Making Sanctions Effective

Tercentenary/Brodies Lecture
Edinburgh Law School
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Professor Richard Macrory
Environmental Courts - Analysis But No Action

- 1989 Carnwath Report on Enforcing Planning Control
- 1991 Lord Justice Woolf Lecture
- 2000 Grant Report
- 2002 Royal Commission 23rd Report *Environmental Planning*
- 2003 Macrory and Woods Report *Modernizing Environmental Justice*
- 2004 WWF/Environmental Law Foundation Report *Environmental Justice*
Unexpected Alignment I

• HAMPTON
• 2004/5 Treasury commissioned Hampton Review of business regulation generally
• Real concern that too many regulators and ‘tick-box’ mentality
• Hampton urges risk based approach to regulation
• Hampton also recognized importance of sanctions that are fast and effective and proportionate
MACRORY REVIEW 2005/6

‘Son’ of Hampton: Review the penalty and sanctioning regimes of regulators within the UK

- Around 60 national regulators in England and Wales plus UK wide regulators
- Local Authority regulators

OUTSIDE REMIT

Economic regulators such as Financial Services Authority, competition and utility regulators (but useful to examine as representing modern sanction regime)
MACRORY REPORT

- Published November 2006: *Regulatory Justice: Making Sanctions Effective*
- Government accepted all recommendations
What Macrory does not do not do

- Propose restructuring of regulators
- Prescribe how regulators should exercise enforcement discretion
- Interfere with sentencing discretion of courts
- Restructure existing regulatory offences
- Criticize substantive content of regulations
Sanctions underpin a Regulatory regime

- Advice and incentives generally preferred way of securing compliance
- Formal sanctions underpin regulator’s authority
- Existence of sanctions act as a deterrent
- Where breaches occur, sanction should ensure no economic gain from non-compliance, deter future breaches, and impose societal stigma in appropriate cases
Penalties Principles and Characteristics

- Penalties Principles – Sanctions should:
  - Aim to change behaviour
  - Aim to eliminate financial gain if applicable
  - Be responsive
  - Be proportionate
  - Restore the harm caused if applicable
  - Deter future non-compliance
Limited Formal Enforcement Options

• Limited range of formal sanction options
  — Criminal Prosecution - Financial penalties or Imprisonment
  — Enforcement Notices, also underpinned by criminal law
Strict Liability Offences

• Single offence encompass the truly criminal to the negligent company or an accident
• Culpability is in part reflected in discretion of regulator whether to prosecute in first place
• Also should be reflected in sentence of the court
• Long standing debates on value of strict liability tradition
Strict liability offences

- Permeate many areas of business regulation (health and safety, trading standards, food safety etc.)
- Some offences allow for a due diligence defence but inconsistent
- Useful for regulators in that easy to secure conviction but often confusing to courts
- Strict liability offences sometimes described as not criminal in true sense
- In economic regulation much greater use of economic penalties rather than criminal law
Criminal processes

• Suitable for certain types of breaches but
  — Prosecution can be a disproportionate response, though a sanction required
  — Fines often small compared to the economic benefits of non-compliance
  — Fines may not be best in achieving the right outcome (i.e. a change in behaviour)
  — Prosecution costly and time-consuming process
  — Over-reliance on prosecution may devalue impact of criminal law
  — Over reliance on prosecution may lead to compliance deficit
Improve criminal processes

- Better training for magistrates, clerks, and prosecutors
- Regulatory prosecutions should be focussed on certain courts within localities
- Profits order in addition to fine
- Wider range of sanctions against businesses beyond fine (96% of current outcomes a fine) - corporate rehabilitation orders, publicity orders
Administrative penalties

• In certain circumstances, imposition of admin penalty by regulator without intervention of court may be more effective response to criminal prosecution
• Penalty calculated by regulator in accordance with published guidelines
• Enforcement policy gives guidance when admin penalties to be used in preference to prosecution
• Revenue from penalties not to go directly to regulator
Unexpected Alignment 2

- Sir Andrew Leggatt
Appeals against Administrative Penalties

- Must be right of appeal to independent body on both merits and as to amount
- Could be back to ordinary criminal courts but will confuse
- Tribunal system currently being reformed to be more adaptive and flexible
- Recommend appeals to new regulatory tribunal (likely to be chaired by judge with technical assessors)
Enforceable Undertakings

- legally binding agreement between regulator and offender
- Require offender to undertake specific actions related to non-compliance
- include provisions for compensation, reimbursement and some element to ensure that offence won’t be repeated
- could be offered by the business - regulator’s enforcement policy provides guidance on when such an offer might be appropriate
RESTORATIVE JUSTICE

- Designed to give victims a greater voice in enforcement process
- Developed in context of juvenile crime in UK but not in the area of business regulation
- Some positive examples from other jurisdictions
RESTORATIVE JUSTICE

• Administrative penalty system and enforceable undertakings can encourage business to take account of victims
• But essentially a voluntary process where business acknowledges wrong.
• Room for distortion by both business (crocodile tears) and victims (vengeance seeking) but worth trial experiments
Governance issues

• Greater sanctioning powers implies greater responsibility
• Regulators should...
  — Publish Enforcement Policy
  — Measure outcomes as well as outputs
  — Justify enforcement actions
  — Follow-up enforcement actions
  — Be transparent in how admin penalties are calculated
  — Publish year or year types of enforcement action taken
  — Avoid incentives that distort choice of sanction
Governance Issues (2)

- Cabinet Office to convene regular meetings of regulators to share best experience
- Regulatory Select Committee in Parliament to help provide oversight on cross departmental issues
Next Steps

• Primary legislation will be required for certain aspects
• Departments and regulators develop detailed provisions in areas where required
Key challenges

• Redraft enforcement policies to reflect new sanction options
• Consider how to calculate admin penalties
• Develop robust outcome measures
• Ensure effective monitoring and feedback
• Engage with the regulated and other interests