

# Clarity

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to simplify legal language

Guest editors

Dr Robert Eagleson + Michèle Asprey

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## This issue

We are taking a broad sweep across the main groups associated with documents, exploring the impact that preparing legal documents in a plain language environment has on:

- the organisations responsible for producing them – changes to their management, policies and procedures
- the various audiences for them – approaches to getting closer to the language and outlooks of those whose rights and obligations are affected: the advantages for staff who have to administer the documents; the benefits for those who have to negotiate them; the responses of judges who have to rule on them
- the writers – adjustments to language, styles and attitudes to writing.

We set our contributors limits on length and asked them for practical accounts of projects and personal responses rather than theoretical treatises. Their articles should be read in the context of these specifications.

Our contributors are drawn widely from Australia, Canada, New Zealand, Singapore, UK and USA. Their articles contain valuable insights and creative ideas for those planning plain language projects. They also provide fresh evidence of the variegated benefits of plain language for audiences, writers and organisations.

## *Giving users a central role*

RADICAL APPROACHES TO PREPARING LEGISLATION

**Claire Grose**

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The factors that distinguish the Corporations Law Simplification Program from all other corporate law reform projects in Australia are its goal of simplifying the existing law in stages and its emphasis on the importance of private sector consultation in developing both the policy and the text of the new law.

The principal goal of the Simplification Program was to develop in stages a Corporations Law which could be readily understood by its users. The then current law was widely recognized as being complex and unwieldy. It was an amalgam of the Companies Codes that had been enacted by the Commonwealth and the Australian States in 1981. It contained constitutional underpinnings essential to a national scheme of laws encompassed in a Commonwealth Act. It combined old and new texts and it had been the subject of piecemeal reforms over a number of years.

Simplification involved reducing the complexity of language used in the law. Where the policy underlying provisions of the law was unclear or capable of ready improvement, the Corporations Law Simplification Task Force examined and made recommendations on how the policy could be improved. Reforms under way or under consideration by government and the work of other law reform bodies were independent of and continued unaffected by the Simplification Program. They provided the context within which the Task Force would be operating and selecting its priorities.

The government engaged the private sector in the Program from the beginning of the simplification process, even before policy development and drafting actually began. The Task Force invited private sector participation on a continuing basis by consulting on policy in every phase of its development and by testing the text with users of the law as it was written and as the policy was developed.

## *The Task Force*

Task Force, of which I was a member, comprised 2 persons from the public sector and 2 from the private sector. The public sector representatives on the Task Force were Ian Govey, an experienced policy officer in the Business Law Division of the Attorney-General's Department, and Vince Robinson, a senior drafter from the Office of Parliamentary Counsel. The expertise which I brought to the Task force was as an experienced legal practitioner in the area of Corporations and Securities Law. Robert Eagleson, the other private sector participant, brought to it his expertise in plain English and his communications skills.

The Task Force was responsible for the day to day operation of the Program. We were supported by a team of lawyers, secretarial and administrative staff from the Attorney-General's Department. Lawyers from the Office of Parliamentary Counsel, Australian Securities Commission and private law firms were seconded to the Simplification Unit at different times. Our brief was to make recommendations to the Attorney-General on simplification of the Corporations Law. We prepared discussion papers and undertook the redrafting of selected areas of the Law. Working as a team brought to the project the best of each member's different skills and experience. Close involvement of the drafter and the language expert at the formative stages of policy development provided major benefits in both the drafting process and the end product. Every day participation in the Program by the corporate law practitioner ensured that practical application of the law was fully considered and taken into account.

## *Consultative Group*

A private sector Consultative Group, comprised of 14 representatives of business, both large and small, and members of the legal and accounting professions, was appointed to work closely with the Task Force and assist in providing overall guidance for the Program. The members of the Consultative Group and the Task Force met together on a regular basis. The role of the Consultative Group was to influence the direction of the Task Force to ensure the needs of the users of the law were satisfied by the

results of the Simplification Program. Members of the Group participated in the preparation of discussion papers and draft legislation that were put out for public comment. This enabled the expertise of members to be used at the earliest possible stage. While members were nominated by peak business organizations and legal and accounting bodies and expected to liaise regularly with them, each was to act in their own right and not in any sense as a delegate of the nominating organization or body.

Additional private sector input emerged from the Task Force extensively consulting on policy proposals and testing the text and organization of the new material at every stage of their development. We met regularly with the stock exchange, the futures exchange and peak industry organizations to ensure that the law would be capable of being understood by its users. There was also close consultation with the regulator, Australian Securities Commission, to take account of its practical experience in administering the Law.

## *A staged program*

The 3 stages of the Simplification Program found their way into the Corporations Act 2001, which recently replaced the Corporations Law because of Australian constitutional law imperatives, by amendments made to the Law by the First Corporate Law Simplification Act 1995, the Company Law Review Act 1998 and the Corporate Law Economic Reform Program Act 1999. Only the changes made to the Law by the First Corporate Law Simplification Act are entirely the work of the Task Force. The Simplification Program was announced in April 1993. The Task Force was established in October 1993 and disbanded in April 1997 when the Program was relaunched, following a change in government in the previous year, as the Corporate Law Economic Reform Program. As the names of the 2 Programs imply, corporate law simplification gave way to economic corporate law reform.

The first 2 stages reshaped the core company provisions of the Law to more appropriately reflect the way in which Australian companies operated in the 1990s by stripping away the vestiges of 19<sup>th</sup> century law which had lingered far too long and removing distortions and

anomalies which had arisen through piecemeal reforms over many years. The third stage improved and clarified the officers and related parties and fundraising provisions that had recently been the subject of law reform measures without affecting their fundamental policy settings. It also resulted in takeovers provisions that are easier to understand and to apply, and easier compulsory acquisitions.

### *Illustrative benefits*

3 examples of changes to the law with wide application brought about by the Simplification Program demonstrate some of the significant benefits to business that were enhanced through the continuing collaboration between public sector policy makers and private sector practitioners and users of the law. The high degree of co-operation facilitated teasing out the practicalities of proposed reforms and the impact on costs to business of implementing them and was one of the great strengths of the Program. The move to single director/single shareholder companies allowed a sole trader to truly operate as a 1-person owned and controlled corporate entity. Lifting the requirement for a minimum of 2 directors and 2 shareholders meant that a spouse, another family member or a friend, who had no real involvement in the business, no longer needed to be called on to act as a director. Decisions and disclosures of conflicts of interest of a sole director must be recorded; there is no need for a directors' meeting. The single director can also act as company secretary and can witness the use of the company's seal if that fact is stated when documents are sealed by the company.

Streamlining the regulation of proprietary companies by categorizing them as small or large as the basis for distinguishing between companies for the purposes of financial reporting resulted in less than 2 per cent of companies needing to prepare annual accounts although all companies were still required to maintain accounting records that would enable financial statements to be prepared if they should be directed to do so. It also meant that it was no longer mandatory for proprietary

companies to hold annual general meetings and that any proprietary company could pass an ordinary resolution without holding a meeting of its shareholders if all members were to sign a minute of the resolution.

The innovation of inserting replaceable rules in the law made it optional for a company to have a constitution and gave the company the flexibility of electing to have all or part of the rules to govern its internal management. The replaceable rules as they apply to a company have effect as a contract in the same way as a company's constitution. Failure to comply with them is not a contravention of the Law, so the provisions about criminal and civil liability and injunctions do not apply.

A real benefit of this initiative is that as changes are made to the law those changes will be reflected in the replaceable rules. This contrasts to the previous situation whereby many closely held proprietary companies operated under outmoded memorandum and articles of association or relied on an out of date Table A (standard form articles of association) in the legislation and were not able to take advantage of changes made to the law as they occurred.

### *The end result*

The outcome of taking a shared approach to improving Australia's companies and securities laws by closely involving the private sector at every stage of the legislative process in the Simplification Program is a law that works. The provisions of the law tackled by the Task Force in the mid-nineties that are to be found in the Corporations Act 2001 today accomplish what the Task Force stated in its published Action Plans that it intended to achieve: rules that are clearly expressed, readily understandable, well arranged, accessible and easy to comply with.

### *Companion articles*

Robert Eagleson looks at the Program from the perspective of audience and plain language on pages 14-17. Vince Robinson looks at the Program from the drafter's perspective on pages 22-24.

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# Does it have to be a *Lawyer?*

**Tim Workman**

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Formerly Legal Adviser, Civil Aviation Authority of New Zealand*

In New Zealand all primary legislation passes through the Parliamentary Counsel Office. However, some subordinate legislation (rules and regulations) is prepared by others. Delegated technical legislation in the maritime, aviation, and land transport sectors is an example.

In these cases, primary legislation authorises rules to be made by the Minister of Transport. Instead of officials instructing Parliamentary Counsel on the drafting of the requirements, the rules are drafted by a Crown Entity responsible for safety in a given transport sector. The rules are drafted and consulted on under delegation and by contract to the Ministry of Transport. They are reviewed by the Ministry of Transport, and then made by the Minister. They are also subject to legal scrutiny.

The focus of this article is on how plain English principles are applied when drafting technical legislation in New Zealand, and in particular who is best equipped to undertake this task: non-legal technical experts or lawyers.

## *Plain English challenges*

For transport agencies that are delegated drafting responsibilities, plain English principles are a contractual obligation. A contract is entered

into between the Crown Entity and the Ministry of Transport that requires rules to be drafted to meet accepted New Zealand standards for legislative drafting, and more specifically, to comply with the Guidelines of the Legislative Advisory Committee. Compliance with the requirements is usually ensured through the Ministry review process. In the case of dispute or uncertainty on drafting issues, the matter is referred to a Parliamentary Counsel or accepted drafting experts for arbitration.

Achieving the objects of plain English in technical legislation is challenging for the drafter, in obvious and also more subtle ways. The obvious challenges are the technical complexity of the language and the concepts that need to be described. Jargon is rife and often hard to avoid.

In the maritime and aviation sectors, the incorporation of internationally agreed technical standards into domestic legislation can be one of the great obstacles to plain English. The vagaries of language in documents drafted in international forums are well known. Drafting is done by negotiation, often conducted in a mix of languages and often by persons trained in diplomacy rather than plain English drafting. Yet where there is

ambiguity or unsatisfactory language, there is a real fear of losing the intended meaning if anything but the actual wording of the international document is used. Hence the original terminology of the international document is preferred irrespective, in most cases, of plain English considerations.

There are plenty of opportunities to keep the fog to a minimum though. Wherever possible language is kept simple and direct. Drafters use the active voice. Phrases with historic meaning to a handful of knowledge bearers are translated into modern English wherever possible. Some phrases, such as “in way of” in the naval architect’s language, still defy us. Sentences are kept short or are paragraphed for ease of reference.

The rules have also been innovative in making legislation accessible. The maritime rules are the first New Zealand legislation to my knowledge to use flow charts to determine obligations on persons where the concepts were too difficult to explain simply by language alone.

Technical experts are often called on to draft the rules. This can result in a quite different approach to plain English than perhaps might be adopted by a legally qualified drafter. The

flow chart example was the suggestion of a technical expert that has proved very successful in explaining the required qualifications for engineers on ships with a bewildering array of engine sizes, engineering systems and operating locations. Such an innovation may not have been considered by a drafter trained within a more conventional legal framework.

In terms of language choice, the technical expert tends to use English appropriate to the industry personnel who are likely to use the technical standards prescribed in the rule. This is a sound principle. Rules by their nature will be considered by the legal profession and others from time to time; however, the needs of the clear majority of users have to be taken into account. Wherever possible the language should be understandable to all potential users, but foremost the rule must be technically correct and capable of easy use by its intended audience.

### *Structure in technical legislation*

Another key tool for achieving clarity in technical legislation is structure. A logical structure is invaluable in bringing order to complexity and is a must in technical legislation. Again technical experts often apply or understand a different logic in drafting structure to that usually understood by legally qualified drafters.

The technical expert tends to be interested in describing standards and processes efficiently and taking into account the needs of the

technical audience. If the rule deals with certifying that a ship is constructed to set standards, the expert will begin with the first step in that process. It might be stating that the design of the ship needs to be approved by a recognised naval architect. The rest of the rules take the intended audience through the process of ship construction to its logical conclusion of gaining a certificate of compliance.

On the rare occasion where a lawyer gets the initial drafting task it is interesting to see how differently the task of drafting legislation is approached.

The Parliamentary Drafting Manual section on organisation of material is a neat summary of that viewpoint. It requires that sequence should be logical:

- substantive matter should precede procedural matter;
- the general should precede the particular;
- provisions of universal or wide application should precede provisions of limited application;
- that which is the basic or fundamental should be presented prominently and not obscured by minor provisions;
- the procedural or administrative provisions should be removed to a schedule where possible, so as to give prominence to important material.

Foremost in the legal drafter's mind is the mandatory nature of the rule. Compliance is required and the first matters to be dealt with, after any application or definition

provision, are the key requirements of the rule. In the above example the first rule would likely be the requirement for a ship to have a certificate of compliance and any other key mandatory requirements that the rule deals with. To the lawyer these provisions set the scene for the rule. Stating the mandatory requirements up front explains the reason for the rule. The legal mind seems uncomfortable with launching into technical processes before these requirements are clearly set out.

To the technical audience the mandatory requirements are often treated as a given! It is generally understood that a commercial ship needs to be certified as meeting safety standards. There is no need to state this up front. The technical audience wants to know what the standards are and what the correct process is to demonstrate compliance. It is quite common for the provision to be added in a miscellaneous section towards the end of the rule.

So is it appropriate to follow the Parliamentary Counsel guidance that these provisions be stated first? The structure suggested by the Parliamentary Drafting Manual appeals to my legal background and I think is preferable. However, it pays to be wary of imposing a lawyer's ranking of importance on a majority audience with quite different needs. Perhaps in this case it is enough to ensure that the necessary provisions are all contained in the rule and to ask the legal profession to work a little harder!

## *A collaborative effort by equals*

Our primary goal is to produce rules that are easy to understand so that the intended audience can comply with them. The rules must be correct both technically and legally. Whether a technical expert or a lawyer has the initial role in drafting the rules, both must be intimately involved. In the end it should never be an issue of who has the last say: the lawyer or the technical expert. Both should

work together as a team of equals to produce comprehensive, accurate, readable rules.

My first rules manager, an aircraft engineer, was firmly of the view that successful technical legislation required a meeting of minds between the technical expert and the lawyer working on the project. These two form the core of the drafting team and their equal contribution is critical to the success of the rules.

Different disciplines bring a different appreciation of audience needs and expectations. The challenge is to work together to draft functional legislation that is accessible to the broadest spread of likely users.

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## A **judicial** response to plain language

Justice R I Barrett

*Supreme Court of New South Wales*

**Judges work with words at close quarters. One recently described a word in a plain language contract as “the strong word”:** Davies AJ in *AJDJ Pty Ltd v Pacific West Developments Pty Ltd* [2002] ANZ Conv R 267. It is this mindset that makes lawyers generally and judges in particular approach new verbal forms with care.

### **New word for old**

This care is acute when a new word is used in an old context. Before 1981, Australian companies legislation created a presumption of insolvency if a company “neglected” to satisfy a creditor’s formal demand for payment. In the new legislation of that year, “neglected” was replaced by “failed”. In a paper presented at that time, I wondered whether the change would make any difference.

According to precedent, mere non-payment was not “neglect”: the omission had to be without reasonable cause. Did “fail” carry the same shade of meaning? The answer was provided by McLelland J in *L & D Acoustics Pty Ltd v Pioneer Electronics Australia Pty Ltd* (1982) 7 ACLR 180. He said,

quite simply, that it could not be supposed that the change from “neglected” to “failed” was “intended to alter the position which has been established for more than a century”.

Verbal shifts will always be viewed in the light of received expectations. In *R v Piccin* [2001] NSWCCA 323, Hulme J considered whether a rewritten statutory provision about leniency for first offenders reflected any new meaning. He found in the parliamentary materials nothing to suggest that “any change of significance” was intended. A meaning consistent with that given to the old provision was therefore preferred:

Such an emasculating of an important provision, designed to mitigate ‘the rigidity of inexorable law’, is



not to be inferred in the absence of legislative intent far more clearly demonstrated than in the change in terminology from s.556A to s.10.

Sometimes, however, a judge may pause before concluding that no change was intended, even if the writer seeks no more than the avoidance of old-fashioned forms. If “agree” replaces “covenant”, the judge will wonder whether there is a shift away from the technical meaning of “covenant” as a promise in a deed, as distinct from any other contractual promise. One answer may be given in a context concerned with deeds, another where the context deals with documents or contracts generally. Substitution of “leased premises” for “demised premises”, on the other hand, will be seen as no more than adoption of a synonym better understood by today’s readers.

### **May be, may be not**

What does “may only” indicate? This question occupied the attention of 5 members of the High Court of Australia in *David Grant & Co Pty Ltd v Westpac Banking Corporation* (1995) 184 CLR 265. Judges of intermediate appeal courts had given different answers to the question whether an earlier provision of corporations legislation giving the court a general discretion to extend time could be used where a section added in 1993 said that an application of a certain kind “may only be made within 21 days after” a specified event. The High Court judges said that the phrase “an application may only be made within 21 days” must be read as

a whole, so that the right to make an application does not exist unless the time limit is observed. On that basis, and in the light of other indicators in the legislation, the general power to extend time was not available in the particular case.

This controversy is not over. Another provision says that a certain type of application (application A) “may only be made” within a particular period of 3 years or within such longer period as the court orders on an application (application B) made within those 3 years. Opinion among first instance judges is divided on the question whether the period of 3 years for the making of application B is constrained by “may only be made” (which refers directly to application A) or whether the general provision for extension of time is available to allow application B to be made outside the 3 year period. As I am 1 of the judges involved in the division of opinion, I shall not pursue the matter here.

Modern words of command or prohibition can cause uncertainty. In New South Wales, the *Civil Liability Act* 2002 says that a legal practitioner “cannot file” an originating process claiming damages unless the practitioner certifies that the claim has reasonable prospects of success; and that such a process “is not to be accepted for lodgment” without a certificate. I had a case in which damages were claimed but there was no certificate. In the end, I did not have to deal with the defendant’s submission that the originating process was a nullity: sense prevailed and a

new summons with the necessary certificate was substituted. But questions went through my mind. Was the summons a nullity as the defendant contended? What was the position of the court official who had accepted the original summons for lodgment? Had the solicitor achieved the impossible by filing something the statute declared every practitioner incapable of filing? The “cannot” and “is not to be” wording did not immediately suggest the answers that will no doubt emerge when these new provisions are fully considered.

### **Definite or indefinite?**

Among “strong words”, a special place belongs to “the” and “a”. The general approach to them was described by Callaway JA in *Walsh v Natra Pty Ltd* [2000] 1 VR 523: “Speaking very generally, the indefinite article is used the first time a person or thing is mentioned and the definite article, or ‘that’ or ‘those’, is used thereafter”. I was mindful of this when I heard *Awada v Linknarf Ltd* (2002) 20 ACLC 1669. The question there was whether the following provision applied to a company in the course of a members’ (as distinct from creditors’) voluntary winding up:

After the passing of the resolution for voluntary winding up, no action or other civil proceeding is to be proceeded with or commenced against the company except by leave of the Court ...

The key words are “the company”. Which class of companies is relevant? On 1

view, it is all companies that have been the subject of a “resolution for voluntary winding up” and therefore covers both the members and creditors subclasses of such winding up, since such a resolution is common to both. But closer attention to the statute convinced me that only the second subclass is affected. An important point is that the section is located in a division of the Act headed “Creditors’ voluntary winding up”. Many of the provisions in that division have obvious counterparts in the immediately preceding division headed “Members’ voluntary winding up”. Particularly in light of the weight that interpretation legislation directs be given to headings, it seemed to me clear that a provision in 1 of the divisions referring to “the company” catches only a company subject to the type of voluntary winding up identified in its heading.

#### Et tu, Brute

Judges who, as readers, seek the meaning of other people’s words must also, as writers, be conscious of the impact of their own language. Most of us are not yet subject to statutory direction of the kind found in s.348 of the *Workplace Relations Act 1997* (Qld):

The commission must ensure the commission’s written decisions are-

- (a) in plain English; and
- (b) structured in a way that makes a decision as easy to understand as the subject matter allows.

The peremptory “must” does not disclose the consequences of disobedience. The criminal justice system will break down if every non-complying judge is treated as a law-breaker. All judges try to say clearly what they mean. Their mixed success is reflected in passages such as, “The conclusion to be drawn from Barrett J’s reasoning *seems to be* that ...” [emphasis added]: *Energex Ltd v Elkington* (2002) 43 ACSR 276. We must ensure that our efforts as both readers and writers do not abate.

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## Clarity

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how to be *streetwise* about the audience

**Liz Skelton**

General Manager, Streetwise Communications

**Most discussion of plain language takes place in the context of preparing or rewriting legal documents such as contracts, insurance policies and legislation. But accuracy and clarity are equally vital in those documents that explain the law and encourage members of the community to comply with it. There is a compelling demand to come up with language, episodes and examples that match the experience of the target audience and evoke an appropriate response.**

Streetwise Communications is a leading Australian communicator of accessible, culturally relevant and entertaining information on social issues for the community, especially young people. 1 of the keys to its success in reaching its target audience is its process of consultation: we talk to young people!

The Streetwise consultation process has been developed and refined over the past 19 years in consultation with target audiences, in particular young people and service providers. The unique consultation process has enabled Streetwise to be credible and popular with disadvantaged groups that are traditionally seen as “hard to reach” and that are disadvantaged in terms of their access to information.

### **The Streetwise Process**

Whether the final resource is a comic, educators’ kit, animation, video, website, or audio resource, our development process is the same.

#### **Stage 1: Brainstorming**

We talk to the experts and workers in each field to find out what the issues are and to get advice on successful approaches. This begins with a ‘brainstorm session’ involving relevant specialists and stakeholders, as well as representatives from the funding bodies and Streetwise staff. Following this initial discussion of ideas, we conduct a literature search and seek the views of additional relevant experts.

#### **Stage 2: Consultation with the audience**

We talk to groups of young people around Australia to find out what they want to know and what their stories are. The kind of information we try to get includes:

- the attitudes of young people to this issue
- the gender and age
- the most effective means of putting across information on this issue
- the main issues
- the young people’s experience of this issue
- what they know about this issue
- what they don’t know
- what resources they know of
- what they think of them
- community attitudes.

#### **Stage 3: Preliminary drafts**

We draw up “roughs” of the stories and take them back to the storytellers, experts and workers to make sure we have got it right. This ensures that the end products reflect the issues, language and concerns of the audience and that the information is accurate and up to date.

To ensure that the final resource will be appealing to the target audience, that the messages will be understood and that the information is accurate, Streetwise obtains extensive feedback on the draft and makes any necessary changes.

#### Stage 4: Final product

A resource is printed and distributed. Streetwize has an established distribution network which gets resources to the most appropriate organisations. The mailing list to youth, community and indigenous organisations is 1 of the most comprehensive in Australia and includes over 20,000 outlets nation-wide.

We then evaluate how the resource was received so that we learn from experience how the resources work. Through this process we have established a proven record and recognisable image.

#### Case Study

Because of the audience and in the light of previous experience, we decided that a comic format would be the best approach to take with *Spur of the Moment!*, a car theft prevention campaign, aimed at young people at risk of being involved in car theft.

#### Stage 1: Brainstorming

The car theft project began with a brainstorm session attended by young people and representatives from the NRMA, NSW Police, community legal centres, youth centres, local government and the NMVTRC (National Motor Vehicle Theft Reduction Council). Among the key issues raised were:

- the perspective to be taken (i.e. the victim's perspective, the perpetrator's perspective or both?)
- the target audience
- the need to show the consequences of stealing a car (i.e. court action, injury or death)
- passengers in stolen cars also as offenders
- car theft as a pathway to further offending
- stealing cars to commit other thefts
- theft of cars for parts or for insurance claims
- the need for young people to take responsibility for the consequences of car theft.
- reasons why young people commit car theft (i.e. as a consequence of boredom and lack of public space, access to transportation)

- car theft hierarchy, i.e. thieves often begin with stealing Excels and move on to V8s.

#### Stage 2: Preliminary draft

With these issues in mind, Streetwize conducted a series of consultations with young people on the mid north coast of NSW (Taree area) and in the Sydney metropolitan area. We also contacted a range of other services working with young offenders or young people at risk of being involved in car theft.

The research indicated that a wide range of young people commit car theft, in rural and metropolitan areas, at ages from as young as 10 and mainly boys but including some girls. Asked why they do it, the major reason given was for the thrill.

*It's like an adrenalin rush, just faggin' around. (HBT, Parramatta)*

However, it also came out that some of these young people saw stealing cars as a good way to get around.

*Most of them are idiots. They just do it for joyriding but some of them really need the car to score drugs. (Belmore)*

*Sometimes if you want to go down to the beach or further down the coast you might steal a car if the bus is a hassle. (My Place, Taree)*

In discussions with young people who had become involved in car theft it quite quickly became apparent, in terms of deterrence, that many of the issues raised at the brainstorm meeting were of little concern. Young offenders exhibited little empathy for victims:

*When I was into stealing cars I wouldn't have given a \_\_\_\_ I'd have just gone out and stolen another one. As far as this proving a deterrent I'd doubt it. (Kingsford)*

They were unconcerned about not being able to secure employment or drivers' licenses in the future:

*It's really just part of a wider problem. There's little kids going hungry, they don't even see a future for themselves. In one group of 13 year olds we had here 4 out of 7 answered "death" when we asked them what they thought about the future. (Koori Youth Network, Taree)*

Even the prospect of juvenile detention was of only minor concern to some of the young offenders:

*Many of the kids see Worimai [Newcastle Juvenile Justice] as a safe place and a place to get a feed and a warm bed (Koori Youth Network, Taree)*

So when it came to writing the draft story the need to get across some form of deterrence was crucial. Some young people were deterred by the risk of being arrested by the police and stopped participating in these activities after a few episodes. However, many of the young people involved in car theft were only deterred by the prospect of really traumatic circumstances as a result of their actions. Any consequences less serious than being locked up in an adult jail or seeing a friend get seriously hurt or killed failed to deter them.

*I was in for 2 years for car theft, prison really put me off doing it again (Kingsford)*

*Getting busted or hurt. This friend of mine got killed he was in the DFC gang all they did was steal WRX's and do rorts. One time they did a ramraid and clipped a car and went into a pole - they all died. (Belmore)*

*At times it's scary when the cops are chasing and you lose control. (Purfleet)*

Consequently we decided to demonstrate 'serious' consequences in the draft to see if this heavy message approach would resonate with the target audience.

### **Stage 3: Consultation**

The draft comic was tested in a series of consultations with young people to see if it was effective in getting the key messages across. Consultations were held with young people in and around Sydney metropolitan area. We also received a range of written feedback from services and from some additional young people, including from organisations in SA and Victoria. The general reaction was that the draft comic was realistic.

*It's the sort of stuff that happens in everyday life, it's the sort of things that teenagers do today. (Holroyd)*

Most young people were able to ascertain the key messages in the comic.

*It's really good, it shows that there can be bad outcomes to car stealing. It's not just all joyriding. (Eastlakes)*

*The message is pretty clear without nagging and being too moralistic, don't steal cars. (Port Kembla)*

At the conclusion of the feedback stage there were a few recommendations for minor changes to characters and the car chase and to some aspects of the legal information but generally the comic stayed pretty much intact. The results of the feedback indicated that the 'heavy message' approach suggested by the original research had been appropriate to reach this target audience.

### **Stage 4: Final product**

60,000 copies of *Spur of the Moment!* were printed and distributed through the Streetwise established distribution network throughout Australia. 6 months later the comic was evaluated with positive results as follows:

- The comic was seen as realistic by a wide range of young people.
- Importantly, *Spur of the Moment!* was successful in increasing young people's awareness of the implications and consequences of car theft. Many young people stated that they would be discouraged from considering car theft after reading the comic.
- The comic also serves as a source of important first-contact information for young people needing legal advice and assistance. A contact section in the comic provided freecall numbers for general legal advice in each state and territory.

On the basis of the evaluation, the NMVTRC funded the *Spur of the Moment* campaign which included: a reprint and distribution of the comic; the development of a 30 second animation on the dangers of car theft which was screened in cinemas, TV networks and copied onto a CD-ROM for use in schools and youth centres; the development of an educators' kit with background on car theft, activities and discussion guides to explore issues around motivation, peer pressure, consequences etc.

## So does it work?

Over 23 independent evaluations in Australia and overseas have been conducted on the effectiveness of Streetwize resources. The reports have consistently shown that the comics are more successful than other print media in getting information to young people in the

Streetwize target audience. Young people relate to the situations, characters and language used and have a high level of recall of the information. They pass the comics around.

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# *Bringing the audience to the fore*

## RADICAL APPROACHES TO PREPARING LEGISLATION

### Dr Robert Eagleson

*Member of the Task, Corporations Law Simplification*

*Plain English Consultant, formerly A. Professor of English Language, U. of Sydney*

When the Australian Government undertook in 1993 to recast the Corporations Law, it had 2 interlocking objectives with keen relevance for users. The first was to simplify and streamline the content. The second was to reshape the expression in plain English so that the Law could be readily understood by its users. To accomplish these goals the Government adopted several innovations in the preparation of legislation as far as Australia was concerned. These innovations had emerged from experiences in rewriting legislation in the previous decade or so.

First, the private sector was involved from the beginning in the recasting of the legislation. This meant that the breadth of view and the experience being brought to bear on any portion was considerably extended. It is members of the private sector that have the day-to-day experience of observing the application of the law in business activities. This background is vital if we are to fashion a law that will work smoothly for the governed as well as the governing.

Secondly, the legislative drafter was attached to the program from the beginning. Another departure from existing practice, this innovation enabled drafters to participate in the give-and-take that led to final solutions, giving them insights with which to capture the true balance and to prepare a satisfactory draft. An added advantage in involving drafters from the start is that their experience in composing documents enables them to see pitfalls for expression in schemes being proposed and their observations can lead to alternatives which are easier to document and so increase comprehensibility for readers.

Thirdly, a plain language expert was associated with the exercise also from the beginning. This allowed every step of the way to be illuminated by plain English principles and practices. The way was also opened for traditional approaches to the composition and drafting of legislation to be challenged and new ways to be explored. (Appointments like this had already been made in other countries, such as Sweden and Switzerland.)

The way the Corporations Simplification Program was structured and the impact of private sector participation is described by Claire Grose in a companion article on pages 3-5. Vince Robinson looks at the Program from the drafter's perspective on pages 22-24. This article examines aspects of the Program from the viewpoint of users.

### *Testing*

An extensive and comprehensive testing program underpinned the efforts to achieve legislation that was efficient for all the varied users and also readily comprehensible. It sought to elicit vital insights into the daily ramifications of the Law and the comprehension of its text from those most closely associated with its operation and administration.

The participants for each testing session were selected depending on the portion of the Law under scrutiny. Each group contained a spread of people drawn from large and small companies as appropriate and as well lawyers, accountants, government administrators and regulators. We held it important to mingle the participants and especially not to keep those from government agencies separate from those from the community, nor those from large corporations from those from small ones. It meant that during testing sessions participants were made aware that there were other considerations than their own and that there could be different reactions to the same language. It helped all to explore the issues more deeply and to move towards genuine solutions – rather than compromises – that would satisfy the needs of all.

Testing sessions were conducted in all States and in smaller cities as well as larger ones to capture all viewpoints and to remove any bias in the treatment of a topic. This proved essential even in points of technical terminology. In the first State in which a draft on company meetings was tested, the term used by participants for a motion voted on by directors by mail rather than at a meeting was *round robin resolution*. However, subsequent testing in other States revealed that the common term was *circular resolution*. As this term was recognised in the first State although not regularly used there, it was adopted because of its more widespread use and general intelligibility.

### *Testing the content*

The testing program started with content. To avoid modifying the law with partially understood notions, focus group discussions were held with those closely involved with the part of the Law under consideration. These discussions produced not only a list of ideas but also an appreciation of the conflicts and tensions in outlook among the various parties.

Once decisions had been made on the changes that seemed necessary, we returned to the audience to probe whether the proposals had general appeal or needed further modification. This step was tackled in 2 ways. A Proposal Paper which set out the proposals and raised a series of questions to stimulate thinking was distributed widely to individuals, industry

associations, regulatory and market bodies to elicit written responses. As well, we returned to the relevant focus groups for further exchanges of opinion. These procedures yielded both a breadth and depth of coverage.

### *Testing organisation*

Before any text was prepared on a particular part of the legislation, fresh focus groups explored how the information should be arranged. To save time for participants, we provided 2-4 options for structures as a starting point. Working from several options rather than a single plan avoided channelling thinking in 1 direction and indicated that we were open to their wishes. For example, in testing how to organise the information in the chapter on directors, 2 of the optional plans presented to the focus groups were along these lines:

<b>Plan 1</b>	<b>Plan 2</b>
Appointment	Powers
Powers	Duties
Duties	Appointment
Termination	Termination

The participants bypassed the chronological logic of plan 1 to the more topical logic of plan 2. Their choice was driven by experience: except for the initial setting up of a company, their involvement with matters of appointment arose only after a director retired or resigned and another had to be appointed to fill the vacancy. The consideration of powers and duties on the other hand was an ongoing and separate concern.

This type of testing was also used to examine the total structure of the Law as well as the arrangement of sections within a part or chapter. It had 2 significant benefits. The end product fitted neatly into the expectations of users and the ways in which they searched for and handled information. It made the writing task speedier as the drafters did not have to experiment with the direction to take.

### *Testing the draft text*

The first activity took participants through the text section by section, eliciting their responses both to the ease with which they could understand and to the language forms used. To some extent this was investigating readability,

but at various points participants would spontaneously propose different wording for a clause or sentence, thereby indicating that the wording in the draft was less easy or less familiar.

A second activity posed problems that put the participants to the trial of applying the text to practical situations to confirm how well they actually understood what was written. This part of the testing was also used to examine how quickly and easily participants could move through the text to find answers. It prompted us to re-arrange portions, improve headings and sharpen wording.

Having assimilated the results of this type of testing into the draft, we returned to at least some of the groups to check on the revisions to ensure that different difficulties had not been introduced in correcting the original ones.

### *Specialised consultation*

Alongside all this testing went continual conferring with the Consultative Group established to work closely with the Task Force. It examined all proposals on content and commented on all drafts. In a sense the Consultative Group was a grand, all-embracing testing focus group.

### *The challenge to traditions*

Conventions have grown up in legal drafting that have their roots in misapprehension and have no real justification. They persist by weight of tradition and we can become so tethered to them that we allow them to override pressing needs of readers.

### *Tables as operative provisions*

In recasting the chapter on share buy-backs, it emerged that the clearest way to express the rules was to present them in a table. Up to this point in legislative drafting it had not been accepted that a table could be an operative provision. Instead, the information would be set out in consecutive prose and at times – though not always – the table would be added as a supplementary aid.

We broke with this convention and as appropriate elevated the table into an operative

provision in this manner: ‘The following table specifies the steps required for, and the sections that apply to, the different types of buy-back.’ (The table followed immediately.)

The practice was questioned by several lawyers in testing sessions who argued that ‘tables were not supposed to function as operative provisions’. Already appreciating the great advantage of the new approach for understanding, the majority in the sessions voiced forceful support for our action. The issue simply boiled down to asking ‘Why not?’ and to recognising that readers could cope far better released from the tradition.

### *Guides in legislation*

The majority of businesses in Australia are small companies with 1 or 2 owners, most of whom have no training in law, need to consult the legislation infrequently, and are daunted by its size (then over 1800 pages). The Task Force decided to include a *small business guide* at the beginning of the legislation to provide them with an overview of the sections that impinge on them most and to direct them to the parts of the legislation where they could get the actual details.

Immediate opposition came from corporate lawyers in major legal firms and others with regular contact with the law. It was not that they were opposed to plain English or to the idea of the guide as a separate publication but they felt that it had no place in a piece of legislation. In their view an Act should contain only the bare words of the law – the black letter as it were. This was the time-honoured position.

The weakness in this line of reasoning is that it does not investigate the past tradition with sufficient rigour. It challenges the new but tends to accept the old as granted. However, a government introduces legislation on behalf of the community it serves and for its success compliance is as important as knowledge. The Task Force argued that the guide would help citizens both to understand the law and to comply with it. That should be the goal and benefit of any piece of legislation. To insist on all occasions for only a statement of the law is too inflexible and too restrictive a view of an Act as communication.



After the Act was published, the guide received strong support from a crucial secondary audience. Members of small legal and accountancy firms welcomed it perhaps even more than small business owners. Corporate law is only a minor part of the work of these professionals. They find the guide a valuable refresher tool before they move into a closer examination of the law proper. Their reaction confirms that our focus must be on the audience and what it has to do with a document. This must be our driving force, prompting us to challenge former approaches and freeing us to introduce new devices if they contribute to comprehension that leads to correct performance.

### *A validation of plain language*

The results of this exercise of simplifying and rewriting the Corporations Law give great credibility to the claims of plain language. The response to all the consultation and testing processes was immediately favourable and continually increased as people realised how it genuinely opened the way to better law. Their reactions to drafts displayed a pleasure and relief with the break from conventional legalese. Once we had produced the first Act as part of the Program, we were under friendly but persistent pressure to proceed with the next stages.

The recasting both of content and expression worked in practice. In 1989 new buy-back rules had been introduced. Between then and 1994 few companies had attempted buy-backs and a number had floundered through a failure to negotiate the complicated rules. Once the new version appeared under the Simplification Program, buy-back activity was revitalised and now is a regular practice with companies.

There was a ready acceptance in the community of new legislation produced by the Program once it has been passed by Parliament. This flows very largely from the extensive participation of the community in the process from examining and shaping the content to contributing to the choice of language. Most of the conflicts had been resolved before the legislation reached Parliament and readers could understand what was being enacted.

There was a reduction in the size of the text. This was a by-product rather than a conscious goal, a result of eliminating irrelevant and outmoded provisions, removing unnecessary complications and eradicating verbiage. In the first 2 Acts that we completed 134 000 words in the original shrank to 73 000, a saving of 61 000 words or 45%. This is equivalent to some 170 pages of law. The consequences in time saved are enormous when we consider how many lawyers, accountants and regulators have to consult the legislation, before we take into account all the company directors, shareholders and others in the community who may turn to it. Add to this the time saved because the text is now so much easier to read, the higher level of compliance because citizens can understand their obligations, and the reduced litigation because the text is no longer obscure.

While it is true that the costs in producing legislation in this way are greater, they are 1-off and have to be evaluated in the light of the savings that accumulate year after year for the government in administering the law as well as for the community. It may be that limited resources and finances may restrict the approach from being applied to all legislation. However, it should be pursued as far as possible with Acts that apply widely, and what we learn in producing 1 document can provide useful insights for rewriting other documents, for example in notions of organisation and preferred language structures and uses of tables, graphs and other devices.

During a test the company secretary of a major firm remarked on a table in the text: 'I like this: I don't have to think'. He actually was a thoughtful person who had made many valuable contributions. Beneath his remark was the acknowledgement that readers did not have to spend energy on thinking about or unravelling the language before they knew what to do. Rather than hindering them, the form of communication sped them on to the message. This is the goal - and the achievement - of plain language.

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# *The prudence of always listening to the audience*

**Patrick Chen**

*Director, Life Operations, Prudential Assurance Company, Singapore*

Prudential Assurance Company was the first insurer in Singapore to simplify policy documents from legal jargon into plain English. Its action sprang from its brand promise *Always Listening. Always Understanding*. Our customers' needs come first. By listening attentively to them, we can fully understand their requirements and deliver top-notch service. The Plain English initiative, launched in January 1998 by our Singapore operations, is a good example of how we translated Prudential's brand promise into deed - by listening to feedback and responding with effective changes.

We realised that many people found it difficult to understand the binding contracts of their insurance policies. The onus of comprehension rested too heavily on our customers' shoulders. To ensure that further communications with our customers would be simple and easily understood, it was decided that our policy documents should be re-written for the customer.

Since it was a top priority to help our customers understand their benefits, rights and obligations, Prudential sought the help of Dr Robert Eagleson, a world authority in Plain English.

The improvements made are dramatically self-evident. For

instance, an old policy document stated that 'No suit on account of alleged disability shall be maintainable if commenced before the expiration of one year or after the expiration of two years from the date of the happening of the disability'. This clause was reworded into a much simpler and shorter sentence: 'If you intend to take up legal action on a claim, you can only do so in the second year of the date of disability'.

## *Gains across all audiences*

Miss Elsie Seah, Assistant Director of Customer Service and Claims (until January 2003) noticed that Prudential's customers were no longer intimidated by the complex and overwhelming jargon contained in previous policy documents. Benefits of the change to plain English were felt immediately - customer satisfaction rose and productivity received a boost.

But there were equally important gains for that other vital audience for documents - staff. Organisations often fail to realise that if their documents are convoluted and obscure, their staff too are going to struggle to understand them, will waste valuable time in the effort, and will be hindered from giving the service customers are entitled to. Once our new policies were in use,

we found pleasurable reactions and increased efficiencies in staff.

Miss Karen Shee, Senior Claims Executive, reported that there were fewer customer enquiries and complaints, especially those pertaining to the exclusion clauses in the policy documents. She discovered that she no longer had to attend to numerous customer calls on this aspect. 'Previously, our old documents used to combine the exclusion clauses with other clauses,' she explained. 'Due to the complexity, the customer was often confused as to what was covered and what was not.'

Moreover, Miss Shee pointed out that Prudential's own financial services advisers could easily understand the various conditions of the policy documents which in turn made it easier for them to explain conditions to customers.

Executive Financial Services Adviser, Miss Judy Ho, added that policy documents written in plain English reduced her workload considerably because she no longer had to spend as much time as before to clarify them with her customers. 'Everything is laid out in a question-and-answer format, written in simple English. 1 glance tells it all. My customers were pleased about the switch to plain English. Needless to say, so am I.'

Customer Care & Claims Senior Manager, Miss Lee Tsui Lin, has pointed to another boon for staff. 'Modifying the policy documents not only helped Prudential's customers, but was also a great relief to all our staff dealing both directly and indirectly with the policy documents. Our plain English Initiative minimised the risk of misinterpretation for everyone.'

Senior Adviser, Miss Jean Quek, has given strong confirmation of this. 'We are not legally trained so it was harder to interpret the old policy documents. With the changes made, I no longer have to crack my head to think of how best to coin my own phrases to explain things.' Everything became a lot more convenient for Miss Quek who

started using the policy documents for her marketing presentations. The clear language meant that all she had to do was simply extract the relevant portions and present them to potential customers without further explanation.

### *Media approval*

The leading newspaper, *The Straits Times*, commented that it was splendid that Prudential had "put an end to grandiloquent prose" by "conveying precision in meaning." Other publications such as *The Financial Planner*, the *Insurance Review* and *Directions* all lauded Prudential's efforts to replace jargon with plain English in our policy documents.

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Patrick.Chen@prudential.org.sg

## Making the switch

The types of changes Prudential made to its policies.

The old jargon	The new Prudential
<p>This Benefit shall not apply or be payable if the total and permanent disability ceases or the total and permanent disability is directly or indirectly caused by :-</p> <ol style="list-style-type: none"> <li>1) attempted suicide or self-inflicted injuries while sane or insane; or</li> <li>2) travelling in an aircraft other than               <ol style="list-style-type: none"> <li>(a) as a farepaying passenger or as a crew member in a licensed passenger carrying aircraft of a commercial airline; or</li> <li>(b) as a member of the armed forces or reservist travelling as a passenger in a military aircraft for the purposes of transport; or</li> </ol> </li> <li>3) disability that existed at the date of issue of this benefit or at the date of any reinstatement</li> </ol>	<p>We do not pay if the disability:</p> <ul style="list-style-type: none"> <li>• existed at the cover start date of this benefit or at the date of any reinstatement; or</li> <li>• arises directly or indirectly out of:           <ul style="list-style-type: none"> <li>- attempted suicide or self-inflicted injuries while sane or insane; or</li> <li>- travelling on a non-commercial airline except military aircraft; or</li> <li>- an activity under Special Exclusion shown on your Certificate of Life Assurance.</li> </ul> </li> </ul>

# 9/11 AFTERMATH

**Joanne Locke**

*Plain Language Coordinator  
U.S. Food and Drug Administration*

**Nearly all Americans, especially those of us in the Federal government, have a story about how the events of 9/11 changed our lives. At the Food and Drug Administration (FDA), plain language played a key role in the many activities that followed.**

FDA has intensified its focus on counter-terrorism activities and has a number of expanded responsibilities in the aftermath of September 11, 2001. For example, we have increased the number of inspectors at our borders and have worked hard to ensure the availability of vaccines to prevent smallpox and anthrax. Yet with all these responsibilities, FDA has kept its focus on plain language and clear communication as it sought to guide the community in a whole range of new experiences and pressures.

Independence Day, July 4, 2002 offers a good illustration. As the day drew near, we heard about many threats to Washington. Many thought this might be a perfect opportunity for another terrorist strike. A concern was the fear that a nuclear power plant might be targeted for terrorist activities which could result in the release of radioactive iodine into the atmosphere. If this happened, FDA wanted consumers to know how to protect their children. Many consumers were aware that potassium iodide can protect people against radiation poisoning – but at that time the only form of that drug approved was a tablet in a dosage for adults, NOT for children.

FDA scientists looked at various food and drinks that might disguise the unpleasant taste of potassium iodide well enough for children and infants to accept it, in the event the adult pills had to be broken down for them in an emergency. FDA was ready to make this information available on its website.

This posed the question of how we could present the material. A possibility was to follow the traditional way of presenting scientific material. This approach would have given rise to a table along these lines:

#### **Traditional version**

*Table 1. Recommended doses of KI for children and infants with predicted thyroid radioactivity exposures equal to or greater than 5cGy.*

Risk Group	Amount of KI mixture to give your child	Amount of KI in mg
Children over 3 through 12 years	<b>4 teaspoonfuls</b> (NOT tablespoonfuls)	65
Over 1 month through 3 years	<b>2 teaspoonfuls</b> (NOT tablespoonfuls)	32.5
Birth through 1 month	<b>1 teaspoonful</b> (NOT a tablespoonful)	16.25

There is no question that this table presents the information accurately. Scientists and other health professionals would be able to absorb the information readily in such a table because its form and terminology are familiar to them. However, we recognized that those without a scientific background would not find it so easy to understand. As a result we suggested a revision, using the tools and techniques of plain language, and came up with a table that might be more helpful, especially in those circumstances where a parent was already frantic because their child had been exposed to a harmful substance. In our new version, we inserted the full name as well as the chemical symbol of the helpful compound and developed the following “If-then” table:

## Plain language version

*Table 1. Recommended doses of Potassium Iodide (KI) for children and infants with predicted thyroid radioactivity exposures equal to or greater than 5cGy, using 130 mg tablet preparations.*

If your child is:	Give your child this amount of Potassium Iodide (KI):	Which is:
Between 4 and 12 years old	<b>4 teaspoonfuls</b> (NOT tablespoonfuls)	65 mg of potassium iodide (KI)
Over 1 month through 3 years	<b>2 teaspoonfuls</b> (NOT tablespoonfuls)	32.5 mg of potassium iodide (KI)
An infant from birth through 1 month	<b>1 teaspoonful</b> (NOT a tablespoonful)	16.25 mg of potassium iodide (KI)

This illustration reveals the need for flexibility: plain language does not mean 1 invariable form. Instead it means finding out what will be the most appropriate writing style for a given audience or a specific context. It is an encouraging demonstration that plain language has a vital role in critical situations that involve complex information. It can result in significant differences for health professionals in achieving their goals of making crucial knowledge readily available to consumers and in playing their role in the community.

Using plain language is not just a cosmetic, after-the-fact exercise, but an integral part of the process of communication. No wonder FDA regards it as a top resource in its operations, enabling us to reach our goal of serving the community and helping every section of it by providing better information about the products FDA regulates.

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jlocke@oc.fda.gov

## *Clarity* seminars

### on clear legal writing

Mark Adler uses many before-and-after examples to teach the theory and practice of clear, modern legal writing, covering style, layout, typography, and structure. One handout gives an outline of the lecture, which is interspersed with exercises and discussion; the other gives model answers to the exercises.

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# *Including drafters from the start*

## RADICAL APPROACHES TO PREPARING LEGISLATION

### **Vince Robinson**

*Member of the Corporations Law Simplification Task Force  
First Assistant Parliamentary Counsel, Office of Parliamentary Counsel*

The Corporations Law Simplification Task Force was set up to carry out a progressive rewriting of Australia's corporations legislation (which deals not only with company incorporation and internal management but also with fundraising (public offers of securities), takeovers and securities market regulation).

The way the project was structured and the impact of private sector participation are described by Claire Grose in her article on pages 3-5 of this issue. Robert Eagleson looks at the project from the perspective of audience and plain language in his article on pages 14-17 of this issue. In this article I highlight some of the main features of the project and briefly note the implications these features had for me as a drafter. The views expressed are, of course, my personal reflections on my experience in working on the project and should not be taken as representing the views of the Office of Parliamentary Counsel.

I would like to note in passing that a number of papers on plain language (and plain language rewrites in particular) can be found on the Office of Parliamentary Counsel's website at [www.opc.gov.au](http://www.opc.gov.au).

### *Early and continuous involvement of drafters*

The Corporations Law Simplification project was not limited to merely reworking the text of the corporations legislation. It also looked for opportunities to make recommendations to simplify and make minor practical improvements to the policy settings. This meant that all the project's proposals went through a policy development stage before moving on to the rewriting stage.

The drafters working on the project were outposted to work with the Task Force. Rather than becoming involved only towards the end of the policy development phase, the drafters were involved from the very beginning. They had the benefit of being involved in the strategic and planning stages of the project. They read and closely studied the research and options papers that were prepared for the Task Force. They also took part in all the Task Force policy discussions and the consultations with stakeholders.

By being involved in the policy development and consultative phases, the drafters obtained a thorough and sound understanding of the policy choices being made and of the practical environment in which the legislation operated. Legislation does not operate in an abstract vacuum; it operates in a particular society at particular time; it interacts with the established and emerging practices, motivations and interests that exist in that society. Whether the legislation works well or not depends to a large extent on how well

the detail of the legislation is adapted to the environment in which it has to operate. A sound understanding of the complexities, peculiarities and nuances of that environment puts the drafter in a good position to frame effective legislation.

The drawbacks of the outposting arrangements for the drafters included:

- some periods early on in the project during which there was not much drafting work (as such) around. (This was not a problem for the project itself because the drafters were certainly usefully employed, and made a valuable contribution, during the policy development stage. From a whole-of-government view however, the outposting arrangements may have involved some wastage of the specialist resources available for drafting other Commonwealth legislation and those specialist resources are always in short supply.)
- the drafters losing touch with the day-to-day developments in their home drafting office
- a gradual loss of the drafters' ability to give truly independent analysis and criticism of proposals.

## *Extensive consultation on policy proposals*

The Task Force ran an extensive and effective program of consultations with professional and other interest groups, regulatory and market bodies and users of the legislation. These consultations often led to discussions of, and a detailed exploration of, the factual situations in which the legislation would operate. This exploration exposed:

- unanticipated (but possible or likely) situations that might arise
- the motivations that people would or would not have to pursue particular courses of action
- the adjustments people might make to their behaviour to work with, or around, the proposed rules.

In the course of putting their views and explaining their positions, the people consulted brought to light a great deal of information about the practical environment in which the legislation operated. By the time the legislation on a topic was bedded down, the Task Force had some reason for feeling confident that the important aspects of the environment had been factored in.

By being involved directly in the consultations at the policy stage, the drafters had direct access to a lot of factual information about the environment in which the legislation being worked on would operate. They also had a sound grasp of the interests that were in play and a good understanding of why the policy settings being pursued had been chosen. This made it much less likely that the drafters would misunderstand the policy objective of the exercise. Moreover, it gave the drafters a rich set of factual possibilities to test the rules against.

## *Collaborative writing*

The process for producing the legislation was what I would call **collaborative writing**. The drafters retained the responsibility for preparing the drafts. As a result, the drafts retained the coherence you get from having a single authorial voice; the drafts bore no signs of having been drafted by committee.

The drafters, however, prepared the drafts with the benefit of strong guiding input from the Task Force and saw themselves as writing to a

commission or brief given to them by the Task Force. The Task Force provided input in the form of:

- diagnosis of the problems with the existing legislative text to be rewritten
- suggestions for alternative approaches that could usefully be explored
- guidance on the general communicative strategies and values to be pursued in the project
- insight into the structure and organisation that might work well for particular topics or users
- feedback on the preliminary rewriting efforts on each topic
- assistance with unpacking the results of the focus group sessions (described in the next section on consultation).

With this kind of input, the drafters had a clear idea of the commission they were being given, and the challenges they were being asked to meet, in preparing the drafts. Sometimes drafts needed to go through several iterations before the Task Force and the drafters were both reasonably satisfied with the product.

## *Consultation—feedback from users*

The Task Force and the drafters followed plain language principles in preparing the preliminary drafts. Even so, the Task Force felt that it was essential to involve prospective users in developing and refining the drafts. This involvement took the form of putting to focus groups:

- initially, a number of possible structural plans for the provisions; and
- later on, a preliminary draft of the provisions.

For details on the testing program see “Bringing the audience to the fore” pages 14-16.

Although Robert Eagleson usually chaired the testing sessions, the drafters working on the provisions tested also attended them. This allowed the drafters to get all the feedback from the users and get that feedback first hand (rather than getting only filtered and indirect reports of points raised in the sessions). Being at the sessions also gave the drafters the opportunity to ask questions to get a better understanding of the concerns being raised and to sound users out on possible solutions.

Drafters often wonder what readers would prefer or how readers will react to particular features. With the focus group sessions, we had the chance to ask at least a sample of prospective users.

The focus group session invariably threw up surprises. On the one hand, the users often coped well with what we thought they might find difficult and, on the other hand, found difficult or confusing things that we thought were clear and easy. The sessions showed how easy it was, despite our best intentions, to fail by either patronising or baffling the users.

It was a humbling experience to find out how well your text fared with the focus groups. We had drafters who were committed to plain language principles. We had a plain language expert on the Task Force going over the preliminary drafts very thoroughly before they were shown to the focus groups. Even so, the drafts always needed a lot of work done on them after the focus group sessions.

### *Avoiding reliance on special features*

If you look at the provisions of the corporations legislation that were rewritten as part of Corporations Law Simplification project, 1 of the things that will strike you is the lack of special features. A good example might be what is now Chapter 2C of the Corporations Act 2002 (which deals with company registers). There are no guides or introductions. The use of explanatory notes is very restrained (even compared with standard Commonwealth legislation these days). There is just the orderly sequence of very plain looking sections and subsections.

The Task Force sought to produce readable texts, by and large, by simply making the best use of the natural resources of the English language. The sentences tend to be short and the grammar tends to be simple. The order of the provisions is sufficiently natural that guides, overviews, introductions or summaries do not seem necessary. We certainly did make effective, economical and well focussed use of:

- section and subsection headings
- paragraphing for lists
- tables.

As a drafter, I certainly found it challenging to have to try to produce a clear and readable text

without resort to “aids to understanding”. Drafters regularly try to tame, or at least hide, the complexity of the rules by:

- using definitions heavily
- beginning sections with application provisions (“this section applies if X, Y and Z occur”)
- layering rules (for example, general rules and exceptions) and making some rules subject to others.

For a variety of reasons, the Task Force set its face against a number of these techniques. The view was taken, for example, that beginning a section with an application provision was artificial and simply delayed the process of getting the message across. At least to begin with, having some of these techniques ruled out of bounds made me feel that I was being asked to fight and slay the dragon of complexity with one hand tied behind my back.

The ultimate effects of these constraints on the techniques available is, I believe, a text that is extremely easy to work with and that seems to do the work it has to do with a minimum of effort. Achieving that level of facility, however, took a lot of hard work on the part of the Task Force and the drafters and the input of the focus groups was critical.

A thing that probably surprised many people was that we were able to set out the technical rules on some particularly difficult areas of the law in such a straightforward and clear manner. The project demonstrated that plain language is not something that only works for simple and easy topics.

### *The end result*

The quality of the legislation that emerged from the Corporations Law Simplification project was high both from the legal and the effective communication points of view. The process that was followed was critical to achieving that level of quality. Mere commitment to plain language values, while worthwhile in itself, does not get the results on the same level. The difficult question is how much of this process our system is willing, and can afford, to adopt as part of the normal process of producing legislation.

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## Why do banks

# *write the way they do?*

Nittaya Campbell

*Department of Management Communication, University of Waikato, Hamilton, New Zealand*

A study I conducted on bank consumer contracts in New Zealand a few years ago confirms that people do feel annoyed, confused, frustrated, even intimidated or stupid when confronted with a bank contract that is beyond their comprehension. Many bank customers who participated in my research project reported that they gave up the idea of reading the memorandum of mortgage when they bought their houses.

Surely writers of bank consumer contracts must realise that the average consumer is not likely to be able to make sense of the legalese used in these documents.

### *Why are bank contracts written this way?*

A common perception held by the public is that bankers and their lawyers who write these contracts use legalese because this type of language keeps the consumers in the dark and thus gives the bankers and lawyers power or control over the clients. Some even believe that these documents are deliberately convoluted and obscure to ensure that consumers have to rely on lawyers to interpret them, thus keeping them in employment. However, the reasons that emerged from the interviews of 36 people, including 26 from the banking industry, seemed to be more innocent.

### *Attitudes and expectations of bank staff*

It became clear from the responses of bank personnel that a major reason why consumer bank contracts are written in legalese has to do not with underhand intent but with a misconception that bank personnel have about bank documents. Many seemed to genuinely believe that security documents, because they were legal contracts, had to be written in legalese. Long sentences with little or no punctuation, legal terminology, confusing syntax, and other characteristics peculiar to legalese were believed to be necessary for the contracts to be valid and able to stand up in court. Some bank personnel interviewed even suggested that legal concepts to do with banking were too complex to be expressed in plain English and that plain English therefore would not “cover all the legal finer points” and provide the same level of legal security. In fact, the incomprehensibility seemed to reassure bank personnel that the documents were legally sound.

That legalese is accepted without question by many bank staff is hardly surprising. The style of writing has been around for a long time, and is seen as precise, unambiguous, as well as prestigious. To banks, there is nothing unnatural about using legalese in consumer contracts because

legalese is the “appropriate” way to write this kind of document. Even if the drafters had wanted to write them more plainly, the banks probably would have insisted they use legalese.

### *For office use only*

A related point that emerged from the interviews is that many bank personnel were of the opinion that the contracts such as the memorandum of mortgage or the guarantee were not meant for the consumer to read anyway, and so it did not really matter if they were written in legalese. The primary purpose of the contracts, they maintained, was to protect banks from possible loss. As 1 officer put it: “*They are not written for the customers really. They’re written so the bank can—if it comes to pass that they have to call on the documents—they can get their money back.*” If consumers could not understand the documents, they should get help from a lawyer. After all, said 1 interviewee: “*if you want a tyre fitted on your car, you go to a man who knows all about tyres. If you want to know all about legal documents, you go to a lawyer.*”

### *The interviews*

The interview of the bankers was part of a larger research project that looked at the comprehensibility of consumer-oriented bank contracts in New Zealand. The purpose of the

interviews was to find out what people in the banking industry thought of the documents used by their own banks and of the use of plain English in these documents.

The bankers interviewed were from 7 major banks in New Zealand - only 1 bank declined to participate. The sample, 16 males and 10 females, consisted of both front-line staff, who had day-to-day dealings with the documents and the customers, and management staff, who were in a position to affect decisions on policy. They were from both head offices and local branches. The semi-structured interviews lasted between 45 minutes and 1 hour. The bankers, guaranteed confidentiality and anonymity, were interviewed individually in an office at their place of work. Among other things, they were shown documents from their own banks and asked how comprehensible they thought the documents were for customers and why, in their opinion, their banks drafted the documents the way they did.

#### *Confessions of bankers*

A few quotations illustrate the attitudes to writing of the bank personnel. 1 officer explained: *'It [a bank document] must be written in a way that it is watertight from the lender's point of view.'* Another observed: *'It [getting a mortgage] is a complex transaction, and [it is] probably unreasonable to expect to have to phrase it [the memorandum of mortgage] in such a way that the average person can understand it completely.'*

Some, however, believed that it would be a good thing to write bank documents in plain English. *'I definitely think there are benefits to the bank because . . . I think it's important to both parties to understand terms and obligations on both sides,'* said 1 interviewee.

Although agreeing about the desirability of the exercise, others were not convinced about its feasibility. One commented: *'I think from the customer's point of view, looking from customer service, yes, it would be good if we could do it. But are we asking the impossible and actually causing more problems for the customer by not having a document that might . . . that in the end might not be binding, might not be legally [sound]?'* Another said: *'I do think that if they were in simple language, they would be more easy to understand, but whether or not—it's mainly a legal thing really—whether or not it would fit the legal criteria, cover all the aspects that you've got to cover . . . It would definitely be an advantage if people could read them.'*

#### *The future*

In view of these underlying attitudes, then, it is not surprising that many consumer bank contracts are written in a way that is not conducive to reading by consumers. On the other hand, there are encouraging signs. A number of bank personnel interviewed reported that they had heard of the movement towards plain English and that they supported the idea of rewriting consumer-oriented contracts so

that their customers could understand them. The majority (18 out of 26) said that their banks were concerned, very concerned, or becoming more concerned about how well customers understood their contracts. For some, the issue was "high on our agenda"; for others, their banks had "gone to considerable effort" towards simplifying documents. At the time of the interview, a few banks had already begun to "rewrite in plain English" some of their contractual documents to make them simple and customer friendly.

As the practice of plain English becomes more and more widespread in New Zealand, more bankers may come to realise that plain English consumer contracts are possible and follow suit. But in any training programs a vital early step must lead the staff to reconsider notions of appropriateness, and especially the belief about the appropriateness of legalese; to understand that documents need not be incomprehensible just because they are legal documents; and to recognise that documents written in plain English can be both accurate and also far more effective in enhancing the status of a bank because they are appreciated by customers. Only then can instruction on the methods of producing plain English documents have lasting value.

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# The **plaining** of writers

**Merwan Saher**

*Assistant Auditor General in the Office of the Auditor General of Alberta*

If plain language is good medicine for readers, it is even better for authors. This is what we discovered in the Office of the Auditor General of Alberta.

## **Who we are and what we do**

We are 120 legislative auditors whose job is to provide independent assurance on the government's performance reporting, but more importantly to improve that reporting and the government's use of Alberta's public resources. Our product is recommendations—lots of them. We bring together the most significant recommendations to the government in our annual report to the Legislative Assembly.

## **Better writing = better product**

To communicate clearly, concisely, and precisely is one of our goals. We reasoned that clarity and precision influence the persuasiveness of our advice, and we set out to improve the quality of our writing. So we advertised for a plain language adviser to help our auditors become better writers.

Our newly hired adviser soon learned that he had acquired a clientele of professionals trained to audit. And of course we can all write! We are university graduates with

accounting designations. Some of us have law degrees and a good number have been writing audit reports for more than 20 years. But the sum total of all this experience was a corporate disease of unintelligible precision. What could be said in a few words, if it needed to be said at all, often read like a treatise. A small extract from a report gives a sense of the problem.

### **Before**

A general practitioner avoided a potential assessment for having billed for treating twice as many patients in one year as the average of peers. The physician's legal counsel (same for all physicians and paid by public funds) successfully argued that the time guidelines were not a requirement of the fee schedule and there was no agreement to apply them as terms of physician payment. The high volume of limited visit billings was explained by using nurse triage and longer office hours.

### **After**

A doctor who billed twice the average number of cases last year avoided reassessment by arguing time guidelines for *limited service visits* were not binding. The doctor used nurse triage and longer office hours to double the average number of patient visits.

## **Writing process**

In part, the disease is a product of our process—a process that has 3 levels of reporting, each subjected to increasingly senior levels of rewriting and editing. First, at the end of an audit, we tell management the problems we found and the solutions we plan to recommend. This exit conference with management is a critical part of an audit. It confirms our findings and, by its nature, is full of detail. Next, we condense the exit conference into a management letter to the most senior manager, often a deputy minister, to communicate formally the results of an audit. Finally, we condense the management letter to produce a section of our annual report. The annual report is the public product of our work for an audience of legislators and the public as citizens. Our 2001 annual report had 342 pages.

## **Specific plan to improve report**

With the problem identified and an expert to guide us, we launched a Plain Plan—a project to make our 2002 annual report clear, concise and shorter. We would focus on the primary users, the members of the Public Accounts Committee of the Legislature, and reduce the report to fewer than 300 pages. As advocates of performance measurement, we would measure our performance, primarily through surveying

legislators. We would ask them how readable the report was, if they could navigate it with ease, if it was interesting, and if it helped them do their job. Also, we would look for an increase in the number of our recommendations the government implements. In other words, we would examine our presumption that the clarity of a recommendation increases its chance of acceptance.

## Details of plan

In April 2002, a small group met to work out the details. We decided our auditors needed to see a model chapter of what we expected (a chapter contains the audit results for one of Alberta's 24 government ministries). That was a good but easy decision. The hard part was building the structure of a chapter, which took some time and much debate. For example, should a recommendation come before or after its supporting text, and should the text have numbered paragraphs, and if so how many levels of numbering? Once we had a structure, we applied it in rewriting a chapter from the previous year's report. This became the model chapter and it has 4 parts.

- **Summary** highlights what a ministry must do to improve its systems and performance reports.
- **Overview** briefly describes a ministry and its agencies, boards, and commissions.
- **Scope** explains the extent of our work in a ministry.

- **Findings and recommendations** describes problems we found and solutions we recommend. It has a tight organization with the interrelationship of its sub-parts designed to help auditors test the consistency of their material.

We wanted to know whether the new format and style had in any way distorted the original message so we asked the Ministry whose chapter we had rewritten for comments. The reaction was favourable. We found it particularly telling to hear that the chapter was clear—perhaps too clear.

Over the summer of 2002, as the annual report came together, we heard many things from our auditors:

*This is terrible—this so-called clear, concise writing implies that the problems are simple and easily solved.*

*This is great—it's much clearer to me that my evidence is weak.*

Of course, whether a problem is simple is a matter of fact. The auditor's job is to precisely expose the problem. And better that you conclude your evidence is weak before going to press, than have a legislator tell you so after.

## Results of plan

We released the 2002 annual report in October. 1 thing is sure: at 296 pages, we just met the goal of fewer than 300 pages. We have not yet surveyed legislators to formally hear what they think about our changes. Others have told us the report is clearer and easy to

navigate. But we have learned some lessons.

- Changing the way you communicate will change the way you do your work. Already, auditors are demanding that we examine the 3-part process of exit conference, management letter and annual report.
- Choosing a plain language structure is as important as the writing. Structure that forces the auditor to discretely set out audit criteria, findings and implications exposes substandard work.
- Shifting an organization's writing culture causes stress. You are challenging something very personal when you suggest a change in writing style.
- Writing clearly and concisely leaves no room for substandard audit work. Clarity and quality are interdependent.

## Is it worth it?

To those who question the time and effort in improving our written communications, we say we cannot afford *not* to make the investment. Plain language can expose defects in audit recommendations and, as a result, improve audit quality. The risk of a poor recommendation masquerading behind a torrent of words, or a brilliant recommendation lurking within incomprehensible prose, is unacceptable.

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## Some thoughts on

# : LISTS

**Richard Castle**

*Plain English consultant and drafter*

### Uses of lists

The modern reader expects legal material to be served up in an easily digestible form. So the drafter uses lists to break up the elements of the sentence to make the meaning plainer. Frequently, fragmentation of sentences (or “shredding” as it is sometimes called) can be overdone. In fact there is a danger of over-reaction to the “block of type” characteristic, with the result that sentences become even harder to understand because their constituent parts become over-shredded and difficult to follow.

### The lead-in

The words of each listed item must flow logically and grammatically from the lead-in. Often the drafter observes this principle for the first 1 or 2 items listed, but then forgets it for later items. The lead-in words should be chosen with care both for comprehensibility and for maximum effect. Repetition of the same word or phrase at the beginning of each item is a good indication that the word or phrase could be transferred to the lead-in. But this is by no means an absolute rule. For example it may be better to say:

The purpose of this action is—

- (a) to inform ...
- (b) to create ...
- (c) to allow ...

rather than

The purpose of this action is to—

- (a) inform ...
- (b) create ...
- (c) allow...

### Punctuation after the lead-in

Good practice would seem to be:

- use an em-dash immediately after the lead-in if the listed words flow immediately and naturally as part of the same sentence, and
- use a colon if the list is the product of the lead-in.

So for instance:

The deputy may exercise all the powers of the principal while—

- (a) there is a vacancy in the office of the principal...

but

The powers and duties of the principal are these:

- (a) to notify the board...

The distinction is not really important, however. Statutory drafters favour the em-dash, private drafters favour the colon. Neither tend to use in the body of text the hybrid :- , known as a full set. Sentences with a succession of dashes or colons are suspect, whether or not they are presented as lists.

### Punctuation within lists

Punctuation within lists is not easy, and there is no universal practice or right way. In England it is customary (and seemingly entirely natural) to treat the lead-in and the list as part of the same sentence, so that there is just 1 full stop at the end (often after the last listed item) and the listed items do not begin with a capital letter (unless of course the first word happens to be a proper name). 2 problems arise: first, what to do at the end of each listed item; and second what to do when another sentence begins in the middle of a listed item. There are 3 punctuation

options for the end of each item in a list:

- (1) put nothing
- (2) put something, depending on circumstances; or
- (3) have rules for putting the same thing in the same circumstances.

If commas are normally used at the end of each item, a semi-colon at the end of each item will be called for where any 1 of the listed items contains commas. This creates a useful distinction. Thus—

- (c) apples, pears, bananas and beans;
- (d) root vegetables; and
- (e) other perishable goods.

Punctuate as lightly as possible. The 21<sup>st</sup>-century reader does not expect to see the writing cluttered with little marks. Hence minimal use of the hyphen and fewer commas. When you have a choice, use the less heavy mark. Adopt a comma in place of a semi-colon where possible and consider leaving out the punctuation mark altogether. This is feasible even if there is a linking word at the end of the penultimate item, though that linking word would normally be preceded by a comma (see for example (1) (2) and (3) above).

Where a new sentence begins in the middle of a listed item, logic may have to go out of the window. The full stop and new sentence start do call for other punctuation, so if the general policy is 'no punctuation in lists' that policy will need to be abandoned. The following possibilities present themselves:

- recast the list so that the new sentence becomes a separate item, or is eliminated in some other way
- reshape the list into a different type where each item becomes a stand-alone topic beginning with a new sentence, allowing new sentences within it; or
- put a comma, semi-colon or colon at the end of each item, but otherwise follow the same principles (eg each item begins as a follow-on from the lead-in with a lower case first letter).

## Conjunctions

1 parliamentary counsel office stipulates that a linking word (usually either 'and' or 'or') should be inserted after every item in a list unless there is a good reason not to.

If they appear only after penultimate paragraphs, users might be prompted to apply the linking word only to the last 2 paragraphs. Also, repeating "and" or "or" after each paragraph avoids the difficulty that may otherwise arise if a penultimate paragraph is revoked and the only "and" or "or" disappears.

This rule is not one which commends itself either to the general writer of standard English or to parliamentary drafters in other jurisdictions. Its use makes the text seem unduly fussy. The revocation point (which surely arises only rarely) can be overcome by careful revocation provisions. In short, lists do not need every item to conclude with a conjunction and the device would be better abandoned. In any event, some lists require no conjunction, as in—

The order may prescribe all or any of the following matters:

- (a) the rate of the levy
- (b) the persons liable to pay the levy
- (c) penalties and interest for the late payment of levies
- (d) the taking of legal proceedings to recover any levy.

## Summary of conclusions

- Treat your list as part of 1 long sentence if possible.
- Punctuate lightly and consider leaving out punctuation marks.
- Choose the lead-in for greatest impact.
- Check that all items on the list follow the lead-in.
- Put the conjunction (if you need one) at the end of the penultimate item only.

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# Physicians, heal yourselves

**Sue Stapely**

General Counsel, Quiller Consultants, UK

It's very easy to sit on the sidelines whingeing. It's much harder to come up with constructive solutions, and harder still to implement them.

I have the dubious privilege of being a practising solicitor and a media and design consultant. For the past decade or so I have advised on communications for lawyers, law firms, barristers' chambers and their clients, as Head of Public Relations for the Law Society or as a consultant. Most recently I mounted the media campaign which helped achieve the quashing of Sally Clark's convictions for the murder of her babies.

I've written, designed and produced innumerable pieces of print for a range of audiences, learnt a lot and reached a few conclusions:

- Lawyers, on the whole, write very badly.
- Materials which are approved by lawyers rarely work for other audiences.
- Lawyers like words better than white space or graphics and this is reflected by the publications they approve.
- It is harder to write simply, briefly and clearly than it is to be prolix.
- Legal publications lag about a decade behind those produced by other sectors.

I suggest – arrogantly and without any entitlement to do so apart from long-standing membership of Clarity and a fondness for its beliefs — that the time has come for a radical re-think of our own newsletter.

Of the many pieces of print which reach my desk each day, Clarity's newsletter is without doubt the one I seize with the least enthusiasm, despite my commitment to plain legal language. It is not designed to be an appealing publication visually, there are more words crammed onto the page than is recommended by best practice guidelines and the language used is as dense as that about which on occasion it protests.

It's an enormous achievement that Clarity produces and despatches a newsletter at all, but to expect practitioners and academics to make time to create and publish a modern, accessible publication, without any of the necessary skills and experience to do so, is unrealistic.

Hasn't the time come for us to engage professionals and ensure that our own publication demonstrates more convincingly what we preach? Surely we, of all organisations, should have a newsletter which sets standards of best practice in terms of clarity and modernity of style and tone?

---

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## **Mark Adler**

a solicitor with 24 years in general practice  
and a former Chairman of Clarity  
will work with you to

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# hereby

In *Clarity* 48 Professor Peter Butt reported on a 2002 decision in the NSW Supreme Court. A tenant purported to exercise an option to renew a lease by sending a letter which began: 'We would hereby like to exercise our option to re-new the lease'. At issue was whether these words were sufficient to indicate an intention, then and there, to exercise the option, or whether they were a mere expression of intention to exercise the option formally on some later occasion. Davies AJ held that they amounted to an intent to exercise the option then and there. He considered that the use of *hereby* was 'a very strong indication' that the option was being exercised by that letter.

Peter observed that he would 'recommend avoiding *hereby*. But the decision in this case is a useful reminder that words which we might instinctively avoid may sometimes serve a useful purpose in clarifying disputes over meaning.'

There have been 3 responses.

## Hear, hear to "hereby"

**Donald Revell, Toronto**

I seldom like to disagree with the experts on plain language but I do disagree on the dismissal of *hereby* from the language. *Hereby* sounds like a law word like *hereafter* and *heretofore*. In my opinion it is not. It has a real function.

Assume we come across an act that states 'The XYZ Corporation is established'. This is a statement of fact. It is not an act of creation. It does not tell you the means whereby the Corporation comes into existence. If I ask the question: 'Is this an established

Corporation?' one would answer: 'Yes, it is.' But if I ask how it was established, one would answer: 'It may have been established by the XYZ Act but I can't be sure'.

On the other hand, assume the Act read 'The XYZ Corporation is hereby established'. This is an act of creation. If the same questions are asked now, the first answer remains the same but the second becomes 'It was established by...'

*Hereby* is not an obsolete word nor is it legalese. While the law will not fall apart if it is dropped, it is my opinion that its elimination makes the law less clear when bodies are being established.

## Never in 20 years

**Mark Adler, London**

I would take a different approach to Peter Butt on the occasional use of *hereby* (as in 'We would hereby like to exercise our option to re-new the lease').

First, a pedantic point: it is the exercise, not the liking, which is "hereby". To avoid splitting the infinitive or putting the adverb in the fashionable (but clumsy and often ambiguous) position before the verb I'd suggest 'We would like to exercise hereby...'

More importantly, it is not the absence of *hereby* which would be at the root of the problem if it was omitted; it is the unnecessary vagueness of '*would like*', which leaves open the possibility that the writer has not finally made up their mind. (I seem to remember reading of a British case a year or two ago which turned against the party

trying to exercise the option on this point.)

Rather than use *hereby* for the first time in some 20 years I would prefer something on the lines of 'I opt to renew the lease under clause x of the agreement'.

## Polite but not plain

**Robert Eagleson, Sydney**

Is this an illustration of 2 wrongs making a right? The relapse into *hereby* cancels out the misuse of *would like*.

It is with *would like* that error creeps into the sentence. The writers have brought over the language of social situations inappropriately into a business situation. In social situations we soften orders to turn them into requests. We go from 'Close the door' all the way to 'Would you mind closing the door, please?' We tone down statements of rights with *would prefer* or *would like*.

These polite forms are out of place in documents seeking to carry out a commercial transaction rather than negotiate social relationships. The writers would have served their purpose more aptly with something like: 'We are renewing our lease under the option in clause X' or 'We are taking up our option to renew the lease'.

There is no call for business documents to be rude or brusque but, equally, their message should not be encumbered with inappropriate forms. Instead we need to select the forms that are fitting for a situation and that express the real intention rather than cloak it under a polite, but mistaken, diffidence.



You will have found this issue of *Clarity* full of interesting articles and notes. 2 of our leading members – Dr Robert Eagleson and Michèle Asprey – have been the guest editors, and have worked hard to gather a fascinating collection of contributions from a diverse range of writers. We owe Robert and Michèle our thanks for their efforts. Later in the year Michèle will take over as Editor in Chief, following the retirement of Phil Knight.

### **A new look**

I am sure you would have been conscious of innovations as you moved through the pages. Major headings have been treated variously and column widths adjusted to highlight key messages and to give the right balance to the types of material in an article. White space has been exploited to help the eye. Page 2 collects in an easily found location details about our organisation and the journal, while the application form now carries details on dues and methods of payment. We are grateful to Robert for designing the pages and passing on ideas.

Robert has stressed to me the excellent support he has received from Joe Kimble and Patricia Schuelke in the USA. While he laid out the individual pages, they undertook assembling them for printing, steering the issue through the printer, and handling the distribution. In fact they have been providing editors with extensive service for several years. We appreciate deeply their commitment to Clarity.

### **Clarity conference**

In *Clarity* 48 I promised to say something about last year's conference, which Clarity co-hosted with the Statute Law Society, in Cambridge, England. This was Clarity's first-ever conference, and proved an outstanding success. We were indeed fortunate to have the Statute Law Society as co-participant.

The conference attracted 90 participants from 17 countries. The theme was 'The Language of Legislation', a subject central to the interests of both Clarity and the Statute Law Society. The objective was to examine the style and purpose of legislation, with the ultimate aim of seeing how legislation could be "improved" for its different users.

Clarity members played a leading role, and gave papers at most of the sessions. The first 4 sessions were:

- "The Purposes of Legislation" (papers by the Rt Hon Lord Justice Mummery, of the Court of Appeal of England and Wales; and Emma Wagner, Head of Department, Translation Service of the European Commission)
- "Legislation from the User's Perspective" (Edward Nugee QC; and Martin Cutts, Head of the Plain Language Commission)
- "Producing Legislation: Lessons from Experience" (Peter Knowles CB, Parliamentary Counsel of the

Cabinet Office; and Lady Beryl Mustill, Financial Services Authority)

- "Effective Drafting Techniques" (Kieran Mooney, Chief Parliamentary Counsel of the Office of the Attorney-General, Ireland; and David Elliott, lawyer and drafter, Canada).

The Hon Mr Justice Michael Kirby, Clarity's Australian patron, gave an entertaining and illuminating after-dinner speech, "Statutes and Contracts – Towards a Grand Theory of Interpretation". You will find the full text of his speech in *Clarity* 48. It is soon to appear also in the Statute Law Society's journal, *Statute Law Review*.

In the "master class" on the second day, 5 drafting specialists spoke about their approach to drafting, and drew on their expertise to redraft selected clauses "on the run". All 5 "masters" are Clarity members: Sir Edward Caldwell (recently retired First Parliamentary Counsel, Cabinet Office), Mark Adler (solicitor and former Chair of Clarity), Professor Joseph Kimble (Thomas Cooley Law School, Michigan), Christopher Balmford (solicitor and Head of Words and Beyond, Sydney), and Philip Knight (previous *Clarity* Editor, and plain language consultant, Vancouver). With its informal and interactive approach, this session was a conference highlight.

The conference provided an excellent opportunity for like-minded delegates from the 2

societies to meet in the inspiring ambience of Peterhouse, Cambridge's oldest college.

#### **More country representatives**

2 new country representatives have been appointed: Anne Wagner for France, and Catherine Rawson for Europe (specifically those European countries without their own representative).

Both will join our committee. Also joining our committee is Sir Edward Caldwell, whose participation in the Cambridge conference I have already mentioned.

#### **We'd love to hear from you**

Clarity is well and truly an international organization. We have members in most countries where English is the language of the law, and members in some countries where it is not! We are working on ways to increase our membership and spread our message even more widely, such as improving our website ([clarity-international.net](http://clarity-international.net)) and producing a promotional brochure. If you have any suggestions about ways in which we can better promote Clarity's aims, please contact your country representative or me. We value your input.

Along these lines I welcome Sue Stapely's contribution on page 31 prodding us to practice what we preach. It is a pity if, while advocating plain language, we ourselves falter in following its principles. We might make more use of the pages of *Clarity* to help each other, perhaps running a Question Box on ticklish items.

**Peter Butt**

## **New Books by Clarity members**

### **Drafting Trusts and Will Trusts**

**James Kessler**

*Published by Sweet & Maxwell*

*Sixth edition August 2002*

*Hardback and CD-ROM  
£99.00 + VAT*

This book covers the general issues in drafting trusts and will trusts; the choices that have to be made; and the issues that concern the settlor and testator. It explores the technical issues involved in drafting settlements and exposes the common mistakes and traps.

The sixth edition includes new chapters on Charitable Trusts, Trusts for Disabled Beneficiaries, and Restricting Rights of Beneficiaries. It considers the extensive changes to the law since the fifth edition, including the Finance Acts 2001 and 2002, *Tod v. Barton* (the first case on the Hague Convention), and the Pension Scheme Office's new integrated Model Rules.

It contains a comprehensive range of precedents, drafted on the principles of plain language, and including lifetime settlements, will trusts and administrative provisions.

#### **About the author**

James Kessler is a tax barrister and founder of the internet based trusts discussion forum (see [www.trustsdiscussionforum.co.uk](http://www.trustsdiscussionforum.co.uk)). He was a winner of a Clarity award for plain drafting in 1996 for an earlier edition of this book. He is also the author of the STEP Standard Provisions for trusts & wills.

### **Media Relations for Lawyers**

**Sue Stapely**

*Published by Law Society (UK)*

*Second edition due late 2003*

'Trial by media' is a common allegation and increasingly lawyers are expected to advocate their clients' cases in the court of public opinion as well as in the court room. This book answers the growing need to understand how the media operates, how a client's case should be presented, the ethical dilemmas and how to avoid the pitfalls.

A guide to media relations written especially for lawyers, the second edition fully revises the successful first edition. It incorporates practical new case studies, chapters on *Litigation Support* and *Crisis and Issues Management*. The appendix updates regulation.

Its contents cover: Media relations for marketing; Setting the rules; Defining the media; How to handle the print media; How to handle radio; How to handle television; Litigation support; Crisis and issues management; Quick checklist; Appendices.

#### **About the author**

Sue Stapely is now a strategic issues management consultant with Quiller Consultants, advising law firms, barristers' chambers and clients involved in high profile legal cases. She was a BBC TV program maker before she became a practising solicitor. She spent some time as the Head of the Press and Parliamentary Unit at the Law Society (UK).

# Membership matters

## New members

### Australia

*Jane Atkins*, solicitor  
Office of Chief Parliamentary  
Counsel; Melbourne, Victoria

*Marco Stella*, solicitor  
Mallesons Stephen Jaques  
Sydney

### Canada

*Michael Gauthier*  
Rockland, Ontario

### England

*Canterbury City Council*  
[Mark Ellender]  
Canterbury, Kent

*Steven Loble*, solicitor  
Steve Loble Solicitors; London

*John Moisson*, Reading

*Office of Fair Trading*, London

*Ellis Simpson*, Glasgow

### France

*Anne Wagner*  
Boulogne-sur-Mer, Cédex

### Israel

*Joseph Shattah*, Sr. Vice President  
Bank Hapoalim BM; Givatayim

### Italy

*Alfredo Fioritto*  
Via del Sudario, Rome

### United States

*Boston University, Pappas Law  
Library*; Boston, Maryland

*Mary Dash*, Branch Chief,  
U.S. Government  
Clifton, Virginia

*Salt Lake Legal Defender's  
Association*  
[Heather Johnson]  
Salt Lake City, Utah

## New country representatives

2 new country representatives have been appointed: Anne Wagner for France, and Catherine Rawson for Europe (except France, Italy, Sweden and the UK, which have their own specific representatives).

The address details for Anne and Catherine can be found on page 2.

## New committee members

In line with Clarity's policy that country representatives should be members of the Clarity Committee, Anne Wagner and Catherine Rawson are joining the Committee. The policy enables Clarity to keep closely in touch with the interests and concerns of members worldwide.

Sir Edward Caldwell has also joined the Committee. As the former First Parliamentary Counsel in the UK, he brings to Clarity a valuable background, experience in plain language drafting and a range of contacts.

## New details for India

Sandeep Dave, our representative for India, has changed his address. His new details are listed on page 2.

## Old dues

Have you paid your annual dues for 2003?

Details of the current annual subscription rates and methods of payment are set out on page 36. Please send any outstanding dues to your country representative listed on page 2.

## Members by country

Australia	95
Austria	1
Bahamas	1
Belgium	4
Brazil	1
British West Indies	3
Canada	43
Denmark	4
England	394
Estonia	1
Germany	3
Gran Canaria	1
Hong Kong	12
India	6
Ireland	1
Isle of Man	1
Israel	2
Italy	2
Japan	1
Jersey	2
Luxembourg	2
Malaysia	2
Malta	2
Netherlands	6
New Zealand	17
Scotland	9
Singapore	11
South Africa	31
Sweden	6
Switzerland	3
Thailand	2
USA	242
Wales	9
<b>Total</b>	<b>920</b>

# Application for membership in Clarity

Individuals complete sections 1 and 3; organisations, 2 and 3

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## 1 Individuals

*Title*                      *Given name*    *Family name*

Name .....

Firm ..... Position .....

Qualifications

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## 2 Organisations

Name .....

Contact Name

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## 3 Individuals and organisations

Address .....

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..... Fax .....

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Main activities

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### Annual subscription

Australia	A\$35
Brazil	R50
Canada	C\$30
France	€25
Hong Kong	HK\$200
India	R1225
Israel	NIS125
Italy	€25
Malaysia	RM95
New Zealand	NZ\$50
Singapore	S\$40
South Africa	R100
Sweden	SEK250
UK	£15
USA	US\$25
Other European countries	€25
All other countries	US\$25

### How to join

Complete the application form and send it with your subscription to your country representative listed on page 2. If you are in Europe and there is no representative for your country, send it to the European representative. Otherwise, if there is no representative for your country, send it to the USA representative.

Please make all amounts payable to Clarity. If you are sending your subscription to the USA representative from outside the USA, please send a bank draft payable in US dollars and drawn on a US bank; otherwise we have to pay a conversion charge that is larger than your subscription.

### Privacy policy

Your details are kept on a computer. By completing this form, you consent to your details being given to other members or interested non-members but only for purposes connected with Clarity's aims. If you object to either of these policies, please tell your country representative. We do not give or sell your details to organisations for their mailing lists.