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 . . . . . ".

"towards control of persons who, by reason of language used by them, could be regarded as serious annoyances to others in public places".[6] However, he did not follow up that point. The Court arrived at a test of obscenity which could be compendiously described as a "community standards" test. The passages of Windeyer J. in *Crowe* v. *Graham*[7] where that Judge said:

> "Of this I would say only that the word 'obscene', as an ordinary English word, does, I think, still carry the meaning which Doctor Johnson gave us its primary sense: 'Immodest; not agreeable to chastity of mind; causing lewd ideas'; and, when used in the criminal law, it carries too the emphasis of the other sense, given by Doctor Johnson as 'offensive; disgusting'. Writings are obscene by reason of what they describe, express or bring to mind, and the way and the words by which they do it. It is assumed incontrovertibly by the common law that obscene writings do deprave and corrupt morals, by causing dirty-mindedness, by creating or pandering to a taste for the obscene."

and further down the same page where he concludes:

> "In the result then, whatever secondary or additional meanings have been laid upon the word obscene, it has not lost the meaning of filthy, bawdy, lewd and disgusting; and any tribunal which has to say whether a thing is obscene has only to say whether the word reasonably describes the thing."

were quoted with approval by Douglas J.[8] and referred to by Stable[9] and Matthews JJ.[10] Having decided that what had to be determined was whether "the word" as used in the present context could be "offensive to current standards of decency", the Court divided two to one in the negative. Accordingly, the order to Review was made absolute and the conviction quashed.

The interesting point in the decision is the application of a purely subjective test to determine whether the offence had been committed. The Hicklin Test[11] was confined to "obscene publications" within the meaning given to that term in section 2 of the *Act*,[12] and the Judges in the present case were concerned with "what is today acceptable to ordinary, decent-minded people—males and females, with community standards".[13]

The ways in which Judges discern those standards are interesting. Matthews and Douglas JJ. did not divulge the circles they mix in, or know of, to determine them on their course of action. Stable J., however, details an experience at the racecourse, when he noticed general disgust against an over-enthusiastic punter who urged his choice on by using "the word" to qualify the word "beauty". He

6. *Ibid.*, at 88.
7. [1968] 41 A.L.J.R. 402 at 409.
8. *Ibid.*, at 87.
9. *Ibid.*, at 81.
10. *Ibid.*, at 89.
11. *R.* v. *Hicklin* [1868] L.R. 3 Q.B. 360, at p. 371. "I think the test of obscenity is this, whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall" Cockburn C. J. It is submitted that this test provides greater protection for a defendant if applied literally. It has, however, been diluted so that the tendency to deprave and corrupt has been assumed incontrovertibly to follow if a work is offensive to current standards of decency. In this way the Common Law has given up demanding hard-core evidence of depravity, or corruption caused by works coming to a person's notice—*vide* footnote 18. Expert evidence today suggests that no such assumption made by the law is a valid one, so that a literal application of the Hicklin Test would favour the defendant.
12. *Infra.*
13. *Ibid.*, p. 82 per Stable J.

also suggests what can be called the "porridge test"—i.e. if one uses "the word" to describe porridge to one's wife at the breakfast table she, as a decent member of the community, would be disgusted. If this is the way to determine general standards of decency in a community, then one can see that the extent of the meaning of obscenity will vary according to the width or otherwise of the circle of activities and pastimes of the judge of facts, e.g. would another judge who attends Rugby League Football matches at Lang Park have noticed the same reaction as did Stable J. on the flat at Eagle Farm racecourse? Such a vague test does not augur well for a defendant in these matters—for he will not know whether he has offended against the law until the particular judge of facts has given his decision. This hardly accords with accepted notions of justice when applied in the criminal field. The minority of people whose standards are those "to whom it is the breath of life to be seen or heard doing or saying whatever they regard as the 'in' thing of the moment"[14] are still entitled to the protection which would be afforded them by a law which is certain in application.

This problem of the lack of certain standards to be applied was noticed and commented on by Hart J. in the second case to arise before the Full Court—*Herbert* v. *Guthrie*[15]. The three respondents were the proprietors of a bookshop in Elizabeth Arcade in Brisbane. They had fifteen prints on display in the shop. Thirteen of them were entitled "Lysistrata and the Three Ladies" and two "Shower with a Friend".

The police obtained the issue of a search warrant under the provisions of s. 15(1) of the *Act*. They took possession of the fifteen prints. A summons was then issued to the respondents under s. 15(3) of the *Act* to show cause why the articles seized should not be forfeited to Her Majesty. This matter came on for hearing before another Magistrate.

Destruction and forfeiture of articles seized is covered by s. 15(4) which states, mentioning only relevant parts of the section:
"The Court shall—

(a) .....

(b) If the occupier or such other person appears, and it is found that the articles seized, or any of them, are of the character stated in the warrant and have been kept;

order the articles seized, except such as the court considers necessary to be preserved as evidence in further proceedings, to be destroyed or forfeited to His Majesty at the expiration of the time allowed for lodging an appeal."

It is to be noted that the articles must be "of the character stated in the warrant". This refers one back to s. 15(2) which states:
"No such warrant shall be issued unless—

(a) A complaint is made on oath; and

(b) The complainant states in his complaint that he has reason to believe that indecent or obscene publications are kept in some house, shop, room, premises, or other place, whether for sale, distribution, exhibition, lending upon hire, or being otherwise published; and

(c) The complainant also states on oath that one or more articles of the like character have been sold, distributed, exhibited, lent or otherwise published at or in connection with such place; and

14. *Ibid.*, at 82 per Stable J.
15. [1970] Q.R. 16.

(d) It is proved to the satisfaction of the police magistrate or justices that any of the articles so kept are of such character and description that their publication *would be an indictable offence or an offence under this Act and proper to be prosecuted as such.*"

Hart J. says: "The result is that merely falling literally within the definition (i.e. within s. 15(4)) is not enough to warrant destruction or forfeiture. The articles must also be of such a character or description that the publication would be a criminal offence and proper to be prosecuted as such."[16] This must mean that the offence under s. 12 of the *Act* or under s. 228 of the *Criminal Code* must be made out.

Section 12 of the *Act* states
"Any person who—

(a) Prints, photographs, lithographs, draws, makes, sells, or has in his possession apparently for the purpose of sale, or publishes, distributes or exhibits, any obscene publication or assists in so doing;
(b) .....;
(c) .....;
(d) Affixes to or inscribes on any house, building, wall, hoarding, gate, fence, pillar, board, tree, or any other thing whatsoever so as to be visible to a person in any public place, or affixes to or inscribes on any public urinal, closet, or sanitary convenience, or delivers or attempts to deliver or exhibits to any person, or throws down in the area of any house or into the garden or curtilage of any house, or exhibits to public view in the window of any shop, stall, or building, or otherwise publishes any indecent or obscene picture or printed or written matters;
(e) .....;
(f) .....;

shall be liable for a first offence to a penalty of forty dollars or imprisonment for three months; for a second offence to a penalty of one hundred dollars or imprisonment for six months; and for a third or any subsequent offence to a penalty of two hundred dollars or to imprisonment for one year; and on any conviction in the case of a newspaper, the registration thereof shall be liable to be cancelled by order of the court."
Obscene publication within section 12 has been given an extended meaning by s. 2. That extended meaning is as follows:

"Obscene publication includes any obscene book, paper, newspaper, or printed matter of any kind whatsoever, and any obscene writing, print, picture, photograph, lithograph, drawing, record or representation: In this definition the word "obscene" includes, *but without limiting the generality of its meaning,* emphasising matters of sex or crime, or calculated to encourage depravity: For the purposes of this definition a record shall be deemed to be obscene if the words or sounds capable of being reproduced therefrom are obscene".

The Magistrate ordered the thirteen "Lysistrata" prints to be forfeited to Her Majesty. The two other prints were given back to the respondents. An order nisi was made to show cause why the order forfeiting the thirteen "Lysistrata" prints to Her Majesty should not be reviewed.

16. [1970] Qd.R. at 27.

The Full Court had to determine whether or not there was sufficient evidence upon which a reasonable Magistrate could find that "their publication would be an indictable offence etc." and hence come within the terms of s. 15(4)(b) of the *Act*.

Again, a "community standards" test was applied by the three Judges on the Court. The Court divided two to one in favour of discharging the Order Nisi to Review, i.e. the majority decided that there was evidence upon which a reasonable Magistrate could have come to the same conclusion as did this Magistrate. The word "obscene" in the definition of "obscene publication" in s. 2 of the *Act*—although containing the *Hicklin* test of "encouraging depravity"— was given its ordinary meaning. Hanger, J.[17] quotes from Mr. Justice Fullagar in *R.* v. *Close*[18]:

> "As soon as one reflects that the word "obscene", as an ordinary English word, has nothing to do with corrupting or depraving susceptible people, and that it is used to describe things which are offensive to current standards of decency and not things which may induce to sinful thoughts, it becomes plain, I think, that Cockburn C. J., in the passage quoted from *R.* v. *Hicklin* was not propounding a logical definition of the word "obscene" but was merely explaining that particular characteristic which was necessary to bring an obscene publication within the law relating to obscene libel. The tendency to deprave is not the characteristic which makes a publication obscene but is the characteristic which makes an obscene publication criminal".

He then says "The point I wish to emphasize is in the last sentence". The learned judge then proceeds to quote from Windeyer J. in *Crowe* v. *Graham*[19]:

> "Writings are obscene by reason of what they describe, express or bring to mind, and the way and the words by which they do it. It is assumed incontrovertibly by the common law that obscene writings do deprave and corrupt morals, by causing dirty mindedness by creating or pandering to a taste for the obscene".

Then he goes on:

> "I may add, in an endeavour to stress further what I think these remarks make quite obvious, that while a tendency to deprave may be consequence of obscenity, *it does not express a concept in the meaning of obscenity.*"

Hart J. in applying a "community standards" test, says—

> "The legal definitions of obscenity are at a high level of abstraction and it is possible to descend by many ladders. Everyone has his choice. People in the same community, including those who hold judicial office, vary greatly in their opinions as to what is obscene. Even the same man is seldom constant in his view. His opinion in his youth is probably not the one he will hold in his age, especially if he has daughters. I think that the net result of the approach which we are bound to use is to give far too much weight to the opinions or rather the emotions of one man. Thus the result must often be just the luck of the magisterial draw. I do not suggest that the position would be different if a judicial draw were substituted. It would be far better if questions of indecency or obscenity were decided by a jury of twelve. Under

17. *Ibid.* at 21.
18. [1948] V.L.R. 445 at p. 463.
19. [1968] 41 A.L.J.R. 402 at 409.

s. 228 of the Criminal Code this can already be done in cases such as this where obscenity is alleged, and a magistrate has therefore, under s. 47 of Vagrants Act, a power to commit for trial. There are no doubt, in some cases, reasons why this should not be done. But in my opinion, a person charged with indecency or obscenity should have a right to a trial by a jury, if he so wishes. Juries of course are not infallible but they are a cross-section of the community and are thus more likely to reflect its ideas."[20]

One can only agree with the final statement in that extract. He neatly points out the vagueness of the subjective test which the Court has to apply in judging whether obscenity exists within the terms of the *Act*. It is to be hoped, now that Queensland has a Law Reform Commission, that that body will apply its mind to those areas of the criminal law where the tests to be applied to determine whether a person has breached the law are vague in content. It is to be deprecated that the criminal law of this State, in a matter of such importance as obscenity, is such that the legislature cannot define, with any greater precision than it has, the standards which it wishes to be applied. At present these standards are used as "screens" for the "emotions of one man"[21] which reflect the life style or moral values of that particular judge of fact. Such shifting sand on which to construct an edifice!

J. M. HERLIHY*

20. [1970] Qd.R. at 26.
21. *Supra,* footnote 18.

*B.A., LL.B. (Qld.), LL.M. (Lond.), Barrister-at-Law, Lecturer in Law, University of Queensland.

LIABILITY FOR ECONOMIC LOSS

"At present, I content myself with pointing out that in English law there must be, and is, some general conception of relations giving rise to a duty of care, of which the particular cases found in the books are but instances. The liability for negligence, whether you style it such or treat it as in other systems as a species of "culpa" is no doubt based upon a general public sentiment of moral wrong-doing for which the offender must pay. But acts or omissions which any moral code would censure cannot in a practical world be treated so as to give a right to every person injured by them to demand relief. In this way, rules of law arise which limit the range of complainants and the extent of their remedy. The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be—persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question."[1]

Although this statement would no doubt qualify as one of the most famous in modern English law, it has never been accepted by the courts without the imposition of limitations; and the question of what these limitations should be has never been given a precise answer.

1. *Donoghue* v. *Stevenson* [1932] A.C. 562, per Lord Atkin at 580.