Please note

The telephone numbers of the Parliamentary and Health Service Ombudsman changed on 15 March 2009.

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Response by the Treasury to standard of regulation discussion paper (July and November 2005)

GOVERNMENT RESPONSE TO THE OMBUDSMAN'S DISCUSSION PAPER ARTICULATING AN APPROPRIATE STANDARD OF PRUDENTIAL REGULATION

Paragraphs 37 and 38

Principles
We agree with the three fundamental principles identified in paragraph 37, i.e. that the Ombudsman may only scrutinise *administrativ*e actions; that the Ombudsman may not question the merits of a discretionary decision taken without maladministration; and that what is to be regarded as maladministration is (subject to the ultimate scrutiny of the court) for the Ombudsman to decide. 'Traditionally', maladministration has focussed upon the *manner* in which decisions are reached and the *manner* in which they are or are not implemented – an interpretation that has been consistently adopted by the courts.

In a very complicated investigation like the present, there are potentially in issue a variety of administrative acts that were performed over a considerable period of time – spanning some 30 years in fact. We are not sure, looking at the Discussion Paper, whether it is the Ombudsman's intention to apply the tests for maladministration to individual instances, or whether she will apply them in the context of an overall assessment of the standard of regulation. This is important because individual instances of maladministration, if found, may have had little bearing on the overall standard of regulation to which ELAS was subject and so, in a broader sense, were not maladministrative.

Perhaps the real issue is injustice – in circumstances like this case, not all instances of maladministration would, even remotely, have caused injustice. In our view it makes sense, in the circumstances of this particular investigation, if maladministration were only addressed in the context of a demonstrable causative link with an identifiable injustice suffered. Where this is lacking, our view is that any finding of maladministration would serve no purpose, because the regime under scrutiny has now been replaced – and there has already been a comprehensive Inquiry conducted by Lord Penrose which looked at the lessons to be learnt.

Scrutiny of Ministerial Policy Decisions
Paragraph 38 mentions that ministerial policy decisions will be subject to scrutiny. This assumes, of course, that the Ombudsman views these decisions as 'administrative functions'. Naturally, as this paragraph recognises, many of the regulator's and GAD's actions at issue in this investigation were administrative in nature. However, we think that the line can be much more difficult to draw in the case of ministerial policy decisions. In practice, there is often a chain of interrelated decisions at different levels, each linked to the other; for example, decisions by civil servants in line with policy decisions of ministers, who in turn act consistently with high level policy determined by the government of the day on the basis of its electoral mandate and the will of Parliament. Logically each of these is a separate decision, and those lower down the hierarchy are determined by and have to be understood in the light of those above it. The higher up the chain, the less administrative in nature the decisions are. The then government's policy of *"freedom with disclosure"*, and the resourcing policy formulated in parallel, is a good illustration of this.

The question is how far up the chain the Ombudsman, in her discretion, chooses to go.

Response by the Treasury to standard of regulation discussion paper (July and November 2005)

A comparison of the Ombudsman's process and judicial review may be a useful means of illustrating the difficulties involved. Indeed this is a particularly appropriate comparison because the language of paragraph 38 suggests a similar scrutiny process to that which the courts would adopt in judicial review.

As already noted, the orthodox meaning of maladministration focuses on the manner in which a decision is taken or executed. As such, it has something in common with the test of procedural fairness applied by the court in exercise of its discretion in judicial review. But there is a very significant difference. Where the court quashes a decision on the grounds of procedural unfairness, it will then remit the matter to the decision maker for reconsideration. The court cannot dictate to the decision maker what decision he or she should make. As such, having considered the matter again, and having followed a fair procedure, the decision maker may quite lawfully *come to exactly the same conclusion as before*. The Ombudsman, on the other hand, does not have the power to quash a decision and refer it back, not least because her investigations are of necessity conducted some time after the relevant events have occurred; and therefore there is no way of knowing whether, absent the maladministration, the decision maker would nevertheless have reached exactly the same policy decision. The higher level the decision, and/or the more policy based it is, and/or the older it is, the more insuperable these difficulties become because there will be an ever-increasing chain of related decisions. The courts do not encounter this problem because of the 3-month time limit to bring a claim in judicial review imposed for this very reason by Parliament to avoid undermining certainty in public administration.

We accept, of course, that there is no absolute legal bar upon the Ombudsman from finding that a policy decision was defective and therefore maladministrative, even in the case of decisions made many years ago. The more significant question is whether it is appropriate for her to do so in practice. In particular, what would she do having made such a finding? It is of course open to her to make a recommendation to pay compensation in any case. However, such a recommendation in the situation contemplated would of necessity be premised upon a conclusion as to what the outcome would have been had the defect been absent. Unless it is quite obvious what the outcome would have been, this must involve some sort of assessment of the merits of the original decision – which is territory in which the Ombudsman cannot go. We suggest that the correct approach is that when decisions are looked at – whenever and by whomever they were made – no maladministration should be found unless it is *obvious* that, had the defect not occurred, a different conclusion *would* have been reached, *and* what that conclusion would have been. Without this, no sensible quantum could be determined in respect of any recommendation to pay compensation. And, if no quantifiable recommendation can be made, there is no practical purpose in making a finding of maladministration.

In relation to the JR-like test that is proposed in paragraph 38, we would also wish to urge caution in treating the traditional grounds of judicial review as grounds for a finding of maladministration. There can't be a simple read-across. For example, a rationality test[1] involves an assessment of the merits of the decision, and the Ombudsman cannot determine what the correct interpretation of the law ought to have been. Even in the example of

[1] In other words, was the decision within the range of responses reasonably open to the decision maker?

whether relevant or irrelevant considerations were taken into account, there cannot be blanket read-across. Discretionary decisions sometimes involve giving different weight to a range of very complex factors. In practice, decision makers acting in good faith have got it wrong and have been judicially reviewed; yet it seems contrary to a common sense understanding of the concept to suggest that on all these occasions there was maladministration. We note the helpful emphasis in paragraph 38, perhaps in recognition of these points, that process flaws are *capable* of constituting maladministration.

Paragraphs 39, 41 and 42

Paragraph 39 recognises that the actions of the regulator and/or GAD cannot be viewed with hindsight or in the light of the Ombudsman's opinion of what the regulatory regime ought to have been at the relevant time. We agree with this.

In relation to the references in paragraphs 39 and 42 to the actions of the prudential regulator/GAD being measured in the light of "the then prevailing legislation, guidance and accepted good practice": we completely agree that the Ombudsman must assess the actions of the prudential regulator and/or GAD in the light of the then prevailing regulatory regime. By "regulatory regime" we refer to the then prevailing legislation and government policy adopted pursuant to it, as embodied in the guidance and accepted best practice that went with them. We feel that "regulatory regime", cross-referenced as necessary to the detailed description of it that will be published, is a better descriptor of what the prudential regulator/GAD ought to be measured against, because "guidance and accepted good practice" does not clearly convey the central role that government policy played in the regime[2]

We are not clear as to what is proposed by the second strand of the Ombudsman's assessment referred to in paragraph 41 (and which similarly appears in paragraph 42(c)). It appears to be an application, in the context of the Ombudsman's jurisdiction over maladministration, of legal concepts of a duty of care and its breach – in effect, negligence. We would urge caution against borrowing from the law of negligence, with the considerable complications that this will entail.

Firstly, is it the Ombudsman's intention to focus on negligence as to *manner*, or negligence as to *outcome*? If the former, we do not think that this adds anything to the first strand of the Ombudsman's assessment, and wonder, therefore, whether the second strand is necessary. If the latter, this would represent a move from the traditional test with its focus on *manner* to a broader substantive inquiry focused upon the result of the decision. This would be problematic. In the case of policy or discretionary decisions in particular, this approach would risk crossing the line drawn at assessing the merits of such decisions. For example, a discretionary decision correctly taken in line with a properly formulated policy may simply be an inadequate response and negligent for that reason. How would such a finding not represent an assessment of the merits of the decision?

Secondly, reliance on concepts borrowed from the law of negligence, like 'duty of care', risks the Ombudsman becoming mired in the same legal complexities that vex the courts. In particular, before imposing a negligence standard on the prudential regulator, the Ombudsman would need to consider the following issues: (i) what would bethe practical consequences of imposing a duty of care on prudential regulators? (ii) what standards

[2] It tends to assume that government policy *was* the guidance and accepted good practice, when in fact guidance and accepted good practice would have been developed *pursuant to or in the light of* government policy.

should be applied when trying to assess whether or not any such duty has been breached? (iii) what tests of causation or remoteness should be applied to any loss said to have been suffered by the investing public? For present purposes, we would simply like to observe that each of these questions has, in the past, given rise to considerable legal debate, which we think cannot be ignored by the Ombudsman before utilising a "negligence" test to determine whether or not there has been maladministration.

(i) Consequences

There are three broad concerns:

Firstly, we assume that the Ombudsman intends to apply the duty of care test to all discretionary decisions, including ministerial policy decisions. If this is so, this would cut across the tendency of the courts (in England and Wales at least) against applying a test of negligence in these circumstances. The courts have drawn a distinction between policy or discretionary decisions, which involve the assessment of different choices of courses of action, and operational decisions, which involve the carrying out or implementation of policy or discretionary decisions[3]. The line of course is difficult to draw, but the principle is that the more policy orientated a decision may be, the less inclined are the courts to impose a duty of care.

Secondly, regarding the position with regulators in particular, on a number of recent occasions the courts (the Privy Council and the House of Lords) have for policy reasons refused to impose a duty of care on prudential regulators in favour of the investing public.[4] The Courts have consistently taken the view that, where prudential regulators are concerned, a number of different factors arise which militate strongly against the imposition of a duty of care. These include the following:

i. There is a serious risk that imposing such liability would result in over-cautious or otherwise risk-averse regulation. This dead hand would not be in the interests of the wider economy, which lie in sectoral innovation, enterprise and thus growth.

ii. In acting, or not acting, regulators are required to consider and balance a range of different matters including the allocation of scarce resources; they have a wide discretion and the issues involved are not readily justiciable.

iii. The imposition of a duty of care on the regulator would involve making it liable for the defaults of a regulated entity. As a matter of principle, a person should not be made liable for the wrongdoings of another unless it can exercise a high degree of

[3] See, for example, *Barrett v Enfield London Borough Council* [2001] 2 AC 550, where Lord Hutton said: "...I consider that where a plaintiff claims damages for personal injuries which he alleges have been caused by decisions negligently taken in the exercise of a statutory discretion, and provided that the decisions do not involve issues of policy which the courts are ill-equipped to adjudicate upon, it is preferable for the courts to decide the validity of the plaintiff's claim by applying directly the common law concept of negligence than by applying as a preliminary test the public law concept of *Wednesbury* unreasonableness (see *Associated Provincial Picture Houses Ltd v Wednesbury Corpn* [1948] 1 KB 223) to determine if the decision fell outside the ambit of the statutory discretion. I further consider that in each case the court's resolution of the question whether the decision or decisions taken by the defendant in exercise of the statutory discretion are unsuitable for judicial determination will require, as Lord Keith stated in the *Takaro* case [1988] AC 473, 501, a careful analysis and weighing of the relevant circumstances."

[4] See in particular *Yuen Kun Yeu v AG for HK* [1988] AC 175; *Davis v Radcliffe* [1990] 2 All ER 536; and *Three Rivers District Council v Governor and Company of Bank of England* [2003] 2 AC 1.

control over the latter. A regulator does not have day to day control over the management of the regulated entity; its role is much more limited.

iv. It is not reasonable for the customers, or potential customers, of a regulated body to expect the regulator to guarantee its soundness. No system of regulation can guarantee that outcome – and all investment carries with it risk.

v. Regulation is conducted in the wider public interest, not for particular groups of investors, either within a particular sector or within a particular company. Different members of the public may have differing and potentially conflicting interests that a regulator is obliged to balance (for example an expectation that regulation would not be too interventionist, so that the costs to industry and therefore the public are kept to a minimum; or, in the present context, the differing PREs of differing classes of policyholder within ELAS).

vi. The potential width of the class of individuals to whom a duty of care would be owed gives rise to a risk of "floodgate" claims, if a prudential regulator is held to owe a duty of care to the investing public.

All of these policy considerations would apply with equal force to preclude a recommendation being made by the Ombudsman for compensation to be paid by a prudential regulator on the grounds of a finding of negligence based upon a breach of a duty of care.

Thirdly, the Ombudsman may be aware of the recent policy initiatives by the government to streamline the regulatory burden on the business sector. The recent Hampton Review recommended that regulators should take a risk-based approach across all of their enforcement activities. In the Chancellor's Budget report the Government accepted the Review's recommendations and undertook to bring forward legislation to implement them. An approach by the Ombudsman which, we believe, potentially could give rise to the prospect of over-cautious or risk-averse regulation would cut right across these policy developments.

(ii) Standard

Aside from assessing whether a duty of care should be imposed, how will the Ombudsman assess whether or not it has been breached? Will she, for example, apply the test in law for judging breach in a professional context – i.e. against what the generality of professional opinion would be (the *Bolam* test)[5]? In other words, will she look to see what other regulators or professional advisers would have done in similar circumstances with the knowledge (and constraints) the regulator actually had at the prevailing time? Or will she consider what skill and care a hypothetical regulator ought to have had and then what a regulator with that skill and care would have done in similar circumstances with the knowledge (and constraints) the regulator actually had (or ought to have had) at the prevailing time? Or will she apply a test more analogous to the test applied by the Courts in a judicial review

[5] See the direction to the jury of McNair J in *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 586 – 587. The test is "...not the test of the man on top of the Clapham omnibus, because he has not got this special skill. The test is the standard of the ordinary skilled man exercising and professing to have that special skill. A man need not possess the highest expert skill at the risk of being found negligent. It is well established law that it is sufficient if he exercise the ordinary skill of an ordinary competent man exercising that particular art..."

context: and consider, when assessing an alleged breach of any duty, whether the regulator conducted itself in a way that no reasonable regulator, in similar circumstances and with the knowledge (and constraints) of the regulator, would have done?

(iii) Causation

Certain questions arise to which we wish to draw the Ombudsman's attention: How will the ombudsman deal with questions of causation and remoteness? In particular, would a mere "but for" test be applied to determine the issues of causation? Or would the Ombudsman consider, as is done in the case of auditors' professional negligence cases, whether the negligence was the effective cause of the investors' loss, as opposed to simply giving rise to the opportunity for the investors to suffer that loss at the hands of fraudulent or incompetent management (and for which the auditor should not be held liable)?[6] What losses break the chain of causation and/or are too remote (for example the fall in the stock market; the outcome of the *Hyman* litigation; the fact that the ELAS sale fell through)?

Conclusion on negligence

Although we recognise that it is a matter for the Ombudsman to decide whether to do so, we wonder whether it would be wise or practical for her to adopt the language of negligence and to try to adapt it as part of the concept of "maladministration". In our view there are real and substantial difficulties with this approach. It risks the Ombudsman's process becoming burdened with the considerable legal baggage that goes with it; and it cuts across the wider public interest that judicial and government policy has sought to address.

We therefore suggest the following wording for paragraph 41:

> *In considering the actions and decisions of the regulators and/or GAD, the Ombudsman's objective assessment will focus on whether the prudential regulator acted – or in omitting to act, behaved – outside the bounds of, or inconsistently with, the regulatory regime that the prudential regulator was responsible for operating with advice and assistance from GAD.*

...

[6] See *Galoo v Bright Grahame Murray* [1994] 1 WLR 1360.

ANNEX A

EXCERPTS FROM: COMMENTS ON THE "FRAMEWORK FOR DETERMINING WHETHER MALADMINISTRATION OCCURRED"

Paragraphs 42 (a) and (b)

We agree that the starting point in the Ombudsman's factual inquiry should be the regulator's assessment of Equitable Life's annual returns. This was, of course, the starting point by which the regulator determined whether life insurance companies were complying with the statutory solvency requirements, supplemented by appropriate questioning of this information, and appraisal of the replies, during the scrutiny process.

...

... [W]e think that it would make sense in this particular investigation if maladministration were only addressed in the context of a demonstrable causative link with an identifiable injustice suffered. We remain of the view that where this is lacking, any finding of maladministration would serve no purpose, because the regime under scrutiny has now been replaced, and because there has already been a comprehensive inquiry conducted by Lord Penrose which looked at lessons to be learnt.

... [M]aladministration has 'traditionally' focused upon the *manner* in which decisions are reached and the *manner* in which they are or are not implemented – an interpretation that has been consistently adopted by the courts. Our view is that this principle ought to be central in any assessment of the "appropriateness" of the regulator/GAD's behaviour. The assessment of whether any behaviour was "appropriate" should not involve questions of whether what was done was "reasonable" or "rational" (see below).

We also wish to comment on your proposal to assess whether behaviour was "appropriate" in the light of "accepted good practice". Unlike the position with legislation and guidance, it is not clear what administrative standards the regulator/GAD are to be measured against if the benchmark is "good practice". This is a flexible concept which could encompass a range of standards from acceptable to best practice. We do not accept that a failure to follow "accepted good practice" would be maladministration. By definition, good practice is of a higher standard than (for example) acceptable practice.

Paragraph 42(c)

We suggest that the primary question for the Ombudsman to consider in her analysis of the facts is whether the prudential regulator acted – or in omitting to act, behaved – outside the bounds of, or inconsistently with, the regulatory regime that it was responsible for operating with advice and assistance from GAD.

This is in part reflected in the first bullet point of paragraph 42(c), but the second bullet point seems to indicate a separate objective test going beyond the requirements of the regulatory regime itself, in particular a duty of care test (hence the comments in our draft response in relation to negligence). In the light of your assurances, we are assuming that the second bullet point will be deleted.

Taking all the above points together, could not paragraph 42(c) be expressed as follows:

Did the regulator and/or GAD, with maladministration, fail to act in accordance with the statutory regulatory regime and the policies adopted in implementing that regime?

Where this involved a discretionary decision or the exercise of judgment, did the process by which the decision was reached or the judgment determined, or its implementation involve maladministration?

In relation to (b), our view is that the question before the Ombudsman ought to relate solely to process, or *manner*. As we mention above, we don't agree that it can involve any assessment of "reasonableness" or "rationality", which would represent in our view an assessment of the merits of the decision. Section 12(3) of the 1967 Act states that "nothing in this Act authorises or requires the Commissioner to question the merits of a decision taken without maladministration...in the exercise of a discretion vested in that department or authority". In our view "decision taken without maladministration" refers to the how the decision was made, not its outcome, which is what an assessment of its reasonableness would refer to.

This view is consistent with the *Bradford* judgment quoted in the discussion paper, where Lord Denning, in considering the meaning of "maladministration", said, *"It would be a long and interesting list, clearly open-ended, covering the manner in which a decision is reached or discretion is exercised: but excluding the merits of the decision itself or of the discretion itself. It follows that a 'discretionary decision, properly exercised, which the complainant dislikes but cannot fault the manner in which it was taken, is excluded'."*

You have of course given us assurances that it is not the Ombudsman's intention to assess the merits of discretionary decisions, for which we are grateful.

ANNEX B

FREEDOM WITH PUBLICITY

We have been requested to provide a 'positive' statement of what the Government believe could have been expected – by individual policyholders and by regulated entities such as Equitable – from those operating the regulatory regime as guided by the policy of freedom with publicity.

Background
The governments of the day had two primary objectives in life insurance regulation: commercial freedom and innovation on the one hand and policyholder protection on the other.
The doctrine of freedom with publicity was seen as providing an appropriate balance between these two competing objectives.

By the time the Insurance Companies Act 1973 was enacted, the doctrine of "freedom with publicity" had been government policy in regulating the insurance sector for almost a century. Its form had of course evolved considerably over this time, but the essence of the doctrine remained the same: provided that life insurance companies complied with certain requirements, they were free to pursue their business as chosen without government interference[1].

In limiting interference in the affairs of insurance companies the doctrine sought to facilitate effective competition, promote growth and expansion in the industry and to reduce the administrative cost of regulation upon the regulated sector. In other words, in applying the doctrine the prudential regulator was pursuing the government's publicly stated objective of an efficient, competitive and innovative market[2].

Freedom with publicity was not so much a " 'benchmark' against which the regulators should or could be judged" as a guiding principle which generated certain expectations in the regulated sector and in the investing public. Provided certain conditions were fulfilled it was fundamentally a policy of "not doing things", as opposed to "doing things", although that does not mean that there weren't positive obligations.

What the industry could expect under Freedom with Publicity
The primary expectation of any government is that it will exercise its discretionary powers consistently and in accordance with its stated policies.

When it came to the prudential regulation of the insurance sector, whilst the industry was of course obliged to comply with the statutory controls placed upon it, there was a clear expectation that the prudential regulator would not otherwise seek to interfere in the affairs of a company.

[1] In an address before the House of Lords on 8 February 1973 the Parliamentary Under Secretary of State, Department of Trade and Industry, said, *"The form and extent of supervision designed to reduce the risk of insurance failures has changed through the years, but a modified form of the caveat emptor doctrine has been the guiding principle throughout. This has usually been referred to as "freedom with publicity", meaning that the insurer normally has more or less complete freedom to run his business as he thinks fit, but must make available certain prescribed information to help the policy holder take a view as to his likely ability to pay up if and when the occasion for indemnity arises."*

[2] On 21 May 1973 the Minister for Trade and Consumer Affairs, in an address to the House of Lords, said, *"The aim in legislation in these matters is to strike a proper balance between, on the one hand, allowing the industry so much freedom that it can be exploited by rogues and, on the other hand, creating for the industry such shackles that it cannot give an efficient, competitive and forward-looking service to consumers here and abroad."*

Provided that they were complying with statutory requirements, authorised insurance companies could legitimately expect to have the freedom to design their own products, set their own premiums and conditions of contract with customers, to determine their own investment and bonus distribution strategy, and to pursue their chosen business models[3].

The obligation upon the prudential regulator was to regulate consistently with these expectations. The approach adopted in practice was characterised as regulating with a "light touch"[4].

"Publicity" as a pre-requisite for "Freedom"
The "price" of the freedom that insurance companies could expect was that they were required to make certain aspects of their affairs public and to comply with certain other safeguards built into the regulatory system[5].

In this the doctrine sought to fulfil the government's other objective of protecting policyholders by enabling them, with input from market analysts, journalists, and brokers, to make informed investment choices. If this was to be effectively achieved, **it naturally entailed an obligation upon the prudential regulator (within the extent of its remit) to ensure that the "publicity" element of the doctrine was properly discharged by the regulated sector.** However the doctrine of freedom with publicity had informed the very design of the prudential regulatory framework to achieve this. Primary and secondary legislation prescribed in detail the nature and form of disclosure required; and this was supplemented by additional guidance. Section 65 of the Insurance Companies Act 1982 obliged the prudential regulator to deposit with the registrar of companies copies of the returns made by insurance companies.

The investing public's expectations
Although not the primary "recipient" of the exercise of executive power pursuant to the doctrine of freedom with publicity, members of the public had expectations deriving from the doctrine's design to best balance their interests as consumers. The public would have had expectations in relation to both the behaviour of the companies they invested in and the prudential regulator's exercise of its statutory powers.

In relation to the companies themselves, the public had an expectation that they would provide honest and proper disclosure to the prudential regulator in accordance with their statutory obligations. In turn their expectation of the prudential regulator was that it would monitor life insurance companies' compliance with regulatory requirements, in particular statutory solvency on the basis of the information disclosed in the regulatory returns.

There was an expectation of the prudential regulator that it would not regulate in a way so as to damage consumers' interests by distorting the market, reducing the amount of choice available or by making insurance products more expensive through failure to minimise the cost-burden of

[3] During the passage of the Insurance Companies Bill through Parliament in 1981, the Under-Secretary of State for Trade said, *"In general, there has been no Government control of premiums or other conditions of contract between insurers and policyholders; there has not been Government direction of the investment of insurance companies; there has been a wish to see the insurance industry expand the range and volume of its business in the United Kingdom and in other countries…"*

[4] As the PCA noted in paragraph 35 of her first report, *"The style adopted by the prudential regulators was variously described by them to my staff at interview as "passive", 'light touch' and 'like negative vetting'…"*.

[5] See again paragraph 140 of the PCA's first report.

regulation[6]. Powers of intervention were broad and draconian and the intention was that the regulator would be able to use influence and persuasion under threat of their use[7]. **Consumers could legitimately expect that the regulator would not use its powers lightly or capriciously.**

Having highlighted what consumers could expect under the doctrine of freedom with publicity, it is equally relevant and important to highlight what they could not expect.

Firstly, there were limits to the extent to which the prudential regulator could be expected to fulfil the role of policeman or detective in addition to its monitoring role. The investing public did not have an expectation that the prudential regulator would second-guess or challenge the management of a company, or its Appointed Actuary, unless there was clear evidence[8] that it was acting in a way that was contrary to regulatory requirements.

The actuarial practices adopted by a company were a matter for the professional judgment of its Appointed Actuary, acting within the limits permitted by the regulations and guidance issued by the actuarial profession, and there was a range of possible actuarial approaches satisfying this criterion. The Appointed Actuary was professionally bound to provide full and accurate disclosure in the returns and to certify compliance with the regulations, and, consistent with the concept of freedom with publicity, the regulator and GAD could reasonably be expected to rely on the information provided by the company when monitoring compliance with the regulations.

Secondly, there was no expectation that the regulator would prevent all company failures or underwrite their losses when failures occurred. Clear public statements were made to the contrary[9] and this would not have been consistent with an expectation not to distort the market. Where things did go wrong, the government had enacted the Policyholders Protection Act in 1975 to provide some safeguards for the consumer.

[6] As the Ombudsman recognised in paragraph 35 of her first report, *"The philosophy of the regime, in contrast to those that had applied in some of the other financial sector regulatory regimes, such as banking, which concentrated on product and tariff control, was to allow consumers to benefit from competition between insurers through downward pressure on prices and greater choice of products"*.

[7] As the PCA found at paragraph 24 of her first report, *"I do not dissent from [the] view that the prudential regulator could only intervene formally if a company breached the statutory requirements and that, otherwise, their role was to identify problems and issues, and through informal pressure, encourage the company to take the necessary action to get back to a sound financial base"*.

[8] From the Returns or from replies to questions put to the company by the regulator/GAD

[9] The Under-Secretary of State for Trade, on 2 February 1981, said to Parliament, *"There have been cases in the past where failures of insurance companies have done policyholders and interested third parties great harm, and, indeed done the industry no good. Although no system of supervision can avoid completely the risks of difficulty or failure of an insurance company, Government responsibility for a systematic approach is to be found not just in the United Kingdom, but throughout the countries of the developed world and in many others."*.

Conclusion

The doctrine of freedom with publicity entailed both positive and negative obligations upon the prudential regulator. It was fundamentally a policy of restraint (provided that certain conditions were met) in pursuance of positive market related objectives.

The doctrine of freedom with publicity informed the design and operational implementation of the statutory framework. In other words, a description of the positive obligations under the doctrine of freedom with publicity involves a description of the statutory requirements themselves as they from time to time existed, having been designed to implement the doctrine as it was then interpreted.

When it came to the exercise of discretion, the prudential regulator was obliged to act consistently with the expectations that the doctrine created in terms of its stated objectives. In practice the approach adopted was described as regulating with a "light touch".