RE-THINKING THE SEPARATION OF POWERS

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Constitutional theory and doctrine are important to our understanding and experience of government. No description of Australian government is complete without reference to representative democracy, responsible government, separation of powers and the rule of law. Those and other theories also have substantial practical impact. Courts refer to them in developing legal principle and deciding cases. Legislators are reminded of them in framing laws. They structure transactions between the different institutions of government. The community is also influenced by them in evaluating the performance of the institutions of government.

The most important doctrine in analysing government legal accountability is the separation of powers. The essence of the doctrine is that parliament makes law, the executive administers it and the judiciary — in the context of adjudicating individual disputes — decides whether the law has been correctly construed and applied. This three-way division of functions avoids the undue concentration of power in any one branch of government, enables each branch to counterbalance the others, and ensures that legal disputes about government power are conclusively resolved by an independent judiciary.

The judicial role in legal accountability is prominent in Australia. Doubtless that will continue. Landmark rulings are frequent, and there is broad agreement in government and society on the need for an independent judiciary. What has changed, however, is that courts no longer stand alone in checking and curbing government power. Over the last thirty years a large number of tribunals and independent 'watchdog' agencies have been established by statute to review and scrutinise government decision making and to cement public law values in government processes.

The growth of non-judicial accountability bodies has not been constrained by the doctrine of the separation of powers, but equally this new system of government accountability does not fit easily within that doctrine. In a functional sense, the new bodies are not part of the legislative, executive or judicial branch. There is a need to update our constitutional thinking to take account of the more complex dispute resolution and accountability framework that has evolved over the past thirty years. Three emerging theories that supplement (not replace) the separation of powers doctrine are discussed below. One is the concept of a 'national integrity system', that describes the collection of institutions (including courts) that separately play a similar

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role of controlling government and ensuring integrity. Another is the concept of the 'justice system', that again includes all those bodies but focuses instead on their shared civil law role of resolving legal disputes arising between people and with government. The third is the concept of a 'fourth branch of government', comprising tribunals, ombudsmen and similar non-judicial oversight agencies.

The unifying theme in each theory is that society now relies on a range of independent institutions and mechanisms to perform the same scrutiny and accountability role as courts. Sometimes they do this more effectively than courts. That is why it is necessary to 'rethink the separation of powers', to build a more accurate picture of legal accountability and to question longstanding beliefs that impede a proper appreciation of how people are protected in relation to government.

This paper starts by tracing briefly the influence of the doctrine of separation of powers in Australian constitutional development and thinking. The paper then examines the comparative practical importance of judicial review, tribunal review and Ombudsman oversight in Australian administrative law. The paper ends with a discussion of the three alternative theories of accountability noted above.

SEPARATION OF JUDICIAL POWER IN AUSTRALIA

The separation of powers doctrine is reflected in Australian constitutional theory and practice in various ways. The first is in decisions of the High Court declaring laws to be invalid for contravening the separation of judicial power in Ch III of the *Constitution*. A defining case was *Boilermakers*'[1] in 1956, holding that Federal judicial power can be conferred only on a court mentioned in *Constitution* s 71, and that those federal courts can exercise judicial power only. In the result, the Court of Conciliation and Arbitration, which had been given a mixture of judicial and arbitral (non-judicial) functions, could not exercise the judicial power of imposing a fine on a union that was in breach of an order of the Court.

One side of the *Boilermakers*' equation is that judicial power cannot be conferred on a non-judicial body. Thus, in *Brandy*,[2] the High Court held that the Human Rights and Equal Opportunity Commission could not make a determination awarding compensation for racial discrimination that was to have effect and be enforced as if it was an order made by the Federal Court. More recently in *Lane* in 2009 the High Court held that the creation of the Australian Military Court (AMC) was an impermissible attempt to create a 'legislative court' — a court outside Chapter III that was exercising the judicial power of the Commonwealth. This was condemned as an impermissible 'attempt by the Parliament to borrow for the AMC the reputation of the judicial branch of government for impartiality and non-partisanship'.[3]

The other side of the *Boilermakers*' equation is that an incompatible non-judicial function cannot be conferred on a federal judicial officer. An example, from *Wilson*,[4] is that a Federal Court judge could not be appointed under Aboriginal heritage protection legislation to conduct an inquiry and prepare a report for government on the much-publicised Hindmarsh Island Bridge dispute in South Australia.

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1 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers*'').
2 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 ('*Brandy*').
3 *Lane v Morrison* (2009) 239 CLR 230, 237, 242–3 ('*Lane*')
4 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 ('*Wilson*').

The constitutional protection of judicial power has also been extended to State government, in two landmark High Court decisions. In *Kable*[5] the Court held that State legislation can be invalid if it vests in a State court a function that is incompatible with the exercise of federal judicial power by the State court. The legislation declared invalid in that case authorised the NSW Supreme Court to order the continued imprisonment of a named individual as an exercise in preventative detention rather than as punishment following a finding of criminal guilt. In *Kirk*[6] the Court held that a State legislature cannot enact a privative clause that would deprive a State Supreme Court of the power to grant relief on the ground of jurisdictional error. Otherwise, the State legislature could 'create islands of power immune from supervision and restraint' by the High Court, to which a right of appeal lies under the *Constitution*.[7]

Those cases and many others underpin a legal culture that is strongly wedded to the importance of judicial separation and, more generally, holds special reverence for judicial power. Three explanations are commonly given in support. The first, noted by the High Court in *Wilson*, is that the separation of powers is one of the 'checks and balances on the exercise of power'.[8] It has been called 'a safeguard against arbitrary power',[9] since power is not centralised in a single institution but is distributed across three branches of government that can each check the functioning of the other two branches.

A second theme is that separation of powers safeguards the independence of the judiciary. It 'secure[s] for the judiciary an environment in which the judges can perform their functions without being subject to any form of duress, pressure or influence.'[10] This can bolster public confidence in the administration of justice and the settlement of disputes in a civilised and non-violent manner. This is said to be particularly important in a federal system, 'for upon the judicature rest[s] the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised and upon that the whole system was constructed.'[11]

A third and related theme is that the separation of powers is 'one of the bulwarks of liberty enacted by the *Constitution*'.[12] An independent judiciary can safeguard individual rights against unlawful encroachment or abuse of power by government. Judicial scrutiny is applied to the exercise of coercive government actions, such as fining, detention and imprisonment.

Those justifications for judicial separation present an accurate picture of the fundamental role of the judiciary in securing the rule of law in government and society. That much is uncontentious. However, there is a tendency in some quarters to go further and assume either that the judiciary alone plays that role or that no other agency can be as effective in doing so. At times, judicial review is heralded uncritically

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5 *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51 ('*Kable*').
6 *Kirk v Industrial Relations Commission* (2010) 262 ALR 569 ('*Kirk*').
7 Ibid 598 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
8 189 CLR 1, 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).
9 W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) 322.
10 Enid Campbell and H P Lee, *The Australian Judiciary* (2001) 50.
11 *Boilermakers*'(1956) 94 CLR 254, 276 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).
12 *Wilson* (1996) 189 CLR 1, 10–11, 13 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

as an exclusive or predominant mechanism for controlling government administrative action, as illustrated by the following judicial observations:

> If the courts do not control these excesses, nobody will.[13]
>
> The judiciary is the vehicle for applying the rule of law. ... [I]t is the judge who stands between the government and the citizen.[14]
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> For redress of [a citizen's complaints against government], whether because of a denial of benefits to which a citizen is entitled or of unlawful interference with his freedom of action according to law, it will be primarily to an independent judiciary that the citizen must look. … And only an independent judiciary … can offer the assurance that those intrusions are kept within the limits which the law imposes.[15]
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> [Section 75(v) of the Constitution is] the means by which the rule of law is upheld throughout the Commonwealth.[16]

This obeisance to the elite role of courts can be seen in other ways. The theory component of many university courses and texts on administrative law refers only to the separation of powers, and courses tend to focus on judicial review. The discussion of government accountability in judicial speeches usually dwells on the tension between the judiciary, on the one hand, and parliament and the executive, on the other. A related tendency in legal articles or conferences that discuss good decision making is to assume that it equates with compliance with the grounds for judicial review.[17] Generally, there is an untoward focus in legal scholarship on the accountability role of courts. This can present an unrealistic comparison of judicial and non-judicial oversight. An example is that few if any of the large number of articles that criticise the High Court ruling in *Griffith University v Tang*[18] that a decision of the University to dismiss Ms Tang as a PhD candidate was not reviewable under the *Judicial Review Act 1991* (Qld), mention that ombudsman offices in Australia can investigate complaints against universities, and do so frequently. Nor do the many articles that discuss whether public law should incorporate a principle of estoppel refer to Ombudsman reports that discuss the remedies available for defective oral advice by an agency.[19] Indeed, to underscore this point, in all journal articles published in 2009 and listed in the Attorney-General's Information Service (AGIS), 140 articles contained the word 'court' in the title, 12 contained 'tribunal', and 1 contained 'ombudsman'.[20]

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13 *Paradise Projects Pty Ltd v Gold Coast City Council* [1994] 1 Qd R 314, 322 (Thomas J).

14 Chief Justice Warren, 'Unelected Does Not Equate with Undemocratic: Parliamentary Sovereignty and the Rule of the Judiciary' (Speech delivered at the Deakin Law Oration, Melbourne, 20 August 2008).

15 Sir Ninian Stephen, 'Judicial Independence — A Fragile Bastion' (1982) 13 *Melbourne University Law Review* 334, 338, cited approvingly by Chief Justice Warren, 'What Separation of Powers?' (Speech delivered at the Twelfth Lucinda Lecture, Melbourne, 20 September 2004).

16 *Re Carmody; Ex parte Glennan* (2000) 173 ALR 145, 147 (Kirby J).

17 See, eg, Steven Rares, 'Blind Justice: the Pitfalls for Administrative Decision-Making' (2006) 50 *AIAL Forum* 14. Note also the title of a University of Melbourne Faculty of Law human rights conference in July 2006: 'Who Best Protects Rights, Parliament or the Judiciary?'.

18 (2005) 221 CLR 99.

19 For example, Commonwealth Ombudsman, *Issues Relating to Oral Advice: Clients Beware* (1997).

20 Anita Stuhmcke, 'Ombudsman Research', (Paper presented at the Australasian and Pacific Ombudsman Region Conference, Canberra, 19 March 2010) 14. This criticism of an

The argument made below is that those misconceptions (and others to be referred to) are best countered by developing a theory that better explains the new framework for government legal accountability. A revised theoretical framework should take account of limitations on the influence of judicial review, the growth of alternative dispute resolution, and the growth of other legal accountability mechanisms. Those three themes will now be discussed.

LIMITATIONS ON THE INFLUENCE OF JUDICIAL REVIEW

The influence of courts on government and society largely occurs in two ways. The first is through the psychological impact on government and the community of knowing that government actions can be scrutinised by an independent judiciary that can make binding and conclusive rulings. Government agencies are thus generally aware of their obligation to act lawfully and to heed the principles of administrative law. Knowing this, the community can be more confident that the rule of law is being maintained.

The second way that courts exert an influence on government and society is through individual proceedings and rulings. This impact will be felt more in agencies that are either routinely subject to judicial review or that anticipate a challenge to a particular decision. If judicial review is unlikely, agency personnel might not pay close attention to the attitude or response a court could take in judicial review (beyond heeding the need to act lawfully). The personnel are more likely to be guided by their own sense of what is proper and to pay equal or greater attention to guidelines and opinions conveyed by other oversight bodies such as the Auditor-General, Ombudsman and parliamentary committees. To agencies, the idea of 'the judge over your shoulder' — a title of a 1988 British Cabinet Office pamphlet — will be quaint but illusory.

That observation is made by this author as a lawyer who headed an Australian Government agency for over seven years, knowing that judicial review of the agency's actions was unlikely. By contrast, Auditor-General and parliamentary scrutiny was routine and constantly borne in mind. The legislation administered by the office raised legal interpretation issues, and the need to observe natural justice and other legal obligations was ever-present. Nevertheless, case law precedents were part only of a mix of different pressures and considerations that guided the agency. There was only one single-judge ruling that was directly in point on the powers of the office, and it partially rested on a debatable and impractical distinction.[21]

It is therefore important in considering the impact of courts on government to note that few areas of administrative activity are routinely subject to judicial review. As to the High Court in 2009, of the 50 cases in which it gave substantive reasons, only 13 concerned the exercise of government power, and mostly in 3 areas — immigration (6 cases), taxation (3), and duty of care (2). There were an additional 9 constitutional cases

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imbalance in legal scholarship is also made by Rick Snell, 'Towards an Understanding of a Constitutional Misfit: Four Snapshots of the Ombudsman Enigma' in Chris Finn (ed), *Sunrise or Sunset? Administrative Law for the New Millennium* (2000) 188.

21 *Chairperson, Aboriginal and Torres Strait Islander Commission v Commonwealth Ombudsman* (1995) 134 ALR 238, holding that the Ombudsman's role was to express an opinion, not reach a finding.

(higher than in many previous years). Most of the remaining 28 cases concerned criminal law (7), commercial disputes (8), civil liability claims (6), and practice and procedure (3).[22]

As to the Federal Court,[23] 4 125 causes of action were finalised in the original and appellate jurisdiction in 2008–09, and were classified by the Court as corporations (42 per cent), bankruptcy (6 per cent), and native title (2 per cent). Other major areas included workplace relations, taxation and intellectual property. There was no separate listing for judicial review of government administration, other than that 50 per cent of the appeals to the Full Court were migration matters (67 per cent in 2007–08, and 79 per cent in 2004–05). Only 3 or 4 of the 23 cases listed by the Court in the 'Summary of decisions of interest' section of the *Annual Report 2008–2009* dealt with broad questions about the exercise of government power.

The decisions of the Federal Magistrates Court display a similar pattern.[24] In 2008–09 the Court finalised 85 951 matters, comprising family law (92 per cent), bankruptcy (5 per cent), migration (2 per cent) and only 28 non-migration administrative law matters.

As those figures indicate, substantial and significant areas of government administration receive little direct judicial oversight.[25] Comprehensive scrutiny of the legality and propriety of decision making is more likely to come in other ways. This is illustrated by the review statistics concerning the administration of the *Social Security Act 1991* (Cth), which is a complex Act comprising over 2 500 sections (of numbering such as s 101ZZFGD). The Act is primarily administered by Centrelink, the largest Australian Government agency (outside Defence) and one that has substantial direct contact with the Australian public. In 2008–09, Centrelink comprised over 27 000 officers who administered $86.8 billion in social security payments to 6.8 million clients who made 28.3 million answered calls to the agency. Yet, in nearly 20 years the Act has only ever been mentioned in five High Court cases (none involving any interpretation or exercise of power issue), in 30 decisions of the Full Federal Court (roughly one third of which dealt with procedural or jurisdictional issues), 307 Federal Court cases and 30 Federal Magistrates Court cases.[26]

By contrast, and to anticipate a point developed below, the *Social Security Act* has arisen in 5 266 Administrative Appeals Tribunal cases between 1991–2010; the Social Security Appeals Tribunal finalised 13 777 Centrelink cases in 2008–09; and the Commonwealth Ombudsman dealt with 7 226 approaches and complaints against that

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22 Analysis based on cases published on <www.austlii.edu.au>. Another representation of the Court's work, taken from the High Court, *Annual Report 2008–09* (2009) 17, is that it dealt with 569 special leave applications; 50 per cent of the civil special leave applications involved immigration matters (63 per cent in 2007–08), and 89 per cent of those were filed by self-represented litigants.

23 Figures taken from the Federal Court of Australia, *Annual Report 2008–2009* (2009).

24 Figures taken from the Federal Magistrates Court of Australia, *Annual Report 2008–2009* (2009).

25 There is perhaps more diversity in State judicial review, though it too is concentrated on a few areas, such as planning and development approval, water management and parole decisions.

26 The figures in this and the following paragraph are taken from the Annual Reports for 2008–09 of Centrelink, Administrative Appeals Tribunal, Social Security Appeals Tribunal, Commonwealth Ombudsman, and from cases reported on Austlii as at May 2010.

agency in the same year. The role of tribunals in safeguarding the rule of law in social security administration is expressly recognised in the *Social Security (Administration) Act 1999* (Cth), which provides in s 8 that in administering the social security law the Secretary is to have regard to 'the need to apply government policy in accordance with the law and with due regard to relevant decisions of the Administrative Appeals Tribunal and the Social Security Appeals Tribunal'.

GROWTH OF OTHER DISPUTE RESOLUTION METHODS, AND 'THE VANISHING TRIAL'

The importance of judicial decisions and orders has also diminished due to a decline in litigation as a means of resolving legal disputes. If courts play less of a role in applying the law to resolve disputes, it becomes correspondingly more difficult to emphasise their accountability role in the separation of powers. By analogy, it is sometimes said by lawyers that parliament has been diminished by the growth of executive power. It could equally be said that the relative importance of judicial power has been diminished by the growth of alternative mechanisms for legal dispute resolution.

A simple illustration of this point occurs when parties to a dispute agree to appoint a senior barrister or former judge to arbitrate the dispute and to make findings on their legal claims, to form the basis of a settlement. The dispute is settled according to law, but no reasons are published that can operate as a precedent in other cases. An example is that the high-profile damages claim by Ms Vivian Alvarez arising from her unlawful immigration removal was settled by the parties in accordance with findings reached in a private arbitration by Sir Anthony Mason, former Chief Justice of Australia.[27] It is increasingly common to hear of former Commonwealth and State judges performing a similar role.

Claims settled in this manner form part of a much stronger trend in Australia towards alternative dispute resolution (ADR). There has been a growth in use of techniques such as preliminary conferences, neutral evaluation, expert case appraisal, pre-trial settlement conferences, facilitated negotiation, mini-trials, mediation, conciliation and private judging. This trend has the active support both of the legal profession and of government.

In the legal profession, most major law firms offer ADR as a service, and a growing number of practitioners are accredited ADR specialists. Indeed, the private dispute resolution centres that have been established by some firms have the hallmarks of a 'private judiciary': cases are heard before a panel constituted by one or more senior lawyers, including former judges; parties are represented by leading barristers; a formal procedure is adopted for presentation of evidence and argument; and the parties agree to accept the panel ruling as decisive and binding. Necessarily, the proceedings do not occur in public and do not operate as a check and balance in the separation of powers.

Government measures to promote ADR have been numerous, varied and effective. One measure was the formation in 1995 of the National Alternative Dispute Resolution Advisory Council (NADRAC). The Council, whose members are drawn from government, the judiciary, tribunals, the legal profession and universities, has actively

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27 Jewel Topsfield and Andra Jackson, '$4.5m Payout to Alvarez Solon for Wrongful Deportation', *The Age* (Melbourne), 1 December 2006.

promoted the greater use of ADR, through publications, conferences, research forums and advice to government, courts and tribunals. There was strong Government endorsement of a package of reform proposals in a NADRAC report in 2009,[28] leading to the introduction into the Parliament of a Civil Dispute Resolution Bill 2010 that requires prospective litigants 'to take genuine steps to resolve disputes before proceedings are instituted' in a federal court.[29] This complements the *Access to Justice (Civil Litigation Reforms) Amendment Act 2009* (Cth), which also contained measures to ensure that cases commenced in federal courts could be resolved without going to trial.

This theme, of resolving legal disputes without resort to courts or legal proceedings, was also taken up strongly in a public report by the Australian Attorney-General's Department in 2009, *A Strategic Framework for Access to Justice in the Federal Civil Justice System*. The thrust of the report was that access to justice strategies must look more broadly than access to courts and legal processes — 'Courts are not the primary means by which people resolve their disputes'.[30] The justice system was defined broadly in the report as including all mechanisms for legal dispute resolution, such as courts, tribunals, ombudsmen, family relationship centres, legal aid and community legal centres, insolvency and trustee services, ADR mechanisms, and agency internal complaint and review procedures. A point made in the report to underscore the importance of this broad approach was that for each $1 million spent on the justice system, 986 matters could be finalised by the Ombudsman, 474 by the Administrative Appeals Tribunal and 57 by the Federal Court.[31]

The Strategic Framework for Access to Justice outlined in the report was endorsed by the Standing Committee of Attorneys-General in November 2009.[32] Reform proposals along the same lines have also been made in State government reports, particularly in NSW and Victoria.[33]

The role of courts has not been supplanted by the growth of ADR and dispute options, but there are direct implications. This is made clear in ministerial statements in support of ADR. The Australian Attorney-General has spoken of government playing 'a leadership role in moving from a culture of litigation to a culture of dispute resolution',[34] of 'shifting focus from a court centric approach'.[35] The Victorian

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28 National Alternative Dispute Resolution Advisory Council, *The Resolve to Resolve: Embracing ADR to Improve Access to Justice in the Federal Jurisdiction* (2009).

29 Civil Dispute Resolution Bill 2010 (Cth), title to Part 2.

30 Attorney-General's Department, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009) 3.

31 Ibid 37. The net costs were $17 590 for a matter finalised in the Federal Court and $1 014 for a complaint finalised by the Ombudsman.

32 Standing Committee of Attorneys-General, *Communiqué and Summary of Decisions* (2009).

33 The NSW Government has been implementing ADR proposals made in a Discussion Paper issued by the State Attorney-General in 2009: eg, see, Department of Justice and Attorney-General, Parliament of NSW, *ADR Blueprint Draft Recommendations Report 2: ADR in Government* (2009). Reform proposals in Victoria have been made in two reports: by the Law Reform Committee, Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice* (2009), and the Victorian Law Reform Commission, *Civil Justice Review: Report* (2008).

34 Robert McLelland, 'Utilising ADR — The Evolving Landscape' (Speech delivered at the Government Law Group Forum, Canberra, 15 February 2010).

Attorney-General, in announcing government support for ADR, questioned whether the adversarial system of justice isn't 'past its use-by date', and warned that the courts risked 'becoming a fiefdom for large corporate entities to take action against each other'.[36]

Studies in the United States into what has been called 'the vanishing trial' illuminate another dimension of the trend to alternative dispute resolution. A study by Galanter for the American Bar Association, comparing federal court statistics from 1962 and 2002, showed a five fold increase in the number of civil cases filed in the courts, but a decrease in the total number of cases that went to trial; in 2002 only 1.8 per cent of civil claims filed in federal courts were disposed of by trial, compared to 11.5 per cent in 1962.[37] Plausible explanations for this decline, suggested by Galanter, 'include a shift in ideology and practice among litigants, lawyers, and judges [and] the diversion of cases to alternative dispute resolution forums.'[38] Other commentators have pointed to the cost of legal proceedings, complex evidentiary procedures in adversarial trials, and an untoward focus in litigation upon procedure rather than identifying the real issues in dispute.[39]

No similar statistics are available in Australia,[40] although two senior jurists — Chief Justice French and Justice Hayne — have both observed that there is a discernible contraction in the number of civil trials.[41] Differing opinions can be reached on whether this contraction should be viewed favourably, or — to quote Justice Hayne — should be a cause for concern: 'The quelling of controversies by the application of judicial power of the polity is a fundamental feature of the organisation and government of this society.'[42] The trend is significant for another reason, that there is an inverse correlation between the growing importance of law in society and the

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35 Robert McLelland, 'A Strategic Framework for Access to Justice' (Speech delivered at the Brad Selway Memorial Lecture, Adelaide, 23 September 2009).

36 David Rood, 'Fees Drive Justice Out of Reach, says Hulls' *The Age,* (Melbourne), 1 June 2008.

37 Marc Galanter, 'The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts' (2004) 1 *Journal of Empirical Legal Studies* 459, 459.

38 Ibid 460. See also papers by Galanter and others in the 'Vanishing Trial Symposium' (2006) 1 *Journal of Dispute Resolution* 1.

39 See, eg, Justice Kenneth Hayne, 'The Vanishing Trial' (2008) 9 *The Judicial Review* 33.

40 Acting Justice Ronald Sackville, 'Meeting the Challenges of Complex Litigation: Some Further Questions' (2009) 9 *The Judicial Review* 197, discusses the lack of comprehensive data in Australia on litigation trends. The number of cases filed in the courts are reported, but not the percentage filed without a hearing. The Federal Court, *Annual Report 2008–09* (2009) 15, reported that the number of cases filed in the Federal Court decreased by 3 per cent in the original jurisdiction, and 13 per cent overall primarily because of a decrease in migration appeals in the appellate jurisdiction. The Administrative Appeals Tribunal, *Annual Report 2008–09* (2009) 127 reported that 81 per cent of the more than 7 000 cases finalised by the Tribunal that year were finalised without a hearing. One estimate is that over 90 per cent of matters filed in courts are resolved without a 'final' judicial decision: John Wade, 'Don't Waste My Time on Negotiation and Mediation: This Dispute Needs a Judge' (2001) 18 *Conflict Resolution Quarterly* 259, 269.

41 Chief Justice Robert French, 'The Future of Litigation: Dispute Resolution in Jurassic Park?' (Speech delivered at the Bar Association of Queensland Annual Conference 2009, Queensland, 7 March 2009); Hayne, above n 39.

42 Hayne, above n 39, 35.

declining role of the judiciary in construing the law. The paradox was noted by Galanter:

> Every other part of the legal world grows: there are more statutes, more regulations, more case law, more scholarship, more lawyers, more expenditure, more presence in public consciousness. … The decline of trials is occurring in a setting in which the amount of law is increasing rapidly.'[43]

GROWTH OF OTHER GOVERNMENT REVIEW AND ACCOUNTABILITY MECHANISMS

The field of administrative law is now populated by a large number of non-judicial review bodies and mechanisms that grow in caseload and importance. The short explanation is that there has been a dramatic change over the last thirty years in how laws and programs administered by government affect members of the public. Statistics from just three of the more than 200 Australian government agencies illustrate this point:

- The Department of Immigration and Citizenship in 2008–09 processed 23 801 594 passenger movements into and out of Australia, and granted permanent residence to 224 619 applicants; the Department administers 90 visa classes and 149 visa subclasses.[44]
- The Australian Government Human Services portfolio (including Centrelink, Medicare, the Child Support Agency, CRS Australia and Australia Hearing) received in 2009 a daily average of 361 000 face-to-face contacts, 221 000 phone calls, 400 000 letters and 70 000 online transactions; [45] as noted earlier in this paper, Centrelink alone comprises over 27 000 officers who administered $86.8 billion in social security payments to 6.8 million clients.
- The Australian Taxation Office, comprising over 22 000 officers who administer an estimated 8 000 pages of legislation, in 2008–09 processed 41 340 545 forms, made 19 376 783 payments (including the tax bonus payment to 8.43 million Australians), issued 13 626 525 refunds, managed 22 752 114 accounts, and cross-matched around 350 million items of third party data.[46]

This increased interaction between government and the community is matched by heightened community expectations. People are routinely in contact with government agencies, and claim the right to question and challenge adverse administrative decisions. Government clients are less tolerant of mistakes, blunders and indifference in decision making and service delivery, and they expect that a practical remedy will be provided promptly when an error has occurred. In short, people expect administrative justice to be accessible, inexpensive, efficient and effective; and they expect government systems to be responsive, transparent and competent.

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43 Galanter, above n 37, 522, 529.

44 Department of Immigration and Citizenship, *Total Arrivals and Departures by State/Territory and Category of Traveller, 2008–09* <www.immi.gov.au> at 22 September 2010; Minister for Immigration and Citizenship, 'A Simpler Visa System' (Press Release, 4 June 2010).

45 Chris Bowen, 'Service Delivery Reform: Designing a System That Works for You' (Speech delivered at the National Press Club, Canberra, 16 December 2009).

46 Australian Taxation Office, Australian Government, *Commissioner of Taxation Annual Report 2008–09* (2009) 5, 48–9.

This immense volume of interactions between people and government is underpinned by legislation. Disagreements are common about whether a correct decision was made or action taken; difficult questions arise frequently about the correct meaning of the legislation being applied. People insist — and the rule of law requires — that those disagreements can be taken to an external forum for an independent ruling or opinion. It is not practical to rely on the judiciary for this purpose in all but a minor fraction of the cases that arise. The small administrative law caseload of the federal courts bears this out.

Administrative tribunals

To make external review of government administrative action a reality, many administrative tribunals have been established in the last 30 years. Their caseload is substantial: in 2008–09 the Administrative Appeals Tribunal (AAT) finalised 7 231 applications,[47] while four other specialist tribunals — the Social Security Appeals Tribunal, Migration Review Tribunal, Refugee Review Tribunal and Veterans' Review Board — finalised 28 883 applications.[48]

Tribunals, as those statistics indicate, have become the frontline of administrative justice for the public. The large number of people who turn each year to tribunals for review of government decisions is itself a measure of their importance. There is also strong support for the tribunal system from government agencies, a point borne out in an empirical study undertaken by the author and a colleague in 2002.[49] In a survey of 360 officers in 40 Australian Government agencies, a high proportion of the officers agreed that tribunal review reinforced the core administrative law objectives of accountability, legal compliance and individual justice, and that the quality of tribunal reasons was adequate. Of particular importance is that tribunals and not courts have provided most of the jurisprudence on complex legislative provisions in the areas of social security, family assistance, customs, employee compensation, veteran's entitlement, taxation, and freedom of information.

Another way that AAT members contribute strongly to safeguarding the rule of law is through authorising warrants for telecommunications interception, electronic surveillance, continuation of controlled operations, preventative detention and proceeds of crime examinations.[50] Those functions, which keep intrusive law enforcement activity in check, were more commonly performed by federal judges prior to the 1995 decision of the High Court in *Grollo v Palmer*.[51] In 2008–09, 37 nominated AAT members issued 86.7 per cent of the warrants under the *Telecommunications (Interception and Access) Act 1979* (Cth), compared to the 13.3 per cent of warrants

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47 Administrative Appeals Tribunal, *Annual Report 2008–09* (2009) 20.

48 Social Security Appeals Tribunal *Annual Report 2008–09* (2009) 23; Migration/Refugee Review Tribunal, *Annual Report 2008–09* 32; Veterans' Review Board, *Annual Report 2008–09* 17.

49 Robin Creyke and John McMillan, 'Executive Perceptions of Administrative Law — An Empirical Study' (2002) 9 *Australian Journal of Administrative Law* 163.

50 Administrative Appeals Tribunal, *Annual Report 2008–09* (2009) 31.

51 (1995) 184 CLR 348.

issued by 56 members of the Federal Court, Family Court and Federal Magistrates Court.[52]

It has, nonetheless, been fashionable in legal circles to disparage tribunals and compare them unfavourably to courts. There are two main themes in the criticism. One is that tribunal members do not enjoy the same independence as judicial officers, especially when appointed either part-time or for a short term. While tenure is doubtless an important issue,[53] it is questionable whether too much is made of it. For example, of the 11 non-judicial presidential members of the AAT at June 2009, five had held office for more than 14 years, and four for more than five years. This is not markedly different to the pattern of judicial tenure: a quarter of the Federal Court judges who ceased office between 2000–10 held office for 10 years or less. Moreover, there is no empirical study to confirm that part-time or short-term tribunal members are less independent of government in the way they go about their work. If anecdotal evidence or opinion is to provide a guide, there is as much to suggest that the professionalism of individual members is unrelated to their term of appointment.

The second criticism is that tribunal members are not for the most part as legally experienced or competent as judicial officers. Justice Kirby, for example, has remarked that 'judges are members of a trained profession to whom are conventionally ascribed capacities of analysis and discipline in decision-making superior to those possessed by, or expected of most members constituting statutory tribunals'[54], and that '[a] special vigilance is required' by courts in reviewing the decisions of 'non-court repositories of functions, powers and discretions'.[55] There is of course no empirical standard for measuring whether lawyers are superior decision makers, especially in tribunal adjudication that is expected to be an efficient and inexpensive element of the administrative justice system.[56] Moreover, tribunal decisions are appealable on questions of law to a court. The appeal statistics do not present a damning picture. Of 122 appeals from AAT decisions to the Federal Court in 2008–09, 30 per cent were allowed or remitted, 55 per cent were disallowed, and 15 per cent were discontinued. By contrast, of the 62 appeals from federal and state superior court decisions to the

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52 Attorney-General's Department, Australian Government, *Telecommunications (Interception and Access) Act 1979: Annual Report for the year ending 30 June 2009* (2010) 59.

53 See, eg, Joint Select Committee on Tenure of Appointees to Commonwealth Tribunals, Commonwealth Parliament, *Tenure of Appointees* (1989); Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39 (1995) 74–7.

54 *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470, 498 [91]

55 *Coal and Allied Operations Pty Ltd v Australian Industrial Relations Commission* (2000) 203 CLR 194, 229 [85]. See also *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 205 CLR 507, 563 [180] (Hayne J): 'The decision-maker has little security of tenure and, at least to that extent, may be thought to have some real stake in the outcome.'.

56 In 2007–08 the Federal Court finalised 4 913 matters at a budget cost of $78.46m; the Administrative Appeals Tribunal finalised 7 179 at a cost of $33.33m; the Social Security Appeals Tribunal, 12 343 at $26.77m; and the Migration and Refugee Review Tribunals, 7 537 at $37.82m: Attorney-General's Department, above n 30, 37.

High Court in 2008–09, 68 per cent were allowed, 29 per cent were dismissed, and three per cent were discontinued.[57]

Ombudsmen and other complaint and review bodies

A large number of independent oversight agencies now operate at the federal level.[58] They include: the Commonwealth Ombudsman, who investigates the administrative actions of nearly all Australian Government agencies; the Australian Human Rights Commission, which investigates whether agencies have engaged in discrimination or a breach of human rights standards; the Inspector-General of Intelligence and Security, who investigates the actions of the six agencies that form the Australian intelligence community; the Australian Commission for Law Enforcement Integrity, which investigates corruption in federal law enforcement agencies; the Aged Care Commissioner, who investigates the handling of aged care service complaints; and the Australian Information Commissioner, supported by the Privacy Commissioner and the Freedom of Information Commissioner, who investigates and reviews freedom of information and privacy administration.

Each of those agencies is established by statute as an independent agency that is not subject to government direction. They have extensive statutory powers akin to those of a royal commission to conduct investigations, either upon complaint or as an own motion investigation. Their investigation reports are often published, either by the review body or through the Minister or Parliament. Many have additional statutory functions. Examples include the Ombudsman's function of preparing a report to the Parliament on every person held in immigration detention for more than two years; the Inspector-General of Intelligence and Security's function of attending questioning conducted under warrant by the Australian Security Intelligence Organisation; and the Information Commissioner's function of publishing freedom of information guidelines to which agencies must have regard.

The independent watchdog agencies have some advantages over courts in securing the rule of law.[59] Firstly, they deal with a large volume of complaints each year across government. For example, in 2008–09 the Commonwealth Ombudsman received 45 719 approaches and complaints from the public, against more than 100 Australian Government agencies.[60] This ongoing contact between the Ombudsman and — effectively — the whole of government, reinforces the administrative law values of legality, rationality, fairness and transparency. Agencies are keen not to have an adverse finding made against them, particularly in a published report or statement. Generally speaking, the media takes an interest in Ombudsman reports, and the spectre of adverse publicity is a powerful motivating force in government.

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57 High Court of Australia, *Annual Report 2008–09* (2009) 39. Appeals to the High Court are heard by leave of the Court, and it is possible that the Court is disposed to grant leave if an appeal is more likely to succeed.

58 For a more detailed analysis, see John McMillan and Ian Carnell, 'Administrative Law Evolution: Independent Complaint and Review Agencies' (2010) 59 *Admin Review* 30.

59 These points are developed by the author in other articles, including 'The Ombudsman and the Rule of Law' (2005) 44 *Australian Institute of Administrative Law Forum* 1; 'Ten Challenges for Administrative Justice' (2009) 61 *Australian Institute of Administrative Law Forum* 23; and 'Future Directions 2009 — the Ombudsman' (2010) 63 *Australian Institute of Administrative Law Forum* 13.

60 Commonwealth Ombudsman, *Annual Report 2008–2009* (2009) 13–15.

The Ombudsman has extended that influence by publishing an increased number of reports. In 2009, for example, the Commonwealth Ombudsman published 20 reports,[61] mostly arising from own motion investigations on matters as diverse as visa processing, mail redirection, departure prohibition orders, administrative compensation, executive schemes, heritage protection, use of interpreters, immigration detention, re-raising tax debt, industry grant schemes, postal compensation, disability support, taxation compliance visits and government economic stimulus payments.

In important respects the Ombudsman's province is more extensive than that of courts. The Commonwealth Ombudsman investigates not only public sector actions but those of non-government bodies that provide goods and services to the public pursuant to a contract with a government agency.[62] The Ombudsman can also investigate executive scheme decisions, which are not challengeable under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) as that Act applies only to decisions made under an enactment (s 3). As discussed in a recent Ombudsman report, there is increasing use of executive schemes by government to distribute grants, benefits and compensation and to regulate industry behaviour.[63] An important executive scheme to administrative justice is the Scheme for Compensation for Detriment Caused by Defective Administration (CDDA). Compensation can be paid under the scheme to a person who has suffered loss arising from defective administration such as incorrect advice, computer malfunction or damage to private property. There has been no judicial review of CDDA decisions,[64] yet there is regular Ombudsman oversight including two reports that both prompted revision and improvement of the scheme.[65]

The flexibility of the Ombudsman model also enables the office to highlight issues that pose a danger to administrative justice. An example is a recent Commonwealth Ombudsman Issues Paper that calls for the development of legislative safety net powers to counteract the problem of unforeseen or unintended consequences arising from legislation that is tightly drafted or does not enable erroneous decisions to be remade.[66] Similarly, the Ombudsman can provide practical guidance to agencies to improve the quality of administrative decision making, through reports, fact sheets, e-bulletins, conferences and training seminars. An example is the 'Ten Lessons' report by the Commonwealth Ombudsman that spelt out the legal, factual and administrative pitfalls that were exposed by the Ombudsman's investigation during 2005–07 of over 200 cases of wrongful immigration detention.[67]

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61 See Commonwealth Ombudsman, *Investigation Reports 2009* <www.ombudsman.gov.au/reports/investigation/2009>.

62 *Ombudsman Act 1976* (Cth) ss 3(4B), 3BA; Cf *NEAT Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277.

63 Commonwealth Ombudsman, *Executive Schemes*, Report No 12/2009 (2009) 2–3.

64 See, eg, *Smith v Oakenfull* (2004) 134 FCR 413.

65 Commonwealth Ombudsman, *To Compensate or Not to Compensate?* Report No 02/1999 (1999); Commonwealth Ombudsman, *Putting Things Right: Compensating for Defective Administration*, Report No 11/2009 (2009).

66 Commonwealth Ombudsman, *Mistakes and Unintended Consequences – A Safety Net Approach*, Issues Paper (2009).

67 Commonwealth Ombudsman, *Lessons for Public Administration*, Report No 11/2007 (2007); Commonwealth Ombudsman, *Fact Sheet 5 Ten Principles for Good Administration* (2009).

Although the scope of ombudsman work and the impact on government has grown markedly over 30 years, a deeply-rooted stereotype about the institution is still heard in legal and academic circles. One theme is that the Office is not independent of government, as the Ombudsman is appointed by the Governor-General for a fixed term, relies on an annual budget, and practices a close working relationship with agencies. There is no obvious empirical evidence on which to conclude that those features weaken the independence of the Office, and indeed the high public profile of the Office for being an accountability 'watchdog' suggests the contrary. If anything, the history of the Office in Australia suggests the need for a more sophisticated and contemporary understanding of principles such as 'independence' and 'accountability'.

Another familiar theme is that the Ombudsman can only recommend and lacks the hard-edged powers of a court. In fact, most Ombudsman recommendations are not of a kind that can easily be fashioned as a binding determination. Common examples are a recommendation that an agency rewrite its administrative procedures, revise a program, reconsider an adverse decision, provide better assistance to a dissatisfied client, expedite a case, or apologise for an agency defect. Those remedies can effectively resolve many disputes. They are backed up by Ombudsman powers that can be more effective than a determination, namely persuasion and adverse publicity. Moreover, the rate of acceptance of Ombudsman recommendations is high — for example, 82 per cent of the 92 recommendations made by the Commonwealth Ombudsman in published reports in 2008–09 were accepted in full or part.[68] An illustrative case study of Ombudsman work is that the number of people in long term immigration detention dropped between July 2005 and June 2008 from 149 to 34, following the introduction of new measures that included a report to Parliament by the Ombudsman on each person in detention for more than two years.[69] This mechanism has been more effective than the attempted use of judicial review to constrain indefinite immigration detention.[70]

Agencies themselves confirm the important contribution of the Ombudsman to improving administrative justice. A survey of NSW government agencies published in 2005 ranked the Ombudsman as the most important oversight body, followed by the courts in sixth position.[71] Commonly, too, agency heads acknowledge publicly the positive influence of watchdog agencies in ensuring that administrative law values are respected within agencies.[72]

The active difference that an independent oversight agency can make in ensuring government accountability will soon be tested in relation to open government. The constitutional significance of the *Freedom of Information Act 1982* (Cth) ('FOI') is

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68 Commonwealth Ombudsman, *Annual Report 2008–2009* (2009) 19.

69 See 'Response to Ombudsman's Statement made under Section 486O of the Migration Act 1958 - Statement to the Parliament', Minister for Immigration and Citizenship, 3 June 2008.

70 See, eg, *Al-Kateb v Godwin* (2004) 219 CLR 562.

71 A J Brown et al , *Chaos or Coherence: Strengths, Challenges and Opportunities for Australia's Integrity Systems,* National Integrity Systems Assessment Final Report (2005) 25.

72 See, eg, Andrew Metcalfe, 'Administrative Law Evolution: An Administrator's Point of View' (2010) 59 *Admin Review* 42; Michael D'Ascenzo, 'Effectiveness of Administrative Law in the Australian Public Service' (2008) 57 *Australian Institute of Administrative Law Forum* 59; Peter Shergold, 'At Least Every Three Decades — Acknowledging the Beneficial Role of the Commonwealth Ombudsman' (Speech delivered to the 30th Anniversary Seminar for the Commonwealth Ombudsman, Canberra, 8 August 2007).

captured in a new objects clause (s 3) enacted in 2010 that specifies the following objectives of the Act: to 'promote Australia's representative democracy', 'increas[e] public participation in Government processes', 'increas[e] scrutiny, discussion, comment and review of the Government's activities', and 'increase recognition that information held by the Government is to be managed for public purposes, and is a national resource'. It is generally accepted that the aims of the FOI Act were not fulfilled in the first nearly three decades of the Act's operation,[73] during which time the review of agency FOI decisions and development of FOI jurisprudence was largely undertaken by the AAT, Federal Court and High Court. Some key decisions were disappointing,[74] and tribunal and judicial review were unable to correct major problems in FOI administration such as delay and lack of commitment by some government agencies.

The reform path taken by the Government in 2010 was to establish a new independent statutory office, the Office of the Australian Information Commissioner.[75] Among the powers of the Commissioner are to undertake merit review of agency FOI decisions and decide if documents are exempt; investigate FOI complaints, and issue implementation notices requiring agencies to specify the action they will take to implement the Commissioner's recommendations; publish guidelines on the FOI Act to which agencies must have regard; monitor and audit agency FOI administration; promote the FOI Act and provide assistance to the public; and advise the Government on information policy issues.[76] The Government expects this new scheme of independent review to 'lead to the development of a greater pro-disclosure culture throughout government'.[77]

ALTERNATIVE THEORIES OF ACCOUNTABILITY

The conventional approach in Australian public law is to classify tribunals, ombudsmen and like bodies as part of the executive branch. The reason neatly put by Professor Saunders is that 'they fit in here better than anywhere else'.[78] It is now time to update our constitutional thinking, and the following three theories of accountability point to the possibilities.

National integrity system

The national integrity system refers to a collection of institutions, laws, procedures, practices and attitudes that promote and encourage integrity in the exercise of power in Australian society. The label 'integrity' is applied to convey that our expectations of government and business go beyond legal compliance and incorporate other

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73 See Joe Ludwig, 'The Freedom of Information Act — No Longer a Substantial Disappointment' (2010) 59 *Admin Review* 4.

74 See eg, *News Corporation Ltd v National Companies and Securities Commission (No 4)* (1984) 1 FCR 64 (the objects clause), *Re Howard and the Treasurer* (1985) 7 ALD 626 (the public interest test and deliberative process documents), and *McKinnon v Secretary, Department of Treasury* (2006) 228 CLR 423 (review of conclusive certificates).

75 *Australian Information Commissioner Act 2010* (Cth).

76 *Freedom of Information Act 1982* (Cth) ss 55K, 89, 93A; *Australian Information Commissioner Act 2010* (Cth) ss 7, 8.

77 Ludwig, above n 73, 13.

78 Cheryl Saunders, *It's Your Constitution: Governing Australia Today* (2nd ed, 2003) 114.

expectations such as good decision-making, respect for values that underpin institutional integrity and public virtue, fidelity to the public interest, and lack of corruption. In short, the expectation is that government should embody both a values driven culture and a rule abiding culture.[79]

One model of a national integrity system first proposed by Transparency International uses the metaphor of the ancient Greek Temple.[80] The roof of the Temple is the fundamental objective: national integrity in all areas of government and business. Eleven columns in the Temple support a civilised system that conforms to that objective and upholds the rule of law. Three ancient columns — the legislature, executive and judiciary — are joined by the Auditor-General, Ombudsman, anti-corruption agencies, the media, the public service, civil society, private sector and international organisations.

This model of a National Integrity System was taken a step further in a recent Australian study, the National Integrity Systems Assessment (NISA) Report, prepared jointly by the Key Centre for Ethics Law Justice and Governance at Griffith University and Transparency International Australia.[81] The NISA Report uses the different metaphor of a birds nest to describe a coherent integrity system. A birds nest is an unruly but integrated structure of many different twigs or strands. Some strands represent integrity institutions such as parliamentary committees, ombudsmen, auditors-general, anti-corruption commissions, public sector standards commissions, inspectors-general and administrative tribunals. Other strands represent laws and codes that promote accountability and provide safeguards to the public, dealing with topics such as judicial review, freedom of information, whistleblower protection, codes of conduct and conflict of interest.

The birds nest lacks the majesty and coordination of a classic Greek Temple, and the geometric simplicity of a three-cornered separation of powers. However, in a well-constructed birds nest, single twigs that are individually frail can support more than their own weight and withstand turbulence that would destroy any one of the twigs. The strength of the structure comes not from its individual parts, but from their interrelationship. A weakness in any one integrity institution does not necessarily weaken the whole structure. Equally, the structure is stronger when all the pieces are interrelated.

The concept of integrity and the notion of an integrity system are being embraced strongly by Australian governments, influenced in part by the NISA Report. A reform program in Queensland in 2009 was initiated by a Government discussion paper, *Integrity and Accountability in Queensland*. The topics covered in the paper included freedom of information reform, whistleblower protection, public service ethics, registration of lobbyists, anti-corruption oversight and the Ombudsman. Many of those issues were taken up in the *Integrity Act 2009* (Qld), which established the office

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79 James Spigelman, 'The Integrity Branch of Government' (2004) *Australian Institute of Administrative Law National Lecture Series on Administrative Law No 2* 1, 2.

80 Jeremy Pope (ed), *Confronting Corruption: The Elements of a National Integrity System* (Transparency International, 2000).

81 A J Brown et al, above n 71. See also Brian Head, A J Brown and Carmel Connors (eds), *Promoting Integrity: Evaluating and Improving Public Institutions* (2008); and Tim Prenzler and Nicholas Faulkner, 'Towards a Model Public Sector Integrity Commission' (2010) 63 *Australian Journal of Public Administration* 251.

of Integrity Commissioner to raise awareness of ethics and integrity issues in government and the community. The Queensland Premier announced that the new integrity and accountability framework was based on four principles: 'strong rules, a strong culture, strong scrutiny and strong enforcement'.[82]

At much the same time the Tasmanian Government announced a 'Ten Point Plan to Strengthen Trust', covering the same issues. This, too, resulted in a new Act, the *Integrity Commission Act 2009* (Tas). The Commission is headed by a Chief Commissioner, and a Board of seven members that includes the Auditor-General, Ombudsman and State Service Commissioner. The principal functions of the Commission are to develop codes of conduct, educate public officers, and investigate complaints of misconduct or refer them to other investigatory bodies. The Act also establishes a Parliamentary Joint Standing Committee on Integrity.

Victoria looks poised to follow the same path. In June 2010 the Government announced that it accepted the recommendations in an independent report to government proposing a new integrity and anti-corruption system.[83] Four new bodies recommended in the report are a Parliamentary Integrity Commissioner, a Victorian Integrity and Anti-Corruption Commission (headed by a Public Sector Integrity Commissioner, and a Director of Police Integrity), an Investigations Inspector (to monitor and investigate complaints against the Commission) and an Integrity Coordination Board (comprising those officers except the Inspector, together with the Auditor-General, Ombudsman and Public Sector Standards Commissioner).

Fourth branch of government

A variation of the national integrity system concept is the fourth branch of government. This theory builds on the analogy of the separation of powers by propounding that in truth there are now four branches of government — the legislature, executive, judiciary and the 'integrity' or 'oversight' branch. This fourth branch comprises independent statutory oversight bodies such as the ombudsmen, administrative tribunals, auditors-general, inspectors-general, privacy and information commissioners, human rights and anti-discrimination commissioners, anti-corruption commissions, and public sector standards commissioners.

This theory builds on the separation of powers so as to highlight the inappropriateness of grouping watchdog agencies with other executive branch agencies. Watchdog agencies do not formulate policies, provide services or regulate society; their role is to investigate and hold to account the agencies that discharge those executive functions; and they have statutory independence from other executive agencies and from ministerial direction. As discussed earlier in this paper, they are a new and effective means of enforcing the rule of law in government, checking the propriety of administrative decision making, and controlling government action.

The notion of a fourth branch of government has received support from NSW Chief Justice Spigelman.[84] He saw it both as a way of institutionalising the concept of integrity in government, and acknowledging that the integrity branch institutions have

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82 Anna Bligh, 'Sweeping Reforms Deliver Queensland Strong Integrity and Accountability' (Press Release, 10 November 2009).

83 Public Sector Standards Commissioner, *Review of Victoria's Integrity and Anti-Corruption System* (State Services Authority, 2010).

84 Spigelman, above n 79.

developed and become independent of the executive branch. A variant of this proposal has been made by Professor Ackerman, who sees that stemming corruption is now a major democratic challenge that warrants constitutional recognition:

> [I]it is a mistake to view corruption as if it were just another social problem. A failure to control it undermines the very legitimacy of democratic government. ... The credible construction of a separate 'integrity branch' should be a top priority for drafters of modern constitutions. ... Once this branch has been established, it may be plausible to define its concerns more broadly to include other pathologies beyond outright corruption.[85]

It is premature — perhaps idle — to think of a fourth branch as having a constitutional footing (although that is now the case in Victoria for the Auditor-General and Ombudsman[86]). Rather, a fourth branch concept provides a basis for developing a formal and interdependent relationship between independent oversight agencies and publicly stressing their integrity role. A step in this direction is the initiative in Tasmania and Victoria to create a coordinating board comprising the officers who head the individual integrity agencies. A similar move in Western Australia was the formation of an Integrity Coordinating Group by the Auditor-General, Commissioner for Public Sector Standards, Corruption and Crime Commissioner and Ombudsman 'to promote policy coherence and operational coordination in the ongoing work of Western Australia's core public sector integrity institutions'.[87] A like development in the Commonwealth is that many of the review and accountability agencies were located within the portfolio of the Department of Prime Minister and Cabinet and referred to as the 'integrity group' within government — specifically, the Australian Information Commissioner, Australian National Audit Office, Commonwealth Ombudsman, Inspector-General of Intelligence and Security, and National Archives of Australia.[88]

The justice system

A third approach, reflected in the recent policy stance of Australian governments, is to define the judiciary as one element only of a broader justice system. An important aim of the justice system is to resolve legal disputes that arise between people and government. The judiciary is uniquely placed to resolve disputes in a binding and conclusive manner, yet formal justice is one of many options, and often the option of last resort. Other elements of the justice system can resolve disputes as effectively and in different ways, and in so doing hold government to account.

The premise of this theory is that in modern society disputes between people and with government are common and varied, and there is a public interest in resolving disputes promptly, inexpensively and effectively. Different dispute mechanisms are needed, ranging from formal adjudication in courts to alternative dispute resolution in

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85 Bruce Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633, 691–3. Another variant is that independent watchdog agencies can be given recognition as officers of parliament: Jeffrey Bell, 'Agents of Parliament: A New Branch of Government' (2006) 29 *Canadian Parliamentary Review* 13.

86 *Constitution Act 1975* (Vic) ss 94B, 94E.

87 Government of Western Australia, *About Us,* Integrity Coordinating Group <www.opssc.wa.gov.au/ICG> at 23 September 2010.

88 The Attorney-General's portfolio includes the Administrative Appeals Tribunal, Australian Commission for Law Enforcement Integrity and Australian Human Rights Commission.

other forums. Phrases increasingly used to capture that objective include 'proportionate dispute resolution' and 'fitting the forum to the fuss'. A related concern, especially of governments, is to ensure a rational allocation of resources among the different components of the justice system.

The practical need for this new approach is shown by three recent studies. A survey in 2006 by the Law and Justice Foundation of NSW found that 62.4 per cent of respondents had experienced a civil legal issue in the preceding 12 months, and 8.5 per cent a family legal issue.[89] A Victorian study in 2007 reported that 35 per cent of respondents had encountered a dispute with family, neighbours, government or business in the previous 12 months.[90] The Commonwealth Access to Justice report in 2009 estimated that the institutions that make up the justice system, as broadly defined in that report, dealt with over 55 million complaints, inquiries and requests for assistance in 2007–08.[91] All three studies emphasise another feature of the justice system, that a growing proportion of people involved in legal disputes are held back by education, language, culture and disability. They need a justice system that is attuned to their circumstances.

Reflecting those concerns, the justice system was defined broadly in the Access to Justice report as including courts, tribunals, the Ombudsman, family relationship centres, legal aid and community legal centres, insolvency and trustee services, ADR mechanisms, and agency internal complaint and review procedures. This definition was tied to a higher social goal: 'An accessible and effective way of resolving disputes … is central to the rule of law'.[92]

Britain has embraced the same approach and given it a legislative basis. The *Tribunals, Courts and Enforcement Act 2007* establishes the Administrative Justice and Tribunals Council to keep under review the administrative justice system, with a view to making that system accessible, fair and efficient. The Act defines 'the administrative justice system' as including 'the overall system by which decisions of an administrative or executive nature are made' and 'the systems for resolving disputes and airing grievances in relation to such decisions'.[93] The Council has embarked on an innovative program that illustrates the benefits that flow from adopting a contemporary theoretical approach of this kind. Two illustrative Council publications are *The Developing Administrative Justice Landscape* (2009), and a draft statement of ten *Principles for Administrative Justice* (2010).

CONCLUSION

Theories exert a powerful influence on our understanding and development of the system of law and government. That can be said of the doctrine of separation of

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89 Christine Coumarelos, Zhigang Wei and Albert Z Zhou, *Justice Made to Measure: NSW Legal Needs Survey in Disadvantaged Areas* (Law and Justice Foundation of NSW, 2006) 73.

90 Ipsos Australia, *Dispute Resolution in Victoria: Community Survey 2007* (Victorian Department of Justice, 2007) i.

91 Attorney-General's Department, above n 30, 12.

92 Ibid 2.

93 *Tribunals, Courts and Enforcement Act 2007* (UK) sch 7, cl 13(4). The Act arose from a report by Sir Andrew Leggatt, *Tribunals for Users: One System, One Service* (2001), and a 2004 White Paper: Department of Constitutional Affairs, *Transforming Public Services, Complaints, Redress and Tribunals*, Command Paper Series 6243 (2004).

powers, which supports an active system of checks and balances, a strong tradition of judicial independence, and an equally strong democratic tradition. It is now time to supplement the doctrine of the separation of powers with other theories that are attuned to the more sophisticated framework developed in Australia over the last thirty years for resolving disputes, holding government to account and securing the rule of law. Three theories discussed in this paper — the national integrity system, the fourth branch of government, and the administrative justice system — have stimulated fresh thinking about the adequacy of existing arrangements for controlling government misconduct, meeting community expectations, and linking independent oversight agencies to each other and to the parliament.