AUSTRALIAN LEGISLATION ON SEDENTARY RESOURCES OF THE CONTINENTAL SHELF

The question whether particular marine resources may be classified as sedentary resources under article 2(4) of the Convention on the Continental Shelf is one which has given rise to disputes between deep sea fishing countries and countries whose fishing is restricted to adjacent maritime areas. The tendency of some of the deep sea fishing countries has been to restrict, as far as possible, the species falling within the definition of a sedentary organism while the tendency of some of the developing countries in the latter group has tended to give an enlarged definition to the class of organisms coming under the Convention.[1]

In 1968 the Australian Parliament enacted the *Continental Shelf (Living Natural Resources) Act*[2] the main effect of which was to enable the Governor-General to proclaim marine organisms as coming within the definition of article 2(4) as being "organisms which at the harvestable stage either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil." The Act also empowered the Executive to impose conservation controls in respect of specific sedentary resources in areas adjacent to the Australian coastline. The pattern of the legislation may well establish a precedent for future international regulation of marine resources.

The basis of the legislation is to be found in four sections of the Act: sections 7, 11, 12 and 13. Section 7 provides that where the Governor-General is satisfied that a marine organism of any kind is, for the purposes of the Convention, part of the living natural resources of the continental shelf by reason of the fact that it belongs to sedentary species, he may by proclamation declare the organism to be a sedentary organism. Proclamations under this section were published in the Commonwealth Gazette in April, 1970.[3] They designate thirteen classes of marine organisms as belonging to sedentary species. These classes may be broadly grouped under six main categories: 1. The anthozoan group, 2. the echinoderm group, 3. bivalve molluscs, 4. gastropods, 5. sponges, and 6. seaweed.

Until this new legislation came into effect Australian law covered only four types of sedentary species. Under the *Pearl Fisheries Act* of 1952[4] which replaced earlier legislation[5] of the Federal Council of Australasia (a pre-Federation law making body with limited powers) of the nineteenth century, four species were made subject to Australian exclusive fisheries jurisdiction: pearl-shell (a species of bivalve mollusc), trochus and green snail (a species of gastropod) and beche-de-mer (a species of echinoderm). The historical

1. See ODA, *International Control of Sea Resources,* (1963) Pp. 191 et seq.
   BOWETT, *The Law of the Sea* (1967) Pp. 35-37.
   GOLDIE, Comment in Alexander (ed.) *The Law of the Sea: Offshore Boundaries and Zones* (1967). Pp. 285 et seq.
   O'CONNELL, "Sedentary Resources and the Australian Continental Shelf" (1955) 49 A.J.I.L. 185.
2. *Commonwealth Acts, No. 149.*
3. *Commonwealth Gazette No. 25,* 1970, P. 2315.
4. *Act No. 8,* 1952.
5. *Queensland Pearl Shell and Beche-de-mer Fisheries Act,* 1888, 51 Vic. No. 1; *Western Australian Pearl Shell and Beche-de-mer Fisheries Act,* 1889, 52 Vic. No. 1.

reasons for the inclusion of only four types of sedentary species are to be found in the fact that off the Western Australian, Northern Territory and Queensland coasts these four species were sought either for ornamental or human consumption reasons. In particular a very profitable industry had been established in relation to pearl-shell. However in recent years it was recognised that the Australian Continental Shelf was inhabited by a great number of other sedentary species which contributed to the ecology of the region, particularly in the Barrier Reef area, one of the great scenic marine areas of the world. It became apparent therefore that, in order to conserve the ecological balance in various regions, further action should be taken to define all those sedentary species which Australia could claim under Article 2(4) of the Convention on the Continental Shelf.

As mentioned above the legislation covers six main groups although not all species within the groups are included. The first group, the anthozoan group, comprises those living creatures which are fixed to or sessile on the seabed.[6] They are the so-called "flower-animal" group such as the corals and sea anemones which are found in great numbers in the Barrier Reef area and contribute so much to the remarkable coloration of the seabed in that area. Species of the echinoderm group affected by the legislation include sea-urchins, sea lilies and beche-de-mer (or sea cucumber) which are small creatures dwelling on the seabed and which are either immobile or have a slight degree of mobility.[7] These creatures also are to be found in a number of areas particularly in coral areas and for this reason they are protected as being important for the ecology of the Barrier Reef area.[8]

The next group are the bivalve molluscs and gastropods. Most of these fish are sought and taken for reasons of human consumption although some of them have valuable shells that are prized for ornamental reasons and one, the pearl-shell, of course for the pearl that it contains. The bivalve molluscs are the shell-fish with a hinged double shell lying immobile on the seabed or with some slight burrowing capabilities. The main species are oysters, pearl-shells, clams, mussels and cockles. It is to be noted that one species of bivalve mollusc, the scallop, is not included probably because this mollusc can propel itself from one point to another on the seabed rising above it during these movements. It is to be assumed that the drafters of the legislation considered this capacity of movement, even though the scallop's point of departure and point of return to the seabed can be accomplished in a short period of time, took it outside the designation of organisms which could only move in constant physical contact with the seabed itself. The next group of sedentary species are the gastropods or shell-fish of a univalve nature.[9] These are the shell-fish or sea snails with one

6. The classes listed are:
   1. Corals included in the Phylum Coelenterata, Class Anthozoa or Class Hydrozoa.
   2. Lace Corals included in the Phylum Ectoprocta, Order Cheilostomata or Order Cyclostomata.
   3. Sea anemones included in the Phylum Coelenterata, Class Anthozoa (other than sea anemones included in the Family Minyadidae).
   4. Sea pens included in the Phylum Coelenterata, Class Anthozoa, Order Pennatulacea.
7. The classes listed are:
   1. Sea urchins included in the Phylum Echinodermata, Class Echinoidea.
   2. Sea lilies included in the Phylum Echinodermata, Class Crinoidea, Sub-order Millercrinida.
   3. Beche-de-mer (or trepang).
8. The beche-de-mer is exploited for reasons of human consumption.
9. Another related group which is covered by the Proclamation is the chiton.

shell which may extrude their ventral organisms from their shells and which are either immobile on the seabed or capable of slight movement on it. The species covered in this class include abalone, green snail, trochus, triton-shell, helmet-shell and cone-shell.[10] The other groups covered are sponges and species of sea-weed and kelp[11] which are valuable for commercial purposes and in the preparation of pharmaceutical substances.

There is no doubt that all the classes come within the definition of article 2(4) in that they are either attached to or immobile on the seabed or capable of slight movement, this movement being in constant physical contact with the seabed.

The listing of these classes as sedentary does not of course prevent further proclamations from being made as other groups are recognised as sedentary species by international practice. However it is to be noted that no species of crustacea such as prawns, crayfish or crabs have been included. The Australian prawn can move into the waters above the seabed at particular times although it is a species that remains burrowed into the mud of the seabed for most of its diurnal cycle. Until further state practice clarifies the scope of article 2(4), it would seem that the present view of the Australian Government is that these mobile characteristics takes the prawn outside the provisions of the Convention. Likewise no attempt has been made to include crayfish or crabs although it seems that some species of crabs on the Australian continental shelf would have characteristics similar to the king crab of the northern Pacific which has been treated as a sedentary species.[12]

Section 11 of the Act enables controls in relation to particular species of sedentary resources to be imposed in particular areas around the Australian coastline, as distinct from blanket prohibitions applied to all areas and all species. Different control areas are set out in accompanying notices made under the legislation. The boundaries of these control areas are related to the areas of the continental shelf adjacent to particular States. They therefore take account of the need for the protection of species which are to be found in these different areas. For example the notice in relation to the Queensland division establishes a controlled area in respect of corals, sea-urchins, beche-de-mer, bivalve molluscs and gastropods. The notice relating to the Victorian division applies only to two classes, oysters and abalone. The controlled area in the Tasmanian division applies to sea-urchins, abalone and bailer-shells and certain other types of gastropods; that of the Western Australian division to beche-de-mer, pearl-shell, razor-fish, abalone, trochus, green-snail; and that of the Northern Territory division to sponges, beche-de-mer, bivalve molluscs and gastropods.[13]

Conservation controls are imposed by notices issued under section 12 of the Act. These notices[14] which fall into several classes operate in specified controlled areas. In the first place there are notices which prohibit the taking of particular species which are less than a certain length or a certain weight. These conservation notices apply to pearl-shell, trochus and green-snail.[15] In the

10. However, the classes *excepted* are—
    Sea hares, sea butterflies, sea slugs of the order Opisthobranchiata, violet snails of the Family Ianthinidae and organisms of the Family Heteropoda.
11. Sea Weed of the Family Gelidiaceae or Family Gracilariacea, kelp of the Genus Macrocystis.
12. See above n. 1.
13. These notices are to be found in Commonwealth Gazette, No. 27, 1970, Pp. 2322-2324.
14. Commonwealth Gazette, No. 28, 1970, Pp. 2325-2327.
15. *Conservation (Australian Continental Shelf) Notice No. 1.* See also *Notice No. 4* (Northern Territory).

second place are the notices which relate to the method of taking sedentary species. It is provided that the taking by any method of trawling or dredging is prohibited. This applies again to pearl-shell, trochus, beche-de-mer and green-snail.[16] Furthermore there is a notice relating to the removal of sedentary organisms which prohibits the removal of sedentary organisms unless they are dead. This notice applies to pearl-shell, trochus, beche-de-mer and green-snail.[17] Removal would seem to encompass any physical dislocation of sedentary organisms even though it does not involve "taking" and of course could be accomplished by removal by hand as distinct from a trawling or dredging process. Finally there is one notice which prohibits the taking of certain types of shells in the Queensland division.[18] The shells affected are triton-shells, giant clams and helmet-shells. While the other prohibitions are subject to the licencing provisions set out in section 13 there is a total prohibition on the taking of these shells. It is clear that the Government has taken the view that the ecology of the Barrier Reef area was a paramount consideration and has recognized that these gastropods, which attack coral predators such as the crown of thorns starfish, should not be subject to exploitation.

Finally reference may be made to the licencing provisions set out in section 13 of the Act. It is provided that an appropriate Minister may grant a licence authorising a person to search for or take sedentary organisms of a specified kind. The licencing procedures however may have a wider scope. They enable the Minister to authorise the use of a ship for the taking for commercial purposes of sedentary organisms or the employment of divers for this purpose. It can therefore be seen that a different type of licencing provision may be related to the nature of the species and the method of taking it. While dredging in one case may be too deleterious to the ecology of a region, diving and hand removal may not.

It is to be hoped that other nations will scrutinise in detail the structure and substantive provisions of the Australian legislation. The legislation is based on a careful assessment on the sedentary nature of species: no attempt has been made to include doubtful species within this category. Furthermore the controls that are imposed are not all out prohibitions but selective controls related to the method of taking a species, the size or weight of the species, the area in which the species may be found and the personnel who may be used in the taking of the species. The pattern of the legislation therefore is designed to protect not only the ecology of the region but also the level of productivity in relation to the exploitation of resources. It is not intended to constitute a structure for the "economic colonization" of the marine resources of the continental shelf. Consequently the structure of the legislation can be related to any international rights of a preferential nature acquired by coastal countries over non-sedentary resources in continental shelf areas outside the 12 mile zone, which may result from any agreement reached at a new law of the sea conference.

R. D. LUMB*

16. *Conservation (Australian Continental Shelf) Notice No. 2.*
17. *Conservation (Australian Continental Shelf) Notice No. 3.*
18. *Conservation (Australian Continental Shelf) Notice No. 5.*

*LL.M. (Melb.), D.Phil.(Oxon.), Reader in Law, University of Queensland.

A SIGNPOST TO COMMONSENSE

When faced with an application to develop land, local authorities possessing town planning powers have three alternative courses of action open to them; to approve unconditionally, to approve subject to conditions, or refuse the application. Obviously the second alternative, that of imposing conditions, gives local authorities a powerful weapon in the fight to control the standards of our environment whereby they can ensure that inherently acceptable development conforms to good planning standards when carried out.

The House of Lords has recently had to consider two important aspects of planning permissions subjected to conditions; aspects bearing the greatest importance for local planning authorities in the United Kingdom and having a derivative significance in Australia also. In *Kent County Council* v. *Kingsway Investments (Kent) Ltd., Kent County Council* v. *Kenworthy*[1] each of the conjoined appeals raised similar questions concerning firstly the validity of a time condition and secondly the severability of invalid conditions. In the *Kingsway Investment* appeal, the Kent County Council, the local planning authority, had granted planning permission for residential development subject (inter alia) to the following conditions: (i) that details relating to layout, siting, height, design and external appearance of the proposed buildings, and means of access thereto shall be submitted to and approved by the Local Planning Authority before any works are begun; (ii) the permission shall cease to have effect after the expiration of three years unless within that time approval has been notified to those matters referred to in condition (i) above. The period of three years specified in condition (i) was by successive extensions extended to September 26, 1962, but a further extension was refused. No detailed plans were approved by Kent County Council within the extended specified period. The normal channel of objection by appeal to the Minister of Housing and Local Government was no longer open to the developers because of the lapse of time, so the only line of attack available to them was to apply for declarations that the second condition was *ultra vires* and/or unreasonable, and further that the second condition was severable from the remainder of the permission and that, accordingly, the permission still subsisted.

The practice of granting outline planning permissions is not unknown in Queensland where the Local Government Court has impliedly sanctioned such a procedure on appeal. In *Goodsir and Others* v. *Brisbane City Council*[2] an application was made to the Council for permission to erect a building on an area of something more than four acres near Heroes Park, Taringa, for a University Women's College. Brisbane City Council refused the application on the grounds of adverse effect on the amenities of the locality, and in his judgment allowing the appeal, Byth D.C.J. indicated that "(t)he application was made to the Council in principle only without setting out details at that stage of the layout of the buildings and the grounds, and the Council dealt with the application in principle only. The appeal has been contested today in principle only and, in my opinion, it should succeed." Although in the *Goodsir* case the matter of fixing appropriate conditions was remitted to the Council to be dealt with within 28 days of receiving site plans from the appellants, quite obviously it was open to Byth D. C. J. to impose such conditions, including time conditions similar to those imposed in the *Kingsway Investments* case, on appeal.

1. [1970] 1 All E.R. 70; [1970] 2 W.L.R. 397; [1970] L.G.R. 301; 21 P. & C.R. 58.
2. [1967] Q.J.P.R. 66.

It is perhaps worth pointing out that a decision delivered against the local planning authority in the *Kingsway Investments* appeal would have had ramifications not only throughout its own area but throughout the areas of many other local planning authorities also. The condition that the respondents in both appeals alleged to be objectionable was a usual condition to be found in a multitude of "outline" permissions given by them and other authorities, and the courts were therefore faced not only with problems of precise interpretation but arguments "ab inconvenienti" also. As Lord Denning M. R. said in his dissenting judgment in the Court of Appeal[3]:—

> "The condition here in question—that the details of reserved matters are to be submitted *and approved* within a specified time—has been imposed for 16 years at least by the defendants. And by other councils too, see *Hamilton* v. *West Sussex County Council.*[4] It has been accepted by all concerned as being reasonable and valid, as is witnessed by the contractors' letter which I have read. No one has sought to challenge it in the courts until recently. It would be most unfortunate if, after all these years, the condition were to be held now to be bad, and, what is worse, for it to be held that the condition can be simply struck out, leaving those permissions shorn of the condition, good in perpetuity. Many permissions, which were thought to be dead, will be resurrected: and the defendants will *either* have to let them go forward (and by so doing injuriously affect the countryside) *or* they will have to revoke them and pay compensation to the owners (which may run into millions of pounds). The compensation would be a clear windfall for the owners who have done nothing to earn it save put in an application for outline permission years ago.
>
> I do not think it would be right for the courts to upset a state of affairs which has continued so long without challenge; and thereby to throw the planning administrators of several countries into confusion. I would repeat in regard to planning practice what I said recently in regard to commercial practice in *United Dominions Trust Ltd.* v. *Kirkwood*[5]. When it has grown up and become established, the courts should not seize on a flaw so as to invalidate past transactions or produce confusion. It is a maxim of English law to give effect to everything which appears to have been established for a considerable course of time and to presume that which has been done was done of right and not in wrong. Seeing that the validity of this condition is balanced on a knife's edge, we should uphold it rather than destroy it by fine-spun arguments."

However, although the first problem the House of Lords had to decide, namely the validity or otherwise of the particular time condition, was of great practical importance to local planning authorities, its general legal significance is perhaps of less moment. The main contention by the respondent was that the condition was void in view of the fact that it made no provision to cover the time that might be required for an appeal to the Minister of Housing and Local Government. It was an argument that for its success demanded "a close scrutiny of words"[6] by the court and a process of reasoning based on an "ardent literalism"[7] by counsel for the respondents. By a bare majority the Court upheld the appeal on this point since on a true construction of the second condition in

3. [1969] I All E.R. 601 at p. 612.
4. [1958] 2 All E.R. 174; [1958] 2 Q.B. 286.
5. [1966] I All E.R. 968 at p. 980; [1966] 2 Q.B. 431 at pp. 454, 455.
6. [1970] I All E.R. 70 at p. 84 per Lord Morris of Berth-y-Gest.
7. *Ibid.*

each case, the applicant satisfied it, in that a condition as to time was, generally, *intra vires* section 14(1) of the *Town and Country Planning Act* 1947 provided that, as in the cases under consideration its imposition was warranted by a planning consideration. Further that, on a true construction of the second condition in each case, the applicant satisfied it, in a case where the local planning authority either refused approval of the details submitted by him or approved them subject to conditions or failed to determine his application for approval, if, within the specified period, he had an appeal pending before the Minister against that refusal, conditional approval or failure to determine and the Minister subsequently held that unconditional approval should have been given. Consequently, if the applicant acted reasonably, submitting details in good time before the expiry of the period specified, a condition requiring approval to be given within a specified period did not deprive him of his rights of appeal and the second condition in each case was, therefore, valid.

It is clear from the language of Lord Denning M. R. in the Court of Appeal and of the majority in the House of Lords that the impugned condition was to be given a benevolent meaning by applying the well-known maxim "ut res magis valeat quam pereat", whereas the minority took a formalistic view that the addition of words to the condition to give it business efficacy was not a proper exercise. Athough the point in issue was a technical drafting one the inarticulate major premise for the majority judgments can fairly be said to be that a local planning authority should not have its affairs put into needless confusion because of a formalistic technical objection to an old planning permission. As Lyell J. said in his judgment in the Queens Bench Division.[8]

> "in carrying out its duty to plan for a wide area the authority clearly has to keep in mind what developments it has already approved when determining what further developments should be allowed. It has to be borne in mind that when a permission, even a permission with full details of the work to be done, is granted, the authority has no certainty that the work will be carried out. When faced, however, with a new application for a development in an area where other permissions have been granted, it may well be of the utmost importance to their decision on the new application, that they should be able to form a realistic judgment whether the existing permissions will be implemented by the grantee. Take a simple example. The authority has already given permission either detailed or outline for the building of one hundred new houses in a parish and has reached the limit of the number of houses which for the time being should be built. It is important, therefore, for the authority to assess realistically how many of those houses will in fact be built. The defendants argue, and in my judgment with force, that until a holder of a permission has put in details it is very difficult to assess whether he is really intending to build the houses for which he has got only outline permission. A man who has gone to the expense of getting detailed designs and plans is much more likely to have a serious intention of building than one who at little relative cost has obtained outline planning permission. By imposing a condition that within a given period details must be approved the authority can perform its task more effectively, in that it can from time to time re-assess at least the probable amount of development which will actually take place under permissions already granted and so do greater justice to an applicant whose request for permission is under consideration."

8. [1968] 3 All E.R. p. 197 at p. 201.

All the practical administrative arguments of sensible convenience were in favour of Kent County Council, and in the House of Lords they prevailed. In much the same way the English courts now regard with a benevolent eye the drafting of enforcement notices served to control development in breach of the law after previously requiring a strict technical standard of draftsmanship, failure to comply with which rendered the notice a nullity.[9]

It is submitted that this more flexible attitude towards irritating technical impediments in planning law is to be applauded as a clear recognition by the courts of the broad scope of the *Town and Country Planning Act*, 1962, and also of the basic policy of upholding that Act which resides in the local planning authorities and the responsible Minister of the Crown. The Courts should not take isolated decisions based on technicalities that as a consequence overturn by a judicial side wind long accepted policies based on a long accepted statute. It may be also that the *Kingsway Investments* case represents another stepping stone in the gradual evolution of a consistent and liberal attitude towards laws of social administration, that segment of the law to which town planning law belongs.

The second major point arising in the case, that of severability, was again a difficult one for the judges to decide, and the judgments reveal not only the problems of a precise legal solution but also illustrate to an extent an acknowledgment of town planning law as an area of particular and special importance in the general field of administrative law.

Kingsway Investments (Kent) Ltd. and Mr. Kenworthy had formidable hurdles to overcome even if they established the invalidity of the impugned condition. Lyell J. decided that the condition was indeed invalid but refused to grant a declaration that it was severable from the rest of the outline planning permission, so that the void condition infected the rest of the permission which consequently ceased to subsist. After a review of the authorities[10] he adopted the view that Kent County Council considered it was important to control the time when details should be approved, and that had it been pointed out to them that the form they had adopted as the normal condition was invalid, the result would not have been that a permission with unlimited time for approval of details would have been substituted. This antithesis between conditions fundamental to the whole planning permission whose invalidity renders the whole permission void, and trivial conditions, whose invalidity does not have this effect was adopted by Lord Denning M. R. and Davies L. J. in the court of Appeal; and Lord Morris of Borth-y-Gest, Lord Upjohn and Lord Donovan in the House of Lords. True, the learned judges differed in the conclusions they drew about the importance of the particular condition under scrutiny, but their attitude on the theoretical point was quite clear. All the judges mentioned regarded a planning permission with conditions attached as much the same kind of creature as any other unilateral licence. However the most significant recognition of the special importance of conditional planning permissions was given in the robust judgment by Lord Guest in the House of Lords when he said that a "(p)lanning permission is an animal sui generis not to be compared with licences and similar permissions. It seems to me that planning permission is

9. *Miller-Mead* v. *Minister of Housing and Local Government* [1962] 2 Q.B. 555; [1962] 3 W.L.R. 654; 126 J.P. 457; 106 S.J. 492; [1962] 3 All E.R. 99; 13 P & C.R. 425; 60 L.G.R. 340.
10. *Pyx Granite Co. Ltd.* v. *Minister of Housing and Local Government* [1958] I All E.R. at p. 637; [1958] I Q.B. at p. 579. *Hall & Co. Ltd.* v. *Shoreham-by-Sea Urban District Council* [1960] I All E.R. 1. *Allnatt London Properties* v. *Middlesex County Council* (1964), 62 L.G.R. 304.

entire. If a condition as to its grant flies off owing to its invalidity, the whole planning permission must go, and it is impossible to separate the outline permission without the time limit from the grant. The good part is so inextricably mixed up with the bad that the whole must go (see *Pigot's case*[11] and *McDonald* v. *McDonald's Trustees*[12] per Lord Cairns L. C.)".[13]

What is the position in Queensland with regard to severability? Here, of course, there is direct appeal to the Local Government Court both on planning merits and planning law so that an invalid condition can be dealt with directly by the Court on such an appeal and a valid condition substituted if necessary. However there remains a further appeal on a point of law to the Queensland Supreme Court[14] where an invalid condition either sanctioned or unnoticed by the Local Government Court could be corrected and where the difficult question of severability might have to be decided. The same problem would arise equally sharply in those Australian states that provide for administrative as opposed to judicial appeals from decisions on town planning applications, such as Western Australia and Tasmania.

An important decision for any Australian Court to consider would be *Lloyd* v. *Robinson*[15] where the High Court of Australia had to consider the propriety of conditions imposed on a subdivisional approval by the Town Planning Board in Western Australia, and which the respondents considered to be beyond power. The High Court rejected this contention so that its observations on severability were "obiter" only, but it did in fact make comment on the apparent assumption by the respondents that, if the conditions were invalid, the approval would stand stripped of the conditions or that, alternatively, the Board would be under a duty to give a fresh approval without the invalid conditions. Faced with this assumption their Honours commented: "We would not wish to be taken as accepting either conclusion. It may well be that in the supposed situation the approval given would itself be void. That would mean that the Board . . . . would be under a duty to deal with the application . . . . according to law but would not be compellable to decide it in any particular way."[16]

The Land and Valuation Court in New South Wales, a court it is worth mentioning in passing to whose decisions the Local Government Court in Queensland pays the greatest respect, had a similar difficulty to resolve in *Woolworths Properties Pty. Limited* v. *Ku-ring-gai Municipal Council.*[17] Here the respondent council had approved a development application on the condition that the appellant would provide fifty car-parking spaces or else contribute £5,000 "towards the enlargement, extension, or improvement of car parking facilities in the vicinity." Else-Mitchell J. held that the requirement for a cash contribution was invalid since it was not sufficiently related to the proposed development and that the provision of car-parking space, although reasonable, was no longer practicable. In these circumstances he held that the proper course, despite the Council's conditional approval, was to refuse the application altogether. Such an attitude could only be consistent with the trench-view expressed by Lord Guest in the *Kingsway Investments* case, and the judg-

11. (1614) 77 E.R. 1177 at 1179.
12. 1875 2 S.C. (H.L.) 125 at 132.
13. [1970] I All E.R. 70 at p. 89.
14. *City of Brisbane Town Planning Act*, 1964 to 1969, section 28(3).
15. (1962) 107 C.L.R. 142; 8 L.G.R.A. 247.
16. *Ibid.* at pp. 152; 253.
17. (1964) 81 W.N. (Pt. 1) (N.S.W.) 262; 10 L.G.R.A. 117.

ments in that case in all three courts in which it was considered will provide a valuable mine for Australian counsel and judges should the questions of invalidity and severability of conditions imposed on a subdivisional or town planning permission arise for consideration in Australia.

Professor Sawer has suggested[18] that Australian town planners are apt to rush ahead with attention fixed on what they regard as a great social objective and in doing so tend to forget about the legal limits within which they have to operate. It is certainly true that one man's "red tape" may be another's due process of law, but this really begs the question of where the boundaries of legal intervention should be drawn. The laws necessary to support the concept of town planning form a specialised branch of the law but it is doubtful if any other specialised branch operates in so widespread a fashion or is gaining such a generalised importance beyond that normally accorded to a specialised subject. Environmental problems are acquiring an acknowledged political significance throughout the world, and it is essential that those public organisations responsible for the conduct of planning policy should not be hamstrung by unduly restrictive decisions in the courts. Judicial "red tape" can affect them just as much as an occasional lawless decision by local authorities on planning applications can affect members of the public.

A. S. FOGG*

18. *Redevelopment and the Law of Town Planning*—a paper published in *Urban Redevelopment in Australia* (Ed. Troy) p. 136.

*M.A. (Oxon.), L.A.M.T.P.I., Solicitor (Eng.), Lecturer in Law, University of Queensland.

OBSCENITY—A BREACH OF "DECENT" STANDARDS?

During 1969 the public of Queensland witnessed a flurry of activity by the Queensland Police Force on the "censorship front".

This activity gave rise to two interesting Full Court decisions—by way of orders to review decisions given by Stipendiary Magistrates. Both cases involved the interpretation of that well-worn piece of legislation, *The Vagrants Gaming and Other Offences Acts,* 1931-1967.

First, in point of time, was *Bradbury* v. *Staines ex parte Staines*[1]. This case involved "that" word—used in a one-act play performed at the independent Twelfth Night Theatre, Brisbane—a play, which Douglas J.[2] and Matthews J.[3] described as of some serious moment in that it treated the theme of racial discrimination. Staines, who played the part of a "very, very rough Australian"[4] (Norm) in the play "Norm and Ahmed", used the words "fuckin' boong" as he punched Ahmed at the dénouement. The police arrested Staines and charged him under section 7(c) of the *Vagrants Gaming and Other Offences Act* (from now on called (The Act)) with using obscene language in a public place. The actor was duly convicted and fined by the Magistrate and appealed to the Full Court by way of review. The Court was called upon to interpret section 7(c)[5] of the *Act.* Matthews J. noted that that section would seem to be directed

1. [1970] Qd. R. 76.
2. [1970] Qd. R. at 85.
3. *Ibid.*, at 87.
4. *Ibid.*, at 78.
5. S. 7(c) says "Any person who, in any public place or so near to any public place that any person who might be therein, and whether any person is therein or not, could view or hear—
Uses any profane, indecent, or obscene language; shall be liable . . . . . ".