Government Accountability

Australian Administrative Law

Third edition

Judith Bannister
Anna Olijnyk
Stephen McDonald

CAMBRIDGE

GOVERNMENT ACCOUNTABILITY

AUSTRALIAN ADMINISTRATIVE LAW

THIRD EDITION

Government Accountability: Australian Administrative Law presents a thorough account of the administrative state and the mechanisms that exist to bring the state to account for its actions. It contextualises the theory and explanation of administrative law through carefully chosen case studies and events that offer practical examples of the principles discussed and how they are applied.

The third edition has been thoroughly updated to incorporate recent legal developments. In particular, there is expanded discussion of 'materiality' in the context of jurisdictional error. The examples used illustrate the operation of legal principles and reflect contemporary social and political circumstances.

Written by a team of experts in the field, and known for its clear, consistent and straightforward narrative with logical progression, *Government Accountability* remains a student-friendly guide to complex administrative law concepts.

Government Accountability: Australian Administrative Law is accompanied by a casebook, *Government Accountability Sources and Materials: Australian Administrative Law*, which provides curated cases and primary legal materials with helpful commentary.

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PREFACE

Government Accountability: Australian Administrative Law, third edition, is intended to provide a scholarly yet accessible introduction to Australian administrative law. We have aimed for an optimal combination of accuracy, clarity, concision and richness; qualities that are not always complementary. We have also endeavoured to provide the human, political, and historical context that makes administrative law so fascinating.

Throughout the book, detailed case studies are used to show how administrative law works in practice and to highlight strengths and weaknesses in the law. Where possible, we have chosen case studies that demonstrate multiple administrative law doctrines and mechanisms to reflect the reality that many parts of administrative law are related and may intersect in a single fact situation. Many of the case studies illustrate the application of the overarching themes of accountability and statutory interpretation.

This is the third edition of this book. We have thoroughly updated the text, including extensive discussion and synthesis of the emerging body of case law on materiality. Significant recent cases have been added, including *Hossain v Minister for Immigration and Border Protection,*[1] *BVD17 v Minister for Immigration and Border Protection,*[2] *Minister for Immigration and Border Protection v SZMTA,*[3] *Frugtniet v Australian Securities and Investments Commission,*[4] *ABT17 v Minister for Immigration and Border Protection,*[5] *Hocking v Director-General of the National Archives of Australia,*[6] *MZAPC v Minister for Immigration and Border Protection,*[7] *Charisteas v Charisteas,*[8] *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane,*[9] *Plaintiff M1/2021 v Minister for Home Affairs,*[10] and *Nathanson v Minister for Home Affairs.*[11]

1 (2018) 264 CLR 123.
2 (2019) 268 CLR 29.
3 (2019) 264 CLR 421.
4 (2019) 266 CLR 250.
5 (2020) 269 CLR 439.
6 (2020) 271 CLR 1.
7 (2021) 95 ALJR 441.
8 (2021) 95 ALJR 824.
9 (2021) 96 ALJR 13.
10 (2022) 96 ALJR 497.
11 (2022) 96 ALJR 737.

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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.

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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.

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 decisions[16] 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 is 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).