NURSING HOMES: Policy, Profit and Litigation

Karen Wheelwright*

Introduction

The delivery of health services in Australia occurs within a complex legal framework which regulates the provision of services and funding at Commonwealth and State levels. The complexity of this framework is partly due to our federal system and partly a product of the competing interests and pressures - fiscal, social, political and technological - which are brought to bear on the policy-making process for health services and on service delivery.

The constraining influences exerted by law on the health services area have yet to be systematically examined. The legal framework - constitutional and legislative - within which the regulation of the health system is established, has a significant impact on the nature, cost and distribution of health services. Furthermore, litigation (often in conjunction with the political process[1]) can influence certain health programs substantially, and can frustrate Government attempts to modify those programs, particularly where there are attempts to reduce subsidies to private sector service deliverers.

This paper examines some of these issues in the context of one particular Commonwealth health-welfare program - the nursing homes program as it operated from 1973 until the introduction of the Aged Care Reform Strategy

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* B.A., Dip. Ed., LL. B. (Hons), Senior Research Assistant, Faculty of Law, Monash University. Research and writing of this paper were supported by a grant from the Australian Research Council to Peter Hanks and Beth Gaze of Monash University on the topic of Legal Regulation of the Health System. The assistance of P Hanks and B Gaze in planning the paper and their comments on drafts are acknowledged.

1 The dispute and litigation in 1989 and 1990 over the Commonwealth Government's attempts to reduce public subsidies for pharmaceutical services is a good example.

in 1985-86. Litigation prompted by the Government's attempt to control, by administrative means, the level of subsidised fees private nursing home proprietors were permitted to charge their patients displayed the approach of the judiciary to the wider issues involved, such as Government budgetary considerations. The litigation also highlighted the pitfalls in the Government's legislative and administrative approach to cost containment in the nursing home program. The paper also examines some of the legal difficulties of policy implementation in the program, an examination which aims to provide some useful insights into the implementation of health services policy generally.

Finally, the paper goes on to consider the extent to which the courts characterise what are really disputes about policy and resource-allocation as contests between the individual and the bureaucracy. Such a characterisation, which has its basis in Diceyan theories of administrative law, fails to take account of 'the major clashes of policy and ideology' which inevitably arise in a late twentieth century democratic state, where important services like health, education and transport services are consumed collectively and are therefore funded and managed on a collective public basis by central governments.[2] Judicial review which is pre-occupied with individual grievance handling at the expense of broader policy and resource allocation issues adversely affects the Government's attempts to control the allocation of limited financial resources in an area of seemingly ever-increasing and competing demands. More importantly, it risks becoming marginal, when it has the capacity to make an important and necessary contribution to government administration at a time of rapid change.

LEGAL FRAMEWORK OF HEALTH CARE PROGRAMS

Constitutional constraints on the nursing home program

The development and implementation of health care programs by the Commonwealth has been necessarily constrained by its limited powers, as defined by the Commonwealth Constitution. As originally drafted, the Constitution conferred no power on the Commonwealth to establish

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2 McAuslan, P, 'Administrative Law, Collective Consumption and Judicial Policy', (1983) 46 *Mod LR*, 1 at 2.

programs in the health care area. This point was made emphatically by the High Court in the *Pharmaceutical Benefits* case[3] in which the *Pharmaceutical Benefits Act* 1944 (Cth) was held invalid, principally because it purported to regulate the activities of pharmacists and medical practitioners, over whose activities the Commonwealth Parliament had no constitutional authority. Section 51(xxiiiA) - the 'social welfare power' - was added in 1946 to overcome the deficiency, so that the Commonwealth Parliament could make laws with respect to:

> The provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorise any form of civil conscription), benefits to students and family allowances.

The prohibition on 'civil conscription' was inserted in the Bill in 1946 by agreement between the Government and Opposition, to reduce the risk of a Commonwealth Parliament moving to nationalise medical and dental services. The High Court has held that the prohibition on civil conscription applied only to the reference in the paragraph to the provision of 'medical and dental services'.[4]

The nursing home program is a health-welfare program which provides accommodation, personal and nursing care to dependent aged people in homes owned by private operators or religious or charitable organisations, or in government nursing homes.[5] The Commonwealth's power to legislate on nursing homes comes from the part of section 51(xxiiiA) which authorises the Parliament to make laws with respect to 'sickness and hospital benefits'. The section clearly empowers central government to provide a separate

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3 *Attorney-General (Vic) (ex rel Dale)* v *Commonwealth* (1945) 71 CLR 237.

4 *Federal Council of the British Medical Association in Australia* v *Commonwealth* (1949) 79 CLR 201. The High Court has also stated that the words of the prohibition are not irrelevant to the scope of the other matters described in the paragraph, at least to the extent that whenever medical or dental services are provided pursuant to a law with respect to the provision of some other benefit, for example, sickness or hospital benefits, the law must not authorise any form of civil conscription of such services: *Alexandra Private Geriatric Hospital* v *Commonwealth* (1986-87) 162 CLR 271, 279.

5 Nursing homes (and hostels for the aged) are currently funded under the Commonwealth's Residential Care For Older People Program, which is administered by the Department of Health, Housing and Community Services.

source of financial support for people cared for in specialised nursing homes for the aged.[6] The argument in the *Alexandra* case[7] that the statutory scheme for nursing homes lay outside Commonwealth legislative power was rejected by the High Court, which held that a single law can possess more than one character and it suffices for constitutional validity if any one or more of these characters fairly falls within a head of Commonwealth power. In that case, it was held that a law with respect to nursing homes could be properly characterised also as a law with respect to the provision of hospital or sickness benefits.[8]

It has been said, however, that the section does not give the Commonwealth direct power to regulate the supply of such health-related services by the private sector. In *British Medical Association* v *Commonwealth*, Dixon J said that the purpose of the section was to enable the *Commonwealth* to provide the allowances, services and benefits mentioned;[9] and in the *General Practitioners Society* case, Gibbs J held that there was no express power conferred on the Parliament to make laws to regulate the manner of performance of medical or dental services.[10]

Despite this limitation on direct regulatory intervention, the Commonwealth Parliament can adopt a 'private enterprise approach' by legislating to provide nursing home services to the public, through subsidising those private enterprise service providers who agree to participate in a Commonwealth funded scheme. Indeed, an important feature of health services provision in Australia is the reliance upon, and subsidisation of, the private sector as principal deliverers of many health care programs; accommodation services for the aged, medical services under Medicare, and pharmaceutical benefits are three important examples. The practical effect of the Commonwealth's subsidisation of private sector services seems to be that it can impose regulations on those providers who

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6 Carney T and Hanks P, *Australian Social Security Law, Policy and Administration,* Melbourne, Oxford University Press, 1986, at 205.

7 *Alexandra Private Geriatric Hospital* v *Commonwealth, supra n 4.*

8 *Supra n 4* at 279.

9 *Federal Council of the British Medical Association in Australia* v *Commonwealth, supra n 4* at 260.

10 *General Practitioners Society* v *Commonwealth* (1980) 145 CLR 532 at 557.

choose to participate in the subsidised scheme.[11] In the *Alexandra* case,[12] the plaintiffs argued that the nursing home provisions in the *National Health Act* 1953 (Cth) enabled the Commonwealth to assume control of the entire nursing home industry, and consequently were outside the limits of any law which may properly be characterised as a law with respect to the provision of sickness or hospital benefits. The High Court rejected the argument, stating:

> As a matter of practical reality, it may be true to say that the Commonwealth has this degree of control over the industry because there would be few proprietors who would find it profitable to conduct a nursing home without the benefit of the very substantial government subsidy. But as a matter of law, the point must be made that it is only if and when the proprietor of a nursing home obtains approval of his premises as such that he becomes subject to the provisions of the Act. True it is, his freedom from control must be purchased at the price of the benefit that would otherwise be payable in respect of each patient under his care, for the benefit is payable only in respect of qualified nursing home patients occupying a bed in an approved home. Nevertheless, his participation in the scheme is ultimately a matter of his own choice.[13]

As far as nursing homes are concerned, the Commonwealth can impose regulations on those providers who choose to participate, even if that participation is due more to economic pressure than to free choice. Proprietors in the Commonwealth-funded nursing home program can thus be required to conform to Commonwealth standards on bed-numbers, levels of fees chargeable to patients and standards of service delivery.

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11 Carney and Hanks, *supra n 6* at 178. In *Alexandra Private Geriatric Hospital* v *Blewet,* Woodward J noted that Commonwealth subsidies at the time were substantial, covering about three-quarters of the fees. Given the size of the subsidies, remaining outside the scheme, in his view, could have had little attraction to the great majority of nursing homes: (1984) 56 ALR 265, 266.

12 *Supra n 4.*

13 *Supra n 4* at 278-9.

This may not be the case for medical and dental services, however, which are qualified by the civil conscription prohibition. The High Court considered the issue in the *General Practitioners Society* case.[14] In obiter comments, four judges[15] considered that the prohibition against civil conscription would be infringed if economic or other circumstances compelled the performance of the service, even though there was no legal compulsion directly applied in relation to the act to be performed. Aickin J gave as an example of practical compulsion:

> the prohibition of the performance of medical or dental services by particular qualified practitioners other than in some designated place, though no punishment was attached to failure to practise in that place.[16]

In Barwick CJ's view:

> to make out such a case [of practical compulsion] would need an extremely strong set of circumstances which, in real terms, left the individual with no choice but to submit to what the statute required, though it did not command it.[17]

The judgments leave open the possibility of a challenge to Commonwealth laws which, through economic or other practical coercion, compel the performance of medical or dental services, or compel their performance pursuant to a law with respect to some other benefit in s 51(xxiiiA).

As a result of these apparent constitutional inhibitions on direct regulatory intervention in health care services, Commonwealth policies have focused on financial intervention, adjusting the supply of and demand for services, and on regulating incidental matters. Nursing homes and hostels have been funded under the Commonwealth Parliament's broad appropriations power (s 81) and grants power (s 96), while consumer access

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14 *Supra n 10*. The Court held that certain provisions of the *Health Insurance Act* 1973 (Cth) relating to pathology did not impose a form of civil conscription on medical practitioners contrary to s 51 (xxiiiA) of the Constitution.

15 Barwick CJ at 537-8, Gibbs J at 550, citing the *BMA* case, Murphy J at 565, Aickin J at 565-6.

16 *Supra n 10* at 566.

17 At 538.

to the facilities, as already stated, has been funded under the social welfare power (s 51xxiiiA).[18]

Private nursing homes are directly regulated by state legislation. For example, Part 4 of the *Health Services Act* 1988 (Vic), and equivalent legislation in other states, requires that a private nursing home operated for profit must be registered. Approval of proprietors, approval of land and the design of premises are all prerequisites of registration being granted. Regulation varies from state to state, however, and there is little incentive for State Governments to use their powers to control nursing homes, given that they are funded (and substantially controlled) by the Commonwealth.

Legal context of the Australian health system

The Commonwealth Constitution defines the broad framework within which the specifics of health policy are developed and implemented. The formulation of health policy is moulded by legal processes - in particular, by judicial attitudes and rulings, expressed in the course of litigation, and by the Government's legally-informed responses to those attitudes and rulings. Given these legal dimensions, the law is very important to health policy analysis, and the critical consideration of its influence has to date been neglected.

Apart from a few lawyers who advise health care institutions and governments, lawyers do not encounter the health system as a system, with many interlocking elements. In general they view the health system through the eyes of their individual clients who might have a personal injuries claim against an individual doctor, or a complaint about an individual hospital, or a claim that a regulatory agency has unlawfully denied funding. Lawyers deal with the health system at the level of individual relationships, the 'micro' level. This view is largely reflected in court decisions in the health area, as the courts also see only the dispute before them, and do not usually consider that dispute in the context of the health system generally.[19]

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18 Hanks, PJ, *Constitutional Law in Australia,* Sydney, Butterworths, 1991, at 371-2.

19 A more detailed discussion of the issues canvassed in this section can be found in Gaze, B, *Legal Issues in Resource Allocation*, unpublished address to the College of Medical Administrators, Melbourne, June 1992.

Institutions and pressure groups in the health system use the legal system as an instrument to gain advantage and improve their positions. There is an inevitable conflict when public programs are grafted onto private practice, as they are in the Australian health system. In recent years, there have been a number of legal challenges (by pathologists,[20] pharmacists,[21] and nursing home proprietors[22]) to Government moves to modify various health programs, moves which reflect the Government's desire to rein in the burgeoning expenditure on health services.[23] The success of the legal challenges by private enterprise service providers shows the influence which can be exerted by the law on health policy and the tension between the law and the process of policy implementation. An examination in this article of a sample of the nursing homes cases will show the legal weaknesses in the policy approach taken by the Government in its recent attempts to control expenditure by cutting back the profitability of those private enterprises onto which public health service delivery has been grafted.

It is argued in the litigation that legal errors have been made in the course of bureaucratic decision-making (in the case of nursing home proprietors, in the course of determining an individual application for a fee increase), but the broader issue which underlies the technical legal arguments is the issue of resource-allocation. The difficulty here is that the law does not directly recognise the arguments and conflicts about resource allocation as 'legal

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20 *Queensland Medical Laboratory* v *Blewett* (1988) 84 ALR 615; *Peverill* v *Meir* (1990) 95 ALR 401; *Peverill* v *Health Insurance Commission* (1992) 104 ALR 449.

21 *Commonwealth* v *Pharmacy Guild of Australia* (1989) 91 ALR 65; *Pharmacy Guild of Australia* v *Riordan* (1989) 18 ALD 446; *Dornan* v *Riordan* (1990) 95 ALR 451. In addition, there were two unreported judgments of the Federal Court on the same issue of chemists' remuneration under the Pharmaceutical Benefits Scheme.

22 *R* v *Hunt; Ex p. Sean Investments* (1979) 25 ALR 497; *Nagrad Nominees* v *Howells* (1981-82) 38 ALR 145; *Sean Investments* v *MacKellar* (1981-82) 38 ALR 363; *Howells* v *Nagrad Nominees* (1982) 43 ALR 283 (FC); *Sean Investments* v *MacKellar* (1982) 42 ALR 676 (FC); *Croft* v *Minister for Health* (1982-83) 45 ALR 449; *Alexandra Private Geriatric Hospital* v *Blewett* (1984) 56 ALR 265; *Alexandra Private Geriatric Hospital* v *Blewett* (1986) 68 ALR 222 (FC); *Octet Nominees* v *Grimes* (1986) 68 ALR 571; *NCA (Brisbane)* v *Simpson* (1986-87) 70 ALR 10; *Octet Nominees* v *Grimes* (1987) 73 ALR 107 (FC). There were also a number of unreported judgments on the fees control issue.

23 Health expenditure was 8.1% of Gross Domestic Product in 1990-91 and has been at that level for some years: Australian Institute of Health and Welfare, *Health Expenditure Bulletin*, No. 7, Canberra, AGPS, July 1992, 1.

issues'. This is partly because the dominant legal model in our culture characterises legal problems in terms of individual legal rights and obligations, a characterisation which is often highly inappropriate in administrative law where the challenge is 'to balance action taken on behalf of the public at large against the interests of a single individual whose rights ... may be affected by the exercise of the public power'.[24] Some judges have been prepared to balance individual and communal rights in their approach to the interpretation of health legislation. Some have interpreted the grounds of challenge in the *Administrative Decisions (Judicial Review) Act* 1977 (Cth) (the ADJR Act) restrictively, thus supporting the exercise by the bureaucracy of broad discretionary powers which give effect to Government policy. In the nursing home fees cases, however, most characterised the dispute as one of the individual aggrieved by the unlawful exercise of administrative power, and did not go beyond protecting individual rights to broader public policy issues.

The nursing home fees decisions which are critically discussed in this paper also show that the *way* in which a Government chooses to implement expenditure controls can have unforeseen legal consequences. The nursing home fees litigation has some useful lessons for health policy implementation generally. One important lesson is the need for explicit legislative expression of Government policy in the health area, given the tendency of our Courts to critically and narrowly interpret statutes. Another is that there may be legal difficulties encountered in the use of guidelines which give effect to Government policy, if those guidelines do not have formal legal expression.

GOVERNMENT INTERVENTION IN HEALTH SERVICE PROVISION - NURSING HOMES FEES CONTROL

History of Commonwealth subsidisation of nursing home accommodation

Commonwealth involvement in the provision of nursing home accommodation for the frail aged was marked by the incremental increase in

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24 Bradley, AW (ed), *Wade and Phillips' Constitutional and Administrative Law* (9th ed), Longman, London, 1977 at 557-558, cited by Hutchinson, A, 'The Rise and Ruse of Administrative Law and Scholarship' (1985) 48 *Mod LR* 294 at 299.

Commonwealth funding between the 1950's and the mid-1980's, and a lack of a clear policy framework for future nursing home provision and for aged services generally.[25] It was not until the mid-1980's that the Government began to implement an aged care strategy aimed at ensuring the provision, within necessary budgetary constraints, of an appropriate and integrated range of residential, home and community services for the aged into the 21st century.[26]

1954 - 1972

The *Aged and Disabled Persons Homes Act* 1954 (Cth) was the first Commonwealth initiative in this area and provided assistance to charitable and religious bodies to build homes (mainly hostel-type or self-contained units) for the aged, to cater for those in economic need and without family support.[27]

It was not until 1963 that Commonwealth legislation, namely the *National Health Act* 1953 (Cth), made specific reference to nursing homes as we know them today. The impetus for separate recognition of facilities providing long-term non-acute nursing care came in the 1960's. Under the then-prevailing hospital benefits arrangements, patients who contributed to private health insurance funds received a Commonwealth benefit (paid to the fund) to subsidise the cost of their care in registered hospitals. The insurance arrangements, however, failed to provide adequate protection for the frail aged and chronically handicapped because of the strict rules of the private health funds about pre-existing illnesses and chronic conditions, whereby claims for fund benefits (although not Commonwealth benefits) were disallowed. In addition, there were inadequate facilities for those requiring long-term non-acute care and the accommodation of nursing home-type patients in State public hospitals created an increasing strain on those facilities.

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25 See Howe, A, 'Nursing home care policy: from laissez-faire to restructuring' in Kendig, H and McCallum, J (eds), *Grey Policy. Australian Policies for an Ageing Society,* North Sydney, Allen and Unwin Australia, 1990, at 150-159.

26 For details of the strategy and an assessment of its progress to 1991, see Department of Health, Housing and Community Services, *Aged Care Reform Strategy Mid-Term Review 1990-91,* Canberra, AGPS, 1991.

27 Department of Community Services and Health, *Quality, Staffing and Dependency: Non-Government Nursing Homes,* Canberra, AGPS, 1986, 3.

In 1962 the Government recognised that it was not equitable to require pensioners in long-term hospital care to pay an insurance contribution to a hospital benefits fund in order to qualify for a Commonwealth benefit towards meeting the cost of their nursing care. Consequently, non-contributory benefits for patients in nursing homes approved by the Commonwealth were introduced from January 1963, at a rate of $2 per day.[28]

At the time the new benefit was introduced, a number of private hospitals were in effect nursing homes offering prolonged care for the aged, but were not distinguished from other institutions classified as hospitals under the hospital insurance scheme. They were transferred to the new nursing home system, and the new subsidy arrangements also applied to many institutions which had been hospitals which were not recognised as such for hospital benefits purposes.[29] In addition, State Governments sought to transfer to nursing homes patients from the geriatric wards of their residential mental health institutions, for both humanitarian and financial reasons.[30]

The new scheme initiated a rapid expansion of the nursing home industry.[31] The new benefit was paid, without a means test, on behalf of any person (insured or not) who was accommodated in an approved public or private nursing home. In January 1969, a supplementary benefit of $3 per day was introduced for patients in nursing homes requiring 'intensive' nursing care.[32]

1973 - the introduction of fees control

Until 1973, there was no Government control over the level of fees permitted to be charged in nursing homes or over the growth in the number of nursing home beds. The only restrictions on fees were by way of market

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28 See Carney and Hanks, *supra n 6* at 205-6; and Sax, S, *A Strife of Interests Politics and Policies in Australian Health Services,* Sydney, George Allen and Unwin, 1984, at 61-65.

29 Sax, *supra n 28* at 64.

30 Carney and Hanks, *supra n 6* at 206.

31 It has been estimated that the number of approved nursing home beds grew by 48% between 30 June 1963 and 30 June 1968. The growth of general hospital beds in the same period was 6.25%. See Wilson, D, 'Nursing home benefits: the first ten years and the new arrangements', (1973-74) 1 *Social Security Quarterly,* no. 3, 21.

32 Sax, *supra n 28* at 64.

forces and self regulation. As the Commonwealth benefits were not adjusted regularly, any increase in residents' benefits or pensions was very soon absorbed by increased fees charged by nursing homes. The open-ended nature and rapidly expanding cost of the nursing home benefits scheme and the rapid growth of nursing home accommodation, especially in the private sector, led to the introduction of a range of controls over nursing homes.[33]

In the 1972 Budget, the Government introduced administrative measures to regulate the growth of nursing home beds, the admission of patients and the level of fees which could be charged. These controls gave, for the first time, formal policy recognition to the nursing home system. The controls were applicable from 1 January 1973 and the *National Health Act* 1953 (Cth) was amended accordingly.[34]

Implementation of the new controls required considerable input from both nursing home proprietors and the Commonwealth bureaucracy. A new section 40AA provided for the approval of nursing homes by the Department of Health[35] - only approved nursing homes qualified for generous subsidisation of fees by the Commonwealth. A condition of approval was that participating nursing homes did not charge more than the scale of fees set by the permanent head of the administering Commonwealth Department or his delegate (s 40AA(6)(c)(i)). No extra charges were permitted to be levied by the nursing home except in respect of matters not related to nursing home care. The Act authorised the permanent head to substitute a new scale of fees for the one already determined by him, either on application to him or on his own motion (s 40AD(1)(b)). Proprietors were required to make individual applications to the Department for an increase in fees and the permanent head was required to consider and determine the application for a fee increase, having regard to 'costs necessarily incurred in providing nursing home care in the nursing home' (s 40AA(7)). Where the

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33 Senate Select Committee on Private Hospitals and Nursing Homes, *Private Nursing Homes in Australia: their conduct, administration and ownership*. Canberra, AGPS, 1985 at 35.

34 Act No. 114 of 1972.

35 This was the name of the Department at the time fees control was introduced and, for simplicity, will be used throughout. The Commonwealth Department responsible for aged services has changed its name several times since the 1970's. The current title is the Department of Health, Housing and Community Services.

application was refused, the proprietor was entitled to seek from the Minister for Health a review of the permanent head's decision (s 40AE). The Minister in turn was required by the Act to refer the matter to a Nursing Home Fees Review Committee of Inquiry established under the Act (s 117) for examination and report.

Departmental administration of the fees control system

In administering the fees control policy, the Department of Health was concerned to balance three competing considerations - the financial protection of patients, the commercial interests of nursing home proprietors and the control of government expenditure. This was done in a number of ways, most of which were subsequently challenged in litigation. The Department sought to control expenditure by identifying certain costs or 'business items' which were excluded from calculations in claims for fee increases (called 'policy exclusions' in the Department's Guidelines for Determination of Fees, issued as an internal document following the decision in *R* v *Hunt; Ex parte Sean Investments*[36]). These included capital expenditure (unless it increased the bed capacity of the home), interest payments, depreciation on buildings, costs incurred on change of owner or proprietor and profitability claims.

In spite of controls on fees and bed numbers, program expenditure and bed numbers continued to increase. From the mid-1970's to the early 1980's, some 8000 new private nursing home beds were established and the total outlays on nursing home care in all sectors increased more than fivefold between 1972 and 1982.[37] The fees control mechanism appeared to have been ineffective in limiting the rate at which fees grew.[38] According to

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36 (1979) 25 ALR 497.

37 By the late 1970's, nursing home care was the most rapidly growing item in the health care budget: Howe, *supra n 25* at 158-9. The deficit-funded sector, ie those non-profit nursing homes run by religious and charitable institutions whose approved budget deficits were met by the Commonwealth from 1976, also proved an expenditure drain. Expenditure in 1983-84 was 31% higher for deficit-funded than for participating (ie private sector) beds: Carney and Hanks, *supra n 6* at 219-220.

38 For example, the average annual increase in fees per bed Australia-wide between 30 June 1973 and 30 June 1978 was 19%. The average inflation rate for the same period was 13.5%: See *Report of the Auditor-General on an Efficiency Audit of Commonwealth Administration of Nursing Home Programs,* Canberra, AGPS, 1981, at 79.

the Auditor-General, who reviewed the program in 1981,[39] this was due to the higher profitability of nursing homes approved since 1973 (because, in setting fees for new homes, each regional office had regard to the fee structure of equivalent existing nursing homes and sought to ensure that the newly-approved nursing home achieved a 'reasonable' profit). Another reason was the lack of Departmental control in the area of proprietors' claims for salaries and wage increases, which were built into fee levels.[40] Successful court challenges to fee determinations also forced the Department to allow a range of costs, which it otherwise would not have permitted, to be reflected in the fees charged after 1979.[41]

The ability of the Government to control the growth in bed numbers and public expenditure in the nursing home fees control program in its first eight years of operation was affected by numerous administrative problems. In 1981, the Auditor-General reported that the program lacked a comprehensive, systematic statement of objectives, policy guidelines and assessment criteria and procedures. As a result, significant variations were evident in assessment criteria and procedures used in regional offices of the Department of Health. This led to inconsistencies and inefficiencies in the expenditure of Commonwealth funds.[42]

The Senate Select Committee on Private Hospitals and Nursing Homes was unanimous in its view that the fees control system was 'an administrative disaster'.[43] It criticised the administrative unwieldiness of assessing fees for each home several times every year and the delays in assessing fees and complaints from proprietors about viability, particularly

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39 Auditor-General's Report, *supra n 38*.

40 Significant weaknesses included inadequate and inconsistent validation of wages claims by the Department and wide divergence between wages costs actually incurred and estimates reported to the Department. It was estimated that wage costs in 1979 were overstated in NSW in almost 50% of homes, at an estimated overpayment of $2 million: Auditor-General's report, *supra n 38* at 15.

41 Although the Private Geriatric Hospitals Association of Victoria complained to the Senate Select Committee that the Department had refused to abide by decisions of the Federal Court on the inclusion of rent and profit in fee determinations: Senate Select Committee report, *supra n 33* at 41.

42 Auditor-General's report, *supra n 38* at 15.

43 Senate Select Committee report, *supra n 33* at 67.

those homes which were operating and were experiencing relatively low levels of profit prior to 1973.[44]

The much-criticised cost-reimbursement system of funding nursing homes was replaced, starting in July 1987, by a new and more efficient system of recurrent funding.

1984 - The Nursing Homes Fees Determination Principles

The difficulties in implementing Departmental fees control policies led to the amendment of the *National Health Act* 1953 (Cth) in June 1983.[45] The successful challenges in the Federal Court to the Department's decisions on fees were catalysts for the amendments.[46] Section 40AA(6)(c)(i) was amended to enable the Minister to formulate principles in accordance with which the permanent head or his delegate was required to determine a scale of fees. A new subsection (7B) of s 40AA provided that in formulating the principles, the Minister shall have regard to specified factors, including the need to ensure that nursing homes are efficiently and economically operated, and the need to ensure that the cost to patients of nursing home care was not excessive or unreasonable. A new s 40AE made it clear that the Minister might, on appeal, decide that a rigid application of the principles was inappropriate, given the merits of the particular case.

The Minister for Health stated that the intended effect of the amendments was to allow the continuation of the Department's established policies and practices pending the introduction of the Government's residential care program.[47] Indeed, the *Nursing Home Fees Determination Principles* (which were not tabled in Parliament until almost a year after the amendments were proclaimed),[48] contained cost-control measures that had

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44 At 57. The Committee heard evidence that raised 'a strong presumption that at least some nursing homes have very low profitability' and found it 'undeniable that established participating nursing homes face an inevitable decline in profitability under the fees control system'. Nevertheless, the Committee was unable to find any business failures during the whole fees control period.

45 *National Health Act Amendment Act* 1983 (Cth), which was assented to on 19 June 1983.

46 See the Minister's Second Reading Speech to the *National Health Act Amendment Act 1983*, *Hansard*, (H.R.) 11 May 1983, pp 404-5.

47 *Supra n 46*. It is assumed that the program referred to is the Government's Aged Care Strategy, which was introduced in 1985.

48 Cwlth of Aust Gazette No S 195, 30 May 1984.

been internal policies of the Department prior to the amendment of the *National Health Act* and which were being challenged under the ADJR Act.[49]

Aged Care Strategy 1985 - present

The late 1970's and the early 1980's saw considerable review and criticism of policy and program management in the aged care area, particularly residential care. The Department of Community Services and Health's own *Nursing Homes and Hostels Review*[50] recommended a range of reforms which became the basis of the Government's ten-year, eight-stage reform strategy. The strategy aimed to redistribute resources for aged care away from nursing homes to alternative forms of residential care (principally hostels) and to community care. This was intended to increase the range and quality of aged care available and to foster the independence of aged people.[51] The Strategy's *Mid-Term Review 1990-91* found that the program of reform was on course and that these objectives were being achieved.[52]

Bearing in mind the Government's aims in developing a policy of fees control, the legal challenges to that policy are examined in the next section, with particular emphasis on the differing judicial approaches to the right of the Government, through the Department of Health, to control the profits of subsidised nursing home proprietors.

NURSING HOME FEES DETERMINATIONS - LEGAL PITFALLS OF POLICY IMPLEMENTATION

An overview of the litigation

The Department of Health's decisions on the maximum fees permitted to be charged by nursing homes to their residents were subject to more legal

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49 A legal challenge to a decision made under the Principles was unsuccessful, at first instance and on appeal, suggesting that cost-control policies are more likely to be effective if they are given legislative form. See *Octet Nominees* v *Grimes* (1986) 68 ALR 571; (1987) 73 ALR 107 (FC).

50 Department of Community Services and Health *Nursing Homes and Hostels Review,* Canberra, AGPS, 1986.

51 Statement on the Care of Aged People (Senator Grimes) *Hansard* (Sen) 17 September 1986, p 490.

52 Department of Community Services and Health *Aged Care Reform Strategy Mid-Term Review 1990-91,* Canberra, AGPS, 1991, chapter 1.

challenges than any other administrative decisions taken under Commonwealth health legislation since the passage of the ADJR Act. The litigation, which commenced in 1979 with *R* v *Hunt; Ex parte Sean Investments* and continued into 1987,[53] had a perceptible effect on the Department of Health's administration of the nursing home fees control system. Departmental changes to accommodate judicial interpretation of the legislative provisions were made, but it became obvious that there were some fundamental differences between the Department's and the courts' perspectives which could only be resolved by legislative change.

The first legal challenge to the Department of Health's fees control procedure was litigated in the High Court in 1979: *R* v *Hunt; Ex parte Sean Investments Pty Ltd.*[54] Numerous cases were litigated in the Federal Court in the 1980's, of which eleven have been reported.[55] The litigants - all private sector nursing home proprietors - sought judicial review of decisions made by the Minister of Health or his delegate with respect to their applications for increases in permitted fees for residents. The litigation should be viewed in the context of the pre-1970's boom in nursing home growth. The sustained growth in nursing home beds between 1963 and the end of 1972, when controls were first introduced, was due to injections of capital and operating subsidies by the Government which prompted substantial entry of providers. As has already been noted, the numbers of beds almost doubled between 1962 and 1969. The national health scheme, with little or no design, had 'spawned an industry which now loudly - and understandably - demanded the right to survive'.[56]

Until 1983, sub-section(7) of section 40AA of the *National Health Act* 1953 (Cth) gave the only direct guidance to the permanent head or his delegate as to how fees were to be fixed. It provided:

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53 While *Octet Nominees* v *Grimes* (1987) 73 ALR 107 was the last reported case, there was an unreported judgment of a challenge to the pre-1984 fees control system as recently as March 1992: see *Dibo Pty Ltd* v *Minister for Community Services and Health* (18 March 1992, Einfeld J), noted in (1992) 81 *Australian Administrative Law Bulletin* 15.

54 *Supra n 36.*

55 See *n 22.*

56 Howe, *supra n 25* at 155.

> (7) The Permanent Head shall, in determining the scale of fees in relation to a nursing home ... have regard to costs necessarily incurred in providing nursing home care in the nursing home.

The courts disagreed with the Department of Health on what 'costs' must be taken into account in setting fees and how far the legislative scheme was concerned with ensuring the profitability of individual nursing homes. In the end, the Department was forced by judicial interpretation to consider a wider range of costs than it had intended under the fees control scheme. The Department found it very difficult to apply general policy guidelines to individual nursing homes without falling foul of one or other of the grounds of review prescribed by the ADJR Act. The Department faced a major difficulty in considering applications for fee increases from nursing home proprietors when its policy of pegging profits in money terms to those being made at the date of approval of the nursing home was rejected as unlawful by the Federal Court.

The cases illustrate how the interpretation of legislative provisions, based on judicial attitudes to profit and the public purse, can seriously undermine Government attempts to implement cost-control policies. The fate of the Department's policy guidelines before the Federal Court also illustrates how statements of policy that are not embodied in legislation have no inherent legal effect, however central they are to the workings of Government. Such policy statements are therefore vulnerable to judicial scrutiny and the Government risks a finding that its understanding of the meaning of the relevant legislation or the manner in which it should be applied, was wrong.[57]

After numerous successful legal challenges, the Government amended the *National Health Act* in 1983, which effectively incorporated the departmental fees control guidelines in legislative form.

Departmental policy on profit

One of the factors which facilitated the profit-protecting thrust of many of the judgments was the failure of the 1972 amendments to the Act to include any statement of aims or principle. Although factors prompting the

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57 Pearce, D, 'Courts, Tribunals and Government Policy' [1980] *Fed L R* 203 at 204-5.

changes were mentioned by the Minister in his Second Reading Speech, there appears to have been no definitive policy statement at the time on the aims of the new controls over private sector nursing homes. From available documentation, the Senate Select Committee gleaned the following objective:

> The purpose of fees control was to provide financial protection and security to nursing home patients by ensuring that proprietors did not charge excessive fees in the absence of normal market place constraints. In addition, it also aimed to contain Commonwealth benefit levels.[58]

Expressed thus, the policy emphasised the absence of normal marketplace constraints in the nursing home industry and implied that considerations other than strictly commercial ones were relevant when assessing appropriate fee levels. It appears from the reported cases and the Senate Select Committee report that the Department, in implementing the fees control policy, sought to balance the private enterprise profit considerations of nursing home proprietors against the fact that the nursing home industry was a 'guaranteed benefit' industry, which had as its basic philosophy the protection of nursing home patients.[59] The Government's position was that ensuring full commercial return to nursing home owners and proprietors by means such as the commercial valuation of goodwill, rental and return on capital investment was not appropriate. The high rate of those returns was largely the result of its intervention in the industry which, through growth control and payment of benefit, had achieved security of income for nursing home owners.[60] Within the protected environment of the nursing home industry, there was very little incentive on the part of proprietors to constrain costs, given the cost-based nature of fees determination and the high occupancy rates resulting from Government control on new beds.[61] These were the factors to which the courts generally

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58 Senate Select Committee report, *supra n 33* at 35. The Minister's Second Reading Speech for the Bill mentioned the burden of fees on patients as a reason for the new arrangements: *Hansard* (Sen.) 16 August 1972, p 58.

59 See, for example, *Nagrad Nominees* v *Howells* (1981-82) 38 ALR 145 at 162.

60 *Supra n 59* at 158, quoting from the Department's 'Guidelines for Determination of Fees'.

61 Second Reading Speech for the *National Health Act Amendment Act* 1983 (Cth) *Hansard* (HR) 11 May 1983 pp 404-5.

failed to give the weight which, from the Department's perspective, they deserved.

It became departmental policy in implementing fees control that fee increases could reflect only changes in 'costs necessarily incurred in providing nursing home care' and that an element of profit, not being such a 'cost', was not specifically taken into account when proprietors sought an increase in the level of fees they were permitted to charge. For homes already in operation when the fees control system was introduced, the fees being charged at 30 June 1972 (which had a profit component built into them by the proprietor) were the 'baseline' fees which was periodically adjusted for rises in costs after 1 January 1973. Consequently, provided costs were accurately and fully adjusted, profits remained the same in money terms but declined in real value as the result of inflation.[62]

For homes established after 1972, the profit component of fees was set at the time of approval of the nursing home. Before October 1981, each regional office set fees having regard to the fee structure of equivalent existing nursing homes and sought to ensure that the newly-approved nursing home achieved a 'reasonable profit'.[63] From October 1981 (prompted partly by the Auditor-General's report and partly by litigation) the Department provided new proprietors with a fair market rental return on land and buildings as assessed by a Commonwealth valuer (a figure of 10% in 1984) and a return equivalent to the prevailing Commonwealth bond rate on investment in plant and equipment, furniture and fittings and working capital.[64] Thereafter, profits were eroded with the passage of time by

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62 The Committee found that there was considerable variation in levels of profitability at 30 June 1972; only those with relatively high profit margins at that date could absorb the effects of inflation and remain profitable. The Participating Nursing Home Advisory Council Working Party, reporting in 1978 on its examination of the fees control system, stated that some nursing homes were making very low profits in 1971/72 as a result of the accelerated growth in nursing home accommodation. Due to fees control, they had no opportunity to improve their profits. On the other hand, some of the older, lower standard nursing homes which managed to maximise profit before the introduction of fees control had kept their levels of profit: Senate Select Committee report, *supra n 33* at 36-8.

63 The Auditor-General noted that criteria for determining a 'reasonable profit' varied between regional offices of the Department: Auditor-General's report *supra n 38* at 81.

64 Senate Select Committee Report, *supra n 33* at 37.

inflation in the same way as was happening with homes which were established before 1972 (this policy became clause 9 of the *Nursing Homes Fees Determination Principles*). Where a nursing home freehold or leasehold changed hands, any increased costs (such as higher rent) were not to flow through to increased fees for residents (and increased subsidisation by the Government), although allowance for return of capital at 1972 rates was included in the fees the new proprietor was permitted to charge. Similarly, the price paid for goodwill when a business changed hands was not allowed to flow through to fees.

These policies were implemented through the application of internal Departmental guidelines. In the early 1980's, the guidelines became widely publicised in the *Draft Nursing Homes Fees Control Manual* before finally being gazetted as the *Nursing Home Fees Determination Principles* in 1984.

Judicial consideration of 'profit'

The Federal Court held that the Department's application of such policies on profit offended various administrative law principles. The fact that s 40AA(7) did not mention profit did not prevent the issue from receiving considerable judicial consideration and the section proved not to be the limiting framework that the Department no doubt expected it to be.

The issue of profit was raised in the very first case on nursing home fees control, litigated in the High Court on common law principles. In *R* v *Hunt; Ex parte Sean Investments*,[65] the nursing home proprietor sought an increase in the fees the home was permitted to charge following a CPI increase in the rent payable on the nursing home premises. The Minister refused the application, in substance because both the new rent and the original rent were excessive when assessed against capital valuations and net returns on capital valuations on a statewide basis. The proprietor then applied for mandamus in the High Court's original jurisdiction. The issue was the interpretation of s 40AA(7) and whether an excessive rent was a 'cost necessarily incurred'. Mason J (with whom Gibbs J agreed) considered that rent was a 'cost' within the meaning of the section and that it was a 'cost necessarily incurred' in providing nursing home care, notwithstanding that the rent might be described as excessive. Although the question of

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65 *Supra n 36.*

allowance for profit was not an issue in the case, Mason J clearly stated in his consideration of the scope of the section that profit was a factor to be taken into account:

> In many cases it is to be expected that the scale of fees will be fixed by ascertaining the costs necessarily incurred *and adding to them a profit factor*. In the very nature of things, the costs necessarily incurred by the proprietor in providing nursing home care in the nursing home are a fundamental matter for consideration.
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> However, the sub-section does not direct the Permanent Head to fix the scale of fees exclusively by reference to costs necessarily incurred *and profit*. The sub-section is so generally expressed that it is not possible to say that he is confined to these two considerations. The Permanent Head is entitled to have regard to other considerations which show, or tend to show, that a scale of fees arrived at by reference to costs necessarily incurred, *with or without a profit factor*, is excessive or unreasonable.[66] (Emphasis added)

Mason J did not explain how a reading of the section justified these allusions to profit. Probably, the fact that nursing homes were private businesses implied for Mason J that profit must be a consideration in the setting of fees which patients may be charged, and therefore was an obvious example of the additional matters that the legislature envisaged would come within s 40AA(7). The Court held that the Minister had failed to deal with the application for review according to the requirements of the statute and granted a writ of mandamus directing the Minister to consider and determine the application for a fee increase according to law.

The case was an important one - the acknowledgement of profit as a matter for due consideration by the Department understandably influenced judges in later cases.[67] The case had a major effect on the Department's

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66 *Supra n 36* at 504.

67 In *Nagrad Nominees* v *Howell, supra n 59* Northrop J read Mason J's obiter comments as *requiring* the permanent head to add a 'profit factor' to costs necessarily incurred in order to determine fees.

policies and practices, prompting the Department to produce a set of guidelines specifying which costs could be taken into account and the means by which they were to be calculated.[68]

The question of profit and viability of nursing homes were litigated in a number of cases following *R* v *Hunt*. These cases came before the Federal Court by way of applications for orders of review under the ADJR Act, challenging decisions of the Minister, permanent head or his delegate. In the absence of any clear statement of policy in the Act, the various (and varied) judicial interpretations of how the permanent head or his delegate should deal with the issue were strongly influenced by judicial characterisation of the policy of the Act. It is here that 'judicial policy' gains sway - those judges inclined to favour private enterprise considerations over the wider considerations of restraining Government expenditure and minimising the financial burden on the residents of nursing homes, in a program where the two were inevitably in conflict, could readily justify that approach.

Judicial policy on profit - two contrasting approaches

Nagrad Nominees Pty Ltd v *Howells*[69] on the one hand, and *Sean Investments* v *MacKellar*[70] and *Alexandra Private Geriatric Hospital* v *Blewett*[71] on the other, illustrate contrasting judicial approaches to the Department of Health's attempt to control the profits of nursing home proprietors. They show how the same legislation and grounds of judicial review can be interpreted to be either supportive of or antipathetic to the wider questions of collective consumption. This level of choice in interpretation is a problem both for the Government in policy implementation and for administrative law generally.

Nagrad Nominees Pty Ltd v *Howells*

In *Nagrad Nominees Pty Ltd* v *Howells*, a Victorian nursing home proprietor, with the backing of the Victorian Private Geriatric Hospitals Association, sought an order of review under the ADJR Act of a decision by a delegate of the permanent head of the Department of Health not to

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68 Senate Select Committee report, *supra n 33* at 47.
69 *Supra n 59*.
70 (1982) 42 ALR 676 (FC).
71 *Supra n 11*.

increase the fees the home was permitted to charge.[72] The new proprietor had sought a review of fees on the ground of profitability, in that 'the approved fee structure was insufficient for an acceptable return on capital to be achieved'.[73] The decision not to allow an increase in the fee scale was based on the Department's policy that additional costs incurred by a new proprietor on the acquisition of the freehold or leasehold of a nursing home should not flow through to patients in increased fees.[74] Northrop J ordered the decision to be quashed, on the grounds that the delegate had not made his decision according to s 40AA(7) of the *National Health Act* 1953 (Cth) and because the application of the departmental guidelines could make a nursing home business financially unviable and was therefore contrary to the policy of the Act.[75]

Northrop J's judgment provides a useful illustration of the common inability of administrative law courts to come to terms with (or even acknowledge) the wider context of public policy implementation within which the individual case sits. He held that the permanent head should allow the applicant a profit factor based on the current costs of that nursing home. Taking what appeared to be a basic commercial approach, he advocated a 'cost-plus' system of determining appropriate scales of nursing home fees. In his view, the permanent head or his delegate should have regard to capital investment, including goodwill and working capital as 'costs necessarily incurred'[76] in determining a profit factor, and Northrop J suggested the detailed accounting methods by which the appropriate calculations ought to made. He left little, if anything, to the discretion of the decision-maker, failing to address Mason J's point that the delegate may

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72 The specific grounds in the ADJR Act upon which the order to review was sought are, rather surprisingly, not stated. Sections 5(1)(f) (error of law) and 5(2)(f) (inflexible application of policy) are probably the most likely.

73 *Supra n 59* at 151.

74 The guidelines for determining new fee scales were prepared in 1980 following the decision in *R* v *Hunt*. The relevant guideline is quoted in *Nagrad, supra n 59* at 158.

75 The decision was affirmed on appeal, mainly on the ground that by relying on departmental guidelines and policy for determining scales of fees for approved nursing homes, the delegate failed to give due weight to the matters listed in s 40AA(7) of the Act.

76 *Supra n 59* at 169. On appeal, Smithers J held that goodwill was not a 'cost' within s 40AA(7) simply because it was a condition of obtaining the lease of the premises. See (1982) 43 ALR 283 at 298.

have regard to other considerations which tend to show that the scale of fees arrived at, after determining costs necessarily incurred and with or without an allowance for profit, was unreasonable.

Northrop J justified this approach to profit by a very narrow reading of the purpose of the relevant sections of the *National Health Act* 1953 (Cth):

> In my opinion, the relevant essential policy of the Act is to ensure that the proprietors of private nursing homes do not make excessive profits in providing nursing home care, particularly since the Commonwealth does to some extent subsidise patients admitted to those homes.[77] The Act presupposes the existence and the continuation of private nursing homes. The number of approved nursing homes can be restricted. The Commonwealth does not provide all nursing home care, but because it subsidises patients in private nursing homes it is concerned to ensure that the proprietors do not make excessive profits. This policy is made clear by a consideration of s 40AA, especially the power to impose conditions relating to fees to be charged and the express provisions of s 40AA(7).[78]

It would be difficult to dispute his view that the Act presupposed the existence and continuation of private nursing homes. However, one might challenge his finding that the legislative policy behind the provisions of s 40AA were directed *only* at the level of profit of the individual nursing home proprietor and not also at the impact of fees on patients and the expenditure implications of the program as a whole, issues to which Parliament must have turned its attention in considering the amendments[79] and which were

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77 Northrop J's rather reluctant acknowledgement of the Government's financial commitment can be contrasted with Woodward J's reference to 'substantial subsidies' (*Alexandra Private Geriatric Hospital* v *Blewett, supra n 11* at 266) and Deane J's statement that the nursing home applicant in the case before him received 'more than two-thirds of its gross income' from Commonwealth subsidies (*Sean Investments* v *Mackellar* (1981-82) 38 ALR 363, 367).

78 *Supra n 59*, at 162.

79 As already noted, the Minister emphasised the financial burden of fees on nursing home patients, more than 80% of whom were pensioners, as a reason for the new arrangements. See *Hansard* (Sen) 16 August 1972 p 58 (Ministerial Statement on Nursing Care).

clearly reflected in the Department's guidelines for determining new fee scales. Northrop J did not say why he decided that the Act ought to be so narrowly construed.

Although the vagueness of the legislative provisions provided considerable scope for a range of judicial interpretations of the Act's purpose (a problem the legislature addressed when the Act was amended in 1983), the Court heard submissions which raised issues other than profit. Counsel for the Department submitted that the policy of the Act was directed to the provision of a Commonwealth subsidy for nursing homes for the purpose of lowering costs to patients and the provision of fees that were reasonably affordable. Counsel also cited a letter signed by the Minister for Health which stated:

> It is of course sometimes difficult to satisfy individual nursing home proprietors that they have been fairly treated when there are the two often competing thrusts of legitimate private profit aspirations and a fee controlled and guaranteed benefit supported industry, which has as its basic philosophy the protection of nursing home patients.[80]

Northrop J gave scant regard to these broader public policy considerations and relied on the vagueness of the Act to disregard them. His only direct response to them was to rely on a very literal view of the provisions in remarking that 'the special requirements [of s 40 of the Act] make no reference to the financial position of persons seeking to be admitted to approved nursing homes'. He also failed to define a 'not excessive' profit or to consider the criteria against which profit levels might be measured.

It is worth contrasting Northrop J's eagerness to protect the rights of the individual nursing home proprietor against the power of the decision-maker with Murphy J's view of the role of the decision-maker in *R* v *Hunt:*

> If the costs necessarily incurred are excessive for any reason whether inside or outside the control of the proprietor, it may be that the scale of fees the Minister determines is such that if those costs continue, the home can be conducted only at a little profit or at a loss. If that result follows it is

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80 *Supra n 59* at 162.

> because the Minister is not engaged in determining a scale of fees based on a cost-plus system; he is carrying out a statutory duty to determine what, in his opinion, is an appropriate scale of fees in relation to an approved nursing home.[81]

Northrop J's decision was confirmed on appeal[82] and the case led to the Department modifying its approach to the calculation of a profit element, while still taking as the basis for the calculation the value of the nursing home's assets in 1972.

Judicial support for profits control

Sean Investments Pty Ltd v *MacKellar*

The question of 'profit' was not addressed directly again until the Full Federal Court heard *Sean Investments Pty Ltd* v *MacKellar* in 1981.[83] The case was an appeal from a decision of Deane J, who had refused an application for an order of review under the ADJR Act, by a nursing home proprietor whose request to the Department of Health for a fee increase, based on a CPI increase in rent, had not been met in full.[84]

The Nursing Homes Fees Review Committee of Inquiry for New South Wales (established under s 40AE of the *National Health Act* 1953 (Cth) to advise the Minister when appeals were made to him concerning fees) gave the following reasons for recommending to the Minister that he reject the applicant's appeal against the decision not to allow the increased rental to pass fully into the new scale of fees:

> [I]n the absence of normal market controls on fees in the nursing home industry, it was necessary to ensure that excessive costs were not built into fees. Should rent

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81 *Supra n 36* at 508-9.

82 *Howells* v *Nagrad Nominees Pty Ltd, supra n 76.*

83 *Supra n 70.*

84 In this case, the Department had allowed fees to be increased for patients in 4-bed wards but not for those in one, two and three-bed wards. Deane J held, inter alia, that the Minister was entitled to have regard to considerations other than an increase in the rent payable for the premises which showed that a scale of fees arrived at by reference to costs necessarily incurred was excessive or unreasonable. See *Sean Investments Pty Ltd* v *MacKellar, supra n 77.*

> increases be seen by the industry as not subject to challenge, then an upsurge in rent claims could follow. The Minister considers rent should not be regarded by owners as an unchallengeable avenue to additional profit, which patients have to provide in fees and the Commonwealth subsidise in benefits. Leasing could become a device to enable proprietors to circumvent the fee control policy - and realise a total return on investment which is excessive by market standards;
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> ... The proposed fee increases would in the view of the Committee have adverse effects on the financial well-being of patients.[85]

Bowen CJ and Fox J found that the challenge was to a very large extent to 'findings of fact which are properly the province of the Minister and to the way he exercised his undoubted discretion'[86] and dismissed the appeal. They considered specifically the correctness in law of giving weight to the fact that, if the full increase sought by the applicant was granted, the surplus cash left out of an age pension would be very small in two and three-bed wards, and the pension would be insufficient to cover fees in single-bed wards. They looked to the purpose of the Act, as determined by the language used:

> When considering the purposes of the Act, it is almost always easier to decide, negatively, and in relation to concrete cases what is inconsistent with those purposes than to propound them positively. While wise administration would probably suggest that each nursing home be kept viable, we are unable to construct a purpose of the Act to the effect that adequate profit must be allowed in every case. This is evident from what we have already said. Also, we are unable to conclude that the ability of patients, that is to say uninsured patients, to pay cannot be a relevant factor.[87]

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85 *Supra n 70* at 679-80.
86 *Supra n 85.*
87 *Supra n 70* at 681.

This could not be a more different approach to the profit issue than that taken by Northrop J who found in the Act a clear intention that nursing home proprietors make a profit (although not an 'excessive' one) and an intention (by inference) that the financial situation of patients was not a relevant consideration.

Alexandra Private Geriatric Hospital* v *Blewett

The decision of Woodward J in *Alexandra Private Geriatric Hospital Pty Ltd* v *Blewett*[88] is a further example of judicial support for the Department's right to control profits in the nursing home industry, although he was critical of the implications of the operation of Departmental policy on profit for some nursing homes, including the applicant in the present case.

The applicant sought an order of review of the delegate's decision not to allow a fee increase for the Alexandra Private Geriatric Hospital. The applicant challenged the delegate's method of calculating fees on numerous grounds under the ADJR Act. The principal challenges were that the delegate had erred both in allowing only a modest amount by way of profit in calculating the fees the applicant was permitted to charge, and in the way he arrived at staffing levels on which he calculated the salary component of permitted fees.

Woodward J dismissed the applicant's claim that the number of nursing hours allowed by the Department for the Alexandra Private Geriatric Hospital was so unreasonable that no reasonable person could have arrived at it (ADJR Act s.5(2)(g)). The Department's approvals were based on minimum hours recommended by the Victorian Health Commission and the nursing home's actual staff hours only minimally exceeded the Department's notional allocation. He also dismissed the challenge to the Department's method of calculating those hours. The method used, while not in all respects satisfactory, was not unlawful. In particular, the Department's reliance in its calculations on an approval of hours made 12 months earlier did not amount to the following of a rule or policy without regard to the merits of the case (ADJR Act ss 5(1)(e) and 5(2)(f)). Finally, the

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88 *Supra n 11*. The case arose under the *National Health Act* 1953 (Cth) as amended in 1983, but before the *Nursing Homes Fees Determination Principles* came into effect. Woodward J took the amendments into account, but found that they did not alter the policy of the Act as he understood it.

Department had listened to the matron's views about the need for an increase in approved nursing hours; in the circumstances of the case, a failure by the delegate to act on those views did not amount, in Woodward J's view, to a failure to take a relevant consideration into account (ADJR Act ss 5(1)(e) and 5(2)(b)).

The challenge to the Department's approach to profits was the major issue in the case. The standard 'profit formula'- an 'historic approach' based on 1972 values and not current values - had been applied.[89] The applicant sought review on three main grounds: first, that the delegate had failed to apply a Ministerial policy and so had acted contrary to law (s 5(1)(j)) or had exercised a power the result of which was uncertain (s 5(2)(h)); second (and in contradiction), that the delegate had applied the policy without regard to the merits of the particular case (s 5(2)(f)); and third, that the policy itself, being based on 'historic' and not current costs, was wrong or unlawful on various grounds (ss 5(1)(d), 5(2)(b) and 5(2)(g)).

Woodward J dismissed the first two arguments. After examining various Ministerial instructions about profitability, he found that it had not been established that the delegate had departed from them, nor that the delegate's decision was contrary to law or uncertain by virtue of any such alleged departure.[90] Woodward J acknowledged that the second argument raised a more difficult issue. In dealing with it, he demonstrated an appreciation of the types of administrative considerations that inform the way policy is implemented by Government Departments:

> In an area as important as the calculation of profits for nursing homes there must necessarily be a substantial degree of uniformity of approach to questions of principle, or injustice as between nursing homes could become rife. It

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89 Until the *Nagrad* decision, the effect of that approach was that the nursing home was allowed the same money sum by way of profit as it had earned in 1972. After that decision, the delegate took the valuation of land and buildings appearing in the applicant's balance sheet in 1972 and allowed, by way of profit, 10% on the book value of the land and buildings, 12.5% on the book value of furniture and equipment and on the value of current assets, and 10% on the value of any later improvements to buildings, provided they increased the bed capacity in the nursing home. This was the approach used for the Alexandra Private Geriatric Hospital.

90 *Supra n 11* at 290.

> would create obvious difficulties if different delegates were to adopt different criteria in deciding when to depart from historic costs in order to allow much larger profits based on current valuations. There is much to be said for the view that exceptions to such a general rule should be made in a consistent and co-ordinated way by the Minister who is responsible to Parliament for both the economical and equitable administration of the legislation.[91]

Woodward J held, therefore, that if the historic costs approach could be justified at all, it was not unlawful or unreasonable to provide that exceptions to it had to be decided, not by the delegate, but by the Minister after a hearing by a Nursing Homes Fees Determination Review Committee. The only requirement of the delegate was that, if he was urged to depart from the policy, he should be prepared to listen to any submissions.[92] There was no evidence in this case that the delegate had refused to listen. Accordingly, the applicant's challenge under s 5(2)(f) failed also.

Having rejected the arguments challenging the particular application of the profits policy to the applicant in this case, Woodward J went on to consider whether the 'historic costs' basis of the profits policy was itself wrong or unlawful on one or more grounds in the ADJR Act. The question of profit was clearly an issue for consideration by the delegate because the amended s 40AA(7B) evinced an intention that nursing homes be efficiently operated and the delegate 'could not expect any nursing home to be efficiently operated, or even to remain viable over a period of time, if no profit at all was allowed'.[93] However, Woodward J said that the enforced reduction of profit margins in real terms, due to the use of historic costs in fixing profits, was not so unreasonable as to be unlawful, or otherwise contrary to the relevant legislation. He was very careful to consider broader issues than those presented by the case at hand in addressing the argument that the historic profits approach was contrary to the policy of the Act. While readily acknowledging that the Department was taking a very hard

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91 *Supra n 11* at 291.

92 *Supra n 91,* citing *British Oxygen Company* v *Minister for Technology* [1971] AC 610 at 624-5.

93 *Supra n 11* at 291.

line with the proprietors of established nursing homes, he also considered the Department's perspective:

> On the other hand, it was pointed out for the Department that lack of competition, very high nursing home occupancy rates, negligible bad debts, and a high level of cost recoveries are virtually guaranteed and, at the profit levels allowed, many people are still trying to get into the industry. Indeed the ruling figures for the sale of goodwill would enable the applicant to sell its business for some $400,000 in addition to the value of the fixed assets. In the face of this surprising but uncontradicted evidence, I cannot be satisfied that the Department's approach to profits is so contrary to the policy of the Act as to make it unlawful.[94]

Woodward J was prepared to look further than the individual case before him to assess the legality of the Department's approach to curbing nursing home profits. He acknowledged the relevance of competing public policy considerations:

> I have already said that the applicant is entitled to regard the decision as quite unfair. Others, looking at the overall costs of health care, may take a different view and say that all incomes and profits in this area have to be closely watched, and perhaps in real money terms curtailed; but those are not matters for this court.[95]

This is not to say that the individual case was forgotten - in setting out the five principles which in his view underlay the policy of the Act, Woodward J said that commercial viability required some reasonable return on investments.[96] It was also important to his finding for the Department that, while it was possible the applicant's nursing home might become insolvent in the future, it was not in fact insolvent at the time the application was made.

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94 *Supra n 11* at 293.
95 *Supra n 94.*
96 *Supra n 11* at 278.

Woodward J, it is submitted, adopted a careful and balanced approach to assessing the legality of bureaucratic decision-making. By interpreting the purpose of the Act broadly, he allowed the Department to make the necessary policy decisions without judicial interference, appreciating that it was for the Government (with its superior information, resources and expertise) and not the courts to decide, in a system of collective consumption, how to achieve the difficult balance between private enterprise aspirations, consumer needs and wider budgetary considerations. At the same time, Woodward J made some forthright criticisms of the administration of the fees control scheme.

The decision was overturned on appeal. Woodward J's approach of non-interference with matters of Government administration failed to find favour with the Full Bench of the Federal Court,[97] although their reasons, set out in three separate judgments, differed. However, Jenkinson J agreed with Woodward J that the delegate's application of the historic costs basis for calculating profit did not in itself offend s 5(2)(g) of the ADJR Act. The decision-maker had a wide discretion to determine what was a reasonable return:

> Short of insolvency, the question as to what may be regarded as outside the range of reasonableness of monetary return on fixed capital investment ought not in my opinion be answered according to accepted economic doctrine or 'ordinary business principles' ... I think that the language of s 5(2)(g) [of the ADJR Act] leaves the person exercising the power free to give effect to economic and political views which are well beyond the middle ground of public and academic opinion, provided that those views are not beyond the ground which may be reasonably defended.[98]

In Jenkinson J's view, the delegate was also entitled to have regard to the practical effects of its profits policy and the other considerations to be balanced against private enterprise considerations. However, he held that the determination was unlawful on the ground that it was 'an exercise of a power that is so unreasonable that no reasonable person could have so

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97 *Alexandra Private Geriatric Hospital Pty Ltd* v *Blewett* (1986) 68 ALR 222.
98 At 240.

exercised the power' (s 5(2)(g)), because the Department's policy had a discriminatory effect as between leasehold and freehold proprietors of nursing homes, an effect which the Department had failed on the evidence to justify. On the other hand, Smithers J held that the historic costs approach was unlawful: given Parliament's intention that nursing homes be conducted on a private enterprise basis, it followed that profit must be determined according to the current value of the assets of the home.[99] Sheppard J held that the profit figure allowed by the Department was so small that no reasonable person could have regarded it as sufficient to provide an adequate return, and that the Department had failed to take the particular circumstances of the appellant's case into account in making its decision.[100]

Clearly, there are quite different judicial policies in operation in these cases. Those judges who were inclined to read the ADJR Act narrowly and who supported the exercise of a wide discretion by Ministers and Government officials were not prepared to find any outright legislative intention that a particular level of profit be guaranteed to nursing home operators. Nevertheless, they acknowledged the practical difficulty of operating the nursing home scheme if many nursing home businesses were not viable. These judges showed a greater preparedness to look beyond the individual case to the wider scheme and to balance other considerations (the financial well-being of both the patients and the Government scheme itself) with the concerns about the profitability of the individual enterprise. Those judges who characterised the legislative scheme as concerned predominantly with the profit of the individual enterprise correspondingly read the decision-maker's discretion very narrowly and were unable or unwilling to look at the individual grievance in the context of wider public policy considerations. The fact that those judges inclined to favour the individual over the broader public policy considerations (when the legislation was arguably either way) were in the majority suggests that the courts in these cases were not able to respond adequately to issues of resource-allocation and collective consumption in administrative law.

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99 At 226-228.
100 At 238-239.

The Search For a Successful Policy Strategy

The cases show some of the legal difficulties faced by the Government in implementing cost-control measures in programs where public health services are delivered via the private sector. Principally, the cases show that the initiatives of the Government could not be supported by the legislation under which those initiatives were taken, and that the individual decisions made within the broad program structure offended administrative law principles. Given the successful legal challenges to the administration's attempt to implement fees control, what are the lessons about effectively controlling costs of public health programs delivered by the private sector?

Administrative Difficulties

It was in the context of a program generally lacking a clear and consistent policy framework and administration that the litigation took place and it is likely that internal inconsistencies and poor administration made the Department's decisions more vulnerable to challenge.

The Commonwealth programs of care for the aged and infirm, of which the nursing home fees control program was only one part, had been the subject of considerable study and review in the 1970's and 1980's[101] and a number of difficulties had been identified with the program as a whole and with specific arms of the program. The problems identified by the Auditor-General included the lack of precise policy guidelines for the aged care program, which hampered the systematic implementation of policies and programs, and the lack of a coherent planning strategy for matching needs and services (or funding of services), which permitted increasing Commonwealth support for high cost nursing home programs and relatively less expenditure on other related programs (such as supports for the elderly in their own homes) and unnecessary institutionalisation of the aged and infirm. On the administrative side, operational guidelines provided to regional offices of the Department were not sufficiently detailed. Variations in regional office processes and interpretations of existing

101 The reports of the Auditor-General and the Senate Select Committee have already been cited. The Auditor-General cited several others at p 5 of his report, including the Henderson Report.

guidelines produced 'diseconomies' and inconsistencies in program administration.[102]

Legal difficulties - legislative imprecision

Legislative design is shaped by the legal culture; the tradition in which Commonwealth legislation is drafted partly reflects the attitudes of the courts. In Australia legislation must be very precisely drawn, despite the increased possibility of error this leads to, for the courts interpret it in a critical rather than a sympathetic way.[103] The overwhelming message from the litigation is that the legislative provisions of the *National Health Act* 1953 (Cth) were inadequate to support the detailed procedures implemented by the Department of Health in its administration of the fees control system. The 1972 amendments to the Act failed to state the policy behind the amendments and its rationale; they merely specified the rule which implemented (or attempted to implement) that policy. In the very first case of *R* v *Hunt,* Mason J commented on the vagueness of the legislation, particularly with respect to the width of the permanent head's or his delegate's discretion. Section 40AA(7) was 'so generally expressed' that it was not possible to say that the permanent head was confined to the considerations of costs and profit only. The vagueness of the legislative provisions on fees control left open for judicial consideration a range of important matters, including the identification of those items which were 'costs' to be taken into account in setting new scales of fees, the other matters which ought to be taken into account by the permanent head or delegate, and whether the decision-maker exercised his or her discretion lawfully. Leaving such a wide range of matters open to curial interpretation is likely to compromise the administration of any Government program because it opens the way for judicial imposition of approaches and criteria which may be inconsistent with the bureaucracy's implementation of Government policy. This is what occurred in the fees control cases.

Legislative intent and judicial policy

The legislative provisions were interpreted in the light of Parliament's assumed purpose in enacting them, a purpose which itself was gleaned from

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102 Auditor-General's report, *supra n 38* at 7-8.

103 Cranston, R, *Law, Government and Public Policy,* Melbourne, Oxford University Press, 1986 at 173.

the language and scope of Part V of the Act. This posed problems as the several judicial interpretations of the Act's purpose were inconsistent with each other and, very often, with the interpretation adopted by the Department. Thus, for example, Northrop J in the first *Nagrad* case eschewed any purpose relating to the financial burden of fees on nursing home patients, and went on to decide the legality of the delegate's decision by reference solely to whether the fees allowed an acceptable level of profit to the proprietor. By contrast, Bowen CJ and Fox J in *Sean Investments* v *MacKellar* held that a major purpose of the whole scheme must be to provide nursing home care for indigent patients, and expected that fees and subsidies would be determined with that in mind.[104]

This inconsistency is not at all surprising, given that statutory interpretation 'is not a technical and objective activity, but is inescapably creative and political'.[105] The construction of statutory provisions is not an apolitical and value-free exercise, involving the application of objective rules of interpretation, but a value-laden one and it is the courts' construction of legislative words and not the words themselves that is law. It is still argued as an important justification for judicial review of administrative action that the courts are giving effect to the will of Parliament by interpreting and enforcing the provisions of statutes which confer power and impose duties on administrative agencies. However, it is difficult to make sense of the 'intention' of Parliament in multi-member Houses with simple majoritarian voting systems, and there will be many cases when the Parliament did not think about the particular issues which go on to be litigated, when the legislation is passed. In such cases, the courts must act creatively in deciding what the statute means.[106]

Departmental policy and the 'individual case'

Another difficulty for the Department created by the form of the legislation was the requirement that the circumstances of each individual nursing home be considered in setting a new scale of fees. The legislation as it stood prior to the 1983 amendments greatly circumscribed the use of

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104 *Supra n 70* at 681.
105 Hutchinson, A, *supra n 24* at 304.
106 Cane, P, *An Introduction to Administrative Law,* Oxford, Clarendon Press, 1986 at 12-13.

policy guidelines. This posed some difficulty for a large Commonwealth program administered Australia-wide, where administrative necessity required the assessment of applications for fee increases against standard criteria based on practical considerations. In *R* v *Hunt*, for example, the Department had rejected the applicant's claim for an increased scale of fees based on increases in rent of the nursing home premises because the rent was excessive, considering capital valuations based on statewide averages. Mason J made it very clear in an obiter statement at the end of his judgment that such an approach was unacceptable:

> The terms of the Director's letter appear to indicate that the Minister, like the Committee, was pre-occupied with statewide statistics; it maintains a deafening silence on considerations related to the rental costs of this particular nursing home.[107]

Looking at the cases overall, it appeared to be as much a question of judicial policy as legal principle whether the application of general guidelines to the individual nursing home was considered to be an inflexible application of policy or an acceptable exercise of the decision-maker's discretion under the Act. Woodward J in the *Alexandra Private Geriatric Hospital* case interpreted the grounds of the ADJR Act restrictively and the policy of the *National Health Act* broadly to allow for a wide discretion on the part of the delegate. It was not for the courts, in his view, to say that a particular approach to the allowance for profit was fairer or more appropriate than the one taken by the delegate and he appreciated the administrative importance of a substantial degree of uniformity of approach to such 'questions of principle'. The only requirement on the delegate, if he was urged to depart from such a policy, was that he was prepared to listen to that argument. The fact that the delegate refused to depart from the policy of allowance for profit based on historic costs, even though such a policy appeared to threaten the viability of a particular nursing home, did not constitute a refusal to listen, as that term was understood in the relevant case law.[108]

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107 *Supra n 36* at 507.
108 *Supra n 11* at 291.

An illustration of the more restrictive approach to the application of policy can be found in the judgment of Fox and Franki JJ in *Howells* v *Nagrad Nominees*.[109] Their Honours addressed the issue of the application of departmental policy or guidelines, acknowledging that the interface between policy and discretion in the exercise of statutory powers was a difficult one. They thought it reasonably clear that the Act treated policy as important; discretion was vested in the permanent head in the interests of continuity and uniformity, particularly as he was responsible for the administration of many laws affecting health and medical and nursing care and was probably expected to try to keep a balance between many relevant factors. Because of the number of nursing homes under the scheme, the permanent head's power was delegateable and there was therefore a need to ensure a reasonably uniform basis of treatment.[110] In spite of these observations, however, Fox and Franki JJ held that the decision to refuse the fee rise was bad in law, the fundamental defect in the decision being that individual requests for increased fees were assessed against departmental guidelines which were 'a series of fairly precise requirements' expressed in 'dogmatic or mandatory terms'. They said:

> Where the power given relates to the consideration of individual cases, it is not to be denied that the predominant aspect must be the consideration of the individual case. The merits of that case must be considered genuinely and realistically; there must always be a readiness to depart from policy.
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> ... If the guidelines had been more general, expressing in a broader and possibly more direct way the policy sought to be maintained, the Delegate would have been freer to test the individual case against it, or to test it against the merits of the individual case.[111]

The facts of the case, however, showed that the delegate had not blindly applied the historic costs policy without considering other factors:

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109 *Supra n 59*. This was an unsuccessful appeal by the Department against the decision of Northrop J. The facts of the case have been noted briefly at pp 125-126 above.

110 *Supra n 76* at 307.

111 At 308.

> The Delegate took as a starting point the ingredients upon which the fees were fixed for the previous owner. ... By complex calculations, the Delegate attempted to update the figures upon which the earlier determination had been based. In this way, of course, some new or changed expenses had to be recognised, and some adjustments were made referable to the new situation, but the historical figures remained the foundation.[112]

This line of reasoning reveals that the court implicitly (if not explicitly) rejected the right of the Department to administer the fees control program by assessing individual requests against departmental cost-control policies developed under the general terms of the legislation. This was in spite of assertions in almost every case, including this one, that s 40AA(7) gave the delegate a wide discretion to consider matters other than 'costs necessarily incurred'. In weighing up the decision-maker's discretion against the right of each individual nursing home to have its own circumstances considered in detail, the rights of the individual were favoured. The implication of this and most of the other cases is that the Department may have a 'general' policy (as long as it is not expressed as a series of precise guidelines) but it must be prepared *in every individual case* to depart from that policy if the individual proprietor's circumstances warranted it (and apparently, on the facts of the cases, a proprietor's circumstances did not need to be particularly unusual to do so).[113] It is not clear what 'policy' would remain in these circumstances, nor how useful such a policy would be, given that it could be neither very precisely expressed nor very generally applicable. Also, not only would such an approach be an administrative nightmare in the work it would entail, but it would make the goals of consistency across the program and cost control (which after all was a major aim of the program in the first place) impossible to meet.[114] It is also questionable whether the Act's

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112 At 304.

113 There were exceptions. For example, in *NCA (Brisbane) Pty Ltd* v *Simpson* (1986-87) 70 ALR 10, Fox J held that the delegate was entitled to rely on policy guidelines which were announced and well-known. The applicant in that case had failed to show that his was a new or special situation which called for a deviation from the policy.

114 An administrator can apply a policy which facilitates the sifting of a large number of applications without infringing the rule against the inflexible application of policy as long as the administrator does not shut his or her ears to an applicant who wishes to

formulation demanded the individual case to be considered at the expense of the application of general policies and guidelines.

The judges' insistence that this was the required approach may simply reflect judicial preference for the protection of the individual against the arbitrary exercise of bureaucratic power. It may also reflect the inability of the courts in the modern age of collective consumption to take 'legal notice' of broader questions of allocation of limited Government financial resources, and the administrative processes necessary to ensure that allocation of resources according to democratically determined policies. On the other hand, judges like Woodward and Jenkinson JJ were able to balance the interests of the individual and the government in a way which was more sympathetic to the issues of collective consumption and broader policy considerations.

Perhaps the preferred approach is for the courts to respect departmental policy, and the need for efficient administration, but with a concomitant preparedness on the part of the Department to seriously consider defects shown to exist in the policy (such as the markedly different effects of the Department's profits policy on leasehold and freehold proprietors), with a view to refining it, rather than just ignoring those defects.

Legislative response to judicial decisions

As a result of these decisions, the Department was forced to make incremental changes to its policies, for example by allowing rent increases to be reflected in higher fee levels at nursing homes with lessee proprietors. These changes in turn contributed to the inequities in treatment of nursing home proprietors of different legal status.[115] The Department was obliged,

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make representations as to why his or her case is exceptional. The administrator must be 'prepared to listen to anyone with something new to say': see *British Oxygen Company Ltd* v *Minister of Technology* [1971] AC 625 and Allars, M *Introduction to Australian Administrative Law,* Sydney, Butterworths, 1990 at 199-206. It appears that some judges in the nursing home cases had a much narrower view as to what offended the rule against the inflexible application of policy.

115 For example, lessee proprietors in homes approved after the Full Court decision in *Howells* v *Nagrad* received an allowance for rent, and for subsequent rent increases,

by decisions like *Croft* v *Minister for Health*,[116] to meet increased costs when a nursing home changed hands, even when the sale or lease was not an arm's-length transaction. By exacerbating some of the inequities in the fees control policies, through forcing changes to some policies but not others, the court decisions became a major stumbling block for the nursing home fees control program.

As already noted, the Federal Court decisions prompted the amendment of the *National Health Act* 1953 (Cth) in 1983 and the introduction of *Nursing Home Fees Determination Principles* in legislative form. The Second Reading Speech of the Minister referred specifically to the cases as catalysts for the amendments and expressed concern about the financial implications:

> Costs which previously were not allowed for the purpose of setting fees now have to be given consideration possibly resulting in significant fee increases contrary to government policy. This would lead to higher benefits and therefore increased government expenditure ...[117]

The Minister estimated an expenditure increase of $50 million on top of a program that was costing $600 million in benefits alone in 1983-84. However, the precise basis for the estimate of $50 million could not be established from departmental records and in any event was a matter for speculation.[118]

The case brought before the Federal Court by an applicant who had had his request for a fee increase assessed against the Principles[119] suggested that the Government had been successful in making decisions on how fees

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in the scale of fees following a departmental policy change consequent on that decision, and were thus compensated in some measure for the effects of inflation and appreciation on land and buildings. By contrast, a proprietor who was a freehold owner did not receive, under the Department's policy, any allowance in fee increases for inflation or asset appreciation.

116 (1982-83) 47 ALR 449.

117 *Hansard* (HR) 11 May 1983, pp 404-5.

118 Senate Select Committee report, *supra n 33* at 49.

119 *Octet Nominees* v *Grimes* (1986) 68 ALR 571; (1987) 73 ALR 107 (FC).

were to be calculated a matter for the Department and not the Federal Court. This suggests that the more specific and explicit legislative policy is in an area where Government programs are delivered by subsidised private enterprise units, the more likely decisions made by the bureaucracy in accordance with that policy are to be immune from judicial review (provided the Commonwealth has the constitutional power to enact the legislative scheme in the first place). In *Octet Nominees Pty Ltd* v *Grimes*,[120] the Full Court held that the Principles were not *ultra vires* the powers conferred by the Act and that the delegate, having made his decision in accordance with the Principles, had made no error in law. The fact that the costs taken into account were far less than the costs actually incurred by the proprietor was immaterial as it was 'clearly the purpose of the principles to impose strict limits on the charges made by management in conducting a nursing home'.[121] The Court held that the Principles meant that the delegate did not have an overriding discretion to allow a fair and reasonable scale of fees. Thus the extent of the delegate's discretion was a matter for the Government rather than the court.

CONCLUSIONS

The decisions on nursing home fee determinations raise the question of the capacity of our legal structure and administrative law to move beyond the traditional characterisation of administrative law disputes as the protection of the individual from excess or abuse of power by governmental agencies. This traditional view of the role of administrative law is based on the theories of the Victorian jurist, A V Dicey, who argued that the great strength of the English legal system was that the governmental officials were subject to exactly the same laws as private citizens, to the extent that these covered the activities of government. In this way, the law ensured that arbitrary administrative power was controlled, and the government was not given any unfair privileges or advantages over its citizens. In the Diceyan model of administrative law, individual citizens assert their rights and

120 (1987) 73 ALR 107.
121 At 112.

protect their interests against named individuals who represent the public service. The 'state' does not feature in this equation.[122]

The theories of Dicey and the system of administrative law which developed from them have been widely critiqued. Some academic writers have argued that they are inadequate, not only to the late twentieth century democratic state, but even to the rapidly-changing and expanding role of the state in his own time.[123] In the words of two English academics, 'some authors feel that Dicey left English administrative law with a great mistrust of executive or administrative action but without any theoretical basis for its control'.[124] It is the inadequacy of the individualist model of our legal process as the dominant model for judicial review of administrative action that we have discussed and explored in examining policy and litigation in the nursing homes area.

Collective consumption and the modern state

Why, then, is the individualist model inadequate and what would a more responsive administrative law look like? The theories of some academics writing in British law journals in the early 1980's[125] provide some useful theoretical perspectives which assist us in understanding these questions in the Australian context. McAuslan has argued that the emphasis of administrative law on individual rights and procedural fairness has obscured for administrative lawyers the broad trends of evolution of government and administration in recent years and left them ill-equipped to make sense of major clashes of policy and ideology taking place within our system of administrative law. In his view, what has characterised governmental activity in the late 20th century welfare state has been the predominance in it of 'collective consumption', whereby services and facilities which are consumed collectively are, and have to be, organised, planned and managed on a collective public basis by governments or semi-government agencies. Some obvious examples are health care and educational services, social

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122 Harlow, C and Rawlings, R, *Law and Administration,* London, Weidenfeld & Nicholson, 1984 at 14.

123 See, for example, Arthurs, HW, 'Rethinking Administrative Law: A Slightly Dicey Business' (1979) 17 *Osgoode Hall LJ* 1; Harlow and Rawlings, *supra n 122,* chapter 1.

124 Harlow and Rawlings, *supra n 122* at 17.

125 For example, McAuslan P, *supra n 2* and Hutchinson, A, *supra n 24.*

welfare services, public transport and roads. The collective gathering of resources (the introduction of the Medicare levy is an Australian example) has led to an attempt at a better allocation of resources for their collective consumption via new and more centralised administrative processes. Access to resources is determined by other than market considerations.

McAuslan has argued that the expansion of these processes of collective consumption - their management, organisation and the allocation of funds to them - has been brought about through legal and administrative processes, but has been largely unaccompanied by any legal perception of the new kind of administrative state coming into being:

> The attention of lawyers ... was directed *towards* the issue of fair hearings for individuals in court-like proceedings, and *away* from the issues of policy-formulation, the allocation of resources and collective decision-making within the processes of collective consumption.[126]

In his view, traditional judicial review has been largely powerless to make any significant impact on the way most programs of collective consumption were administered, being concerned with individual grievances and not more general questions of policy-making, administration and resource allocation. His overriding concern about numerous important United Kingdom administrative law decisions in the late 1970's and early 80's was the trend they showed towards a misunderstanding by the judiciary of the policy conflicts which the cases represented, which are a natural concomitant of the administration of the processes of collective consumption. The courts (particularly the House of Lords) avoided those conflicts by characterising the issues in the cases as contests between the individual and governmental bureaucracy, enabling them to find in favour of individual rather than collective interests, and consistently supporting private over collective consumption. One very clear example in British case law was the case of *Bromley LBC* v *Greater London Council,*[127] where the

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126 McAuslan, *supra n 2* at 3.

127 [1982] 2 WLR 62 (HL). Briefly, the facts were that the GLC instructed the London Transport Executive to reduce public transport fares by 25%, in fulfilment of a GLC pre-election promise. The Government then reduced its grant to the GLC, which meant that the supplementary rate levy imposed on the 32 London boroughs to pay for the fare cuts was increased. Bromley sought to quash the supplementary rate and

Greater London Council's policy of reducing public transport fares was characterised by the court in terms of the fiduciary responsibility of the Council to its individual ratepayers. An equally legitimate characterisation would have been the right (or otherwise) of an elected body to subsidise collective transport services from collective resources. McAuslan criticised what he saw as the increasingly political role played by the House of Lords in the processes of government and challenged administrative lawyers to go beyond legalistic analyses of cases and statutes, and to direct their attention to the wider constitutional and administrative aspects of the growth of processes of collective consumption in the modern state.

McAuslan's theory focuses attention on the changing nature of the modern state and his critique of the peripheral nature of administrative law as it is largely practised and written about is very useful for Australia. However, in Australia the situation is complicated by the constitutional structure, which means that the provision of funding by the Commonwealth is not accompanied by adequate direct regulatory powers, and accordingly the centralisation of decision-making which is important to the theory of collective consumption is not as marked. The situation in the Australian health system is complicated by the private sector delivery of some Commonwealth-subsidised health programs, although in some respects (nursing home fees litigation being one of them), the inadequacy of the 'individual versus the bureaucracy' characterisation of administrative law disputes is highlighted when subsidised private sector interests seek to entrench those interests through the mechanism of judicial review.

While originally derived very substantially from English law, in Australia judicial review of administrative action has been codified in the *Administrative Decisions (Judicial Review) Act* 1977 (Cth). With this statutory support, administrative law has drawn a new lease of life and is undergoing significant development. Since the bulk of administrative law decisions are made in the Federal Court under the ADJR Act rather than in the State and Territory courts, the Act provides the cutting edge for

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restrain the GLC from continuing with its new fares scheme. See Hutchinson, *supra n 24* 306-9.

rationalisation of judicial review in Australia.[128] A final consideration is that in Australia, important political disputes about social policy are not mediated through administrative law litigation (as they are in England). When litigated, they present as constitutional law cases and consequently the ideological passion that is seen in many British administrative law cases is not present in our administrative law.

A more responsive judicial review?

McAuslan's thesis helps us to understand the nursing home fees decisions in a context that is broader and ultimately more useful than just looking at the application of legal principles of judicial review. Nursing home fees disputes - like other recent disputes in the health services area - can be characterised as contests about the allocation of limited financial resources and the rights of the Government to determine their allocation according to democratically-determined policies. The determination of some members of the Federal Court to see them only as challenges by aggrieved individuals to the alleged excesses of the bureaucracy is to avoid consideration of the difficult broader issues facing governments in this and other social policy areas.[129]

In many areas of governmental activity, particularly in social policy areas, the concept of 'individual rights' is not as clear-cut as some writers who argue strongly for it as the foundation stone of judicial review would have us believe. Inevitably, in an area like health, the endorsement of the individual right to a financial subsidy or benefit contrary to Government policy simply means that there is a smaller funding pool left to meet other needs. Also, the upholding of individual rights is a very selective process - while a nursing home proprietor enforces the right to charge higher fees, where is the right of the individual nursing home resident to seek review of the higher fees she or he will have to pay as a result? The individual right to

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128 Allars, M *supra n 114* at 162. The relative merits of common law judicial review and review under the ADJR Act are touched on at pp 161-2.

129 Some writers have suggested that this emphasis may be as much a consequence of modes of legalistic reasoning as it is of conscious values. Even if this is so, it is not an excuse not to change. See Thynne I and Goldring, J *Accountability and Control: Government Officials and the Exercise of Power,* Sydney, Law Book Company, 1987 at 246.

challenge administrative action through the courts is selective and tends to favour those already in positions of power in society.[130]

McAuslan challenged administrative lawyers and academics to develop a more responsive administrative law, without positing precisely what its elements might be. One writer who accepted the challenge argued for both the marginal nature and the political bias of judicial review of administrative action and suggested that 'the retention of *any* form of judicial review cannot be justified if our democratic commitments and ambitions are taken seriously'.[131] Other writers argue just as strongly for the benefits of external review and for the capacity of judicial adaptation, combined with legislation, to change the legal system so that it can deal with the demands placed upon it by social change.[132] Still other writers argue for an administrative law which emphasises legislation and regulation and which acts, not as a counterweight to the interventionist state, but to facilitate government action.[133]

The specific focus of this paper does not allow for the discussion and analysis of the comparative merits of these broad theories, nor has it aimed to do so. However, this enquiry acknowledges the value of judicial review that is informed by an understanding of relevant Government policies and priorities and seeks to balance those against the claims of the individual seeking judicial review of administrative action taken in implementing those policies. This involves making unavoidable value-judgments, which ought to be more openly acknowledged by the courts,[134] for public law in general, and judicial review in particular, exists in a political environment and the courts in administering public law perform a variety of political functions. The idea of 'the public interest' or the interests of individuals or groups, are themselves political notions.[135] If these competing interests (and values)

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130 Hutchinson, *supra n 24* at 320.

131 At 295. In Australia, section 75 of the Constitution formally guarantees that the traditional administrative law remedies will be available against the Commonwealth and its officers, as part of the general law.

132 Thynne and Goldring, *supra n 129* Chapter 7.

133 Harlow and Rawlings, *supra n 122* at 39-59.

134 Although this then raises the question for some of the role of such unelected and unaccountable bodies in a democratic system. See, for example, Cranston, *supra n 103* chapter 2 and Conclusion.

135 Cane, P, *supra n 106* at 33.

are openly acknowledged and weighed, then a finding by the court that the limits of bureaucratic discretion have been exceeded is likely to more readily contribute to better administration by promoting clearer policy guidelines, or more just application of existing policy, as well as providing justice to the individual applicant. For such an approach to become the rule rather than the exception in the health area, and other social policy areas, requires a range of approaches, perhaps including judicial training (common in many civil law countries), greater attention by academics and administrative lawyers to the changing face of government and the increasing use of decision-making processes which recognise and attempt to balance the competing calls on health resources.[136]

The interface between Government policies for collective consumption in the nursing home fees control program and the court decisions on fees control created tensions for policy implementation. They were by no means the only ones for, as this paper has tried to explore, tensions were also caused by a lack of a coherent policy framework for aged care in the 1970's and early 1980's and some obvious shortcomings in the general administration of the program by the Department of Health. Nevertheless, court decisions are an important pressure on policy development and implementation which deserve greater systematic study, both from the perspective of implementation of health policy by government and from the broader perspective of the consideration and assessment of the role of administrative law in a rapidly-changing modern state.

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136 McAuslan cites an example of a Health Services Board established to consider requests for hospital building outside the National Health Service. The Board was required to consider the resources likely to be diverted from the NHS and the facilities likely to be created by the works in question. Only if a fair balance between resources for collective consumption and private-market allocated consumption was likely to be maintained could permission to build private facilities be given: McAuslan, *supra n 2* at 4.