

# KELLEHERS AUSTRALIA

---

## SCANDALS AND REGULATORS

Recent high profile media exposés, revealed major scandals in the banking, insurance and aged care systems. Now facing Royal Commissions, they highlight obvious failures by regulators to curb illegal action and excess. The recent issues sit alongside chronic failures of regulators, nationally and internationally, in the environmental 'industry'<sup>1</sup>.

This paper looks at the dangers of regulatory capture<sup>i</sup>.



**Source:** Michael Langan, 'The Physician Wellness Movement and Illegitimate Authority: The Need for Revolt and Reconstruction' Disrupted Physician Blog.<sup>2</sup>

Regulatory capture occurs when a regulator (eg EPA, ASIC) advances the commercial or political concerns of the regulated industry rather than advancing the social purpose of the regulation itself. A regulator is the interface between government and everyday life.

Regulatory capture occurs because those with high-stakes in the regulatory outcome (eg private aged care providers, private land developers, the nuclear industry, bankers and insurers) focus their resources and energies on ensuring the regulator provides outcomes that benefit them. Lobbyists provide professional support<sup>ii</sup>. Members of the public, each with only a tiny individual stake in the outcome, tend to rely on the regulator to achieve the statutory purpose, assuming it will compel performance<sup>iii</sup>.

---

<sup>1</sup> Examples include the US Bureau of Ocean Management, Regulation and Enforcement responsible for offshore oil drilling prior to the Deepwater Horizon oil spill. Von Hippel argues that, despite the 1979 Three Mile Island disaster, the US Nuclear Regulatory Commission is timid in ensuring that America's 104 commercial reactors operate safely (New York Times March 23, 2011 *It Could Happen Here*. Despite warnings about its safety, Japanese regulators from the [Nuclear and Industrial Safety Agency](#) (NISA) approved a 10-year extension for the oldest of the six [reactors](#) at [Fukushima Daiichi](#) just one month before the earthquake and tsunami. The conclusion to the [Diet of Japan's](#) report on Fukushima attributed this directly to regulatory capture. (Hiroko Tabuchi, Norimitsu Onishi and Ken Belson, New York Times March 21 2011, *Japan Extended Reactor's Life, Despite Warning*).

Australia's threatened species face the gauntlet of State regulatory processes, applying due to Federal divesting of responsibility to states and State planning regulatory authorities if not 'captured', strongly encouraging of development with stiff competition between states.

<sup>2</sup> <<https://disruptedphysician.com/2016/08/06/the-regulatory-capture-of-american-medicine-by-the-drug-and-alcohol-testing-assessment-and-treatment-industry/>> accessed 25 September 2018

Copyright © Kellehers Australia Pty Ltd 2018

Liability limited by a scheme approved under professional standards legislation. This fact sheet is intended only to provide a summary and general overview on matters of interest. It does not constitute legal advice. You should always seek legal and other professional advice which takes account of your individual circumstances.

# KELLEHERS AUSTRALIA

---

Often the public is unaware of the regulator's capture (or apparent capture based on its inaction) until a crisis arises.

Any regulatory agency risks, by its very nature, exposure to regulatory capture. Government must protect the regulator from high-stakes influence, by every means possible. Having no regulator at all can be better than the dangers of a captured regulator because a captured regulator wields the full authority of government. Economists, such as the Chicago School, went so far as to advocate for only a limited role for regulators, due to fears of regulatory capture.

Current approaches to regulation encourage self-regulation and co-regulation. They actively seek to harness industry knowledge<sup>iv</sup>. However, regulatory capture is a high risk with such regulatory models. Despite these risks, since the 1990s, self-regulation and co-regulation have been encouraged as best practice alternatives to conventional regulation<sup>v</sup>.

The regulatory impact assessment (RIA) process that is now routine in most western economies, invariably fails to take this properly into account. Its key focus is generally on cost-effectiveness<sup>vi</sup>, with reduction of the regulatory burden as a key goal<sup>vii</sup>. For example, the Victorian Treasury's current on-line RIA measurement instrument has, as its measure of regulatory change, the change in *costs*. It includes a time cost calculator<sup>viii</sup>. Australia's Office of Best Practice Regulation, which administers Federal RIA, is within the Department of the Prime Minister and Cabinet<sup>ix</sup>. Its functions appear to comprise risk analysis, cost-benefit analysis, assessments of compliance costs, assessments of competition effects and consultation and avoidance of unnecessary compliance costs and competition restrictions.

Beyond the process itself, Australian regulation occurs within a Government institutional culture where notions of progress and an ideology of developmentalism tend to dominate<sup>x</sup>. The line between Government as regulator tends to blur with the role of Government as development proponent. At the political level, Ministers tend to adhere to a development ideology, requiring a good reason to hold back development. Where a regulatory scheme creates a relationship, alliance or public-private partnership between Government and another party, it is particularly important to identify the complete suite of Government roles at play and their boundaries.

Principles of good regulation insist that any regulation be transparent, accountable, proportionate, consistent and targeted<sup>xi</sup>. However, "transparency" has been irreverently critiqued as "blame avoidance", directing attention to who gets to blame those being monitored and who does the monitoring<sup>xii</sup>.

Some see the role of the regulator as merely a 'network participant and influencer ... working to ensure the integrity of the semantics of the net, not only with information but in terms of such things as reputation reporting and recommendations, so that such a complex, dynamic and automated market can and will optimally self-organise...'<sup>xiii</sup>.

Current media exposés hint, if not actually confirm, that *regulatory capture* could be widespread in Australia. It's time to address this matter urgently.

Copyright © Kellehers Australia Pty Ltd 2018

Liability limited by a scheme approved under professional standards legislation. This fact sheet is intended only to provide a summary and general overview on matters of interest. It does not constitute legal advice. You should always seek legal and other professional advice which takes account of your individual circumstances.

KELLEHERS AUSTRALIA: [www.kellehers.com.au](http://www.kellehers.com.au) / e: [kelllegal@kellehers.com.au](mailto:kelllegal@kellehers.com.au)

497 Swan Street, Burnley, 3121, Victoria, Australia

# KELLEHERS AUSTRALIA

---

Should every meeting of the regulator with a regulated party be matched with a meeting with a beneficiary of the regulation? Should meetings between regulators and those regulated be made public? Should standard RIA process consider regulatory capture alongside burdens and costs? Should Parliamentary Counsel be more vigilant in protecting against regulatory capture from the outset?

---

<sup>i</sup> Stigler, G.J., 1971, The Theory of Economic Regulation, *Bell Journal of Economics*, Vol. 2, 3, Stigler, G.J., 1964, Public Regulation of the Securities Market, *Journal of Business*, Vol. 2, 117, Stigler, G.J. and C. Friedland, 1982, What Can Regulators Regulate: The Case of Electricity, *Journal of Law and Economics*, Vol. 5, 1.

<sup>ii</sup> <https://www.theguardian.com/australia-news/ng-interactive/2018/sep/19/lobbying-in-australia-how-big-business-connects-to-government>

<sup>iii</sup> Timothy B. Lee, "[Entangling the Web](#)" *The New York Times* (August 3, 2006).

<sup>iv</sup> For example, the Australian Communications and Media Authority, 2010, *Optimal conditions for effective self- and co-regulatory arrangements; Occasional paper*, June, Commonwealth of Australia, Government of Victoria, 2016, *Victorian Guide to Regulation*, Department of Treasury and Finance, State of Victoria, Edition 2.1, November.

<https://www.dtf.vic.gov.au/commissioner-better-regulation/victorian-guide-regulation>

<sup>v</sup> Government of Victoria, Victorian Competition and Efficiency Commission, 2011, *Strengthening Foundations for the Next Decade: An Inquiry into Victoria's Regulatory Framework*, April <https://www.dtf.vic.gov.au/sites/default/files/2018-02/strengthening-foundations-for-the-next-decade-summary-report.pdf>

<sup>vi</sup> For example, the US Regulatory Flexibility Act 1980 (US) and the UK Better Regulation Commission.

<sup>vii</sup> Organisation for Economic Cooperation and Development (OECD), 2010, *Regulatory Policy and the Road to Sustainable Growth*, OECD Publishing, Paris, OECD, 2002, *Regulatory Policies in OECD Countries: From Interventionism to Regulatory Governance*, OECD Publications, Paris.

<sup>viii</sup> <https://www.dtf.vic.gov.au/commissioner-better-regulation/victorian-guide-regulation> accessed 25 09 18.

<sup>ix</sup> <https://www.pmc.gov.au/regulation/best-practice-regulation/compliance-reporting> accessed 25 09 18.

<sup>x</sup> O'Faircheallaigh & Corbett 2005, Indigenous Participation in Environmental Management of Mining Projects: The Role of Negotiated Agreements, *Environmental Politics*, Vol. 14, No. 5, November, 629-647, Lane, M.B. and S. Cowell, 2001, Land and resource planning and indigenous interests, in O. Yiftachel, J. Little, D. Hedgcock & I. Alexander (eds.), *The Power of Planning: Spaces of Control and Transformation*, Kluwer, Dordrecht, Netherlands, 155-169, Lane, M.B., 1997, Aboriginal participation in environmental planning, *Australia Geographical Studies*, 35, 308-323, Howitt, R., 2001, Rethinking Resource Management: Justice, Sustainability and Indigenous Peoples, Routledge, London, Chase, A., 1990, Anthropology and impact assessment: development pressures and indigenous interests in Australia, *Environment Impact Assessment Review*, Vol. 10, 11-25.

<sup>xi</sup> BIS, 2011, *Better Regulation*, Department for Business Innovation and Skills, viewed 13 June 2011,

<https://www.gov.uk/government/policies/business-regulation> accessed 25 09 18.

<sup>xii</sup> OECD (Organisation for Economic Cooperation and Development), 2010, *Regulatory Policy and the Road to Sustainable Growth*, OECD Publishing, Paris.

<sup>xiii</sup> Chapman, Chris, 2011, *The 'convergence phenomena' from a regulator's perspective*, Speech to the Communications and Media Lawyers Association, May 30, 18. See also, Chapman, Chris, 2008, *The flexibility benefits of Australia's co-regulatory approach*, Speech to 14<sup>th</sup> European Conference of Postal and Telecommunications Administrations (CEPT), Strasbourg, France, 17 April.

Copyright © Kellehers Australia Pty Ltd 2018

Liability limited by a scheme approved under professional standards legislation. This fact sheet is intended only to provide a summary and general overview on matters of interest. It does not constitute legal advice. You should always seek legal and other professional advice which takes account of your individual circumstances.

KELLEHERS AUSTRALIA: [www.kellehers.com.au](http://www.kellehers.com.au) / e: [kelllegal@kellehers.com.au](mailto:kelllegal@kellehers.com.au)

497 Swan Street, Burnley, 3121, Victoria, Australia