To return to an earlier theme, in the case of judicial power, there is a wealth of constitutional theory that appears not to be reflected in practice. When we look at the exercise of executive power we have no difficulty in finding, in practice, the great gulf between the AAT and the executive. Some will applaud that gulf; others will lament it. But I think we still search for the theoretical rationalisation for it.

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I am greatly indebted to Professor Campbell for the preparation of her paper and only wish to raise two issues. The way in which either of these issues will be resolved is unclear, but I raise them knowing that they may prove to be controversial.

1. *Constitutionality of section 7(1) of the Administrative Appeals Tribunal Act 1975?*

Section 7(1) of the Administrative Appeals Tribunal Act 1975 provides that "a person shall not be appointed as a presidential member of that Tribunal unless he is or has been a judge . . . of the High Court, or another Federal Court or of a Supreme Court of a State or Territory . . .".

The doubt as to the constitutionality of this provision arises by virtue of the fact that a person may be selected to be President of the Administrative Appeals Tribunal on the basis that he is, for example, a Federal Court judge. The objection to such a provision is that the basis of appointment is a person's "judgeship". In my opinion the comments of Bowen C.J. and Deane J. in *Drake* v. *Minister for Immigration and Ethnic Affairs* (1979) 24 A.L.R. 577, 584 do not answer this objection.

The cornerstone as to my doubts of the constitutionality of section 7(1) is found in the following comments of the judgment of the Privy Council in *Attorney-General of the Commonwealth* v. *R.* (1957) 95 C.L.R. 529, 540:

> Then it has been urged that the doctrine has not always been closely observed in regard to the separation of legislative and executive powers. That is perhaps so, but the explanation of it rests not on a theoretical rejection of the doctrine but upon the text of the Constitution as expounded in a series of cases culminating in *Dignan's Case* (5), from which the majority judgment in the present case cites significant passages. It is worth noting that in the judgment of *Gavan Duffy* C.J., and *Starke* J., in that case a distinction is made between the union of legislative and executive power on the one hand and the union of judicial and other power on the other hand. "It does not follow that, because the Constitution does not permit the judicial power of the Commonwealth to be vested etc." (6) are the opening words of a passage in which the granting of a regulative power akin to a legislative

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> power to a body other than Parliament itself was justified. Nor, if any further justification is sought than that of the text itself of the Constitution, would it be difficult to find a distinction. The delegation of regulative power by the legislature to an executive body does not mean that the legislature has abdicated a power constitutionally vested in it. For the executive body is at all times subject to the control of the legislature. On the other hand in a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive. To vest in the same body executive and judicial power is to remove a vital constitutional safeguard.

With these comments in mind, I am prompted to ask: what is the difference between

(a) the Legislature providing that all members of the Federal Court are members of the Administrative Appeals Tribunal; and

(b) providing that the Executive can select members of the Administrative Appeals Tribunal from the membership of the Federal Court?

It is suggested that there is no difference between appointment to the Administrative Appeals Tribunal by either the Legislature or the Executive. If the first method of appointment is accepted to be unconstitutional, why not the second?

To some extent, I recognise that this doubt as to the constitutionality of section 7(1) is academic, as, if that section were to be repealed, then appointment to the Administrative Appeals Tribunal could be made of people who so happen to be Federal Court judges. But at least if that were done appointment would not be made on the very basis of being a judge.

If these doubts are correct, doubt must also be thrown on the constitutionality of s. 31(1) of the Trade Practices Act 1974 (Cth). That section provides as follows:

> 31.(1) A person shall not be appointed as a presidential member of the Tribunal unless he is—
>
> (a) a Judge of a Federal Court, not being the High Court or a court of an external Territory; or
>
> (b) a person who has the status of a Judge of the Court.

2. *The Extent to which the Administrative Appeals Tribunal can review the Legality of a Decision: Collector of Customs* v. *Brian Lawlor Automotive Pty Ltd*

Professor Campbell comments on *Collector of Customs* v. *Brian Lawlor Automotive Pty Ltd* (1979) 24 A.L.R. 307 in her paper (*supra*, p. 43). It is, however, intended to focus greater attention upon the following comments of Deane J. (at pp. 343-344):

> An administrative tribunal will ordinarily have no authority to transcend the limits of the jurisdiction conferred upon it by hearing an application aimed not at invoking the jurisdiction which it possesses, but at securing an authoritative determination of questions of fact or law anterior to the existence of that jurisdiction. The provisions of the Act do not purport to confer any such authority upon the Administrative Appeals Tribunal. If they did, a serious question would arise as to whether, to that extent, they purported to confer part of the judicial

power of the Commonwealth upon an administrative body which was not a court for the purposes of Ch III of the Constitution.

In the course of his reasons for decision, the learned President of the Administrative Appeals Tribunal forcefully pointed to the serious inconvenience which would result if questions relating to the validity of the purported exercise of a power were excluded from the Tribunal's authority to review decisions made under the enactment conferring the power. The present matter does not however, in my view, raise that general point for decision and I have indicated that, in my view, such questions will ordinarily be within the ambit of the Tribunal's authority. The question raised by the present matter is whether the jurisdiction which the Act confers upon the Tribunal to deal with an application for review of a decision made under a particular enactment includes jurisdiction to entertain and determine an application that a particular decision should be set aside on the ground that there had not even been a colourable exercise of a power contained in the relevant enactment for the reason that there was simply no relevant power to be found in it. It may well be inconvenient that a person who wishes to litigate the question whether an enactment confers any power at all to make a decision, is unable to do so in the administrative tribunal which has authority to review decisions made under that enactment. Such inconvenience is not, however, an uncommon consequence of the division of judicial and executive powers.

In the result, I am of the view that the Administrative Appeals Tribunal did not have jurisdiction to set aside the purported revocation of the Company's warehouse licence on the ground that no relevant power of revocation existed. The issue between the company and the collector as to the existence of the relevant power of revocation was not, in my view, an issue which could be resolved by the Administrative Appeals Tribunal at the suit of the company which propounded its denial of the existence of any relevant power as the basis of what was, in effect, an application for a declaration that there was no decision which the Tribunal had authority to review. The decision of the Tribunal setting aside that purported revocation was beyond jurisdiction and should itself be set aside.

There is no doubt that, if the Administrative Appeals Tribunal Act 1975 listed the grounds of review as set out in the Administrative Decisions (Judicial Review) Act 1977, it could be said that the exercise of those powers by the Federal Court would be the exercise of the judicial powers of the Commonwealth, whereas when performed by the Tribunal it is the exercise of administrative powers. That is to say, it is possible to have the same powers conferred both upon judicial and administrative bodies and that the nature of those powers will vary accordingly.

An example of such a situation is provided by the *R.* v. *Quinn; ex Parte Consolidated Foods Corporation* (1977) 138 C.L.R. 1. In that case it was argued that the powers conferred upon the Registrar of Trade Marks under s. 23(1) of the Trade Marks Act 1955 (Cth) was unconstitutional in that it conferred upon the Registrar the judicial power of the Commonwealth. Section 23(1) at that time provided as follows:

> 23. (1) Subject to this section and to section ninety-three of this Act the High Court or the Registrar may, on application by a person aggrieved, order a trade mark to be removed from the Register in

respect of any of the goods in respect of which it is registered, on the ground—

(a) that the trade mark was registered without an intention in good faith on the part of the applicant for registration that it should be used in relation to those goods by him or, if it was registered under sub-section (1) of section forty-five of this Act, by the body corporate or registered user concerned, and that there has in fact, been no use in good faith of the trade mark in relation to those goods by the registered proprietor or a registered user of the trade mark for the time being earlier than one month before the application; or

(b) that, up to one month before the date of the application, a continuous period of not less than three years had elapsed during which the trade mark was a registered trade mark and during which there was no use in good faith of the trade mark in relation to those goods by the registered proprietor or a registered user of the trade mark for the time being.

It will be noted that the same powers are conferred upon the Registrar and the High Court of Australia. The constitutionality of this provision was upheld and the High Court maintained that when the Court was exercising the powers conferred it was exercising a judicial power; and when the Registrar was exercising the power, he was exercising administrative power. In reaching this conclusion, one of the Judges, Jacobs J., referred to *Shell Co. of Australia Ltd* v. *Federal Commissioner of Taxation* (1930) 44 C.L.R. 530; [1931] A.C. 275 and the historical approach as to whether a particular power was judicial or administrative. His Honour maintained:

> Both these passages were expressly approved by the Judicial Committee on the appeal. *Shell Co. of Australia Ltd* v. *Federal Commissioner of Taxation*. Earlier in his judgment Isaacs J. had said:
>
> > ". . . some matters so clearly and distinctively appertain to one branch of government as to be incapable of exercise by another. An appropriation of public money, a trial for murder, and the appointment of a Federal Judge are instances. Other matters may be subject to no *a priori* exclusive delimitation, but may be capable of assignment by Parliament in its discretion to more than one branch of government. Rules of evidence, the determination of the validity of parliamentary elections, or claims to register trade marks would be instances of this class. The latter class is capable of being viewed in different aspects, that is, as incidental to legislation, or to administration, or to judicial action, according to circumstances. Deny that proposition, and you seriously affect the recognized working of representative government."
>
> If one does not deny that proposition and if one assumes that the power under s. 23 is in respect of a matter which cannot, in the words of Isaacs J., be subject to a priori exclusive delimitation (which assumption I shall presently consider) I think that it is plain that Parliament intended the power to be exercised by the Registrar to be an administrative power. Section 23 was passed before the decision in the *Boilermakers' Case*. At the time it was well established that no person appointed by the Commonwealth who did not hold appointment for life could exercise a judicial power of the Commonwealth

> under s. 71 of the Constitution. It was not understood to be the law that the High Court could not exercise any power other than judicial power. In these circumstances I have no doubt that Parliament would have intended rather that this Court should exercise an administrative power than that the Registrar should exercise judicial power. However, it appears likely that on a true construction the intention was severable and distributive in the sense that the Court was to exercise judicial power and the Registrar administrative power. In the present case it is sufficient that the Registrar was intended to exercise no more than an administrative power. ((1977) 138 C.L.R. 1, 8-9.)

His Honour also maintained:

> The historical approach to the question whether a power is exclusively a judicial power is based upon the recognition that we have inherited and were intended by our Constitution to live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive. But the rights referred to in such an enunciation are the basic rights which traditionally, and therefore historically, are judged by that independent judiciary which is the bulwark of freedom. The governance of a trial for the determination of criminal guilt is the classic example. But there are a multitude of such instances. One of them has been held to be the determination of a status of a person whereby the right to recover money owing by that person is barred: *Reg.* v. *Davison* (50).
>
> On the other hand the course of legislation in comparatively recent times does not, in itself, provide a foundation for the historical approach. If the legislation requires the exercise of a power to determine questions the determination of which will affect what are traditionally regarded as basic legal rights, the judicial nature of the power springs from the effect which the exercise of the decision-making function under the legislation will have upon the legal rights rather than from the history of similar legislation reposing the function in a judicial tribunal. ((1977) 138 C.L.R. 1, 11-12.)

Perhaps it could be suggested that when considering the grounds of legality of a decision one is considering a function which is inherently judicial in nature. Historically it is the function of the courts to determine the legality of any decision and, unlike the result in the *Consolidated Foods* case, it could be suggested that such a function does not take its character from the nature of the body that it is conferred upon.

If the Legislature has not said that the Administrative Appeals Tribunal can review the legality of a decision, perhaps it should not be for the courts to say that that Tribunal can review legality. If one accepts this approach, the decision in *Lawlor's* case is circumventing the Constitution.

Conclusion

The result of these two comments is a dual problem. On the one hand it could be suggested that the Legislature is conferring non-judicial functions upon judicial personages (*Drake's* case); and on the other hand, it could be suggested that the Courts have permitted the conferral of judicial functions upon non-judicial bodies (*Lawlor's* case). Either way there is a constitutional difficulty.

3. *Who is to argue these Matters?*

Even if either of the above two suggestions is accepted, there is still a difficulty as to having the issues raised before the High Court of Australia. It is apparent that the Commonwealth will not argue these suggestions, as they failed to raise the issues in the *Lawlor* case. Nor is the applicant, who initially invoked the jurisdiction of the Tribunal, likely to argue the issues. It would appear that only if a third party intervenes in the original proceedings before the Administrative Appeals Tribunal to support the original decision, could that party have an interest to argue the decision further before the High Court.

A further way in which the issues could be raised is if prosecution is brought for a contempt of the Administrative Appeals Tribunal. If the Administrative Appeals Tribunal included a Federal Court judge, perhaps it could be argued that there could be no contempt as the Tribunal was unconstitutionally constituted.