CHAPTER 1

WHY DOES ADMINISTRATIVE LAW MATTER?

1.1 Introduction 1
1.2 Some key ideas 2
1.2.1 Three kinds of accountability 3
1.2.2 The merits/legality distinction 4
1.3 Some history 7
1.4 Looking ahead 13
1.5 Structure of the book 16

1.1 INTRODUCTION

We live in an administrative state. This means that the way in which government power is *exercised* is predominantly through 'administrative'—rather than 'legislative' or 'judicial'—power. Administrative *law* is the body of law which is of most direct relevance to the administrative state for the reason that its central (albeit not exclusive) focus is on the legal regulation of executive branch of government: the 'administration'. Administrative law is about how administrative power is constituted and controlled *by law*. Studying administrative law thus enables us to ask: what is the law's contribution to the constitution and control of public or governmental power in contemporary conditions?

Administrative *law* is not the only vantage point from which to study the administrative state. Public administration, political science, political theory, economics and sociology all provide alternative lenses. The engagement of these other disciplines with the administrative state makes clear that not all means of controlling administrative power involve specifically legal modes of control. In practice much control of administrative power is undertaken by the power-holders themselves (for example, through managerial and bureaucratic controls internal to administrative institutions). Administrative law controls are, in this sense, merely a subset of a range of broader accountability techniques.

Administrative law controls do, however, tend to have certain distinctive features. Each part of administrative law—whether judicial review, an appeal to a merits review tribunal, an ombudsman's investigation, or some other accountability mechanism—involves a process

which empowers one unit in the overall scheme of government to exercise some form of legal control over another. Legal controls on administrative action are thus in this way *external* to the decision-makers who are being supervised or kept to account. This external feature is important, and might helpfully be understood by reference to the two propositions that lie at the core of the traditional, tripartite idea of the separation of powers. The first proposition is that we should not allow too much power to be concentrated in the hands of any one individual or institution. This is why there are three broadly distinguished branches of government—the legislature, the executive and the judiciary—each with broadly distinctive functions. The second is that those who exercise power should be subject to some form of external check.

Judicial review of executive action is the paradigmatic instance of such external review, but other institutions such as administrative tribunals and ombudsmen can also be external to particular government agencies and departments, even though they are technically part of the 'executive branch'. Indeed, this point serves to illustrate how the idea that administrative law operates upon the activities of the executive 'branch', though a convenient description, should not be understood narrowly. The executive branch of government is in fact composed of a multiplicity of institutions and actors, all involved in different ways in the 'administration' of government power.

1.2 SOME KEY IDEAS

The presence of the word 'principles' in the title of the book indicates that our aim in the chapters that follow is to provide a large-scale rather than a fine-grained map of the terrain of administrative law. What actually *is* administrative law? What exactly does it *do*, and *how*? Why do we need it? What role, if any, do the norms, principles, processes, and institutions of administrative law play in making the relationship between government and the governed *legitimate*?

We have given this introductory chapter the title 'Why Does Administrative Law Matter?' to encourage critical reflection on these questions throughout the discussions to follow. Without doubt, administrative law is a complicated field of study. To navigate it requires a certain willingness to keep in view a host of interconnections between law, politics, our constitutional order, our legal institutions, the position of those charged with the actual exercise of government power, and, of course, the position of those who are ultimately subject to that power. Still, amid those complex interconnections, we think it is important to identify some key distinctions, concepts and relationships. The first concerns the three different kinds of control or accountability that bear upon the scope and function of administrative law: *legal*, *bureaucratic*, and *political*.[1]

1 This approach is borrowed from P Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge University Press, 2016). The terms 'control' and 'accountability' may be given different meanings, but for present purposes we use them as synonyms.

1.2.1 Three kinds of accountability

Legal accountability encompasses modes of control that focus on whether or not administrative power is exercised in accordance with law. It is the mode of accountability that is the primary focus of this book. To understand the nature, function, and scope of legal modes of accountability, therefore, it is necessary to consider what exactly is signalled by the term 'legal' or 'law' in administrative law. We return to this point below. For now we will simply observe that modes of legal accountability include the body of legal norms applied by courts in the exercise of their judicial review jurisdiction, as well as legal norms applied by bureaucratic institutions in their exercise of administrative power. The latter include merits review tribunals as well as complaints and investigation bodies that have been constituted by legislation and whose activities are governed by law.

Bureaucratic accountability is the term that might broadly be used to capture modes of accountability *within* the executive branch of government. These will include myriad 'internal' accountability structures as well as mechanisms for the independent 'external' review of government decision-making that—as is the case with merits review tribunals—nonetheless remain located within the executive branch of government. This rough description alone should be sufficient to indicate that, at least with respect to merits review tribunals, the line between 'legal' and 'bureaucratic' modes of accountability will often be a blurred one.

Political accountability has a very different focus to legal and bureaucratic modes of accountability that concentrate on individual review and grievances. Modes of political accountability focus on policy objectives and outcomes of administration. It is important, however, not to overdraw the contrast. Understanding how political modes of accountability arise and how they work is important for a well-rounded picture of the administrative state and the methods through which its activities are controlled. This understanding is also specifically important to a study of administrative law because of how legal modes of accountability operate in a context of awareness of political modes of accountability. For example, a court conducting judicial review of an instance of administrative action (about which we say more below) may emphasise statutory rules that require notice of such action to be tabled before the parliament. Noting the presence of this mechanism of political accountability, the court will often adapt its own role as a site of legal accountability accordingly.[2] In this way, a legal form of accountability may be calibrated by reference to the existence and perceived efficacy of other modes of accountability.

The short point, then, is that it is not possible to grasp the characteristics and functions of each of the various modes of legal, bureaucratic and political accountability without an understanding of their relationship to each other. It is also not possible to evaluate why administrative law matters without thinking about how its various mechanisms operate within a wider context of alternate modes of accountability (see further 10.1.3.2). This context

2 *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 539 serves as an interesting case in point (see 4.2.3).

in turn bears upon another key idea that is foundational to work of administrative law. This is the distinction between the *merits* of administrative action and its *legality*.

1.2.2 The merits/legality distinction

1.2.2.1 The 'merits' of administrative action

Discussions in the chapters to follow will refer repeatedly to the accepted idea that the 'merits' of a given instance of administrative action is for the executive to determine. The 'merits' refers to the considerations bearing upon why a given administrative action is considered to be the preferable one in the legal and factual circumstances.

The requirement that the executive determine the 'merits' of administrative action is closely associated with the fact that many statutory powers vested in administrative decision-makers will be in the form of a *discretion*. The conferral of discretionary powers on government bureaucracies is a standard response to complexity and uncertainty. Discretion gives—and is intended to give—administrators a degree of freedom of choice. This holds across the two main kinds of discretion that arise in the administrative state: *rule-making* and *decision-making*. Rule-making refers to the making of 'secondary' or 'delegated' legislation and policies through which the primary legislation enacted by parliament is administered (see 8.4.3). It is undertaken principally by the executive arm of government. This is considered appropriate in light of time and resource constraints that make the parliament unsuited to the task. But it will inevitably see those executive actors engaged in rule-making exercising discretion. The still more typical example of discretion is that involved when administrators apply pre-existing rules to make individual administrative *decisions*. The need for discretion here arises because although rules can confer more or less choice upon an administrator—that is, the rule can be framed in a way that 'structures' those choices—a rule cannot itself determine how it is to be applied to particular facts.[3] Is the applicant for a fishing licence a 'fit and proper person' to hold such a licence, as specified by the relevant statutory criteria? Does the person identified as a possible candidate for cancellation of their visa on character grounds pass the statutory 'character test' on which their visa depends? Such are just two examples of administrative action, of an inherently discretionary character, with respect to which a range of outcomes could plausibly follow depending on the facts. Someone, however, ultimately has to make the 'call'. This, at its simplest, is what is meant by determining the 'merits' of administrative action.

To be sure, discretion potentially carries with it certain costs. These include the risk of exploitation, arbitrariness and uncertainty. But discretion can also achieve certain benefits, such as flexibility, consistency and responsiveness. Either way, it is impossible (and would be unwise) to eliminate discretion entirely. It is an important part of the package of administrative law. That said, we will see in our discussion of the 'norms' of administrative law in Chapter 4 that, even though discretion lies at the heart of the exercise of many or

3 See R Goodin, 'Welfare, Rights and Discretion' (1986) 6 *Oxford Journal of Legal Studies* 240, 237–9.

even most administrative powers, it presents special kinds of challenges to the court's task of checking the 'legality' of that exercise.

The idea that it is the executive's job to attend to the 'merits' of administrative action, while it is the judiciary's job to supervise its 'legality' signals something very important. The merits/legality distinction reflects not only a particular institutional division of labour, but also, in Australia, a *constitutional* story about who, according to the Australian version of separation of powers, is to perform which role, and why.[4] At the core of the prescription that the 'merits' of administrative action are for the executive to decide is the observation that, through enacting legislation that empowers administrative officials to act, the democratically elected legislature has decided to give the executive that task. Exercising those powers is thus the executive's responsibility—and no one else's—to discharge. It follows from this that the task of the judiciary is equally confined. The judiciary must perform the role, and only the role, that has been assigned to it, namely to check the 'legality' of administrative action. Moreover—and this is the crucial point—in performing that role, the judiciary must ensure that it does not encroach on the role that has been assigned to the executive, namely its responsibility for deciding the 'merits'. In Australian law, these propositions are framed at the Commonwealth level by reference to the strict separation of judicial and executive power in the Constitution (see further 2.2.2).

1.2.2.2 The 'legality' of administrative action

What, then, do courts have in view when determining the 'legality' of administrative action through 'judicial review'? Put very simply, when conducting judicial review the court might determine the 'legality' of administrative action by reference to four different kinds of legal material. First, of course, there is the *Constitution*. The executive branch in its administration of government power must stay within its constitutionally assigned role. But second and of foremost importance, there is the *statute* (the legislation) that the executive is charged with 'administering' in the given instance. This statute will explicitly repose certain powers in administrative decision-makers that, within the set legal boundaries, they are required to exercise. Importantly, this legislative source of the legal authority that is vested in administrative decision-makers is not limited to the 'primary' legislation enacted by parliament. It will also include any (variously described) regulations, rules, by-laws, legislative instruments, delegated or subordinate legislation enacted by the executive under powers specifically delegated to it under that primary legislation. Though made by the executive rather than the legislature, these forms of 'mini-legislation' are also recognised as legally binding on administrators, and so equally form part of the 'legality' mix.

The third source of law to which the judiciary refers when supervising the legality of administrative action are the *principles of statutory interpretation*. These, too, are 'law' because they have been developed by both the common law and statute.[5] The importance of the

4 Recourse to the separation of powers principle to delimit the boundaries of judicial review can also be seen in other jurisdictions: cf *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2015] AC 945, 965, [22].

5 For example, the *Acts Interpretation Act 1901* (Cth).

principles of statutory interpretation cuts across every area of law in which legislation plays a part. But that importance is arguably still more significant in the case of administrative law. This follows from how the executive, in whatever form it might take, acts primarily through the authority granted to it by statute.[6] Interpreting the statute is therefore a key part of the executive's role in 'administering' it, as well as the judiciary's role in supervising the legality of that administrative action. To determine the lawful possession and limits of the power granted by statute, the court must look to the text, context and purpose of the relevant statutory provisions in order to form a view about what those lawful limits are. Principles of statutory interpretation drawn from common law and statute are a crucial part of this exercise. This, indeed, explains why judicial review is often referred to as a specialised branch of statutory interpretation.

The fourth source of law upon which the judiciary draws when supervising the legality of administrative action are the *norms* of administrative law, also known as the 'grounds' of judicial review. They are the focus of our lengthy discussion in Chapter 4. For many, these legal norms go to the heart of the very idea of 'administrative law'. To pave the way for the remaining issues discussed in this introductory chapter, therefore, it is important to say something more about them.

The legal 'norms' or 'grounds' of administrative law have a distinct historical lineage. As we explain in more detail in due course (3.1.1 and 4.1.1), these norms emerged over time from applications to the courts for what were known as the 'prerogative writs'.[7] The various writs were orders addressed to an official requiring the official to act or refrain from action—for instance, to perform a duty or not to do something unlawful. In other words, the writs were the equivalents of modern remedies. Of course, an application for a writ would succeed only if the applicant could specify some reason why a remedy should be granted. Put differently, the applicant had to identify a 'ground' for the issue of the writ, such as error of law or procedural unfairness.

Insofar as a ground for a particular writ was part of the justification for judicial intervention, that ground necessarily also established a norm with which the decision-maker had to comply to insulate any decision from judicial review. This means that although the language of grounds of review speaks most directly to courts—it identifies the circumstances in which their intervention is justified—all that is necessary for that language to be understood as addressing administrators is a change in emphasis. That is, although the grounds indicate when 'a public authority has overstepped the mark and when judicial intervention is warranted', the grounds *also* constitute 'court-recognised rules of good administration' which are able to guide administrative action.[8] Collectively the norms or grounds of judicial review mark out general *legal* rules and principles with which administrators must comply if they are to act lawfully.

---

6 The reviewability of non-statutory executive power is discussed at 2.6.2.2.

7 The decisive period for the assertion of this jurisdiction was the seventeenth century: L L Jaffe and E G Henderson, 'Judicial Review and the Rule of Law: Historical Origins' (1956) 72 *Law Quarterly Review* 345.

8 M Fordham, 'Surveying the Grounds: Key Themes in Judicial Intervention' in P Leyland and T Woods (eds), *Administrative Law Facing the Future: Old Constraints and New Horizons* (Blackstone Press, 1997), 199.

It took time for these underlying norms, which developed to control and structure administrative power, to be thought of as applicable across the wide range of government decision-making. But this is ultimately what occurred, and is what caused the norms or 'grounds' of judicial review to become positioned at the centre of the principles of administrative law as this body of law has been developed through the common law and statute alike (more on this below). In Australia, currently recognised 'norms' or 'grounds' include procedural fairness, relevant and irrelevant considerations, improper purpose, inflexible application of policy, the 'rules' against delegation and dictation, error of law, jurisdictional fact, no evidence, irrationality/illogicality in factual findings, and unreasonableness.

There are differences in the way the grounds are labelled and classified, and there is also some overlap between them. Though the language of 'grounds' remains commonplace, in this book we have decided to describe the grounds of review also by reference to the language of the 'legal norms' of administrative law (or 'administrative law norms') (see Chapter 4). In choosing this nomenclature we are wanting to make an important point. Administrative law needs to be understood not merely in terms of institutions and remedies through which the courts hold administrators to legal account, but as also being composed of a set of rules and principles which, at least presumptively, *regulate* those decision-makers who fall within the jurisdiction of the law's accountability institutions. Seen in this way, it becomes obvious that the courts are not the only institutions capable of playing a role in ensuring that administrative laws norms and requirements developed through judicial review cases are respected by those who wield government power. Indeed, judicial review may not even be the most effective way of ensuring systematic compliance with those norms, a point to which we return in 1.5, below.

1.3 SOME HISTORY

The attention given in this section to the history of administrative law provides an important foundation from which to reflect on these key ideas and the range of larger questions to which they relate. It is only through some knowledge of that history that we can understand how and why our current modes for calling administrative power to account through law take on the forms that they do, and how and why they relate to each other in the ways that they do. A reader of this history will quickly see that the administrative law patchwork we now have is a product of features of political and legal practice at different points in time. Indeed, that history can itself be read as a changing story about why administrative law matters, insofar that modes of legal accountability for administrative action have arisen, been extended, or been restricted in accordance with different views at different times about the appropriateness of controlling government action through law.

The sketch of the trajectory of Australian administrative law that we provide here is designed to offer a basic understanding of the large-scale changes that have occurred over the past 40 years and which help explain the institutional and normative features of Australian administrative law today. We have already briefly explained how the modern practices and norms of judicial review emerged from applications for the 'prerogative writs' brought by persons aggrieved by allegedly illegal official action. We might therefore begin the present

discussion by noting how this history came to be reflected in s 75(v) of the Constitution, which confers jurisdiction on the High Court in all matters 'in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth'. Under that section, therefore, an applicant may apply to the High Court in its 'original' jurisdiction (meaning 'in the first instance') for two writs which had been of central importance at common law: mandamus (which compels the performance of unperformed duties required by law), and prohibition (which prevents further action being taken on the basis of its illegality).[9] This source of jurisdiction ensures a measure of judicial control of officers of the Commonwealth that the legislature cannot remove.

We return to explain the scope of this jurisdiction in Chapter 2. We also provide further details on the elements and functions of the writs and other judicial review remedies in Chapter 3. Of significance for the present discussion are two points. First, the specific reference to the writs of mandamus and prohibition has meant that the traditional *remedially* oriented way of thinking about judicial review to an extent is hardwired into the Constitution. That document, by contrast, says nothing at all about the 'norms' or 'grounds' upon which that review ought to hinge. Second, the scope of this constitutional jurisdiction is explicitly defined in 'institutional' terms—that is, in terms of the institutional identity of repository of power as an 'officer of the Commonwealth'. This approach to defining the reach of judicial review is very different from the English 'public function' approach that we will discuss in Chapter 2.[10]

The period of 70 or so years after federation was one in which the judicial review jurisdiction vested in the High Court under s 75(v) of the Constitution was relatively infrequently invoked to challenge administrative decisions by the executive.[11] During this period the grounds of judicial review associated with the exercise of jurisdiction under s 75(v) were largely assumed to be those found in the common law, as those grounds had developed in association with the grant of the writs. This meant that the law of judicial review as it developed with respect to the jurisdiction granted to the High Court under the Constitution, and the 'common law' of judicial review as it operated in the supreme courts of the states, developed more or less in tandem. In both cases, however, the focus remained on the complex technical preconditions governing the availability of particular writs, rather than on developing the grounds of legal complaint against administrative action that might justify the issue of those writs in particular instances.[12]

From the middle of the twentieth century this state of affairs began to cause considerable dissatisfaction. In a post-war era that had seen great changes in the nature and role of the state, it became clear that a citizen's dealings with government were increasingly frequent and important. The judicial review process as it stood was a complicated means through which

9 Along with certiorari, mandamus and prohibition were the most important writs for the development of administrative law. On the omission of certiorari from s 75(v) of the Constitution, see 2.4.1.1.

10 See 2.6.1.

11 The court's caseload was dominated by matters arising out of the industrial conciliation and arbitration system that involved the exercise of *judicial* or quasi-judicial functions.

12 In 1945 Dixon J expressed the view that a unified law of 'judicial review' was a 'mischievous abstraction'! See *Arthur Yates & Company Pty Ltd v Vegetable Seeds Committee* (1945) 72 CLR 37, 81.

to redress grievances generated by those dealings. Moreover, there grew a sense that judicial review did not necessarily address the particular nature of many of those grievances, which tended to go much more to matters of the 'merits' of administrative action than to its 'legality'. Although there was a version of an 'administrative justice' system on foot in Australia before the 1970s—that is, there existed a number of administrative review tribunals that provided a non-judicial, merits-oriented review mechanism with respect to some areas of government activity—this 'system' was disorganised and its coverage patchy. On the basis of growing concerns about the efficacy and fairness of Australia's administrative law system, therefore, the Commonwealth government appointed an Administrative Review Committee (the Kerr Committee) to undertake a comprehensive examination in 1968.

The primary impetus for the Kerr Committee was the recognition that there were problems with the extant administrative justice system of the sort mentioned above. But in an era in which discretionary administrative decisions had come to affect the daily life of many individuals, it had also become apparent that the mechanisms of *political* accountability were also inadequate to redress the kinds of grievances that were arising. What was to become the 'new administrative law' package of the 1970s must therefore be understood in the context of the strengths and weaknesses of this broader species of accountability for executive action (see 1.2.1). To do this it is necessary to say something about the idea of 'responsible government'. The framers of the Constitution drew on both the British and American constitutional traditions. The most significant borrowing from the American tradition was the constitutionally entrenched separation of powers—legislature, executive, and judiciary—to which we have already referred. Perhaps the most significant institutional aspect from the British heritage that was brought to bear on Australian constitutional design was the system of 'responsible government'. In Walter Bagehot's famous description,[13] the key idea behind the institution of responsible government is that the executive government (the Cabinet) relies for its initial and continuing existence on the support of an elected legislature. Stated simply, the executive government is answerable to the Parliament for its actions. This can be contrasted with a 'presidential' system of government, such as that of the United States, where both the legislature and the executive are elected by popular vote.

In the early stages of its British history in the nineteenth century, the primary mechanism for the integration of the legislative and executive branches that is reflected in the idea of 'responsible government' was the principle of *collective ministerial responsibility*. As its name implies, this principle dictated that individual members of the government—the ministers of state—would stand or fall as a *group* depending on whether they 'retained' or 'lost the confidence' of the British House of Commons.[14] This principle held sway before the rise of political parties as we now know them. By contrast, in the (predominantly) two-party

13 In his 1867 work, *The English Constitution*. A standard modern edition is that of R H S Crossman (Fontana/Collins, 1963).

14 The other feature of responsible government is that most of the powers of the head of state (Monarch, Governor-General, Governor)—except the power to appoint the government—must be exercised on the advice of the government of the day.

parliamentary system such as exists today in both Britain and Australia, the making of governments is the result of party political electoral success. Governments typically give up office voluntarily only when an election is due, or earlier if government strategists detect good prospects of electoral success.

In this system, the effective mechanism of integration of the executive and the legislature is the principle of *individual ministerial responsibility. Collective* ministerial responsibility still plays a role in current arrangements, such as through demanding the loyalty of government ministers to its policies, and dictating the confidentiality of Cabinet deliberations and the inner workings of the government machine. But it is *individual* ministerial responsibility that requires ministers to provide the legislature with information about and explanations for their conduct, as well as that of their public servants, and to take remedial steps when things go wrong. In extreme cases of personal failure or misconduct, the principle of individual ministerial responsibility requires that a minister should resign.

The recommendations of the Kerr Committee (1971), and those in the reports of the Bland and Ellicott committees (1973) which followed, need to be understood against this background. Legal reform was needed to remedy shortcomings of the administrative justice system, in particular the inability of judicial review to remedy unjust decisions which were objectionable 'on their merits' although not affected by legal error (that is, not 'illegal'). But reform was also needed as a partial cure for the limited utility of forms of extant political accountability to fill the breach left by limited efficacy of judicial review. It was unrealistic to expect ministers to shoulder responsibility for the plethora of administrative decisions which were made under their watch. Political responsibility for those decisions had become more theoretical than actual.[15]

What followed was a round of law reform that was unprecedented in its scale, and that generated a raft of important legislation that remains central to the architecture of Australian administrative law today. This package of legislation included the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*', a simplified approach to judicial review), the *Federal Court Act 1976* (Cth) (establishing a new federal court to, among other things, administer jurisdiction conferred by the *ADJR Act*), the *Administrative Appeals Tribunal Act 1975* (Cth) (a generalist merits review tribunal), and the *Ombudsman Act 1976* (Cth) (a scheme for both complaints resolution and for systemic review of areas of possible administration). The *Freedom of Information Act 1982* (Cth) emerged from separate set of reform processes. These reforms were described (in now anachronistic language) as the 'new administrative law'.

We explain the important details of each of these initiatives in the chapters to follow. For present purposes, however, two measures in particular invite emphasis. The first was the establishment of the Administrative Appeals Tribunal ('AAT'), with jurisdiction covering a wide range of government activities, to review decisions of administrative officials and first-tier tribunals. The second was the introduction through the *ADJR Act* of a 'grounds-led' rather than 'remedy-led' statutory procedure for judicial review.

15 Commonwealth Administrative Review Committee, *Commonwealth Administrative Review Committee Report*, Parliamentary Paper No 144 (1971) ('Kerr Committee Report'), ss 7 and 33.

In support of what was to become the AAT, the Kerr Committee argued that most administrative decisions raise 'non-justiciable issues' (meaning, at its simplest, that those decisions are not apt for judicial resolution; see 2.6.2). Yet the committee in turn noted that inadequate provision was made elsewhere for citizens to challenge administrative decisions 'on their merits'. Filling this gap, however, raised special constitutional challenges. As explained earlier in our discussion of the constitutional aspects of the merits/legality distinction (1.2.2), the committee noted that reviewing the merits as opposed to the legality of administrative decisions is not a 'judicial' function. It could not therefore be committed to courts established under Chapter III of the Constitution, as to do so would confer upon them non-judicial powers. Moreover, the separation-of-judicial-power doctrine, settled by the High Court some years earlier, had made clear that the problem also worked the other way. That is, parliament has no power to invest the judicial power of the Commonwealth other than in a Chapter III court and, conversely, a non-judicial function may not (subject to a few tightly circumscribed exceptions) be exercised by a Chapter III court unless such is incidental to judicial functions.[16] This point of constitutional principle thus explains why the AAT, which was designed to make the review of administrative decisions on their merits possible, was established not as a Chapter III court but as a body exercising executive power under Chapter II of the Constitution.

The recommendations of the Kerr Committee that led to the introduction of the *ADJR Act*, by contrast, were aimed at simplifying the procedure of applying for judicial review. We explain the workings of jurisdiction provided through the *ADJR Act* in Chapter 2. Here, we will restrict ourselves to three points relevant to the institutional implications of the changes that this Act brought about. First, although the *ADJR Act* created a new, simplified judicial review regime at the federal level, it did not purport to affect either the supervisory review jurisdiction of the Supreme Courts of the states or the entrenched jurisdiction of the High Court under s 75(v) of the Constitution,[17] both of which retained their jurisdiction, alongside the *ADJR Act*, to issue orders in the nature of the writs. Here it is also notable that only three state and territory jurisdictions have adopted clones of the *ADJR Act*. Second, jurisdiction under the *ADJR Act* was conferred by reference to a general formula which acts as threshold for bringing an application for judicial review under the Act. This formula requires that action ('decisions' or 'conduct') amenable to review under the *ADJR Act* must be made 'under an enactment'. In this way, *ADJR Act* jurisdiction is expressly linked to the *statutory* source of the power exercised. Third, one aim (and ultimate effect) of the enactment of the *ADJR Act* was greatly to reduce the High Court's administrative law caseload under s 75(v) of the Constitution by diverting it to the newly established Federal Court.

Of these three points, the first two continue to hold as described. The course of history, however, has proven to considerably complicate the third point. In brief summary, largely as a result of an upsurge in the international movement of persons and uncontrolled

16 The first proposition was recognised in *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 355; the second in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

17 Section 39B of the *Judiciary Act* 1903 (Cth) now confers jurisdiction in the same terms on the Federal Court.

immigration into Australia, in the 1980s challenges to immigration decisions brought under the *ADJR Act* came to represent a very significant proportion of the Federal Court's judicial review caseload.[18] In the eyes of successive governments, the Federal Court adopted an unreasonably pro-immigrant stance in many cases. In order to counter this trend, various statutory provisions were enacted from 1989 onwards and were designed to clip the wings of the Federal Court's jurisdiction in immigration matters. Removing the court's jurisdiction to hear immigration cases under the *ADJR Act* was among these measures. The net result of these provisions and their interpretation by the High Court[19] was to give immigrants a strong incentive to invoke that court's constitutionally entrenched judicial review jurisdiction under s 75(v). In due course, the High Court was swamped by a flood of immigration cases (see further 2.4.1.1). In order to address this problem, further legislative changes conferred on the Federal Court the same jurisdiction to issue injunctions and writs of prohibition and mandamus as the High Court has under s 75(v). These were designed to subject immigration decisions to the constitutionally entrenched minimum of judicial review (which the legislature cannot remove) and no more.

There is much more to be said about this history of tensions between the legislature and the judiciary with respect to the role of the courts in conducting judicial review of migration decisions. The point to emphasise for introductory purposes, however, is that by the turn of the twenty-first century the High Court was confronted with the need to interpret and apply its entrenched original jurisdiction under s 75(v) of the Constitution in the light of developments in administrative law in the previous 20 years, *and* in a context (immigration) in which s 75(v) had relatively rarely been applied. The development of s 75(v) jurisprudence had been more or less in abeyance since 1980 as a result of the enactment of the *ADJR Act*: the Federal Court, via this statutory regime, had basically been carrying the vast majority of the judicial review workload at the federal level. But the removal of review of immigration decisions from the *ADJR Act* and related legislative reforms ultimately meant that the High Court's original jurisdiction under s 75(v) of the Constitution came to lie at the centre of the development of the norms of twenty-first century judicial review generally. The result has been that many of the most important recent administrative law cases have been forged in a context (migration law) where the *ADJR Act* has no application.[20]

All elements of the 'new administrative law' generated by the law reform efforts of the 1970s remain on the legal accountability landscape.[21] All, including the *ADJR Act* (which is still invoked

18 For a more detailed account see S Gageler, 'The Impact of Migration Law on the Development of Australian Administrative Law' (2010) 17 *Australian Journal of Administrative Law* 92.

19 In *Abebe v Commonwealth* (1999) 197 CLR 510.

20 Moreover, in *Kirk v Industrial Court of New South Wales*, (2010) 239 CLR 531, the High Court went a very long way down the path of aligning the law applicable in the supervisory jurisdiction of state Supreme Courts with that being developed in the High Court's original review jurisdiction, even though there is no express provision entrenching judicial review akin to s 75(v) of the Constitution. The developments signalled in *Kirk* raise a host of issues (see 2.4.3).

21 To this picture should be added a number of further review and accountability mechanisms which have proliferated over the course of the last 30 or 40 years, such as human rights commissions, anti-corruption commissions and privacy watchdogs. For discussion, see 8.1.

in a many cases), retain practical significance. Yet some have suggested that the *ADJR Act* could now be repealed without great loss. That suggestion has to do with the extent to which the shadow of the Constitution now looms over contemporary Australian administrative law. We return briefly to this issue of 'constitutionalisation' of administrative law immediately below.

1.4 LOOKING AHEAD

It is helpful to conclude the substantive discussion in this introductory chapter by emphasising three themes that cut across the chapters to follow, and which are occupying an increasingly significant place within the landscape of contemporary administrative law. The first, as just foreshadowed, is our concern to chart what might be described as the 'constitutionalisation' of modern Australian administrative law. The second is the question of how, in conditions of contemporary administrative governance, we are to understand the 'law' in 'administrative law'. The third relates to the scope and reach of administrative law more generally.

Despite the fact that Australia's written Constitution says very little about the way in which administrative institutions should be constituted or about the legal norms that should control them, the administrative state undeniably sits at the core of our working (small 'c') constitution.[22] Control of administrative power should, given the nature of the administrative state, therefore be understood as a matter of constitutional significance in this sense. But as just hinted, the 'large C' Constitution has also had a profound effect on the shape of administrative law institutions and the development of the legal norms of administrative law. We have seen that an interpretation of the constitutional separation of judicial power has split review of administrative action at the Commonwealth level into two institutions: merits review and judicial review. Merits review can only be undertaken by administrative tribunals, which are by definition not Chapter III courts, and judicial review, which is limited to 'legality', can only be undertaken by such courts. But the demands of administrative law in Australia, in large and small detail alike, are increasingly being presented at a constitutional 'pitch' that moves beyond the merits versus legality strictures generated by the constitutional separation of powers. Most notably, of increasing significance is how cases in the High Court's original jurisdiction (or its statutory equivalent: see 2.4.1) have affected the way in which the 'norms' or 'grounds' of judicial review have been understood and applied. In Chapter 4, therefore, we aim to alert readers to the importance of understanding the details associated with the 'norms' or 'grounds' of judicial review not only as categories of legal error upon which an application for judicial review might hinge, but also as expressions of the judiciary's conception of the possibilities and limits of its supervisory role within the context of our constitutional order. In Chapter 4, we also explain how that the legal norms of administrative law have increasingly been understood by reference to the difficult notion of 'jurisdictional error' (see also 3.3).

22 In this respect, Australia's written constitution is not distinctive: see T Ginsburg, 'Written Constitutions and the Administrative State: On the Constitutional Character of Administrative law' in S Rose-Ackerman and P Lindseth (eds), *Comparative Administrative Law* (Edward Elgar, 2010), 125.

This last point leads to another important one. Though constitutional law and administrative law are taught as separate subjects in most law school curricula, they are deeply connected in conception and practice alike. First, administrative law presumes some background concepts (such as the rule of law and separation of powers) and broad allocations of power which are fixed on the constitutional plane of thought. Second, the administrative state provides the apparatus through which government power is routinely exercised and controlled under our constitutional arrangements. Third, some of the substance of Australian administrative law doctrine hangs directly from a constitutional peg. The most prominent example is the entrenched minimum provision of judicial review of decisions made by Commonwealth officers in the High Court, which is derived from s 75(v) of the *Constitution* (2.4.1). The entrenched minimum provision of judicial review of decisions made by state officers in state Supreme Courts is also implied from the Constitution, but by a less direct route (2.4.3).[23] Thus, while it might be helpful to distinguish administrative and constitutional law for pedagogical purposes, it is a distinction that invariably breaks down. 'Public law' is best conceived as a whole cloth.

The question of how exactly we are to understand the 'law' in administrative law—the second theme—proves to be of considerable importance in practice once we look more closely at how different architectures of administrative decision-making actually work. Under a system of the rule of law, government is required to act through and be accountable to law. The idea that there should be legal controls over governmental (administrative) action is in many ways the epitome of this fundamental idea. Obviously, in addition to attending to questions of 'merits', executive actors must also comply with 'the law'. As just explained, when courts supervise the 'legality' of administrative action, they do so with reference to uncontroversially 'legal' resources: the Constitution, primary and secondary legislation, principles of statutory interpretation, and the judicially declared administrative law norms. But much more than just the law so understood will usually be needed to ensure well-informed, responsive, and consistent decision-making in the administrative state.

How then are we to understand the place of the 'policies', 'guidelines', 'manuals', 'codes of practice', 'quasi-legislation', and other materials that also provide important 'inputs' into decision-making processes by structuring and confining what otherwise present as very broad statutory discretionary powers? These are not statutes, nor rules made by courts, nor instruments made in exercise of a statutory power to make rules. Does administrative 'law' also speak to these? A policy on the procedures to be followed by a university committee considering disciplinary action against a student will affect that student's opportunity to be heard.[24] A guidance document setting out which regulatory offences are considered most serious will affect prosecution decisions. The examples could easily be multiplied. Yet unlike the rules and principles of judicial review, these materials are typically generated by the government entities themselves to guide their own behaviour, and are not directly enforceable by others. The increasing importance of such materials in the practice of administering

23 In this book the term 'state'—when used in the context of the component parts of Australia's federal system of government—refers collectively to the states and territories unless otherwise indicated.

24 See discussion at 2.5.1.4.1 of *Griffith University v Tang* (2005) 221 CLR 89.

government power has caused administrative law scholars in recent years to pay more attention to normative influences on governmental entities beyond statutes and principles of judicial review as articulated through the decisions of appellate courts. Drawing a distinction between 'hard' and 'soft' law is a common mode of analysis:[25] 'hard' law requirements are binding on administrators, and therefore enforceable, whereas 'soft' law requirements are not. But whatever nomenclature is used, the underlying question is this: to what extent should norms and structures imposed within the bureaucratic processes of government to regulate the exercise of administrative power form part of the study of administrative law?

Here we are not concerned to resolve the debate over whether such material should attract the label and, for some, caché of 'law'. However that philosophical question might be answered, if one's aim is to develop a rich explanation of the law's contribution to understanding how public power is constituted and controlled in an administrative state, the more pressing question is the extent to which these kinds of resources ought to form part of the analysis of administrative law. Many features of soft law are indistinguishable in form and content from rules that have the full status of law. Moreover, their practical, if not their formal, significance and force may be equivalent to those of legal rules in the strict sense. The short point is that 'soft' law can generate considerable normative 'pull' in its influence on decision-making. The point to emphasise for now is that readers of this book will discover how the challenges presented by 'soft' law occupy an increasingly significant place within all of the mechanisms for legal accountability, including a number of the recent and leading judicial review cases.

With respect to the third theme, the brief history just recounted (1.3) will have illuminated how administrative law as a body of principles, practices, and institutions has always needed to be responsive to the characteristics of the administrative state and needs of those who interact with it. Achieving that responsiveness has been and will always be a work in progress. In conditions of contemporary governance, however, this task has arguably become even more complex. We noted earlier that the idea that administrative law controls operate upon the activities of the 'executive branch' is itself problematic, insofar as that term suggests a unified set of actors when in reality the 'executive' comprises of a multiplicity of actors. Another dimension of this descriptive problem arises from a tendency to assume that the actors in whom administrative power is reposed are necessarily 'public' in character. This assumption might have held with some accuracy at certain stages of our history.[26] It arguably cannot, however, be said to hold in conditions of contemporary governance, where privatisation practices have blurred the line between public and private actors, and public and private law, in the composition and activities of the administrative state.

These trends have presented significant challenges for how we might think about the boundaries of administrative law as a legal accountability toolkit, as well as a subject of study. We demonstrate two ways in which these challenges play out in our discussion of how the public/private distinction bears upon the scope of judicial review, as well as in our treatment

25 See G Weeks, *Soft Law and Public Authorities* (Hart Publishing, 2016).

26 For a brief account of the historical story in Australia, see Cane, n 1 above, 455–8; see also R Wettenhall, 'Corporations and Corporatisation: An Administrative History Perspective' (1995) 6 *Public Law Review* 7.

of government contracting, both in Chapter 2. But the prefatory point to emphasise is that the framework of administrative law norms and institutions detailed in this book should not be assumed to be a wholly stable one. As it stands, that architecture is a product of many challenges and changes in the design and performance of government over time. It will invariably be subject to further challenges and changes in the future. If administrative law is to (continue to) matter, therefore, a critical eye must be kept on the extent to which prevailing principles, practices and institutions of administrative law are and will continue to be capable of doing the work that we require of them, in the present and future alike.

1.5 STRUCTURE OF THE BOOK

Any study of the 'principles' of administrative law, of the kind we seek to offer here, must aim to keep the key distinctions, concepts, relationships and history just traversed closely in view. It must equally attend to the wider landscape of accountability mechanisms to which we referred earlier in the chapter (see 1.2.1). These two imperatives have closely informed the way that we have chosen to structure this book.

We begin with judicial review: the species of 'administrative law' that for many represents the apex of legal accountability as well as the most common understanding of the term itself. Though we dedicate much of the book (Chapters 2–6) to explaining the architecture within which judicial review operates—its jurisdictional reach or 'scope', its remedies, the 'norms' or 'grounds' that provide the kinds of legal errors in administrative action that might be argued before a court, the question of who can apply to a court for judicial review, and the ways in which the role of the courts in reviewing administrative action might be restricted by legislation—we consider it crucial to not overstate the role of judicial review in the actual practice of controlling administrative power through law. To that end, the chapters to follow need not and in some respects should not be read sequentially. For many, internal review, ombudsmen, and parliamentary committees (Chapter 8), and the work of tribunals that conduct merits review of first-instance bureaucratic decision-making (Chapter 7), and freedom of information processes (Chapter 9) will not only be much more commonly accessed than judicial review, but may also in many respects more effective in addressing the kinds of grievances that can arise from a person's encounters with the administrative state.

The location of these chapters towards the end of the book should therefore not be taken as signalling the lesser importance of these modes of accountability within the overall structure of administrative law. The order of the chapters does, however, reflect the historical fact (as just outlined) that judicial review has played a crucial role in developing the norms of administrative law as well as the foundational distinction between legality and merits. Although this reality means that it is (we think) helpful to start our account of the subject with judicial review, we do not suggest historical priority equates to practical significance. The issues traversed in the final chapter (Chapter 10) on the values and effects of administrative law cut across discussions throughout the book. To bring the book full circle from the framing question of the present chapter about why administrative law matters, our aim in this final chapter is to encourage readers to continue to reflect on the question of what administrative law achieves and what it is for.