REGULATORY CAPTURE: CAUSES AND EFFECTS

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Background

The last decade in Australia has seen many demonstrations of the phenomenon of 'regulatory capture', that is, capture of 'regulators' by the regulated.

By 'capture' is meant behaviours, active and passive, by responsible authorities, which behaviours act to protect the same illegal, unethical, immoral or anti-public interest practices that those authorities are charged with 'policing'.

By 'regulator' is meant the widest class of professionals and authorities within corporations, organisations or jurisdictions holding formal administrative cum legislative cum ethical responsibilities for maintaining accountability within those units of society, community and government. Examples from this 'regulator' class include auditors and accountants, lawyers and police, clergy and ethicists, medical practitioners and nurses, government and private industry 'watchdog' authorities, the profession-at-arms, and researchers and scientists.

The 'captors' are the 'regulated', again defined widely, to include organisations or coalitions or classes/networks of individuals who would be the focus of the accountability regime but for their success in 'capturing' that regime. Examples can include major industries, corrupt officials, important customers, large corporations, political associations, professional elites, community leaders, and in-house wrongdoers.

At a first level of capture, the regulator allows the regulated to breach the law, ethic, good practice rule, moral principal or public interest duty that the regulator is responsible for upholding. At a second level, the regulator assists the regulated to avoid the regulatory consequences after the fact. At a deepest level of development, the 'capture' is so complete that the regulator may assist the regulated to defeat the regulatory regime before the fact.

This phenomenon of 'capture' has been visible with respect to the regulation functions carried out within Australia's private sector organisations, within professions, and within State and Federal public sector authorities. Australian experience has been matched in recent times by spectacular examples of regulatory capture in other democratic countries.

Media reports from a three month study period prior to the preparation of this paper, that state or imply (by the above definition) allegations of 'capture', include:

- Officers of the Court, in their role as lawyers for tobacco companies, allegedly advising the tobacco companies on procedures for the destruction of evidence, which destructions have been held by the Court to constitute a 'deliberate intention of denying a fair trial to the plaintiff' (Shand, Financial Review, 2002; Birnbauer, The Age, 2002) – a case of **the accused capturing (officers of) the Court?**

- Medical researchers providing findings on medicines for controlling high blood pressures that omit or understate or mis-state the results of that research (Sunday, NINE, 2002) – **the misinformer capturing the fact finder?**
- Partner of an international Auditor Company pleading guilty to the obstruction of justice by the destruction of papers relevant to audits that allegedly mis-stated, understated and / or omitted the true and fair financial position of a mega-corporation that subsequently went into liquidation (SBS, 2002; McCullough, 2002). The evidence included a training video that allegedly trained auditors to destroy evidence before the police arrived – **the audited capturing the auditor?**
- Police who allegedly broke the law in order to secure convictions against alleged law-breakers (Rule, The Age, 2002) – **law-breaking capturing law enforcement?**
- Criminal justice investigators allegedly failing to follow a document trail and using a rule wrong in law to read down the criminality of actions by a government to destroy documents pertaining to the pack rape of a young girl in the care of the government (Austin, ABC Radio, 2002) – **a government capturing its watchdog?**
- Insurance regulators allegedly failing to report findings that a major insurance company was heading towards insolvency, and then approving a re-insurance contract while knowing that the contract would allow the failing insurance company to report artificially high profits (Walker, Courier Mail, 2002) – **the flawed capturing the flaw finder?**
- Archbishops allegedly allowing paedophile priests and ministers to move to a succession of fresh parishes where they re-offended against the children of the archdiocese (Lieblich, Chicago Tribune / Courier Mail, 2002) – **the wolf capturing the shepherd?**
- An environmental protection authority and mining regulator allegedly failing to complete compliance audits of mines or enforce the law when mines are in breach of the conditions of their mining leases (O'Malley, Courier Mail, 2002; Southwell, The West Australian, 2002) – **the leasee capturing the landlord?**

Reports from previous years memorable to the author include

- The Chief Officer of a 'Merit Protection'-type authority training the CEOs of government departments on how to avoid the force of the anti-discrimination legislation that the Merit Protection Authority was administrating
- The health bureaucrat allegedly advising a Minister for Health on how to avoid the force of Freedom of Information legislation
- The ethicist who publicised through the media the view that the destruction of evidence by government, evidence of child rape and abuse of children in government care institutions, was justified by the ends that the government sought to achieve through the destruction
- The Commission of Inquiry that accepted Terms of Reference that allowed investigation of allegations of criminal wrongdoing by community organisations, when those same TORs vetoed investigations of allegations of similar fact wrongdoing by government authorities
- The victimisation and removal of a whistleblower auditor by Defence procurements authorities, regarding criticisms by the auditor of procurement in technical areas that later 'procured' the multi-billion dollar losses for Australia's submarine development program

These reports have been chosen to present some perceptions about the phenomenon of 'capture'. Firstly, there is a flood of such allegations, and the flood is occurring now. Secondly, the cases come from a very wide spread of private organisations, professional groups and government authorities. Thirdly, most of the instances of 'capture' are before the Courts, or have already been proven before the Courts or administrative tribunals or judicial inquiries. Finally, there is no bastion of morality or courage or vigilance or statesmanship or ethics that seems immune from the threat of 'capture'.

A number of different concepts may be able to link some of these events to a common theme, concepts such as 'corruption', 'adversarial cultures', 'self-interest', 'noble cause wrongdoing' and / or 'winning'. It is the concept of 'CAPTURE', however, that links all the cases, and the concept of 'capture' does this by describing the behaviours of the regulators rather than by describing their motivations.

The phenomenon of 'capture' is also a primary cause for whistleblowing. The failure of integrity workers to appreciate the existence and strength of 'capture' within their professions or organisations, and within the watchdog authorities to which integrity workers make their disclosures, is a first order cause for the great harm that comes to whistleblowers, their careers, health, lives and families. Thus does Whistleblowers Australia have a strong research interest in the phenomenon of 'capture'.

Aim

The aim of this paper is to present a demonstration of the phenomenon of 'capture' that is visible to the public through the media. Most instances of 'capture' are only partly visible, like an iceberg, and even the Courts have difficulty uncovering the mechanisms within captured regulators.

The demonstration has been chosen for the analogies that it provides as to how the behaviours of captured authorities affect the operations of those authorities.

The demonstration also allows some inspection of the causes for the establishment of 'capture'. A comparison with a similar situation that does not exhibit 'capture' provides analogies that suggest the possibilities for 'escape' from 'capture' and for how 'escape' might be engineered.

The Demonstration

The demonstration of 'capture' chosen for this paper does not involve any sense or category of wrongdoing, either in itself or in any impacts that it has on others. The demonstration is an activity from a televised game or sport, the rules for which are well publicised. The application of the rules is completely transparent, being open to slow motion television replays and unending commentator analysis.

The demonstration is ‘the scrum’. It is proposed that the Rugby League scrum displays behaviours analogous to the behaviours of ‘capture’, while the Rugby Union scrum does not display such analogies.

The scrum originally was a competition for winning possession of the ball. Opposing teams form a tunnel, three players from each side in a line, locking heads and shoulders with their opponents over the tunnel, like one interlocks one’s fingers when one joins one’s hands together to pray.

The middle player of the line of three players is the striker or hooker of the ball, and hooks for the ball when the ball is fed into the tunnel by the player called the halfback. The other two players in the threesome are called props, and they support the hooker but may not themselves hook for the ball.

Behind the row of three is a row of two players whose role is to push their scrum, immediately the ball is fed into the tunnel, so as to assist their scrum to win the ball by travelling the tunnel forward over the ground. The row of two are called second rowers.

A lock is a further player behind and between the two second-rowers who also assists in pushing the scrum immediately that the ball is fed into the tunnel by the halfback.

With interlocking fingers, the middle finger of one hand will be closer to the person than the middle finger of the other hand. Similarly with the scrum, one of the middle players / hookers will be closer to the opening of the tunnel than the other hooker, and so has an advantage in striking for the ball. The rules of the game give this advantage to the team whose halfback gets to put the ball into the scrum – this affords a further advantage to this team, as the halfback and hooker can work out a signal for when the halfback is to put the ball into the tunnel. Empirically it is known that this combination of advantages is not totally fatal to the chances of the other team winning the ball – there is still a 15% chance of the disadvantaged team winning the ball under these rules when they are properly applied.

The Rugby League Scrum

This paper now makes a disclosure to the world that, in televised games of Rugby League over a study period, the halfbacks viewed did not put the ball into the tunnel, and the referees did not police errors by halfbacks in this aspect of the game.

Discussions on television football commentary programs about the Rugby League scrums (The Sunday Footy Show, 1998, 1999, and 2002; The NRL Footy Show, 2001; Lang, 1999; and Harrigan, 2002) indicate that the results of observations during the study period are indicative of the total period of the modern game.

In this respect, there is an analogy here between the failure of the referee (‘the regulator’) to police this rule of the game, and the failure of regulators to enforce their regulations in the wider community cum economy cum jurisdiction.

A study of the behaviours related to the Rugby League scrum may have analogies that assist understanding of behaviours in captured regulators.

This paper proposes that there are seven principal outcomes for Rugby League (hence RL) games arising from the apparent non-enforcement of the rule for putting the ball into the scrum

- There may be no halfbacks on television RL football who will put the ball into the middle of the tunnel – the ball is fed into the scrum crookedly, not straight
- There may be no referees used on television RL football who will require the halfback to put the ball into the middle of the tunnel
- No member of the disadvantaged team ever complains, on or off the field, about the scrum related actions of the opposing halfback or about the scrum related actions of the referee on television RL games
- The forwards in the scrum do not push to try to win the ball by travelling the scrum
- There no longer are any specialist hookers in the essential hooking position within the scrum
- Referees of games lower in grade than the television grades do require the halfback to put the ball into the middle of the tunnel
- The captors have reasons for preferring the sham of a scrum rather than doing away with the scrum and maintaining the integrity of the regulatory function

Below is explored the legitimacy of the proposition that these characteristics of Rugby League are analogous to the characteristics of captured regulators and their captors.

The 'Crooked Feed' Analogy

This analogy suggests that the regulated regimes will have principal players who have surrendered certain ethics, or who do not follow certain laws, in critical situations.

There is strong support for this description of a captured regulator in the list of recent media reports given earlier in this paper. Lieblich (2002) and O'Malley (2002) report allegations about the principals of religious faiths and of government departments respectively; the first reports a form of capture of the shepherds of the flock by the wolves amongst the flock (this is the author's imagery, not that of Lieblich); O'Malley uses the term, 'capture', and reports allegations of an environmental protection authority being more captured with respect to regulation of mining than the mining regulators that the environmental authority replaced (because the mining regulators were allegedly captured).

Austin (2002) discusses allegations of destruction of evidence by the principals of a government before a legal writ arrived, and McCullough (2002) reports a principal of a worldwide partnership being found guilty of obstruction of justice for destroying evidence before the police arrived. Shand (2002) also reports on principals of world tobacco companies engaged in "legal coordination" that led to the destruction of evidence before litigation was on foot – again the courts found the companies to have subverted the discovery process, it is reported; the companies then had their legal defence, against litigation that came on foot after the destruction, struck out by the Court because the destruction denied the subsequent litigant a fair trial.

The 'No Refereeing' Analogy

This analogy suggests that, where capture has been effected, persons who do enforce the rule will not be chosen for the role of rule enforcer, and officers who start to enforce the rule will be placed in other places or with other duties.

Shand (2002) and McCullough (2002) report from legal jurisdictions where at it has proven to be illegal to destroy evidence before litigation is on foot. Austin (2002), by comparison, reports on events from a jurisdiction where the watchdogs of illegal behaviour have failed to act on any suspicion of illegality in destroying evidence of child rape and child abuse. Three Queens Counsel, one now a Justice on the High Court of Australia, have given opinions that it is open to conclude that the actions in destroying the evidence known to be required for foreshadowed court proceedings and revealing child rape and abuse of children held in the care and custody of the Crown were criminal acts (Callinan, QC (1995), Morris QC and Howard (1996), and Greenwood QC (2001)). All State Government watchdogs, however, namely a criminal justice watchdog, a watchdog over the criminal justice watchdog, an ombudsman, the police, various legislative committees, attorneys-generals, the prosecutions authority, a Speaker, a governor, an ethicist, archivists, a Commission of Inquiry, several bishops, several senior bureaucrats and a Parliament have failed to act to bring any offenders to trial. It has been left to a woman brutalised as a child while in State care to have the alleged criminality addressed (Doneman, 2002). The defence put forward by the Head of Government in the case discussed by Austin (2002) is that the documents were destroyed before the plaint was initiated. This is the same defence that failed both before the Supreme Court in an Australian jurisdiction in McCabe v British American Tobacco [2002] VSC 73 (Shand, 2002) and also before the Federal Court jurisdiction of the United States (McCullough, 2002).

The issue arises as to whether the allegations discussed by Austin (2002) constitute allegations of the capture of an entire jurisdiction, in that the allegations match exactly the testing criterion from the 'No Refereeing' analogy derived from the RL scrum demonstration.

Processes that might lead to the establishment of a captured watchdog, or of a whole jurisdiction of watchdogs, involve distortions in selection procedures to prevent untouchable or scrupulous persons gaining positions of authority within watchdogs. The processes might also involve exclusion or expulsion of untouchable or scrupulous persons who have got through any screening.

Insights into the selection of officers for senior positions within watchdog authorities can be gained from the applications of successful applicants and the reasons for selecting / not selecting applicants given by selection panels. An example from the jurisdiction that was the subject of Austin (2002), showed the application indicating that the applicant was philosophically inclined towards requiring public sector departments to decide matters fairly, but was also experienced enough to appreciate that this was not always achievable. The applicant then spoke of being realistic, of balancing knowledge of the law with awareness of the political context, of judging whether disputes are resolvable and whether decisions can be negated, whether any

useful purpose can be served, and whether the offending department is open to the complaint. The selection panel, in judging responses by interviewees to a complaint scenario, included a requirement that the applicant involve the offending public sector office in the watchdog's decision making.

Where are the lines and overlaps between effectiveness, compromise and surrender? What, say, would be the political context, the reversibility, the resolvability, the purpose to be served, and the openness to the complaint, in the mind of such an applicant when a complaint is received that the cabinet of a government authorised the destruction of evidence of child rape and child abuse in a State institution?

Allegations of expulsion and exclusion arise from the history of inquiries and investigations (eg, Matthews (1995), Connolly and Ryan (1997)) preceding the issues reported in O'Malley (2002). An inspector, who continued to report breaches of environmental conditions of mining licenses to the mining regulator, was forcibly transferred, it was alleged, to a lower level position in another public sector department. The order for the inspector to be moved allegedly came from a big Australian mining company (Sanderson, 1997). Three years after the transfer, the inspector resigned from the lower level position. Subsequently, the former inspector was recommended by a selection panel for a position with the mining regulator, but the CEO of the mining regulator withdrew the position, allegedly, two weeks after the former inspector had been recommended for the position (Griffith, 1999).

These sets of allegations describe situations for allegedly captured organisations, both from the private and the public sector, that are analogous to the 'No Refereeing' rule drawn from the RL scrum.

The 'No Complaints' Analogy

Here, the analogy suggests that, where 'capture' has been established, it is the practice of those participants who are not presently benefiting from the captured situation, or are being disadvantaged, to wait without complaint for the time when the capture situation will work for their benefit too. In Rugby League, the benefit from not complaining comes to the disadvantaged team when it becomes their turn to put the ball into the scrum tunnel.

Sunday (2002) described the situation where the drug companies, whose practices might be susceptible to scientific criticism, were major providers of funding for medical research – medical researchers, by not criticising deficient science reported by their colleagues, were keeping open their options for gaining research funding from the drug companies in the future.

Rule (2002) reported on a practice within a police force of fabricating evidence to convict persons that the police were convinced were guilty – 'noble cause corruption' it is termed in the article. Presumably, other officers did not report the corruption because of the 'noble cause' that they all served. News reports subsequent to Rule (2002) indicate that the police informer described in the article is being asked to also inform on a death-in-custody scandal for which 17 police, who were on duty at the police station where the death occurred, refused to give evidence to the coronial

inquiry into the death – the police informer was one of the 17. Solidarity ensured that any police officer would be protected for any corruption, noble or otherwise, that the officer might be involved in, currently, or in the future.

The capture-upon-capture alleged in O'Malley (2002) concerning the environmental management of mining continued during governments from both sides of politics – this would be a case of 'bipartisan capture' if the allegations were confirmed.

Again, the behaviours of members of allegedly captured organisations would appear to follow the 'No Complaints' analogy drawn from the Rugby League scrum.

The 'No Push' Analogy

This analogy indicates that the captured regulator will put very little effort into inspections where the 'outcome' of the inspection is predetermined.

Thus O'Malley (2002) reported that the environmental authority, during 2000/01, completed only 20 compliance audits of 1400 active mines. Walker (2002) reported that the insurance regulator received one day of training in the subject area for which he was employed as the analyst.

Here, too, the 'No Push' analogy appears valid.

The 'No Hooker' Analogy

The point to this analogy is that, in a situation of capture, people with abilities, integrity, qualifications or other success attributes will not seek a career in the critical 'hooking' position. One program of The Sunday Footy Show (Lang, 1999) included commentary by a former Australian representative hooker, Mr John Lang, that scrums do not have to win the ball anymore, and so the hooker in the scrum has been replaced by a kind of "heavy duty halfback".

Austin (2002) contains commentary from a senior university lecturer in law that the legal opinion, relied on by the various watchdogs who are refusing to act on the destruction of evidence of child rape and child abuse, would fail a first year law exam. The legal verdicts reported by Shand (2002) and McCullough (2002), and the legal opinions offered by three QCs, one of whom is now a Justice in the High Court of Australia, would seem to support an analogy that the critical legal expertise expected of a criminal justice authority has been replaced by the expertise of a heavy duty PR officer (Franklin, 2002; Davidson and Scott, 2002).

Similarly from Lieblich (2002), the focus by bishops on victim 'healing', versus their reluctance to compensate the victims, and the statements of regret about predator priests, versus their reticence to respond to their own cover-up of the crimes of the predators, indicates a lack of religious expertise. The Catechism (undated) sets out the requirements for true penance, and includes as two of the four parts to perfect penance the steps of contrition and reparation / satisfaction. Question 209 of the Catechism asks:

How do our Acts of Reparation help us?

The answer is then given:

> ***Our acts of reparation help us to share in the infinite satisfaction offered by Our Lord for sin. They lessen the temporal punishment due to sin, which sometimes remains even after the sin itself has been forgiven.***

The analogy with the 'No Hooker' situation that, on the commentary of Rugby League experts, has developed within that game, appears to exist with allegedly 'captured regulators'. Captured regulators tend to become second class professionals.

The 'Compliance at Lower Levels' Analogy

The captured regulator, if this analogy is applicable, will continue to carry out its responsibilities for lower level issues, and save its captured behaviours for the critical, higher level issues.

Lieblich (2002) described the issue for world religious organisations, who most reluctantly appear to be moving to remove predator priests and ministers from parishes. These organisations, however, are drawing the line at sacking the bishops and cardinals who allegedly covered-up the crimes and moved the predators on to fresh opportunities for additional crimes.

A criminal justice authority was criticised in Austin (2002) for failing to follow a document trail concerning destruction of evidence of child rape and child abuse; the destruction was allegedly carried out on the order of principals of a political party in government. The same criminal justice authority, however, used covert phone taps and pursued to court a low-level operative of the opposition party over the alleged destruction of mere telephone records. The operative won a legal case against the criminal justice authority for that action.

Leggate (2002) advised that, during his time as a mine inspector, he experienced relatively easier processes in getting 'Show Cause' orders against small miners. Leggate alleged that, in recommending that a 'Show Cause' order be issued against a big Australian mining company, the executive of the mining regulator opposed the action on the basis that the order would embarrass the big miner. Leggate recalled that the only prosecutions lodged were against small mining companies, at a time when the damage being done to the environment by 40 large mines was estimated to cost taxpayers $1billion to arrest. O'Malley (2002) reports on the need that small miners have expressed for assistance to ensure their compliance with the environmental conditions of their leases.

Southwell (2002) reports an inquiry into a regulator that prosecuted a small family factory on the same day that it decided not to prosecute a multi-national releasing pollution flows exceeding emission limits by 700%.

Again the analogy appears useful for identifying when organisations are exhibiting captured behaviours.

The 'Preference-for-the-Sham' Analogy

The state of capture could not be said to exist if the regulation or rule that the captured regulator was ignoring was simply done away with or deleted. Rugby League has gone some way to diminish the rule (see below), but the rule requiring a feed of the ball into the tunnel still exists. Scrums are part of the culture of the game, and it has been judged unmarketable to do away with the scrum altogether.

The notion of removing the unwanted rule is not discussed in the news media reports from the study period from which this paper has drawn alleged examples of captured behaviours. There is no proposal to change the law so as to allow companies to falsify their Profit and Loss Account, to permit police to break the law in securing convictions, to make lawful the destruction of evidence, or to categorize paedophilia as a special kind of love. The value systems in which the community trusts would not contemplate such distortions. While the criminal justice authority relevant to the allegations in O'Malley (2002) may have claimed that everyone knows that the environmental laws concerning mining are not being enforced (CJC, 1997), no mining company has ever admitted this wrong.

The absence, in all the articles, of any discussion about doing away with the rule ignored by the captured regulator, is thus the demonstration of the 'Preference-for-the Sham' behaviour predicted by the Rugby League analogy

In summary, then, seven behaviours associated with the Rugby League scrum appear to have strong similarities to the behaviours described for organisations allegedly subject to 'capture'.

It might be said then of organisations that are proven to be captured, that such organisations have **'the integrity of a rugby league scrum'.**

These seven analogies have been argued and analysed in one direction only - from the observed RL scrum behaviours to the behaviours of participants in a state of regulatory capture. The analogy device might also work by asking a question about captured regulators, and then revealing what the corresponding answer was for the Rugby League scrum. Two issues that attract this latter approach are:

- The causes of regulatory capture, and
- The tactics used to defend the captors and the captured regulator

The Causes of Regulatory Capture

Briody and Prenzler (1998) attributed the occurrence of regulatory capture to either 'systemic capture' (procuration of an entire regulatory system by the regulated industry) or 'undue influence' (personnel exchange, identification with values through frequent contact, direct corruption). Their paper was heavily influenced by the disclosures of Jim Leggate before the Matthews Inquiry (Matthews QC, 1994); their paper concluded that there was a strong prima case of capture of the mining regulator reported by O'Malley (2002). The paper explained the cause of capture for the mining regulator as a tradition of under-enforcement based on a non-prosecutorial history. So

capture can become ingrown, cultural, inherent. The Briody and Prenzler (1998) paper was complimented by the West Australian Royal Commission on Finance Broking (Temby QC, 2001).

Grabosky and Braithwaite (1986) describe circumstances where 'capture' is more readily effected. These pre-conditions include where only one industry is being regulated, where the regulator is part of a larger organisation, where there is conflict between the regulator and the regulated, where regular contact occurs between the regulator and the regulated, and / or where significant personnel interchange occurs between the regulator and the regulated.

An additional comment by Briody and Prenzler (1998), on the significance of threats to agency survival on an agency's behaviour, corresponds with the author's views on causes of capture. The author (McMahon, 2001) prefers a concept of self-capture, internally organised and orchestrated, because of some 'impossibility' that the executive of an organisation sees or perceives about their strategic situation.

With Rugby League, a need was perceived to make the scrum contribute to the entertainment value of the game (The Sunday Footy Show, 1998). League authorities gave up on efforts to reduce delays at scrums (scrum collapses, wheels and movement of the scrum before the put-in, scrum break-up, incorrect formation of the scrum). Coaches and players had worked out the best tactics for winning the ball, and these tactics made, in engineering terms, for an unstable scrum formation (Wright, 2002). Referees were selected for their abilities to ensure a quick scrum – referee policies for immediate put-ins and for a 'one scrum, one result' rule had not achieved a streamlining of the performances of players at scrum (The NRL Footy Show, 2001). In evaluating the 'one scrum, one result' performance of a referee, a completed scrum was valued at five times the value of the referee blowing his whistle to award a penalty. The culture of the game was anti-whistleblowing.

On the other hand, the traditionalists still regarded the scrum as an essential component of the game (The Sunday Footy Show, 1999; The NRL Footy Show, 2001).

The solution was seen to be to make the scrum a nil contest, by allowing the halfback to put the ball into the second row tunnel rather than into the tunnel between the opposing front-rows. As the game's current top referee stated recently (with some nostalgia), *'in those days the ball had to go into the middle of the scrum'* – but not so these days (Harrigan, 2002).

In overview, then, all the ideas of Briody and Prenzler (the culture against 'whistleblowing'), of Grabosky and Braithwaite (the position, characteristics, and ex-player dominance of the referees associations), and of the author (the strategic marketing 'impossibility', to the governors of the game, of scrappy, time-wasting scrummaging) gain support from the capture effected over the Rugby League scrum.

The Tactics of Justification

Captured organisations are criticised for the inappropriateness / illegality / immorality / etc of their actions, and for the lack of independence / integrity / accountability / etc of their decision-makers.

Tactics described in the set of recent news articles used to introduce this topic were directed at defending the actions of the allegedly captured organisations. Claims were made that it was legal to destroy evidence before the police arrived or before the plaint was served (Shand, 2002; Austin, 2002; McCullough, 2002). The non-enforcement reported by O'Malley (2002) was defended at the Connolly-Ryan Inquiry with the argument that it was not official misconduct not to enforce the law, because everyone knew that the law was not being enforced (CJC, 1997). The regulator reported on in Southwell (2002) claimed that the breach was only a 'technical breach', and Austin (2002) reports the regulator as saying behind the scenes that the whistleblower and the news reporter who are supporting the campaign for prosecution are 'obsessed'. Shand (2002) and Southwell (2002) report in turn an 'enforcement policy' not to enforce environmental breaches, and a documentation retention policy not to retain documentary evidence.

The generic tactic is to downgrade the offence by the party under the protection of the regulator to no offence, or even to spin it into good government as part of a deceptively named policy. The purpose of the tactic, however, is to make the breach the argument rather than the non-prosecution of the breach, as it is the latter that is the greater threat to the regulator – for the latter proves 'capture'.

These recent news articles also described tactics used to defend the credibility of the organisations allegedly displaying captured behaviours. Lieblich described arguments in defence of churches, that it was only a 'tiny minority of priests' who were abusing children (when the executive of regions of the church had been protecting them). The criminal justice authority featured in Austin (2002), in Connolly-Ryan (1996-7) and in Matthews QC (1994) runs PR articles claiming a course of continuous improvement (Franklin, 2002), without any action to address the outstanding issues voiced in Austin (2002), Connolly-Ryan (1996-7) and Matthews QC (1994). The mining industry that allegedly has captured regulators in two Australian jurisdictions, produced an 'Ethics Policy' to ensure that it would be able to:

> ***refute any suggestion that detailed Government regulation of its members activities might be justified***

The generic tactic is to separate, by distance, by time, by name, by intent, by ethics policy, by any factor plausible, the executive of the regulator from the allegations of the offence. The separation is more important than the denial of any offence, for the offence is not the threat – the threat is proof of 'capture'.

What happened with respect to the decision to turn the Rugby League scrum into a nil contest?

Rugby Football League (1988), the official rule book, stated in Section 12 Rule 6(a):

> ***The ball … must be put <u>into the centre</u> of the tunnel formed by the opposing front row forwards.*** (Underling added.)

In 1993, the Official Rule Book of international laws was replaced by referees manuals, such as QRL Brisbane Division Referees' Association Inc (1993). These manuals had both laws and 'Policy'.

The law on putting the ball into the scrum was not changed, but the policy read:

> ***In general there are three outcomes expected:***
> ***1. That it look like a scrum***
> ***2. The ball gets into the scrum***
> ***3. The ball emerges cleanly from the scrum***

Under an explanation of 'policy' plank No. 2, the policy adds (underlining added):

> ***THE BALL GETS INTO THE SCRUM***
> ***This statement would seem simple enough. However, the greatest complaint about scrums is about the feed. We must accept that the spectators, players and administrators expect that "whoever puts the ball in wins".***
> ***…***
> ***The rules state clearly that the ball must strike the centre of the tunnel. Unfortunately, this is nearly <u>impossible</u>.***
>
> ***The halfback feeding the scrum must:***
> ***a. …***
> ***b. …***
> ***c. Ensure the ball strikes <u>the ground between</u> the two front rows***

No longer does the ball, by policy, have to be put into the centre of the tunnel.

So the 'policy' was the instrument designed to over-rule 'the law' – the perfect analogy for the generic tactic inferred from observations of behaviours of regulators under allegations of being captured regulators.

Note also the role played by a perceived 'impossibility' in justifying to the referees that the referees should submit to capture voluntarily – what this author terms 'self-capture'.

ARL (2002), nine years later, reads at Section 12, Rule 6(a):

> ***The ball shall be put into the scrum … by … rolling it along the ground <u>into the tunnel</u> formed by the opposing front row forwards.*** (Underlining added)

In this way, via the trick of 'policy', breach of the law became the law.

The issue addressed in Austin (2002) has risen, it is alleged, to this level where the breach of the law has become the law. The leader of the government that destroyed the evidence, and the successor who refused Morris QC permission to look at the Cabinet documents, have both stated that ten investigations have been made into the matter, and no wrongdoing had been reported. This statistic has been used by two governments as a defence for not prosecuting the alleged wrongdoers. The statistic is,

however, clear information tending to show that there may exist 'systemic capture', that is, capture of wide sections if not all of the public sector in that jurisdiction.

Further to this hypothesis that breach of the law can become the law, Wenham (2002) quotes a Committee monitoring child abuse issues, stating that:

> ***an unfortunate irony appears to be that the poor or non-existent record-keeping practices criticised by the Forde Inquiry now serve to shield institutions and the Government from successful litigation.***

There is no analogy with respect to the generic tactics in defending the integrity of the manner in which Rugby League referees apply the new RL rules; this is because the dynamics of criticism do not get a start - the RL authorities have a rule imposing a $10,000 fine for any player, referee or administrator criticising a referee in any way that brings the game into disrepute.

Captured Regulators and Impossibilities

As if to complete the deceptions associated with 'capture', the 'impossibility' used by regulators to justify their capture can be a falsehood as well.

On another TV channel is another rugby, Rugby Union, where the scrums have a specialist hooker, the forwards push to the limit of their might, the ball goes into the middle of the tunnel, and the team putting in the ball win about 85% of the scrums.

Conclusion

The Rugby League scrum provides an excellent analogy of the behaviours expected within a captured regulator.

The analogies available from the Rugby League scrum suggest that a captured regulator will exhibit the following characteristics:

- The principals of the captured organisation act in breach of the relevant laws / morals / ethics, but they rationalise and cover-up that breach by invention of policies or legal interpretations that circumvent their sin or illegality – in their contrived rationale, they are following a policy or legal opinion or protocol or procedure, not breaking a law
- The need of the policy or adversarial legal interpretation can be born from a perception, within the captured organisation, that there is some perceived 'impossibility' about the strategic situation of the organisation that is promoted by the captors. The perception can be readily shown to be a false perception
- The captured organisation selects its internal and external 'referees' – auditors, legal advisers, inspectors, investigators, consultants, researchers, ethicists, archivists, and similar - for their compliance with the policy and for their silence about the breach
- The fore-ordained result of the organisation's regulation, with respect to highly strategic events for the organisation, robs the regulator of its expertise and of its drive for the responsibilities that the captured organisation carries

- The captured organisation can pursue low level events with great vigour, even to the point of illegality, so as to convey the pretence of a dedication to duty that the captured organisation surrendered when it ignored the rules during the more strategic events.
- The captors will prefer the sham of pretending to comply with the rule rather than do away with the unwanted rule. The captors will exercise this preference because doing away with the rule would be unmarketable to the participants.

The Significance of Whistleblowers

This summary also explains the venom that captured organisations and the captors show towards whistleblowers. The whistleblower, even acting singly, impoverished in finances and power, is always so close to exposing the captured organisation. This is because the whistleblower has the integrity to say the words:

A policy cannot displace the law

or:

Non-enforcement of the law is itself a breach of the law

and the captured organisation can be destroyed by the whistleblower's exposure of the sham and the pretence.

Destruction is now a prospect for certain national legal firms (Shand, 2002), a world auditing and accounting partnership (McCullough, 2002), and religious organisations and dioceses (Lieblich, 2002), because others are saying these words in different jurisdictions across the democratic world wherein these words are the truth.

For this reason, two whistleblowers from an Australian jurisdiction yet to recognise the truth of these words, have been declared 'Whistleblowers of National Significance' by Whistleblowers Australia. These two whistleblowers, Messrs Kevin Lindeberg (destruction of evidence required for court and revealing child rape and child abuse) and James Leggate (non-enforcement of environmental legislation), are saying these words about matters of significant importance to the community, its morality, its ethics and its justice.

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