliamentary disallowance power, are not ordinarily used. As such, this dialogue points to the fact that Australia's standard legal mechanism for controlling independent authorities does not seem to have much practical bite, at least in technical fields of market regulation.

Notwithstanding the political dimension of the institutional and regulatory choices involved, all the above policy questions were not apparently the subject of parliamentary or electoral political contest in Australia.[166] Successive governments sought to delegate them either to APRA as the independent regulator or to sub-political contestation[167] within sectoral commissions of inquiry. Both the Wallis and Murray sectoral inquiries were well publicised locally, but at least on the policy questions considered above, which affect a broad range of stakeholders, it was only banking industry representatives that made submissions influencing the eventually adopted local solutions.[168] Such an outcome reflects the fact that the distributional and policy trade-offs involved are not as sufficiently crystallised and salient at the rule-making stage to mobilise and engage representatives of dispersed stakeholder interests.[169]

165. Abraham L Newman and Elliot Posner, *Voluntary Disruptions: International Soft Law, Finance, and Power* (Oxford University Press 2019) 2.
166. In an apparent attempt to 'avoid the hazards of direct engagement in partisan politics' by successive governments: Aronson (n 21) 166.
167. Salo Coslovsky, Roberto Pires and Susan S Silbey, 'The Pragmatic Politics of Regulatory Enforcement' in David Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar Publishing, 2011) 322, 326.
168. See Fiona Haines, *The Paradox of Regulation* (Edward Elgar Publishing, 2011) 28; Ramsay (n 37) 13–14 (harnessing civil society input in the regulatory process).
169. Jodi L Short, 'Politics of Enforcement and Compliance: Theorizing and Operationalizing Political Influences' 15(3) *Regulation & Governance* 653.

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Importantly, notwithstanding the concern that regulatory networks and peer review forums are opaque and vulnerable to capture, the transnational recommendations on both capital requirements and deposit insurance were relatively less favourable to the banks and more favourable to dispersed interests, such as those of depositors, small bank customers and even the Australian taxpayer.[170] In such circumstances, it is perhaps unsurprising that it took the establishment of another sectoral inquiry — the Banking Royal Commission — that was explicitly focused on submissions from various classes of bank customers, to reveal the extent to which the problems and concerns of dispersed interests may have fallen through the cracks of the Australian financial supervisory framework.

In sum, all three case studies illustrate that transnational standards and peer review recommendations — although formally non-binding — have a significant impact on framing regulatory choices in Australia with respect to institutional design, the exercise of regulatory discretion, as well as substantive policy choices. However, notwithstanding the apparent conflict, the interactions between transnational recommendations and local deliberation in these cases point against the dysfunctional scenarios of the blind local adoption of transnational norms or the parochial resistance to international best practice. Instead, the interactions between transnational peer review recommendations and national choices reveal substantial scope for mutual learning through dialogue. Furthermore, the case studies also illustrate how transnational peer review can augment and assist the traditional rule-making and oversight mechanisms (including legislatures, the executive and even courts) that define and control the mandates of specialist financial regulators.

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170. In that respect, the Banking Royal Commission reflects a broader trend. Cf Penny Crofts, 'Three Recent Royal Commissions: The Failure to Prevent Harms and Attributions of Organisational Liability' (2020) 42 *Sydney Law Review* 395.

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