

# CONCEPTUALISING SOCIAL AND ECONOMIC REGULATION: IMPLICATIONS FOR MODERN REGULATORS AND REGULATORY ACTIVITY

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*The importance of regulation has risen over the past 40 years. It has been central to economic growth as well as an important part of social progress. Whilst governments have progressively tended to become less involved in direct service provision, regulation has become an expanding part of their work and a policy preference. Governments are increasingly using a mix of contractual arrangements, rules and other regulatory tools to achieve a range of social and economic objectives. Independent regulators are also increasingly required to balance sometimes contradictory social and economic values. This article examines the extent to which traditional conceptions of social and economic regulation continue to provide a useful framework within which to analyse modern regulators and regulatory activity, and concludes that they no longer reflect what occurs in practice with the risk that their continued use is apt to confuse. The article then posits an alternative way of conceptualising economic and social regulation that better reflects modern regulatory practice — one in which all regulation is underpinned by a mix of interconnected and interdependent social and economic values; where the distinction between social and economic regulation resides in the primacy of the values each is designed to advance and the purpose each is designed to achieve; and where the presence of the other (non-primary) values play a crucial role in legitimising the regulatory endeavour. This later point — which has not always been acknowledged — has important implications for modern regulators and regulatory activity.*

## I INTRODUCTION

Over the past 40 years there has been a dramatic increase in both the volume of regulation<sup>1</sup> and the number of regulatory authorities, across both economic and social sectors.<sup>2</sup> Regulation in traditional economic areas of commerce, corporations, finance and competition, and traditional social areas of health, safety, consumer protection and the environment, have increased in number, breadth, reach and complexity. New regulatory arenas have emerged in areas as diverse as biotechnology, the internet, mobile phones, equal opportunity and

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1 Organisation for Economic Co-operation and Development, *OECD Reviews of Regulatory Reform: Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance* (2002); Regulation Taskforce, Parliament of Australia, *Rethinking Regulation: Report of the Taskforce on Reducing Regulatory Burdens on Business* (2006).

2 Jacint Jordana, David Levi-Faur and Xavier Fernandez i Marín, 'The Global Diffusion of Regulatory Agencies: Channels of Transfer and Stages of Diffusion' (2011) 44 *Comparative Political Studies* 1343.

anti-discrimination, privacy, child, elder and animal protection, and fertility and human reproduction, to name but a few.

Numerous theories have been put forward to explain this increase in an era dominated by deregulation rhetoric. Some commentators attribute the increase to a fundamental change in what governments do and how they do it. As Majone observed, modern western governments have undergone fundamental change, moving from a positive state — in which governments intervened directly in order to achieve a range of social and economic goals — to a regulatory state — in which direct service delivery is increasingly outsourced to third parties, who governments seek to control and influence through a mix of contractual arrangements, rules and regulations.<sup>3</sup> Braithwaite, Coglianese and Levi-Faur similarly observed that of the three functions of governments — providing, distributing and regulating — the work of distributing (or redistributing) wealth has continued unabated through time;<sup>4</sup> the role of directly providing services is decreasing (through outsourcing and privatisation for example); and the role of regulating is both increasing and changing, from the old sense of developing and enforcing rules or managing risks to steering the flow of events and behaviour.<sup>5</sup> Consistent with this theme, other commentators have observed that we now live in an age of ‘regulatory governance’<sup>6</sup> or ‘regulatory capitalism’,<sup>7</sup> in which increasing reliance on the market as the vehicle for both individual wealth maximisation and the provision of government services has been accompanied by a proliferation of new regulation (and regulatory regimes) to ensure the market’s efficiency and effectiveness; and the social responsibility of the private sector organisations to which the government has delegated some of its functions — a phenomenon which Vogel describes as ‘Freer Markets; More Rules’.<sup>8</sup>

Other commentators attribute the increase to heightened public expectations. Sunstein, for instance, argues that the increase is a reflection of an extended

3 Giandomenico Majone, ‘The Rise of the Regulatory State in Europe’ (1994) 17(3) *West European Politics* 77; Giandomenico Majone, ‘From the Positive State to the Regulatory State: Causes and Consequences of Changes in Modes of Governance’ (1997) 17(2) *Journal of Public Policy* 139. The Organisation for Economic Co-operation and Development similarly observed that: ‘Regulation has developed as a fundamental tool of government in managing more complex and diverse societies and economies and allowing competing interests to be balanced.’ Organisation for Economic Co-operation and Development, *OECD Reviews of Regulatory Reform*, above n 1, 20.

4 More recently, a number of commentators have observed that the government’s traditional ‘welfare role’ also is at risk of diminishing under the pressure of the global financial crisis and the era of fiscal austerity ushered in by it. See, eg, Deborah Mabbett, ‘The Regulatory Rescue of the Welfare State’ in David Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar, 2011) 215; David Levi-Faur, ‘The Odyssey of the Regulatory State: Episode One: The Rescue of the Welfare State’ (Working Paper No 39, Jerusalem Papers in Regulation & Governance, November 2011) 26.

5 John Braithwaite, Cary Coglianese and David Levi-Faur, ‘Can Regulation and Governance Make a Difference?’ (2007) 1(1) *Regulation & Governance* 1.

6 Martin Minogue, ‘Governance-Based Analysis of Regulation’ (2002) 73(4) *Annals of Public and Cooperative Economics* 649; Martin Minogue and Ledivina V Carino, *Regulatory Governance in Developing Countries* (Edward Elgar, 2006).

7 David Levi-Faur, ‘The Global Diffusion of Regulatory Capitalism’ (2005) 598 *Annals of the American Academy of Political and Social Sciences* 12; John Braithwaite, *Regulatory Capitalism: How It Works, Ideas for Making It Work Better* (Edward Elgar, 2008).

8 Steven Kent Vogel, *Freer Markets, More Rules: Regulatory Reform in Advanced Industrial Countries* (Cornell University Press, 1996). Braithwaite, above n 7, similarly describes the reciprocal (and mutually reinforcing) relationship between capitalism and regulation.

concept of the ‘rights’ which people believe governments should support — such as rights to welfare, employment, education, food, housing, adequate medical care, good health and safety and security;<sup>9</sup> Peltzman refers to ‘the working of the natural progress of opulence’ in which growing wealth produces growing demand for personal health and safety;<sup>10</sup> and Kuttner argues that demands for much social regulation can ‘flow from a recognition that society as a whole may choose to award itself certain common minima’ such as clean drinking water, wholesome working environments, safer prescription drugs and food, and the like.<sup>11</sup>

Another theory is that we live in a ‘risk society’ where advances in science and technology have created new risks that require specialist management (eg biotechnology; chemical exposure; mobile phone radiation; nuclear power; reproductive technology; the internet).<sup>12</sup> Others argue that we live in a ‘risk averse society’ in which people demand government protection from a growing array of perceived risks,<sup>13</sup> although some further argue that the increase is attributable not so much to the risk aversion of society as it is to the pavlovian response of governments and regulators to over-react and over-regulate in response to public perceptions of risk.<sup>14</sup> Haines et al, for example, identify three dimensions of risk — actuarial, social and political — and comment insightfully that regulatory proliferation is as much, if not more, the product of political risk aversion as it is of actuarial and social risk assessments.<sup>15</sup>

Yet other commentators argue that the increase in regulation may in part be explained by a decrease in the public’s trust in social, economic and political institutions,<sup>16</sup> whereas others still argue that the growth in regulation is not the

- 9 Cass R Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* (Harvard University Press, 1990).
- 10 Sam Peltzman, *Regulation and the Natural Progress of Opulence* (AEI-Brookings Joint Center for Regulatory Studies, 2005) 5. See also Anthony I Ogus, *Regulation: Legal Form and Economic Theory* (Hart Publishing, 2004) 54.
- 11 Robert Kuttner, *Everything for Sale: The Virtues and Limits of Markets* (Alfred A Knopf, 1997) 282.
- 12 Ulrich Beck, *Risk Society: Towards New Modernity* (Sage Publications, 1992); Christopher Hood, Henry Rothstein and Robert Baldwin, *The Government of Risk: Understanding Risk Regulation Regimes* (Oxford University Press, 2001) 3–4.
- 13 Regulation Taskforce, above n 1; Tony Blair, ‘Compensation Culture’ (Speech delivered at the Institute of Public Policy Research, University College, London, 26 May 2005) <<http://www.guardian.co.uk/politics/2005/may/26/speeches.media>>.
- 14 Christopher Hood and Martin Lodge, ‘Pavlovian Innovation, Pet Solutions and Economizing on Rationality? Politicians and Dangerous Dogs’ in Julia Black, Martin Lodge and Mark Thatcher (eds), *Regulatory Innovation: A Comparative Analysis* (Edward Elgar, 2005) 138; Hood, Rothstein and Baldwin, above n 12, 4–5; Ogus, *Regulation: Legal Form and Economic Theory*, above n 10, 338; Organisation for Economic Co-operation and Development, *OECD Reviews of Regulatory Reform*, above n 1.
- 15 Fiona Haines, Adam Sutton and Chris Platania-Phung, ‘It’s All About Risk, Isn’t It? Science, Politics, Public Opinion and Regulatory Reform’ (2007–08) 10 *Flinders Journal of Law Reform* 435; Fiona Haines, *The Paradox of Regulation: What Regulation Can Achieve and What It Cannot* (Edward Elgar, 2011).
- 16 Jacint Jordana and David Levi-Faur, ‘The Politics of Regulation in the Age of Governance’ in Jacint Jordana and David Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar, 2004) 1, 12–15 (‘*The Politics of Regulation*’); Michael Moran, ‘The Frank Stacey Memorial Lecture: From Command State to Regulatory State?’ (2000) 15(4) *Public Policy and Administration* 1, 10; Neil Gunningham and Darren Sinclair, ‘Organizational Trust and the Limits of Management-Based Regulation’ (2009) 43 *Law & Society Review* 865, 870–1.

product of individual preferences or attitudes, but the result of paternalism where ‘experts’ or so-called ‘elites’ claiming to know better, substitute their choices or preferences for those of the individual.<sup>17</sup>

Whatever the reason for the increase, much of the cost of this increased regulation is initially paid for by the business sector.<sup>18</sup> As a result, it is not surprising that business often resists new regulation on economic grounds — arguing that it makes them less competitive in an increasingly global market — and calling for reforms designed to reduce the burdens such regulatory obligations place on them.<sup>19</sup> These calls are amplified in federal systems when the issue is one within the competency of state governments, and multi-jurisdictional businesses have to comply with several state based regulatory regimes that can differ in scope, form, detail, administration and enforcement.<sup>20</sup>

Thus governments find themselves simultaneously being asked to safeguard an ever-increasing array of rights and to provide protection from an ever-increasing range of risks, *and* to do so in a manner that is necessary, proportionate and designed to minimise the fiscal and regulatory burden on taxpayers, regulatees and society generally; to balance market efficiency with societal demands for protection from the worst excesses of those markets; economic efficiency with justice, equity and fairness. It is no wonder that modern governments find themselves ‘constantly dangling in an uneasy equilibrium between competing values’.<sup>21</sup>

These changes in what governments are being asked to do and how they are being asked to do it require us to understand the notions of ‘economic’ and ‘social’ regulation.<sup>22</sup> ‘Social’ and ‘economic’ regulation have traditionally been conceived of as contrasting policy pairs with economic regulation designed to improve economic and market efficiency, and social regulation designed to produce socially desirable outcomes either by correcting for the damaging effects of economic activity or by producing outcomes different to and better than those produced by efficiently operating markets. Economic regulation is traditionally characterised by non-majoritarian institutions staffed by technical experts searching for

17 Ogus, *Regulation: Legal Form and Economic Theory*, above n 10, 51–3; Fabrizio Gilardi, Jacint Jordana and David Levi-Faur, ‘Regulation in the Age of Globalization: The Diffusion of Regulatory Agencies Across Europe and Latin America’ in Graeme A Hodge (ed), *Privatisation and Market Development: Global Movements in Public Policy Ideas* (Edward Elgar, 2006) 127, 139–41.

18 Of course business can choose to pass the additional cost through to consumers in higher prices if market conditions enable them to do so without sacrificing market share and profitability.

19 See, eg, Business Council of Australia, ‘Business Regulation Action Plan for Future Prosperity’ (Report, May 2005); Australian Chamber of Commerce and Industry, ‘Holding Back the Red Tape Avalanche: A Regulatory Reform Agenda for Australia’ (Report, November 2005).

20 Business Council of Australia, ‘Reshaping Australia’s Federation: A New Contract for Federal-State Relations’ (Report, October 2006); Business Council of Australia, ‘Towards a Seamless Economy: Modernising the Regulation of Australian Business’ (Report, March 2008).

21 Steven Van de Walle, ‘International Comparisons of Public Sector Performance’ (2009) 11(1) *Public Management Review* 39, 45.

22 There are many ways of differentiating between types of regulation. This article focuses on two — ‘social’ and ‘economic’. This is not to deny the existence of others such as ‘risk’ regulation designed to eliminate or reduce risks or exposures to risks (Stephen Breyer, *Breaking the Vicious Cycle: Towards Effective Risk Regulation* (Harvard University Press, 1993)) and ‘integrity’ regulation designed to safeguard accountability and other norms of conduct in the public sphere (David Levi-Faur, ‘Regulation & Regulatory Governance’ in David Levi-Faur (ed), *Handbook on the Politics of Regulation* (Edward Elgar, 2011) 3).

efficient or optimal solutions. Social regulation, on the other hand, is traditionally characterised by majoritarian institutions in which conflicting interests are represented and policy outcomes negotiated.<sup>23</sup> Independent regulators overseeing electricity market operations are examples of the former;<sup>24</sup> occupational health and safety ('OHS') and environmental regulators that continue to operate from within a government department are examples of the latter.<sup>25</sup> However, in the new world of regulatory governance, regulatory capitalism and the regulatory state, governments are increasingly using regulation to deliver social goals traditionally delivered through direct government action (what Haber refers to as 'regulating for welfare' or 'regulatory welfare regimes'<sup>26</sup>) and economically based regulatory techniques to define and solve social problems.<sup>27</sup> This potentially has significant impacts for modern regulators and regulatory activity.

This article examines the extent to which traditional conceptions of social and economic regulation continue to provide a useful framework within which to analyse modern regulators and regulatory activity and, to the extent to which they may not, whether there is an alternative way of conceptualising economic and social regulation that better reflects modern regulatory practice. We commence in Part II with an examination of what is 'regulation'. Part III then examines how the concepts of social and economic regulation are commonly differentiated in the literature. In Part IV, the article notes that while these concepts are analytically useful and instructive, neither concept on its own conveys a complete picture of what occurs in practice, with the risk that the continued use of these traditional labels is apt to confuse. An alternative model is then suggested in which all regulation is underpinned by a mix of interconnected and interdependent social and economic values, and the distinction between social and economic regulation lies in the primacy of the values it is designed to advance and the purpose it is designed to achieve, while recognising the important role the presence of the other (non-primary) values play in defining the boundaries of, and supporting and legitimising, the regulatory endeavour. In Part V, this alternative model is applied to three common types of regulators to illustrate its value and utility. In Part VI the article discusses some of the implications for modern regulators and regulatory activity of conceptualising social and economic regulation in this manner.

23 Tony Prosser, *The Regulatory Enterprise* (Oxford University Press, 2010); Giandomenico Majone, 'Regulatory Legitimacy' in Giandomenico Majone (ed), *Regulating Europe* (Routledge, 1996) 284.

24 See for example the Australian Energy Regulator (Cth); Independent Pricing and Regulatory Tribunal (NSW); Queensland Competition Authority; Essential Services Commission of South Australia; Office of the Tasmanian Economic Regulator; Essential Services Commission (Vic); Utilities Commission (NT); and Economic Regulatory Authority of Western Australia.

25 With respect to OHS see for example Comcare which is within the Commonwealth Department of Education, Employment and Workplace Relations; WorkSafe ACT which is within the Department of Justice and Community Safety; Workplace Health and Safety Queensland which is within the Department of Justice and Attorney-General; SafeWork SA which is within the Department of Premier and Cabinet; Workplace Standards Tasmania which is within the Department of Justice; and WorkSafe WA which is part of the Department of Commerce. Many of these safety regulators are overseen or supported by tri-partite (regulator, union and employer) advisory committees.

26 Hanan Haber, 'Regulating-for-Welfare: A Comparative Study of "Regulatory Welfare Regimes"' in the Israeli, British, and Swedish Electricity Sectors' (2010) 33(1) *Law & Policy* 116. See also Levi-Faur, 'The Odyssey of the Regulatory State', above n 4.

27 Stuart Kells and Arie Freiberg, 'Economic Regulation' in Arie Freiberg (ed), *The Tools of Regulation* (Federation Press, 2010) 108; Mabbett, above n 4.

## II WHAT IS 'REGULATION'?

This article is concerned with clarifying the distinction between the adjectives 'social' and 'economic' when applied to the term 'regulation'. This raises the preliminary question: what is 'regulation'? The definition of regulation is itself heavily contested. As Levi-Faur observes, regulation 'means different things to different people' with definitions varying according to professional discipline, political ideology and even geography.<sup>28</sup> Definitions vary from the legalistic that confine regulation to legal rules promulgated by a sovereign state, to more expansive but still state centred definitions that include all forms of government intervention, through to decentred definitions that include all activities designed to influence behaviour regardless of source and intent.<sup>29</sup>

It is not the purpose of this article to traverse the extensive literature articulating the various conceptions of regulation. Nor is its purpose to seek to provide a definitive statement on what is regulation. Indeed, Jordana and Levi-Faur caution that 'it would be futile and somewhat nonsensical to offer one authoritative definition of the notion of regulation that holds across all divides'.<sup>30</sup> Rather, we are guided by the practical advice of Black that what is important is what we want to do with the concept rather than what the concept 'means' in some fundamental sense,<sup>31</sup> and that the 'specific context and goal [should] shape the particular meaning of the notion of regulation'.<sup>32</sup>

In this article we are concerned to understand the implications for modern regulators and regulatory activity of the changes that have been taking place in what governments do, and how they do it. With this state centred purpose in mind, we have chosen to define regulation by building upon the definition proffered by Black, that

'regulation is a process involving the sustained and focussed attempt to alter the behaviour of others according to defined standards or purposes with the intention of producing a broadly indented outcome or outcomes'.<sup>33</sup>

28 Levi-Faur, 'Regulation & Regulatory Governance', above n 22, 3–6. Levi-Faur notes that legal scholars have emphasised legal instruments whilst sociologists have emphasised other forms of control; economists have viewed regulation as a tool used only when necessary to deal with market failures; and public administration scholars have emphasised the authority of the state and its formal regulatory organisations.

29 Robert Baldwin, Colin Scott and Christopher Hood, *A Reader on Regulation* (Oxford University Press, 1998) 2–4; Robert Baldwin and Martin Cave, *Understanding Regulation: Theory, Strategy and Practice* (Oxford University Press, 1999) 1–2; Julia Black, 'Critical Reflections on Regulation' (2002) 27 *Australian Journal of Legal Philosophy* 1; Christine Parker and John Braithwaite, 'Regulation' in P Cane and M Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press, 2003) 119; Jordana and Levi-Faur, 'The Politics of Regulation', above n 16, 2–5; Bronwen Morgan and Karen Yeung, *An Introduction to Law and Regulation: Text and Materials* (Cambridge University Press, 2007) 4; Levi-Faur, 'Regulation & Regulatory Governance', above n 22, 3–6; Arie Freiberg, *The Tools of Regulation* (Federation Press, 2010).

30 Jordana and Levi-Faur, 'The Politics of Regulation', above n 16, 3.

31 Black, 'Critical Reflections on Regulation', above n 29, 25. See also Julia Black, 'What is Regulatory Innovation?' in Julia Black, Martin Lodge and Mark Thatcher (eds), *Regulatory Innovation: A Comparative Analysis* (Edward Elgar, 2005) 1, 6 where she states: 'Definitions are analytical constructs that serve particular purposes. What is asked is that analysts be clear of the implications and limitations of the definition that they use.'

32 Jordana and Levi-Faur, 'The Politics of Regulation', above n 16, 4.

33 Black, 'Critical Reflections on Regulation', above n 29, 26.

We also add the qualifier that the process is one undertaken by or under the auspices or authority of government, thus retaining the state as the source of regulatory authority. This would include the direct use by government of all the regulatory tools at its disposal as well as co- and self-regulatory regimes that operate ‘with the sanction, or support or threat of the regulatory state’.<sup>34</sup>

This definition has a number of important features and advantages. First, as Morgan and Yeung note, this broader concept of regulation challenges traditional legal perspectives in three ways. First, it challenges the assumption that the state is the primary locus for articulating community goals by recognising the social influence of commercial and non-government organisations. Second, it challenges the assumption of a vertical hierarchy in which the state has final authority by recognising multiple sites of governance operating in concurrent and overlapping ways. Third, it challenges the assumption of the centrality of rules and ‘command and control’ as the primary mode of shaping behaviour by both recognising and allowing for alternative regulatory techniques.<sup>35</sup> Notwithstanding this however, the law remains central to understanding the theory and practice of regulation. The law facilitates the entire regulatory endeavour by creating the framework within which it can effectively take place: from constructing and constraining the institutions and actors which undertake regulatory activities; to creating and shaping the regulatory tools; through to creating the infrastructure and rules for enforcement and dispute resolution.<sup>36</sup> Moreover, the law remains a distinctive form of regulation because it is backed by the coercive power of the state.<sup>37</sup>

Second and as already alluded to, the definition allows for the use by governments of a broad range of policy instruments or tools. Freiberg for example, identifies six categories of regulatory tools: (1) economic tools (such as through making markets, taxing, quotas or pricing); (2) transactional tools (where governments influence behaviour through contract or grant conditions); (3) authorising tools (such as registration, licensing or accreditation); (4) informational tools (such as product labelling or continuous disclosure regimes); (5) structural tools (of physical design, or processes such as our PAYG tax arrangements); and (6) legal tools (such as laws, rules and regulations).<sup>38</sup> Viewed this way, regulation can be either positive, where behaviours are encouraged through assistance and incentives; or negative, where behaviours are discouraged through prohibitions, disincentives and traditional command and control.<sup>39</sup>

Third, the definition allows for a wide variety of actors. While consciously choosing not to adopt a ‘decentred’ definition of regulation that shifts the locus of regulation

34 Ian Bartle and Peter Vass, ‘Self-Regulation and the Regulatory State: A Survey of Policy and Practice’ (Research Report No 17, Centre for the Study of Regulated Industries, University of Bath, October 2005). See also Ian Bartle and Peter Vass, ‘Self-Regulation Within the Regulatory State: Towards a New Regulatory Paradigm?’ (2007) 85(4) *Public Administration* 885.

35 Morgan and Yeung, above n 29, 4.

36 Freiberg, above n 29, 178; Morgan and Yeung, above n 29, 3–7. Morgan and Yeung also identify, in addition to the ‘facilitative’ role, an ‘expressive’ role in which the law legitimises state coercion and reflects shared or community values.

37 Morgan and Yeung, above n 29, 5; Freiberg, above n 29, 178; Neil Gunningham and Peter Grabosky, *Smart Regulation: Designing Environmental Policy* (Clarendon Press, 1998) 4.

38 Freiberg, above n 29. See also Parker and Braithwaite, above n 29.

39 Baldwin, Scott and Hood, above n 29, 4; Peter J May, ‘Social Regulation’ in Lester M Salamon (ed), *The Tools of Government: A Guide to the New Governance* (Oxford University Press, 2002) 156, 157.

away from the state to other, multiple locations,<sup>40</sup> the definition recognises that non-state actors are involved throughout the regulation (policy) development, design and deployment process, and that regulation can be shaped and ‘co-produced’ through interactions between these non-state actors and the state.<sup>41</sup>

Fourth, under this definition regulation is purposive, sustained and focussed. Regulation is the result of an intentional decision of government. It is systematic and designed to solve a particular problem or produce a particular outcome.<sup>42</sup> Moreover, it is not achieved by simply passing a law. It requires ongoing monitoring of the relevant activities, continual (re)assessment of values and trade-offs, and adjustments to changing needs and circumstances.<sup>43</sup> Viewed this way, a regulation’s purpose extends beyond a particular regulatory instrument or activity, to characterise the regulatory agencies that administer the regulation and the regulatory regimes that govern it.

And fifth, the definition places some reasonably clear boundaries around the concept of regulation that differentiate it from the other principal activities of government (providing and distributing), and prevent it becoming too broad (by becoming commensurate with the entire legal system) or too abstract or amorphous (if inclusive of all mechanisms of social control or influencing behaviour regardless of source or intent).<sup>44</sup>

### III DIFFERENTIATING SOCIAL AND ECONOMIC REGULATION

Having adopted this definition of regulation, the next question is how to best differentiate between ‘social’ and ‘economic’ regulation? ‘Social’ and ‘economic’ regulation are commonly presented as mutually exclusive notions differentiated according to:

- 1) the actor or activities being regulated,<sup>45</sup>
- 2) the nature of the regulatory instruments or tools employed,<sup>46</sup> or

40 Julia Black, ‘Decentring Regulation: Understanding the Role of Regulation and Self-Regulation in a “Post-Regulatory” World’ (2001) 54(1) *Current Legal Problems* 103; Black, ‘Critical Reflections on Regulation’, above n 29.

41 The involvement of non-state actors reinforces the importance of an effective state presence in ensuring that regulation furthers public purposes and not the special interests of the non-state actors through which it may be produced and delivered. Dimity Kingsford Smith, ‘Beyond the Rule of Law? Decentred Regulation in Online Investing’ (2004) 26(3–4) *Law and Policy* 439, 445.

42 Note that a purposive definition also has its disadvantages. First, it can be difficult to clearly discern the purpose of a regulatory regime. A particular regime can have multiple purposes, and different people can attribute different purposes to the same regime. Second, purposes can change over time in response to changing circumstances, attitudes and preferences. See Leigh Hancker and Michael Moran, ‘Organizing Regulatory Space’ in Leigh Hancker and Michael Moran (eds), *Capitalism, Culture and Economic Regulation* (Clarendon Press, 1989) 271, 293–7; Eric Windholz, ‘Evaluating the Harmonisation of Australia’s OHS Laws: Challenges and Opportunities’ (2010) 32(2) *Asia Pacific Journal of Public Administration* 137.

43 Tony Prosser, ‘Regulation and Social Solidarity’ (2006) 33(3) *Journal of Law & Society* 364, 375; Philip Selznick, ‘Focusing on Organizational Research on Regulation’ in Roger G Noll (ed), *Regulatory Policy and the Social Sciences* (University of California Press, 1985) 363, 364.

44 Freiberg, above n 29, 3; Kingsford Smith, above n 41, 445–6.

45 Black, ‘Critical Reflections on Regulation’, above n 29, 19; Sunstein, above n 9, 243.

46 Freiberg, above n 29.



- 3) the purpose of the regulatory activity in terms of the problems it is designed to solve or the particular outcomes it is designed to produce.<sup>47</sup>

In this article we have chosen to distinguish between ‘social’ and ‘economic’ regulation by reference to the purpose of the regulatory activity. In our view, it best reflects the contextual and purposive nature of regulation making — that regulation is fundamentally about altering ‘the behaviour of others according to defined standards or purposes with the intention of producing a broadly identified outcome or outcomes’.<sup>48</sup> By contrast, instrument based definitions fail to recognise that economic tools (such as markets, tax credits or levies) may clearly be adopted to achieve a social objective (such as lower pollution levels) as well as economic objectives. Similarly, a social tool (such as government praise or pressure) can be adopted to achieve an economic objective (such as increased local investment or the moderation of anti-competitive practices) as well as social objectives. Actor/activity based definitions also fail in that they do not acknowledge that social actors (eg family, parent or individual) can be the subject of regulation in pursuit of economic objectives (eg increase savings and slow spending), and economic actors (eg businesses, workers or consumers) can be the subject of regulation in pursuit of social objectives (eg equal opportunity and anti-discrimination).

Having adopted purposive criteria for differentiating social regulation from economic regulation, the next question for each of them is — what is the problem it is designed to solve or the particular outcome it is designed to produce?

### **A Concept of Economic Regulation**

An examination of the literature reveals a generally well-developed and consistent concept of economic regulation centred on improving efficiency and competition.<sup>49</sup> Such analysis has generally been consistent about its purpose. Typical is the following definition of ‘economic regulation’ used by the Organisation for Economic Co-operation and Development:

Economic regulations intervene directly in market decisions such as pricing, competition, market entry, or exit. Reform aims to increase economic efficiency by reducing barriers to competition and innovation, often through deregulation and use of efficiency-promoting regulation, and by improving regulatory frameworks for market functioning and prudential oversight.<sup>50</sup>

47 Baldwin, Scott and Hood, above n 29, 41; May, above n 39, 157.

48 Black, ‘Critical Reflections on Regulation’, above n 29, 26. See also Freiberg, above n 29, 4.

49 Bruce A Williams and Albert R Matheny, *Democracy, Dialogue, and Environmental Disputes: The Contested Languages of Social Regulation* (Yale University Press, 1995) 5.

50 Organisation for Economic Co-operation and Development, *The OECD Report on Regulatory Reform* (1997) 6. See also: Ogus, *Regulation: Legal Form and Economic Theory*, above n 10; Baldwin and Cave, above n 29; Access Economics Pty Ltd, ‘Benefits and Costs of Regulation’ in Business Council of Australia, ‘Business Regulation Action Plan for Future Prosperity’ (Report, May 2005) appendix 2; Government of Victoria, *Victorian Guide to Regulation* (Department of Treasury and Finance, 2<sup>nd</sup> ed, 2007).

Economic regulation is based on values of efficiency and competition and generally involves correcting for market failures or imperfections that reduce economic efficiency or competition within a specific market such as monopolies, inadequate or asymmetrical information, externalities and unequal bargaining power.<sup>51</sup> This concept of economic regulation adopts a utilitarian approach and assumes that what is good for society is the aggregation of individual preferences as revealed in market behaviour.<sup>52</sup> It sees the market as the best available mechanism for the efficient production of goods and services and for their efficient allocation between members of the community so as to maximise society's wealth.<sup>53</sup> Regulation according to this view is only justified where private forms of market failure correction (eg private law remedies) are more costly or less effective than regulatory intervention.<sup>54</sup>

## B Concept of Social Regulation

In the case of social regulation, the literature reveals two conflicting streams of answers on how social regulation is conceived: (a) to correct for the damaging effects of economic activity (market failures); and (b) to attain certain socially desirable outcomes.<sup>55</sup>

51 See, eg, Ogus, *Regulation: Legal Form and Economic Theory*, above n 10; Baldwin and Cave, above n 29; Baldwin, Scott and Hood, above n 29; Government of Victoria, above n 50.

52 Organisation for Economic Co-operation and Development, *OECD Reviews of Regulatory Reform*, above n 1, 20–5.

53 Government of Victoria, above n 50, s 2.1.

54 Eugene Bardach and Robert A Kagan, 'Introduction' in E Bardach and R A Kagan (eds), *Social Regulation: Strategies for Reform* (Institute for Contemporary Studies, 1982) 3; Anthony Ogus, 'W(h)ither the Economic Theory of Regulation? What Economic Theory of Regulation?' in J Jordana and D Levi-Faur (eds), *The Politics of Regulation: Institutions and Regulatory Reforms for the Age of Governance* (Edward Elgar, 2004) 31.

55 The literature reveals a potential third conceptualisation of social regulation, namely regulation designed to protect individuals or the community from risks to their health, safety or welfare. See, eg, Malcolm K Sparrow, *The Regulatory Craft: Controlling Risks, Solving Problems, and Managing Compliance* (Brookings Institution Press, 2000); Organisation for Economic Co-operation and Development, *The OECD Report on Regulatory Reform*, above n 50; Eugene Bardach, 'Social Regulation as a Generic Policy Instrument' in L M Salamon (ed), *Beyond Privatization: The Tools of Government Action* (The Urban Institute Press, 1989) 197. However, we do not consider this to be a separate category. For example, Bardach and Kagan use 'social' and 'preventative' regulation interchangeably, Bardach and Kagan, above n 54; Levi-Faur uses the terms 'social regulatory agencies', 'risk regulation agencies' and 'protective-regulation agencies' interchangeably, Levi-Faur, 'Regulation & Regulatory Governance', above n 22, 13. Protective regulation can be categorised as either: (a) correcting for the damaging effects of economic activity, see, eg, Kuttner who refers to social regulation protecting 'citizens from a variety of assaults that laissez-faire forces would otherwise produce', Kuttner, above n 11, 281; and May who categorises measures designed to avoid consumer and other harms from imperfectly competitive markets as economic regulation, May, above n 39; or (b) a means of producing the socially desirable outcome of a safer and more secure community, see, eg, Government of Victoria, above n 50, s 2.1.3.

## 1 Correcting for the Damaging Effects of Economic Activity (Market Failures)

Many commentators define social regulation in terms of correcting for the damaging effects of economic activity. For example, according to Baldwin, Scott and Hood

[s]ocial regulation tends to operate across all sectors of the economy and commonly involves the exercise of state influence in relation to the unwanted effects of industrial activity on society — such as pollution or risks to the health and safety of employees and consumers.<sup>56</sup>

Yeager similarly defines social regulation as government regulation to address the negative effects of production relations in consumers, workers, communities and the environment.<sup>57</sup> Hawkins and Hutter refer to social regulation protecting people or the environment from the damaging consequences of industrialisation,<sup>58</sup> and Kuttner talks of social regulation protecting ‘citizens from a variety of assaults that laissez-faire forces would otherwise produce’.<sup>59</sup> These include pollution, dangerous products and unsafe working conditions.

The purpose of social regulation according to this definition is to correct for the market failures that give rise to these damaging effects, such as externalities, unequal bargaining power, inadequate or asymmetrical information, and public good, collective action and other co-ordination problems.<sup>60</sup> It also corrects for imperfections in the legal system (especially liability and tort law) which result in private law remedies failing to adequately correct for imperfections of the market system.<sup>61</sup> Viewed this way, social regulation is part of economic management,<sup>62</sup> and in effect is a type or sub-set of economic regulation.<sup>63</sup> This is diagrammatically represented in Figure 1.

56 Baldwin, Scott and Hood, above n 29, 41.

57 Peter Cleary Yeager, *The Limits of Law: The Public Regulation of Private Pollution* (Cambridge University Press, 1991) 24.

58 Keith Hawkins and Bridget M Hutter, ‘The Response of Business to Social Regulation in England and Wales: An Enforcement Perspective’ (1993) 15(3) *Law & Policy* 199.

59 Kuttner, above n 11, 281.

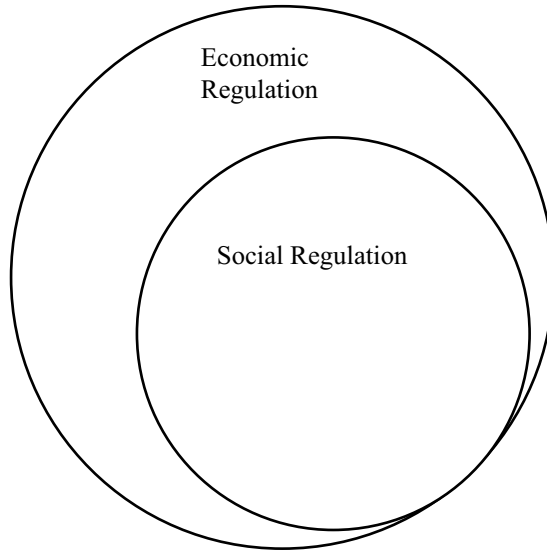
60 Ogus, *Regulation: Legal Form and Economic Theory*, above n 10, 4–5; Ogus, ‘W(h)ither the Economic Theory of Regulation?’, above n 54, 32; Kuttner, above n 11, 227–8; Giandomenico Majone, ‘The European Community Between Social Policy and Social Regulation’ (1993) 31(2) *Journal of Common Market Studies* 153, 156–9.

61 Bardach, above n 55, 198. See also Ogus, ‘W(h)ither the Economic Theory of Regulation?’, above n 54, 33.

62 Prosser, *The Regulatory Enterprise*, above n 23, 1.

63 May in fact defines economic regulation to include measures designed to avoid consumer and other harm from imperfectly operating markets, see May, above n 39, 157. We acknowledge the comments of an anonymous referee who suggested that it may be better to show economic and social regulation as two separate circles inside a bigger circle labelled economic efficiency. We also acknowledge that some economists may be more used to conceptualising economic and social regulation in this way. Such a conceptualisation does not change the arguments made in this article however.

**Figure 1**



This concept treats social regulation as a technical issue insulated from distributive objectives. It rejects the notion that interventions by persons and forces operating outside of the market are capable of producing outcomes better than those produced by the market and, as a consequence, views social regulation as second best to market-based solutions — a ‘regrettable means of correcting market failures’ — something to be minimised.<sup>64</sup>

## **2 Attaining Socially Desirable Outcomes**

The second and opposing concept of social regulation defines it in terms of attaining certain socially desirable outcomes; of meeting collective desires or aspirations,<sup>65</sup> and of producing societal outcomes different to and better than those produced by an efficiently operating market economy.<sup>66</sup> The socially desirable outcomes reflect broader societal values such as justice, equity and fairness,<sup>67</sup> social cohesion or solidarity,<sup>68</sup> and enhancing trust.<sup>69</sup>

This definition views social regulation positively; as something that is required to adjust for the morally arbitrary (and undemocratic) outcomes of even perfectly

64 Prosser, *The Regulatory Enterprise*, above n 23, 1. See also Levi-Faur, ‘Regulation & Regulatory Governance’, above n 22, 5.

65 Sunstein, above n 9, 57–60.

66 Prosser, ‘Regulation and Social Solidarity’, above n 43, 375; Morgan and Yeung, above n 29, 29.

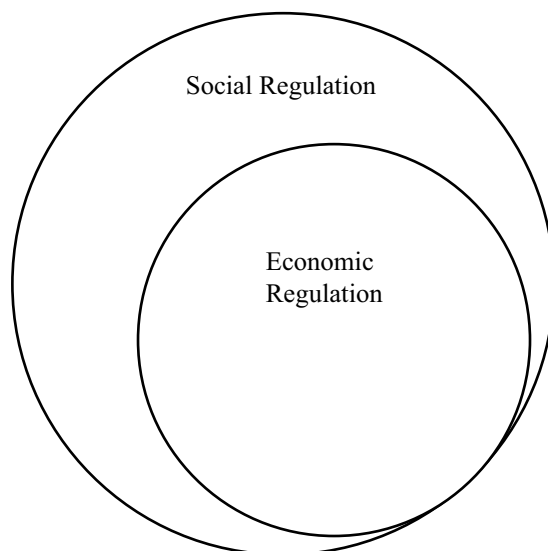
67 John Rawls, *A Theory of Justice* (Oxford University Press, 1971); Arthur M Okun, *Equality and Efficiency: The Big Tradeoff* (Brookings Institution Press, 1975); Ogus, *Regulation: Legal Form and Economic Theory*, above n 10, 46–56.

68 Prosser, ‘Regulation and Social Solidarity’, above n 43.

69 Gunningham and Sinclair, above n 16, 870–2; Freiberg, above n 29, 13–16.

efficient market economies.<sup>70</sup> Social regulation, rather than being a subset of economic regulation, and dependent on some form of market failure for its justification, provides the broader context within which markets are constituted and operate. A market economy is not an end in itself, but a means to an end — a co- or self-regulatory regime that enables individuals to satisfy their preferences, and for communities to build a better society. Viewed this way, a market economy is a tool of social policy and, as a consequence, economic regulation is a type or sub-set of social regulation. This is represented diagrammatically in Figure 2.

**Figure 2**



This second concept believes that not all decisions in our society should proceed on a purely utilitarian basis, and that principles of individual justice, equity and fairness are of greater moral importance.<sup>71</sup> It views markets with suspicion which, if left unchecked, produce results that are inconsistent with a just, fair and equitable society.<sup>72</sup> According to this view, there are social objectives which the market cannot or should not, as a matter of principle, be allowed to deliver.<sup>73</sup>

70 Neil Gunningham, *Safeguarding the Worker: Job Hazards and the Role of the Law* (Law Book, 1984) 293–6; Sunstein, above n 9, 39; Kuttner, above n 11, 282; Braithwaite, above n 7, 198.

71 Rawls, above n 67, 15; H L A Hart, 'Between Utility and Rights' (1979) 79 *Columbia Law Review* 828.

72 Gunningham, above n 70, 293; Sunstein, above n 9, 39; Anthony Ogus, 'Regulatory Institutions and Structures' (2002) 73(4) *Annals of Public and Cooperative Economics* 627, 629.

73 Braithwaite, above n 7, 198.

#### IV A CONCEPTUAL MODEL OF INTERCONNECTED AND INTERDEPENDENT SOCIAL AND ECONOMIC VALUES

These distinctions between economic and social regulation — and between the two concepts of social regulation — are analytically useful and instructive. They enable, for instance, one to focus on the facet of the concept they describe and explain. But they also tend to be rigid. Not only do they not (on their own) convey a complete picture of what occurs in practice, they risk polarising debate with one concept being advanced to the exclusion of the other.<sup>74</sup> Take economic regulation for example. It does not occur in a vacuum divorced from a discussion about broader social values and the type of society in which we want to live: markets serve society, not the other way around. The decision to support a market tool as a vehicle for allowing individuals to satisfy their preferences, to correct for an externality,<sup>75</sup> or to protect certain people from certain risks, are value judgements, as is the decision to set economic efficiency or wealth maximisation as a societal priority.<sup>76</sup>

In the case of social regulation, viewing it only in terms of a response to market failure ignores that there can be compelling social reasons for government intervention, even in situations where doing so introduces so-called inefficiencies into an otherwise perfectly efficient market. As Prosser observes, it risks masking important social considerations and reducing social regulation to a mere technical process (undertaken by technocrats) rather than as the meeting of competing social and economic values debated in the polity.<sup>77</sup> And as Black notes, even commentators from strong economic traditions have long acknowledged the existence of a range of non-economic regulatory goals such as distributional justice, equity, and social cohesion.<sup>78</sup>

Similarly, to view social regulation only in terms of attaining socially desirable outcomes, better than those produced by an efficiently operating market, risks ignoring or giving insufficient weight to market forces and the importance of

74 Each of the concepts has its foundations in ideology about the respective roles of governments and market economies, and the moral precepts which should guide our society. Like so many issues on which strong ideological views are held, proponents of the concepts can become polarised, with each camp unwilling or unable to concede any merit in the counterarguments to their views.

75 Sunstein makes the point that what constitutes an externality justifying regulation is, in the first place, an inherently moral and political decision. It requires one to determine who is 'at fault' or has caused the adverse effect, and requires one to choose which of the many activities that impose costs on third parties ought to be regulated, see Sunstein, above n 9, 54–5. Williams and Matheny similarly observe that solutions to externalities are, by definition, redistributive in nature — as they alter the outcome of market determined distributions of income, such policies always redistribute income from the person causing the externality to the people paying for the externality (as a result of the market failure) and as such involve value judgements about who should pay, see Williams and Matheny, above n 49, 18.

76 Studies on the global diffusion of regulatory authorities and of regulatory capitalism also evidence that governments are increasingly choosing to employ markets as regulatory mechanisms, See, eg, Jordana, Levi-Faur and Fernandez i Marin, above n 2; Levi-Faur, 'The Global Diffusion of Regulatory Capitalism', above n 7. This is consistent with the earlier socio-legal work of Polyani who argued that the development of free markets was actually the product of centralising states, See Karl Polyani, *The Great Transformation* (Octagon Books, 1944).

77 Prosser, 'Regulation and Social Solidarity', above n 43, 373–5. See also May, above n 39, 171.

78 Black, 'Critical Reflections on Regulation', above n 29, 9.

efficiency as a value. The failure to properly consider the valuable role that market based or economic regulatory tools can play in achieving social objectives can result in regulatory regimes that are unnecessarily burdensome on businesses and governments, reduce choice for consumers and use excessive resources to fulfil a policy goal. Importantly, it also risks regulatory failure by not properly considering the likely market responses to any regulation, such as the migration of the regulated activity to a more tolerant regulatory regime, or the creation of compensatory activity worse in kind and effect than the original activity being regulated.<sup>79</sup>

What is required is a conceptual model that recognises the interconnectedness and interdependence of economic and social values; that all regulation is a value judgement about the type of society in which we want to live involving a balancing of sometimes contradictory social and economic values. In this model the difference between social and economic regulation lies in the primacy of the values it is designed to advance and the purpose it is designed to achieve. The primary values advanced by social regulation are broad societal values such as justice, equity, fairness, social cohesion and trust. Its primary purpose is to attain certain socially desirable outcomes in preference to those produced by efficiently operating markets. The primary value advanced by economic regulation, on the other hand, is efficiency, and its primary purpose is to improve the economic efficiency of those markets.

However, also central to this model is the critical role it assigns to the presence of the non-primary or secondary values in defining the boundaries, and providing the foundations for the stability and legitimacy, of the regulatory regime. Economic considerations (cost and resource constraints) place limits on the scope of social regulation; and social considerations (the need for regulation to be legitimate — to be seen as desirable, proper and appropriate) place limits on economic regulation. Social regulation that becomes too costly, such that it loses its balance with economic values, is at risk of becoming unsustainable, tottering and falling,<sup>80</sup> as is economic regulation that is perceived to be inconsistent with societal norms and values.<sup>81</sup>

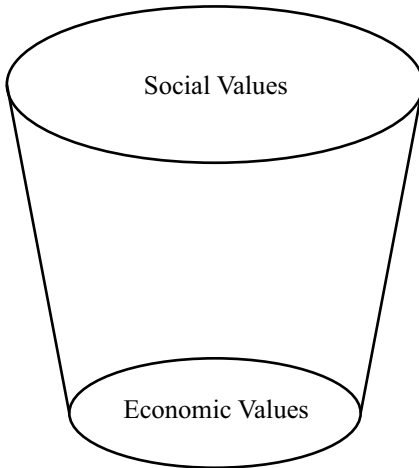
Such a perspective of social and economic regulation is represented diagrammatically in Figures 3a and 3b, with examples of the primary values and supporting (ie secondary) values for both economic and social regulation constructs shown in Table 1.

79 Peter Grabosky, 'Counterproductive Regulation' (1995) 23(4) *International Journal of the Sociology of Law* 347.

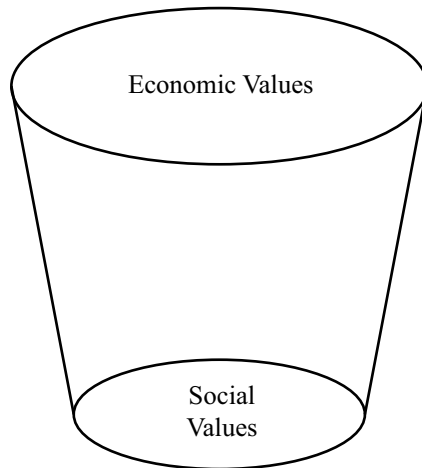
80 For example, in Australia, despite opinion polls showing majority public support for government action to address the negative effects of climate change, the proposed emissions trading scheme of the previous Labor government failed to garner majority support because of concerns that its economic cost was too great.

81 For example, in Australia, the Howard Coalition Government's industrial relations reforms ('WorkChoices') were designed to make the Australian labour market more flexible and efficient. However, opinion polls showed that the majority of the public perceived some elements to be 'unfair' which is widely accepted as a significant contributing factor in the failure of the Howard government to win re-election in 2007, and the subsequent popular repeal of the regime by the new Labor government.

**Figure 3a — Social Regulation  
(primary social values; supportive economic values)**



**Figure 3b — Economic Regulation  
(primary economic values; supportive social values)**



**Table 1 — Economic and Social Regulation Values**

|                                  | <i>Economic Regulation</i>   | <i>Social Regulation</i>   |
|----------------------------------|--|--|
| Primary Values                   | Efficiency<br>Competition<br>Innovation<br>Individualism<br>Choice | Justice<br>Fairness<br>Equity<br>Social Cohesion<br>Trust          |
| Supporting (ie Secondary) Values | Justice<br>Fairness<br>Equity<br>Social Cohesion<br>Trust          | Efficiency<br>Competition<br>Innovation<br>Individualism<br>Choice |

There are three core premises behind this conceptual model. The first — that social regulation primarily advances social values, and economic regulation primarily advances economic values — has been traversed by other commentators.<sup>82</sup> The second — that the distinction between what is ‘social’ and what is ‘economic’ in real regulatory decision-making is difficult to draw — has also been recognised by a number of commentators. Prosser, for instance, observed that

there is no clear dividing line in regulatory practice between economic decisions which can be resolved through expertise and social decisions based on value judgements; this distinction may be extremely useful for

82 See, eg, Okun, above n 67; Majone, ‘The European Community Between Social Policy and Social Regulation’, above n 60; Hood, Rothstein and Baldwin, above n 12; Prosser, ‘Regulation and Social Solidarity’, above n 43.



analytical purposes, but it is difficult to apply to the major regulatory remits ... which ... characteristically involve a use of both.<sup>83</sup>

However, the third premise — that the secondary (or what we prefer to describe as ‘supporting’) values play an important role (in addition to the primary values) in defining the boundaries, and providing the foundations for the stability and legitimacy, of the regulatory regime — builds upon and extends existing conceptual thinking and analytical frameworks. This third premise has a number of implications for modern regulators and regulatory activity. It is to these implications that the article now turns, beginning with a brief examination of three common types of regulators to illustrate how the model operates in practice.

## V THREE ILLUSTRATIVE CASE STUDIES

The model outlined above provides a valuable alternative conceptual frame through which to view modern regulators. Three regulators have been chosen to illustrate the value and utility of this new model: a regulator traditionally labelled as ‘economic’; a regulator traditionally labelled as ‘social’; and a regulator with a more complex mandate including both economic and social goals.

### A Utility Regulation — Traditional Economic Regulation

A utility regulator is a classic example of a regulator traditionally labelled as ‘economic’. They are designed to protect against abuses of monopoly power by reducing barriers to competition and innovation and increasing consumer choice or, in situations where it is not possible to introduce competition, by intervening to mimic the outcomes of a competitive market.<sup>84</sup> The Essential Services Commission in Victoria, Australia, is typical of such regulators. In its own words, it is ‘Victoria’s independent economic regulator of prescribed essential utility services supplied by the electricity, gas, ports, and rail freight industries’.<sup>85</sup> Yet its legislative mandate makes clear that in the discharge of its functions, the Commission must consider not only efficiency and other economic factors, but also ‘the relevant health, safety, environmental and social legislation applying to the industry’ and ‘low income and vulnerable consumers’.<sup>86</sup> This is consistent with the principles underpinning the reform of public monopolies under the National Competition Policy reform package agreed by Commonwealth

83 Prosser, *The Regulatory Enterprise*, above n 23, 6. See also Prosser, ‘Regulation and Social Solidarity’, above n 43; May, above n 39.

84 Allan Asher, ‘The Scope and Range of Economic Regulation: Perspective from the Australian Competition and Consumer Commission’ [2000] (96) *Canberra Bulletin of Public Administration* 35.

85 See Essential Services Commission, *About the ESC* (22 May 2012) <<http://www.esc.vic.gov.au/About-Us>>. See also the Australian Energy Regulator <<http://www.aer.gov.au>>, the Independent Pricing and Regulatory Tribunal of New South Wales <<http://www.ipart.nsw.gov.au>> and the Essential Services Commission of South Australia <<http://www.escosa.sa.gov.au>> who all describe themselves in similar terms. In Western Australia, in case there may have been doubt about the primary focus of its regulator of the gas, electricity and rail industries, it is called the Economic Regulation Authority <<http://www.erawa.com.au>>; and in Tasmania the regulator of electricity, gas, water and sewerage is called the Office of the Tasmanian Economic Regulator <<http://www.energyregulator.tas.gov.au>>.

86 *Essential Services Commission Act 2001* (Vic) s 8A(1)(d), (i).

and State governments in April 1995. Those principles include, in addition to advancing competition and efficiency, ‘social welfare and equity considerations’, ‘ecologically sustainable development’, and ‘occupational health and safety’.<sup>87</sup> Thus, while a utility regulator’s primary purpose, and the primary values according to which it operates, are clearly economic, broader social values such as fairness and equity remain important.

The importance of balancing economic and social values became clear during the privatisation of many of Australia’s utility regulators during the 1990s and early 2000s. Amidst the creation of new electricity markets at the wholesale and retail levels, a key issue in the privatisation debates was the extent to which cross subsidies would continue in the pricing structures of the newly privatised distributors and retailers. In Victoria for example, electricity pricing under the government owned State Electricity Commission contained a complex array of cross subsidies between different classes of users, between urban and regional users, and between domestic and industrial users. Such cross subsidies create production and distribution inefficiencies thereby offending the economic value of efficiency.<sup>88</sup> Yet their complete removal would have offended social values such as fairness and distributional justice. The solution was a pricing structure that removed some of the larger interclass cross subsidies (eg commercial to large business), but largely retained the urban/regional subsidies, and continued a series of concessions or discounts for low income and vulnerable consumers along with many longstanding billing and disconnection practices — thus honouring the intent of the social compact that had developed over several previous decades.<sup>89</sup> Clearly, economic regulation in this instance continues to occur to optimise the use of resources — but within a system constrained by social context.

It is worth contemplating what may happen to a utilities regulator that operated without reference to these broader social values — say a regulatory regime that allowed the market to operate only according to economic efficiency, allowing utility providers to charge vulnerable, low income and regional customers an ‘efficient market price’? It is submitted that it would not take long before community, media and political pressure became such that the fundamental desirability, appropriateness and legitimacy of the regime came into question. In other words, such a ‘pure’ regime would risk losing its balance with its supporting social values and risk tottering and falling.

## **B Occupational Health and Safety Regulation — Traditional Social Regulation**

OHS is an area of regulation traditionally labelled as ‘social’ and which meets both definitions of ‘social’ regulation found in the literature. Applying the ‘economic’

87 Council of Australian Governments, *Competition Principles Agreement*, 11 April 1995, s 1(c).

88 R R Officer, ‘Privatization of Public Assets’ in Committee for Economic Development of Australia (ed), *Privatisation: Efficiency or Fallacy? Two Perspectives* (CEDA, 1999) 1.

89 Tony Ward and Graeme Hodge, ‘Electricity Privatisation: The Victorian Model’ in Graeme Hodge et al (eds), *Power Progress: An Audit of Australia’s Electricity Reform Experiment* (Australian Scholarly Publishing, 2004) 39. For an examination of how different utility regulatory regimes purport to meet this challenge see Haber, above n 26.

rationale for social regulation, OHS regulation is justified on the basis that it corrects for market failures that result in the private market not adequately accounting for or allocating the costs of workplace deaths, injuries and disease.<sup>90</sup> These failures include: information asymmetries (workers do not know enough about the risks or consequences of an accident (and employers know disproportionately more) to make a fully informed decision about compensatory wages and/or necessary safety requirements); unequal bargaining power (even if workers are fully informed, they often are too weak to bargain for the wage or safety needed to reflect the level of risk); and externalities (workplace injuries impose costs on people not involved in the workplace bargain — that is, the worker's family and the community generally through the worker's use of social security and government provided health care).<sup>91</sup> Regulating OHS only according to the value of efficiency would, however, dictate that governments should intervene to produce an economically efficient outcome — that is, governments should seek to prevent workplace accidents up to the point at which it becomes more expensive to prevent them than to allow them to occur.<sup>92</sup> However, this is not what occurs in practice. While there is an economic case for OHS regulation, economic values alone do not define the extent and nature of OHS regulatory regimes.<sup>93</sup> In fact, efficiency does not feature as an object of any of the OHS Acts currently operating in Australia. Rather, social values of fairness, equity and justice operate to ameliorate (if not subordinate) the operation of the economic values.

Thus OHS regulation better accords with the second definition of 'social' regulation — one designed to achieve societal outcomes different to and better than those produced by an efficiently operating market. OHS regulation is preventative in nature, designed to protect workers 'from a variety of assaults that laissez-faire forces would otherwise produce'.<sup>94</sup> It is based on values of fairness, equity and distributional justice. The UK Health and Safety Commission, for example, refer to it as a 'cornerstone of a civilised society'.<sup>95</sup> WorkSafe Victoria (Australia) is typical of OHS regulators. The *Occupational Health and Safety Act 2004* (Vic) makes clear the primacy of its social objective, to 'secure the health, safety and welfare of employees and other persons at work'.<sup>96</sup> Economic considerations, while important, are clearly secondary, as illustrated by their absence from the Act's objects clause and the clear presumption in favour of safety evident in the Act's 'principles of health and safety protection' that workers (and members of the public) 'be given the

90 As one anonymous referee commented, market failures are probably the major reason for OHS regulation.

91 See, eg, Productivity Commission, *National Workers' Compensation and Occupational Health and Safety Frameworks*, Report No 27 (2004) 36–7; Stephen Breyer, *Regulation and its Reform* (Harvard University Press, 1982) 34.

92 Gunningham, above n 70, 277.

93 Prosser, 'Regulation and Social Solidarity', above n 43, 370; Gunningham, above n 70, 295–6. See also Neil Gunningham and Richard Johnstone, *Regulating Workplace Safety: System and Sanctions* (Oxford University Press, 1999) 6.

94 Kuttner, above n 11, 281.

95 Health and Safety Commission, *A Strategy for Workplace Health and Safety in Great Britain to 2020 and Beyond* (2004) 4.

96 *Occupational Health and Safety Act 2004* (Vic) s 2(1)(a).

highest level of protection against risks to their health and safety that is reasonably practicable', and in the 'reasonably practicable' test itself.<sup>97</sup>

In the case of OHS we have already seen what happens when regulatory regimes are perceived to have lost their balance with their supporting economic values: we have seen the OHS regulators become subject to the 'better regulation' movement and directives to perform their role in a manner that minimises the regulatory burden on employers;<sup>98</sup> we have seen the regulatory pendulum swing from a 'better safe than sorry' philosophy to a cost benefit philosophy that places the onus on the regulator to establish that the benefits of the proposed regulation exceed its costs and that it is the least onerous;<sup>99</sup> we have seen the credibility and legitimacy of regulators attacked;<sup>100</sup> and we have seen OHS regulation become part of the Government's strategic economic management plan to create a seamless national economy through the current process for the harmonisation of Australia's OHS laws.<sup>101</sup> What is again clear here is that social regulation in this instance occurs to achieve goals of justice, safety and security — but within a system shaped

97 *Occupational Health and Safety Act 2004* (Vic) ss 4, 20. See also WorkSafe Victoria, *How WorkSafe Applies the Law in Relation to Reasonably Practicable: A Guideline Made Under Section 12 of the Occupational Health and Safety Act 2004* (30 November 2007) <<http://www.worksafe.vic.gov.au>>. The equivalent provisions in the new harmonised model are found in *Work Health and Safety Act 2011* (Cth) pt 2 div 1, ss 3(2) and 18. The model Act is available on Safe Work Australia's website <<http://safeworkaustralia.gov.au>>. See also Barry Sherriff, 'Occupational Health and Safety' (2011) 39 *Australian Business Law Review* 52.

98 Variably described as 'deregulation', 'better regulation', 'red tape reduction', 'reducing the regulatory burden' and 'rethinking regulation', these initiatives involve subjecting regulatory proposals to regulatory impact assessments, re-examining command and control regimes, the use of market based and more varied, flexible and responsive regulatory tools, and the use of performance based (and less prescriptive) regulatory standards. The Commonwealth and each State government have established a regulatory reform program. For example, the Commonwealth government has a Minister for Finance and Deregulation and a Deregulation Group operating within the Department of Finance and Deregulation; New South Wales has a Better Regulation Office within the NSW Department of Premier and Cabinet; Western Australia and South Australia have Red Tape Reduction Programs; and Victoria has a Reducing the Regulatory Burden initiative.

99 To borrow the language of Ragnar E Lofstedt, 'The Swing of the Regulatory Pendulum in Europe: From Precautionary Principle to (Regulatory) Impact Analysis' (2004) 28(3) *Journal of Risk and Uncertainty* 237. See also Gunningham and Grabosky, above n 37, 8, who refer to the influence of neo-liberal thinking at the political level; to economic rationalism dominating social policy debates; of regulators being 'in retreat, reluctant to argue for newer or tougher regulation for fear of alienating either their political masters or influential business lobbies who are never reticent to suggest that such regulation will make them less competitive, or hasten their move to another jurisdiction'; Julia Black, 'Proceduralizing Regulation: Part I' (2000) 20 *Oxford Journal of Legal Studies* 597, 598, who laments that the value debate inherent in regulatory decision making is often surrendered to economists; and Mabbett, above n 4, 224, who argues that the welfare state is at risk of being 'trampled under the forward march of global capitalism'.

100 A colourful example is the election manifesto written for Jeremy Clarkson, host of the UK television program Top Gear, which stated of the UK Health and Safety Executive: 'The safety bureaucrats are the abominable no-men, constantly dreaming up new reasons to abolish fun and hobble business. With their silly regulations, they have done more damage to British industry than the Luftwaffe', quoted in Leo McKinstry, 'Jeremy Clarkson for Prime Minister!', *Mail Online* (online), 3 January 2008 <<http://www.dailymail.co.uk/news/article-505788/Jeremy-Clarkson-Prime-Minister.html#ixzz1ET3FkCDq>>.

101 Council of Australian Governments' Meeting, *Communiqué* (26 March 2008) <[http://www.coag.gov.au/coag\\_meeting\\_outcomes/2008-03-26/index.cfm](http://www.coag.gov.au/coag_meeting_outcomes/2008-03-26/index.cfm)>; Workplace Relations Ministers' Council, *Communiqué from Australian, State, Territory and New Zealand Workplace Relations Ministers' Council* (11 December 2009) <<http://www.deewr.gov.au/WorkplaceRelations/WRMC/Documents/11Dec09.pdf>>.

and constrained by economic values of efficiency, productivity and international competitiveness.

### **C Australian Competition and Consumer Commission — A More Economically and Socially Centred Regulator**

The Australian Competition and Consumer Commission ('ACCC') is commonly viewed as an 'economic regulator'.<sup>102</sup> Its role is generally expressed in economic terms — to promote effective competition and informed markets by correcting for market failures. To do this, the ACCC attempts to ensure a competitive 'supply-side' structure by prohibiting anti-competitive conduct and regulating access to monopoly services,<sup>103</sup> and a well-informed and confident 'demand-side' by regulating for fair trading and consumer protection.<sup>104</sup> Yet a closer examination of the ACCC's mandate reveals that it is 'to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection'.<sup>105</sup> The Productivity Commission notes that in the area of consumer protection this mandate may warrant ACCC intervention not only to correct for significant market failures, but to advance social justice goals including fair and equitable treatment of both consumers and business, and the protection of consumer rights (such as the 'right to know' and the 'right to safety').<sup>106</sup> As a result, we would argue that the ACCC is better characterised as a more economically and socially centred regulator in that in many instances it is required to take into account both economic values of efficiency and competitiveness as well as broader social values such as fairness, equity and justice. This is clearly different to the common view of the ACCC as solely an economic regulator.

Being a more economically and socially centred regulator is arguably more complex than being a clear economic regulator subject to supporting (or secondary) social values, or a clear social regulator subject to secondary (or supporting) economic values. The complexity and difficulty of this task is illustrated by the ACCC's approach to what in Australia has become known as the 'supermarket milk wars'. In early 2011, in an attempt to win market share, one of Australia's two largest supermarket chains reduced the price of its home-brand milk to below cost. This was soon matched by its largest rival with whom it controlled about two-thirds of the grocery segment. Initially the ACCC was

102 For example, in the Statement of Expectations provided to the ACCC by the Commonwealth Government in February 2007, then Treasurer Peter Costello described the ACCC as a 'key economic regulator'. Letter from Peter Costello, Treasurer, to Graeme Samuel, Chairman, Australian Competition and Consumer Commission, 20 February 2007 <<http://archive.treasury.gov.au/documents/1287/PDF/Ltr%20ACCC%20Statement%20of%20Expectations.pdf>>. See also Asher, above n 84.

103 These are the objectives of pts IV and XIB and pts IIIA and XIC respectively of the *Competition and Consumer Act 2010* (Cth). See S G Corones, *Competition Law in Australia* (Lawbook, 5th ed, 2010) 4.

104 This is the objective of pts IVB, XI, XIAA and Sch 2 of the *Competition and Consumer Act 2010* (Cth). See S G Corones and Philip H Clarke, *Australian Consumer Law: Commentary and Materials* (Lawbook, 4th ed, 2011) 20–1.

105 *Competition and Consumer Act 2010* (Cth) s 2.

106 Productivity Commission, *Review of Australia's Consumer Policy Framework*, Inquiry Report No 45 vol 2 (2008) 34–6. See also Allan Fels, 'A Model of Antitrust Regulatory Strategy' (2010) 41 *Loyola University Chicago Law Journal* 489.

silent in the face of these developments, presumably taking the view that this was predominantly an economic issue — healthy competition at its best — a market development that benefited consumers. However, the ACCC's failure to fully appreciate the potential impacts (economic and social) of the price war on the sustainability and livelihoods of milk producers, processors and independent and small business retailers, and on the social fabric of the local and regional communities that depend on them (or at the very least, the extent of community concern about those impacts), impacted negatively on the ACCC's credibility and legitimacy. In fact, some politicians, community leaders and commentators suggested that the ACCC had been 'napping' and 'asleep at the wheel',<sup>107</sup> and the Australian Senate's Economics Reference Committee pre-empted the ACCC by calling its own inquiry into the impact of the price war at which the ACCC was called upon to defend its own actions.<sup>108</sup>

## VI DISCUSSION AND IMPLICATIONS

Our examination of these three modern regulators reveals that none can be properly conceptualised as either purely economic or purely social in nature. While each broad type of regulator seeks to achieve aims according to its primary values, it also operates within a system constrained by the other values. It also revealed that the balance struck between social and economic values is context specific — with different balances being struck with respect to different policy areas, and at different points of time in light of changing needs and circumstances. This implies a degree of complexity in understanding and analysing modern regulators and regulatory activity. It is to these complexities — and the implications that flow from them — that the article now turns.

First, a regulatory regime can have more than one purpose. A regime can seek both to enhance efficiency and consumer choice and attain certain socially desirable outcomes (eg essential services and utilities regulation designed to ensure equal access and service quality; telecommunication and postal regulation designed to ensure same pricing for metropolitan and regional consumers; and consumer regulation designed to both promote competition and efficient market outcomes, and protect the vulnerable and less powerful). Indeed, in modern democratic capitalist societies there is unlikely to be such a thing as a regulator whose function is purely economic and who is devoid of social context. To some degree, all economic regulators exist within a social context, and social regulators

107 See, eg, Elizabeth Knight, 'Silent Watchdog Unlikely to Bark while Consumers are Cats that get the Cream', *The Sydney Morning Herald* (online), 2 March 2011 <<http://www.smh.com.au/business/silent-watchdog-unlikely-to-bark-while-consumers-are-cats-that-get-the-cream-20110301-1bd86.html>>; Julie Clarke, *ACCC Attacked in Senate Milk Hearings* (10 March 2011) Australian Competition Law <<http://www.australiancompetitionlaw.org/news2011.html>>; Senate Economics Reference Committee, Parliament of Australia, *The Impacts of Supermarket Price Decisions on the Dairy Industry: Second Interim Report* (2011) 65–74 (being the additional comments by Independent Senator Nick Xenophon, Liberal Senator Bill Heffernan, Nationals Senator John Williams and Australian Greens Senator Christine Milne).

108 Evidence to Senate Economics Reference Committee, Parliament of Australia, 9 March 2011, 19–47. Senate Economics Reference Committee, above n 107.

within an economic context. As Okun observes: ‘capitalism and democracy ... need each other — to put some rationality into equality and some humanity into efficiency.’<sup>109</sup> The extremities of ‘purely economic’ regulation or ‘purely social’ regulation exist only in the world of narrow theory where we are willing to bury all underlying assumptions and work only with variables such as quantity and price (for economic regulation) or fairness and justice (for social regulation). This point, to our mind, has been insufficiently acknowledged to date.

Second, the difference between the social and economic domains of regulation, according to this perspective, is not the absence of one or more values, or the victory of one set of values over another (as implied by much of the literature that posits these values in competition with one another), but the primacy and supporting roles played by sometimes contradictory values. The implication here is that regulatory debates are likely to cover the full spectrum of societal values, whether academic theorists or practising regulators welcome this or not. And whilst the mandate of a regulatory body may well have been set through the political process as predominantly either economic or social, a host of other values support and shape the terrain covered by the regulator. Thus, the issue is not whether economic regulation should take social values into account, and social regulation economic values, but when they inevitably do so, whether it is done in a manner that is transparent and in which the balance that is struck is explicit and clear. In most instances the preference should be for transparency — for regulatory decisions to be made with both the competing economic and social values and trade-offs between them visible. To ignore or pretend these issues do not exist will not make them go away; rather, as noted earlier, it risks regulatory failure by masking important social or economic considerations. This is an important point, particularly given the inherently political nature of much regulatory decision-making.<sup>110</sup>

Third, the multiple values within this conceptual model are not arranged in neat hierarchical order. There is no presupposition that one set of values dominates or is dominated by the other. Each set of values is important in its own right with the primacy of either social or economic values depending on the subject matter and context. While for some regulators there will be in practice a clear priority or hierarchy (such as for a traditional economic utility regulator), for others the priority or hierarchy may not be so obvious (which arguably is the case with competition and consumer regulators), or it may change over time (which arguably is occurring in many areas of traditional social regulation such as occupational health and safety subject to ‘better regulation’ initiatives). This implies a degree of complexity in understanding and analysing regulatory activity. Such complexity may not fit well within the usually far simpler everyday public discourse and policy debates, as well as the academic models adopted for regulation. It also

109 Okun, above n 67, 120.

110 Levi-Faur, ‘Regulation and Regulatory Governance’, above n 22, 14–16. See also Graeme A Hodge, ‘Reviewing Public-Private Partnerships: Some Thoughts on Evaluation’ in Graeme A Hodge, Carsten Greve and Anthony E Boardman (eds), *International Handbook on Public-Private Partnerships* (Edward Elgar, 2010) 81.

behaves a healthy degree of community scepticism of regulators that present themselves as being either purely economic or purely social in nature and focus.

Fourth, while it may seem somewhat obvious to observe that all regulation involves a balancing of sometimes contradictory values, what this model emphasises is the importance of regulators acknowledging and substantively addressing the implicit role that ‘supporting values’ play in their work. Clearly, the power of regulators today relies not solely on their legal mandate, but also on the broader legitimacy given to the institution by its stakeholders, by the polity and by citizens. Suchman is right when he refers to legitimacy being something that needs to be built, maintained and repaired rather than something which can be legislatively bestowed.<sup>111</sup> Regulators aiming to maintain and enhance their legitimacy and credibility will therefore not only rely on their capability to achieve their formal economic or social role, but also will seek to deliver on the raft of supporting values. This requires such regulators to be able to both articulate the large difference between the rhetorical label (of ‘social’ or ‘economic’) applied to their institution and the more complex reality of their work, and substantively to bring the sometimes contradictory values into alignment or other appropriate balance. This is particularly important given research establishing that regulatory compliance can depend significantly on people’s perception of the legitimacy of the regulatory regime and the regulators within it.<sup>112</sup>

Fifth, in making these observations we would not want to be accused of oversimplification. The process of bringing economic and social values into alignment or balance, and maintaining that alignment or balance over time in the face of changing circumstances, is both complex and difficult. Indeed, as Haines, Sutton and Platania-Phung point out (in the context of aligning risks rather than values), meeting this difficult challenge and bringing the different dimensions into alignment is in many regards the epitome of ‘smart’ regulation.<sup>113</sup>

It is beyond the scope of this article to explore the possible avenues available to regulators to achieve this balance, save to note that good regulatory processes that involve those who might be affected by or have an interest in the regulation are generally more conducive to producing ‘smart’ regulation and good regulatory outcomes.<sup>114</sup> At a minimum this would involve consultation between regulator, regulatee and other stakeholders, but could extend to more inclusive and participatory models such as Black’s ‘thick proceduralization’ based on deliberative models of democracy,<sup>115</sup> Prosser’s ‘collaborative enterprise’ in which

111 Mark C Suchman, ‘Managing Legitimacy: Strategic and Institutional Approaches’ (1995) 20(3) *Academy of Management Review* 571. See also Julia Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’ (2008) 2 *Regulation & Governance* 137.

112 See, eg, T Tyler, *Why People Obey the Law: Procedural Justice, Legitimacy and Compliance* (Princeton University Press, 1990); Valerie Braithwaite, Kristina Murphy and Monika Reinhart, ‘Taxation Threat, Motivational Postures, and Responsive Regulation’ (2007) 29 *Law and Policy* 137; Julia Black, ‘Constructing and Contesting Legitimacy and Accountability in Polycentric Regulatory Regimes’, above n 111.

113 Haines, Sutton and Platania-Phung, above n 15, 451. See also Haines, above n 15, 48–51.

114 Gunningham and Grabosky, above n 37.

115 Black, ‘Proceduralizing Regulation: Part I’, above n 99.



the regulatee and other stakeholders who inhabit the broader regulatory space are part of the regulator's deliberative process,<sup>116</sup> or Hood, Rothstein and Baldwin's 'open process of institutionalized debate' about competing values.<sup>117</sup>

Finally, the model implies that real world regulators all share a common pool of broad values and that they sustain this broader set of values to strengthen their legitimacy. To this end, a further implication is that regulators are most likely to share many challenges, whilst also facing different challenges. Such a realisation has important institutional implications. The traditional dichotomy between economic regulation focussed on efficiency being conducted by non-majoritarian institutions staffed by technical experts, and social regulation focussed on equity and other socially desirable outcomes being conducted through majoritarian institutions, may no longer hold,<sup>118</sup> and it may well be that each type of regulator has much more to learn from the other than may have been acknowledged to date.

## VII CONCLUSION

Given the difficulties associated with defining regulation itself, perhaps it is little surprise that we have also struggled to clearly distinguish the notions of social regulation and economic regulation. This difficulty has been compounded by changes in how governments fulfil their governance task and the consequences of this change for traditional dichotomies and analytical frameworks. In this age of regulatory governance, regulatory capitalism and the regulatory state, it is important that regulatory concepts are continually revisited and clarified to ensure our analytical frameworks evolve in a manner that enables us to continue to better understand the implications of those changes for modern regulators and regulatory activity. In this regard, our exploration of the different ways social and economic regulation have been conceptualised has been revealing. The literature review identified a broadly consistent concept of economic regulation centred on improving economic efficiency and competition. However, with respect to social regulation two broad and conflicting conceptualisations were identified. The first views social regulation as a mechanism to correct for the damaging effects of economic activity; the second as a mechanism to attain socially desirable outcomes. While each conceptualisation is instructive, neither concept accurately reflects what happens in practice. Governments are simultaneously being asked to create the conditions in which markets can operate more efficiently and to produce socially desirable outcomes different to, and better than, those produced by efficiently operating markets. Traditionally conceived of economic regulators are increasingly being required to perform their functions in a manner that advances broader societal values such as fairness, justice and equity, and traditionally conceived of social regulators are increasingly being required to operate in a manner that is economically efficient and cost-effective. The difference

116 Prosser, *The Regulatory Enterprise*, above n 23.

117 Hood, Rothstein and Baldwin, above n 12, 184.

118 See discussion at above n 23.

between social and economic regulation is now more nuanced and subtle than the convenient (and sometimes ideologically driven) use of these traditional labels suggests, with the result that their continued use is apt to confuse.

This article has suggested that a better way of conceptualising social and economic regulation is to recognise that all regulation is underpinned by a mix of interconnected and interdependent social and economic values, and that the distinction between social and economic regulation lies in the primacy of the values it is designed to advance and the purpose it is designed to achieve, while recognising the critical role performed by the other set of values in defining the boundaries of, and supporting and legitimising, the regulatory endeavour. This clarification of social and economic regulation matters. Not only does it remind us that pure economic regulation or pure social regulation only exists in the realm of theory, but it has important real world implications for governments and regulators — that in transparently achieving the difficult balance of sometimes contradictory values such regulation achieves stronger legitimacy and credibility.