

INTRODUCTION

A brief historical context	2
Administrative law and constitutional law	3
Why do we need administrative law?	5
Unique powers of the executive	5
To keep the executive branch accountable	6
In search of a rationale for administrative law	7
Why accountability?	8
Democratic justifications of accountability	8
Rule of law justifications of accountability	10
Separation of powers justifications of accountability	12
Individual rights justifications of accountability	13
Accountability for <i>what</i> ? Administrative law values	14
<i>How to achieve accountability?</i> Administrative law mechanisms	16
Administrative law and statutory interpretation	16
Modern accountability: some challenges	17
Ongoing reform	19
The rest of this book	20

Most people have come into contact with the principles and mechanisms of administrative law in their day-to-day lives. Administrative law encompasses the legal principles that regulate the exercise of power by public authorities and the mechanisms that exist to remedy failures in the exercise of that power. If a local planning authority has notified residents in your area about a proposed development and explained how you can comment upon it; if a government department has advised you about a decision that affects you directly and provided you with information about how you can appeal the decision; if you have read a newspaper article based upon documents obtained under freedom of information – then you have seen administrative law at work. This book explains how administrative law holds public authorities to account in Australia. This chapter introduces the overarching concept that we use to explain administrative law principles and mechanisms: accountability.

A brief historical context

How should we start a book on administrative law? One approach that writers often favour is to place a contemporary legal subject in a historical context. For administrative law, this inevitably involves political history. A historical approach might begin with the English courts dating back to the seventeenth century.¹ Alternatively, we might begin with nineteenth century industrialisation and the slow emergence of central government that led to the regulation of public health, factories, and railways or we could look to the momentous expansion of government with the emergence of the twentieth century welfare state.² In Australia, especially at the Commonwealth level, a more recent history commences in the 1970s when several significant legal reforms were introduced. Just as nineteenth century British industrialisation brought an upheaval in government, the Australian administrative law reforms of the 1970s and 1980s were implemented during a period of major economic reform, trade and labour liberalisation, privatisation of government services, and reforms in public administration.³ This period of rapid upheaval brought with it concerns that existing mechanisms for bringing the government to account were ‘broken’ or ‘overloaded’.⁴

An introduction to administrative law could provide detailed political histories of these kinds. Like other areas of public law, administrative law ‘is rooted in its social, political, economic, and historical context’.⁵ While we do not propose to provide a detailed history, at the point of introduction it is worth looking back at the development of Australian administrative law as a discipline.

Various elements of administrative law have long common law traditions stretching back hundreds of years. As a discrete discipline, administrative law is of relatively recent origin in the common law world. In the late nineteenth century, English constitutional

1 Lord Woolf et al, *De Smith’s Judicial Review* (Sweet & Maxwell, 8th ed, 2021) 856 [15–002].

2 Paul Craig, *Administrative Law* (Sweet & Maxwell, 9th ed, 2021) ch 2.

3 Andrew Podger, ‘Trends in the Australian Public Service, 1953–2003’ (2003) 109 *Canberra Bulletin of Public Administration* 14.

4 Patricia Day and Rudolf Klein, *Accountabilities: Five Public Services* (Tavistock Publications, 1987) 1.

5 Martin Loughlin, *Public Law and Political Theory* (Oxford University Press, 1992) 4.

theorist AV Dicey investigated the body of French law – *droit administratif* – which was established specifically to regulate government action, was outside the normal civil legal system, and had its own specialised court. Dicey compared the French and English systems and argued that there was no separate system of administrative law in England:

the words ‘administrative law’ ... are unknown to English judges and counsel, and are in themselves hardly intelligible without explanation.⁶

Writing an early English textbook in 1952,⁷ JAG Griffith and Harry Street argued that the study of administrative law in England had still ‘not yet fully recovered from Dicey’s denial of its existence’.⁸ In 1964, Lord Reid in the House of Lords commented that England still did not have ‘a developed system of administrative law’.⁹ These mid-twentieth century English writers explored the emergence of administrative law as a discrete body of law. They sought a coherent rationale for the subject, while at the same time seeking to distinguish administrative law from constitutional law with which it shared a symbiotic relationship.¹⁰

Despite our common law inheritance, early Australian legal writers recognised that English sources were inadequate for Australian needs because of our different constitutional arrangements,¹¹ which merged British and American traditions.¹² Administrative law in Australia slowly emerged at this point in time: Friedmann’s 1950 *Principles of Australian Administrative Law* was a slim volume of 112 pages that would gladden the heart of any law student today!

Modern administrative law is more complex. The legal principles have grown in sophistication and the range of mechanisms available to regulate and oversee administrative power has increased. In this book we explain these administrative law principles and mechanisms in a modern context.

Administrative law and constitutional law

Australia’s written *Constitution*, which embodies both the concept of responsible government (from the Westminster constitutional tradition) and the separation of powers and federalism (from the American constitutional tradition), means that our administrative law principles rest in a unique constitutional framework.

6 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, first published 1885, 1915 ed) 214.

7 In 1963, JF Garner traced the first book to be published in England bearing the title ‘Administrative law’ to one published in 1929 (written by a Dr FJ Port), although it did not have the scope of modern works and was confined to judicial review of ‘quasi-judicial’ and delegated legislative acts of administrative agencies: J F Garner, *Administrative Law* (Butterworths, 1963) Preface.

8 JAG Griffith and H Street, *Principles of Administrative Law* (Isaac Pitman & Sons, 1952) 3.

9 *Ridge v Baldwin* [1964] AC 40, 72.

10 English texts traditionally covered both constitutional and administrative law. See, eg, Stanley de Smith and Rodney Brazier, *Constitutional and Administrative Law* (Penguin Books, 8th ed, 1998); Hilaire Barnett, *Constitutional & Administrative Law* (Routledge, 11th ed, 2016).

11 See W Friedmann, *Principles of Australian Administrative Law* (Melbourne University Press, 1950) Preface.

12 *Ibid* 9.

4 GOVERNMENT ACCOUNTABILITY

As a body of law that regulates the exercise of power by the government against the individual or the community, administrative law falls within the broader area of public law. Constitutional law, which empowers and regulates all branches of government, is closely associated with administrative law. At this point, it is helpful to introduce two fundamental principles of Australian constitutional law that pervade many aspects of administrative law.

The first is the creation of a federal system by the *Constitution*. With two governmental systems – Commonwealth on the one hand, and state and territory on the other – operating within the geographical territory of Australia,¹³ most individuals are subject to two layers of legal regimes and the exercise of power by two levels of government. The immediate impact is that administrative law mechanisms must exist at both levels. Further, there is intergovernmental cooperation in some areas, so that both levels of government may contribute to the same decisions or actions. Within this dual and overlapping system, administrative law must be sufficiently flexible to provide appropriate redress for affected individuals.

The second fundamental constitutional principle concerns the delineation of powers and functions between the three branches of government. Constitutional law – through the text of the *Constitution*, its interpretation by the courts, and constitutional convention – defines the different composition and role of each branch of government. The constitutional powers and associated constraints of the executive, parliament, and judiciary have important repercussions for their roles in administrative law.¹⁴

In Australia, the *Constitution* has heavily influenced the development of administrative law. Throughout this book, we draw on principles of constitutional law to explain the development and contemporary operation of administrative law. Constitutional law provides the framework in which administrative law operates and is an ongoing influence on the development of administrative law principles.¹⁵ Further, in the last two decades there has been an increasing trend for the High Court to ‘constitutionalise’ certain administrative law principles, such as the right to seek judicial review of administrative decisions¹⁶ and the power of parliament to order the production of government documents.¹⁷ We are seeing a reconvergence of the two areas after a period during the twentieth century that saw the development of administrative law as its own distinct discipline. Today, administrative law retains that status but is best understood as a sub-discipline of public law, interwoven with and informed by the sub-discipline of constitutional law.

-
- 13 This analysis leaves to one side the operation of local government within this territorial sphere. Local government is a creature of the states; that is, it is established and regulated by state governments and the administrative law mechanisms of the states generally apply to them. In practice, local government decisions and actions have a large impact on individuals, and, as we will see, many administrative law cases involve review of local government action.
- 14 Chapter 2 introduces the constitutional setting within which the executive sits, including its relationship with the judiciary and parliament.
- 15 See, eg, Cheryl Saunders, ‘Constitution as Catalyst: Different Paths within Australasian Administrative Law’ (2012) 10(2) *New Zealand Journal of Public and International Law* 143.
- 16 See *Constitution* s 75(v); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1. These cases are discussed in Chapters 9 and 10.
- 17 *Egan v Willis* (1998) 195 CLR 424.

Why do we need administrative law?

Why is there a separate body of legal principles known as administrative law that regulates the exercise of power by the executive branch of government? The administrative law mechanisms that we consider in this book – including the Ombudsman, royal commissions, freedom of information regimes, merits review, and judicial review – all focus on holding the executive, and the exercise of executive power, to account.¹⁸ The executive's power includes administering and executing the laws of parliament and enforcing the judgments of the judiciary.

Unique powers of the executive

One reason for having a separate body of law regulating executive activity is that the executive possesses unique and extensive powers. One of America's founding fathers, Alexander Hamilton, described the executive as the branch that 'not only dispenses the honors but holds the sword of the community'.¹⁹ Australian High Court justice Sir Owen Dixon warned in *Australian Communist Party v Commonwealth* ('*Communist Party Case*')

History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power.²⁰

The executive's application of laws affects the day-to-day lives of individuals more often, and more directly, than the actions of the legislative and judicial branches of government. In administering the laws, the executive has the power to alter the legal rights and duties of individuals; for example, in the creation or denial of rights in determining whether to grant a licence. In applying the laws to individuals, the executive may use force if necessary. This is the policing power of the state, an extremely important and defining coercive power if the state is to operate effectively. The executive is also responsible for the protection of the state: it exercises the state's military power.

The executive has a unique capacity to affect individuals. Compare the powers of the executive to those of the judicial and legislative branches of government. Alexander Hamilton described the judiciary as the 'least dangerous' branch of government.²¹ While the judiciary has the power to make decisions affecting individual rights, it is limited to determining disputes that are brought before it. The judiciary even depends upon the aid of the executive to enforce its judgments.

The legislature, as the branch composed almost entirely of democratically elected members, also has power. It 'commands the purse', in the sense that it authorises government taxation and expenditure, and 'prescribes the rules by which the duties and

18 Although there is some limited review of inferior courts, modern administrative law is predominantly concerned with accountability of the executive.

19 Alexander Hamilton, 'Federalist No 78' in Clinton Rossiter (ed), *The Federalism Papers* (Signet Classic, 1787) 464.

20 (1951) 83 CLR 1, 187.

21 Alexander Hamilton, 'Federalist No 78' in Clinton Rossiter (ed), *The Federalism Papers* (Signet Classic, 1787) 464.

rights of every citizen are to be regulated'.²² However, in Australia, the executive is pivotal in this process. It is the executive that (usually) generates the policies and introduces Bills into parliament. Finally, while the legislature has the power to make laws, it is the executive that puts those laws into action in relation to individual cases. And, partly because the Parliament cannot anticipate the individual circumstances of each case, the laws themselves often provide a good deal of room for the exercise of judgment and discretion by officers of the executive.

To keep the executive branch accountable

A second reason for having a separate body of law regulating executive power is that the courts and the parliament already have a number of accountability mechanisms suited to their institutional characteristics. These are largely perceived to function appropriately even in the modern age. With only a few exceptions, the courts must conduct cases in open court, provide reasons for their decisions and, with the exception of decisions of the High Court, are ordinarily subject to appeal. Parliament's proceedings are also conducted in public, the two Houses of Parliament keep each other in check,²³ and members of parliament are directly accountable to the people through regular elections. The *Constitution* requires the judiciary to hold the parliament to account through judicial review of legislative action. Judicial review of legislative action – as distinct from judicial review of executive action – is the subject of constitutional law and scholarship.

In contrast to parliament and the courts, the executive conducts its functions in private. Historically, there were no in-built accountability mechanisms within the executive branch of government. Instead, the executive was brought to account by the other branches of government. Accountability to parliament was achieved through the conventions of responsible government and the use of parliament's powers to question the government and to inquire into executive conduct.²⁴ For over a century, the responsibility of executive ministers to the parliament was generally considered sufficient to bring the executive to account. In *Egan v Willis*, Gaudron, Gummow and Hayne JJ, quoting David Kinley,²⁵ stated:

A system of responsible government traditionally has been considered to encompass 'the means by which Parliament brings the Executive to account' so that 'the Executive's primary responsibility in its prosecution of government is owed to Parliament'.²⁶

However, by the second half of the twentieth century, grave concerns existed about the capacity and willingness of parliament to bring to account all of the government's actions.

22 Ibid.

23 In Australia, all jurisdictions with the exception of Queensland, the Australian Capital Territory, and the Northern Territory have bicameral parliaments.

24 See further discussion in Chapter 5.

25 David Kinley, 'Governmental Accountability in Australia and the United Kingdom: A Conceptual Analysis of the Role of Non-Parliamentary Institutions and Devices' (1995) 18(2) *University of New South Wales Law Journal* 409, 411.

26 *Egan v Willis* (1998) 195 CLR 424, 451 [42] (Gaudron, Gummow and Hayne JJ).

This may have been partly because of the increased complexity and size of modern government – referable to the social economic and labour changes outlined above – but also due to the growing strength of political party discipline and the influence of the executive in parliament, which have significantly diminished the effectiveness of the parliament as an accountability mechanism.

In addition to parliamentary accountability, the judiciary has also historically played a role in keeping the executive accountable by conducting judicial review of the actions of the executive. Judicial review remains a major mechanism within administrative law.²⁷

In search of a rationale for administrative law

Having argued that a separate body of administrative law is necessary, a further question emerges: how can the intervention of the courts and other review bodies in the workings of government be justified?

There is no simple answer. Modern Australian administrative law is still in search of a coherent rationale: commentators and jurists have argued that it exists to protect individual rights, to promote efficient and effective administration, to promote integrity in governmental decision-making, to increase participation in government, and to promote accountability.²⁸

In this book, we advance the view that *accountability* is the overarching principle that informs administrative law: administrative law encompasses the body of legal principles that achieves accountability for the exercise of public power. Administrative law also encompasses those mechanisms whose role is to enforce these principles.

Accountability exists in many different forms and its flexibility and breadth makes it a useful touchstone to understand the myriad administrative law principles and mechanisms. David Feldman explained:

Accountability of government is of different kinds. It may be political or legal; continuous or periodic; accountability to the electorate, to Parliament or to the party; and it may be based on moral or legal standards or party political expediency.²⁹

We cannot simply present the concept of accountability as an axiom. This part of the chapter considers three questions. First, we consider *why* governments should be accountable for their actions. Second, we look at the administrative law values *for which* government ought to be accountable. Finally, we introduce the idea of *how* government is made accountable through the various administrative law mechanisms.

27 See Part IV of this book.

28 See, eg, JJ Spigelman, 'The Integrity Branch of Government' (2004) 78(11) *Australian Law Journal* 724; *Weal v Bathurst City Council* (2000) 111 LGERA 181, 184; Paul Craig, *Administrative Law* (Sweet & Maxwell, 9th ed, 2021) ch 1.

29 David Feldman, 'Democracy, the Rule of Law, and Judicial Review' (1990) 19(1) *Federal Law Review* 1, 6. For a useful taxonomy of forms of accountability, see Dawn Oliver, *Government in the United Kingdom: The Search for Accountability, Effectiveness and Citizenship* (Open University Press, 1991) 23–8.

Why accountability?

This section puts forward four justifications that explain why governments should be accountable: democracy, the rule of law, the separation of powers, and individual rights. Below, we consider each of these justifications and explain that the way in which accountability mechanisms are framed and implemented can vary depending upon which of the justifications is paramount.

Democratic justifications of accountability

Perhaps the most obvious answer to the question of why governments should be accountable is that we live in a representative democracy and that the electors have a right to hold their representatives to account. ‘Democracy’ is derived from an ancient Greek word that means power (*kratos*) of the common people (*demos*). Australia’s representative democracy means the people elect representatives to make laws and decisions on their behalf. Deane and Toohey JJ said of representative government:

The rational basis of [representative government] is the thesis that all powers of government ultimately belong to, and are derived from, the governed ... In implementing the doctrine of representative government, the Constitution reserves to the people of the Commonwealth the ultimate power of governmental control. It provides for the exercise of that ultimate power by two electoral processes.³⁰

Those two electoral processes are the election of members of parliament and amendment of the *Constitution* by referendum.³¹

The Westminster parliamentary system that Australia inherited from the United Kingdom means that we do not directly elect the executive arm of government: the executive is chosen by the lower house of parliament. In this way, a line of responsibility is created from the executive to the people. It is only through the combination of representative and responsible government in Australia that the executive is held to account to the people. The doctrine of responsible government establishes parliament as a central institution of accountability.³² Ministers must be members of parliament and the executive must command majority support in the lower house of parliament. Parliament has ultimate control because it must authorise the supply of money,³³ and ministers must answer personally to parliament for the actions of their departments. Public servants and other officers are responsible to their respective ministers, but – at least under a traditional conception of responsible government – are not directly accountable to the people for their actions. This allows them to provide frank and fearless advice to ministers, while in theory maintaining accountability through ministerial responsibility.

Democracy, even in its representative form, implies some form of collective decision-making; that individuals have ‘a say in the terms and conditions on which social

30 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 70–1.

31 *Ibid.*

32 See further in Chapter 5.

33 See *Constitution*, ss 81, 83.

rules which bind them are developed'.³⁴ A distinction can be drawn between democratic representatives as *delegates* following the expressed preferences of their constituents and democratic representatives as *trustees* who are elected by their constituents to follow their own judgment as to the most desirable action to pursue.³⁵ Under the delegate conception of representatives, constituent input into parliamentary decision-making is ongoing. In this sense, it provides a justification for an ongoing responsibility to the electors to gauge their preferences. It provides a strong basis for *participatory democracy*, where constituents are actively and continually involved in political decision-making. For example, this could be through public consultation processes or focus groups.

Under the trustee conception, constituent input occurs at regular intervals – namely, elections. This highlights the importance of an electorate that is well-informed of the actions and decisions taken by parliament and the government, so that when elections occur, they can properly bring their representatives to account. While the trustee conception of representative democracy may not seek public *participation* in decision-making for the purpose of determining constituent preference, public *consultation* remains pivotal. The trustee is entrusted to exercise their best judgment in determining the best action to pursue. This will often require expert input or the input of affected communities and other interest groups.

Different demands can be placed upon representatives, depending upon whether they are conceived as delegates or trustees. This distinction can lead to significant differences in the nature and content of the parliamentarian's obligations to the people. However, common to each is the idea that the democratic representatives are empowered by the people and accountable to them, although the obligations differ. In Australia, there is no prevailing conception and both of these conceptions are evident across the political spectrum.

David Feldman explained that the accountability achieved through regular electoral processes is 'direct accountability', but that this is often a blunt instrument, insufficiently responsive to issues of good government decision-making.³⁶ Feldman considered a second form of more continuous accountability – 'indirect accountability' – where government is required to take into account a range of opinions.³⁷ Deliberative democracy is a popular modern theory of democracy that emphasises the importance of continuous citizen input into political decision-making.³⁸ Deliberative democracy involves public discourse and has the potential to produce better informed, more rational, and more legitimate decisions, but that depends upon the diversity of the participants.³⁹

34 David Feldman, 'Democracy, the Rule of Law, and Judicial Review' (1990) 19(1) *Federal Law Review* 1, 2.

35 Hanna Fenichel Pitkin, *The Concept of Representation* (University of California Press, 1967).

36 David Feldman, 'Democracy, the Rule of Law, and Judicial Review' (1990) 19(1) *Federal Law Review* 1, 6.

37 *Ibid* 6–7.

38 John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge University Press, 1998) ch 1; Ron Levy and Graeme Orr, *The Law of Deliberative Democracy* (Routledge, 2016).

39 The public sphere of deliberation in this theory is invariably conceived of as being rational debate between citizens of equal status. However, critics emphasise that some voices can be marginalised or silenced in this process. See, eg, Iris Marion Young, 'Communication and the Other: Beyond Deliberative Democracy' in Seyla Benhabib (ed), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, 1996) 120; John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge University Press, 1998) 12.

Each of these different theories of representation and democracy centres on the role of citizens in empowering governments and the proper extent of their input into collective decision-making. In Australia, representative and responsible government provides us with a justification for the right of electors to know and judge the actions and decisions of parliament and the executive. Democratic theory provides various arguments for why the Australian people should be informed *and involved* in parliamentary and government decision-making.

Administrative law accountability mechanisms often intervene in the relationship between the elected representatives and their constituents; and between public servants and their ministers. This might be seen as undermining representative and responsible government. However, when the courts and independent investigatory bodies call the executive to account they can also be seen to be protecting and strengthening the democratic process. They do so by publicly investigating government action, demanding reasons, disclosing information to the public, reconsidering specific decisions on their merits, and ensuring that the exercise of public power is maintained within the limits of the law.

Rule of law justifications of accountability

The rule of law is a contested concept, but at its core is the idea of rule by law and not by individual people.⁴⁰ Rule by individuals, based on idiosyncratic judgments rather than pre-determined rules, is often equated with arbitrary rule. The rule of law brings with it ideas of legality and accountability of the exercise of power to legal norms. The rule of law is synonymous with English public law. As French public law scholar Elisabeth Zoller explained: '[The] principle of legitimacy [for public law in England] is, in the first place, to put government under the law, not to ensure the happiness of the subjects by carrying out the public good.'⁴¹ By bringing the government under the law, happiness of the individual could be achieved in the private sphere.

An early definition of the rule of law was proffered by English constitutional scholar AV Dicey. He identified three features of the rule of law. The first was the supremacy of law over discretionary power to promote certainty and predictability in government action. The second was the principle of legal equality: legal restraints must apply to citizen and government alike. Finally, Dicey identified the importance of the role of the courts in protecting the individual against the government, emphasising the role of the common law in protecting rights as part of the rule of law.⁴²

A fundamental dimension of Dicey's conception of the rule of law is not just that there are restraints on government discretion, but that those restraints are enforceable by law. For Dicey, the English rule of law was to be contrasted against the French *droit administratif* (administrative law), which he viewed with disdain, particularly the system

40 Traditionally expressed as 'a government of laws and not of men'. See *Massachusetts Constitution of 1780* pt I, art XXX: Robert J Taylor (ed), *Massachusetts, Colony to Commonwealth: Documents on the Formation of Its Constitution, 1775–1780* (The University of North Carolina Press, 1961) 131. The passage has been attributed to John Adams.

41 Elisabeth Zoller, *Introduction to Public Law: A Comparative Study* (Martinus Nijhoff Publishers, 2008) 112.

42 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, first published 1885, 1915 ed) 110–21.