

BACKGROUND AND INTRODUCTION TO
THE REGULATORY ENFORCEMENT AND SANCTIONS ACT 2008

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Background

1. The background to RESA essentially comprises:
 - The Government's Better Regulation Agenda;
 - The Hampton Review (Reducing Administrative Burdens: Effective Inspection & Enforcement) (March 2005); &
 - The Macrory Review (Regulatory Justice: Making Sanctions Effective) (Nov. 2006).

2. It is important to emphasise that the Better Regulation Agenda is driven by BERR, whose *RESA 2008: Guidance to the Act* (July 2008)¹ explains that businesses and frontline public and third sector workers regularly complain about the time spent on regulation and the many ways in which they find rules frustrating. The Better Regulation Agenda (to which RESA gives effect) is part of a programme of reform, to address those concerns. Key to BERR's Agenda are:
 - Regulating only when necessary and doing so in a light-touch way that is proportionate to the risk;
 - Setting exacting targets for reducing the cost of administering regulation;
 - Rationalising inspection and enforcement arrangements; &
 - Supporting compliance and tackling businesses that deliberately or consistently flout their regulatory responsibilities.

BERR reason that better regulation promotes efficiency, productivity, and value for money; and that proportionate regulation and inspection arrangements can help to drive up standards and deliver outcomes on the ground (whether in the form of improving public services, a better environment for business, or advancing economic reform).

¹ Referred to simply as 'Guidance'

3. Sir Philip Hampton's Review² set out a vision of a regulatory system based around risk and proportionality. It concluded that - while there were many positive aspects to the work of trading standards and environmental health services - there remained wide variations and inconsistencies in the application of national standards set in legislation; and that these inconsistencies resulted in uncertainty and unnecessary administrative burdens for business. A lack of coordination often led to unnecessary inspection resulting in conflicting advice and the duplication of effort at a local level. Finally, regulators' penalty regimes were cumbersome and ineffective; and he recommended a comprehensive review of them. He envisioned a regulatory regime which is - at national and local level - risk-based, consistent, proportionate and effective.
4. Enter Professor Richard Macrory, whose Review³ established a blueprint for transforming the regulatory sanctioning regime. The Macrory Review found that many regulatory sanctioning regimes were over-reliant on criminal prosecution and lacked flexibility; and it diagnosed a 'compliance deficit', where non-compliance occurs but no enforcement action is taken because the appropriate tool is not available. The Review recommended that regulators have access to a flexible set of sanctioning tools consistent with Hampton's risk-based approach to enforcement.
5. RESA came into force on 1st October 2008 (Royal Assent 21st July 2008), excepting those elements of Part 2 dealing with the Primary Authority Scheme; and it applies across England & Wales (subject to adaptation).

Part 1: The Local Better Regulation Office (LBRO)

6. Part 1 dissolves the Government-owned company known as LBRO and established in May 2007 and replaces it with a statutory corporation also known as LBRO⁴. LBRO in this form is expected to be longer-living than its predecessor, but not long-term; and provision is made for its dissolution by order (Sections 1, 2 & 10).
7. LBRO's operations are directed at the behaviour of local authorities (as defined by Section 3) insofar as they are exercising a 'relevant function' (Section 4). The definition of local authorities is unexceptionable; but that of 'relevant function' is noteworthy and covers a truly vast swathe of activities subject to local authority regulation (subject, naturally enough, to addition or removal by order)⁵.
8. In exercising its functions, LBRO's objective is to secure that local authorities exercise their relevant functions:

² Reducing Administrative Burdens: Effective Inspection and Enforcement, Hampton P, HM Treasury, March 2005. www.berr.gov.uk/files/file22988.pdf

³ Regulatory Justice: Making Sanctions Effective. Final Report. Better Regulation Executive, Cabinet Office, November 2006. www.berr.gov.uk/files/file44593.pdf

⁴ <http://www.lbro.org.uk/>

⁵ Those of note include: Caravan Sites & Control of Development Act 1960, Clean Air Act 1993, Control of Pollution Act 1974, Countryside Act 1968, Environment Act 1995, Environmental Protection Act 1990, Noise Act 1996, Noise & Statutory Nuisance Act 1993, Pollution Prevention & Control Act 1999 and Public Health Acts 1936 & 1961.

- effectively;
- without giving rise to unnecessary burdens;
- in a way which is transparent, accountable, proportionate and consistent; &
- on the basis that they are targeted only at cases in which action is needed (Section 5).

These objectives and principles – aka ‘The Principles of Good Regulation’ permeate RESA (see eg Section 66); and they are transposed elsewhere into duties so far as LBRO itself is concerned (Section 13).

9. LBRO’s functions (Sections 6-11) are to:
- give local authorities guidance, to which they must have regard, as to how to exercise their relevant functions (this may be to one or more selected authorities);
 - when the chips are down, direct authorities to comply with its or another body’s statutory guidance in relation to a relevant function;
 - provide financial assistance to a local authority or any other person in relation to the exercise of a relevant function or assistance in doing so;
 - advise ministers on how local authorities are exercising their relevant functions, the effectiveness of existing and proposed legislation regarding those functions, whether other regulatory functions might appropriately be exercised by local authorities, and generally; &
 - prepare and publish lists, to which local authorities must have regard, specifying those matters to which they should give priority when allocating resources to their relevant functions⁶.
10. LBRO’s online Mission Statement follows closely ‘The Principles of Good Regulation’ (above), and indicates that it will seek to be: outcome-focused, evidence-based, creative, challenging & supportive.
11. LBRO has recently assumed responsibility for a retail enforcement pilot involving some 30 local authorities and involving officers dealing with trading standards, environmental health, licensing and fire safety, which it hopes will provide the basis for practical guidance for local authority regulators. Some 30 local authorities have been involved in the pilot, which sees local inspectors from different disciplines working more closely together.

⁶ Air Quality tops the current non-statutory national priorities for local authority enforcement.

12. LBRO is to enter into a memorandum of understanding with, inter alia, the Environment Agency about how they will work together.

Part 2: Co-ordination of Regulatory Enforcement

13. Part 2 of RESA is more narrowly focussed and establishes the Primary Authority Scheme ('PAS'), whose management is one of LBRO's most important functions. Upon application by a business operating in more than one local authority area and with the written agreement of the local authority concerned, LBRO may nominate that authority as the 'primary authority' so far as that business is concerned in relation to the statutory function concerned. The intention behind the scheme is that a business choosing to have a Primary Authority Partnership should benefit from improved consistency of advice and enforcement action, with improved compliance flowing from this.
14. Once nominated, the primary authority has the function of advising both the regulated person in relation to the relevant statutory function and other local authorities with that function as to how they should exercise it in relation to that person (Section 27).
15. Where the function concerned consist of or includes a function of inspection, the primary authority may make an inspection plan and, subject to LBRO consent to it, they may bring it to the attention of other authorities, who must have regard to it when undertaking their own inspections. Where a PAS is in operation, a local authority must notify the primary authority before taking enforcement action in respect of the relevant function and that authority may direct that that action should not take place, subject to referral to LBRO. LBRO may approve the proposed enforcement action, direct that it not be taken or direct an alternative course of enforcement action.
16. Further provision is to be made for the procedures involved in and exemptions from the PAS; and it is intended that the Scheme will come into operation on 6th April 2009.
17. LBRO is out to consultation on the PAS⁷; and it is clear from the consultation paper that the Scheme will operate (at least initially) in relation to trading standards, environmental health and fire safety functions⁸; and LBRO has recently announced that B&Q, Boots, John Lewis, Tesco, Sainsbury's and Waitrose are gearing up to test the new Primary Authority partnerships with local authority regulators in respect of what it refers to as 'key trading laws'.

Part 3: Civil Sanctions

Introduction

18. Part 3 is aimed at promoting greater adherence to the law by business; and it provides the tools thought necessary for the job. It establishes a range of four 'off the peg' civil

⁷ <http://www.berr.gov.uk/files/file47801.pdf>

⁸ Any overlap with main-stream environmental law is marginal

sanctions ('an extended sanctioning toolkit'), and it is important to secure a grasp of the widespread availability of these sanctions. They are available to:

- The 27 designated regulators listed in Schedule 5
- The additional authorities with an enforcement function in respect of specified offences in the (approaching 150) Acts listed in Schedule 6; and
- Authorities who enforce offences in secondary legislation made under the 45 Acts listed in Schedule 7.

With an eye to the environment:

- The designated regulators include:
 - English Heritage;
 - Environment Agency; &
 - Natural England.
- The Acts specifying offences listed in Schedule 6 include:
 - Ancient Monuments & Archaeological Areas Act 1979;
 - Clean Air Act 1993 [black smoke etc];
 - Control of Pollution Act 1974 (Part 3) [noise];
 - Environment Act 1995 (Section 110) [powers of entry];
 - Environmental Protection Act 1990 (Parts 2, 2A & 3, Sections 118 & 150(5)) [waste, contaminated land, statutory nuisances, clean air & genetically modified organisms];
 - Highways Act 1980 (Part 9) [lawful & unlawful interference with highways & streets];
 - Noise Act 1996 [noise at night];
 - Planning (Listed Buildings & Conservation Areas) Act 1990;

- Public Health Act 1936 (Part 2 & Sections 269,288 & 290) [sanitation & buildings, moveable dwellings, entry, obstruction & notices].
- The Acts authorising secondary legislation include:
 - Control of Pollution Act 1974 (Section 17) [dangerous & intractable waste];
 - Environment Act 1995 (Sections 87, 95 & 97) [air quality, waste & hedgerows];
 - Environmental Protection Act 1990 (Sections 140 & 156) [injurious substances/articles, Community & other international obligations];
 - Pollution Prevention & Control Act 1999 (Section 2 & 3) [polluting activities & offshore installations].
19. These powers are not, however, conferred directly upon any regulators by RESA itself, but are made available by order⁹; and a great deal of concern was expressed as the Bill progressed through Committee about the ‘*unprecedented use of statutory instruments ... a mountain of statutory instruments*’¹⁰ The Guidance explains that the minister must, before making an order, be satisfied that a regulator will use the new powers in a way that is compliant with the principles of good regulation (transparent, accountable, proportionate, consistent and targeted only at cases where action is needed), with much of the evidence for this being forthcoming through Hampton Implementation Review (HIR)¹¹ – which focus on the extent to which regulators are performing in line with ‘the Hampton principles and the Macrory characteristics’.
20. The Guidance introduces the availability of these sanctions in these terms:
- The Government believes that regulators should have access to effective sanctions that are flexible and proportionate and that ensure the protection of workers, consumers and the environment when tackling non-compliance by businesses. These sanctions should be flexible enough to reflect the regulatory needs of legitimate businesses, as well as being able to ensure that where businesses have saved costs through non-compliance, they do not gain an unfair advantage over those that have complied with their regulatory obligations. (emphasis added)*
21. DEFRA is currently undertaking its Fairer & Better Environmental Enforcement Project¹², in the course of which it is to consult the EA and NE on the potential use of civil sanctions¹³.

⁹ For procedure involved in awarding new powers see Guidance p. 29 Fig. 2.

¹⁰ Lord Lyell 30th January 2008: Column GC328.

¹¹ For HIR guidance see http://www.nao.org.uk/publications/workinprogress/HIR_Guidance_31May07.pdf

¹² <http://www.defra.gov.uk/ENVIRONMENT/enforcement/FairerBetterProject/index.html>

¹³ But note that NE’s Hampton Review is not due until March 2009.

Sanctions & Appeals

Fixed monetary penalties (FMP) notices (Sections 39-41)

22. FMPs are intended to provide an alternative to prosecution in respect of low level, minor non-compliance; and since the alternative is prosecution, the regulator must be satisfied beyond reasonable doubt that the recipient has committed the offence referred to and may not prosecute once notice of intent (see below) has been served (to avoid double jeopardy). The level of prescribed or fixed monetary penalty is to be fixed in the minister's order, which may provide for different amounts based on certain factors (eg size of business) (though the amount may not exceed the maximum fine on conviction); and it is very clear that FMPs raise legitimate concerns about the imposition of what may be substantial financial penalties without the safeguards of a court process at the outset¹⁴.
23. RESA provides that the regime imposed by order must provide for the following elements¹⁵: (1) a 'notice of intent' (with prescribed content); (2) an opportunity to make a discharge payment at what may be a discount rate; (3) an opportunity to make written representations; (4) final notice, which may be modified (or no notice); (5) an appeal (grounds must include that the decision was based on an error of fact, was wrong in law or was unreasonable) Appeal is to the first-tier Tribunal; and penalties are to be recoverable via the civil courts.

Discretionary requirements (Sections 42-45)

24. Discretionary requirements are a step up, intended for mid to high level examples of non-compliance. Flexibility of response is a keynote here and the minister is able to give a regulator the power to impose one or more (ie a combination) of the following:
- A variable monetary penalty (VMP) determined by the regulator (this may remove any financial gain and take the history of compliance and gravity into account);
 - A 'compliance requirement' to take specified steps within a stated period, designed to secure that the offence does not continue or recur (the business is required to bring itself back into compliance); &
 - A 'restoration requirement', designed to secure that the position is restored, so far as possible, to what it would have been if no offence had been committed (this may involve cleaning up the contaminated area or reimbursing customers).

¹⁴ It was noted in Committee that whereas some regulators' conviction rates are very high indeed, others are not (Hansard 30 January 2008 Column GC332); but the proposals enjoyed the general support of the Council of HM's Circuit Judges and the Justices' Clerks' Society (ibid GC339).

¹⁵ For procedure see Guidance p. 32 Figure 3.

25. The regime for these reflects that for FMPs¹⁶, with adaptations – of which two are significant. First, the necessary order must provide for a business to offer to the regulator an undertaking to take action to benefit a third party affected by the offence (including the payment of compensation); and the regulator may decide whether to accept that undertaking and how to take it into account in its sanctioning decision. Secondly, failure to comply with a ‘compliance requirement’ or ‘restoration requirement’ results in the possibility of prosecution for the original offence (double jeopardy notwithstanding) (RESA enables the minister to extend the time limits for prosecution to facilitate this – though not retrospectively).
26. The Guidance advises that internal arrangements may provide for a senior and independent officer (ie one not previously involved) to decide or review the decision whether to progress to a final notice having regard to written representations or objections received.
27. The minister’s order may include provision for the recovery of the regulatory authority’s costs in relation to the imposition of a discretionary requirement or Stop Notice; and those costs include investigation costs, administration costs and those of obtaining expert - including legal - advice.

Stop notices (Sections 46-49)

28. Serious situations call for serious remedies, and a Stop Notice may only be served if a business is carrying on or is likely to carry on an activity and the regulator has the reasonable belief:
 - that in carrying it on the business presents, or would be likely to present, a significant risk of serious harm to: human health, the environment (including the health of animals and plants) or the financial interests of consumers; &
 - that in doing so the business is, or is likely to be, committing an offence.

These are, therefore potentially reactive and/or preventative; and breach of a Stop Notice will be a criminal offence. They are also the potentially most far-reaching of the civil sanctions; and the Government established a deliberately high threshold for their use with that in mind (though uniquely amongst the sanctions provided for, it does not appear that a decision to issue a Stop Notice requires satisfaction beyond reasonable doubt that an offence has been – or is likely to be – committed).

29. The regulator must issue a ‘compliance certificate’ if satisfied that the business has complied with the notice¹⁷; and a business may appeal against either the decision to

¹⁶ For procedure see Guidance p. 36 Figure 4.

¹⁷ For procedure see Guidance p. 41 Figure 5.

impose a Stop Notice or refusal to issue a completion certificate. Interestingly, the minister's order will deal with whether notices are automatically suspended on appeal.

30. There is a distinct sting in the tail:

The serious nature of stop notices means that compensation should, in certain circumstances, be available where a notice is wrongly imposed. Accordingly, orders giving regulators the power to serve stop notices will have to provide for regulators, on application, to compensate businesses where they have suffered loss because of the service of a stop notice. The Minister will determine the specific grounds for compensation in the order. Compensation might be appropriate where a business wins an appeal against imposition of a stop notice and where the regulator is considered to have acted unreasonably or in serious default. Compensation will not be appropriate in all cases, for example, it may not be appropriate if an appeal was upheld on a technicality (Guidance paragraph 56)

And there is to be a right of appeal against decisions not to award compensation and against the amount of a compensation award.

Appeals

31. Appeals will lie to a 'general regulatory chamber'¹⁸ of the First-tier Tribunal established pursuant to the Tribunals Courts & Enforcement Act 2007 or to another statutory tribunal specified by the minister (eg employment tribunals). They will be heard by a tribunal judge sitting alone or with one or two members expert in the regulatory field concerned. RESA sets out minimum grounds of appeal, which will differ between sanctions. A person will in general be able to seek to overturn a sanctioning decision on the basis of an error of fact or law or unreasonableness. The Tribunal will be able to substitute its own decision or remit; and issues of suspension will be addressed in the minister's order or the rules of the tribunal.

Other

Enforcement undertakings (Section 50)

32. Enforcement undertakings are a legal novelty, as the Guidance explains:

The Macrory report noted that current sanctioning regimes do not allow for creative ways of addressing regulatory non-compliance. There have been cases where businesses have recognised that they have fallen into non-compliance and proposed innovative and restorative ways of returning to compliance. Until now, there has been no legislative basis to facilitate or encourage this kind of creative measure.

33. RESA provides, in effect for voluntary or reverse compliance or restoration requirements¹⁹, with prosecution or other administrative sanction being no longer available once an authority has accepted an undertaking. If a business fails to comply with its undertaking action may be taken in respect of the original offence; and it is

¹⁸ The First-tier Tribunal and Upper Tribunal (Chambers) Order 2008 (2008/2684) established three other chambers with effect 3rd November 2008.

¹⁹ For procedure see Guidance p. 44 Figure 6.

expected that provision will be made for a right of appeal against refusal of a completion certificate.

Guidance (Sections 63-65)

34. Regulators will be required to provide both penalty guidance and an enforcement policy (though these may be combined).

Publicity (Section 65)

35. Regulators must publish reports specifying their use of civil sanctions.

Part 4: Regulatory Burdens

36. This creates a duty that requires regulators to review their functions, not impose unnecessary burdens and remove unnecessary burdens (unless disproportionate or impracticable to do so) and to report on progress annually; but RESA does not impose this on any regulator within the scope of this papers²⁰ (though ministers may by order do so). These regulators stated that they did not want to be included in the Bill because they already have sufficient powers²¹.

Conclusion

37. The emphasis of this seminar is, of course, on the implications of RESA for Environmental Law; and I hope, that it will be clear from this introductory paper:
- that RESA lays the groundwork for a wide range of regulators to have at hand an entirely new set of enforcement options;
 - the likelihood is that those options will become available in core areas of environmental (including planning) law;
 - that they raise the prospect of appeals to the newly-constituted First-tier Tribunal; & that
 - those options and appeals will raise new opportunities and issues for regulators and regulated alike.
38. Introducing the Bill on its second reading, the Minister of State (Lord Jones) expressed the view that:

Less time preparing for court might be bad news for lawyers – I used to be one – but is very good news for everyone else.

²⁰ The Gas and Electricity Markets Authority (OFGEM), the Office of Fair Trading (OFT), the Office of Rail Regulation (ORR), the Postal Services Commission (Postcomm), & the Water Services Regulation Authority (OFWAT).

²¹ Hansard 30th January 2008 GC350.

May be; but not if they are simply preparing for the Tribunal instead.