

Dr Michael Cole

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Mr Patrick McClure, AO
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By email

Dear Chairman,

Review of the Australian Charities and Not-for-profits Commission (ACNC) legislation

The Australian Charities and Not-for-profits Commission (ACNC) legislation has provided some excellent innovation in the regulation of not-for-profit (NFP) and charity organizations. Unfortunately there is no palpable regulation of not-for-profit organizations by the regulator, NSW Fair Trading.

There are, in my opinion, three areas in which there is some scope for change. They are the issue of 'regulatory capture', the inappropriateness of 'accountability to members' in some organizations and finally the confusing terminology of the *Associations Incorporation Act* (in this case 2009 (NSW)) ('*AI Act*').

Regulatory Capture occurs when the regulated have the power and opportunity to control the regulator instead of the other way around. This occurred, for example, when Lynn Simpson was fired by the Department of Agriculture at the request of the live meat industry. 'the Government did remove Dr Simpson because of pressure from the live export industry. Ms Schneider writes that Dr Simpson can no longer, "... continue working in the Animal Welfare Branch," because, "... the industry with which we engage has expressed the view that they cannot work with you."¹

Regulatory Capture can occur at the organizational level because the ACNC legislation requires organizations to self regulate. The regulator (the Board) and regulated (management) are both in the organization. It is suggested that the ACNC as the higher regulator may need to prevent regulatory capture at the organizational level.

¹ James Thomas, *A government vet has been removed after exposing the appalling conditions on live cattle export ships* (22 July 2016) ABC <<http://www.abc.net.au/7.30/content/2016/s4487220.htm>>.

In passing it should be noted that the concept of self regulation, which some view as an oxymoron, is losing credibility. Medicine, like other professions, is no longer solely self regulated by doctors but is regulated increasingly by professional regulators.

I have become aware recently of a not-for-profits charitable disability organization in which regulation is problematic. An independent investigator found that the CEO held great power over the Board (of Directors) and the Board needed to 'review their knowledge' of governance requirements. The Board and CEO simply rejected the investigator's report. The CEO had direct control over who the Directors of the Board were and were not, and arranged the nomination, paperwork and election of Directors. The CEO sat in on virtually all of the Board meeting and meetings, was on the Board email list and was on the so called Executive Committee. The Board acts vigorously on 'requests' by the CEO including to act against particular Directors. The Board willfully disregards the rules of the association's Constitution, the *AI Act* and *Regulations* in removing Directors who oppose the CEO. The CEO is, in my opinion, a de facto or shadow director of the organization (though the *AI Act* requires that no Director may also hold a paid position (like CEO) in the association). The CEO controls the membership of the organization by not transparently promoting membership and influencing the Board to approve or reject membership applications.

The inappropriateness of 'accountability to members' in some organizations is demonstrated by the fact that in a disability organization the beneficiaries of the organization are the disabled, not the members. The members of the organization are usually the parents or guardians of the disabled and other volunteers and interested parties. It is suggested that some consideration be given to legislating that the organization should be run 'for the benefit of the stated beneficiaries of the organization' rather than 'for the benefit of the members'. And some consideration should be given to whether accountability and fiduciary duty should be to the beneficiaries rather than the 'members'.

In the case of the regulatory capture mentioned above the 'members' are almost all appointed by a process controlled by the CEO.

The confusing terminology

Under the *AI Act* and *Regulations* the terms 'member' and 'committee' have more than one meaning. The term 'member' can mean either a member of the association or a member of the committee. A member of the committee is what would be called a Director of the Board under the *Corporations Act 2001* (Cth). In practice a committee can call itself a Board and then delegate some duties to one or more committees. The term 'committee' could then mean the Board itself or a sub-committee of the Board.

Summary

The review is invited to consider the prevention of regulatory capture of a Charity's or NFP's regulating committee or Board. Accountability may need to be wider than just to 'members'. Perhaps 'beneficiaries' may be more appropriate. Mention has been made of the confusing terminology introduced by other legislation.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Michael Cole". The signature is stylized with a large, rounded initial "M" and a cursive "Cole".

Michael Cole