

REGULATORY THEORY

1. This paper discusses regulatory theory and its role within the level crossings project. The discussion below is based on two questions:
 - (1) What approach to regulation should be adopted?
 - (2) What should be the regulatory architecture and how will this inform the regulatory content?
2. The normal theoretical starting point for a discussion of regulatory regimes is whether any regulation is necessary at all. In relation to railways, the answer to this question seems clear. Railways are a key part of transport infrastructure in Great Britain. They are both economically important and inherently dangerous, and require legal supervision. There seems no advantage in an extended discussion of the theoretical justifications for regulatory intervention in railways or, for that matter, highways/roads.

WHAT APPROACH TO REGULATION SHOULD BE ADOPTED?

3. In recent decades, an extensive literature has developed on regulatory theory. Law has been one of the core disciplines in the development of this learning but economics and public policy have also been influential. It is now an area which attracts considerable attention from governments, both here and abroad. We think that some engagement with regulatory theory is necessary to frame the right questions in relation to the regulation of level crossings, and to inform the way in which those questions are answered.
4. In considering regulatory theory, we focus on a number of approaches to regulation that have developed in recent years. These are “better”, “risk-based”, “responsive” and “smart” regulation.¹
5. These approaches overlap and draw from each other. They are best seen as a source of insight into regulatory problems rather than a rigid set of prescriptions to be applied in all circumstances.

Better regulation

6. Better regulation is the term expressly adopted by recent governments to identify their approach. It seeks to justify regulation in terms of a cost/benefit analysis. The growth in the use of Impact Assessments to justify Government action is the result of the increasing importance of this approach. Better regulation is also associated with reducing the regulatory “burden”. This does not mean the wholesale abolition of regulation. Rather, regulation should be reduced and simplified as far as possible, whilst still achieving regulatory aims.
7. Five principles set out by the Better Regulation Task Force in 1998 state that regulation should be:²

¹ For a general overview of the development of regulatory theory, see R Baldwin and M Cage, *Understanding Regulation: Theory, Strategy and Practice* (1999).

- (1) transparent;
 - (2) accountable;
 - (3) proportionate;
 - (4) consistent; and
 - (5) targeted – only at cases where action is needed.
8. The Hampton report, released in 2005, sets out further principles for regulatory inspection and enforcement.³ The general thrust of this report was again to make regulation more targeted and less burdensome for both regulator and regulated. Essentially, regulation should focus on where it is needed and should only impose such burdens as are necessary to achieve the regulatory aims.
9. A further report by Macrory set out six Penalties Principles.⁴ These made clear that enforcement should react intelligently to both the level and type of infringement. Regulation should be proportionate and encourage beneficial outcomes, rather than merely seek to punish those committing regulatory transgressions.
10. Though some have criticised the approach of better regulation, it continues to influence legal development. In terms of level crossings, it seems self evident that new legal provision should only be introduced where necessary, and its aims should be clear. It can be argued that enforcement of, for example, safety at level crossings should focus on improving performance in the future.

Risk-based regulation

11. Risk-based regulation puts the concept of risk analysis at the centre of regulatory decision-making. In the Hampton report, mentioned above, and in subsequent literature, risk-based regulation is seen as the cornerstone of modern regulatory theory. In relation to level crossings, safety regulation, in particular, is often constructed with reference to risk and its reduction.
12. There are many approaches to risk analysis. However, in general, it can be said that it is composed of three individual elements: risk assessment, risk management and risk communication. Within the context of risk management, there is a further distinction between “standard setting” and “control”. “Standard setting” is the creation of general rules, such as Health and Safety Regulations or codes of practice under the Health and Safety at Work etc Act 1974 (HSWA 1974). “Control” is the ability to enforce the general duties contained in HSWA 1974 and any regulations or codes of practice made under the Act.

² BRTF, *Principles of Good Regulation* (Cabinet Office, 1998), p 1; and <http://www.berr.gov.uk/whatwedo/bre/> (last visited 27 June 2010).

³ Hampton, *Reducing administrative burdens: effective inspection and enforcement* (HM Treasury, 2005) p 7.

⁴ Macrory, *Regulatory Justice: Making Sanctions Effective* (2006) p 10.

13. In many ways risk-based regulation can be seen as an attempt to place scientific methodology at the centre of the decision-making process. One potential criticism of a solely risk-based approach is that considering risks in numerical terms, if done without a sufficiently sophisticated mathematical model, can lend a sense of order and control to situations where in fact there is little of either. It is therefore important to define clearly the risks involved, and state the assumptions made when seeking to calculate them. For the purposes of level crossings regulation risk assessment will of course inform the approach taken by legislation. However, it cannot provide a complete solution to the problems of regulation. Any risk assessment is limited to the information it chooses to include and will be dependent on the quality and quantity of the information available.

Responsive Regulation

14. More modern theories of regulation, and in particular the work of Ayres and Braithwaite,⁵ have sought to re-examine traditional perceptions of regulation as necessarily overly prescriptive and “heavy handed”. A “regulatory pyramid” of sanctions is postulated. This has “persuasion” at the bottom, moves up through various levels and ends with “licence revocation” – that is, removing the ability of the regulated party to participate in a market. Central to this regulatory approach is the principle of escalation. Regulation starts at the lowest possible level compatible with achieving regulatory objectives. The majority of regulation should occur at the lowest level. Escalation up the pyramid occurs only if regulation at the lower end proves ineffective. There is also the possibility of movement in the reverse direction. Regulation should move back down the pyramid once compliance has been secured through firmer action.
15. The idea of the responsive regulatory pyramid conforms well to the principles encapsulated by the Macrory report. Starting with education and “soft law” is often the best way to encourage beneficial behaviour. In the case of level crossings, guidance issued by the Office of Rail Regulation (ORR) and the Rail Safety and Standards Board (RSSB) provides useful practical assistance. However, responsive regulatory theory accepts that sanctions, or at least the threat of sanctions, are necessary. This accords with the approach adopted in the Regulatory Enforcement and Sanctions Act 2008, which gives powers to regulators including ORR to impose a variety of different sanctions in relation to offences under legislation for which they are the enforcing authority. For the purposes of level crossings, it seems that guidance alone would be insufficient without appropriate sanctions to encourage compliance.
16. It is also possible to consider regulation from the perspective of the enforcing authority, rather than the sanction imposed. For example, it is possible to imagine a hierarchy of enforcing authorities, with decisions taken at progressively higher levels. For the purposes of level crossings, this might lead to decisions that are usually made by ORR being taken, in certain circumstances, by the Secretary of State or Scottish Ministers or the Welsh Assembly Government. We discuss this issue in Part 8 of the Consultation Paper.

⁵ I Ayres and J Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate* (OUP, 1992) pp 4, 6.

Smart regulation

17. Recent proponents of the “smart” approach to regulation have emphasised a willingness to work with a variety of regulatory tools, and to promote communication between actors. Gunningham and Grabosky put it thus:

The central argument [is] that, in the majority of circumstances, the use of multiple rather than single policy instruments, and a broader range of regulatory actors, will produce better regulation. Further, that this will allow the implementation of complementary combinations of instruments and participants tailored to meet the imperatives of specific ... issues. By implication, this means a far more imaginative, flexible and pluralistic approach to ... regulation than has so far been adopted in most jurisdictions.⁶

18. The focus on a multiplicity of actors and techniques aims to promote communication between the various parties involved, creating interaction between them that allows appropriate outcomes to be arrived at. This does not exclude the need for, eventually, some form of higher level decision-making body. However, as outlined above, decision-making and regulation at the lowest effective level should be encouraged. We see this as being of direct relevance to level crossings, particularly in circumstances where a proposed development may lead to a change in use of a level crossing. Any legal regulation of this situation should focus on promoting co-operation between the relevant parties, rather than imposing policy from above. Such an approach encourages actors to engage with the regulatory process, fostering a sense of responsibility for and “ownership” of the process. Compliance is encouraged and the development of shared goals and objectives facilitated.
19. “Smart” approaches to regulation also emphasise that it is possible for law reform to use or develop existing legal tools. This might suggest that the law relating to level crossings should not be artificially separated from existing legal structures to create a “level crossings regulatory system”. Rather, we should seek to work with the actors and structures already in existence to promote the best outcomes when it comes to making decisions about level crossings. The advantage of such an approach can be seen in relation to environmental regulation, which must also cover a diverse range of actors and legal regimes. It has to “fit” with these regimes and work with them – whilst focusing on the ultimate ambition of fulfilling its environmental aims.⁷

REGULATORY STRUCTURE AND REGULATORY CONTENT⁸

20. We suggest that a helpful way to look at regulation is to break it down into consideration of the interdependent concepts of “structure” and “content”. Some approaches focus on the powers of the actors involved and the relationship

⁶ N Gunningham and P Grabosky, *Smart Regulation: Designing Environmental Policy* (1998) p 4.

⁷ N Gunningham and P Grabosky, *Smart Regulation: Designing Environmental Policy* (1998).

⁸ This section mirrors (with appropriate adjustments) the text in Part 7 of the consultation paper; Level Crossings (2010) Law Commission Consultation Paper No 194; Scottish Law Commission Discussion Paper No 143.

between them. Other approaches focus on the content of regulation.

General versus specific rules

21. Some rules use a broad approach and generally applicable provisions, such as the general principles set out in HSWA 1974. At the other end of the spectrum are very specific rules. For example, level crossing orders made under the Level Crossings Act 1983 contain specific provision about the safety measures to be put in place at individual crossings.
22. At present, the general rules under HSWA 1974 do play a role in relation to level crossings. It is, however, probably more accurate to see the practice under the current law relating to the regulation of level crossings as exemplifying the specific approach, with separate provision potentially made for each level crossing.

Regulatory structure

23. In relation to level crossings, there is a number of important public sector actors. For current purposes, they include the Secretary of State and Scottish Ministers, the Welsh Assembly Government and local authorities. ORR is the economic and safety regulator for the railways.
24. It would be fair to say that the course of post-privatisation history has been more difficult for the railways than other privatised industries, and the regulatory structure has undergone significant changes, most recently in the aftermath of the collapse of Railtrack plc. It follows from what we have said above that our provisional view is that there should not be wholesale institutional change to the identities, roles and responsibilities of these key actors. In particular, we would not propose a new “level crossings regulator”.
25. We do propose changes to the powers and duties of the existing actors and, as a consequence, the relationships between them. We see these changes as building on their existing roles and responsibilities.
26. The recent history of rail regulation also suggests that we should not automatically assume regulatory stability. Whilst it seems likely that there will always need to be a safety regulator for the railways, we cannot assume that ORR as presently constituted will always fulfil that function. If legislation results from this project, it is likely therefore to have to be adaptable to different institutional arrangements over time. For this reason, we have sought to ensure that our provisional proposals would work in the context of existing institutions, whilst also being capable of adapting to any new arrangements.

Regulatory content

27. Modern approaches to regulation would suggest an alternative to prescriptive legal provision for individual level crossings. The alternative approach would involve greater use of general regulations that can easily be amended. We propose adopting such an approach in relation to level crossings in our consultation paper.
28. The benefits of such a general approach would accrue to both regulator and regulated, in the form of a simpler, more accessible and more proportionate

regulatory regime. Reliance on general regulations, which could be amended from time to time to take account of advancements in technology or safety provision, would remove the need to update individual provision in relation to safety at level crossings.