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Introduction to Administrative Law

Administrative law is how administrative power is constituted and controlled by law.

Administrative law is a reflection of the **separation of powers** principle, which seeks to avoid a concentration of power; the 3 broadly distinguished branches of government are subject to checks and balances on each other (judiciary, administrative, legislative)

Administrative law controls are merely one form of accountability technique; not all means of controlling administrative power involves **legal modes of control** (such as judicial review, ombudsman etc.). In practise, much control of administrative power is undertaken by power-holders themselves (e.g. managerial and bureaucratic controls internal to administrative institutions)

Legal, bureaucratic and political accountability

There are three different kinds of control or accountability that bear upon the scope and function of administrative law; *legal, bureaucratic and political*

<p>Legal accountability</p>	<p>Operated by the judiciary.</p> <p>Involves modes of control focusing on whether or not the administrative power is exercised in accordance with law.</p> <p>Includes:</p> <ul style="list-style-type: none"> • Judicial review • Merits review tribunals • Complaints and investigation bodies
<p>Bureaucratic accountability</p>	<p>Operated by the executive.</p> <p>Involves modes of accountability <i>within</i> the executive branch of government</p> <p>Includes:</p> <ul style="list-style-type: none"> • Internal accountability mechanisms • Mechanisms of the independent external review of government decision-making <p>Note: the distinction between legal and bureaucratic modes of accountability will sometimes be blurred</p>
<p>Political accountability</p>	<p>Operated by parliament.</p> <p>Achieved through the parliamentary system in accordance with the doctrines of responsible government, representative democracy, and government as a public trust (i.e. the government is like a trust in that it should use power for the benefit of the people as a whole)</p> <p>Political accountability refers to both accountability of Parliament to the people and accountability of the government to Parliament</p> <p>Includes:</p> <ul style="list-style-type: none"> • Individual and collective ministerial responsibility <ul style="list-style-type: none"> ○ Individual: Ministers are responsible for actions of government departments. Ministers can be held accountable by being forced to resign

	<ul style="list-style-type: none">○ Collective: once a decision is made by the cabinet it is backed collectively – confidentiality of Cabinet discussions● Disciplinary sanctions: ministers can be sacked from the cabinet/public service or may be censured for misconduct.● Public sanctions: eg, people called before Royal Commissions, possible criminal penalties. However, this doesn't translate for an individual citizen who wants to hold the government to account.● Representative democracy: the people would not re-elect a bad executive government.● Question time● Parliamentary debates● Parliamentary committee inquiries.● Tabling of annual reports & program performance statements to the parliament.● Separation of powers
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Merits/legality distinction

The merits/legality distinction helps to uphold the separation of powers.

It is the executive's job to attend to the '**merits**' of administrative action, while the judiciary's job is to supervise its '**legality**'

- Judges are limited to questions of '**legality**' and as such are not entitled to consider the '**merits**' of decisions
- Federal courts cannot engage in **merits** reviews because to do so would be to exercise non-judicial power and therefore would be in breach of the *Boilermakers' principle*

Brennan J in *Attorney General (NSW) v Quin* 'the merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone'

Why does this distinction exist?

That the judiciary is kept separate from the administration and legislature helps to provide legal checks on the executive, and prevents judges from arrogating themselves functions which have already been given to more appropriate/legitimate decision-makers

- in *Attorney General (NSW) v Quin* Brennan J argued that courts are not equipped (i.e. they lack the expertise and resources) to make decisions which require individual and community interests to be balanced, and that adversarial processes are not well suited to decision-making that requires multiple interests to be considered and balanced

Basically, it prevents judges from **unduly colonising public administration** by reference to their own perceptions of what 'good administration' requires by ensuring that a system of

checks and balances are in place and the legality/merits distinction adequately limits the power of the judiciary.

How is this distinction applied to decision-making?

Unless a particular legal norm of judicial review has been breached, judges cannot intervene to determine the 'merits' of a decision.

<p>Merits Review</p>	<p>Merits review involves a reconsideration of a decision made by the executive, and is restricted to the executive (i.e. non-judicial bodies at the commonwealth level)</p> <p>The merits review body will stand in the shoes of the original decision maker and make a fresh decision based on the merits of the case i.e. focusing on substance; was the decision the best decision based on the merits?</p> <p>The executive is able to attend to the merits of administrative action and can decide this because they have been democratically elected and the people have decided to give the executive this power</p> <p><u>Discretionary powers</u></p> <p>The executive is able to attend to the merits of administrative action and can decide this because they have been democratically elected and the people have decided to give the executive this power</p> <p>A conferral of a discretionary power is often due to complexity and uncertainty and designed to give administrators a degree of freedom and choice.</p> <p>Such discretionary powers are (at the simplest level) what is meant by determining the 'merits' of something (i.e. the discretionary bodies make merits decisions as their function, such as does someone pass the 'character test' in order to be granted a visa?)</p> <p>There are two main kinds of discretion that arise: <i>rule-making</i> and <i>decision-making</i>.</p>	
	<table border="1"> <tr> <td data-bbox="432 1722 708 1982"> <p>Rule-making</p> </td> <td data-bbox="708 1722 1378 1982"> <p>Secondary bodies are often given delegated by the executive to engage in discretionary rule-making.</p> <p>This often involves applying a general rule to situations.</p> </td> </tr> </table>	<p>Rule-making</p>
<p>Rule-making</p>	<p>Secondary bodies are often given delegated by the executive to engage in discretionary rule-making.</p> <p>This often involves applying a general rule to situations.</p>	

		<p>Usually done because parliament does not have the time or resources to carry out the task themselves, so delegates instead.</p>
	<p>Decision-making</p>	<p>This is when administrators apply pre-existing rules to make individual administrative <i>decision</i>.</p> <p>The need for discretion here arises because although rules confer more or less choice upon an administrator (i.e. it 'structures' their choices) a rule cannot itself determine how it is to be applied to particular facts.</p> <ul style="list-style-type: none"> • (e.g. is someone applying for a fishing licence a 'fit and proper person' to hold such a licence?) <p>This therefore has an inherently discretionary character, and could have a wide range of outcomes depending on the facts - someone has to ultimately make the 'call'</p>
<p>Legality Review</p>	<p>Legality review involves '<i>a review of the manner in which the decision was made</i>' (Evans) i.e. focusing on procedure and patrolling the boundaries of the administrator's powers; was the decision correctly made according to the law?</p> <p>The distinction is quite rigid, it must be ensured that the judiciary does not step outside of legality review and into merits review.</p> <p>When determining the legality of administrative action through judicial review, the court might determine this by reference to four kinds of legal material:</p> <ul style="list-style-type: none"> • The constitution. The executive branch in its administration must stay in its constitutionally assigned role • The statute (legislation) that the executive is charged with 'administering' in the given instance. This will explicitly set out certain powers. This isn't confined to primary legislation enacted by parliament but includes any regulations, rules, by-laws, legislative instruments, delegated or subordinate legislation enacted by the executive under powers specifically delegated to it under that primary legislation • Principles of statutory interpretation. These are 'law' because they have been developed by both the common law and statute. As the executive acts primarily through the authority granted to it by statute, 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 administrative action. Court looks at the text, context, purpose of relevant statute. 	