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Navigating Murky Waters

characterising capture in environmental regulatory systems

Abstract

Regulatory capture is the quest by vested interests to exercise excessive influence on one or more aspects of a regulatory system. While conceptually simple, it is difficult to define and thus hard to diagnose and mitigate. In the environmental arena, sound regulation is at risk from, among other things, amorphous and contested conceptualisations of the 'public interest', politically salient asymmetries and scant institutional recognition of the breadth and depth of capture impacts. This article examines some indicative scenarios to illustrate potential impacts of capture and characterise motivations, conditions and outcomes that enable capture. We propose a wide-boundary definition which frames capture as a risk present throughout a regulatory system and delineates several potential types of capture and their characteristics.

Regulatory capture refers to situations when vested or special interests succeed in exercising excessive influence on institutions and systems that are ostensibly designed to protect the 'public interest'.[1] Our focus is on regulatory capture affecting environmental values and outcomes, which is but one dimension of the public interest. We contend that the outcomes sought from environmental regulatory systems will continue to be undermined unless the harms associated with regulatory capture are recognised and mitigated. Weak or narrow definitions, and scant guidance for policy and regulatory agencies as to how best to diagnose and mitigate capture, enable its perpetuation and the consequential harm to the environment.

Regulatory capture can be mistaken for the democratic power bestowed on our politicians working as it should. Weak controls on democratic institutions such as election funding, political donations and transparency of engagement by elected officials all confound detection of improper conduct in the political realm. Thus, the core challenge in managing regulatory capture lies in recognising where vested and public interests align and where they don't. This demands transparency and rigour often not present in New Zealand.

Some important definitions before we start

Defining regulatory capture relies on a clear understanding of several underlying terms: what is a regulatory system, who or what are 'vested interests', and what is meant by 'the public interest'. We address each in turn. Of the three, the definition of the public interest is the most highly contested, and we cannot pretend to have resolved that here.

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A key driver for proposing a broad definition of capture is to better support its diagnosis and mitigation throughout regulatory systems. We observe a disproportionate focus on managing regulatory capture on the front line of enforcement agencies, without due attention to the potential of vested interests to warp earlier decisions.

We rely on the definition of a regulatory system from the Ministry for Regulation:

> A regulatory system is a set of formal and informal rules, norms and sanctions, given effect through the actions and practices of designated actors, that work together to shape people's behaviour or interactions in pursuit of a broad goal or outcome. (Ministry for Regulation, n.d.b)

Taking a system view of capture better enables effective management and matches the scope of important responsibilities such as regulatory stewardship.

Managing the risk of excessive influence of vested interests on regulatory systems necessitates their definition. Vested interests (sometimes called special interests) can be characterised by having narrow interests that they promote generally at the expense of the public interest. Duncan and Chapple define the term as one which:

> refers to a person, group or firm that wields sufficient economic or political influence to shift decision-making processes in directions that would favour themselves and do injury to the social interest. Here a vested interest is a type of political or economic interest, or related interest group, which has a stake in maintaining or producing a state of affairs that may not coincide with, or may even harm, the public interest, and which enjoys an advantage over others in achieving its objectives. (Duncan and Chapple, 2021, p.5. For further discussion of vested interests, see James and Argyle, 2014.)

A conclusive diagnosis of capture will require a clear notion of what those interests are in the circumstances. Therefore, the final critical underlying definition is that of 'the public interest'.

Members of society generally underestimate their reliance on healthy ecosystems and thus the 'will of the people' commonly diverges from the outcomes that might optimally protect environmental values and associated wellbeing.

The 'public interest' is commonly referenced but rarely precisely defined. It is very much more complex than, in our context, simply private interests versus protection of the environment. Multiple and competing interests, aspirations, values and motivations to organise, advocate and influence must be weighed at every scale. Consequently, different actors with particular values, perspectives and motivations will define the public interest quite differently, often leading vested interests to depict their interest as being the public interest.

Similarly, variation in the purpose and context of different statutes (e.g., the Official Information Act 1982) results in a range of public interest definitions and ways it may be considered in practice (e.g., van der Heijden 2021; Ombudsman, 2019). So, given the chimeric nature of public interest definition, we suggest that clarity about the extent to which the different aspects of the 'public interest' are being served is probably the most feasible basis for analysis of capture.

Appreciating the contested meaning of the public interest, we lean on the analytical definition of the public interest put forward by Brian Barry. Barry defined the public interest as 'those interests which people have in common qua members of the public' (Barry, 2010, p.134). Barry defines 'the public' as any number of representations depending on the context and determined by how they might be affected as consumers (ibid., p.136). Defining 'interest' sees Barry distinguish from the many and mixed possible interests in an outcome that an individual might have, in defining their 'net interest'. The challenge was to identify the best course of action given all the multiple possible and competing interests. Such an undertaking is challenging in the abstract, but we contend more easily able to be determined in relation to a specific set of circumstances.

In terms of the protection of nature, further complexities arise in respect of the public interest in a healthy environment. The pursuit of other interests commonly comes at the expense of the environment. Members of society generally underestimate their reliance on healthy ecosystems and thus the 'will of the people' commonly diverges from the outcomes that might optimally protect environmental values and associated wellbeing. Further, the chronic and slow-moving nature of many environmental issues can mean the cost of pursuit of other interests is muted further in the system, a price to be paid by as yet unborn generations.

Turning to regulatory capture

Regulatory capture became recognised as a phenomenon following George Stigler's discussion of the economic theory of regulation, in which he posited that regulation is shaped not only by the desire to protect the public interest by correcting market failures, but also by the regulated community (Stigler, 1971). Regulatory capture is widely cited as a driver of environmental harm, and other adverse public interest outcomes in regulatory systems (Borges, 2017), though not always supported by a rigorous definition (Carpenter and Moss, 2013). Regulators commonly discuss it, sometimes gingerly,

but acting upon concerns about it may be rare (Pink, 2024). Corruption is well recognised as a key impediment to environmental protection, including climate change (see, for example, UNODC, 2024), and the most common form in liberal democracies is 'trading in influence' (Johnston, 2005).

Carpenter and Moss (2013) and later Lodge (2014) identified regulatory capture as:

> the result or process by which regulation, in law or application, is consistently or repeatedly directed away from the public interest and toward the interest of the regulated industry, by the intent and the action of the industry itself. (Carpenter and Moss quoted in Lodge, 2014, p.539)

The New Zealand Common Capability Compliance Programme defines it as 'when an official inappropriately identifies with the interests of a person or organisation from the regulated sector, rather than the public interest' (Manch et al., 2011, p.94). Newly minted 'quick guides' from the Ministry for Regulation define it thus: 'Regulatory capture happens when a regulator puts the interests of a group above the public interest and the outcomes of the regulatory system. The result is the regulator acting in ways that disproportionately benefit parts of an industry it is regulating' (Ministry for Regulation, n.d.a, p.4).

Various perspectives in the international literature offer alternative definitions (see, for example, Dal Bó, 2006), but the core theme is an intentional drive to warp the activities of a regulator to act in the interests of the regulated, potentially at the expense of the public interest. Capture can have an impact on the full scope of a regulatory system in various ways; however, in New Zealand focus has been largely on the operational front line of regulatory agencies. Such uneven attention means that the impact of capture on earlier stages of the policy cycle (e.g., agenda setting, policy formulation) is only weakly addressed in practice. We suggest that a broader definition of regulatory capture supported by an explanation of underpinning concepts can help enable proactive identification, diagnosis and mitigation and so avert the more egregious forms of regulatory capture. While we focus on regulatory capture linked to environmental harm, we suggest that the definition and characterisation of capture will have application across any regulated domain.

Robust and consistent definition and diagnosis of capture at both conceptual and practical levels is challenging because of the amorphous nature of underlying definitions, low awareness or understanding of risk of capture, and weak transparency of policy and regulatory decision making.

Regulatory capture is a risk associated with the normal activities of policy and regulatory agencies. The challenge lies in how to perform normal activities while avoiding capture. For instance, policy consultation is both a protection against capture (by requiring agencies to take heed of diverse viewpoints and avoid the blinkered view that often characterises a captured entity) and an opportunity for regulated parties to gain excessive influence. Cooperative alignment between regulators and regulated parties presents one suite of risks, while adversarial relationships present a different suite. We also contend that other relationships between agencies, communities and the private sector may also benefit from a clear characterisation of inappropriate levels of influence (e.g., funding and sponsorship arrangements and commercial partnerships).

But how much is too much? When does consultation and engagement with regulated parties constitute or at least lay the foundations for capture? Its definition must not constrain effective engagement with regulated parties (whose interests will be driven by a combination of public and private benefit), robust evaluation of regulatory instruments or information sharing as these are essential for efficient and effective policy.

Towards a sharper definition

Given the scale, pace and existential consequences of the burgeoning meta-crisis (Merz et al., 2023), and the particular consequences for nature in Aotearoa New Zealand (Macinnes-Ng et al., 2021), there is a rapidly closing opportunity to modify and constrain the behaviour of vested interests. Better definition and characterisation of regulatory capture could contribute to this adjustment. Providing clear definitions and ways of thinking about capture supports efforts by agencies and civil society to weed it out and withstand it in practice. Riches (2023) referred to the risk of 'grooming and capture' as 'ever present within regulatory organisations'. A consistent failure to detect and address capture can also result in regulated parties climbing an 'epistemic ladder' – perpetuating harmful behaviours with increasing brazenness, with spillover effects into other regimes (Saltelli et al., 2022). Thus, we suggest that the most pragmatic approach is to recognise capture as a risk to be mitigated due to its adverse effects and the fact that it will worsen if unchecked.

Society bears the cost of poorly designed environmental laws that cannot achieve their purposes. Further, weak implementation of these laws diminishes the societal benefits of a healthy environment, while a privileged few gain material (usually economic) benefits. Capture is context dependent. It arises from the private economic opportunities

and regulatory design and delivery characteristics that incentivise behaviours at odds with achieving intended public interest outcomes.

Robust and consistent definition and diagnosis of capture at both conceptual and practical levels is challenging because of the amorphous nature of underlying definitions, low awareness or understanding of risk of capture, and weak transparency of policy and regulatory decision making. Regulatory capture behaviours can be easily 'explained away' as they tend to be more subtle, insidious and concealable than more blatant forms of corruption. How capture behaviours develop and where normal practice ends and impropriety begins can be difficult to delineate. This is because impropriety is more easily camouflaged, hidden and denied than proven. On top of that are compelling incentives for policy and regulatory staff to look the other way rather than be the whistle-blower suffering career-limiting consequences. This ambiguity confounds capture's detection and management, allowing it to perpetuate.

A proposed way forward

In this article we:

- propose a wide-boundary definition that takes account of the diverse ways in which capture can manifest in a regulatory system;
- identify a range of illustrative examples that may be evidence of capture;
- propose a broad methodology to establish an evidential basis for capture diagnosis based on the motivations, conditions and consequences of observed actions;
- demonstrate the strategies which can be adopted by vested interests to achieve excessive influence on the regulatory system;
- propose some mitigations for capture in the design and monitoring of regulatory systems.

A proposed definition

We define regulatory capture as: the processes and conventions by which vested interests excessively influence a regulatory system, becoming particularly problematic if the public interest is undermined for the benefit of regulated parties. Capture may range from subtle to blatant and have impacts from individual transactions to constitutional settings. It can occur at all stages of the political and policy cycle and at agency and individual levels. Its impacts are typically cumulative in increasing the likelihood that the public interest outcome(s) of the regulatory system will be compromised.

What capture might look like – some examples

We contend that regulatory capture takes place at all levels of the regulatory system, including the political sphere (noting the interplay with democracy mentioned earlier), in policy and regulatory agencies and in the particular behaviours of individual actors. In Table 1, the authors compile and describe a suite of familiar scenarios that policy and regulatory agencies encounter to illustrate the potential impacts of capture. Then we move on to suggesting a systematic process of diagnosis.

Diagnosing capture

Defining what influence is 'excessive' is contextual and dependent on motivations and outcomes. A robust diagnosis of capture requires analysis based on evidence pertaining to all three dimensions. We contend that for capture to be present the following criteria must be met, often as part of a repetitive pattern of behaviour choices:

- the *motivation* behind the behaviour is to secure personal or sector benefit, which will arise generally at the expense of the public interest;
- the *conditions* in the regulatory system have allowed the capture to occur

Table 1: Indicative scenarios to illustrate potential for capture and the likely impact of that capture in different parts of the regulatory system (compiled by the authors based on experience)

Influence	Issue	Consequences
Controlling priority of regulatory development or review at political and agency levels	Delaying or disincentivising interventions that control extraction/development	Reduced likelihood of effective regulation of full suite of harms, (see for example Urlich & Mawardah, 2024) enabled by a range of factors such as uneven policy analysis (Disproportionate regard for impacts on regulated community, such as RIS that emphasizes costs to sector over costs of inaction/BAU or harm to public goods)
Controlling relative stringency of regulatory control compared with comparative or less potentially harmful uses	Reduced focus on or express leniency towards some activities compared with others (e.g., through carve outs and exemptions)	Absence of an even playing field whereby adverse effects are controlled to the extent the targeted activity or sector wields political power, increasing the risk of harm to the environment.
Abrupt changes in policy direction that diverge from urgent policy responses required	Repeal or replacement of policy instruments, without evidence that change is needed (e.g., the regulatory framework is not fit for purpose)	Undermines public participation and results in wastage of embedded energy in processes
Politicised selection processes decision-making panels and boards	The 'stacking' of panels with industry representatives where a more balanced configuration is more appropriate	Decisions more likely to favour vested interests and discount impacts on the rest of society. May lack sufficiently broad governance skills and topic understanding.
Political power of resource users has a chilling effect on regulatory functions	Weak funding of regulatory functions and limited support for executing the function	Neglected regulatory role lacks visibility, detection and addressing of offending is challenging and decision-making skews outcomes towards leniency. (see Manch 2017 for an analysis of good regulatory decision-making including the importance of apolitical decision-making)

Influence	Issue	Consequences
Revolving doors: Frequent and unchecked exchange of staff between the regulator and the regulated community	Industry sourced staff do not deliberately 'change hats'. They use their knowledge or connections to undermine regulatory regime. This is aggravated by usually weak controls and limited or no 'cooling off' periods between roles.	Improper behaviour that advances interests of regulated parties over the public interest and/or over competing regulated parties.
Targeted consultation that favours vested interests over public interest advocates	Consultation minimum requirements are met without recourse to diverse views and consideration of wider matters including distributional impacts	Policy settings fix in place a weak or ineffectual regime that may have adverse consequences or be highly challenging to implement (e.g., may not address the intended harms effectively, may be inefficient to implement or may lack key elements such as sufficient powers of entry/sanction)
Culture of advancing positions of policy that favour industry interests over the public interest.	Weak or patchy regulatory control of high harm activities including a reliance on ineffective voluntary mechanisms	Failure to maintain an even playing field can cause disharmony with adjacent regulated parties who incur higher compliance costs than sectors with equal or greater impacts.
Lenient regulators against repeated non-compliance by powerful industries	Uneven treatment of regulatory expectations depending on political power of the industry in question compared to others	Weak implementation on the regulatory framework, including an emphasis on non-statutory interventions like 'education' in more scenarios than appropriate and a failure to appropriately escalate compliance actions to address poor behaviour.
Political hostility to oversight reduces rigour and frequency of evaluation	Insufficient stewardship and monitoring of the regulatory system as it is under implemented.	Lack of stewardship removes prospect of structured evaluation and detection of failures before they are crises that cannot be disguised
Culture of reticence to regulate	Individuals and agency not geared towards effective enforcement or good regulatory practice (customer service vs. public interest oriented)	Agencies less likely to recommend or develop stringent policies, to monitor proactively or to take decisive enforcement action (especially re more serious sanctions). This issue can reinforce itself by not having sufficient expertise and oversight to detect the issues with the regime being weakly implemented or see the risk.
Receipt of inappropriate gifts	The receipt of inappropriate and/or undeclared gifts or donations from regulated parties for individual officers in a regulatory system	Officer bias including making findings or recommending options more aligned to regulated party interest than public interest. This limits the regulators effectiveness at safeguarding the public interest.
Conscious or unconscious chilling of advice to appease those holding political power	Failing to clearly articulate the costs and benefits of a policy or otherwise skewing advice to favour vested interests	Officer advice to management or governance tacitly or explicitly chilled by individuals or teams under excessive influence
Individual or team reinterpretation of statutory intent	Staff do not correctly implement legislation, implementing requirements more aligned to the interests of the powerful than the public interest	Erosion of rule of law, and reputational risks for the agency. See further Tadaki 2020 for a discussion of the nuance of the exercise of bureaucratic discretion in a named government agency
Obfuscation of information that demonstrates environmental risk by agencies or regulated parties to delay intervention	Information on environmental quality or threats to it are consciously or unconsciously obscured or downplayed, particularly in public reporting	Lower likelihood of issues being prioritised in the policy or regulatory work programme due to a perception that risks are lower than they are (see Joy and Canning for a discussion of capture as it might relate to environmental information and limit setting)

(noting that capture is rarely expressly unlawful);

- the *consequence* of capture is adverse for the public interest.

Unpacking the three elements helps diagnose capture and mitigate it.

Motivation

In environmental law, the benefits of limited or weak regulation are typically concentrated, and thus accrue to a few (i.e., a small minority of the population), while the costs are widely dispersed, and often over multiple generations. Defensible diagnosis of capture relies on identifying the motivations for exercising excessive influence. The resources available to vested interests, and the incentive to organise effectively, can enable much greater (and potentially excessive) influence to be exerted compared with the diffuse and disorganised interests safeguarding public goods (King and Hayes, 2018). This behaviour is not necessarily confined to regulated parties, either. Some or all of the characteristics of capture are evident, for example, in most instances of 'NIMBYism', improper inter-agency pressure, and some of the activities of narrow public bodies. Being clear about the motivation is important: successful influence from the campaigns of civil society organisations advocating for the public interest is unlikely to meet the definition of capture.

Conditions

It is often difficult to distinguish settings that enable capture (which may be an outcome of previous capture action) from extant capture. Conditions in the

regulatory system can drive capture behaviours without the conscious intention of individual actors in the system. We suggest that both system conditions and individual behaviour are usually relevant and should form part of any specific or general analysis focused on capture. For example, a shared cultural identity of the policy agency and/or the regulator with the regulated parties can lead to regulated parties benefitting at public expense (Alves de Lima and Fonseca, 2021). Shared culture also discourages critical questioning of industry perspectives and promotes the view that regulated parties are 'customers' to be served (Wauchop and Manch, 2017; see further Ministry for Regulation, n.d.b) and their interest is indistinguishable from the public interest.

Agency culture is a powerful condition, and many concerning behaviours can be thought of as 'just the way we do things' and deeply embedded in practice. The New Zealand Productivity Commission's analysis of our regulatory institutions and practices highlighted the importance of agency culture as an underlying driver of or mitigating factor against capture. The report noted that, for example, internal cultures that valued evidence and promoted openness and transparency and standards of independence and impartiality likely made entities more resistant to the influence of capture than where those settings were sparse. Conversely, poor culture can provide implicit and explicit incentives that promote capture (e.g., preferentially advancing those individuals who are more likely to be most sympathetic to industry interests).

Consider, for example, an individual officer working in a policy or frontline implementation role, moonlighting as a regulatory consultant to the regulated community they have oversight of. While an egregious and concerning behaviour choice, it is only possible to do it in the absence of successful detection strategies operationally and with (presumably) a perception of trivial sanction. Behaviour and conditions should be considered together, and efforts to curtail impropriety focused not only on the individual's choice, but on the conditions that provided the fertile ground for that choice. Both require a response.

> We do not differentiate a type of capture as 'political' capture because in our view all capture, at its core, is political, because it pertains to public choice.

Consequences

We agree with previous authors that the magnitude of regulatory capture's impact is the extent to which it drags the system outcomes away from the public interest outcome sought (e.g., Carpenter and Moss, 2013). This critical distinction of consequence is what separates influence with pro-social and pro-environmental outcomes from excessive influence driving adverse and anti-social consequences. The influence of civil society groups in protecting public goods is different from the self-interest inherent in vested interests exerting their influence on a regulatory system, as noted earlier. The delineation therefore partly lies in the ultimate outcome (i.e., the consequence for the public interest).

Capture strategies

Regulatory system integrity is compromised with repeated failures to prevent poor decision making. Structural choices, settings and day-to-day behaviours of individuals can become so embedded that they skew agency activities to the extent that they no longer reliably act unambiguously in the public interest. In Table 2 we identify some different capture strategies according to the way in which they are likely to undermine the integrity of the regulatory system.

We do not differentiate a type of capture as 'political' capture because in our view all capture, at its core, is political, because it pertains to public choice. Note that unlike many authors, we purposely exclude 'systemic capture' from the typology. This is because we suggest that 'systemic capture' results from different drivers of excessive influence and is more a measure of severity than a defining feature of capture itself. The list is not exhaustive; further types are likely to exist. The list below is compiled from the literature where noted, in addition to unpublished examples.

Further characteristics of capture

The self-perpetuating nature of capture arises when drivers cascade through the system, starting with compromised problem definition and policy ideation and continuing to include weak regulatory constraints on economic opportunities from flawed policy processes, underfunded agencies with weak mandates, permissive consenting, ineffective offence detection, dilatory enforcement, curtailment to powers of sanction and inadequate performance monitoring. We contend that an integrated definition (supported by an understanding of key characteristics) is necessary to curtail the 'capture cascade'.

Dye behaviour is in some ways analogous to capture. Imagine a river representing a policy process flowing into implementation. Along it are intakes coloured dark purple, denoting excessive influence (capture). On the other side of the river are intakes of clear and clean water, representing checks and balances in a system designed to safeguard the public interest. Effective capture produces deeply discoloured results, while effective mitigations dilute it. If vested interests excessively influence early aspects of the policy process such as agenda setting or regulatory impact analysis, this can 'bake in' (discolour) inadequacies in the policy design, leading to frontline regulators being stuck with manifestly inadequate regulatory instruments, capacity and capability. In short, good design and review of legislation with public interest at the forefront both inoculates against permeation of capture at ideation stage and helps to mitigate it at the operational level.

Table 2: Capture strategies - a description and an explanation of the ways in which these types can manifest. Delineation of types of capture can support actors in a regulatory system to focus attention on areas of greatest risk.

Possible types of capture in a regulatory system	How it might manifest
Financial capture – using monetary contributions to influence or attempt to influence a regulatory system	Resourcing from regulated parties and allies are used to shape policy and implementation delivery. Examples of where these behaviours may arise include • funding of research by industry • funding of political parties and candidates that support particular industries or interests and/or influence election results (see further Rashbrooke & Marriott, 2023).
Sabotage capture – collaboration at any given stage of the policy process designed to constrain regulatory effectiveness	Participation by regulated parties in policy ideation, development and implementation processes that extends into delaying progress, limiting the scope and driving the focus of the regulatory system away from necessary public interest outcomes and/or delaying the process. Impact of sabotage capture may also include that it undermines public confidence in collaborative and codesigned processes and results in wasted effort
Information/knowledge capture – information asymmetry due to expertise and data being held by regulated parties and weak powers or willingness to compel sharing	Inability to access data owned by private entities to support analysis results in inadequate oversight and lower detection of offending. Niche, remote, highly complex and emerging industries can have additional advantage in undermining policy and regulatory functions by holding the bulk of the expertise or otherwise limiting access to operational aspects (see Holley et al, 1998), operating in remote or dangerous contexts where access and unannounced oversight is unlikely or unsafe (e.g. offshore deep-sea activities) or where transboundary impacts particularly in the global south are present.
Culture capture – influencing decision making and conduct of an agency with politicised expectations that detract from independence or incentivise inappropriate behaviours.	Chilling effect on agency conduct is achieved via politicised expectations that they should move from (or not achieve) a balanced and independent discharge of their function, often embracing ideologies such as a 'business friendly' or 'customer service' culture. Outcome is an agency less likely to develop robust policy that safeguards the public interest, or to take actions that promote public good outcomes. This can be facilitated or aggravated by executive leaders in agencies with limited regulatory experience.
Disempowerment and risk aversion capture – sustained criticism of policy and regulatory agencies via informal (media attack) or formal (threat or actualised legal challenge) that erodes their reputation/standing and drives risk averse decision making	Can result in a public loss of confidence in the agencies that might not be reflected by their actual performance, undermining their credibility and diminishing morale. Politicised actions such as the appointment of new leadership or board members to reduce the activity levels of the agency or influence decision making are also relevant here

Regulatory capture also exists on a continuum from weak to strong (see, for example, Carpenter and Moss, 2013). Weak capture is probably always present, because it is necessary and appropriate for agencies to understand vested interest perspectives and this understanding can potentially shape agency actions. Indeed, accommodating vested interests is pro-social to the extent that the public interest is not undermined. At the other end of the continuum, the consequences of extreme regulatory capture are likely to be so averse to the public interest that it might be better if the regulation did not exist at all. Pink (2024) refers to a continuum of agency descriptors spanning collaboration through to conflicted, compromised, captured then corruption. Viewing capture as a continuum supports not only identification, but risk assessment in practice.

The roots of capture and why it matters for New Zealand

A wide variety of factors influence the extent of capture in a democracy like New Zealand. Compared with many Western democracies, New Zealand has many positive features that provide a buffer against capture. These include, but are not limited to, a comparatively high level of transparency, a relatively competent public service and an independent media, in addition to the specific independent oversight roles of the Parliamentary Commissioner for the Environment, the Office of the Controller and Auditor-General and the Office of the Ombudsman.

There is growing evidence, however, that our standards are slipping, and we have been outpaced in the management of risks like capture by other jurisdictions. Recent research by Philippa Yasbek, supported by the Helen Clark Foundation, identified a significant array of concerns, and potential solutions for five key areas of central government policy contributing to corruption challenges in New Zealand. Those factors are political lobbying,[2] the management of political donations and election funding, how official information is managed and shared, foreign bribery, and weak transparency of beneficial ownership (Yasbek, 2024).

Other factors and trends which may lay foundations for capture include the increasingly polarised political context, coalition deals, the political power of the primary industries, and the dominance of neoliberal ideology (i.e., maximising externalisation of social and environmental costs to communities), which arguably set us up for extreme vulnerability in New Zealand. Examples outside the environmental space include the repeal (against official advice) of New Zealand's world-leading smokefree legislation, concerns regarding the role of ministers with lobbying histories now being in core political and decision-making roles related to their respective backgrounds (e.g., tobacco, guns), and a range of analyses that

cast aspersions on the legitimacy of decision making (such as Yasbek, 2024). These examples reflect the settings that had their origins in structural choices made in the 1980s.

We consider that New Zealand's enthusiastic embrace of the neoliberal paradigm has created fertile ground for regulatory capture, including of our environmental legal systems. Neoliberal approaches to environmental protection are characterised by limited regulation (Kelsey, 2010), a limited role of government in high-risk industries (Turner et al., 2016), weak prospects for civil society to challenge regulatory decision making, institutional design that sets up conflicts of interest (Ong, 2020) and a preference for 'flexible standards over preventive rules' (Urlich and Hanifiyani, 2024). A strong link between neoliberalism and regulatory capture has been drawn in other jurisdictions, including Australia (see Toner and Rafferty, 2024 for a variety of examples). For many policy and regulatory staff operating in New Zealand today, their entire lives have occurred within a neoliberal context, meaning that particular dimensions inherent in the model aren't easily perceptible and are seen as fixed aspects of society (Mirowski, 2013).

New Zealand's particular vulnerability to the impact of capture in the environmental sphere lies in the uniqueness of its environment and the globally significant values that are adversely affected by regulatory capture. Over-allocated catchments, rising pollution, falling fish 'stocks', continued attrition in indigenous ecosystems and declines in species even where targeted recovery efforts are in play all demonstrate the short- and long-term impacts of a failure to address drivers of harm such as regulatory capture. The parlous state of our environment means the capacity available to absorb the maladministration of human impacts on natural systems is lower than in some parts of the world and the consequences (such as losing endemic species) particularly significant.

Seeds sown decades ago

New Zealand embraced the 'neoliberal experiment' with an enthusiasm almost unparalleled globally. Central to the New

What had been envisaged as hard constraints within which business would have to operate turned out instead to be soft and negotiable limits, with contested rather than settled meanings.

Zealand neoliberal project was a package of statutes largely divorced from the public sector institutions and practices built up in Aotearoa New Zealand over the century to 1984 and designed instead to fit the extreme individualist version of public choice, with its rejection of communitarian thinking. This 'iron cage' (Bertram, 2021a, 2021b) of constraining laws has successfully crippled state activism on many fronts.

Bertram cites, among many examples, the State-Owned Enterprise Act 1986, in which profit seeking explicitly displaced public interest objectives; the Commerce Act 1986, which legalised 'excess profits' and decriminalised anti-competitive conduct; the Fiscal Responsibility Act (now part of the Public Finance Act) that entrenched low public debt and budget-balancing targets; the Local Government Act 1989, which curbed the scope and capacity of local government; and the Public Sector Act 1989, which has led to replacement of professionalism, vocational skills and a public service ethos with managerialism and silos. All of these weakened both the ability of government to act decisively to advance the public interest, and the capability of its regulatory agencies to resist capture.

In respect of environmental legislation, capture was arguably enabled in a variety of instances by a suite of international (oil price shocks) and domestic factors (e.g., the Muldoon administration's 1976–84 'Think Big' programme of industrial and infrastructure investments, with fast-track planning procedures imposed by the National Development Act 1979). The conceptual design of the Resource Management Act 1991 (RMA) was intended to lay down a clear set of explicit environmental constraints within which private business would be free to operate without detailed regulatory oversight.

In practice, things looked different. The languid approach to the production of crucial national direction and the setting of limits created ambiguity at odds with the intent. In this uncertainty and undefined context, vested interests seeking access to environmentally sensitive resources had strong incentives for opportunistic lobbying and legal action to expand the scope of their operations, and to push back against discretionary attempts by regulators to protect environmental values in the absence of clear guidelines from central government. What had been envisaged as hard constraints within which business would have to operate turned out instead to be soft and negotiable limits, with contested rather than settled meanings. To overcome this legacy, New Zealand must proactively diagnose and mitigate regulatory capture and seek to alter the settings that enable it to perpetuate.

Mitigation of capture

Once diagnosed, or where risk of capture is apparent, mitigation strategies can help avert further instances of excessive influence or reduce and even eliminate the impacts of existing examples. In this section, we briefly set out possible mitigations, but will develop these further in a future paper. Mitigating regulatory capture can occur at multiple levels in a regulatory system. The focus of agency-level mitigation tends to be operational frontline strategies (e.g., rotation of auditing staff), but much wider focus is needed to root out capture in all the places it prospers.

We contend that successfully addressing capture relies on deliberate rebalancing of power. Rebalancing refers to granting greater power to civil society and agency leadership within the political sphere, shifting it away from vested interests. Focusing attention on changing the locus of power deliberately avoids the 'solution' to capture lying merely in greater transparency (which may serve only to expose it), relying on other drivers to compel action to address it (which may not exist).

Mitigation of capture requires a combination of approaches, including:

- leadership that establishes a culture of best practice policy development, integrated consideration of regulatory implementation at the outset, stewardship of effective policies and procedures, and robust evaluation and quality control processes in agencies charged with the relevant role;
- developing operational action plans for policy and regulatory staff to proactively identify areas of risk and identify mitigations in advance (note the workshop approach proposed in Pink, 2024);
- proactive monitoring of operational issues such as the revolving door of staff between the regulator and the regulated, and pre-emptive management of the risks that arise, preferably integrated into risk registers and other formal frameworks;
- rigorous regulatory stewardship practices for both the design and the delivery of regulatory systems, supported by clear lines of accountability and required action where problems are identified (a more robust implementation of existing stewardship mandates would be a good start, combined with explicit treatment of capture);
- supporting the role of the independent judiciary and (specifically in respect of the environment) the value of a specialist judiciary for complex matters (e.g., New Zealand's world-leading Environment Court), and independent decision making more generally (e.g., opting for independent commissioners rather than sitting elected representatives as is common practice in RMA planning);
- ensuring appropriate transparency obligations for processes where the public interest is affected, and limiting exceptions to this (e.g., short consultation periods, targeted consultation, use of urgency and override provisions);
- ensuring a robust fourth estate, as the media plays a critical role in highlighting instances of potential capture and reporting on the implications to raise public awareness (e.g., funding of public interest journalism);
- resourcing and supporting civil society initiatives, including participation in planning processes, public interest research, enabling participation in public discourse, and legal challenge to regulatory decisions (such as via mechanisms like the Environmental Legal Assistance Fund, disestablished without replacement by the coalition government).

Conclusion

Regulatory capture is a driver of environmental harm due to the disruptive and disabling impact it has on the operation and effectiveness of regulatory systems. By exerting influence at one or more levels, vested interests ensure that the statutory goals of environmental protection will generally occur only where such protection does not imperil economic objectives. While defining 'regulatory capture' rigorously is challenging, this article offers a structured and systematic approach that could readily be applied in Aotearoa to environmental law.

As highlighted in the preceding analysis, different strategies are required to counter excessive influence in different parts of regulatory systems. A failure to recognise the risk and respond effectively makes it more likely that capture will be successfully 'baked in' as regulatory systems develop and evolve. A proactive and concerted approach, underpinned by clear definitions and implementable safeguards, will enable individuals and agencies to more often successfully contest, avert and mitigate regulatory capture.

1 There are various other aggregative concepts of a normative nature that are similar to 'the public interest' which are also potentially relevant in this context, including 'the national interest', 'the public good', 'the general welfare', 'the common good', etc. But for the sake of simplicity, and because it is a widely employed term, we use 'the public interest'.

2 Notably, the most recent economic review of New Zealand by the OECD highlighted that we are 'not close to the frontier of international best practice in terms of regulating lobbying' (OECD, 2024).

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