

UKELA LITIGATION WORKING PARTY

REGULATORY ENFORCEMENT AND SANCTIONS ACT 2009

NOTE ON MAIN ISSUES

Introduction

1. The first purpose of this Note is to identify the main issues on which the Working Party, and therefore UKELA, will want to focus in making representations on implementation of the civil penalties regime under Part 3 RESA 2008. The second purpose is to identify the main directions of travel on the key issues.
2. We would be grateful if members of the Working Party would consider the points below and let us have your comments, if any.

Generally

3. UKELA supports the principles in the Macrory Report and effective, proportionate and fair regulation.

Choice of Sanction

4. The objective of any sanction is to regulate behaviour of those sanctioned, and others. There is “encouragement” to do better and deterrence. The rationale of RESA is to increase the range of tools. The identified need for this broader range of tools derives from the bluntness and disproportionality of criminal sanction in some instances.
5. In that context, use of enforcement and stop notices was encouraged in the Macrory Report.
6. There is understandable interest in the important issues surrounding VMPs, but this ought not to shift the focus from real increases and improvement in the use of notices, rather than sanctions which are further up the enforcement ladder. Such sanctions

have significant benefits for environmental protection which are absent from penalties, namely:

- i. They are often served before any environmental harm has occurred, and so are preventative;
- ii. They generally are not accompanied by litigation and so do not disrupt the regulator/regulated relationship;
- iii. They create a record of enforcement activity which is highly relevant to any subsequent enforcement decision making and consideration of any penalty.

7. In short, UKELA wants to see this aspect of the reforms taking a prominent position within guidance to be drafted under S63 RESA.

Civil Penalty – Decision Making

8. There will be provisions in orders made by the appropriate minister, and guidance, on the decision as to whether to impose a civil sanction, or whether to prosecute.

9. We consider that the decision making process is analogous to that which is routinely taken as between:

- i. Advice
- ii. Warning
- iii. Formal Caution
- iv. Prosecution

10. Essentially, the decision as between the civil and criminal routes is one which is inserted in the hierarchy at or around that of formal caution. Adaption of the Agency's Prosecution Policy, and, importantly, its functional guidance, is the obvious approach. The setting of the threshold between civil and criminal route is the really interesting question. This ought to be a focus of UKELA's interest.

11. However, for the system to be respected by those regulated, it will be important for decisions to be demonstrably consistent. Measures to ensure consistency should be sought including training and effective oversight and monitoring at a higher level than “regions”.

Level of VMP

12. In general, we think that the approach to setting the VMP should follow the same principles and take account of the same factors as would be applied if the criminal route were taken.

13. The starting point in setting VMP should be “seriousness”. Section 143(1) Criminal Justice Act 2003 provides:

- i. *“In considering the seriousness of any offence, the court must consider the offender’s culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused.”* (Our emphasis)

14. As to the level of penalty under a S43 discretionary requirement, we are of the firm view that it should be subject to a maximum which is similar to that in the summary jurisdiction. If civil penalties are not intended to address the more serious environmental offences, it is difficult to justify VMPs which would only be available on indictment.

Appeal to the Regulatory Chamber First Tier Tribunal - Rules

15. The decision to impose an administrative penalty is capable of appeal to the First Tier Tribunal (Regulatory Chamber). We consider the safeguards available via the tribunal should be no less than those which would be available via the criminal route. We note that there are potential human rights issues, but our concern is not limited to narrow Article 6 points, but with broader questions of fairness.

16. The tribunal rules were recently consulted upon. However, that consultation was undertaken by reference to those tribunals which have been transferred to the new First Tier Tribunal (charities, for example). The rules do not appear to have not been drafted with RESA civil penalties in view. This is understandable in that the Tribunal and its reforms are independent of progress under RESA. However, it is clear that real issues will arise for practitioners, and the Tribunal. By way of example – a decision to impose a VMP is made on evidence which might be excluded under ss76/78 PACE – should/would the Tribunal consider such an application to exclude the evidence, or not?

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