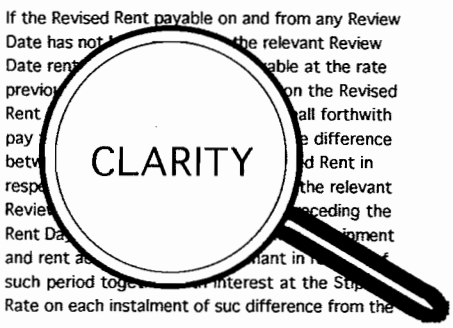

A movement to simplify legal language

Patrons: The Rt Hon Sir Christopher Staughton and the Hon Justice Michael Kirby

No 43: May 1999

Contents

Editorial

As Clarity members know, there is more to clear communication than simple language. Within the document, there is also tone, structure, and design. Beyond the document, there are other issues – for example:

- the culture in which the document is produced; and
- the fact that the document is (almost always) only one part of a larger communication package – a package that may include other documents, oral communications (including meetings, presentations, and phone calls), the media, or advertising.

These multi-disciplinary ideas shaped the life of the innovative Document Design Center, in Washington, DC, for 20 years (see page 3).

This broader approach to clear communication is the theme of this issue of Clarity. We chose that practical approach because of the recent development and success of the plain-language movement. The movement has triumphed in the debate about the compatibility of clarity (on the one hand) with accuracy, certainty, and precision (on the other). Take a bow, Clarity! That triumph is evidenced:

- in the United Kingdom, by the new rules for civil procedure announced by the Lord Chancellor's Department (see Clarity's March 1999 newsletter. A longer piece will appear in *Clarity* 44.);
- in the United States, first by the Securities Exchange Commission's requirements for plain-language prospectuses, and second by President Clinton's "Memorandum for the Heads of Executive Departments and Agencies" directing them to use plain language (see *Clarity* 42 pages 2 – 9); and
- in Australia, by the work of the Law Reform Commission of Victoria. The Commission's work caused general acceptance of plain-language principles throughout government, the courts, and business. It (more or less) silenced the legal critics of plain language and ultimately led to major law firms competing on the basis of the plainness of their documents.

Of course, much remains to be done on the implementation side; but the debate is, at last, over.

Now, the plain-language movement can focus even more on matters beyond mere "word substitution" (see Professor David Kelly's article on page 5). Focusing our attention on these broader practical matters will be worth it. There is more to "the cause" than language-based issues (important though they are). And those of us who strive to produce clear legal communications need to expand our knowledge and practical skills.

We need to worry more (like a dog worries a bone) at all sorts of issues that are beyond (although closely related to) legal language. For example:

- How can we use design to make legal documents communicate better? How can we use visuals in legal documents? What happens if the visuals compete with the "primacy of the written word"? (See the article by David More and Michèle Asprey on page 8.)
- What is the best way to order, and to go about ordering, ideas so that we give readers what they need and want? (See the article by Christopher Balmford on page 14.)
- How can we best revolutionise an organisation's culture to improve the communications that the organisation produces (rather than just chipping away at a few documents)? This is as relevant to the cultures of the law firms in which many of us are based as it is to the individuals and organisations for whom, and to whom, we write. How are you trying to change the culture in your organisation? (See the articles by Dr Susan Kleimann and Melodee Mercer, by Susan McKerihan, by Fulvia Nisyrios and Gail Williamson, and by Dennis Murphy QC. Those articles are in Section 2 beginning on page 26.)
- How do style, substance, and enforceability affect one another? (See the articles by David Knoll, Steve Palyga, and Eamonn Moran QC in Section 3 beginning on page 42.)

Clarity is best placed to address these practical ideas. This issue of Clarity's journal is full of the thoughts of practitioners in the field – people who aim to produce plain-language documents whether they work in law firms, at the bar, as parliamentary counsel, in major businesses, or as consultants.

We hope that this issue of Clarity's journal leads to discussion about the broader role Clarity is beginning to play. Now is the time to recognise the achievements of the plain-language movement and to make it clear to all that Clarity is leaping ahead to help achieve even more. Of course, Clarity will always retain its central focus on legal language and on legal documents. But Clarity's broader role will help cause the sorts of change that really matter:

- change that empowers consumers and improves their access to justice;
- change that improves the efficiency and effectiveness of business and government; and
- change that improves the public's perception of the legal profession, and its respect for the rule of law.

This issue of *Clarity* is divided into:

- Section 1 Beyond Language;
- Section 2 Beyond the Document; and
- Section 3 Style, Substance, and Enforceability.

Together, the 3 sections show how Clarity's broad role helps to make things clearer.

It all makes us wonder whether Clarity should consider changing the statement of its aims from "A movement to simplify legal language" to something broader. When you have had a chance to ponder this issue of *Clarity*, we would be interested to know what you think.

On a very different note, we are delighted to include on page 4 the highlights of the extraordinary career of Clarity's new co-patron the Honourable Justice Michael Kirby of the High Court of Australia. We welcome him to Clarity and thank him most profoundly for his support.

Two final points. Our approach to editing and consistency has largely followed Joe Kimble's approach set out in his Editor's Note to *Clarity* 42. And our deepest gratitude to our diligent, patient, and creative (honorary) designer, Eriko Beeken, from Horniak & Canny.

– Christopher Balmford,
Mark Duckworth, and Gail Williamson

Mark, Gail, and Christopher

Next issue

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Section 1 – Beyond Language

The US Document Design Center: A Retrospective

Dr Ginny Redish and Dr Susan Kleimann

Twenty years ago, the US government (National Institute of Education) funded a 3 year Document Design Project to foster clear writing and design in public documents. The government researchers who initiated the project asked for 3 types of work:

- understand the problems and the sources of the problems people have in dealing with typical documents,
- work with US government agencies to create model documents that work for users, and
- create new undergraduate and graduate curricula for people who will develop workplace documents in the future.

The winning proposal to conduct the Document Design Project was written by Dr Janice (Ginny) Redish and colleagues at the American Institutes for Research (AIR) in Washington, DC in a consortium with Carnegie-Mellon University (Pittsburgh, Pennsylvania) and Siegel & Gale (New York City).

One year into the project (1979), AIR set up the Document Design Center (DDC). Carnegie-Mellon University established their Communication Design Center (CDC) which was active through 1990.

So began a 20-year period rich with contributions to the growing field of document design. Document design as a field brings together aspects of anthropology, cognitive psychology, composition, graphic design, forms design, legal drafting, linguistics, organizational psychology, rhetoric, and sociology. The goal of document design is to create documents that meet the twin goals of:

- being technically and legally accurate and sufficient, and
- working for users.

From the beginning, the Document Design Center defined a document that works for users as one in which the people who are expected to use it can

- find what they need,
- understand what they find, and
- act appropriately on what they understand.

And do all that in the time and effort that they are willing to spend on the document.

Thus, the "design" in "document design" refers to the entire process of developing a document that works for users as well as to page layout, typography, and other aspects of formatting that are a critical part of the process.

In 1980, the Document Design Project team published the first *Review of the Relevant Literature* which established document design as an interdisciplinary field. In 1981, the team published *Guidelines for Document Designers*, the first handbook to help people in the workplace apply the results of research to their workplace projects. Although both of these books are now out of print, they strongly influenced thousands of people in many different fields to improve their documents and spawned other handbooks and model documents.

As the Document Design Project ended, the Document Design Center acquired other work and continued to serve as the source of information on document design (also called clear writing, information design, plain language, and usability). From 1979-1989, DDC published the newsletter, *Simply Stated*, reaching more than 18,000 people in its later years. At least in the US, the Document Design Center pioneered an approach to developing documents that included beginning by observing and interviewing users and understanding the systems the documents were part of and the environments in which they would be used. The Document Design Center's approach included iterative cycles of drafting and testing documents (and later software interfaces) with the actual users of the documents.

Ginny Redish directed the Document Design Project and then the Document Design Center for more than ten years. In 1992, Dr. Redish left DDC and started her own company, Redish and Associates, Inc. She continues to work with government agencies and private companies to help them bring clear writing and usability to their documents and software products. One of Dr. Redish's ongoing projects is working with rule writers and legal reviewers in Washington state agencies who are striving to comply with Governor Gary Locke's Executive Order requiring plain language in state regulations.

In 1993, Dr. Susan Kleimann became Director of the Document Design Center. Under her leadership, the Center's name was changed to the Information Design Center to reflect the growing need for clear communication in electronic formats as well as paper. Dr. Kleimann led many projects in the Information Design Center, included a rewrite of the Form 1040 instruction booklet for the Internal Revenue Service and a major satellite training course on reader-focused writing for the Department of Veterans Affairs. [Ed. This project is discussed in the article beginning on page 26.]

In November 1997, Dr Kleimann left AIR and was joined by two colleagues, Ken Keiser and Barbra Kingsley, in forming the Kleimann Communication Group (KCG). KCG continues to work with the Department of Veterans Affairs and other groups, translating complex information so that people can use it and training subject matter specialists and lawyers to develop clear and useful legal documents.

The American Institutes for Research has not named a new director for the Information Design Center.

You can email Dr. Ginny Redish by e-mail at redish@ari.net or visit her web site at www2.ari.net/redish. You can email Dr. Susan Kleimann at skleimann@erols.com or visit the KCG web site at www.beyondwords.com

Clarity's New Co-Patron

Clarity's new co-patron, **The Honourable Justice Michael Kirby, AC CMG**, has had a glittering career as a jurist in Australia and internationally – a career that has been marked by a strong commitment to human rights.

He was first appointed a judge at the age of 35. From 1975 to 1984 he served as foundation Chairman of the Australian Law Reform Commission.

He was President of the New South Wales Court of Appeal from 1984-96. In 1996, he was appointed a Justice of the High Court of Australia.

Within Australia he has held many other positions of national significance, including President of the Australian Academy of Forensic Sciences and Chancellor of Macquarie University. In 1991 he was awarded the Australian Human Rights Medal.

His work on the international stage is considerable. He is currently President of the International Commission of Jurists and a Member of the UNESCO International Bioethics Committee. Other positions have included being the Special Representative of the Secretary-General of the United Nations on Human Rights for Cambodia; Chairman of the OECD Inter-Governmental Group on International Data Flows; member of the Ethical Legal and Social Issues Committee of the Human Genome Organisation in Washington DC; Commissioner of the World Health Organisation's global commission on AIDS; and Independent Chairman of the Constitutional Conference of Malawi.

He judgments are renowned for being ordered, balanced and clear. As one senior counsel has written, they are designed: "to keep bright the image of the common law and to ensure that the reader, whether a justice of the High Court on appeal, a judge applying the decision, a litigant or an interested member of the public, has as full an opportunity as possible to understand and review the thinking behind the decision". (Geoff Lindsay SC, (1996) 70 *Australian Law Journal*, 377.)

MD

Plain English: An Underestimated Task?

Professor David Kelly

Reading a number of recent articles dealing with plain English gave rise to a couple of concerns. First, some of the plain English literature appears to underestimate the difficulties involved in simplifying the language of complex legal documents. Second, much of that literature remains focused on words rather than on the structure of legal documents. The first of these concerns is the subject of this article. In it, I will give 3 examples of the risk of underestimating the difficulties involved in simplifying the language of legal documents.

One word may not do the work of two

Some lawyers are rightly concerned that word substitution, or simplifying the words used in legal documents (rather than sentence and document structure), is risky and often achieves little. In their view, debates about "start" rather than "begin" or "commence" are simply not worth the effort. And I agree with them.[1] But my concern is about more serious matters than that. It's about the risk of word substitution in general. Take the words "terminate" and "expire", for example. Sometimes, we can substitute the word "end" for each. Sometimes, we can use "cancel". But those substitutions ignore the nuances of the words "terminate" and "expire" in the context of a legal agreement.

Traditional legal drafters use the words to refer to 2 different situations. "Expire" describes the natural ending of an agreement by the passing of the specified time. "Terminate" describes the non-natural ending of the agreement, when one party exercises a right to bring it to an end before it expires.[2] These are different concepts. They may require different words if they are not to be confused with one another. Take, for example, a provision which states what is to happen "when this agreement ends". Does this refer solely to natural ending or does it embrace non-natural ending as well?

I can already hear the response of many plain English enthusiasts: "Both, of course!". And in one sense, that's true – true but not sufficient. Two points deserve special emphasis.

The first is that the audience for the document is not just the people to whom it is primarily directed – the parties to the agreement. The audience includes others as well – including the parties' legal representatives (if they have them) and any magistrates or judges who may be called on to interpret the agreement. The drafter needs to take account of their needs as well as those of the primary audience.

The second, equally obvious, point is that lawyers and judges are accustomed to the 2 words and their accepted meanings. It follows that replacing "expires" and "terminates" with "ends" runs an unnecessary risk. The risk is not so much that a magistrate or judge will read the word "end" more narrowly than is intended, though that risk cannot be totally discounted. It is, rather, that one is creating an opportunity for argument that it is not in the interests of one's client to create.[3] If a dispute arises, it may be in the interests of the other party to raise and pursue arguable points even if they are of doubtful merit.[4] In drafting for a client, one should avoid providing the other party with any ammunition of that type.

I hasten to point out that this does not mean that the words "terminates" and "expires" have to be retained.[5] The risk I have referred to can be avoided by using a variation of "ends" for all cases where one is talking of the non-natural ending of the agreement.[6] That variation could be "is ended". So, when talking of obligations which arise whether the ending is natural or non-natural, one would use a clause beginning "When this agreement ends or is ended". That, surely, is as patently clear as "When this agreement expires or terminates". And it is certainly preferable to using the definitional trick – "ends" means ends or is ended – which is another way of avoiding the relevant risk.

Meanings, common and legal

Another problem with focusing on word substitution is that it runs the risk of ignoring the special meanings that judges have been willing to give to common words[7] in order to achieve what they regard as just results. In some cases, judges have given some words distorted meaning. They have even given different legal meanings to words which, in common language, are synonyms.

Nowhere has this tendency been more noted than in the area of insurance. Faced with judicial distortion of the language of their policies, insurers have striven to use different words to achieve their commercial ends. And the judges have continued to pursue their instincts of fairness and equity, despite the apparent constraints of the words used. The resulting conceptual complexity cannot be simplified by tinkering with words. One simply has to live with the oddities and make the most of them.

Let me give an example.

A few weeks ago, I was faced with the following draft Year 2000 exclusion in an insurance policy:

> The insurer will not be liable to indemnify the insured against any loss or damage that is directly or indirectly caused by, or results or arises from, or is incurred in any way in connection with, a failure of any electronic equipment or function to meet Year 2000 compliance.

This exclusion cries out for simplification. First, why "direct or indirect"? Why raise the distinction? If something is *caused indirectly* by something else, it must be true to say that it is *caused* by that something else. But that simple logic won't do. Some judges, in some contexts, have interpreted "cause" as only referring to "cause directly". So the words have to remain.

OK. But why not simply use any one of "caused by", "results from", "arises from" and "is incurred in any way in connection with"? Why all 4? Again, the answer lies not in the *language*, but in the *law*[8]. Part of the answer lies in the fact that the judges have drawn a distinction between "proximate" causes and other causes. Wordings like "caused by" or "results from" are generally interpreted as referring to a *proximate* cause or "effective"cause. Wordings like "arising from" or "incurred in connection with" are generally interpreted as referring *not* just to a proximate cause, but also to something much less obviously the cause of a loss.

Consequently:

- the use of the latter wordings is clearly preferable, from the insurer's point of view, in excluding its liability for losses; and
- the use of the former wordings is equally clearly preferable, again from the insurer's point of view[9], in setting out the losses covered by the policy.

It follows that, for the Year 2000 exclusion, it is not just a matter of identifying 4 synonyms and replacing them with one. To do so would defeat the insurer's commercial aims. However, the wording of the exclusion can certainly be simplified. In the context of an exclusion from an insurance policy, "arising from" is more appropriate than "caused by" or "resulting from". Those last 2 can therefore be dispensed with. But not, I think, "incurred in any way in connection with". Why not? Because it might (just *might*) cover more than "arising from"; and an insurer will not want to take any risks with

Year 2000 compliance: *everything* has to be excluded.

"Deemed" and the use of fictions

Just about everyone in the plain English movement has condemned the use of the word "deemed". Some people seem to think that it can be got rid of by word substitution. Certainly, it is possible to substitute "is taken to be" or "is to be treated as", instead of "is deemed to be". But that is not plain English. It's asking the reader to perform a conceptual task that is unnecessary. It's preserving the fiction inherent in the ugly word "deemed". Plain English is not just about getting rid of ugliness!

But things get hard when one attempts to get rid of the fiction. Let me give an example.

Professional indemnity insurance policies insure a person against liability for errors in the conduct of his or her profession or occupation. Typically, a policy covers a single 12 month period. It is said to cover claims made against the insured during that period, not errors made by the insured during that period. It is therefore called a "claims made" cover, not an "occurrence" cover.

Now, while it says that it only covers claims made against the insured during the period of insurance, that is misleading. In fact, it also covers some claims made after that period: if an insured reports facts (an error) to the insurer during the period of insurance, a claim arising from those facts is also covered by the policy. The method by which it is covered is the critical thing for my purposes. What the policy says is that the subsequent claim "is deemed to have been made during the period of insurance".

Now, it may seem easy to get rid of the deeming provision. The provisions defining the cover amount to the following propositions:

- This policy covers a claim "x".
- A claim "y" is deemed to be a claim "x".

These 2 propositions can be amalgamated:

> This policy covers a claim x and a claim y.

Nothing to it!

But that type of glib rewrite just won't do. The main problem is that it has been made superficially. The writer has forgotten to ask "what is the *total* effect of deeming y to be x?". Had the writer asked (and answered) that question, he or she would have realised that the rewrite may have unintended effects on other parts of the policy – perhaps a clause several pages distant. Indeed, that is precisely the case in many professional indemnity policies.

Those policies often contain a provision limiting the amount of the insurer's liability. The limited amount (say, $10 million) applies in relation to any claim made under the policy. But it is also an *aggregate* limit - that is, it is the limit of the insurer's liability in respect of *all* claims in total made against the insured during the period of insurance. The last 10 or so words are the critical ones. The *rewritten* cover ("This policy covers claims x and claims y.") distorts the operation of the aggregate limit. In applying that limit, we can only take account of claims actually made during the period of insurance. The problem is that we cannot take account of claims made later that arise from facts notified during the period of insurance. Under the original deeming provision, later claims are deemed to be made during the period of insurance. Consequently, they can be taken into account in applying the aggregate limit.

That is clearly what the insurer intended. It is clearly on that basis that the insurer set its premium. The translator has rewritten its policy in a way which defeats its intentions and which exposes it to a higher level of claims in respect of the period of insurance than it has charged a premium for![10]

This does not mean that "deeming" provisions are necessary or even useful. It is not necessary to resurrect a "deeming" provision to achieve what the insurer intended. One can simply redraft the aggregate limit clause by deleting reference to "made against the insured during the period of insurance" and substituting "in respect of which the insured is entitled to an indemnity under this policy". Simple. But so very easy to overlook.

Conclusion

I have given 3 examples of the difficulties associated with word substitution and related simplification techniques. I hope I have demonstrated that doing plain English is far more difficult than talking about it. I am, of course, not questioning the movement to plain English in legal documents. I am simply expressing the fear that plain English enthusiasts who concentrate on word substitution may underestimate the difficulties involved in simplifying complex legal documents. If they do, they run the risk of reinforcing the erroneous view that plain English distorts the effect of legal documents. And that would be a great pity. Done well, plain English brings enormous benefits to everyone. Done badly, it provides ammunition to its opponents.

Why give the suckers an even break?

Endnotes

1. Oddly enough, some of the "legal" words most criticised may have passed into the vernacular. Take the widely despised word "deemed" for example. I don't know how popular it has become in other countries, but it is now regularly used by non-lawyers in Australia - as in "The umpire deemed him out LBW".
2. In some cases, the termination may be automatic.
3. This is not to cosset Flesch's Judge Fiendish. It is simply to recognise that a drafter has to do more than get things right for the sympathetic reader.
4. There is also a risk of delaying negotiations for the settling of an agreement, but that is another story.
5. Though I wouldn't regard that as a tragedy.
6. This is, of course, not the only way. One might, instead, use "ends early" for non-natural ending of an agreement.
7. I am not referring to clearly "legal" concepts, like "fee simple", "share", "domicile" and the like.
8. This dichotomy is purely for explanatory reasons. The law is language. Some plain English enthusiasts overlook the fact.
9. Leaving aside their ultimate impact on customer relations etc.
10. The later claim may not even be taken into account in the year in which it is made, because that claim may be specifically excluded from cover on the basis that it arose from circumstances notified to the insurer before the policy was renewed.

***David Kelly** is the former Chairman of the Law Reform Commission of Victoria where he initiated and led the plain language debate in Australia. Now, he is the Director of Clear Communication at Phillips Fox, lawyers, Melbourne.*
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Construction, Deconstruction, Reconstruction: Co-operative Contracting and the C21 Construction Contract

David More and Michèle Asprey

In 1996 the communications consultants Montague Leong Design Pty Limited began designing a complex construction contract for the New South Wales Department of Public Works and Services. With the Department and its legal advisers, they formed a team which produced the first edition of the C21 Construction Contract, published in November 1996.

Late in 1997, as the project entered its second phase, Michèle Asprey joined the team as a specialist in simplifying legal language.

Background to the project

The requirement The NSW Department of Public Works and Services (DPWS) is responsible for around a quarter of the Government's annual construction expenditure of about AUS$6 billion each year.

Virtually all DPWS construction projects employ standard contracts. The C21 Contract is one of these. It was developed for use in major architectural and engineering projects – those valued over $500,000 – undertaken by pre-qualified 'Best Practice' contractors.

The context The C21 Contract grew out of the recommendations of the 1992 Royal Commission into Productivity in the Building Industry in NSW. The Royal Commission focused on the problems of the industry, including adversarial relationships, unethical conduct and institutionalised inefficiencies at many levels of the industry. It outlined a strategy for cultural change and industry development, and identified the important role which contract conditions play in determining attitudes and relationships.

One of the Royal Commission's recommendations was for new forms of standard contract to encourage co-operative relationships, 'best practice' and innovation. DPWS intended C21 to be just such a contract: one designed to encourage co-operation between the parties in a project, and focused on achieving client satisfaction.

For our team, this meant that C21 should work on the construction site, not just in the courts.

The process Previous standard construction contracts have been "drafted in committee", a slow and difficult process in which many stakeholders have to work through issues and arrive – if they can – at a compromise.

DPWS felt that the time required (measured in years) and the compromises that result from this approach made it unworkable for an innovative contract. They decided to employ a multi-stage process in which stages of intensive development by a small team were sandwiched between stages of widespread consultation and review. A benefit of this approach is that a usable edition of the contract would be ready after the first stage, and could then be further developed with the benefit of practical experience.

Our approach Montague Leong saw the project as more than just rewriting a legal document, or making it shorter, or clearer. We saw our task as rethinking the contract, to turn it from a record of the rights and responsibilities of the parties into a catalyst for their co-operation for the success of the project.

Our client, DPWS, had enthusiastically embraced the concept of co-operative contracting and 'partnering', an approach used in the construction industry which stresses the importance of teamwork.

Until now, in New South Wales, partnering had been kept outside the contract. Construction contracts were traditional legal documents, drafted along adversarial lines. They were primarily concerned with 'worst-case scenarios' and had little to say about what happens when everything is going well.

Partnering operated separately, in parallel to the contract. It fostered a 'best-practice' approach using, for example, 'start-up workshops' which encourage project participants to bond as a team and to work together in an atmosphere of trust.

C21 was intended to bring this philosophy into the legal framework. Montague Leong's brief was to make the contract part of a non-adversarial work process in which communication was vitally important.

The 1st edition

Aims and expectations Before the project began, DPWS said that it wanted a 'ground-breaking' contract. It envisaged it as simple, 'user-friendly', and about 20 pages long.

From the first, DPWS insisted that the team developing the new contract should include communication consultants. This was something new for DPWS's lawyers, who were unused to the communication consultant's role and approach.

The earliest draft of the contract was prepared by specialists in construction law. Their primary aim was to protect the client and give it the legal outcome it wanted. One of their main concerns was always how the contract would be read by a judge in a court of law if there was a dispute.

Initial research However, in Montague Leong's initial research we identified 10 or so distinct groups of users, of which lawyers were only one. There were also contract supervisors, people preparing tenders, the actual contractors themselves, sub-contractors, financial institutions, and so on.

Our approach was to look at what the various parties were going to do with the document, and shape it to suit their processes. We met with representative users from different groups, to see how they worked with existing contracts and might work with a co-operative contract of the kind DPWS envisaged.

Although our research focused on communication, we also learnt a lot about construction contracting and contractual relationships in general. The meetings with private contractors were particularly valuable; we heard of concerns and attitudes not found in DPWS at any level. If these concerns had only been voiced later, in the consultation process, it would have been harder to influence the basic concepts and mechanisms of the contract.

Using diagrams for analysis To help us understand the first legal draft, we used analytical diagrams and tables to pull together the framework of the contract from the mass of undifferentiated detail, and to map out the parties' roles and the sequences of events in the contract's procedures.

Using relationship diagrams, flowcharts, truth tables and content outlines, we could examine and discuss the content of the contract without being tangled in language issues. We were able to clarify the logic of the early drafts, explore the implications of different mechanisms, and allow DPWS to choose the approaches that best suited their guiding principles.

This analytical process minimised errors and helped us to align outcomes with intentions, but it also added to the time involved.

Frankly, this caused some friction and frustration within the team. As communications consultants, Montague Leong were accustomed to using diagrams and other visual aids to analyse a problem. Lawyers, on the other hand, have traditionally worked with words and are usually keen to "get on with the drafting". However, we always took the view that the time spent at this analytical stage was essential and inevitable – especially as we saw our task as 'rethinking' the contract, not just rewriting it.

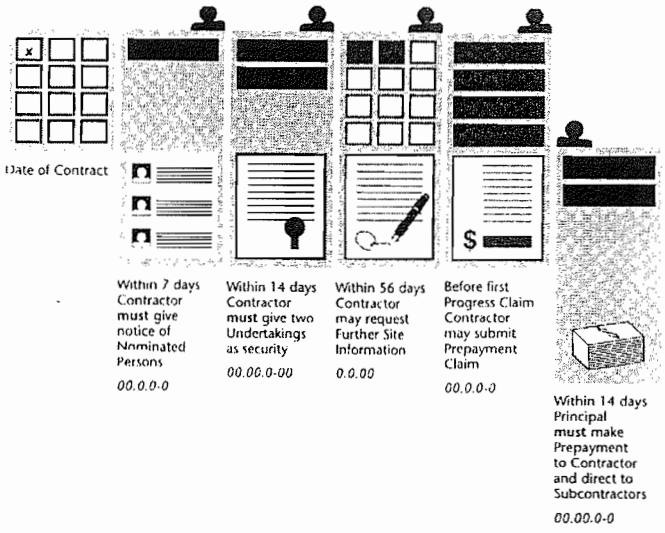
Using diagrams descriptively Our experience with the analytical diagrams, and the client's desire for a short and clear contract, led us to propose including diagrams, descriptively, in the contract document itself. We saw several advantages:

- a visual mode of communication, which some users would prefer
- an overview uncluttered by detail (which could also act as a key to the text)
- unified views of procedures, bringing together relevant provisions from separated parts of the text
- more generally, encouraging non-legal users and showing them that the contract document was approachable and comprehensible.

We therefore developed an overall schematic which showed the main periods and events, and a suite of procedural diagrams which used a specially-developed visual language to summarise who does what, when, for the major procedures.

Here is one of the diagrams developed as a 'visual summary' of procedures.

Initiation, Prepayment Claims



We refined these diagrams in testing until they clearly and unambiguously explained the procedures. We felt that the results (and the very positive informal feedback) showed that the diagrams were effective.

Problems with the diagrams However, the diagrams were not included in the first edition. There were legal concerns that they may be taken as a substitute for the text rather than as a guide to it; and that they may create representations not intended in the text.

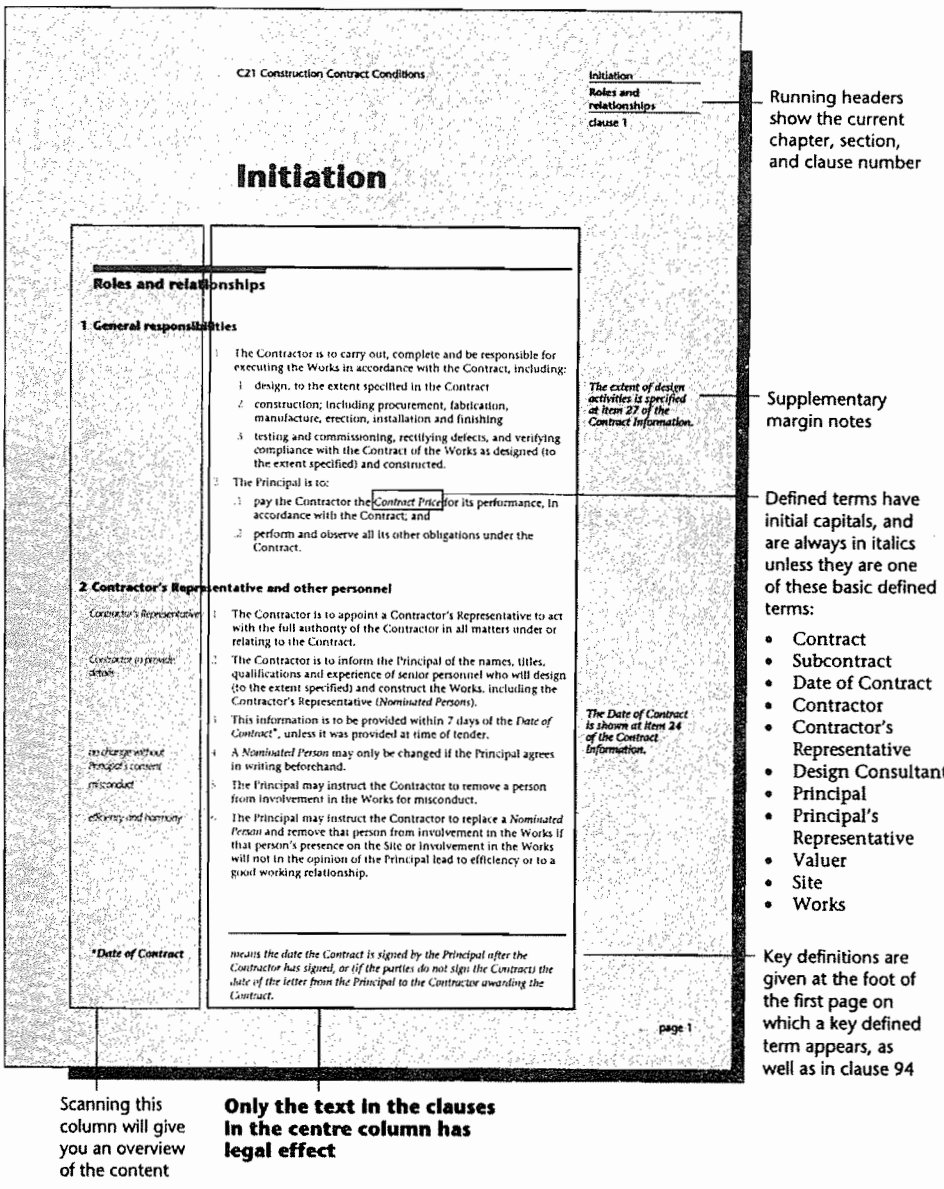
This seems to be a fundamental problem with explanatory material of any kind in a legal document. It is a particularly acute one when the explanations provide so much information that they threaten the primacy of the text.

Other design features of the first edition

Although there were no diagrams in the first edition of the C21 Contract, we did use other design features to assist the reader, such as:

- 2 tables of contents: one was a one-page 'map' of the major sections; the other listed all the clauses, over 3 pages.
- 'How to use' section showed what parts are legally-effective text and what parts were not included in the contract itself (See illustration headed 'Using this document').
- Contents and definitions pages had an orange edge stripe to make them easy to turn to.
- Typical page layout had 3 columns. The first had headings and 'pointers' to allow users to skim down to find what they were looking for. The second had clause text. The third had margin notes, explanations and cross-references (and space for user annotations).
- Clause numbers were greyed out to emphasise the headings, to encourage readers to look at the sense of the contract; cross-references referred to headings as well as numbers whenever possible.
- Defined terms were shown in italics unless they were 'common' (eg Principal, Contractor, Completion).

Using this document



- 'Critical' definitions were repeated in footnotes when the defined term was first encountered.

Review of the first edition The first edition of C21 was published and circulated throughout the construction industry at the end of 1996, and was used in a number of construction projects in 1997.

The first edition ran to 68 pages, 46 of which contained the contract clauses. (The initial brief, as noted earlier, was for a 'user-friendly', 20-page document!). But we had decided that clarity, not brevity, was our top priority. As a result, some 'redundant' material was kept to give readers the full picture.

However, by the time we had completed the first edition, we realised that it was not as approachable as we had hoped, and could be further simplified. Sure enough, after using the first edition of C21, people asked for further simplification.

In the first edition, DPWS took a cautious approach to some innovations or breaks with past practice. Only when feedback and experience became available could DPWS judge how far it could go, and which precautions would be needed in the long term.

The second edition

DPWS had always intended to produce a second edition of the C21Contract, based on:

- experience with the first construction projects to use C21
- feedback from industry, professionals and other advisers
- a major review of users' experience with the first edition.

In the design of the second edition, the focus would be on widespread implementation of the contract rather than on industry consultation.

Another chance to achieve the ideal From our point of view, producing a second edition gave us a second bite of the cherry.

We felt that we could have gone further with the first edition, simplifying it further, and perhaps reintroducing some of the diagrams and tables we had earlier proposed. But as Montague Leong are communications consultants, without a specialised knowledge of the law, we were reluctant to challenge the lawyers in some areas. If a suggestion of ours was rejected on legal grounds, we had to accept that decision, and move on.

The intermediary We needed an intermediary who could 'push the boundaries' with the lawyers – suggesting rethinks, compromises, and ways around some of the problems that we wanted to revisit. DPWS agreed, and so an intermediary, Michèle Asprey, joined the team. Michèle had previously practiced as a lawyer and is now a plain language writing consultant.

Michèle played an important role in welding the C21 team together, as well as in contributing directly to the language and structure of the contract. Although ultimately the lawyers had to carefully vet (and approve or reject) all the suggestions and solutions offered, the team developed a genuine multi-disciplinary approach.

The explanatory material Michèle's role as an intermediary is well illustrated by just one example. One of the first improvements she suggested involved the multi-column layout used in the first edition and its marginal notes, headings and explanatory material.

The first edition of the contract specified that only the main text in the centre column had 'legal effect'. This was partly due to the lawyers' problem with the status of explanatory material.

Michèle was concerned that the contract was divided into 'legal' and 'non-legal' sections, and suggested incorporating the headings and marginal notes into the contract itself. She suggested that if we could make sure that the wording of this explanatory material did not conflict with the rest of the contract conditions, it should be possible for it to have legal effect just as the rest of the document does.

That single, simple suggestion let us remove a fairly major complication from the document, and made it possible for the explanatory material to emerge from the shadows.

The "marginal" notes As we worked on them, the marginal notes evolved into three distinctly new animals:

- introductory words at the beginning of each section of the contract, explaining what that section is about, and pointing out any unusual or different aspects; and
- specific explanations at the end of paragraphs of text; and
- footnotes explaining the meaning or significance of technical words, like 'novation' and 'indemnify'.

The explanations are extremely important in a document like C21, whose users possess a huge range of skills and abilities. From the sophisticated project manager to the unsophisticated subcontractor, these people are meant to be equal participants in the construction project.

So the marginal notes, previously just an annotation for the curious, emerged from the margins to become an explanation for everyone, shedding light on the motives behind the document. Using marginal notes also addressed a problem identified in the industry feedback – it wasn't obvious that C21 is a 'co-operative contract' and some criticism of it was misdirected as a result.

Structure In the second edition, the contract conditions are divided into 5 major sections (though they are not called 'sections,' and are not even numbered). These help readers understand the context of the clauses they contain.

The order of the contract's sections and clauses changed several times through both drafts. It started out as chronological. Then, as drafting progressed, the contract evolved towards logical groupings, partly to accommodate those who expected to see similar topics in the same place, and partly to avoid repetition. But we still maintained a basic chronological order.

Now, for non-lawyers, the document tells the story of how the construction project will work. It is a narrative, rather than a list of rights and responsibilities. We think we have avoided giving the contract an adversarial flavour, making it more consistent with the basic philosophy of partnering.

Grammar & style We were always extremely vigilant about basic grammar and word choice. At times this was difficult – it seemed like nagging, especially when the other issues under discussion were much more weighty. However, we strongly believe that in a document of this length, if you start to compromise on the fundamentals, the whole document suffers.

Controlling the structure and grammar of a document imposes its own style – but only to a certain degree. For efficiency, and to record successive changes, David More of Montague Leong Design acted as 'custodian' of the drafts. This also meant that he was often the person who found the words to express the concepts we had agreed on, but had not managed to draft as a group.

David would always review anything drafted by anyone else, to keep the style, terminology and structure of the contract consistent. This in itself was a distinct advantage. It also made for faster decisions, better use of meeting time and more accurate tracking of cross-referencing and consequential amendments.

Going full circle A few clauses actually went full circle – through a series of changes and back almost to the starting point! For some of these clauses, it was only once the circle was complete that we were able to see the logic behind the original draft. That was a recurring problem – a clause might have been cleverly drafted to achieve a certain legal outcome that was not apparent on the first few readings. In those cases we tried to make the desired effect more explicit.

Simplifying a clause out of existence Sometimes, we broke a complex clause down into its constituent elements, often tabulating it so that it read:

Introduction:

(a).... and

(b)....

Then, after a few more drafts, we would have simplified the elements (a) and (b) so thoroughly that the clause could revert to one simple sentence.

Once or twice we'd simplify a clause so well that DPWS decided to do away with the procedure completely.

Diagrams and other devices we didn't use We considered using the table of contents to show where clauses related to specific concepts such as money, or time. We also explored using the definitions at the back as an index of all the clauses where each definition appears. Eventually, we dropped both ideas; neither was essential, but they added complexity and cost.

In simplifying a document, there's always a trade-off between:

(a) giving people help; and
(b) making the document so simple that they don't need that help.

Here is a draft procedure table, showing roles and the sequence of steps.

Extensions of time

	Principal	Contractor
If a delay begins that • prevents a clear majority of work in progress or planned to be started from proceeding, and • is beyond the Contractor's control (including an act, default or omission of the Principal, but not including a Variation) 41.1.1, 41.1.2		Takes all reasonable steps to avoid and minimise the delay and its effects 41.1.3 Within 7 days, gives notice of the delay, its cause, relevant facts, and its expected impact 41.2.1
When the delay ends		Within 7 days, gives notice of the extension claimed, with sufficient information to allow the Principal to assess the claim, (if not provided in the first notice) 41.2.2
If all conditions are met	Assesses the extension, and adjusts the Contractual Completion Date 41.1	

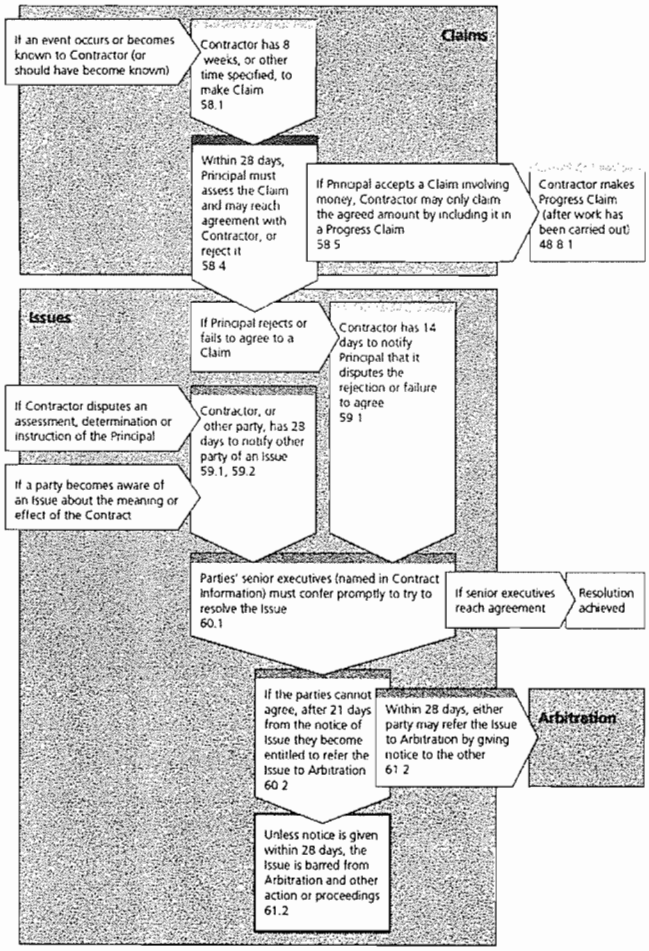
This is a difficult balance to strike, because giving help to non-experts sometimes makes a document harder for the experts to use. It can also make it seem more complicated than it actually is.

These considerations also applied to the diagrams we developed for the second edition.

Although we had not been able to use visual aids in the first edition of C21, when we started work on the second edition we were still very keen to use them to provide a useful overview of the contract. Rather than diagrams, with their attendant problems, we suggested using tables containing text abridged from the clauses of the contract.

We also developed block flow diagrams, which combined the abridged text with a visual process diagram.

Here is a draft block flow diagram, showing conditions as well as steps.



However, neither the procedure tables nor the block flow diagrams were used. One reason was that DPWS was very keen to keep the document as short as possible. Another was that the concepts in the contract, and the text itself, had been simplified so much that the procedures are much less complex than in the first edition, and so are less in need of explanation.

In conclusion – the value of teamwork

For us, the most valuable aspect of the project has been the dynamics of teamwork. The process of collaboration has been one of the most interesting and valuable professional experiences we've had. In particular, our teamwork has mirrored the very concept we have been trying to communicate – the concept of 'partnering' in construction.

Don Murphy, the client's representative 'ran' the project, attended drafting meetings and took a very 'hands on' approach to the project. His role was always central.

Each party had a different talent and a different point of view, but we all worked together and we all learned from each other. We all had to compromise, and none of us had complete control over the process. The client ceded to the experts in some areas, and the experts ceded to the client in others.

Now that the second edition of C21 has been published, we hope that both the contract itself and the experience gained in developing it can help to create a wider understanding of the partnering approach.

The views expressed in this article are the personal opinions of the authors and do not represent the views of Montague Leong Design or the Department of Public Works and Services, or any other person or organisation.

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*Regular readers of "Clarity" will probably know that **Michèle Asprey:***

- *is an Australian lawyer and plain language writing consultant,*
- *wrote the book "Plain Language for Lawyers" (2nd edition, 1996, The Federation Press, Sydney), and*
- *is a pedant when it comes to punctuation on Mark Adler's T-shirts.*

Getting the Structure Right: Process, Paradigm, and Persistence
(Part 2)

Christopher Balmford

The story so far ...

In the previous issue of *Clarity*[1], Part 1 of this article:

- highlighted the importance of getting the structure of a document right for its audience and its purpose; and
- reviewed the structure of 3 documents to show how poor structure inhibits communication.

Now, Part 2 focuses on a paradigm and a process that help us to get the structure right – as long as we are persistent.

In short, Part 1 was about the problem; Part 2 is about the solution.

Many of the ideas here are borrowed from the work of others: notably Dr Betty S Flowers, Professor Joseph Kimble, and Professor David Kelly. My contribution is to synthesise their ideas, and to add some of my own.

My aim, is to present a state-of-the-art approach to getting the structure right. And to encourage others to share their thoughts on structure. Most of the information I see about how to write clearly is about word choice and sentence structure. Sometimes there is information about paragraphs. There isn't nearly as much about structuring documents at higher levels than the paragraph. And most of what there is seems to be more about the hallmarks of good structure than how to achieve good structure.

We need more on the "how to" because getting the structure right is both hard work and crucial. Only when a document's language, structure, and design work together, is the document likely to communicate successfully.

The solutions

To avoid poor structure, we need to:

- put material in an order that makes the best sense to the reader;
- put the main message first;
- put closely related material together;
- use headings liberally and rigorously;
- make sure that pieces of information with comparable heading levels have comparable weight, and a comparable level of importance; and
- use a numbering system that forces us to draft clearly – even if we don't use that numbering system when we print the document.

These are the guiding principles, the hallmarks of good structure, or perhaps the goals we are trying to score. And to that extent they are useful. But they don't tell us how to score the goals. To find out how to do that, we need to have a paradigm and a process, and we need to be persistent.

The paradigm

My favourite paradigm for the writing process was developed by Dr Betty S. Flowers and is called "madman-architect-carpenter-judge".[2] In her paradigm, Dr Flowers separates the writing process into 4 distinct stages: each requiring the writer to use a quite different approach and to adopt a quite different personality. The 4 personalities are:

- *The madman* who brainstorms, takes notes and, is enthusiastic, experimental, and above all creative;
- *The architect* who reviews the information that the madman has created and gathered, and uses it to develop an outline of the document;
- *The carpenter* who fleshes out the structure by writing the text and producing the first (however many) drafts; and
- *The judge* who edits and reviews drafts.

As Dr Flowers points out, when applying the paradigm, it is important to keep the roles separate, to give each personality its turn without allowing the other personalities to interrupt. For example, the judge must not be allowed to interrupt the madman:

> [The judge has] been educated and knows a sentence fragment when he sees one. He peers over your shoulder and says "That's trash!" with such authority that the madman loses his crazy confidence and shrivels up. You know the judge is right; after all, he speaks with the voice of an English teacher. But for all his sharpness of eye, he can't create anything.[3]

The Flowers paradigm is an excellent way to conceptualise the writing process. More than that, it provides us with a methodology that helps us to begin at the beginning and to go through the middle until we to get to the end. It's fun too.

However, in the context of this article, it sort of begs the question: what do we actually do when we are in architect mode?

Having taken off our madman's hat and put on our architect's hat, we see before us a pile of information: notes, mind-maps, articles, books (probably blossoming with yellow post-it notes) and perhaps a few pages of hastily written text.

What the architect has to do is use all that information to create a useful outline for the document – a structure that the carpenter can develop into a full-blown draft.

As architects, we have to get the structure right. But how do we go about it? Having found a paradigm, what process can we follow?

The process

Professor Joseph Kimble has described the process of sorting information to structure a document. And he has developed an analogy that helps us not only to see more clearly what we do, but also to do it: to get the structure right. With Joe's kind permission, I use his material in the plain-language training courses I run (and in this article). His approach and analogy stay in people's heads. They tell me so – sometimes months after they came on the course.

Here's what Joe has to say about the process.

> Technically, when you organise the document you are doing three things: dividing, classifying, and sequencing.
>
> - *Dividing* Deciding how to cut into the material, what principle you will use. You may think of it as creating your headings and subheadings....
> - *Classifying* Describing what ideas go under what section (heading) and subsection (subheading). The main principle is to put closely related ideas together.
> - *Sequencing* Putting the section and subsections in a logical order.
>
> Usually, you divide and classify as one blended operation. As you sort the information into the different sections, you may realise that one of them is too broad or too narrow, or that the sections overlap. So you have to rethink the division. On the other hand, sequencing is pretty much a separate operation.[4]

It is useful to recognise the 3 separate steps in developing a document's structure. (They are, if you like, the paradigm of the architect's role.) In many documents, although the headings at a high level are in a sensible order (that is, the high-level sequencing makes sense), the ideas under the headings have not been properly divided and classified. This dramatically weakens the power of the high-level sequencing. To get the structure right, the dividing and classifying have to be done properly.

So let's look at the dividing and classifying in detail, and then worry about sequencing.

Dividing and classifying

Here's the analogy that Joe developed to support the first 2 steps in the process: dividing and classifying.

> Suppose you're doing the washing. You put whites in one pile and darks in another. Your principle of division is colour. But where do you put the grey T-shirt? If you put it with the whites, then your 'sections' (and headings) have changed: not 'whites' and 'darks', but 'lights' and 'darks'. If you put it with the darks, then that section has a new heading: 'lights and darks'. Or maybe you create three sections: 'whites', 'lights' and 'darks'.
>
> Then there are the sweaters that have to be washed by hand in cold water: they go in a pile called 'handwashables'. And then there's the business suit that goes to the dry-cleaners. Now your principle of division has changed; it's not colour any more. Now the principle of division is how the item will be washed.
>
> By the way, usually it is impossible to use the same principle of division throughout a longer document.
>
> Finally, having sorted things out into their separate piles (with headings), you have to sequence the sections. (And here's a question Why do most people wash the whites first? What sequencing principle is that?)
>
> Of course, when you put away your clothes, all this changes, because your purpose changes.
>
> So much for homely examples. What you should produce by dividing and classifying is a hierarchy of ideas.[5]

When we are in architect mode, sorting information to create a structure and outline for our document, we go through the same process as we do when we sort the washing. That is, we pick up a piece of information, work out what it is about, give it a heading, and put it in a pile. As we go through this process, we may resort the piles and change the headings. That's Joe's "dividing and classifying". Then (perhaps at the same time or perhaps later) we start to put our ideas in an order: we put the information in each pile in order and we put the piles themselves in order. That's Joe's "sequencing".

Audience and purpose

Before we leave dividing and classifying, and the "sorting the washing analogy", I want to dwell for a moment on Joe's comment "when you put away your clothes, all this changes, because your purpose changes". He makes a crucial point.

To illustrate Joe's point in my training courses, I tell the group a story about sorting the washing at home. It goes like this:

At home, I sort the clean washing into piles that, in my mind, are headed:

- "Gracie". She's my 5-year-old. I either put her clothes away for her, or help her do it.
- "William". He's my 7-year-old. I ask him to put his clothes away – I usually have to nag him a bit!
- "Kym". My wife (whose age I have chosen not to reveal). I leave her clothes on the bed. She's old enough to put them away by herself – without being nagged.
- "Me". I put them away all by myself.
- "The linen cupboard" – which is of indeterminate age and quite unable to put away the sheets, pillowcases, towels etc. that are stored in it, so we put them away.

The point is, when we sort clean washing to put it away, our audience and purpose are completely different from what they were when we sorted the dirty washing before washing it. When we are sorting the clean washing, it doesn't matter what colour the particular item or garment is, or how it would be washed. What does matter is whose garment it is, or where it goes. We are sorting exactly the same information (except that it's now clean) but we put it in completely different piles with completely different headings. And all because our audience and our purpose have changed.

Beyond the analogy

Now, there is at least one key difference between dividing and classifying washing (whether it's clean or dirty) and dividing and classifying information for a document: if you like, there's a gap between the analogy and reality. The key difference is that when you reach into a pile of washing and pull out say, a white shirt, you get the whole shirt – no worries. But when you reach into, say, an insurance policy and try to pick up one of the exclusion clauses dealing with why the insurance company won't pay, it is quite likely that you have got only some of the information that is relevant to that clause. (After all, closely related information may be scattered elsewhere in the document.) You can be even less sure that you have all the exclusions. This doubt is caused because (as we saw in Part 1 of this article[6]) many documents are so badly structured that crucial pieces of information that relate to the same idea are often scattered throughout the document.

There is a solution (to the gap between the analogy and reality) that helps to make dividing and classifying the information for a document as easy as sorting the washing. Not only that, it helps to make sure that your document has lots of useful headings. Here it is, in all its glory.

A modified decimal numbering system: the benefits

One way to close the gap between the "sorting the washing" analogy and reality is to use a modified decimal numbering system.

The decimal numbering system (unmodified) is recommended by the International Standard (ISO) on the "Numbering of divisions and subdivisions in written documents"[7]. That standard was produced in 1978. The modifications were developed by Professor David Kelly in 1990, when he was the Chairman of the Law Reform Commission of Victoria and working on the Commission's various reports on plain language.[8]

In the decimal numbering system, the whole number (that is, 1, 2, 3, etc.) appears beside the heading. The sub-numbers (that is, 1.1, 2.1, 3.4, etc.) appear beside the relevant paragraph.

In the modified decimal numbering system, the whole number is used for the first paragraph (the heading is not numbered), and the sub-numbers are used for the sub-paragraphs.

This is how the decimal numbering system works, and what it looks like.

How does the modified decimal numbering system work?

1. When you use this system, you put the main message in the first part of the paragraph, where the number is still whole. The number appears below the heading and beside the main paragraph. (This paragraph is an example.)

   Where do qualifications and exceptions go?

   1.1 Qualifications and exceptions are dealt with in subsidiary numbers.

   What about procedural or ancillary material?

   1.2 So is material that is merely procedural or ancillary.

   Where do the headings go?

   1.3 Each whole number gets a heading. Sometimes each subsidiary number also gets a heading.

Why is the modified decimal numbering system helpful?

2. This system helps because it forces you to comb your ideas out into separate threads. The system prevents you from having 2 main ideas in the one main paragraph because when you try to give that paragraph a heading, you can't ... so you're forced to:

   - separate your ideas;
   - work out which ones are main ideas and which ones are subordinate ideas;
   - give each of the main ideas a number and a heading; and
   - put subordinate ideas in sub-paragraphs.

   All this makes it easier to see the ideas that need to be put together, or that need to be linked in some way.

   Is the "forcing" aspect unpleasant?

   2.1 Sometimes the discipline imposed by the modified decimal numbering system is frustrating and even irritating. But it helps you "sort the information for the document", and that helps you to get the document's structure right. So, even if it is a bit unpleasant at the time, it's always worth it in the end.

How does the modified decimal numbering system help sort the information?

3. This system helps sort the information because:

   - it brings a high level of rigour to the processes of combing out the information into separate threads, giving each thread a heading, and establishing the priority of each thread (that is, the dividing and classifying); and
   - it makes it easier to sequence the information because all you have to do is put the headings in the right order. You can rely on the headings, because you know that every main point has a heading and that there aren't any ideas floating around that aren't revealed by the headings. Then, as you edit the document, the system makes it easier to check the validity of the sequencing, and to reorder things if necessary.

   How does it make it easier to check the validity of the sequencing?

   3.1 The system makes it easier to check the validity of the sequencing because you can do that just by running your eye over the headings. Again, you can rely on them.

   How does it make it easier to reorder things?

   3.2 The system makes it easier to reorder things because when you want to move information around, you pick up the heading (and the text that hangs off it) and move that block of information around. You do that confidently because you know you're getting all the related ideas. To return to the "sorting the washing analogy", you know you've got the whole garment.

(That's the end of the demonstration.)

Some concerns about the modified decimal numbering system

Sometimes, people express one or more of the following concerns about the modified decimal numbering system:

- It may lead to the document having too many headings.
- It is ugly when you end up with, too many numbers – for example "clause 2.2.3.2.6".
- A reference to "Section 1" is ambiguous: Does it refer to all of Section 1, or just to the main paragraph where the number is still whole?

Here are my responses to those concerns.

Too many headings In fact, having lots of headings is helpful for the reader. According to work done at the Document Design Centre in Washington DC, a document should have a heading "for nearly every paragraph"[9]. Many people find that hard to believe. I did when I first read it. But over the last few years I've become convinced – partly through several formal testing projects on insurance documents that I have been involved in, and partly through the training courses I deliver.

In those training courses, we talk a lot about headings. When I say that the Document Design Centre recommends a heading for nearly every paragraph, many audiences visibly flinch. I talk about that reaction with them.

Later, at the end of the first day of the course, I hand out a rewrite exercise that the participants do as "homework" and present to the group the next day. (Each of them gets a different exercise.) I encourage them to use lots of headings in their rewrites. Often, they use 3 or more headings in one page of text. Often, they use a heading for a paragraph that is only one or two lines long. Once, someone used 8 headings in a one-page letter!

The next day, when the participants are presenting their homework, I make a point of asking the group whether there are too many headings. There never has been. They even liked the one-page letter with eight headings! Yet these are the very people who, just the day before, flinched at the thought of a heading for every paragraph.

To be fair, when something I'm writing is getting close to final, I often go back and delete a few headings for aesthetic reasons. At that stage, it always seems easier to delete than to add.

Too many numbers This concern is valid. However, it applies equally to every numbering system. After all, a reference to clause 2.2.3.2.6, awkward as it is, is no worse than a reference to clause 2(2)(c)(ii)(F).

The solution lies in avoiding descending to such depths. To do that:

- for simple lists, it's often best to use dot points; and
- for more complicated material, its nearly always better to break the flow, and the structure, higher up the chain[10]. (For example, if you are about to create a division at the third decimal point, between, say, "2.3.1" and "2.3.2", it's usually better to change "2.3" into "3" so that what was to be "2.3.1" becomes "3.1" and what was to be "2.3.2" becomes "3.2". This usually requires a slight change to the text of "2", and an introductory thought at the start of the new "3".) Thankfully, one advantage of the modified decimal numbering system, and its call for a heading for each main paragraph, is that it makes it easier to break the structure higher up the chain.

In all the documents I've written using the modified decimal numbering system, I have never been beyond the third decimal point (that is 2.2.3). And I have been that far on only a handful of occasions.

Ambiguous references The ambiguity can be overcome in either of these ways:

- a reference to the main paragraph (but not to the sub-paragraphs) can be to "Section 2, first paragraph." A reference to the entire section can be to "Section 2". This can be supported by using a graphic (for example a vertical bar in the margin) that is visually linked to the whole number (that is, "2") to show that a reference to clause "2" includes the subparagraphs 2.1, 2.2 etc; or
- when the document is printed, another numbering system can be used, or the numbers can be abandoned altogether.

Having read this rave about the modified decimal numbering system, it may surprise you that I am not so fussed about what numbering system is used when the document is printed. The reason I'm not fussed is that the main advantage of the system is how it helps the writer to get their thinking straight and the structure of the document right.

The advantage of actually using the modified decimal numbering system in the final, printed version of the document is that the hierarchy of the material is revealed visually and numerically to the reader. It makes the reader immediately aware of the relative importance of each piece of information as soon as they look at the page. However, even if the system is not used in the printed document, that impact can be achieved through careful design.

If you use the modified decimal numbering system, I would be interested to hear whether the ambiguity has actually arisen and how you have tried to solve it. In my experience, it is rarely a problem. And the benefits delivered by the system make it worthwhile.

A conclusion for the modified decimal numbering system

In short, most numbering systems affect and reveal only those ideas that are related to one another. They do not help writers to determine, or readers to realise:

- the relative priority of the information presented; or
- how the ideas are related.

The beauty of the modified decimal numbering system is that it does reveal the relative priority of the messages and the relationship between them. Importantly, the system does that during the writing process. In this way, it helps writers to get their thinking straight. And that is crucial to successful communication.

Sequencing: the process continued

After the architect has divided and classified the madman's material, the architect must start to put it all in order. To use Joe Kimble's word, he or she must sequence it. As always, the architect must do that with the audience and purpose firmly in mind.

The guidelines about sequencing for legal writing tend to make the following sorts of points:

- let your audience and purpose determine the structure;
- deal with the more important before the less important;
- put the main message first;
- put known information before unknown information;
- move from the general to the specific;
- place rules of universal application before rules with a narrow application; and
- (Although it is relevant to classifying, it is also relevant to sequencing) put closely related material together.[11]

These points are all extremely useful. In many ways, they apply as much at a sentence or paragraph level as they do at higher levels.

There is another useful set of guidelines that reflect a much more journalistic approach to writing.[12] They deal more with the importance of a good lead and the various ways of telling a story. In the legal context, that journalistic approach to sequencing is particularly relevant to persuasive writing: for example, in some letters, court documents, and marketing documents. Even so, that approach works with (and not against) the approach described in this article. Indeed, the two approaches work together in even the most dry and contractual, or legislative, piece of writing.

But the aspect of sequencing that I want to deal with in this article is at the highest level: if you like, what order to put the chapters and sub-chapters in. At that level, the most useful guideline is to put the material in the order that the reader is most likely to expect, to need, or to find useful. Easier said than done.

The documents whose sequences work tend to be sequenced either:

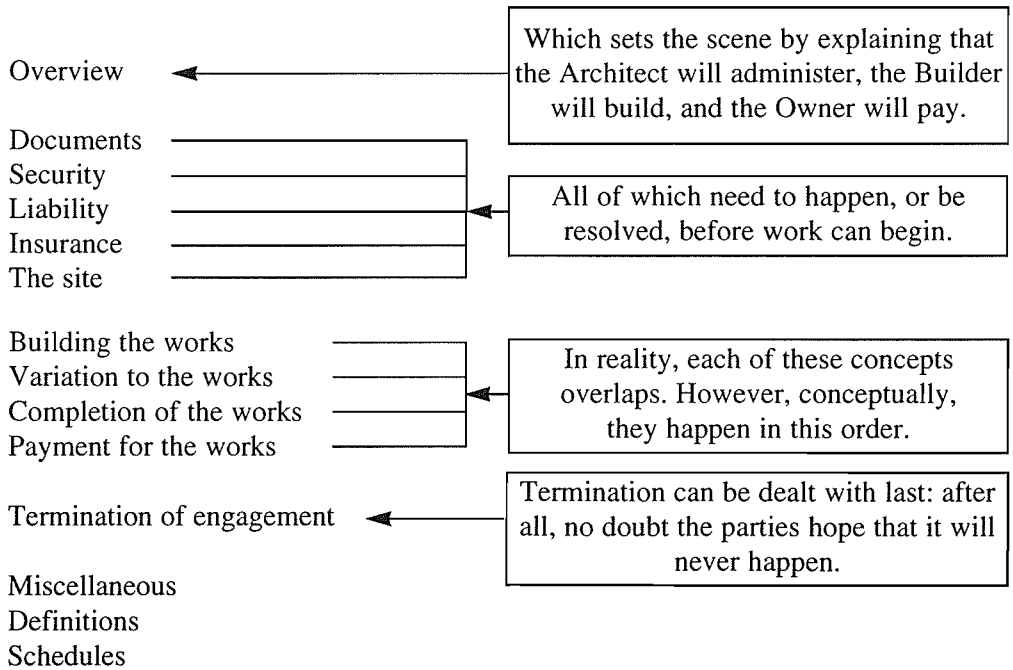
- in a chronological order; or
- in a rights-based order.

Chronologically structured documents

A construction contract is, basically, a chronological document. After a few opening clauses dealing with the broad requirements that the builder will build and the owner will pay, the document can go on to deal with the various rights, obligations, and procedures in a chronological order. For example, in a simple building contract (for new homes) produced by the Housing Industry Association (in Australia), the chapters are ordered like this:

- Main obligations
- Before work begins
- During work
- Completion of works
- Variation of obligations
- Remedies
- Disputes
- Miscellaneous
- Schedules

Consider a more complicated construction contract produced by The Royal Australian Institute of Architects. The chapters are arranged in the order shown in this table:



Rights-based structure

The South African *Labour Relations Act* 1995 is a fine example of a document with a right-based structure. (By the way, Phil Knight, Vancouver, Canada – a Clarity member – was part of the drafting team and was responsible for the Act's structure, style, and language.) After a preamble, and "Chapter I – Purpose, Application and Interpretation", the real substance of the Act begins in "Chapter II – Freedom of Association and General Protections". This Chapter deals with the core rights that employees have.

Those core rights are what the Act is about; they are why the Act exists. The rest of the Act deals with how those rights will be protected, administered, negotiated, and enforced etc. The Act sets up various bodies to be involved in all those activities.

Contrast that structure with the *Equal Opportunity Act* 1984 (Victoria). Like the South African *Labour Relations Act*, this Act also creates rights, sets out how those rights will be protected, and creates a Commissioner to administer the Act and a Board to hear appeals from the Commissioner. These bodies are set up in sections 6 and 8. Yet the rights that those bodies are to administer are not set out until section 17 and following.

Surely, more readers of the Act will be interested in:

- what forms of discrimination are illegal (section 17), and how to enforce the rights the Act creates (section 41);

than in

- the fact that the Commissioner is to be appointed by the Governor in Council, is to hold office for 5 years, and ceases to hold office on death (inter alia!) (all in section 6).

The *Equal Opportunity Act* should begin with the rights it creates. Only much later should it deal with administrative matters. The existing structure of the Act reflects an institutional-based approach to communication, rather than a reader-based approach.

A methodology for sequencing

There are no sure-fire rules about ordering information in a rights-based document. One approach is to work out the most important information from the reader's (or, for a document that has more than one audience, the primary audience's) point of view and put that information first.

Usually, there is one topic that cries out to be dealt with first. After that, various other topics compete for equal attention. This can make it difficult to work out which chapter should come second, third, and so on. One way of simplifying the task is this. There is nearly always a bits-and-pieces chapter that can be put at the back of the document. If there isn't one, put the least important chapter last.

You then have the beginning and end of the document. That usually makes it simpler to order the remaining chapters. When trying to do that, look at the contents of the chapter and consider whether it should be near "the most important chapter" or near "miscellaneous".

Usually, the structure of the document will evolve quite readily through this process – as long as you keep an eye on:

- what information is important;
- what information needs to go together;
- what is the best order to tell the story in; and
- above all, who are you writing to? why are you writing to them? (Audience and purpose.)

When you have an appropriate chapter order, you use a similar technique to order the sub-chapters and the provisions within the sub-chapters and chapters. And then the job is done.

As an example of ordering material within a chapter, let's consider the "general conditions" found in most house and contents insurance policies. These conditions deal with:

- what the insured has to do during the period of insurance: for example, maintain the property, insure it, have someone living in it; and
- one-off issues: for example, how to make a claim, dispute resolution, choice of law, notices, etc. Most of these issues only arise as part of a claim.

All too often, the general conditions appear in no rational order.

The jumble needs to be sorted out. A starting point is to group together the duties of the insured while the house is insured; and in another group, the duties (and rights) of the insured in relation to a claim.

The duties that apply while the house is insured should be dealt with first:

- because every insured needs to be aware of those duties in case a breach of them affects the insured's right to make a claim; and
- because those conditions apply all the time and to every person insured under the policy.

The conditions that apply at claim time only apply then. And they only ever apply to someone who wants to make a claim – a small percentage (the insurer hopes) of the people covered by the policy. Therefore, the conditions that relate to claims should come after the other conditions.

Another approach to sequencing an insurance policy would be to say that for most people, the only time they would ever read their insurance policy is if they need to make a claim: therefore, a section headed (something like) "How to make a claim" should be the first chapter in the policy. Personally, I feel that it is more important to first describe:

- what risk the policy covers (known in the industry as "the cover"); and
- exceptions to the cover (known in the industry as "the exclusions", and known to me as the "When we won't pays").

Then, once the reason for the contract's existence is established and explained, we can proceed to the other administrative matters, including "How to make a claim".

Sequencing: audience and purpose

The way you sequence material depends (like everything else) on your audience and your purpose. For example, I recently ran some training (with Phil Knight) for the South African government body that handles labour disputes, the Commission for Conciliation, Mediation and Arbitration. One of the documents we used in the training sessions was a letter the Commission sends to employees involved in a dispute. The letter tells them when and where their hearing will be, and how to prepare for it.

Let's look at the way the Commission's audience and purpose affected how we structured the section about preparing for the hearing.

The Commission is extremely busy. It is keen to do as much as it can to encourage the parties to do each of the following before the hearing:

- agree on the issues in dispute;
- arrange for witnesses to be there for the hearing; and
- arrange copies of any documents that will be needed at the hearing (and of course to bring them to the hearing).

In the Commission's experience, those objectives are best achieved if the parties meet before the hearing and sort things out. Accordingly, an obvious way to structure this section of the Commission's letter would be to say something like:

> How can you prepare for the hearing?
>
> Before the hearing, you should meet with the employer to sort out:
>
> - the issues in dispute. Together, you should have a clear idea of the issues you need the CCMA to decide. For example, you will need to tell the Commissioner precisely why you ...;
> - who will be called as a witness and any necessary arrangements; and
> - which documents will be needed and who will copy them and bring them to the hearing. You will need to ...

But, according to the Commission, the reality is that most employees are extremely reluctant to meet with their employer. Employees fear that the more informed employer may take advantage of them. Because of this sensitivity, when we were rewriting the Commission's letter with the training group, we structured the relevant section of the letter like this:

> How should you prepare for your hearing?
>
> To prepare for your hearing, you need to:
>
> > Work out the issues
> >
> > Before the hearing, you should work out the specific issues you want the CCMA to decide. For example, you will need to tell the Commissioner precisely why you ...
> >
> > You might like to meet with the employer to do that. This will help to save you time at the hearing.
> >
> > Organise your witnesses
> >
> > Before the hearing, you need to make sure that all the people you might call as a witness will be at the hearing.
> >
> > Gather, share, copy, and bring your documents
> >
> > Please make sure that when you come to the hearing you bring copies of all the relevant documents that you may want to use.
> >
> > Before the hearing, you should try to:
> >
> > - give the employer copies of all those documents;
> > - ....
>
> Also, please bring this letter with you to the hearing.

In a PS, we added

> It is important that you arrive on time and do as much as you can to prepare for the hearing.

The first version makes much of the need for the employer to meet with the employer. It starts out with a direction from the Commission, "Before the hearing, you should meet with the employer to...". We felt that most employees would stop reading right there. If they did, they would do little, if anything, to prepare for the hearing.

The second version takes a more subtle approach. In the second paragraph under the first sub-heading, the Commission makes a gentle suggestion (not a direction) to the employee: "You might like to meet with the employer to do that." And then the Commission explains the benefit of following that suggestion: "This will help to save you time at the hearing". The PS provides a gentle reminder to the employee of the need to prepare.

The Commission's audience and purpose set the structure of the document.

It's just planning, really

It's all about planning. With care, a wide range of disparate information can be brilliantly structured. Consider this example from a short story by Garrison Keilor in which a rock music critic writes about the performance of a punk band. That performance briefly involved a chicken.

> Perhaps no bird, not even the eagle, bluebird or robin, has entered so deeply the folk consciousness of the race as has the common chicken (Gallus gallus). Indeed, throughout the Christian world, and even in many non-Christian countries, the chicken, from Plymouth Rock to lowly Leghorn, has come to stand for industry, patience, and fecundity, and through its egg, for life itself, rebirth, and the resurrection of Christ, and through its soup, for magical healing and restoration of the spirit. And yet, even as the chicken rides high as a symbol of the Right Life in the pastoral dreams of the post-agrarian bourgeoisie, its name has attracted other connotations – of pettiness, timidity, and foolishness – perhaps reflecting our culture's doubts about itself.[13]

I reckon that is an exquisitely clever little burst of text. I also reckon the author must have thought of everything he could about chickens, then divided, classified, and sequenced.

Conclusion

Getting the structure right is hard work. Even if you start with a great plan and a great structure, they will often evolve during the writing process. But you can reduce the effort involved in getting the structure right by:

- breaking the writing tasks into separate roles by applying the madman-architect-carpenter-judge paradigm;
- allowing the architect to have free reign to create the structure;
- equipping the architect with the "sorting the washing" analogy;
- using the modified decimal numbering system to aid the dividing, classifying, and sequencing;
- following the guidelines about sequencing set out on pages 18 – 19; and
- aiming for the goals set out on page 14.

Having said all that, it seems to me that there is much more that we need to discover about how to get the structure right.

I hope this article will encourage others to share their ideas about structure. Perhaps you could produce an article, or maybe just a note, about your paradigm, your process, or a guideline or an approach that you find useful. If there are enough contributions, maybe Clarity could publish a "seminar in print" dealing with structure. I think that would be great.

After all, structure is crucial to clarity.

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Endnotes

1 *Clarity* No. 42, September 1998, page 42.

2 Betty S. Flowers, *Madman, Architect, Carpenter, Judge: Roles and the Writing Process*, 44 Proceedings of the Conference of College Teachers of English 7-10 (1979). I only know Dr Flowers' work through an article by Bryan A Garner, *Using the Flowers Paradigm to Write More Efficiently*, TRIAL Journal of the Association of Trial Lawyers of America, May 1997, p 79.

3 See Flowers at page 7, or Garner at page 79.

4 See Professor Joseph Kimble, *Drafting Documents in Plain Language*, Business Forms Management Association, 1990, 1993, page 13.

5 See Professor Joseph Kimble, *Drafting Documents in Plain Language*, Business Forms Management Association, 1990, 1993, page 13.

6 See *Clarity* 42, September 1998, p 42.

7 ISO 2145, second edition – 1978, 12-15.

8 See *Access to the Law: the structure and format of legislation* Law Reform Commission of Victoria, May 1990, p 9-10.

9 *Beyond Readability: How to Write and Design Understandable Life Insurance Policies* Dr Janice C. Redish, Director of the Document Design Center, American Institutes for Research, Washington, DC, prepared for the Committee on Consumer Affairs, American Council of Life Insurance [no year.] page 7.

10 Thomas Murawski makes the same point in "Excerpts from *Writing Readable Regulations*" in *Clarity* 42, September 1998, p 50 at 53.

11 See for example, *Legislation Manual: Structure and Style* Law Commission (NZ) Report 35, 1996, page 35; and Bryan A Garner *Advanced Legal Drafting* 1994, The Aarhus School of Business, Denmark, August 23-24, 1994.

12 See *Better Writing for Lawyers* Timothy Perrin, The Law Society of Upper Canada, 1990, p 89-104.

13 Garrison Keilor 'Don: The True Story of a Young Person' in *Happy to be Here*, Faber & Faber Limited, paperback edition 1993, p25 at 38.

Consumer Document Meets Legislation (Legislation Wins)

John Biddle

Deacons Graham & James was recently appointed by the Residential Tenancies Authority (which administers tenancy legislation in Queensland) to draft its proposed plain language tenancy agreement for Queensland, to be enshrined in a regulation to the Act.

Residential tenancy agreements are difficult because:

- they're used by many people whose education levels and familiarity with formal legal documents range from none to high;
- what a landlord looks for in an agreement and what a tenant looks for are often diametrically opposed;
- the legal rights governed are very important yet don't usually involve large sums of money, so avenues for redress can be limited.

We had to wrestle with those problems. However, the one we had most trouble with came from outside that list – what we were drafting would end up as a piece of subordinate legislation: should we draft a consumer document or a "selected highlights" of the legislation? The same question often arises in drafting consumer documents against strict legislative ground rules.

Drafting guidelines

In drafting the standard terms we were faced with a very tight timetable – 3 working days to produce the first draft, with industry comment scheduled to start the next day. We then had a short period to redraft after those comments, followed by the big test: final sign-off by the Office of Parliamentary Counsel.

Clear guidelines set by the Authority (a necessity to do any drafting job properly, particularly against a deadline) helped us. We had to:

- comprehensively cover the parties' rights and obligations;
- strike a fair balance between landlord and tenant;
- use plain language;
- make sure the one set of standard terms covered tenancies over houses, flats, units and "moveable dwellings" (caravans and mobile homes – many sections of the Act deal solely with these) and tenancies where the State is the landlord (again, different parts of the Act apply);
- comply with legislative drafting practice, and the principles set out in Queensland's *Legislative Standards Act* 1992;
- ensure that what we drafted would dovetail with the prescribed Information Statement (designed to be delivered to a tenant when a tenancy agreement is signed, setting out tenants' rights and obligations in more detail). This may have been easier if the Statement had already been drafted!

All in all, a cynic might call this a standard set of client instructions – keep it short and simple but make sure it covers everything!

Our approach

Our approach to such tasks is to have one person produce a first draft, which is then reviewed by others in our plain language group, and finalised after a meeting where queries are raised, approaches defended or changed, and new matters included. Producing the first draft involved:

deciding what clauses were needed – a review of existing industry documents and plain language commercial leases we had produced previously. That built up a list of clause headings for a "normal" tenancy agreement. We then rapidly reviewed the Act to see if there were any matters emphasised in it that might not normally be in a tenancy agreement. This introduced provisions relating, for example, to the paramount status of the Act and standard terms;

sorting the order – clauses dealing with similar subject matters are grouped together. Subject matters appear in a descending order of importance and the element of time is considered (for example, if obligations arise in a sequence, the agreement should deal with them in that order) so that there is a logical flow to the document.

None of this is a scientific process, with right and wrong answers – we wrote separate sections covering each party's obligations, subdivided by time (at the start, during and at the end of the tenancy). Parliamentary Counsel changed this to separate sections dealing with different types of obligation; and

actually doing the drafting – we could only put this off for so long.

Dilemmas loom

At this point the "legality/accessibility" dilemmas came home to roost. There were at least 2 of these – the related "do I write this as a consumer document or something that looks like a piece of legislation" and "even if it's in plain language, people won't read it if it's too long".

Paraphrasing/repeating

There is no need for legally effective language to be unclear to the average reader – but what do you do if the legislation your agreement has to follow deals specifically, but not particularly clearly, with a subject that must be in the agreement? Do you repeat the legislative provision or do you attempt to paraphrase it? Where do you draw the line between being brief and being comprehensive? This was a particularly difficult question for us because the final document would be a regulation under the legislation.

These are not easy decisions to take. We tended to opt for paraphrasing in the first draft – the Parliamentary Counsel's final version more often reproduced the legislation.

Length

Reducing the agreement's length was a constant problem. We frequently introduced an issue (so that the parties would be aware that it existed) then referred them to the Information Statement for more detail. The cross-reference appeared in a marginal note. This saved setting out lengthy provisions that would have only occasional relevance. Clauses were also cross-referenced to the section of the Act that dealt with their subject matter.

Other notes

As well as cross-references, we also included warnings (for example where time limits apply to the exercise of rights) and examples.

Headings and definitions

Naturally, headings and sub-headings were used at every opportunity. We did not include a "don't use the headings in interpreting the document" clause. Where possible, headings were cast as questions.

We avoided using a definitions and interpretation section at the start of the standard terms, because this can be a little confusing and even intimidating to some readers. The basic defined terms used in a tenancy – premises, rent and so on – appear in a reference schedule at the start of the agreement anyway, and don't need further definition. The handful of other defined expressions needing definition were defined where they first appeared (for expressions only used in a particular clause) or in a brief clause at the end.

Narrowing the focus

The greatest boost to accessibility came when the Authority accepted that trying to make the standard terms all things to all people caused more problems than it solved. It agreed to separate standard terms being drafted for "normal" tenancies (houses, flats and units), moveable dwelling tenancies and tenancies with the State as landlord. This allowed many irrelevant provisions to be deleted from 2 of the versions. It is always a trap to try to cover every non-standard situation in a standard document. My partner David Colenso refers to a "95% rule" – a standard document should aim to cover 95% of the possibilities, not 99 or 100, because the last few possibilities occur so infrequently they should be individually dealt with instead of cluttering up every other document.

An Agreement or a Regulation?

There are great differences between the standard terms we drafted and those appearing in the regulation. This raises the question – should consumer documents be prescribed by regulation at all? Is there something fundamentally inconsistent between the 2 formats? Inevitably, governments and their drafting advisers tend towards consistency with applicable legislation when drafting a regulation. This is so even where the regulation is intended to be an agreement, and the result is that the agreement loses the accessibility necessary to a consumer document.

However, it could be argued that the social value of giving legislative backing to a consumer document outweighs that problem. Perhaps it is best looked at as a problem that will be overcome in time, as the plain language drafting of the legislation itself is refined and improved.

John Biddle *is a commercial partner at Deacon Graham & James, Brisbane. His plain language career kicked off drafting the first edition of the REIQ Standard Land Contract for Queensland. A 3 year sojourn in the firm's Jakarta office heightened his plain language interest now that he has returned to Brisbane.*

Section 2 – Beyond the Document

Changing a Bureaucracy — One Paragraph at a Time

Dr Susan Kleimann
and Melodee Mercer

"I've been a critic, but I won't be now. This is the way Veteran Affairs should be writing letters." So one veteran said of the new version of a Veterans Benefits Administration (VBA) letter[1]. The original letter was not only confusing, it was downright "insulting," agreed several other veterans. The new letter, although asking for the same information, was not only clearer, but it made the veterans feel that they and the VBA "were working together to solve a common problem."

What's behind this change in the way VBA staff writes? In recent years, Congress and the United States General Accounting Office have often criticized VBA because of how long VBA takes to process a benefits claim. Regional offices received many complaints from veterans and service organizations, such as Disabled American Veterans and Veterans of Foreign Wars, that they didn't understand VBA letters.

These complaints led to several grass roots efforts to write letters that put veterans first: the Milwaukee Regional Office focused on the tone of letters, and the Jackson (Mississippi) Regional Office developed a course called *Writing for Real People* to teach collaborative writing skills, so that VBA teams could rewrite existing standard letters. But with no primary support, no plan for using the training, and no mandate, there was no core course and no real incentive to sustain the project. Finally, Washington, DC Central Office management decided that only a centralized writing project could succeed.

Many people think of changing writing as a dry and boring experience, but VBA's agency-wide initiative, *Reader-Focused Writing (RFW)*, has taken VBA to unexpected, exciting, and satisfying places:

- Changes in writing are beginning to change the organization.
- RFW course results please both veterans and employees.
- Writers and reviewers are learning to articulate the research and facts of clear writing, not merely their personal preferences.
- Rewriting has caused employees to rethink the procedures that the letters and manuals are trying to explain.
- Employees have applied the customer-focus of RFW to other areas of their jobs.

Sustained success on initiatives like RFW is rare in government. Previous initiatives like Managing by Objectives (MBO) or Total Quality Management (TQM) efforts have passed into memory. What makes VBA think that this RFW effort is different? What allows VBA to believe that this effort may be the one that works? VBA's current success and hope for sustained efforts are based on several decisions made during the process: (1) assessing the organization and what was needed to ensure success; (2) identifying a tiered approach based on principles, not rules; (3) using technology and testing to create a critical mass of support; and (4) conducting a formal review of the program.

Assessing the organization

Many organizations try to shortcut this step, but VBA's intensive assessment provided the knowledge base to position the RFW program for acceptance. In December 1994, a Task Force consisting of 5 groups was assembled to collect information about current and previous projects and to identify a strategy for the program:

1. The Coordination Group pulled together the different elements.
2. The Training Group worked with a contractor to develop the initial RFW courses.
3. The Organization-Change Group looked at how to reinforce plain language within VBA.
4. The Marketing Group worked on ways to let others know about the initiative.
5. The Measurement Group collected short-term data and identified other long-term data to measure the initiative's success.

In an organization as big as VBA (about 8,000 staff), coordination is always a challenging task, and a project with this many parts was more so. The Coordination Group recommended that VBA maintain an RFW point of contact in Central Office

to manage the overall project. In addition, to ensure regional input and support, on-site instructors in each of the regional offices were trained in the RFW principles. Then they served as liaisons between Central Office and their offices, initiated RFW activities, and facilitated the on-site exercises for *RFW Tools*, a distance-learning, satellite broadcast course.

> **What is satellite training?** Satellite training provides training at multiple geographic locations at the same time. It can ensure consistent delivery and message for nation organisations. The mechanics of satellite training can vary greatly with regard to audio, video and other interactive technologies. For instance, Veteran Affairs uses One-Touch Keypads which allow for students to respond to "yes/no" or multiple choice questions. Then the system generates on-camera charts of the responses. It also allows each student to call in individually to the instructor from the classroom.

No organization changes without resistance, but the resistance can force you to hone the argument for change. "Learn from the mistakes of others; you can't live long enough to make them all yourself," was the belief of the Organization-Change Team. The team looked at projects like "Plain Letters" (1955), "Feelings" (1978), and "Just Plain English" (1985) – all names for government-wide programs that VBA had tried over the years. Why didn't they stick? The answer: what most of these programs had in common were that they were strictly training programs. They made no attempt to affect the larger organization and its culture, nor did they include any way to help staff after the class.

We believed that if the tacit and not-so-tacit assumptions about VBA culture were not addressed early in the courses, employees would never focus on the initiative or any course material. Our assessment of the organization identified many of these assumptions and allowed us to put in place responses through teaching points or organizational actions. (See Table 1.)

For the first courses of *RFW Tools and Writing Clear and Usable Regulations*, a mixture of supervisors, reviewers, and employees with customer contact was chosen; after all, how can you expect reviewers to evaluate something they've not been taught? Typically reviewers and supervisors are overlooked for a writing course, but we knew that if the reviewers (whether supervisors or attorneys) wouldn't accept the new writing, the new forms of writing would soon disappear. They were key to the success of RFW.

Another key to the success of the course was to link the initiative to VBA's business, making sure that it wasn't just an academic course with no practical relationship to the way VBA operated. For example, the course was overtly linked to the current VBA mission to "provide benefits and services to veterans and their families in a responsive, timely, and compassionate manner in recognition of their service to the Nation." Furthermore, the course tapped VBA's history through Omar Bradley, the first Administrator of the Veterans Administration, who said, "We are dealing with veterans, not procedures; with their problems, not ours." These two touchstones linked the entire course to VBA's basic work.

Building on previous TQM training, the satellite training course explicitly asked students to generate

Table 1: Assumptions and RFW responses

Assumptions	RFW Responses
Management would not support the plain language initiative.	An orientation video showing that the highest level of VBA management supported the initiative. Testimonials from VBA senior managers saying what they liked about the course. Memos and letters coming from VBA's Under Secretary were placed in RFW format.
Lawyers won't let us write this way because it's not legally sufficient.	Bring lawyers into the process and develop "Writing Clear and Usable Regulations" Rewrite standard boilerplate into plain language.
I have to write to please the VBA reviewers.	Stress in the training that good writing is about what the reader understands, that standard techniques can be used to get feedback from readers. Put reviewers through the course.

barriers and aids to the success of the initiative. For example, participants brought up dealing with people who resist change. During the broadcast, discussion focused on practical solutions that led to many off-camera interactions. In addition, we also discussed the unwarranted expectations and disappointments that can be set for performances after training. In general, managers and employees expect that performance will steadily improve after a training experience. Instead, there is a tendency to regress to the mean, that is, a good performance tends to be followed by a less good performance and vice versa. If this fact is not acknowledged, managers and staff may conclude too early that a training effort has not resulted in improvement.[2] At the same time, we understood that to ensure improvement, course principles would need to be reinforced in many ways.

Identifying a tiered approach based on principles, not rules

Although training was not the only answer to VBA problems with claims-processing, clearly it was central to making the RFW initiative work. The Training Group recommended a multi-tiered approach because the group knew that staff who did different types of writing needed different types of training. Previously, employees did not buy into training because they didn't feel it applied to them. The multi-tiered approach allowed for several courses to be taught under the umbrella of RFW, with each course focusing on the specific techniques needed to help writers write for readers of letters, forms, manuals, and regulations.

Tier 1 *Orientation* makes everyone in VBA aware of the initiative.

Tier 2 *RFW Tools* helps all VBA employees who write as part of their jobs.

Tier 3 *Collaborative Writing* teaches teams of writers to rewrite existing pattern letters – those annoying computer-generated letters that rarely seem to address your needs.

Tier 4 *Forms Design and Writing Reference Manuals* are very specific to designing forms and manuals.

Tier 5 *Writing Clear and Usable Regulations* brings regulation writers and regulation reviewers together to give them a common foundation for clear writing.[3]

Moreover, the training courses had to be based on research (to give them credibility) and on the principle of decision-making, not rule-following (to give the courses utility). Good technical writing is based on 20 years of research coupled to practical experience. Some courses that claim to be based on research stress the organization of a letter and sentence-level issues, such as the use of passive voice or sentence length.[4]

The RFW approach, however, turns to research that looks at the performance of expert writers and how to model their thinking strategies.[5] The *RFW Tools* course stresses decision-making, acknowledging the intelligence of the participants, and that good letter writing is a series of decisions about which strategies to use in a particular situation. Good writing is good decision-making. In addition, the *RFW Tools* course stresses the need to test letters and manuals with users. All RFW courses, thus, stress the principles behind the rules. Learning the technical writing principles that have been proven over time, is like learning any other skill. If you want to improvise on the piano, you must first learn the basics of music theory. Likewise, if you want writers to make good decisions, they must first understand how readers read their documents.

Using technology to create a critical mass

Initiatives, like RFW, can wither on the vine for many reasons, but key is the difficulty of creating a critical mass. During the organizational assessment, the groups identified several problems with previous training. Staff reported an inconsistency from region to region and from class to class; they complained about the slowness of receiving training; VBA was also concerned about the cost of training staff in multiple courses fast enough that staff would see changes in letters, forms, and manuals quickly. A careful cost-benefit analysis informed the decision to use satellite-training for the course, *RFW Tools*. Satellite-training allowed VBA to maximize consistency of training, increase the number of staff who could be trained, and build a critical mass of support quickly. The first 2 of these objectives were met easily with 800 staff trained in over 10 course broadcasts to 32 regional offices from July to November 1996. Reaching as many as 100 students in a single broadcast ensured that we would reach a critical mass, but how could we ensure that staff would support RFW, not pan it?

The course not only had to have solid teaching points, but the delivery had to be good as well. We didn't want the typical, boring course with talking heads. Interactivity is important in any course, but it was even more important in this course since it is directed at adults and used a two-way audio and

one-way video system. We consciously decided to use various approaches to interactivity:

- The technology allowed the instructor to ask multiple choice questions and have their answers register as charts and percentages shown on the air. Call-ins allowed for brainstorming as well as responses to exercises.
- The on-air instructor needed and had a strong knowledge of the technology, how VBA works, the principles of RFW, and the ability to talk on-air as if the students were in the same room.
- Some exercises required participants to work in small groups on site, while other exercises had one regional office work with another regional office in a different part of the country.
- Other activities made use of the on-site instructor. In an overall satellite classroom of 100 people, the on-site instructor allowed for more individual attention. This, in turn, allowed for increased participation by each individual participant.

Moreover, the course mixed media as much as possible, so that it used:

- live on-air instruction with taped subject matter experts (SMEs),
- taped testimonials with VBA employees and SMEs,
- games and demonstrations to illustrate teaching points,
- videotaped vignettes showing how readers think when reading a letter,
- videotaped segments from a previously recorded focus group with veterans,
- overheads, and
- PowerPoint slides.

But a critical mass could not be created only through course participation. For employees to be convinced that the initiative wasn't the new "flavor of the month," they would have to see that it was supported and used throughout VBA. As a part of this effort, the Marketing Group ensured that there would be a number of different reinforcements.

- **Within the classroom**. We collected pre- and post-course data, including a writing sample, a survey to capture organizational change, and a test of knowledge. We included a follow-up broadcast, 6 weeks after the core course, to
  - reinforce the primary teaching points,
  - discuss what worked in the workplace and solutions to problems,
  - clarify teaching points, and
  - share stories so staff could see that others were struggling and succeeding with similar constraints.
- **Outside the classroom**. Although some reinforcements were formally planned, others were spontaneous within the agency. VBA Central Office sponsored conference calls to ask and answer questions about the course. Some regional offices created newsletters to report RFW efforts in their offices. Offices that worked together during course exercises, kept in touch to share the results of RFW writing initiatives. The New York Regional Office and others requested additional training or revitalized their collaborative writing initiatives. VBA staff maintained an e-mail drop for staff and contractors to answer questions. Most importantly, staff attending the course wanted to see changes in Central Office documents, so VBA team members rewrote and tested letters, memos, and manuals. Finally, during each RFW Tools broadcast, the on-screen instructor praised the on-going efforts, showing examples of spin-off projects and letting staff see that things were happening.
- **Outside the agency**. The initial reason for external marketing was to inform stakeholders, such as service organizations (American Legion, Veterans of Foreign Wars, Disabled American Veterans) that they would be seeing new types of letters coming from VBA. As the Marketing Group looked outside the organization, they realized an even bigger benefit: The Plain English Network (PEN) was already supporting agencies trying to rewrite government regulations.[6] VA and PEN both benefited from their new association. PEN widened its scope to include all government documents, while VA found a champion at a high government level that could convince all VA management that plain language is here to stay.

In addition, both PEN and VBA pushed for a Presidential Memorandum on Plain Language. At the announcement on June 1, 1998, Vice President Gore used before and after examples from the Occupational Health and Safety Administration (OSHA) and the Veterans Benefits Administration. VBA employees were encouraged to note that the first several minutes of the Vice President's speech focused on 2 VBA examples, and, even more, to watch an auditorium of small business owners applaud the after examples with great enthusiasm. The Presidential Memorandum sets deadlines for the writing and rewriting of regulations as well as any information given to consumers. The Memorandum, as well as the attention from the Vice President, has raised the stakes for VBA staff as well as visibility to the overall initiative.

Conducting a formal review

To change the status quo, we wanted lots of facts in hand to prove that the writing was improving and, by implication, that the RFW initiative was making that difference. Group members collected some performance data in their individual offices using focus groups, cognitive testing of letters, and comparison testing of manual passages.

One study showed that poor readers understood less than 40% of a traditional letter, but more than 80% of a RFW letter. In a comparison of traditional and RFW manual passages, results showed that the time to read the passage decreased, comprehension increased, and ease of reading improved. (See Table 2.)

Having this type of quantitative data was critical for VBA staff, but we wanted qualitative data to give on-going evidence that our RFW letters were clear and made sense to our readers. Thus, the Measurement Group decided that "cued-protocol" testing would be part of rewriting each multi-use document. (See Figure 1 for the difference between cued-protocol testing and focus groups.)

Within the class development process, we also built in measures to track improvement in the participants and in the organization. Prior to the

Table 2: Comparison of Test Results with Traditional and RFW Manual

	Traditional Manual	RFW Manual
Time to Complete	8 minutes, 3 seconds	6 minutes, 9 seconds
Accuracy of Response	22% understood completely 22% understood partially 56% failed to understand	45% understood completely 45% understood partially 11% failed to understand
Ease of Reading	0% easy 56% somewhat easy 44% somewhat difficult	89% easy 11% somewhat easy 0% somewhat difficult

Figure 1: The Difference between Cued-Protocol Testing and Focus Groups

Protocol Testing Definition. Cued protocol testing involves a one-on-one interview with a reader. The reader is asked to read to a specific cue (usually a dot identifying a stopping point). Each time the reader reaches the cue, we ask for an explanation of what he or she thinks that section means. At the end of the letter, we ask additional questions, such as:

- What would you do if you got this letter?
- Do you think that the writer was trying to help you?

Example. Our experience shows that tested letters eliminated needless phone calls and correspondence that ask us to explain the original letter.

In one situation, we tested a letter in which readers appeared to understand every word. However, when we asked what they would do if they got this letter, most people said that they would call the toll-free number. The letter was about a replacement check sent because the original check had not been cashed. The letter said, "You will receive the new check shortly." Readers said that they would call if they did not receive the check at the same time as the letter. Changing the sentence to show the approximate date when they would receive the check eliminated the countless phone calls.

Although this technique is very valuable, we only protocol-test letters that are used over and over. When a letter is written specifically for one individual, we don't recommend protocol testing, just careful editing.

Focus Group Definition. Some people skip protocol-testing and use a focus group instead. However, focus groups are not usually an effective way to test the usability of a letter because of two main differences between protocol testing and focus groups:

- Focus groups are usually done with 8-12 people where each person influences the others; cued protocol testing is one-on-one (usually 6-9 individual interviews).
- Focus groups show if readers think they understand your document; cued protocol tests show how a reader actually understands the meaning.

class, participants took an attitudinal survey that was intended to measure a shift in the organization over time by asking questions, such as whether they saw evidence of RFW principles in manuals, letters, and memos from VA management. Participants also took an objective, multiple choice test which quizzed them on teaching points within the class. Finally, they provided a pre-course writing sample, based on a scenario and a pattern letter which needed to be adapted for the specific situation. At the end of the class, they again took an objective, multiple-choice test and, 6 weeks after the last broadcast, they provided another writing sample, based on a scenario and a pattern letter. In all, 5 different measures were gathered to track immediate and long-term gains.

What are the results across the agency?

Results were compiled from several independent evaluators hired to provide an extensive evaluation of the RFW initiative, the *RFW Tools* course, and their effect on the organization. But there were informal as well as formal results.

Informal results. Most immediate are the anecdotal results.

- Baltimore's site instructor reports that home loan lenders have called specifically to thank her for writing the clearest letter they've received from the government. Houston's site instructor reports a case where a veteran filed a claim in 1994 and never did what was needed because letters weren't clear. She called him in 1996 after many rounds of correspondence and followed up with a reader-focused letter. Within days, the man returned what he needed. The end results: VA increased his benefit and paid him over $8,000 in back pay.
- Students rewriting letters in teams found an even more interesting result. Many times rewriting a letter clearly is not about agreeing on a word or phrase; it's about figuring out what the original letter was trying to accomplish. To deliver a clear message, you have to know what you're trying to say. Teams found that many times the root cause of unclear letters is that they are based on unclear procedures. Those procedures are usually not clearly explained in manuals or in the original federal regulation. And in a worse case scenario, letter writers — in an effort not to make a mistake — quote the regulation (the same one they didn't understand) in the letter[7].
- But the real effect is that staff members are understanding that rewriting in plain language is

Continued on page 32

more than making sentences shorter and choosing simpler words. Rather it is an act of clarifying policy. It required collaboration within VA between the letter writers and the people who had the authority to interpret and make decisions about unclear policies.

Formal results. With all the anecdotal data, most people agreed that RFW was an asset to the organization. The next step was to determine if the *RFW Tools* course was imparting the knowledge employees needed to use in their everyday work.

- In two separate evaluations, participants showed significant improvement in performance. First, a third-party contractor scored the pre-course and post-course writing samples. With a potential for 12 points, pre-course samples had a mean score of 4.34. Post-course samples had a mean score of 8.10, showing particular improvements in using headings, appropriate highlighting techniques, reader-centered tone, and improved organization within the letter.[8]
- In another evaluation, evaluators pulled real letters from files in Regional Offices. A total sample of 76 letters was collected and rated by a panel of 4 raters. These raters looked at a total of 15 criteria, based on the course teaching points.

For this evaluation, 68 letters were evaluated along these 15 criteria. The results show that the median number of criteria rated for pre-training letters was 9, while the post-training number of criteria was 14.

The RFW letters were clearly significantly better than the pre-RFW Tools letters on the criteria taught in the RFW training. Also impressive is that all of the post-training letters included 9 criteria or more.[9] Even more impressive is that the evaluation was completed in October 1997, with the last broadcast of the RFW Tools course in November 1996. The scoring results suggest sustained and retained learning and application of the teaching points as opposed to mere recitation immediately after the course.

But one evaluation expert, Dr. Peter Kincaid, Principal Scientist at the Institute of Simulation and Training (one of the developers of the Flesch-Kincaid Reading Level) reported that:

> The Reader-Focused Writing program is well done and a valuable program in a number of significant ways. . . .The Reader-Focused Writing Program should serve as a model for other government agencies which use letters and other written materials to reach large segments of the American public. . . .".

We would be seriously satisfied if this were the only measures of the course's success, but the final paragraph of the CIRCE evaluation report perhaps best sums up the success of the RFW Tools course:

> Reader Focused Writing is a major asset for the Veterans Benefits Administration. It is built upon sound principles, has the endorsement of the directorate and widespread acceptance among rank and file across the country. The training activities can be improved but, by and large, they have had a strong positive impact and appear well worth the investment. RFW addresses the recognized need for better communication and correspondence, and although insufficient to accomplish it alone, is an appropriate component in any re-engineering effort.[10]

A bureaucracy is defined by Webster's as "a system of administration marked . . . marked by a lack of initiative, by indifference to human needs

Figure 2: Fifteen Criteria

Format	Organization	Style	Grammar & Mechanics	Content
Headings	Up-front message	Tone	Wording	Internal consistency
Bullets	One idea per paragraph	Direct and comprehensible sentences	Mechanics	Statement of rationale for VA decisions
White space	Apparent sequence	Active voice	Grammar	Clear specification of action

Figure 3: Number of File Letters with 3 Criteria to 15 Criteria Present

Number of Criteria	3	4	5	6	7	8	9	10	11	12	13	14	15
Pre-training letters (25)	1	0	1	3	4	1	1	2	2	3	2	3	2
Post-training letters (43)	0	0	0	0	0	0	2	6	2	1	4	12	16

or public opinion, and by a tendency to defer decisions to superiors or to impede action with red tapes. . . ." VBA's *Reader-Focused Writing* is an initiative that teaches flexibility; that focuses on the human needs of the reader and asks the public for its opinion before releasing letters; and that forces the writer to cut through the red tape and decide about what the reader needs before putting pen to paper. Each time a document is rewritten to focus on the reader, it helps to unravel the bureaucracy one paragraph at a time.

Endnotes

[1] The Veterans Benefits Administration is a part of the Department of Veterans Affairs.

[2] McKean, Kevin. (June 1985). Decisions, Decisions. ***Discover***, Volume 6, Number 6, 22-31). In this article, McCean discusses the concept in more detail.

[3] ***Writing Clear and Usable Regulations*** was not originally intended as a part of the RFW initiative, but the Presidential Memorandum on Plain Language issued on June 1, 1998, set deadlines for the rewriting of regulations. VBA knew the Memorandum would be issued because of its work with the National Partnership for Reinventing Government and its Plain English Network.

[4] See Felker, Daniel (ed.) (1979), ***Guidelines for Document Designers***, American Institutes for Research, in which much of this research was collated for the first time.

[5] Flower, Linda, and John R. Hayes. (February 1980). The Cognition of Discovery: Defining a Rhetorical Problem, ***College Composition and Communication***, 31, 21-32.

[6] PEN is one activity of the National Partnership for Reinventing Government (NPR), an initiative of U.S. Vice President Gore.

[7] VA is now working closely with regulation writers and lawyers to makes sure that future regulations are both legally sufficient and focused on the reader. Developed by Kleimann Communication Group and Redish &Associates, the first course was given in November 1997.

[8] Scoring was performed by HumAnalysis in Orlando, Florida in 1997.

[9] Stake, Robert, Rita Davis, and Stephen Guynn (1997). Evaluation of Reader Focused Writing for the Veterans Benefits Administration, CIRCE, University of Illinois, pp. 82-84.

[10] Ibid., p.173

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Plain English in a Big 5 Accounting Firm

Susan McKerihan

For the last 6 years I have been the Plain English editor at PricewaterhouseCoopers in Sydney. While my primary client is the management consulting division, where I help with client reports and other external communications, I have also worked with the audit, tax and actuarial divisions.

The challenge

In my work I face a major challenge: while my colleagues support the plain English approach in theory, in practice most of them do not apply it. Many of their reports, while technically accurate and commercially perceptive, are garbled and unclear. These problems predictably occur throughout the firm, regardless of topic or specialty.

Much of their written output displays the features of unclear writing that any plain English editor would expect:

- long, unwieldy sentences;
- overuse of the passive;
- a preference for nominalising;
- inflated, abstract vocabulary; and
- verbosity – wordy phrases, padding, repetition.

In addition, the material is often presented in such a way that the key message is hidden. A typical consulting report might look like this:

- the first thing the reader encounters is a long-drawn-out section detailing background, terms of reference and scope;
- the key issues that concern the reader are buried in circuitous explanations, narrative, etc.;
- there is no clear recommendation or conclusion;
- 'findings' and 'recommendations' are presented unsystematically. For example, in one chapter findings might appear at random, with no explicit recommendations; in another chapter, both findings and recommendations are presented consistently at the end of the chapter;
- the conclusion appears on the last page of (say) an 80-page report; and
- the executive summary is a summary of the entire report rather than a summary of the key information.

After several years of reading a range of reports written for a wide variety of audiences and purposes, I decided that there were 2 main reasons for this lack of clarity.

The reasons for unclear writing

The first reason, possibly common to all professional services advisers, is 'professional mystique'. I cannot remember where I first read this term, but it perfectly defines the attitude that says "I am an extremely clever specialist in an arcane area; because my subject is so complex, writing about it requires a particularly complicated, learned style". This attitude seems to be more prevalent in the management consulting and tax divisions than in the audit and actuarial divisions, which surprised me given the traditionally conservative nature of audit and actuarial work.

The second reason arises from the fact that my colleagues are business advisers, not writers. They are highly qualified and commercially experienced, and many of them previously held management positions in industry or commerce. One of their skills is seeing the client's perspective in business matters; however, this skill does not always translate to structuring and writing a report from the client's point of view. Many of their reports therefore require a lot of concentration and time from the reader.

How I approached the challenge

My solution had to take into account the work environment. The nature of consulting work is such that the actual advising is usually done in face-to-face meetings or workshops. Reports are often a confirmation of discussions already held, and may be written under great time constraints at the end of the project, with little or no planning. The usual checklists, toolkits, '6-step processes' etc had not produced the desired results. Another approach was required – one that was easy to apply, and whose benefits outweighed the time/effort involved.

***Susan Mckerihan** joined the management consulting division of Coopers & Lybrand in Australia (now PricewaterhouseCoopers) six years ago as their internal Plain English Consultant. She edits reports to clients and aims to raise awareness and understanding of the principles of clear written communication through training, hands-on coaching, presentations, etc.*

In addition, in a commercial business there is not much argument about where the core activities and focus lies. Training, particularly training in 'soft' areas, often takes second place. Writing skills are not generally seen as a core business skill (although poor writing skills are perceived as a negative). Therefore, because the client and the client's needs must come first, effective writing training courses face two main hurdles:

- it is hard to keep participants focused on the course; there is a lot of "I have to pop out for an hour to finish a proposal"; and
- senior people rarely attend; they edit rather than write drafts; and some, to be truthful, do not consider that they need training in this area.

To try to overcome these problems and improve the quality of business writing generally, I decided to work on the basis of 're-education' following these principles.

1. Readers appreciate plain English documents

The first hurdle is to persuade writers that clear, straightforward writing is not only acceptable to, but preferred by, our readers. The most successful way of proving this is to show rather than tell. In other words, rather than trying to explain how a report could be more effective, I redo the report myself and show it to the project manager, comparing it to the original. This convinces people where a sales pitch will not, and the relevant partner or manager then becomes an advocate.

Once a client has received a reworked, plain English report, they almost always compliment the partner and consultants involved, and there is no looking back! If anyone previously had any doubts or concerns about the validity of a plain English approach, they are converted immediately on seeing their client's reaction.

2. Effective writing can be taught

Because of the organisational problems of guaranteeing attendance at report-writing courses, I have had to devise some lateral solutions.

I offer a range of training courses: training for specific groups based on their area of specialisation – people seem to be more willing to attend when they feel that the course has been tailored for their particular expertise

As well as detailed courses in report-writing and plain English, I offer a range of ad hoc courses dealing with different aspects of writing. The courses are short (some are one hour, some half-day workshops) and therefore more accessible, and cover such topics as 'writing user instructions'; 'understanding graphics'; 'an introduction to grammar'; etc

To attract those who do not believe they need help with their writing skills, I offer training in 'editing' rather than 'writing' techniques. These courses in fact cover the same principles – a reader-focused structure and straightforward language – as the effective writing courses, but the name change makes them easier to sell.

My report-writing course is different to most writing courses that participants have attended, in that it focuses on the reader as the key element underpinning any business document. Exercises and case studies challenge participants' mindsets about writing and force them to think strategically about the audience and the most effective way of structuring each message.

The major case study involves small groups preparing a draft outline report in storyboard format, using a brief and two pages of 'findings' from a hypothetical assignment. Each group must defend its work when a partner challenges both their thinking and their presentation of the issues.

A session on effective use of language uses examples taken from their own work. The groups are small enough (16-20) for each person to answer questions on each topic, and for their answers to be individually assessed and discussed.

3. Get the structure right and the rest is easy!

While highly client-focused in other areas many of my colleagues are unable to structure a report from the client's point of view. The solution used to be seen as 'give them some training in grammar'.

My approach is to raise people's awareness of the importance of a coherent, reader-focused structure. I do this by providing before-and-after illustrations which prove that confusion and lack of clarity is primarily caused by the lack of a logical organisation of ideas.

I work with groups when they are preparing a proposal or report, to help with the planning process. We use an electronic whiteboard to map out the storyline and key messages. The team usually finds that what they thought would be a straightforward process (ie planning the outline) becomes more complicated when they see their ideas in storyboard format and realise that there are gaps in their logic or that they have not fully thought through all the issues to be covered.

The challenge continues ...

There's no end in sight – I'm happy to say. In this profession there are always new challenges (and new colleagues to be converted and trained). Despite occasionally feeling that I'm pushing water uphill, most of the time I am incredulous that I can spend my days doing something I enjoy and that I know is appreciated by my clients.

The most rewarding aspect of my work is that I am continually learning. Each report or document I edit teaches me more about the language of business consulting and gives me further ideas for training. I am also lucky to have met and worked with some of the best (Robert Eagleson, take a bow) – and, of course, have wonderful colleagues in audit, tax and management consulting, who are clients of sheer brilliance and creativity!

AMP – Championing the Way to Clearer Communication

Fulvia Nisyrios and Gail Williamson

What do you think about the idea of selecting and training key staff across your organisation to become accredited plain language experts? Your 'Clear Communicators' could help staff edit and review documents. They could introduce and maintain consistent standards and guidelines. They may even work with other Clear Communicators to identify opportunities and implement strategies for ongoing improvements to communication across the organisation. Perhaps most importantly, the Clear Communicators would help staff develop and refine their own writing skills.

Well, AMP's senior managers supported the idea and set up a cross-divisional project team to drive this and other improvements.

Our mission – to improve the quality, coordination and consistency of all written customer communication.

We were both part of this initial team. Another key member was Christopher Balmford, who was seconded to AMP at the time.

AMP Ltd is a major provider of life insurance, superannuation, pensions and other financial services in Australia, New Zealand and the United Kingdom. AMP has significant presence in the UK through Pearl, London Life, Henderson and Virgin Direct.

Why did we start this project?

For 2 main reasons – the sheer volume of communication we produce, and customer satisfaction with this communication.

Volume and complexity Each year, the Financial Services Division of AMP distributes 16 - 20 million pieces of mail to 3 million customers..... this includes notices, letters, statements, brochures and flyers as well as other documents issued by customer service and marketing areas.

That figure doesn't include other regulatory documents we also produce such as policy documents, Customer Information Brochures and prospectuses.

What do these documents look like? Are they easy to read and understand? Are they personal? Do they look like they are produced by the same organisation? And more importantly, do they satisfy customers' needs?

An audit of our written communication revealed that we had inconsistent writing standards, styles and visual language. We were faced with many opportunities for improvement.

Quality communications – a key driver of customer satisfaction Financial Services products are intangible. That is, customers can't see, feel or trial our products like they can if they want to buy a car or house. As a result, the written communication that supports our products is crucial. Easy to use, clear, well designed and informative written communication can differentiate AMP from its competitors.

Further, written communication is a key driver of customer satisfaction with AMP. While it may be hard for us to influence other key drivers of customer satisfaction, like product performance or fees, we can influence the clarity and effectiveness of the documents we write.

What did we do?

We developed the following vision for how we wanted to position AMP's written communication. *Our customers will feel that every AMP communication enriches the relationship between us.*

With this vision in mind, we established aims and measurement criteria for improving our documents. The main aim was to produce documents which are timely, concise, user-friendly, and above all useful. The measurement criteria (derived from a concept by Siegel and Gale) include requirements that every communication must: strengthen the overall relationship between AMP and its customers; be easy to use and understand; reinforce our image; and, comply with our style and design standards.

A solution

At a brainstorming session, the project team developed ways to achieve positive results. We considered hiring consultants to rewrite our documents, but felt this approach:

- was short term
- would not address all the non-standard letters staff write
- could be resented by staff, and, importantly,
- would not build staff skills.

The team decided to establish Clear Communicators who would maintain writing standards across AMP and develop this capability in others. They also proposed to issue a self-learning Clear Communication Guide as the first step towards improving staff skills.

The Clear Communicators

Staff from key areas were selected to become Clear Communicators. Their extensive training program covered everything from planning and editing a document to writing in plain language, giving feedback to others, designing and testing documents and being a change agent.

An AMP Clear Communicator:

- promotes plain language
- acts as a mentor and reference point for employees on Clear Communication issues
- creates documents to meet communication needs
- rewrites documents that need to be improved
- helps employees edit their documents and build their skills
- identifies where employee capability could be improved
- introduces and maintains consistent writing standards
- works with other Clear Communicators to improve written communication and implement strategies for ongoing improvements
- identifies employees to become Clear Communicators
- signs off documents for plain language.

After training these initial Clear Communicators, a formal training program was established. Staff had to complete certain courses and pass oral and written assessments to be accredited as a Standard or Advanced Clear Communicator. Both programs are open to all staff members.

Self-learning guides

The project team also developed a *Clear Communication* Guide to set the benchmark for how we want AMP staff to communicate with external and internal customers. The Guide is not a heavy technical document – it's light and breezy and has lots of examples and suggestions. It includes:

- standards for writing items such as monetary figures, dates and addresses – staff are happy to have these niggling uncertain issues resolved
- a form to help plan documents
- general tips for planning, writing, designing and editing documents
- a letter written before applying the standards and guidelines recommended in the Guide and the same letter rewritten after these standards are applied (with commentary and explanation of the changes)

- a checklist to make sure documents comply with the communication aims and measurement criteria
- a *Clear communication made easy* sheet, which summarises the main principles of content, structure, language and design

About 2,000 Guides were originally issued.

Embedding Clear Communication in AMP

The Clear Communicators became so positive and passionate about clear communication that they took over the management of the project from the initial team.

The Committee's initiatives include:

- Issuing a new version of the Clear Communication Guide to all staff The new Guide included more writing standards which all staff agreed to adopt. Over 4,000 Guides have distributed to staff by the end of February 1999.
- Arranging for the Managing Director of Financial Services to formally endorse Clear Communication by issuing a memo to all staff stating "We established the Clear Communication Project to develop the "voice" of AMP. This voice, which we project through our written communication, is plain language..... I urge you to support the Clear Communication Project and embrace these initiatives. And I expect you to use the *voice* of AMP in all your written communication. By doing this, you help us position AMP documents as communications which enrich the relationship we have with our customers."
- Providing a 50% subsidy for all Clear Communication courses. By subsiding the course fees, we have increased attendance to plain language and related courses.
- Introducing sign-off protocols which require all documents for external customers to be signed-off by a Clear Communicator.
- Keep building awareness and increasing staff interest in clear communication by running regular competitions and producing a monthly newsletter of writing tips.
- Identify appropriate staff and develop them as Standard and Advanced Clear Communicators.

Measuring our success

We always knew it would be difficult to measure how well the program was working. However, we will be closely monitoring:

- whether the customer satisfaction rating for written communication improves (we conduct quarterly research of our customers)
- the standard of documents that pass through our regular sign-off process (in which staff pass documents to Clear Communicators for sign off)
- the number of staff who complete the Clear Communicator training programs and continue to use and apply their skills (staff are regularly contacted to make sure they apply their skills)
- the number of customer complaints and compliments we receive about our documents.

To date the results have been very positive and demonstrate the success of the Clear Communication Project.

Some success stories...

Our major success has been that we don't have to hire consultants or contract communication experts to rewrite our documents – these skills are now available in our organisation.

A clearer letter Late last year we had to issue an apology letter to customers. We calculated the wrong amount when customers cashed in their investment. The standard letter which was long and difficult to understand, was printed and ready to be sent. Previous experience showed most customers who received this letter called AMP for help and were often angry when the situation was explained. A Clear Communicator stepped in and reworked the letter so it explained simply and clearly the situation and AMP's solution. The new title "We didn't pay you enough" was guaranteed to capture our customer's attention and was easy to understand.

The letter was issued and staff waited for the complaint calls to come in, but none did – instead they were delighted when one customer called, to compliment AMP on the clarity, honesty, and customer focus of the letter. We saved time and money because we clearly communicated what had happened and positively contributed to our customer relations.

A facelift for our high volume documents

We are currently rewriting/redesigning over 120 high volume documents. Initial customer feedback shows this is going well. For example: we converted an 8 page annual statement to 3 pages of clear, customer focused information. We then sent samples to about 900 customers and asked them to complete a survey. Customers were asked to rate how clear and easy to understand the new statement was, 83% said it was excellent or very

good. They were asked which statement they preferred and 92% said they preferred the new statement over the current statement. We also asked customers whether the new statement increased their satisfaction with the service provided by AMP and 83% said that it did.

Helping to establish the benchmark for Australian Prospectuses In 1997, our managed funds area needed to issue its new Prospectus. The existing 64 page offer document was cumbersome and confusing for both investors and advisers. The team wanted to create a document that was shorter, simpler and, most of all, easier to understand. They worked with the Investment Funds Association (an industry body) on a pilot project to drive the introduction of short-form (profile) prospectuses into Australia.

A Clear Communicator became heavily involved with this project – creating an 11 page prospectus which provided clear information about 14 different products.

This Prospectus received praise from various parties. Financial advisers called to tell us that the document made their jobs easier as it was short, clear and easy to explain to investors. And to really show that the program was achieving its vision a potential investor wrote 'Your prospectus is an excellent publication, easy to understand and to follow. I will definitely be investing'.

This team also received internal acclaim by winning a prestigious annual award which is part of AMP's Reward and Recognition Program.

Contributing to the success of other major documents AMP's commitment to clear communication extended to the documents that it sent to its members and shareholders as part of its demutualisation and listing on the Australian and New Zealand stock exchanges. These included the Explanatory Memorandum, various prospectuses and other supporting documents. Clear Communicators were part of the team that worked on these documents.

At the highest levels, management recognised that these documents impact on the AMP brand. They wanted the documents in this process to be in plain language as this would help to make the impact positive. In the UK, the employee share plan offer documents contributed to Pearl, an AMP company, winning an award from ProShare[1] in recognition of the way it communicated and educated employees about the share and option plans.

The future

We will continue and expand our commitment to improving all communication. We are working to make sure that the way we communicate will enrich the relationship AMP has with its customers.

Endnotes

[1] ProShare is an independent UK organisation that promotes and researches employee share ownership.

An earlier version of this article appeared in *Consumer Directions*, the journal of the Society of Consumer Affairs Professionals in Business Australia, June 1998, p.3.

Fulvia Nisyrios *has been with AMP Life Limited for 9 years. She currently manages 2 projects which impact on how AMP communicates with customers: Notices & Statements, is about transforming AMP high volume documents into clear, focused marketing communications which build a relationship with customers; Clear Communication, is about making plain language the 'voice' of AMP.*

Gail Williamson *is a Communications Manager with AMP in Australia. Her work includes embedding Clear Communication in AMP and advising on difficult or sensitive communication. Using her economics, writing, marketing, and graphic design skills, Gail analyses needs, determines appropriate communication strategies, and develops information to meet those needs.*

Promoting Plain Language Principles in a Legislative Drafting Office

Dennis Murphy QC

Preparing a parliamentary legislation program in a busy legislative drafting office presents a challenge for ensuring that plain language principles are followed to the maximum extent possible. The pressures under which some legislation is prepared can be a threat to the use of plain language principles, particularly if the instructing agency is not fully supportive of the principles.

In the New South Wales Parliamentary Counsel's Office, we have developed a Plain Language Program to recognise, reinforce and explain our commitment to these principles and to ensure that they are complied with. The Program is a crystallisation of practices that have been developed over the years, and no doubt will evolve in the light of internal and external experience and research.

The Program has 5 elements.

Ongoing commitment

The Office made its formal commitment to plain language in 1986[2]. It has also formally adopted[3] a statement of plain language principles, including a definition of plain language in the following terms:

> Plain language is clear intelligible English. It is not simplistic English. It does not involve any loss of precision.

The commitment is of an ongoing nature, and is reinforced by senior officers. The Office is most fortunate in that its senior officers are enthusiastic supporters of the principles, and I pay tribute to them for their commitment.

The emphasis on ongoing commitment ensures that existing staff have the opportunity to refresh their individual commitment and to share their understanding of the principles in the light of their drafting experience. It also ensures that the torch is handed on to newly recruited staff as part of our scheme to recruit and train legislative drafters.

A crucial part of the commitment process is to emphasise the advantages of using plain language in legislation. Without that emphasis, there is a risk that plain language may be seen as an arbitrary list of things to do and things to avoid. The recognition that the Office receives for some of its drafting projects also serves as a positive stimulus.

Official documents

The Office's commitment to plain language is reflected in our:

- Corporate Plan:[4]

  > Strategies ... fostering the use of plain language drafting

- Ethnic Affairs Priorities Statement:[5]

  > The PCO is fully committed to the principle of communicating the message of legislation in plain language. ... The Office will continue to maintain a policy of plain legal language when drafting new legislation to ensure the widest possible level of accessibility.

- Guarantee of Service:[6]

  > All drafting assignments are subject to stringent review and will conform to PCO policies of quality drafting and plain language.

- Annual Report:[7]

  > The Office is fully committed to the principle of communicating the message of legislation in plain legal language.... Plain language is a characteristic of legislation now expected by the community.

- Manual for the Preparation of Legislation:[8]

  > The Office made a formal commitment to plain language in 1986 and was one of the first Australian jurisdictions to do so. The Office has been consolidating its position on plain language since then, and will continue to do so as part of a long process of ensuring that legislative language is as clear as possible, having special regard to the needs of the users of legislation. The Office is fully committed to the principle of communicating the message of legislation in plain language, without any loss of precision or of any necessary detail.

The task, of course, is to live up to these statements! We strive to do this by personal and team drafting efforts, staff meetings, critiquing draft legislation, and professional development.

Staff meetings

At our regular staff meetings, we draw attention to and reinforce the Office's commitment to plain language. We have raised and discussed a number of particular matters, including the important issue of avoiding undue compression of language on the one hand and undue repetition on the other. We have discussed the usefulness of acronyms in legislation, but have warned against their excessive use, particularly where the acronyms are not obvious or already well known. We have considered the usefulness of purpose clauses, but have warned against their use when they will serve to confuse or merely repeat the thrust of the legislation. We have emphasised the need for concise but coherent expression.

Critiquing draft legislation

The Office's quality assurance program provides opportunities for senior officers to comment on draft legislation before it is released for introduction into Parliament. Senior officers comment on the substance and form of drafts, and particular care is taken to ensure that plain language principles are being followed to the maximum extent possible. Editorial staff are also encouraged to keep plain language principles in mind when checking draft legislation.

Professional development

Part of the Office's professional development program is devoted to the reiteration and development of plain language policies. The program involves professional development circulars and professional development seminars. A series of seminars is planned for 1999 with particular attention being given to producing a new drafting manual.

Conclusion

There is no doubt that the presence of the police encourages law-abiding citizens to behave even more responsibly. In this vein, we note and acknowledge the influence that the Law Reform Commission of Victoria and the Centre for Plain Legal Language in Sydney had on the use of plain language in legal documents before their closure. Of course, both the Commission and the Centre were much more than police officers. In particular, they initiated productive debate and produced useful demonstration rewrites of significant documents. Those rewrites challenged all legal drafters to reassess their communication objectives and how they achieved those objectives. At the New South Wales Parliamentary Counsel's Office we have enjoyed responding to those challenges. Having been involved with the Centre for a number of years, the Office has been keen to maintain the momentum fuelled by these and indeed other organisations. Our Plain Language Program is a contribution to this process.

The program provides a tangible basis for keeping the Office's commitment to plain language principles in robust good health, and it provides a sound basis for the future development and application of plain language principles in the Office. It will continue to be reviewed and developed.

Endnotes

[1] The views expressed in this article are those of the author alone.

[2] This was referred to in an article "Plain Language in a Legislative Drafting Office" by the author in *Clarity* No 33: July 1995.

[3] Referred to in the Annual Report of the Parliamentary Counsel's Office 1997-98, page 17.

[4] Corporate Plan 1998-2002. September 1998.

[5] October 1997. Printed with the Corporate Plan.

[6] 1998-99.

[7] Annual Report of the Parliamentary Counsel's Office 1997-98, page 17.

[8] Parliamentary Counsel's Office, 7th edition, March 1997.

***Dennis Murphy** has been Parliamentary Counsel of New South Wales since 1982, and previously held a number of positions in the Parliamentary Counsel's Office of that State. He is President and a member of the Council of the Commonwealth Association of Legislative Counsel, and Secretary of the Parliamentary Counsel's Committee.*
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Section 3 – Style, Substance, and Enforceability

How Plain English Rescued a Company

David D. Knoll

This article is about how plain language communication helps Boards govern better by removing confusion about legal risk.

Many Boards are risk averse when it comes to dealing with legal risk. That includes both private sector company boards and public sector statutory boards. Most risk averse decisions are made because the decision maker inadequately understand the risks, and perceives that the cost of understanding what the law requires exceeds the benefit of "taking the risk".

In dealing with Boards that take this view, it has been my experience that communications to Board members of what the law requires have been anything but plain.

Consequently, the risk aversion arises out of confusion rather than a commitment to good corporate governance and sensible compliance practices.

If the people advising the board communicate the legal requirements by recommending doable management actions, and do so plainly, practicable governance strategies and legal compliance become part of the ordinary course of business.

There are many definitions of corporate governance. None of them is very plain.

To have effective corporate governance, and to be able to properly implement due diligence processes, the rules by which the Corporation governs itself must be set out in plain language so that they can be understood by everyone who is involved; shareholders, the Board of Directors, managers and staff.

Good and honest folk within the Corporation will disagree as to what corporate governance means. All too often the disagreement is left to fester. Broad concepts of "due diligence" frequently mask an undercurrent of confusion and mystique.

Rather than admit that today's Boards are not communicating well, organisations that represent Company directors have made representations to Government to the effect that too much corporate governance is required of boards, leaving not enough time for management.[1] The perceived conflict between the two is symptomatic of the need for plain and clear communication within corporations of what must be done and why. As a matter practical reality there need be no conflict.

Quite openly, directors of large companies argue that compliance with the law gets in the way of making money. They say that less compliance should be required of them.

The Australian Government's Corporate Law Economic Reform Program Proposals for Reform Paper acknowledged submissions by directors' representative bodies that:

> " ... directors intentions are increasingly being focused on compliance issues rather than on wealth creation for shareholders. In particular, concerns have been expressed that the Corporations Law contributes to risk-averse behaviour on the part of directors. If this is the case, the losers are not only directors personally, but also shareholders, whose returns on company capital will ultimately be diminished. The nation also loses as behaviour that is unnecessarily risk averse distracts from behaviour that could expand enterprise and therefore wealth and employment."[2]

Many Boards, for example, see the Trade Practices Act as a bogeyman; an operational problem to be dealt with by middle management rather than a strategic issue for the Board to address. They often are astonished to hear that section 52 of the Trade Practices Act applies to all businesses, that section 52 can be turned into appropriate rules tailored to their particular business, and most excitingly, that a competitor's noncompliance can be taken advantage of, with tangible commercial benefits.

When a Board understands these issues, two things usually follow. Firstly, the discussion turns from "why must we do this?" to "what must we do, and how do we do it as inexpensively and profitably as possible?" Secondly, legal risk management is understood as a tool for competitive advantage, and it comes to be seen as a Board level issue.

The Government does not agree that compliance with the law gets in the way of making money.

The Government's Corporate Law and Economic Reform Program Paper[3] asserts that:

> "the establishment of maintenance of effective corporate governance practices by Australian companies is essential to Australia's international competitiveness and economic growth."[4]

But neither the Government proposals nor the submissions of business leaders addressed the "how to" issues. Just how can good corporate governance contribute to competitiveness?

To address the "how to" issue, it is essential to appreciate the gap between the law on directors' duties and the reality of corporate life. The following example identifies a few of those "how to" issues.

The law does not adequately deal with the reality that there really are two tiers of responsibility that the owners of the Corporation should be interested in; the Board and the managers who report to the Board.

In modern corporations, control of the corporation is separated from ownership. Directors – not shareholders – govern the corporation. But the directors seldom own even a majority of the equity in the corporation, especially in large corporate entities. In recognition of this reality, the law sets certain standards of management accountability to protect the shareholders.

By management accountability, the law actually means the accountability of the Board of Directors. Yet there is a confusion here. Shareholders seldom have direct contact, or a direct relationship, with the people who manage the corporation. The managers are not the directors.

The law does not adequately deal with the fact that there really are two tiers of responsibility that the owners of the Corporation should be interested in; the Board and the managers who report to the Board.

In this author's experience, working closely with a number of large private sector and public sector corporations, the processes by which a corporation is governed, and the outcomes that are desired, are more than likely to be the subject of whispered misconceptions rather than plain, practicable and therefore profitable rules. The law is unclear as to the division of responsibility and of accountability as between directors and managers, and so its effect is diffracted.

A "need to know" mentality is bad for good governance, and is a symptom of poor communications.

In one "need to know" corporation, the Managing Director and the Company Secretary both knew what had been discussed and what had been resolved in relation to every paper that was presented to the Board. They had the advantage of being present, and the advantage of having vetted everything.

After the Board meeting, the General Managers would receive a briefing from the Managing Director. They would not receive a copy of resolutions because the Managing Director and the Company Secretary took the view that they did not need to know what those resolutions actually said. The Managing Director told the General Managers what was required of them. In this way, the General Managers received only an interpretation of the Board's decisions. Then they added their own gloss, and provided a briefing to the senior managers who reported to them.

Yet, those senior managers were expected to achieve compliance with the Board's resolutions. The best that those senior managers could do was to comply with the interpretation of their own General Manager's interpretation of the Managing Director's interpretation of the Board's resolution.

Problems arose when different divisions of the same corporation had to work together. The General Managers in different divisions often came up with different interpretations of what the Managing Director had said was required. Much corporate time was spent trying to resolve these differing interpretations. The time spent on doing so was not time spent on improving the corporate bottom-line.

Though no-one was game enough to admit it, bad corporate communication led to bad corporate governance, and in turn got in the way of good performance. Yet what people complained about was bad corporate governance and over-regulation.

One might well think that such appalling corporate governance would not last long. Surely, a well run Board would follow up on outstanding actions. It would discover that the activities of management and staff did not always deliver what the Board had resolved. In this particular corporation the Board did not follow-up at all adequately.

Where were the shareholders?

Like most major corporations in the "large public" category, a diverse group of shareholders had no control over the Board. The Board regularly re-nominated itself for election, and was regularly re-elected unopposed. The corporation ran what was essentially a monopoly business. Thus, neither shareholder pressure nor competitive pressure forced the Board to reform in order to make money.

Regulatory pressure did what the market could not do.

The Australian Competition and Consumer Commission (ACCC) came to conduct an investigation of alleged violations of the Trade Practices Act. The regulators had talked first with former employees and then with operational staff in the different divisions. The different divisions gave the investigators differing views of what was going on and of what "management" required.

As a result of its investigation, the ACCC gave the Board a stern warning. The ACCC said it would prosecute if the Board did not quickly correct ingrained illegal practices. "Get your compliance program together, or else" was the message.

So the Board called for help.

The Board accepted that its officers could not comply accurately with resolutions that were never shown to them.

The first step of course was to obtain the Board's agreement in principle that its resolutions were far from top secret. Once the Board resolved that its resolutions would be made available for General Managers and the senior managers who reported directly to them, managers began to cooperate.

The next challenge was to ensure that the General Managers and senior managers whose jobs it was to implement the Board resolutions had a common understanding of what was required.

A new process of drafting Board resolutions was adopted.

Common understandings require common language. Board members had to understand each other, rather than just say that they did. Managers had to understand the Board rather than just say that they did.

Only plain language could deliver a common understanding at both levels.

The history of documenting Board resolutions also had to be overcome. In the past, the Company Secretary would take minutes. The minutes would include the resolutions. These minutes would be drafted and presented to the Managing Director for review. The Managing Director would edit them. The Company Secretary would then send the edited version to the Chairman for further review. The Chairman would make further edits. This version would be sent to the other directors, and at the next Board meeting the Board would discuss what was actually said and done at the last meeting. This discussion would also form part of the next meeting's minutes. I observed three Board meetings and by the third meeting there was some consensus as to what was decided at the first meeting!

After the warning from the ACCC, the Board tried to express simply what it wanted done. The simple expedient of reading the resolution out aloud before it was voted on was reintroduced. Often listening to the resolution being read out led to further discussion and clarification. Directors were required to ask questions as a matter of duty if they thought that any part of the resolution was unclear.

After any clarification, the resolution was then passed and handed down. Yet only the first battle had been won.

It should come as no surprise that the team of General Managers would often disagree as to what was required by Board resolutions.

Now that the Board had decided that it was going to follow-up its resolutions it became apparent that any disagreement between General Managers would be picked up by the Board. If the General Manager's interpretation did not line up with what the Board expected, the disagreement would be resolved at the very next Board meeting.

And plain language was introduced.

Board papers began to be written in a much plainer way, so as to minimise the risk of adverse Board reaction. And managers took more care in preparing the substance of their proposals once they realised that the Board *wanted* to understand where they were coming from.

Regularly, the management view and the view of the independent directors as to what was required would differ. Either management misinterpreted the Board requirements and was disciplined for doing so, or very occasionally the Board acknowledged that the resolution as passed was imprecise. Gradually, plain English emerged in the text of each resolution. Gradually, the Board had to spend less time disciplining management, and was able to spend more time on strategic issues.

Things have not become perfect at this particular corporation, but they have become better. Indeed, two large divisions undertook plain English training so that inter-Divisional communication as well as communication with customers could be improved, with the usual positive results of better sales and fewer disputes.

Conclusion: Good communication and the use of plain language have contributed to more efficient and effective corporate governance.

Because the rules are more quickly understood, corporate performance happens more smoothly. Managers know what the target is and can achieve it. Multiple managers are able to work towards the same target because they no longer dispute the identity of the relevant target. Slowly, cooperation is replacing confrontation.

Ironically, the regulatory intervention has resulted in a more effective corporate governance system, and in a more communicative and efficient corporation.

In short, using plain language meant better governance which then improved corporate performance, and left the shareholders, directors, managers and staff better off.

Endnotes

1 Corporate governance gurus seldom talk about good communication and the use of plain language. Boards of Directors do not like such talk as a general rule. And the gurus who are their consultants cannot allow themselves to displease.

2 "Director's Duties and Corporate Governance" pp. 9-10

3 Ibid.

4 Id. Page 4 – Proposal 5.

Prior to returning to private practice, now at the Sydney Bar, ***David Knoll*** *spent much of the last decade in the corporate governance and legal risk management spheres. He has worked closely with boards seeking to proactively manage legal risk. He led the team that overhauled the Export Finance and Insurance Corporation's products and rewrote them in plain English. David more recently initiated the simplification of electricity contracts and contracting processes in the New South Wales energy sector.*

Is It Safer to Use Legalese or Plain English? What the Judges Say

Steve Palyga

Some lawyers defend legalese on the ground that it is tried and tested.

The argument is that we know how the old words and phrases will be interpreted by courts, and if we change them to simplify them, we run the risk that the new expressions will not be given the effect intended.[1]

Is this argument correct? Is it safer, for you and your client, to use legalese, or plain English?

I explore the answer to this question by reviewing cases where the style of drafting used has been the subject of comment.

The cases supporting legalese

Courts occasionally criticise plain English. Two cases are quoted in a recent article by Robert Eagleson in "Clarity".[2]

What the critics say

Steve Palyga

An example of the argument that plain English is dangerous is an article in the February 1998 edition of the newsletter of the Probate Committee of the Law Society of South Australia:

The article's headline suggests that the drafter's use of plain English caused the foul up.

> **Consequences of Plain English**
>
> Instead of leaving the testator's estate "to such of my friends A and B as survive me and if both in equal shares", the draftsman wrote "to my friends A and B equally". A predeceased the testator. The testator had no next of kin.
>
> Because the word "equally" is a classic word of severance, the gift was construed to A and B as tenants in common, not jointly. So, half of the estate went to the Crown as bona vacantia on a partial intestacy – which was a result the testator would hardly have wanted.
>
> It would have been better to make the gift simply "to my friends A and B".

But despite this implied criticism of plain English, the article itself comes up with an even plainer version which takes into account the rules in question.

The real issue in the example given in the article was an issue of drafting with knowledge of the relevant rules, not the use of plain English.

He refers to *GM & AM Pearce v RGM Australia*[3] in which Callaway JA of the Victorian Court of Appeal says:

> The provisions of the Corporations Law [in question] are drafted in the language of the pop songs ... [The] quest for simplicity pays the price of vulgarity and ends in obscurity.

The Judge particularly thought that to start a section with the word "however" was poor writing.[4]

In *Hallwood Corporation v Roads Corporation*,[5] Justice Tadgell of the Supreme Court of Victoria bemoaned the "grotesque" use of "must" in the Victorian *Planning and Environment Act*.

There are other cases of judicial disapproval of plain English, but they are in fact cases involving poor attempts at drafting in a plainer style.

And I accept that poorly drafted plain English can be as bad as, if not worse than, legalese.

Ross v NRMA[6] is a case in point, where the judge described a new form of insurance policy as "inelegant plain English". However, the case is not an endorsement of legalese, which the Judge describes as "the old time mumbo jumbo."[7]

The Full Court of the Federal Court of Australia also criticised the "plain English" drafting of the *Social Security Act 1991* in *Blunn v Cleaver*[8] for failing to achieve "the clear expression of what Parliament intended". Again, I believe their comments are in substance a complaint against the Act as drafted rather than the plain English style as such.

The cases against legalese

On the other hand, judicial criticism of gobbledegook goes back hundreds of years. Four centuries ago, the Lord Chancellor of England is said to have ordered a hole be punched in a prolix pleading, and the drafter to wear it hung about his neck as a warning to others.[9]

Much of the judicial criticism has been directed at legislation. For example, in the English case of *Bismag v Amblins*:[10]

> ... in the course of this case, I have heard [the section of the Act under discussion] read many times, but, despite this iteration, I must confess that, reading it through once again, I have very little notion of what the section is intended to convey, and particularly the sentence of 253 words, as I make them, which constitutes subsect. (1). I doubt if the entire statue book could be successfully searched for a sentence of equal length which is of more fuliginous obscurity.

See also Bray CJ of the South Australian Supreme Court in *City of Marion v Becker*,[11] referring to the *Planning and Development Act* (S.A.):

> The luxuriant growth of this legislative jungle abounds in ambiguities, inconsistencies, incoherences and lacunae and it is too much to hope that every judge who has had to consider these proceedings would choose to enter the jungle at the same point, still less to emerge from it by the same route.

Note the somewhat similar comments of Kirby P. of the New South Wales Court of Appeal in *Ditchburn v Seltsam*,[12] referring to the *Limitation Act* (N.S.W.):

> Courts, lawyers and citizens must still find their way through the thicket of the statutory language – generally emerging on the other side dazed, bruised and not entirely certain of their whereabouts.

Harman LJ in the English case of *Davey v Leeds Corporation*[13] described slum clearance legislation in the following terms:

> To reach a conclusion on this matter involved the court wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhaling from the forest of schedules lining the way on each side. I regarded it at one time, I must confess, as a Slough of Despond through which the court would never drag its feet, but I have, by leaping from tussock to tussock as best I might, eventually, pale and exhausted, reached the other side ...

But there has been plenty of judicial criticism of agreements, pleadings, submissions and letters as well as legislation.

The English Court of Appeal has been scathing about what they called an old fashioned form of bond document. They had great difficulty in making sense of it. Its literal meaning produced an absurd result, and the court ended up suggesting that those who use these documents would –

> save much time and money if in future they heeded what Lord Acton had said so many years ago and set out their bargain in plain modern English. [14]

A recent New South Wales Residential Tenancies Tribunal decision complained about loan and licence agreements in "arcane legalese and tortured language" and suggested that standard form agreements be imposed by legislation.[15]

The Australian Refugee Review Tribunal criticised a submission as being so full of "convoluted sentences", "serious ambiguities", "obfuscation" and "dense, unyielding language" as to make one "wonder if it were not written by James Joyce".

The Tribunal went on to say that "fair, just and quick decision-making" was not facilitated by the submission: "To put it bluntly the submission is not written in plain, lucid English ..."[16]

There are also many examples of judicial impatience with waffling pleadings. Statements of claim are regularly struck out for being longwinded, confusing and unintelligible.

For example, in *South Australia v Peat Marwick*, Olsson J of the South Australian Supreme Court described various parts of a Statement of Claim of over 500 pages as "unworkable", "convoluted", "impossible to comprehend", "impossible to perceive", "contradictory", "embarrassing and oppressive", "tends to generate mental confusion", "hopelessly intertwined", "meaningless" and so on.[17]

David v Heckle[18] concerned review letters sent by the U.S. Federal Department of Health to elderly people reducing their Medicare claims. Finding the letters "incomprehensible", full of "confusing cross-references", and couched in technical jargon and language with "no real meaning", and therefore in breach of constitutional rights to due process, Chief Judge Weinstein of the U.S. District Court for New York said:

> The language used is bureaucratic gobbledegook, jargon, double talk, a form of officialese, federalese and insurancese, and doublespeak. It does not qualify as English.

The risks of legalese for the client

Put simply, many judges dislike gobbledegook. This means risks for the client if a lawyer writes in legalese.

As long ago as 1858 in the English case of *Notman v The Anchor Assurance Co*,[19] an obscurely worded term in an insurance policy was construed against the insurer. Cockburn C.J.[20] said of the insurer's suggested interpretation:

> Nothing could be more easy than to express that in plain terms in the instrument itself... They have not, however, done so here ...

In *National Bank of Australasia Ltd v Mason*,[21] the High Court of Australia had to decide whether a bank's guarantee extended to contingent liabilities. Stephen J referred to the relevant clause as –

> ... one unpunctuated sentence of over 450 words of small print which is presented to the reader in twenty-five closely set lines, each of excessive length. There the resolute and persevering may find, in the midst of much else, the phrase "and whether contingently or otherwise".

It's a fair bet that the drafter meant to cover contingent liabilities, but the High Court held the guarantee did not. The above comments suggest the style of the guarantee did not assist the bank's case.

In Houlahan v ANZ Banking,[22] Higgins J of the Australian Capital Territory Supreme Court found for plaintiffs who had signed a guarantee without reading it, although they "would have been little wiser had they attempted the exercise". The Judge said it was "impossible for counsel appearing in the case to construe even the first clause when asked", and that the document included "a single sentence of 57 lines in length couched in incomprehensible legal gobbledegook."

In *Goldsbrough v Ford Credit*,[23] a New South Wales Supreme Court judge found a transaction unconscionable. After referring to the transaction consisting of "waves of documents" in fine print and requiring "the aid of a magnifying glass" to read, the judge said:

> I, myself, I must confess, spent about half an hour trying to work out the purport of CL5 and CL6 without complete success ... The lease transaction was written in such legalese that not even the New South Wales office manager of the defendant realised what it meant ...
>
> [There are] matters which cry out for relief, namely, the failure to mention the insurance loading ... the hidden away default interest rate of 24 per cent, the structure of the document which made it impossible to work out the commencement value of the goods in the document itself and the complicated rebate formula which made it impossible to work out with any accuracy the rebate.

In *Commercial Union v Patchell*,[24] the New Zealand High Court refused to order costs in favour of a successful insurer "in the hope that the appellant may thereby be discouraged from continuing to use policies which include exceptions upon exceptions upon exceptions, and are of such complexity as to defy confident interpretation, not only by customers, but by judges ..."

In the New South Wales Supreme Court case of *Consolidated Press v Royal Insurance*,[25] again the insurer won, but the judge almost decided to deprive them of costs "on the basis that the appallingly bad drafting of this policy has brought about this litigation".

In *Lisi v Alitalia*, the U.S. Court of Appeals refused to enforce an exclusion clause printed on an airline ticket which it said was –

> camouflaged in Lilliputian print in the thicket of 'Conditions of Contract' [and] virtually invisible ... ineffectively positioned, diminutively sized, and unemphasised ...

The Court said that even if a passenger was able to read this print, he or she would be unlikely to understand its meaning. So, again, the drafting and design style frustrated the client's plain objectives.

I am indebted to the article by the Centre for Plain Legal Language "Legalese – Is It Legal?"[26] for referring to this U.S. case. The article also refers to several other similar US cases, specifically *Gardner v Champagne* (where a waiver "buried in the 25th line of 40 lines in small print, singly spaced, unparagraphed" was held not to be a valid waiver) and *International Harvester v Bean* and *Myers v Land* (where the comprehensibility of the language used was an important factor in the decision) and *Blossom v Dodd* and *Capitol Music v Jones* (where the design and presentation of the information was also an issue).

In *Edwards Dunlop v CE Heath*,[27] Meagher JA of the New South Wales Court of Appeal said:

> ... the difficulty [in this case] chiefly arises because the policies, and other documents, emanating from the insurer could not be more perplexing if they had been specifically drafted in order to generate ambiguity.

The Court of Appeal held against the insurer. Although the case was reversed on appeal to the High Court of Australia,[28] the comment must be made that plain, unvarnished paperwork might have meant this fight would never had started, let alone go all the way to the High Court at great expense to all involved.

In *Guardian Assurance v Underwood Constructions*,[29] Mason J of the High Court of Australia (with whom the whole Court agreed) said:[30]

> The policy is made up of a jumble of ill-assorted documents expressed in that distinctive style which insurance companies have made their own.

The High Court found against the insurance company.

In the House of Lords case of *Trafalgar House v General Surety*,[31] the question was whether a construction performance bond could be called, or cross claims could be relied on to stop it being called.

The bond is set out in the judgment of Lord Jauncey.[32] The clause in question is almost 200

words long, and the words in issue were buried in the middle of it. Lord Jauncey lamented "the almost universal practice of commercial bondsmen in clothing a very simple language in the jargon of an eighteenth century English bond."[33]

The lower Courts had all said that it could be called, and that asserted set-offs were irrelevant. The House of Lords disagreed.

I have no doubt that most people in the building industry would have believed that, contrary to this decision, the bond was an unconditional performance bond, against which there could be no set-off for alleged counterclaims.

All of these examples show how gobbledegook has a remarkable propensity to get in the way of what the client wants to achieve.

And, it must be added, courts have a growing arsenal to do something about it with the gradual extension of laws requiring plainer style documents.[34]

The trend of both the case law, and statute law, is obvious.

The risks of legalese for the profession

Despite extensive research, I have not personally been able to find any case where a solicitor has been sued over a complex and confusing document or clause which failed to achieve its truly intended purpose. However, there are many cases of simple errors or omissions in document drafting going back at least as far as the 1846 English case of *Re Bolton*.[35]

The editors have referred me to a paper by Professor Peter Butt of the University of Sydney Law School which quotes the unreported 1983 English decision of *Sopcen Trustees Ltd v Wood Nash & Winters*.[36]

Unfortunately, I have been unable to obtain a copy of the decision but, according to Professor Butt, the judge awarded damages of £95,000 to a client who suffered loss due to misunderstanding a legalistic lawyer's letter of advice which was, according to the Court, in "very obscure English" and "anaesthetized [the client] into an oblivion".

The decided lack of cases against solicitors over bungled clauses seems anomalous, especially since, in my experience, poor drafting is a significant cause for litigation over contracts.

The only survey I can locate is a 1941 American study which concluded that "about 25 per cent of litigated [contract] cases covered by the study and reaching appellate courts revolved about problems of interpretation of language. A good part of the difficulty, we concluded, was traceable directly to incomplete negotiation by the parties and poor draftsmanship either by the parties or their counsel."[37]

To some extent the lack of cases may have resulted from Court assistance. The House of Lords case of *Re Gulbenkian's Settlement Trusts*[38] concerned a legalistic 205 word clause in a trust settlement about which Lord Reid said:[39]

> This clause does not make sense as it stands. But the client must not be penalised for his lawyer's slovenly drafting ... I must consider whether underlying the words used any reasonably clear intention can be discerned ...
>
> ... no rational person would insert provisions like that. I was surprised to learn that this botched clause had somehow found its way into a standard book of precedents ...

Lord Upjohn[40] referred to the "duty of the Court to make sense of the parties' intentions even if the draftsman has used words wrongly, his sentences border on the illiterate and his grammar may be appalling."

In this case, but for the Court going out of its way, bad drafting would have caused the settlor's fairly clear intentions to be frustrated.

If the fact that the case proceeded all the way to the House of Lords did not result in a negligence claim against the drafter for the legal costs, I would think it would nowadays.[41]

Similar judicial skirting of befuddled drafting appears in the New South Wales Supreme Court case of *Van der Waal v Goodenough*[42] (Powell J):

> The partnership agreement can hardly be described as a shining example of the draftsman's art – indeed, it is not going too far to describe it as exuding the glutinous aroma of pastepot and scissors ...
>
> [W]here there is revealed such sloppy draftsmanship and confusion of thought as is reflected in the partnership agreement, the court's task, so it seems to me, is, first, to seek to discern the real intention of the parties ...

Fourteen years later Powell JA, now a Justice of Appeal of the New South Wales Supreme Court, had cause to reprise these words in *NSW Rifle Association v. Commonwealth*[43] when the Judge was again confronted with agreements exhibiting "sloppy draftsmanship and confusion of thought". The Judge said:

> Far from that "agreement" being a shining example of the draftsman's art, it is a singularly inelegant document and one which calls to mind the efforts of the, by now, legendary "blundering attorney's clerk" – or, if one prefers it, the "attorney's blundering clerk."

Notably, a key ground on which the High Court of Australia refused special leave to appeal from this decision was that "the two documents relied on by the Applicants are so inelegantly drawn", which made the case an unsuitable vehicle for propounding principles of general application.[44]

In my view, as a matter of ordinary principles of negligence, a lawyer is plainly liable to the client for sloppy drafting.

Does not a confusion-free agreement come within the solicitor's obligation to "draw" a "proper and enforceable agreement which would bind the parties" (see the English case of *Midland Bank Trust v Hett*[45])?

When a Law Lord says[46] he has great difficulty understanding why commercial men continue to "embody so simple an obligation in a document that is quite unnecessarily lengthy, which obfuscates its true purpose and which is likely to give rise to unnecessary arguments and litigation as to its meaning", the protest is really directed at lawyers, and lawyers must take heed of the underlying warning.

Especially since that accurately describes so much of legal drafting.

Conclusion

When one examines the arguments of those supporting legalese, what they are often really saying is that a drafter may fail to correctly state a concept.

That is a genuine risk. But it is a risk that applies to all drafting.

It is, however, true that we do not (yet) have the benefit of knowing how courts will interpret some plain English phrases, as we do with many of the time-honoured phrases.

But a review of the cases admits of only one conclusion, which is that the issue of uncertainty of interpretation is far outweighed by the problems which legalese can generate. The above cases demonstrate clearly that plain English is, indeed, far safer to use than legalese.

And, as to potential uncertainty of interpretation, my experience of drafting in plain English is that there have been very few old-style phrases which have proved difficult to rewrite accurately.

The bottom line is that *good* plain English is invariably far more precise than legalese. The meaning becomes transparent, and thus carries less risk for the client, and less liability risk for the lawyer.

Since that is so, then surely we must discard the bloated, the woolly and the perplexing, and we must embrace the simple, the direct, and the elegant.

Endnotes

[1] I accept that "translating" to plain English means previous interpretations may no longer assist. In Ross v NRMA (1993) 7 ANZ Ins Cas 61-170 at 77,963 the judge held that a new plain English insurance policy should not be interpreted by reference to legalese equivalents.

[2] "Plain English: Changing the Lawyer's Image and Goals", Clarity 42, page 34 (Sep 1998).

[3] (1998) 16 ACLC 429 at 432.

[4] I disagree with the Judge, but do confess to having deep misgivings about "plain English" as practiced by drafters of Commonwealth of Australia legislation.

[5] Unreported, Victorian Court of Appeal, 30th June 1997.

[6] (1993) 7 ANZ Ins Cas 61-170.

[7] At page 77,963.

[8] 119 ALR 65 at 81-83.

[9] Milward v Welden (Ch. 1595) Toth.101. See R. Wydick, "Plain English for Lawyers" 2nd ed. 1985.

[10] [1940] 2 All ER 608 at 622 (per McKinnon LJ).

[11] (1973) 6 SASR 13 at page 29.

[12] (1989) 17 NSWLR 697 at 698.

[13] [1964] 3 All ER 390 at 394.

[14] Trafalgar House v General Surety (1994) 38 Con L R 53 (per Saville L.J.).

[15] Howard v RSL Veterans Retirement Village, unreported, 15th August 1996.

[16] Refugee Review Tribunal, Reference BN94/05128, 27th April 1995.

[17] Unreported, 15th May 1997.

[18] (1984) 591 F Supp 1033.

[19] (1858) 4 CB (NS) 476, 140 ER 1170.

[20] At page 481 (1178).

[21] (1975) 133 CLR 191.

[22] Unreported, ACT Supreme Court, 16th October 1992. I am indebted to Christopher Balmford for drawing my attention to this and the next three cases referred to.

[23] Unreported, NSW Supreme Court, 10th November 1989 (Young J).

[24] (1993) 7 ANZ Ins Cases 61-171.

[25] Unreported, NSW Supreme Court, 28th February 1996 (Bainton J).

[26] New South Wales Law Society Journal, September 1994.

[27] (1991) 6 ANZ Ins Cases 61-049 at page 77,073.

[28] CE Heath v Edwards Dunlop (1993) 176 CLR 535.

[29] (1974) 48 ALJR 307.

[30] At page 308.

[31] [1995] 3 All ER 737.

[32] At pages 739-740.

[33] At page 745.

[34] Recent Australian changes include the requirement for "clearly expressed" credit documents under the Uniform Credit Code, and s.51AC of the Trade Practices Act, under which one of the indicia of unconscionable conduct in small and medium commercial transactions is whether documents were understood by the consumer.

[35] (1846) 9 Beav 272, 50 ER 348.

[36] Queens Bench Division, Jupp J., 6th October 1983.

[37] See 1 J. Legal Educ 151, 154 (1948).

[38] [1968] 3 All ER 785.

[39] At page 787.

[40] At page 792.

[41] Except for the fact that the poor client might very probably have had enough of lawyers.

[42] (1983) 1 NSWLR 81 at 87-88.

[43] Unreported, NSW Court of Appeal, 15th August 1997.

[44] See New South Wales Rifle Association v. Commonwealth (1998) 72 ALJR 713.

[45] [1978] 3 All ER 571 at 611

[46] Trafalgar House v General Surety [1995] 3 All ER at 745 (HL).

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Legislative Drafting, Plain English and the Courts

Eamonn Moran QC

Introduction

The purpose of this article is to reflect on the drafting of statutes in plain English and comment on the attitude of courts in Australia to such statutes.

Judicial criticism

There are many instances of judicial criticism of the language used in Acts of Parliament. In the Victorian Supreme Court an Act was described as being "couched in degendered and obscure language, the meaning of which is blurred to such an extent that the draftsman's intention is almost impossible to discern with any degree of satisfaction".[1] Some 30 years earlier another judge of that court described the language used in section 148 of the Crimes Act 1957 (Vic) as "obscure and difficult to understand" and challenged anyone to search for a sentence "of equal length which is of more fuliginous obscurity"[2]. In the United Kingdom Harman LJ gave the following colourful description[3]:

> To reach a conclusion on this matter involved the court in wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhaling from the forest of schedules lining the way on each side. I regarded it at one time, I must confess, as a Slough of Despond through which the court would never drag its feet, but I have, by leaping from tussock to tussock as best I might, eventually, pale and exhausted, reached the other side...

Lord Hailsham, although not sitting in court but in Parliament at the time, observed that a particular Bill "should be accompanied by a government health warning" because of its complexity.[4]

Lord Denning, famous for his simply expressed written judgments, offered a solution:

> It comes to this, that language ought to be simple and clear. There ought to be not long but short sentences. There should be a few commas and semi-colons in sentences. There should be simple words. There should not be too much detail. One of the troubles is that with the best of motives the draftsmen try to think of every contingency...It is impossible to think of everything that will happen in the future. All this ought to be in simple language expressing principles. There is no need to go into all this detail. The courts should then be allowed to deal with it, as I am sure they have in the past.[5]

Spotlight on legislative drafting

The 1975 Renton Committee Report[6] put the spotlight on legislative drafting techniques and the need for simplicity and clarity in statute law. In Australia the Law Reform Commission of Victoria kept that spotlight turned on by publishing two reports on the subject.[7] Its first report criticised legislation for linguistic defects, excessive sentence length, the creation and use of unnecessary concepts, poor organisation of material and unattractive layout. Its second report demanded that legislative drafters not only aim for precision but also for intelligibility and identified the causes of incomprehensibility of legislation as (1) defective language, (2) defective organisation of material and (3) defective layout and formatting.

Strong support for a plain English policy in legislation was given by politicians. In Victoria the Attorney-General made a Ministerial Statement in Parliament on Plain English Legislation[8]. At the Federal level in Australia a Corporate Law Simplification Programme and a Tax Law Improvement Project were established and the House of Representatives Standing Committee on Legal and Constitutional Affairs delivered a Report on *Clearer Commonwealth Law*[9].

The surrounding legal environment

Part of the blame for the commonly perceived unsatisfactory state of legislative drafting has been attributed to the approach of the courts to statutory interpretation.[10] Up until fairly recent times the courts tended to adopt a strict literal approach to interpretation and attached little importance to the purpose of the legislation.[11] In *Fothergill v Monarch Airlines Ltd*[12] Lord Diplock said:

> The unhappy legacy of this judicial attitude...is the current English style of legislative draftsmanship. It is wary of laying down general principles to be applied by the courts to the varying facts of individual cases rather than trying to provide in express detail what is to be done in each of all foreseeable varieties of circumstances.

An Australian judge commented that the approach of the courts invited "cumbersome, detailed and sometimes unintelligible legislation in the attempts by Parliament to spell out its purpose in such detail as to prevent the frustration of the legislative purpose by courts"[13]. Another one remarked that the "nature of language is such that it is impossible to express without bewildering complexity provisions which preclude the abuse of a strict literalistic approach"[14].

A purposive approach to interpretation is now the preferred judicial approach[15] and is mandated by legislation in the majority of Australian jurisdictions. The literal grammatical meaning of a provision will be departed from to give effect to the statutory purpose if the words used are at all capable of bearing the strained construction. In giving effect to the legislative purpose as ascertained from the statute as a whole, a court may read words into the statute, omit words or give a meaning to words other than their primary meaning.[16] While a court can prevent a legislative miss fire[17] (adverting to an issue but failing to use appropriate words) it cannot remedy an omission of purpose[18] (failing to advert to an issue). Statutory provisions enacted in the majority of Australian jurisdictions allowing wide use of extrinsic materials in interpreting legislation aid the purposive approach[19]. However, the ability to have recourse to extrinsic materials does not allow a drafter to omit to deal with a matter in the belief that courts will give effect to any intent expressed in the extrinsic materials even if unexpressed in the legislation. The function of a court in interpreting a law is to give effect to the will of the Parliament as expressed in the law.[20]

These developments helped smooth the way for changes in legislative drafting style[21].

Response of the drafters

In the course of the 1980s Australian drafting offices examined their practices and moved to adopt a plain English policy. Attention was paid to sentence length and word selection as well as organisation. Page layouts were changed and use made of running heads. The Social Security Act 1991 is an early example of a changed style of Federal Act. It contains a Reader's Guide at the beginning of the Act to assist the reader in finding the information they want. Notes and examples are included throughout the Act and step-by-step method statements are used to assist the reader to calculate benefits. Running heads at the top of each page identify the Chapter, Part, Division and section reference. An index of definitions is included to indicate where in the Act the definition of a particular term may be found. A casualty of this approach has been brevity. When reprinted in September 1998 the Social Security Act 1991 took up 2798 pages.

The attitude of the courts to plain English

There can be no doubt that judges are generally in favour of the use of plain English in legislation. Their support is clearer from out-of-court statements[22] than pronouncements from the bench as the latter tend to occur in situations where the language of the particular statute has caused some difficulty.

The Commonwealth Social Security Act 1991 came before the Federal Court of Australia in *Re Blunn v Cleaver*[23] and gave it the opportunity to comment on "plain English" drafting[24]:

> The first requirement of an Act is that it should express with clarity the rules that parliament intended. If legal training is required to achieve that, no one should be surprised, since special training is required for most skills. If legal training is also required to read it with complete understanding, that should not surprise either. But nothing should obscure the necessity to state clearly parliament's intent.
>
> Clear statement proceeds from clear thinking. If the substance of the intended rule is analysed by a lawyer, trained to understand the implications of various kinds of rules, the appropriate expression is a consequence of the analysis. "Plain English" alternatives may really be less precise, and a self-conscious search for them will certainly be a distraction....
>
> The comments we have made are not intended to undervalue simplicity. But the pursuit of simplicity without due regard to the subject matter may be foolishness. And an Act that is two or three times as long is not necessarily easier to read because some technical expressions (which once understood were succinct) have been replaced by wordier ones. The point is not peculiar to Australia; *The Times* Law Reports for 10 October 1993 reports the remarks of Millett J in *Arab Bank Plc v Mercantile Holdings Ltd*, where the use of more modern language in companies legislation appears to have had an undesirable (and very probably unintended) consequence. Millett J is quoted as having said "that the case illustrated the danger inherent in any attempt to recast statutory language in more modern and direct form for no better reason than to make it shorter, simpler and more easily intelligible". For our part, we would see those as good reasons, but they should not have priority over the first requirement of legislation – the clear expression of what parliament intended.

A Victorian judge has also highlighted the difficulties inherent in the implementation of a plain English policy.

Sitting as a member of the Full Court of the Supreme Court of Victoria in *R v Roach*[25], Tadgell J. made the following observations:

> Official publicity has recently been demanded for the notion that law-makers and practising lawyers should now strive to speak in so-called "plain English". The ideal of unmistakably clear verbal expression is admirable but surely not new. To vaunt it as though previous generations had overlooked and neglected it is to risk the mistake of substituting conceit for zeal. It is another mistake to suppose that clarity of expression can be an end in itself. Plain English alone achieves nothing. To be useful it must run in tandem with clear thought. After all, English speech – in the law at least – is a vehicle for the conveyance of ideas. A feeble or wandering idea will not become strong and precise merely because it is dressed in plain, homely language: it will remain simply a poor idea, and perhaps more obviously and emphatically so because it is plainly expressed. A bright idea, on the other hand, is likely to find its own expression and thereby to make itself understood. Statutes, if I may so, do not commonly contain many naturally bright ideas that speak for themselves...They need to work hard in order to make themselves clearly understood, if only because there are persons whose interests are served by trying to misunderstand them.
>
> The attempted simplification of long-standing, long-understood legislation and ideas contained in it carries its own special difficulties. Thought, ideas and language all feed on their context. The use of "plain English" to amend an existing statute of ancient lineage cannot absolve the draftsman from a careful study of context, both philological and historical. Of course, the older the subject statute, the more ample is the relevant context that needs consideration.

Judges have also been alive to the implications of attempting to simplify statutes by omitting detail and drafting in general terms, as advocated by Lord Denning[26]. The Full Court of the Victorian Supreme Court in *R v O'Connor*[27] stated:

> If Acts of Parliament are couched in general terms which do not make Parliament's intention clear much time is taken up in the courts by arguments as to the meaning of the section and how the court should apply it. Costs and delays are increased and injustice may follow....
>
> In drawing attention to the problems created by legislation of this kind we do not wish to be understood as being critical of the draftsman of the legislation. We recognize the difficulties involved; but we do wish to draw attention to the consequences of drafting in general terms. No doubt such drafting is often prompted by a desire to simplify legislation. Unfortunately attempts to do so usually leave a number of questions unanswered. They also very often leave the courts without guidance as to how the questions should be answered and when dealing with legislation the court's only task is to interpret and apply the law laid down by Parliament. The courts cannot be legislators.[28]

Conclusion

Legislative drafting remains a difficult and challenging profession despite the changes in judicial attitudes to interpretation in recent years and the availability of recourse to background materials. Drafters must still make their intent clear and the juridical consequences of general principle drafting are recognised. In drafting a plain English statute, a drafter may need to deal expressly with an issue rather than rely on the application of little known rules of statutory interpretation.[29] While striving for intelligibility, drafters must continue to strive for precision and legal effectiveness. The well-recognised difficulty of conveying meaning with precision by the use of written words is still there[30]. The policy that drafters must translate into legal rules remains frequently complex[31]. The time pressures under which drafters work have not lessened. Courts have shown that they will be merciless in criticising a drafter for vagueness, imprecision, inattentiveness to surrounding context and inconsistency in approach no matter how plain the language he or she has employed. Linguistic elegance, while important and to be striven for, is not the sole aim of legislative drafting. The overall aim is the precise creation of legal rights and duties with as much intelligibility as the drafter is capable of supplying in the particular circumstances. Achieving that aim is no easy feat.

Endnotes

[1] Murphy J. in *Mayne Nickless Ltd v Mackintosh* [1989] V.R. 878 at 879 referring to the Accident Compensation Act 1985 (Vic).

[2] Pape J. in *R v Danka* [1959] V.R. 834 at 841.

[3] *Davy v Leeds Corporation* [1964] 3 All ER 390 at 394.

[4] United Kingdom, *Parliamentary Debates*, House of Lords, 3 December 1981, col. 1126.

[5] United Kingdom, *Parliamentary Debates*, House of Lords, 15 December 1982, col. 617.

[6] *The Preparation of Legislation* Cmnd. 6053.

[7] *Plain English and the Law* (1987) Report No. 9 and *Access to the Law: the structure and format of legislation* (1990) Report No. 33.

[8] Victoria, *Parliamentary Debates*, Legislative Council, 7 May 1985.

[9] AGPS Canberra September 1993.

[10] See E Moran, "The relevance of statutory interpretation to drafting" in B. Moore (ed.), *Drafting for the 21st Century: Proceedings of Conference at Bond University Gold Coast 6-8 February 1991*, pp. 100-114.

[11] See J Barnes, "Statutory Interpretation, Law Reform and Sampford's Theory of the Disorder of Law-Part One" (1994) 22 FL Rev 116.

[12] [1981] A.C. 251 at 280.

[13] *Metal Manufacturers Pty Ltd v Lewis* (1988) 13 NSWLR 315 at 319 (Kirby P.).

[14] *Commissioner of Taxation (Cth.) v Westraders Pty. Ltd.* (1980) 144 CLR 55 at 80 (Murphy J.).

[15] See *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297; *Mills v Meeking* (1990) 91 ALR 16; *Macalister v R* (1990) 92 ALR 39.

[16] *Kingston v Keprose Pty. Ltd.* (1987) 11 NSWLR 404 at 424 (McHugh JA); *Norcal Pty. Ltd. v D'Amato* (1988) 15 NSWLR 376 at 384 (McHugh JA); *Mills v Meeking* (1990) 91 ALR 16 at 36 (McHugh J.).

[17] See *Inland Revenue Commissioners v Ayrshire Employers Mutual Insurance Association Ltd.* [1946] 1 All ER 637 at 641.

[18] See *Tokyo Mart Pty. Ltd. v Campbell* (1988) 15 NSWLR 275 at 283 (Mahoney JA).

[19] In the United Kingdom, without any legislative intervention, the decision of the House of Lords in *Pepper (Inspector of Taxes) v Hart* [1993] A.C. 593 allowed recourse to Parliamentary debates in certain circumstances for the purpose of resolving an ambiguity.

[20] See *Re Bolton; ex parte Beane* (1987) 162 CLR 514 at 518 (Mason C.J., Wilson and Dawson JJ.).

[21] At the Federal level further encouragement was given by the inclusion in the Acts Interpretation Act 1901 in 1987 of s.15AC (changes to style not to affect meaning) and 15AD (examples).

[22] See, for example, the Hon. Mr. Justice Mahoney, "A judge's attitude to Plain Language" published in the Law Society Journal of New South Wales (1996) 34(8) at 52.

[23] (1993) 119 ALR 65 (Sheppard, Neaves and Burchett JJ).

[24] At 82-3.

[25] [1988] V.R. 665 at 669-70.

[26] See page 52.

[27] [1987] V.R. 496 at 499-500 (Young C.J., Murphy and Fullagar JJ.).

[28] Mason and Wilson JJ. observed in *Cooper Brookes (Wollongong) Pty. Ltd. v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 319 that "it is no part of the judicial function under the cloak of construction to amend statutes merely to overcome shortcomings in their operation".

[29] In *Sydney City Council v Reid* (1994) 34 NSWLR 506 at 511 Kirby P. expressed the view that had Parliament intended in a plain English Act to exclude appeals to a particular Tribunal it would have done so expressly so as "to be understood more readily by people unversed in the sophisticated techniques of statutory construction". See also *Smith v R* (1994) 181 CLR 339 at 354 (Deane J.).

[30] See *Seaford Court Estates Ltd. v Asher* [1949] 2 K.B. 481 at 499 (Denning L.J.) and *Black-Clawson International Ltd. v Papierwerke Waldhof-Aschaffenburg* [1975] 1 All ER 810 at 842 (Lord Simon of Glaisdale).

[31] See *Merkur Island Shipping Corp. v Laughton* [1983] 1 All E.R. 334 at 351 (Sir John Donaldson M.R.) and *Re Blunn v Cleaver* (1993) 119 ALR 65 at 83 (Federal Court of Australia).

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Regular Items

Drafting Tip No.2

Definitions – cross references in disguise

Professor Robert Eagleson

We all dislike documents that are full of cross-references, and especially those which have a cross-reference within a cross-reference. For example, clause 15 directs us to clause 74; it turns out to be subject to clause 101; and it sends us back to clause 34. Our progress in reading is delayed and disjointed.

Despite our frustration and irritation when other drafters impose cross-references on us, we still crowd our documents with definitions. Yet they are a form of cross-referencing. They force readers to leave the clause they are considering to consult the definition section to discover the meaning of a particular word. While the device of defining may lighten the task of the drafter, it interrupts the steady flow of reading and increases the burden on readers. The more we make the reading task difficult, the more we increase the possibility of misinterpretation.

The moral is not to abandon definitions altogether – they can serve a valuable purpose – but to keep a rigorous check on the practice and to ensure that each use of a definition yields true value for the comprehension of the document. We need to keep the kind of cross-referencing that definitions involve to a minimum just as much as we need to control other forms of cross-referencing.

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The 1-off definition

The 1-off definition that applies only to 1 clause or section warrants particular attention because it is so often placed at the end of the clause or section rather than with the other definitions at the beginning or end of the document. As a result, readers can face a double dose of interruption. They come across the word near the beginning of a clause and turn to the definitions section for elucidation, only to find the word not listed. Returning frustrated to the clause, they plough on mystified until they read the final sub-clause, when all is made clear. Back they have to go to the beginning of the clause again to insert the appropriate meaning and reach the proper interpretation.

An example

Section 15 of the De Facto Relationships Act 1984 (NSW) illustrates the issue:

> 15 Prerequisites for making of order residence within State etc.
>
> (1) A court shall not make an order under this Part unless it is satisfied:
>
> (a) that ...; and
>
> (b) that:
>
> (i) both parties were resident within New South Wales for a substantial period of their de facto relationship, or
>
> (ii) ...
>
> (2) For the purposes of subsection (1)(b)(i), the parties to an application shall be taken to have been resident within New South Wales for a substantial period of their de facto relationship if they have lived together in the State for a period equivalent to at least one-third of the duration of their relationship.

This approach with the imprecise *substantial period* places a strain on readers. They are compelled both to grapple with the concept and are left in the dark about its meaning until they have passed through 1(b) and reached (2). It is a wasteful procedure: a much briefer solution is to omit substantial period and to merge 1(b)(i) and (2):

> (i) both parties were resident within New South Wales for at least 1 third of their relationship.

A double whammy

The next example contains in effect 2 instances of 1-off definitions: *foreign members* and, less obviously, *proceeds of the sale*.

(4) The exception in subsection (1) applies in respect of foreign members of the company, if the following conditions are satisfied:

(a) instead of offers being made to issue the shares to the foreign members, rights are granted to a nominee for the issue of those shares

(b) the nominee is approved by ...

(c) ...

(d) the nominee sells the rights at a price and on terms approved by the stock exchange or the ASC

(e) the nominee distributes the proceeds of the sale to the foreign members in the same proportion to which they would otherwise be entitled to the shares.

(5) The foreign members are those whose addresses, as shown in the register of members, are places outside Australia and the external Territories.

(6) In determining the proceeds of the sale of the rights, deduct:

(a) the expenses of the sale; and

(b) amounts payable to the company for making the rights available to the nominee.

Consulting the part that contains definitions will not help readers to understand who a foreign member is; nor will looking at the final subsection (6). The answer is less obvious and turns up in subsection 5. Even more deceptive is the treatment of *proceeds of the sale* in 4(e). Its implications are not revealed until (6), although readers are given no clue to this.

The difficulty has partly arisen because it has become our habit to label every concept, even when a label is not necessary. So here, the drafter introduces *foreign member* to categorise those members who have addresses outside Australia and its external Territories. The label may provide a useful abbreviation if we are going to refer to the category many times, but if there is only one reference, to introduce the label is to burden readers with extra baggage.

We can produce a more straightforward subsection by dropping the label and merging the material. Some other legitimate restructuring of the content also helps.

(4) The exception in subsection (1) applies to members of the company whose addresses as shown in the register of members are outside Australia and the external Territories if under the terms of the offer:

a) the company must appoint a nominee...

b) the company must transfer to the nominee the shares that would otherwise be issued to those members who accept the offer; and

c) the nominee must:

i) sell the shares...; and

ii) distribute to each of the members their proportion of the proceeds of the sale net of expenses.

Subsection (4) could be improved further by eliminating the opening cross-reference:

(4) If the consideration for the offer includes an issue of shares, the shares need not be offered to members of the company whose addresses....

This example illustrates that defined terms do not always improve the comprehensibility of documents but instead may only increase the amount of cross-referencing. A more critical approach and a greater hesitancy to adopt the convention unthinkingly can give much relief to our readers.

A challenge

Here is an early draft of a section that contains three instances of 1-off definitions. Can you propose a rewrite that eliminates all three? As a prize, we are offering a copy of:

> Butt, P and Eagleson R: *Mabo, Wik and Native Title* (Sydney: Federation Press, 1998 - third edition)

which demonstrates how court rulings might be presented in plain English.

Get your entries in by 1st September 1999.

59(1) A person who makes or proposes to make a takeover bid for securities, or their associate, contravenes this section if:

(a) a person acquires securities in the bid class within the 6 months before the bid is made or proposed; and

(b) at any time whatever, the bidder, proposed bidder or associate gives a benefit to, or receives a benefit from:

(i) a persons who...; or

(ii) an associate of a person who ...; and

(c) the benefit is ...; and

(d) the amount or value of the benefit is linked to the bid or proposed bid.

(2) The amount or value of the benefit is linked to the takeover bid or proposed takeover bid for securities if the amount or value of the benefit depends on:

(a) the amount or value of the consideration for the securities under the bid or proposed bid; or

(b) the amount or value of the consideration for which the bidder or proposed bidder acquires, or proposes, offers or proposes to offer to acquire, securities in the bid class:

(i) during the offer period (whether or not under the bid); or

(ii) under section 701 or 703.

(3) For the purposes of this section:

(a) *giving a benefit* includes:

(i) offering to give a benefit; or

(ii) agreeing to give a benefit; and

(b) receiving a benefit includes agreeing to receive a benefit; and

(c) the amount or value of a benefit depends on the amount or value of consideration if it:

(i) is equal to the amount of that consideration; or

(ii) is, or is to be, determined by reference to that consideration; or

(iii) is, or is to be, determined by reference to matters that include that consideration.

Book Review

Shelley Dunstone, *A Practical Guide To Drafting Pleadings*, LBC Information Services, 1997

Reviewed by James D Elliot, Barrister, Melbourne

Over many years, many books have been published on drafting pleadings. In my 10 years or so practising commercial litigation, I have looked at my fair share of them. This book is different to those at which I have looked previously, it is easy to follow and pleasant to read. The author takes a refreshing approach, concentrating on the process of pleading rather than the finished product.

According to the preface, the book was written "to help students and new practitioners learn to draft pleadings". Although I no longer possess the mind of a law student or a new practitioner, I expect that both categories would find the book informative and helpful. Indeed, the author discusses many issues that arise (either consciously or otherwise) when preparing a pleading. These issues may not be readily apparent to those of little experience.

Many Clarity readers no doubt dislike the use of "stock phrases" in pleadings. Sadly, it is often easier for a pleader to turn to such phrases than it is to focus on the specific meaning intended by the phrase, and the specific issues before the pleader. Dunstone provides a solution: an extensive table of stock phrases (for example "inter alia", "by reason of the matters aforesaid", "the same", etc.) with suggested alternatives. This useful table should encourage the reader to be more creative and to focus on the real purpose of the pleading. This is likely to lead to clearer and more persuasive pleadings.

If stock phrases are bad, blindly following a precedent is worse. Dunstone has a healthy scepticism of precedents and constantly advocates against a slavish use of them. However, in my view, she takes this valid point too far when she suggests a rule that one never starts with a precedent. I agree with her that a precedent should never dominate the finished product, however sometimes starting with a precedent can be useful. For a novice pleader, or for someone pleading a particular cause of action for the first time, precedents can be useful to establish all the necessary elements. Further, precedents can help writers overcome what seem to be insurmountable stumbling blocks.

Throughout the book Dunstone draws on, among other cases, the circumstances of the well known case *Home Office v Dorset Yacht Co Ltd* [1970] AC 1004. The author set out the facts of this case in an extensive manner. She uses those facts and the manner in which they were actually dealt with in the conduct of the case to illustrate certain points. This method of introducing issues is done extremely well. It provides a familiarity and a consistency throughout the book that makes it far easier for a student or new practitioner to digest.

Three small notes of caution. First, the book was published in 1997. In the early chapters, general comments are made about the court system and the purpose of pleadings. It appears that the observations have been made without the benefit of the decision of the High Court of Australia in *Queensland v J L Holdings Pty Ltd* (1997) 189 CLR 146. Naturally, given the timing of the publication, this is no criticism of the author: but it does mean that some of her observations may be out of date.

Second, one "before" and "after" example may lose something in translation. When discussing the active voice and the passive voice, we are given the example: "Sharon and I signed a contract" as compared with "An agreement was entered into between the plaintiff and the defendant". To my mind, there is a material distinction between the two examples given (other than simply that one is in the active voice and one is in the passive voice). Obviously, signing a contract and entering into an agreement can be quite different things. After all, it depends on the facts! Perhaps that is the very point the author was seeking to make. However such a comparison may give rise to confusion.

Third, in my experience, clients are often not the slightest bit interested in the contents of a pleading. Consequently, I found it novel of Dunstone to suggest that the drafting of a pleading might be dictated by whether or not a client "is likely to feel excluded or intimidated by language that he or she cannot readily understand". It is one thing to ensure that a client understands the pleading, something which every practitioner should attempt to ensure, it is quite something else to change the pleading so that a client can understand the document without any assistance from a legal practitioner. Ultimately, a pleading is prepared for a judge for the purposes of trial. The document must work for that audience. Other audiences are secondary.

As an experienced practitioner, I found this book a beneficial read. I am sure that many students and practitioners will find this book profitable.

Letters to the Editor

Deconstructing Legal Language

William H. DuBay

Dear Clarity,

In Eirly Roberts' fine article in the April '98 edition of Clarity, "Europe -en clair," she states several reasons why legal language has become so unintelligible: the desire to impress, the need to be dignified, the need to sound official, and the need to be complete or vague. Looking behind those objectives, we may see the need to maintain the power and role of the state.

An important element of law is the dramaturgy which requires the unmistakable assertion of the gravity of the proceedings. It is no accident that the word "demeanour" (proper conduct or bearing) derives from the Latin verb "to threaten" and still conveys something of that sense. Whether we are engaged in a criminal or civil case, we are brought into contact with the state's dark and awesome power.

Although we protest the legal innocence of suspects until proven guilty, the unambiguous intent of the criminal justice system, from the arrest ("You are coming wit us") to the judge's final gavel, is to demean, confuse, and impersonalize the suspect. Gustav Klimt's painting, "Jurisprudence", comes to mind, in which the emaciated and naked suspect stands grasped in the tentacles of the law, while the judges sit aloof and distant, arrayed in splendour.

As soon as an agreement between citizens becomes a contract, its language moves from the authority of the persons involved to that of the state. Lawyers pore over it, certainly not to clarify it in the minds of the contractors, but to make it conform to the state's interests. A civil case elevates the stake of a dispute considerably, in which the objective is to win, not just a favourable decision, but also the powerful backing of the state – always the third party in every case.

Lawyers, "keepers of arguments" as Auden wrote, are also keepers of power. If power corrupts, it corrupts language and uses it for its own purposes. Lawyers use language not just to protect their position, but to protect the claims of the state.

We are prompted to ask how the plain language movement benefits those objectives.

The state's legitimacy is always a precarious affair, as Hume pointed out. The state itself is a legal fiction dependent upon the intent of the governed. The great labour of law is to maintain not only "truth and justice" but also the reality of the state in the minds of its citizens.

If the language of law has taken a turn toward clarity and simplicity, are we all to benefit? If it is important that more people be able to read and understand legal documents, is it because such understanding will give them more access to power or because it will align their interests more closely with those of the state?

William H. DuBay is a technical writer in California. He writes frequently on issues of plain English.

Antique "Chair"

Tony Lang

Michèle Asprey's "A 'chair' with no leg to stand on" in *Clarity* 41 prompted me to revisit some material I collected a few years ago in the course of writing a new edition of *Horsley's Meetings: Procedure, Law and Practice*, 4th ed, Butterworths, Sydney, 1998. Previous editions had been in gender-specific language, with "chairman" used throughout. I decided to use "Chair" to refer both to the person presiding at a meeting and to the office held by that person. As we shall see, this usage is unequivocally sanctioned by the *OED*.

My notes on "Chair" reminded me of the changes in terminology that have taken place over the last 20 years in another well-known Australian text on meeting procedure, NE Renton's *Guide for Meetings and Organisations*, The Law Book Co Ltd, Sydney.

The third edition (1979) is dedicated, "To all the Chairmen who have upheld my Points of Order". The second-last paragraph of the preface proclaims:

> This book unashamedly uses the term "Chairman" – a title which, despite appearances, is equally appropriate regardless of whether a man or a woman occupies the Chair. The terms "Chairwoman" for a lady in the Chair or "Chairperson" for either sex are neologisms of no philological merit whatsoever. (The use of "Chairman" for a male and "Chairperson" for a female is even sillier.) Similar remarks apply to other similarly-formed words, e.g., "spokesperson" for "spokesman". (Those who think "Chairman" sounds unduly sexist will presumably need to replace the word "Chairperson" by the word "Chairperchild" to be perfectly logical!)

By the fourth edition (1985), the author has begun to see the error of his ways. The dedication is now, "To all the Chairs who have upheld my Points of Order". There is a new preface, which doesn't contain the paragraph quoted from the third edition (although the prefaces to the three previous editions are all reproduced in full). In the chapters that follow, "Chair" is used instead of "chairman" almost without exception. At page 29, at the beginning of the chapter on chairing, we are told, "The title 'Chair' is discussed in para. 1554.". And, finally, towards the end of the book, at page 243 under the heading "Forms of Address", we find in para. 1554:

> Remarks should always be addressed to the chair. The Chair's title (Mr President, Mr Mayor, Mr Acting President, etc.), or the expression "Mr Chair" should be used, and not his name; remarks are addressed to him as Chair of the meeting and not in his personal capacity as "Mr Smith". A woman in the chair is addressed using "Madam" instead of "Mister", for example, Madam President, Madam Mayor, Madam Acting President, Madam Chairman, etc.; "Miss" and "Mrs" (for example, Miss President) are quite incorrect, but the expression "Madam Chair" can be used. The terms "Chairwoman" and "Chairperson" are also to be avoided.

With the fifth edition (1990), the conversion is nearly complete. There is a new chapter on terminology, which suggests that gender-specific drafting is best avoided, as it may "reinforce male stereotypes and subliminally encourage discrimination against females". The author goes on to say at page 132:

> 11.8. The word "Chairman" has for a very long time been used as the customary title of the person presiding over a meeting. As with so much else in the lore of meetings [sic] procedure, this usage is steeped in tradition. As a form of address (see also para 12.64–12.65) the title can become either "Mr Chairman" or "Madam Chairman" as the case may be.
>
> 11.9. The writer feels that the words "Chairwoman" for a female presiding officer and "Chairperson" for a presiding officer of either sex are neologisms of no philological merit whatsoever. The simultaneous use of "Chairman" for a male incumbent and "Chairperson" for a female incumbent is even sillier. Should an audience really be addressed as "Persons and Gentlemen"? Like remarks

apply to other similarly-coined words: for example, "spokesperson" for "spokesman".

11.10. One solution to this dilemma is to use the term used throughout this book, namely, "Chair" (spelt with a capital letter) for the presiding officer. (The word "chair", without the capital, is used for the symbol of authority rather than for the particular incumbent for the time being, as in phrases such as "vacating the chair". However, there is some overlap between these two concepts.) But this approach also has some limitations: the art of "chairmanship" cannot be termed "chairship".

(The final paragraphs of the chapter describe some well-recognised techniques for avoiding gender-specific language.)

I still don't agree with Nick Renton's preferred forms of address. Why get rid of the "-man", but keep the gender-specific "Mr", "Madam", etc? Why not simply "Chair", "President" or whatever? Nonetheless, changing "chairman" to "Chair" is a positive development, as is Renton's support (albeit limited) for gender-neutral drafting.

The interesting thing is that, whatever its philological merit, the use of "chair" for the person presiding at a meeting is historically impeccable. The OED gives as the first recorded use of "chair" in the sense of "occupant of the chair, the chairman":

> 1658-9 in Burton Diary 23 Mar. (1828) 243 The Chair behaves himself like a Busby amongst so many school-boys .. and takes a little too much on him.

while for "chairman" the first recorded use in the present sense is:

> 1654 TRAPP Comm. Job xxix. 25, I sate chief, and was Chair-man.

So, despite what John Howard or Bronwyn Bishop might like to think, "chair" for "chairman" is no neologism, but a word that has been in common use in that sense for over 300 years, and perhaps for as long as its gender-specific alternative.

Tony Lang is a Melbourne barrister

PS: The *Corporations Law*, the legislation regulating companies in Australia, was extensively amended on 1 July 1998. The provisions applying to company meetings have been consolidated into a new Chapter 2G, which for the first time uses "chair", rather than "chairman".

PPS: And I recently discovered section 18B of the *Commonwealth Acts Interpretation Act* 1901, which since 1 January 1998 has provided:

> How Chairs and Deputy Chairs may be referred to:
>
> (1) Where an Act establishes an office of Chair of a body, the Chair may be referred to as Chair, Chairperson, Chairman, Chairwoman or by any other such term as the person occupying the office so chooses.
>
> (2) If a person occupying an office mentioned in subsection (1) does not make known his or her choice of term, the person may be referred to by whichever of the following terms that a person addressing that person considers appropriate:
>
> (a) Chair;
> (b) Chairperson;
> (c) Chairman;
> (d) Chairwoman.

News

News For Members

Want to be listed as a Plain Language Consultant?

In support of the presidential memorandum on Plain Language, the Kleimann Communication Group (See page 4) is hosting a list of consultants who work on the plain language projects. The National Partnership for Reinventing Government (NPR) has linked to this listing on our web site and will refer government staff to the listing.

The list will be housed on KCG's web page at www.beyondwords.org

Look at the plain language consultants page to see how to be listed or send the following information by e-mail through the site.

- Your name and company name
- Contact information (including a web site address if you have one)
- A 25-50 word description of the work you company does
- A 25-50 word listing of clients or a description of a plain language project
- The name and contact information of a client who agrees to give you a recommendation for anyone who wants to call for a reference. Be sure you check with the reference before the person gets a call.

CLARITY SEMINARS

on writing plain legal English

England

Mark Adler has now given some 50 seminars for CLARITY to a selection of firms of solicitors, to law societies, legal interpreters, and to the legal departments of government departments, local authorities, and other statutory bodies. Participants have ranged from students to senior partners.

The seminar has slowly evolved since we began early in 1991, with a major relaunch in 1995. But it remains a blend of lecture, drafting practice, and discussion. The handouts outline the lecture, with exercises and model answers.

The seminars are held on your premises, and you may include as many delegates as you wish, including guests from outside your organisation. The normal size ranges between 12 and 25 delegates.

The half-day version lasts 3hrs 10mins (excluding a 20-minute break) and costs £450 net.
The full-day version lasts 5hrs 10mins (excluding breaks) and costs £650 net.

Expenses and VAT are added to each fee and an extra charge is negotiated for long-distance travelling.

Contact Mark Adler (details on page 23)

Canada

Plain Language Partners Ltd delivers the Clarity workshop in Canada.

The workshops are offered in-house. A half-day (3 1/2 hours) seminar is $1000 and a full day (6 hours) $1,500, both with up to 15 participants. Larger groups can be accommodated through team-teaching by arrangement. The longer session allows for more hands-on practice in clear drafting.

Primary instructor is Cheryl Stephens; for larger groups she is joined by Janet Dean. Cheryl is a lawyer who has been a legal communications consultant and instructor for 8 years. Janet is an adult educator and trainer who specializes in business and technical communications.

Plain Language Partners Ltd.
PO Box 48235 Bentall Centre
Vancouver, B.C.
Canada, V7X 1A1
1-604-739-0443

Clear Writing Committee – Law Society of Western Australia

The Clear Writing Committee of the Law Society of Western Australia was established in July 1996. Members include lawyers in government employment and private practice, the Chief Parliamentary Counsel for Western Australia, and an academic from Murdoch University.

The primary purpose of the committee is to encourage lawyers in Western Australia to use written forms of communication, that are clear to the reader as well as being legally effective. The committee encourages and supports appropriate training programs, promotes the use of clear writing, and encourages the Law Society to follow clear writing policies in its publications.

The committee is actively promoting the principles of clarity in legal writing in Western Australia.

News About Members

Joseph E. Stevens, Jr.,
We regret to inform you of the death [Dec 18 1998] of the Honorable Joseph E. Stevens, Jr., who served as a United State District Court Judge for the Western District of Missouri.

John Walton
We are very sorry indeed to report that John Walton has resigned from the committee. Clarity was conceived, launched, and initially run by John. The committee which was formed around him in 1984, at the end of the first year, and all subsequent committees, merely built on the rather unusual but workable foundations he laid down. When pressure of work forced him to step down from the chair in 1988 we had 400 members and a worldwide presence. But he stayed in touch, and when at the 1997 annual meeting his early retirement was mentioned, someone suggested – and everyone else agreed – that we should invite him to rejoin the committee. John pointed out that he had not in fact retired but had moved to a new career (with a charity helping the homeless) and was busier than ever. Even so, he agreed to come back, and has since made the 200-mile round trip from Coventry to London for committee meetings. But his work and the commitments of his new family have proved too much, and he has resigned. We will miss him. He retains the honorary life presidency with which we expressed our appreciation some years ago.

Keith Howell – Jones, our ongoing thanks to Keith Howell – Jones for his help in distributing the journal and newsletter.

Richard Castle's new contact details:
9 Maitland House Barton Road Cambridge CB3 9JY England
Tel: 44 (0)1223 460112 Fax: 460111

Christopher McGrarvey's new address:
30 Plovers way Herons Reach Blackpool F73 8FE

Susan Midha, a probate specialist in London, has moved from Manches & Co to Dawson & Co.

Martin Cutts' new e-mail address:
cutts@plainlanguage.demon.co.uk

Welcome to New Members

[contact names in square brackets]

Australia

Australian Securities & Investments Commission [Danielle Sinani]
Gilbert & Tobin [Tracey Vitnell], Sydney
The College of Law [Frances O'Flynn], Sydney
Mr Ken Aitken, Solicitor, Melbourne
Mr Jefferey Barnes, School of Law & Legal Studies, La Trobe University

Canada

Mr David Butt, Office of the Chief Justice, Ontarlo Court (Gen Div)
Ms Jo Sept, Student, British Columbia

England

Clarity business solutions in writing [Rupert Morris]
Commtext [Pamela Jones]
Effortmark Ltd. [Caroline Jarrett]
The Family Law Consortium [James Pirrie]
Mr Tim Albert, Tim Albert Training, Dorking
Mr Ivan Brissenden, Writer, Nth Lincs
Mr Sean Kelly, Lamport Bassitt, Hampshire
Ms Sophie Pearson, Solicitor, London
Mr Andrew Rimmer, Law Student, Middlesex
Ms Colette Williams, Student, Wirral
Mr Keith Wright, Solicitor, Kent

Hong Kong

Bloomsbury Books Ltd [James Li]
Mr Tony Yen, Law Drafting Division, Department of Justice

Isle of Man

Mr John Rimmer, Dickinson, Chruikshank & Co

New Zealand

Rudd Watts & Stone [Judy Graham]

South Africa

Professor Frans Viijoen, Law Faculty, University of Pretoria

USA

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General Assembly of Iowa, Legislative Service Bureau [Jonetta Douglas]
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Law Revision Commission
Legislative Counsel Committee (Oregon) [Greg Chaimov]
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Loyola Law School Library
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Marquette University Law Library
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Mississippi Attorney General [Michael Lanford]
North Carolina General Assembly
Northeastern University/ Boston
Office of Investor Education & Assistance, US SEC
Office of Chief Counsel, Bureau of Public Debt U.S. Department of the Treasury [Jacqueline Jackson]
Ohio Legislative Service Commission [Debbie Tavennu]
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Schaffer Law Library, Albany Law School
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US Environmental Protection Agency
US Federal Bureau of Prisons
Wake Forest University Professional Center Library
William J. Jameson Law Library, University of Montana [Fritz Snyder]
Yeshiva University/Cardozo School of Law
Ms Bess Abare, Alston & Bird, LLP, Georgia
Ms Carol Baldwin, Com Pro Inc
Mr James Bauer, Attorney, Michigan
Ms Cherie Beck, Attorney, Michigan
Mr Michael Behan, Schram, Behan & Behan, Michigan
Mr James Bersie, Illinois
Mr Richard Bisio, Honigman Miller Schwartz and Cohn, Michigan
Ms Suzanne Broadbent, Attorney, Oklahoma
Ms Heather Camp, Attorney, Michigan
Mr Bradley Cassato, Attorney, Illinois
Professor Rebecca Cochran, University of Dayton School of Law
Dr Dan Dieterich, Word One Writing Consulting, Wisconsin
Mr William Dubay, Phoenix Technologies, California
Mr John Geekie, Attorney, Georgia
Mr Eric Hamill, Attorney, Michigan
Ms Jennifer Hecker, Attorney, Georgia
Ms Shannon Hicks, Foreign Attorney, Alabama
Mr Gary Hoffman, Pennsylvania Code and Bulletin
Mr David Jackisch, Dupont Corporation, Delaware
Mr Bert Kalisch, American Gas Association, Virginia
Mr Robert Kennedy III, The Florida Senate
Mr Michael Kimbrell, Attorney, Michigan
Mr William Metros, Attorney, Michigan
Mr Otto Monaco, Attorney, New Jersey
Dr Paula Pomerenke, Department of Bus Comm, Illinois State University
Dr Jane Root, Maine
Mr Mark Shepard, Minnesota House of Representatives
Ms Debbie Taylor, Attorney, Michigan

We apologise to new members whose details have been omitted for want of space; they will be included in the next issue.

Clarity is the journal of the group CLARITY and is distributed free to member from 74 South Street, Dorking, Surrey, UK

CLARITY: Membership application form

If you are joining as an individual

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What is the latest issue of the journal you have been given (leave blank if none)?					
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