

There appears to be no reason why a similar result should not follow in Australian Courts, thus giving to a clause like the Law Society's model dispute resolution clause the same operation as a *Scott v Avery* arbitration clause.

Finally, a word should be said about how such a clause operates. According to Mustill and Boyd:

"A *Scott v Avery* clause does not prevent the parties from bringing an action in the High Court. A writ issued in respect of the matter falling within the clause is not irregular or a nullity; and if, for example, a defendant waives the right to insist on an award, the action proceeds in the normal way. The effect of the clause is not to invalidate the action, but to provide a defence; and since the effect of the condition precedent is to prevent any cause of action from arising until an award has been obtained, there is no ouster of the jurisdiction of the Court, since there is nothing to oust. It has been said that such a clause 'postpones but does not annihilate the right of access to the Court'." (at 162, footnotes omitted)

4. Summary of Conclusions

- (i) The disputes clause considered in *Allco Steel* apparently was enforced by Ambrose J of the Queensland Supreme Court.
- (ii) *Allco Steel* holds that a disputes clause that is like a simple arbitration clause will not be enforced by means of a stay of proceedings.
- (iii) *Allco Steel* is apparently not authority for the proposition that a disputes clause in *Scott v Avery* form is not enforceable.
- (iv) As a matter of principle, a disputes clause in *Scott v Avery* form should be enforceable as a defence to Court proceedings concerning the dispute to which the clause relates.
- (v) The Law Society's model dispute resolution clause clearly is in *Scott v Avery* form and should therefore be enforceable in this manner. □

ENGINEERING-ENVIRONMENT

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Hang 'Em From the High Trees: Denning Supports Death Penalty

Former Master of the Rolls Lord Denning, the erstwhile promoter of "High Trees" estoppel and of a variety of constructive trusts has never been a stranger to controversy. Now he has hit the British headlines again, in an interview couched in "the famous Hampshire voice" but delivering itself of trenchant statements on the death penalty, juries, prominent judicial figures, homosexuals and illegitimacy.

Not surprisingly, his comments, made in an interview with *The Spectator* in August, have generated a number of outraged Letters to the Editor and various other comments.

The comments made by Lord Denning include:

On Marriage: "I think that one of the most deplorable things today is that the institution of marriage is going down. No end of people living together without being married. No end of one-parent families. They're never called bastards or illegitimate - those are words which are not allowed to be used, if you please."

On the Death Penalty: "It ought to be retained for murder most foul. We shouldn't have all these campaigns to get the Birmingham Six released if they'd been hanged. They'd have been forgotten, and the whole community would have been satisfied."

On Sentencing People to Death: Q: "It must have felt terrible when the black cap was put on your head?" A: "Not really ... there could always be a reprieve if it was a proper case."

On the Jury: "In my young days juries were all middle-aged, middle-class and middle-minded, to use Devlin's phrase. The present system of random juries may lead to random justice. Look how bad it is for these fraud cases, the Guinness trial, all that sort of thing. The jury aren't bright people, they aren't versed in accounts ... I'd have a panel of suitable jurors. I'd let names be nominated if you please by trade unions and the like, by big employers, by the banks. In other words, I'd have a list of respectable, responsible citizens. I wouldn't have every Tom, Dick or Harry, as they do now."

On Legalising Homosexuality: "Oh, I don't mind 'em not being put in prison, but I hate it being put on a par with other things. And lesbianism - Oh no! I'm still against it."

On Legal Fees: Q: "Isn't it a terrible indictment of the legal system that barristers charge such high fees that people can't any longer afford to defend their interests in law?" A: "Yes ..."

The comments not only sparked off a number of outraged responses, but also thoughtful comment by Marcel Berlins on the abolition by Lord Mackay of the Kilmuir Rules forbidding British judges to talk to the press. The article predicts, among other things, that such freedom will lead to public disclosure of judicial prejudices on a number of social and political issues.

□ Richard Phillipps