

Clarity

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This issue

Usage, certainty, and clarity

Why was the international media so excited late last year by the Canadian court case involving the "million dollar comma"? The story about this—presumably, humble—speck of ink made it into Canada's *The Globe and Mail*, it made *The New York Times*, it even made it into *Clarity*.

The case involved a dispute over a phone company's attempt to cancel a contract with Canada's largest cable television provider. As *The New York Times* put it, in "The Comma That Costs 1 Million Dollars (Canadian)" (25 October 2006), "... the argument turns on a single comma in the 14-page contract. The answer is worth 1 million Canadian dollars ..."

But why the media interest? The case is merely a sharp example of the simple but terrifying fact that every court case involving the interpretation of a document—whether contract, letter, legislation ... whatever—is evidence of a failure in drafting. What an enormous pile of drafting failures there would be if all the cases and disputes involving "interpretation" were gathered from every court in every country.

The "million dollar comma" case surely confirms for all time that traditional legal drafting is inaccurate, uncertain, and imprecise.

In that light, traditional legal drafting can be abandoned in favour of an ongoing quest for a clearer more reader-focussed style. (Though to be sure, even the clearest, most reader-focussed document may have usage errors—or other issues—that lead to inaccuracy, imprecision, or uncertainty; or, horrors, all three. Has the perfect legal document been written? Is it capable of being written? Oh to write it! Sigh.)

Usage—The theme for this issue of *Clarity*

In this issue of *Clarity*, we focus on usage—in honour of the "million dollar comma" and of its ancestor that led to Sir Roger Casement being "hanged on a comma" (see Lynne Truss, *Eats, Shoots & Leaves*) and Alec Samuels's article in this issue of *Clarity*.

Just as proponents of plain language focus on language, structure, and design, usage deserves our attention. With that in mind, we have gathered 6 articles and put them together as a "Seminar in Print". The seminar has its own introductory editorial on page 14.

Beyond the theme

Before the seminar in print on usage, this issue of *Clarity* begins with the text of the opening address at New Zealand's inaugural "Plain English Conference and Awards 2006" presented by WriteMark and The Write Group (www.write.co.nz).

The opening address by writer and comedian Duncan Sarkies was delivered at a pre-conference breakfast. It was the perfect start to the day, linking our work and our cause to almost every aspect of most people's lives. If sometimes you feel you may be "getting a bit bored with the whole plain-language thing", then read Duncan's brilliant address to remind yourself of why plain language matters.

Then read on as Justice Michael Kirby of the High Court of Australia (and one of *Clarity's* co-patrons) reviews judicial attitudes to plain language in an interview by Sydney law Student Kathryn O'Brien.

Then comes the Seminar in Print on usage.

The Seminar is followed by an article from Sue Bell summarising the learning from her document-testing projects. Sue helps us understand how we can write in a way that encourages people to read the business mail they receive at home.

Then to show us just how clear plain language can be, 3 Sydney law students, Justin Vaughan, Ryan Thorne, and Ben Zhang, present highlights of their rewrite of a contract.

Marco Stella then reviews the second edition of Mark Adler's book *Clarity for Lawyers—Effective Legal Writing*. Then Mark himself comments on split infinitives.

To almost conclude this issue, Lynda Harris from New Zealand's The Write Group reports on the NZ conference and award day—the breakfast address of which began this issue of *Clarity*.

Then at the back, there are the regular sections on member news and new members. And a message from the president about *Clarity's* plans. Please read and comment on *Clarity's* plans. The Committee welcomes your thoughts.

Enjoy

Christopher Balmford, Melbourne Australia
Georgina Frampton, Sydney Australia

New Zealand's first plain English conference and awards day—the opening address

2006 and 2007 New Zealand Plain English awards

Lynda Harris

Founder and CEO of WriteMark Limited

[The article beginning on page 5 was the breakfast welcome at New Zealand's first plain English awards. It is a joy. ... as is the plain-language news from New Zealand ...Ed.]

New Zealanders baffled by gobbledygook and impenetrable legal documents can take heart—change is afoot. Some of the country's top government organisations and businesses were honoured last October in New Zealand's first plain English awards. And it was a law firm that took the premier award!

The WriteMark Plain English Awards 2006 were held as the grand finale to New Zealand's first plain English conference.

Sponsored by Write Group Limited, the awards attracted strong competition from organisations all over New Zealand. More than 130 guests gathered for the black tie event at Wellington's Te Papa Museum to hear the finalists and winners announced in the seven award categories.

Look out for the 2007 conference and awards

This year's conference and awards will be held in Wellington, New Zealand on 16 November and will feature a number of international plain-language experts including Annetta Cheek (USA). Annetta has been the chair of the interagency plain-language advocacy group plainlanguage.gov, since it was founded over 10 years ago. She is also vice-chair of the board of the private sector Center for Plain Language.

A report on the 2006 awards appears on page 57.

More details about the 2007 awards will be published at www.writemark.co.nz very soon. Overseas delegates most welcome.

Write Group is a New Zealand firm that has specialised in plain English training, campaigning and consultancy for the past 17 years. Write Group's sister organisation, WriteMark Limited, launched New Zealand's plain English quality mark in March 2005.

Opening speech at the conference for the launch of New Zealand's WriteMark plain English awards

Duncan Sarkies

[For the first few minutes of Mr Sarkies's speech, a translator assisted. Translations are in bold.]

For more information about the WriteMark awards, see page 57 and www.writemark.co.nz.

By the way, as you read, try to "read it as a speech". It's worth it. Ed.]

The name of the speaker is Duncan Sarkies.

My name is Duncan Sarkies.

A creative instigator of fictional works is, primarily at least, the occupation of the speaker before you.

I am a fiction writer.

Cinema and theatre are amongst the media that I, the speaker, have had the pleasure of facilitating in my chosen area of expertise in the field of creative instigation.

I have written for film and theatre

Furthermore, I have also been lucky enough to be solely responsible for the penning of a collection of anecdotal prose pieces, all of which could be categorised as of the brief variety, which were collated together and printed in book form.

and I have written a book of short stories.

Business documentation, including strategic and marketing—encompassing both advertising in visual mediums and in hard copy correspondence formats—not to mention in-house communications and communications to colleagues off-site in connection with a variety of commercially sensitive materials including procedural audits, reports and methodology assessments have not been written to any great degree by the speaker.

I have not written many business documents.

However many of these documents and communications have undergone careful examination.

But I have read them.

Upon commencement of examination, and perhaps it could be said as a result of much of the documentation, the addresser who is before you today has had multiple occasions of complete bafflement as to the meanings of some, but not all, of said documentation.

And I have often been bamboozled by them.

[At this point, Mr Sarkies found his true voice, and the interpreter left the stage. Ed.]

We are living in the information age. It's a wonderful time to be alive. Information is always at our fingertips. Everywhere you look ... helpful words, sentences, sound bytes, slogans, e-mails, jingles, questionnaires, virtual birthday cards, infomercials, computer-generated reminder messages of overdue accounts, people on television giving you advice on how to eat better, people convincing you to buy things you need and things you don't need, people trying to convince you to drive a fast car, and people trying to scare you so you won't drive fast,

people rescheduling meetings with predictive texting, people emailing you on how to increase your brain power, how to sleep better at night, how to improve your immunity, how to hook the plasma screen up to the dvd recorder, how to make the toaster comply with electricity regulations, how to dispose of your hamburger remnants using the handy recycling trays:

remember to put food in the food baskets and waste in the waste baskets and recycling in the green bin and rubbish out on a Tuesday and yoga classes on a Wednesday and don't be late for the PowerPoint presentation on

Thursday and leave a key out for the plumber on Friday and remember to reset your clock for daylight savings and don't forget to brush your tongue as well as your teeth and your anti-virus software has just been installed, do you want to register now or register later

and don't forget to give flowers this Valentine's Day—you can order them online, and when you cross the road look right, then left then right again unless you are in a right-hand drive country where you look left then right then left again and remember that even though broccoli used to be good for you scientists have now decided that broccoli is bad for you and if your printer isn't working it might be because your USB cable is currently connected to your USB vibrating hand-massager,

and if you are going to download an attachment check the size first because if it is too big the system will crash and when the system crashes, whatever you do, don't turn the computer off without shutting it down first, and to learn to do that you'll need to book an appointment with Rhonda at Resource Management

and if you really want to park in the suburb of Mount Victoria you'll need a resident's permit and to get a residents permit you'll need to prove you live in the suburb of Mt Victoria and to prove you live in the suburb of Mount Victoria you'll need to bring a bank statement if you pay rent, or a homeowner's certificate if you're a homeowner, and some mail addressed to you and two forms of identification to prove that you are who you say you are because this is the age of identity-theft and spyware and motion capture and sudoku and extra fat newspapers on the weekend

and wheat grass is the latest health fad and ugg boots are in fashion inside, and out of fashion outside, and to tune the television you'll need to read the instruction manual which is in five different languages and you'll need to find the remote which is under the couch and while you're under it, could you have a look for that missing power bill because I wrote the telephone number of the insurance company on it and I must have temporary amnesia because I've forgotten my phone account number and I've forgotten the pin number on my EFTPOS card and I've

forgotten my e-mail password and I have no idea what my video store password is and I've forgotten my own cellphone number and I need it because I've lost my cellphone and without that I'm really stuffed

and is it any wonder that there are more people than ever falling over from stress because we are all suffering from TOO MUCH INFORMATION, and nobody warned us, they said the information age was going to be a good thing but its quickly turning into a nightmare...

Okay, take a breath.

It's not that bad...

We're all coping...

There's too much information, but we're coping...

How do we cope?

We block out what we don't need to see. A letter arrives in the mail and if it doesn't hook us in three seconds we chuck it in the bin and we block it out. An e-mail pings into our inbox, but if it doesn't get to the point, we click to the next one and block it out. All unnecessary information is blocked out. If you don't make it easy for me I will block it out and it's not because I'm dumb, and believe me, I don't want to be treated like a dummy—it's because I feel harassed and I feel busy. And guess what? I can block out nine-tenths of the world and still function like nine-tenths of a human being. How come no-one notices? Because everyone else is doing it. I'm just one in the crowd...

Whose at fault here?

Should we blame society? Computers? Is it Osama's Bin Laden's fault? The United States of America? Shall we blame the Government? What about God? Lawyers—people always blame lawyers—let's blame lawyers. Or teachers. They should have taught us better. Is it astronauts' fault? What kind of messages are astronauts sending to our kids? Whose fault is it that I can't be bothered reading your important document?

All of us are the problem. We all have needs, and we all need to communicate. A lot of this communication is well-meaning—we just want to help people by keeping them better informed. The trouble is there is so much of

it. If all of us in this room were to hand each other one important document to look over, we would all be kept busy for a week. Our in-trays are filling faster than our out-trays. So we block each other out. Report spam—no problem. Do you want to save this message or delete this message? Delete. Shall we file this or shred it? Shred it. Shall we dispose of this hard-to-understand information, or shall we store it somewhere in our clogged up brains? Hmmm... Dispose.

Here's a fun game...

Let's all fax each other. Actually if we really want each other's attention we should e-mail that we are about to fax, we should follow up the fax with a phone call—hopefully when no-one is in so we can leave an answer-phone message, then e-mail a reminder with the time and date we sent the fax. Then fax again to check the fax was working, a follow-up cellphone message, e-mail to check the cellphone answer phone is working, and then finally after a few rounds of phone tag, we text each other to find a good time to call and then we get hold of each other and say what we wanted to say, "Do you want to have lunch?" "Why?" "There's something I want to discuss." "What is it?" "I'd rather not say over the phone." "Why not?" "Actually, I'd rather not say what it is at all. I'd rather just babble and play this stupid game of communicating without actually communicating." "Oh, well I'm actually a bit busy." "Me too." "Okay, when shall we meet?" "Um, I haven't got my diary with me. I'll e-mail you, okay?"

Too much information. What can we do?

Autism might be an answer.

Shall we close our ears and eyes and hope for the best?

We need to give each other information. After all, this is the information age.

Without information we won't know how to turn off the computer. We won't know how to make an insurance claim. We won't know what to do in an earthquake—that's an issue here in Wellington. We won't know how to get out of bed.

We won't know how to do *anything*, so...

So we need to keep talking. This is, after all, the information age.

So how's this as a compromise?

I understand that the information you need to give me is important. I just want to get the information quickly and easily. I want to get the information and get out. I want the information to be pleasant and pain free. I don't want to read the document twice because these days, I get dizzy easily.

* * *

Plain English does not mean stupid English. Plain English does not mean it is written only to be understood by Teletubbies. Otherwise, they would have asked a Teletubbie to give this speech. Plain English is not English for dummies.

It just means taking your time to be clear and concise. It means having respect for your reader. Plain English is written for the reader.

"Who's that?"

"The reader."

"Why would you write for the reader?"

"Because they're gonna read it."

"Yeah but... I mean... Naa... because... I mean... Thanks for the tip but..."

I don't even know the reader, I mean... Who is the reader anyway?"

Excellent question. Perhaps you should have a think about that...

* * *

Writing is harder than talking.

Why? Because the expectation is that more time and care has been taken.

With talking off the cuff, we are often formulating as we are speaking.

I might say the same sentence twice but in different words, when I'm figuring out what I think.

Or to put it another way, when I am clarifying a thought in my head, I will often say it again but use a different collection of words.

I will say the same sentence several times with different words as a way of forming my own opinion.

It's called thinking aloud.

You shouldn't think aloud on paper and then show it to people. By all means do it as a pro-

cess if it helps you. But the reader doesn't care about the long and winding road you took to form your opinion.

As readers, we expect more care to be taken with the written word. If I am having a conversation with you, then I don't point out the grammatical flaws in your sentence structure. Compare that to the glee I feel when I can show you a typo in a menu. And if there are several mistakes in a brochure, it makes me question how competent the company is.

Yet for some reason, people spew out letters and e-mails and all sorts of documents and print them off and send them out as fast as they can. These documents represent you. If they are sloppy, you will appear sloppy. Most of us would tuck our shirts in before going to a meeting, so why would you not take the same care with what you write and send?

* * *

I stole this story from a WriteGroup manual. Winston Churchill had written a ten-page letter to a friend. The friend wrote back saying, "Your letter was extremely informative, but I don't know what to make of it," to which Churchill replied, "I'm sorry, but I didn't have the time to write a shorter letter".

The great paradox is that it is harder to write a simple document than it is a complex document. It takes a writer time to save a reader time, but believe me when I say this: it is time well invested.

Writing in plain English is curious because we think it should be easy. It's easy to read. So it should be easy to write. Well, the good news is that it can be easy to write clearly—if you can pick up some simple techniques and re-train yourself to treat the act of writing with the respect it deserves.

If it all seems a bit intimidating, rest easy—it's not as hard as it sounds. And we're lucky being here, because there are people in this room who have the skills to help us.

* * *

I want to finish off with a sideways thought. Because I'm a sideways sort of person. A lot of us probably think we're terrific communicators. Be warned. People who think they are good communicators are more likely to suffer from verbal diarrhoea.

I thought I was a good communicator because I was good at talking and pretending to listen. To improve my ability as a communicator I had to stop faking and start listening again. And while I was listening to people, I discovered this: Some people speak in questions, and some people speak in statements. Some people are willing to change their minds, some people can never be budged. Some people like the sound of their own voices. Some people like the sound of other people's voices. Some people engage. Some people never leave their own headspace.

And this one's the biggie. It is easy, when talking to someone, to tell if they are wise or if they simply *act* wise. Anyone can tell the difference. There is one distinguishing characteristic that separates these two groups:

Wise people never stop learning. People who *act* wise are far too proud to learn.

I hope you're not too proud to learn.

Cheers.

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In New Zealand, Duncan Sarkies is most known for writing Scarfies, which is New Zealand's sixth highest grossing film. He is a novelist, play-write, short-story writer and performer. His novel Two Little Boys, Two Little Boys is due to be published by Penguin in 2008. He has recently started working for a plain English company in New Zealand, Write-Group.

Judicial attitudes to plain language and the law

Kathryn O'Brien

Law student at the University of Sydney

*Interview of Justice Michael Kirby,
High Court of Australia*

*Research project supervised by former Clarity
President Professor Peter Butt.*

Wednesday, 1 November 2006

KOB: Thank you very much for agreeing to see me, and for forwarding me a copy of your review of Professor Kimble's book, *Lifting the Fog of Legalese*.¹ I am delighted to have the opportunity to speak with you.

You mentioned that you are a judge with an unorthodox opinion, in that you support the plain-language movement. In the course of my research, I have found that very few judges will say they are against plain language, but it will sometimes emerge that they nevertheless have some strong reservations about it.

Justice Michael Kirby: Some lawyers have got a lot of issues on this topic I'm afraid. I've seen this in the courts over the years. There are some judges—indeed I would say many, and even possibly most—who are psychologically resistant to any talk of “plain language”, or “plain English”, or “new language”, or changing things long established. They love to mock so-called plain-English drafts and to point to their defects. Now, some of those drafts do have defects. Indeed, virtually every draft of anything ever written by a human being has defects. But nothing gives antagonistic lawyers greater pleasure than pointing to suggested defects in plain-language drafts. This seems to vindicate, for them, the priestly cast of the legal profession and their own psychological and emotional resistance to the plain-language movement. I always distance myself from such remarks.

KOB: In the book review, you note that you are a patron of Clarity, an international

organisation devoted to improving legal writing. What sparked your interest in plain language to begin with?

Justice Kirby: I think it goes back to my time in the Law Reform Commission. I was appointed Chairman, as the title was then named, of the Australian Law Reform Commission in 1975. In 1976, the first full-time Commissioner was appointed—that was Professor David St L Kelly. He was also appointed the Commissioner in charge of the insurance contracts reference. That led to a very careful scrutiny of all the insurance policies then in force in Australia. That led, in turn, to his realisation of the obscurities, antiquities and misleading, complicated and uncommunicative features of many insurance contracts. That led to him becoming very interested in the plain-language movement. That, in turn, led to his making contact with Professor Vernon Countryman, an American Professor who was very much involved at the time in the plain-language movement in that country. I'm talking about the early 1980s. In due course, that led to my becoming interested in it, because I was Chairman of the Commission, and a member of the division of the Commission which was working on the project. So I just became interested in this issue. I began to read about it. I began to see examples of plain English. And from that, and later contacts with Professor Peter Butt and other distinguished Australian writers who were involved, most particularly in Victoria—there was a whole cabal of them in Victoria—I became quite committed to the efforts to introduce plain language in legal writing.

So that's how it came about historically. I suppose my emotional predilection for plain English went back long before Professor Kelly and Professor Countryman. Probably it goes back to my earliest upbringing, and my early teaching, and my love of clear and simple English, which is my native language. It is, of course, a language which is inherently disputable. That's because English, unlike many languages, is the combination of two powerful linguistic streams: the language of the original Anglo Saxons, the Germanic base, which is the language we speak in the kitchen, and the language of professions, scholarly work, and complex specialised writing, which was infused with the French language of William

the Conqueror. This is the language we tend to speak and write in courts and in legal prose. So we have this combination of languages in the one tongue. It makes English a language very rich for literature and poetry, but somewhat ambiguous and therefore needing of attempts to adopt simple expression in matters of important legal obligations as a matter of conscious strategy.

KOB: You note in the book review that legal argument is often so complex that it can't always be simplified in the manner that Professor Kimble suggests. I was wondering if you could elaborate on the reasons why you have some hesitations about Professor Kimble's suggestions?

Justice Kirby: If you have a look at the *Commonwealth Places (Application of Laws) Act 1970 (Cth)*, for example. Just have a look at that statute. It was drafted by Mr John Ewens, QC, who was the first parliamentary counsel of the Commonwealth.

He was a brilliant man, basically a mathematician. His son became a Professor of Mathematics at Monash University and at, I think, Chicago University. So that was the sort of mind John Ewens had. He was gifted with great skills in legal drafting. He drafted the *Insurance Contracts Act 1984 (Cth)* arising out of the work of the Australian Law Reform Commission. Earlier, he had drafted the *Commonwealth Places Act*. If you read that Act, or if you read, for example, some of the Limitation statutes that have been considered in the last year by the High Court of Australia,² you will see how complicated are the concepts. As a consequence, the expression is also complicated. Some concepts in law are quite complicated. The more the judges don't give effect to the legislative purposes, the more determined the legislators become to spell them out in great detail. This leads to legislative expressions which are very detailed and complicated. Sometimes it is difficult to reduce the concepts to simple expression. On the other hand, as Professor Joseph Kimble points out in his book, and as I pointed out in my review,³ there are some simple rules that you can adopt which will help you to speak and write more clearly in English. Short sentences; more direct expression; avoidance of clichés; writing more closely to the way we speak—these and other simple rules are ways in which lawyers can make legal expression clearer and simpler.

The sad thing is that this subject and its techniques are not really taught in Australian law schools. There was an attempt at Sydney Law School to introduce such teaching, but it did not endure. Professor Butt was involved in it. There is a need to introduce this subject at the early stages of legal education, because otherwise, once people have fallen in love with the "wheretofores", and the "whereupons", it is almost impossible to rescue them and to capture their hearts as well as their minds, and bring them back to expressing things simply as they basically do in the kitchen. Prefer the Anglo Saxon word to the French, and you have another rule for simpler expression, because that is the language in our genes, our basic language, the Germanic language, before the Conqueror came along and complicated things.

KOB: Some of the judges I have spoken to have commented that judges have written increasingly longer judgments over the last one hundred years or so. Why do you think judgments have become longer?

Justice Kirby: That is because many contemporary judges no longer believe that legal matters can be simply solved by taking out a magnifying glass and looking at words—words in the Constitution, words in the statute, words in the common law decisions. For me, as an example, context in the law is everything.⁴ Therefore, it's necessary, in my mode of reasoning, to explain the context, including the social context of the problem in hand, in order to explain how I come at my decision. That may make the reasons longer. But I think my reasons are simpler and clearer. Many students tell me that that is so. Of course, they might just be flatterers, and perhaps I shouldn't pay any heed whatsoever to students. But I often need to know a lot about a particular branch of law in order to explain to myself why I come to a conclusion. Especially so if my conclusion is different from that of my colleagues. I need to have a clear view of the facts; a clear statement of the applicable law; a clear explanation of the issues that emerge; and I do feel an obligation to explain, acknowledge and answer the principal arguments of the parties. I do this out of a sense of natural justice, to make it plain that I have considered, addressed and reached a conclusion on the main arguments. Not everybody feels that that is necessary. Some don't even think it's appropriate. I must respect their way of doing things. But that is

the way I do things. It's very largely connected with a contextual view of legal problems. Psychologists say that women are generally more contextual, and that men tend to be more linear and verbally logical. Maybe it is my female genes that are having this effect in me. However, if I go down that path, we won't know where we might end up. So I don't think I will explore that further! But there would be lots of explanations. They're the main ones.

KOB: At the end of your book review, you argue that "Lawyers are often quite good in oral communication. What we need is to get them to *write* in the simple way in which the best of them *speak*."⁵ Does this mean that you find, for example, that barristers' oral submissions are often clearer and simpler than their written submissions?

Justice Kirby: Written submissions tend to be tighter. Lawyers have got to put it down and view it, and study it, think about what they've written. That, therefore, tends to make written submissions more precise and better thought out. On the other hand, persuasion isn't always about logical communication. Persuasion includes sending signals through electronic messages in the brain to other parts of the brain, but also to the heart, and to feelings of empathy, intuition, emotion. Therefore, written communication has perhaps a different role, supplementary to oral communication. What we are now seeing in the world, the Anglo common-law world, is a gradual increase in written communication, to the cost of time spent hearing oral communication. One aspect of that move is that you do get more formalised writing. It is more precise. But it is more formal. That means it's going to have more French words in it. And to be more complicated, and to include references often necessary to the complexities, the exceptions, the qualifications, the analogies, the cross-references and all of the variations that go into a complex legal argument. Oral communication, on the other hand, has to speak more clearly and directly to the recipient. It therefore tends to have more Germanic words, and to be simpler. This is because that's the way we talk when we're trying directly to persuade.

KOB: You note that word processors "risk embalming current errors for regurgitation by future generations, even future centuries."⁶ Some of the judges that I have spoken to have

commented on the rise of what they call "cut and paste judgments". This is a reference to a perceived tendency among some judges to write judgments that are peppered with large slabs of submissions, or slabs of other judgments, that have been "cut and pasted" into a Word document without being carefully thought through. Do you agree that the word processor can facilitate sloppy writing in this way?

Justice Kirby: I don't know about that, though that very point was put to me only yesterday by a colleague in the High Court. He expressed the same concern. He expressed the anxiety that the problem with "cut and paste", or the computerized equivalent, is that slabs will be included without properly digesting what is included, and without it actually going into the writer's brain.

I'm not a great one in my reasons for quoting slabs in the opinions of other people. I did learn in my time in the Law Reform Commission the great importance of synthesising and conceptualising. Therefore, you won't see lots of slabs of quotations in my reasoning. Yet including them is not an uncommon way of writing reasons. It varies between judges. It isn't a judgment-writing style that I like myself, because I think it's important for the judge to say what he or she thinks, rather than what other judges or authors, in earlier times, have written about problems that can never be quite the same problem that is before the court where the decision is being made.

Having said that, there are two qualifications. First of all, I am now a justice of the High Court. Therefore, it isn't perhaps as important for me to have slabs of other people's writing as it is if you are in a court under the High Court. There, it may on occasions be important to set a passage out, a critical passage out of a decision of the High Court or perhaps a Court of Appeal, because it expresses part of the binding rule that governs the legal determination of the case. Secondly, judges of trial, and to some extent judges of intermediate courts when they're conducting an appeal by way of rehearing, often have to include critical passages of the evidence. They must do so at some length in order to explain the factual determinations that they reach. Once you get to the High Court, at the second level (or sometimes third level) of appeal, you are really dealing usually with issues that are more conceptual and have already been refined. So it isn't necessary, in my

view, to have large passages of detailed judicial or textual elaborations or factual evidence. At least, it isn't normally necessary or useful. The task is different once you get to the High Court.

But that's just my opinion. Every judge is independent, not only from outsiders, but from other judges, including other judges in his or her own court. Other judges will have different writing styles, consider different things important and write in different ways. Furthermore, different generations tend to witness different styles of writing. If we now read Oliver Wendell Holmes, Jr, in the United States Supreme Court it seems very flowery. Yet he was undoubtedly a great judge, and very influential. The way things are written by judges does tend to follow fashions of writing. That is just going to vary from time to time. Style is just a feature of changing times.

KOB: In terms of changing writing styles, one judge I spoke to mentioned that in older judgments, you tend to come across a lot of biblical allusions—for example, 'Who is my neighbour?' in Lord Atkin's speech in *Donoghue v Stevenson*. The judge mentioned that you do not tend to see biblical allusions in more recent judgments; there is no longer an assumed knowledge of the Bible. Have you noticed that sort of change in judgment writing?

Justice Kirby: We are a less religious society than we once were. We are also a multicultural and multi-religious society. Insofar as religion is still important, we all know that we have to respect a variety of religions, and not simply the Christian religion. That has probably led to people being less inclined to quote from the holy book of particular religions. When I was young, as was normal, natural, and in any case, it was what happened in my case, I was sent to Sunday school, then to church.

Then I was confirmed. I still count myself as a member of the Anglican Church, and of the Christian religion. It is just part of me. I love the liturgy of the Anglican Church in the *Book of Common Prayer*. It is most marvellous language, very spiritual in my opinion. It was written by Archbishop Cranmer and his colleagues. I find it intensely moving. Yet I believe that many younger people today find that language a big turn-off. Therefore, there are moves to simplify the liturgy.

Of course, there are some things that are not so easily simplified, because they have a mystical or spiritual content in the language that is chosen. Perhaps it was chosen precisely because it is not everyday language. "O God, who art the author of peace and lover of concord, in knowledge of whom standeth our eternal life, whose service is perfect freedom." How would one translate that into plain language? "God. You invented peace. Believing in you is not a burden, it's freedom⁷." You see—it wouldn't be quite the same. So it's a matter of horses for courses. Nevertheless, there's a big difference between an insurance contract, a bill of sale, or an Act of the Parliament and a prayer-book. So what is appropriate to the mystical language that lifts the mind into a different and other-worldly realm, and reminds the participant of spiritual and non-worldly values, is not necessarily what is appropriate to a commercial contract, or a judicial decision on a negligence action. Horses for courses should be our guiding rule.

KOB: On the first page of your book review, you note that the use of the second person—the pronoun "you"—can make writing more approachable to the ordinary reader. Judges I have spoken to have noted that some legislation—the *A New Tax System (Goods and Services Tax) Act 1999*, for example—is written in the second person. A provision will say that "you must not" do something, instead of "a person must not" do something. Do you approve of the use of the second person as a drafting technique to make legislation seem "friendlier" and easier to understand?

Justice Kirby: That is particularly hated by many judges. They hate it. And they react very adversely to it. And I suspect that some, though I won't name names, then try to show how foolish and stupid it is. I must admit I don't like a statute written in the second person. I like a statute to be in the language of a command from Parliament, which is going to be in the third person. However, maybe I will get used to statutes in the second person. So far, there aren't many of them. I think we should be open-minded to the fact that there may sometimes be a place for different ways of expressing parliamentary commands, as, for example, in consumer legislation, which an ordinary person can pick up and understand more easily if it is expressed in the second person. The passive voice is the most horrible

enemy of clear expression. Justice McHugh always used to denounce it and try to avoid it, and I try to avoid it.

It would actually be interesting to me to have someone go through one of my opinions and to critique it from a plain-language point of view. No doubt I could learn lessons from that. True, it is getting a little late in the day, given that I only have a bit more than two years to go in judicial office. However, one is always learning. I would be quite happy to continue to learn. Keep an open mind, I say.

On the other hand, I would not sacrifice things that seem important to me, such as the obligation to answer the submissions of parties. To me that's not negotiable because I regard it as part of the judicial function. By my arguments I cannot always persuade a party whose cause I reject. But I hope I can persuade them that I've given serious and thoughtful attention to their submissions about those questions. Maybe my attitude in this respect comes from the fact that I don't regard myself as a true member of an elite. I came from ordinary citizens. My mind is still there with ordinary citizens. I therefore feel an obligation to explain to ordinary citizens and so far as it is possible to speak in their language. This is a mighty well spring for plain language.

KOB: Thank you very much for your time and consideration, I am delighted to have had this opportunity to speak with you.

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Endnotes

- ¹ (2006) 80 *Australian Law Journal* 623.
- ² See, for example, *Queensland v Stephenson* (2006) 80 ALJR 923.
- ³ J Kimble, *Lifting the Fog of Legalese: Essays on Plain Language* (2006), reviewed (2006) 80 ALJ 623.
- ⁴ *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 548 [28], applied in *Siemens Ltd v Schenker International (Australia) Pty Ltd* (2004) 216 CLR 418 at 460 [128]; *Al-Kateb v Godwin* (2004) 219 CLR 562 at 624 [174]; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 at 229 [64]; *Maroney v The Queen* (2003) 216 CLR 31 at 51 [63].
- ⁵ (2006) 80 ALJ 623 at 624.
- ⁶ (2006) 80 ALJ 623 at 624.
- ⁷ *Book of Common Prayer*, Second Collect for Peace.

Kathryn O'Brien interviewed 20 of Australia's most senior judges in 2006 for a project on judicial attitudes to plain language. She conducted the research as a final year law student of Professor Peter Butt at the University of Sydney. She hopes to publish the results of the survey later this year. Kathryn is now a Law Graduate in the Sydney office of Malleasons Stephen Jaques, a leading Australian law firm.

Clarity member receives the Burton Award

On June 4, former Clarity President Joseph Kimble was honored with the prestigious "Reform in Law" Burton Award, an award established through the United States Library of Congress and the Law Library of Congress. Joe was recognized for his work as drafting consultant for the newly revised Federal Rules of Civil Procedure. The original rules—more than 300 pages—were drafted in 1937; they have never been completely rewritten until now. The United States Supreme Court approved the new rules and sent them to the United States Congress in April. They are scheduled to take effect on December 1, 2007. A recent news release sums up Joe's work:

"The new rules will help put to rest the mistaken notion that laws and rules must be written in the archaic, inflated, verbose, and convoluted style that has come to be known as legalese. . . . On the practical side, judges, lawyers, and law students will find them much easier to learn and use; they are shorter, clearer, plainer, more internally consistent, and much better organized and formatted." *Ingham County Legal News*, 31 May 2007.

Congratulations, Joe, on a job well done!

Introductory editorial for the seminar in print on usage

Georgina Frampton

Sydney, New South Wales, Australia

With wars on terror and with global warnings about global warming dominating most media, considerations of grammar, punctuation and usage might just precipitate an existential crisis in an average writer or reader. Or these considerations might be just the comfort fraught writers and readers need—a hot toddy for the weary.

But the reality is that considerations of grammar, punctuation and usage can't offer comfort because they elicit passion, self-righteousness and a heightened sense of virtue in every writer or reader with an opinion. Cheeks glow flushed and brows grow furrowed over changes in usage and over their impact on clarity.

Those who care join the clash of computer cursors defending the merits of either a descriptive or a prescriptive approach to language.

The drafts of this seminar-in-print are stained with ink as passions rise concerning adherence to, or abandonment of, language conventions.

In *Linguistic Nasties and Niceties*, Sarah Carr and Martin Cutts canvass the merits of going with or against linguistic convention. Electing to obey conventions until they are widely discredited, they opt for roles as clear communicators, rather than as “agents of change.” The battle to challenge sticklers is apparently not fitting in the forum of plain-English writing and editing.

Chris Peters sees the process of change as “inevitable” but “invariably very ugly”. In his *Rant in favour of empathy and against relativism*, he suggests that “we should look at change in the language in the same way we regard underwear—it's probably a good thing but it's best kept out of sight, mostly.” Peters joins the Carr and Cutts trench defending linguistic conventions, agreeing to accept changes “only when they have a decent pedigree”.

In Suellen Thompson we have a brave warrior who saw blood and suffered wounding while arranging a style guide for an international law firm. She describes her brave stance between stakeholders who “were prepared to do anything to protect their tower of stylistic penchants”. Oh how high can a hackle rise over the placement of a second “e” in judgment? Thompson's focus is less on linguistic conventions and more on the impact of a chosen language register on the client-friendliness of a large law firm.

Naida Haxton is another courageous combatant who, in a hypothetical letter to her successor as editor of the *New South Wales Law Reports*, describes the hurdles of the role: not your measly split infinitive or starting with a conjunction stoush but the judicial ego up against the insertion of a footnote no less. As with child welfare, Haxton advocates early intervention if the editor is to succeed in changing the judicial headspace to foster the writing of judgments in plain English.

Clive James would empathise with her views as he bemoans the fact that “the school system itself [has become] a potent incubator for the semi-literate scribbler”. He describes recording grammar and spelling blunders as they flooded by in 2001: “I expected the flood to abate. But by now I am sitting on top of the house, and my notes for that crucial year are in my trembling hand.” For James, an appropriate sense of desperation has been far too slow to set in.

Alec Samuels considers the potency of a little comma on the battlefield of legislative drafting and judgment writing. The million-dollar Canadian comma was long predated by the issue of a comma in an English treason trial of 1917 based on the Treason Act of 1351. One could say that a capital offence swung on the matter of a comma. Groan. Richard Oerton, in a letter to the editor, also laments the imperfect use of punctuation, but tolerantly acknowledges that “in the real world people don't punctuate perfectly”.

Perhaps, in these torrid times, tolerance is what we need.

Wars on terror will surely pass and global warming will wane, but the battlefields of linguistic convention will remain . . . for as long as there are readers and writers, you and I [not me], who remain and who care whether our gerunds are served with possessives, whether our infinitives are split and who may care not that “whom” serves to make us sound like butlers.

Linguistic nasties and niceties:

Who should we pander to?

Or to whom should we pander?

Sarah Carr

Carr Consultancy and Plain Language Commission

Martin Cutts

Plain Language Commission

This article looks at certain linguistic conventions in English which our readers may think of as 'rules'. We discuss whether it is clearer to go:

- *with convention—to avoid distracting 'sticklers' by making them think we have broken the rules; or*
- *against convention—to meet other plain-language guidelines more effectively.*

All the examples used are real, taken from UK newspapers and public and business documents.

Who should we pander to? For a plain-language practitioner, the answer may seem obvious: we should pander to the mass of our readers, making our meaning as clear as possible to them. Grammar in its true sense—where there is a definite right and wrong way of writing—is vital to achieving this. Incorrect grammar can make language mean something different from what the reader intended, or make it ambiguous. It also gives a poor impression of the writer and their organization. Let's look at 4 examples of common grammatical mistakes. We would expect most people who know about grammar to agree that these are indeed wrong, though the final example (the misplaced 'only') is less clear cut and widely seen in newspapers and literature.

- **Dangling participle:** *Conceived and organised by the British Council, 4 British and 4 Chinese writers will travel the length and breadth of China.* (Many organizations may like to be thought of as fertile, but probably not in this way.)
- **Incomplete sentence:** *With regard to your letter of 15 September.*
- **Run-on sentence:** *The ball was normally the highlight of the social season, however 30 of the guests were later taken ill with food poisoning.*

- **Word order:** *You can only appeal against a Council Tax banding in certain circumstances.* (We assume this means that you can appeal only in certain circumstances. But as it stands, it could mean that you can do nothing except appeal in these circumstances.)

But what about all those other 'rules'—those that the sticklers among our readers may regard as gospel (having been taught them at school perhaps) but that we may more accurately describe as conventions or even myths of writing? Here are some of the areas we are thinking of, with examples that go against convention. We suggest one possible way to rephrase each, though in most cases there are other ways too.

Some of these conventions have never really mattered. For example, there are many instances of respected (and long-dead) writers splitting infinitives and using 'they' as a third-person singular pronoun. Others (such as using a gerund without a possessive) may be more recent developments, part of the natural evolution of language. But whatever the history of each convention, going against them may make the sticklers think we have made a mistake. This damages both our credibility and the document's clarity—as the broken 'rule' will distract some readers from the message we wish to convey. Given that we are usually working on written language, we will rarely get a chance to explain our thinking to them. What should we do?

Our answer is that we should follow convention so long as this does not make the document harder to read. Although it may be tempting to challenge sticklers' belief in myths of writing, the place for doing this is not, we believe, in our day-to-day plain-English writing and editing. This question—of whether to follow the linguistic *status quo* or seek to overturn it—is a common theme on the email discussion group run by the Plain Language Association International (PLAIN). Robert Eagleson raised the same question in his article *Numbers:*

Controversial area	Example that goes against the 'rule'	Example rephrased to conform with the 'rule'
Ending sentences with prepositions	<i>Write your National Insurance number—this helps us to help you claim all the benefits you are entitled to.</i>	<i>Write your National Insurance number—this helps us to help you claim all the benefits to which you are entitled.</i>
Starting sentences with conjunctions	<i>But for some exceptional people there is a need for something more, a permanent and more public recognition.</i>	<i>However, for some exceptional people there is a need for something more, a permanent and more public recognition.</i>
Splitting infinitives	<i>The region covered is discharging ice so heavily that concerns have been raised about the stability of the ice sheet and its potential to rapidly and significantly raise global mean sea level.</i>	<i>The region covered is discharging ice so heavily that concerns have been raised about the stability of the ice sheet and its potential to raise global mean sea level rapidly and significantly.</i>
Using a gerund without the possessive	<i>Our investigation will usually be finished within 10 working days of us receiving your appeal form.</i>	<i>Our investigation will usually be finished within 10 working days of our receiving your appeal form.</i>
Leaving out apostrophes when the meaning is 'for' rather than 'of'	<i>Parents Guide to the Teaching of English in School</i>	<i>Parents' Guide to the Teaching of English in School</i>
Using 'who' instead of 'whom'	<i>Who should I contact for more details?</i>	<i>Whom should I contact for more details?</i>
Using 'which' with restrictive clauses	<i>HIV is the virus which can lead to AIDS. The body's defence system breaks down and leaves the patient open to infections and cancers which eventually prove fatal.</i>	<i>HIV is the virus that can lead to AIDS. The body's defence system breaks down and leaves the patient open to infections and cancers that eventually prove fatal.</i>
Using sentence adverbials	<i>The first of 5 lectures hopefully includes a live broadcast from Mars—courtesy of the Beagle 2 mission.</i>	<i>We hope that the first of 5 lectures includes a live broadcast from Mars—courtesy of the Beagle 2 mission.</i>
Using 'they' as a third-person singular pronoun	<i>Your child has been chosen to take part in a class to support and consolidate their writing skills.</i>	<i>Your child has been chosen to take part in a class to support and consolidate his or her writing skills.</i>

figures or words. A convention under the spotlight, in *Clarity* No 50. The experiment (in *Clarity* No 49) to present (most) numbers as figures led to several readers' letters saying the practice was distracting.

In obeying conventions until they are widely discredited, our role is as clear communicators, not as agents of change. Of course we can try to bring about change in other ways, outside our usual work. For example, in our own writing, we at the Plain Language Commission have begun to use figures for all numbers in text unless the number appears at the start of a sentence or is 'one'. But we have to respect

customers' preferences when editing their documents and training their staff. Similarly, we use the older English 'z' form in words with a Greek zeta root, like 'organization'. The Oxford dictionaries do this too, but most customers prefer to use 's' ('organisation').

Other ways of trying to bring about linguistic change include:

- writing and implementing style guides
- (for individuals) joining or starting pressure groups
- (for governments) setting up bodies such as the Académie française.

A detailed discussion of these and other ways of trying to change language could be an interesting topic for another article.

If we can achieve clarity in both senses—being easy to read and not distracting readers from the message—then that seems the sensible solution. But what if we cannot? What if following the ‘rules’ makes the document harder to read? Should we go with convention

(making the document less easy to read) or against it (risking distracting readers who think we have made a mistake)? In this case, we must either decide which we think compromises overall clarity less or, ideally, test the 2 possibilities on some typical readers. As always, what we decide may vary depending on the audience for our document.

Do you stickle? And if so, where? A survey of plain-language practitioners

At PLAIN’s conference in Washington DC last November, we asked a group of 24 delegates to complete a survey asking whether (without the chance to consult their readers) they would be happy to break various linguistic conventions (a) in their own writing, (b) in a leaflet about welfare benefits for a mass audience, and (c) in a company’s annual report to shareholders. The table shows the results for the 9 conventions listed earlier.

Controversial area	OK in own writing	OK in benefits leaflet	OK in company report
<i>Ending sentences with prepositions</i>	71%	71%	58%
<i>Starting sentences with conjunctions</i>	100%	96%	63%
<i>Splitting infinitives</i>	92%	83%	58%
Using a gerund without the possessive	29%	38%	29%
<i>Leaving out apostrophes when the meaning is ‘for’ rather than ‘of’</i>	38%	33%	33%
Using ‘who’ instead of ‘whom’	29%	46%	33%
Using ‘which’ with restrictive clauses	25%	29%	38%
<i>Using sentence adverbials</i>	58%	50%	46%
Using ‘they’ as a third-person singular pronoun	50%	58%	21%

These results show that delegates would usually feel free to break the 5 italicized conventions more readily when writing for the public than when writing for shareholders, but most free to do so in their own writing. Of these 5 conventions, leaving out apostrophes when the meaning is not strictly possessive was the one that delegates felt unhappiest about breaking. This may be because missing or misplaced apostrophes are often a hot topic among sticklers (think Lynne Truss). All, however, were happy to start sentences with conjunctions.

Delegates were generally more likely to use a gerund without the possessive, ‘who’ instead of ‘whom’, and ‘which’ with restrictive clauses when writing for others rather than for themselves. Perhaps they felt able to stickle in their own writing but accepted that these conventions were disappearing elsewhere. But delegates seemed to think that an audience of shareholders would be much less likely to accept their use of ‘they’ as a third-person singular pronoun than would the public.

Both this survey and our analysis are obviously rudimentary. The survey was designed as a thought-provoking workshop exercise, not as watertight research. It would be interesting to look at this topic on a larger scale and using more scientific methods. The delegates were from a range of countries; perhaps such a study could throw light on international differences in plain-English writing.

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Martin Cutts is research director of Plain Language Commission and author of the Oxford Guide to Plain English. His books on legal English include *Lucid Law and Clarifying Eurolaw*, both available on free download from www.clearest.co.uk.

A rant in favour of empathy and against relativism: the impact of grammar, punctuation and usage on clarity

Chris Peters

Retired lawyer and public servant

I often have difficulty working out what people are saying and writing—people who apparently no longer feel the need to follow the rules. I constantly wonder how these people expect others to understand them. They treat the rules that I grew up with as mere optional guidelines, and sometimes not even that. It's bad enough in everyday life but in areas in which words can actually make a difference, such as business, law and politics, the lack of clarity can be frightening. This is not going to be a thinly disguised attack on your favourite politician or a bitter exposé of the evil that lurks in the hearts of lawyers, but I'm not going to hide where I'm coming from. I'm a grumpy old man, and I'd prefer not to take it any more.

Are there any objective rules?

Is there any such thing as 'correct' grammar, punctuation and usage? If the purpose of language is to communicate ideas, are the rules that set language standards merely a bluff perpetrated by anal-retentive obsessive-compulsives, or is it all a conspiracy aimed at homogenising the way we think? Should there be any objective standards, or is language just a matter of opinion? Can 'correct' grammar, punctuation and usage enhance the clarity of the messages we send, and can 'incorrect' language reduce clarity?

Our language is constantly changing, and 'correct' grammar, punctuation and usage will always change with time and across continents. Although change is inevitable, the process is invariably very ugly. That infuriates me because it doesn't have to be that way. I say we can have change without the ugliness, assuming of course, that it's not just me who sees it. I know that most people don't see it or don't care about it. Adherence to the rules drummed

into some of us at school may be seen by one person as accuracy to the point of pedantry, by another as outstanding scholarship, by yet another as reasonable accuracy, by many as basic knowledge and by everyone else as pig-ignorance. The purpose of this discussion is to suggest that we should not use the constant shifts in our language as an excuse to stop thinking or communicating clearly.

Nor should we rely on the fact that schools have recently stopped teaching grammar, punctuation and usage to justify the violence we inflict on the language. I believe that applying at least some objective standards in grammar, punctuation and usage can only make our writing easier to understand.

Empathy

I'm not saying these things merely because, in my middle-aged grumpiness, things are no longer the way they used to be—as we all know, they never were. (Actually, I have a seriously sunny disposition, and ranting is not in my usual kitbag of techniques.) But it concerns me that so many people are prepared to adopt versions of the English language that inhibit clarity. It seems to me that the main villain is the writer's lack of empathy for the reader. Even when people actually know what they're trying to say (this is much less common than you'd think), they don't consider their written work from the reader's point of view. And if we don't consider the reader's point of view, it's the same as writing in a foreign language. I can confirm that much of what is said to be written in the English language these days is, in effect, not written in the language that I was taught.

The trouble is that there's often a discrepancy between what people want to say, what they think they're saying and what they actually say. It's not enough to simply write down the good idea that's been drifting through your mind—despite your best intentions, that idea

often fails to appear on the page. Sometimes we end up writing things we don't mean, sometimes we write things that contradict our original idea and all too often we write nothing sensible at all. There are many ways in which an idea will change as it's written, mostly arising out of the writer's communication limitations. I suffer from many of those limitations and I find it absolutely essential to re-read my work, preferably at least a day after I write it, to check whether the words still express my ideas as I intended. Not that the words are likely to change overnight, but by separating the words from the ideas in time, I can stop myself becoming committed to the words rather than to the ideas.

Most people just don't get the words right the first time. I certainly don't. People who have no empathy for their readers don't care about this, or can't acknowledge it. The capacity to ruthlessly edit your own work is therefore crucial. Re-read your work as if you don't know what you were trying to say when you wrote it. Put yourself in the readers' place. Don't take the position that if you knew what you meant when you wrote it, so should everyone else. Don't make the reader responsible for comprehending what you write. Let's face it, very few of us are as good at expressing ourselves as we like to think we are.

Should our language have rules?

It has been fashionable for several decades to say there is no such thing as incorrect use of language, there is only legitimate variation. Whatever gets the message across is correct, they say. That's why punctuation and grammar are no longer taught in schools, although I personally believe it has more to do with education funding, but I digress.

According to this view, clarity of communication has nothing to do with adherence to the rules. Abandoning language rules reduces elitism and gives everyone better access to information because it will no longer be hidden by obscure and arbitrary language.

Following absolute standards of correctness in language also leads to a logical problem. If you insist on using the same rules that you learned as a child, you have to make a difficult decision for each new usage. You must decide whether to adopt it, thus denying any absolute standards, or you can ignore it and stick to your rules. If you adopt the second option, it

won't be long before the rules of language describe a language that no-one speaks.

Are rules elitist?

So what's wrong with allowing everyone to use words, grammar and punctuation in any way that suits them, as long as they 'get their message across'? Do the rules of language really stifle creativity, especially in school children? Is it demeaning or patronising to point out errors, even to school children? Do rigid rules discourage people from exercising their natural and free-spirited inclination to write? Is it snobbish or pompous to use language 'correctly'? Do only highly educated people speak and write correctly? When someone tries to comply with rules learned at school, is he or she impliedly criticising those who won't or can't apply the same standards? Since the language is always changing anyway, is it pointless to teach standards?

I don't want to tackle these post-modern relativist propositions other than to say they don't convince me. Even though our language—happily—continues to shift beneath our feet, I think there are still good reasons to observe rules of grammar, punctuation and usage. First, it's self-evident that nothing crystallises a person's capacity for logical and well-ordered thought better than the process of explaining his or her ideas to others. Second, it would lead to chaos if we all decided to use language in any way we liked, and it would be impossible to tailor our language to meet the requirements of every listener and reader.

I'm not saying that we should resist changes in the language on principle, but I'm suggesting that we can stop the process being so ugly. Perhaps we should look at change in the language in the same way we regard underwear—it's probably a good thing but it's best kept out of sight, mostly.

Clarity in thinking

Lack of clarity in writing is often a symptom of lack of clarity in a writer's thinking. In his essay *Politics and the English Language* (1946), George Orwell demonstrated the close relationship between the quality of our thinking and our use of language. He showed how lazy, mindless writing leads to lazy, mindless thinking, which in turn leads to more lazy, mindless writing.

It's therefore probably true to say that people who don't follow the rules when trying to get their message across often don't really know what their message is. It's not only that they're unable to accurately translate their thoughts into words: part of the problem is that their thoughts aren't very clear. If what we say is not the same as what we mean, others are unlikely to distinguish between them. Is not the failure to comply with the rules of language a sign that many of us really don't know what message we're trying to get across? Or is 'getting the message across' merely an excuse for people to hide their message in unclear language? Too often a writer either has a meaning and cannot express it, or inadvertently says something else, or doesn't seem to care whether or not the words mean anything.

Examples of lazy, mindless thinking

The lazy, mindless thinking and writing to which I'm referring includes tired metaphors and mindless clichés, slavish copying of the latest fads, pretentious words and expressions, meaningless words and expressions and words that the writer doesn't really understand. Often the purpose is to sound posh or educated or important. If we add thoughtless punctuation and embarrassing grammar, the result is pre-fab writing that consists of strings of words that have already been set in order by someone else and merely tacked into place by the writer. The writer then hopes that the reader doesn't ask too many questions. Legal and business letters often consist solely of such mindless borrowing in which the words are chosen for the way they sound rather than for their meaning.

It is too easy to sneer at the excesses of lawyers and bureaucrats because they often use lazy, mindless forms of expression as instruments of policy, so I won't do it here. There is no better example of the phenomenon, however, than in the world of professional sport. We recently celebrated the two-hundredth anniversary of the last time a football player said anything interesting in an interview. That is, something that wasn't a cliché or some dull, superannuated metaphor that our sports heroes chose because it meant nothing or because he couldn't tell the difference between meaning and meaninglessness. Interestingly, it's been nearly as long since a sports journalist asked a sportsman a sensible question. Maybe it's a sports thing.

And I'm not just talking about sports expressions such as 'step up to the plate', 'out of left field' (often bizarrely rendered as 'from left of field'), 'down to the wire', 'behind the eight-ball' and 'push the envelope', which have passed into general use (not that general use justifies them). People borrow expressions like this because they sound good, although this must be a meaning of the word 'good' with which I have until now been unfamiliar. What bothers me most is that people often use these kinds of vague metaphors even though they have no idea what they mean. This is why they often sound so strange. Those who know that 'step up to the plate' is a baseball metaphor, for example, know that it means nothing in countries where baseball isn't played.

Relativism inhibits clarity

In fact, after decades of reluctance to impose language rules or standards, of freeing school children from the tyranny of grammar and punctuation (and sensible usage), there is no sign that society has benefited or that people are better able to get their messages across. Quite the contrary. With nothing to guide them (and that includes the teachers who no longer seem to know that there used to be rules), the average person's vocabulary has been decreasing, and his or her knowledge of grammar, punctuation and usage can (and regularly does) make some grown men cringe. Newspapers, television programs and the internet perpetuate the problems. Don't get me started. Meanwhile, the people who get ahead in almost all areas of endeavour are invariably those with good language skills and the capacity to get their message across the old-fashioned way, rules and all.

Mistakes drive change

Despite the suggestion that only educated people speak and write correctly, most changes to the language are driven from below. This is because changes arise mostly out of mistakes made by the worst educated and the least interested. These mistakes are repeated and drift up the socio-economic scale until they eventually crystallise into everyday language. Until a mistake is absorbed into the mainstream, however, chunks of the language are ambiguous. It's impossible to tell, without making inquiries of the writer, whether something means what it used to mean or what it will soon mean. The development of the

English language is therefore in the hands of people who don't give a damn about it: people who use clichés and platitudes and meaningless phrases to avoid thinking about what they're saying. Before you know it, the language has changed, and what used to be wrong is right. We are all drawn into perpetuating mistakes because everyone else does. And what does the pedantic grumpy old man think about being forced to choose between repeating newfangled things he knows to be wrong, and using words and usage correctly but anachronistically? It's the main reason that some grumpy old men become so grumpy.

So it's not helpful to assert that anything should be allowed as long as we get the message across. Because chances are that we will not be across the message got, . . . well, not easily anyway. Encouraging people to write in this way has done more to impair the exchange of ideas than any other factor. Language is power, and the clearer your ideas and the better you can fit them into language, the more power you will have.

Getting the message across

If we're truly interested in getting the message across, it would certainly help if we were sure that our grammar, punctuation and usage was understandable to those with whom we were trying to communicate. The speed at which our language is changing shouldn't be used as an excuse to stop thinking or communicating clearly.

Don't let this happen to you

I often read ambiguous words that force me to investigate whether the writer was employing the grammar, punctuation and usage that I was taught, or some new, modern version that, by traditional standards, can only be wrong. Here are a few of the things that really annoy me about current usage. Most of them are examples of the mistakes to which I've been referring.

Neologisms

In the opinion of some people, 'hopefully' is a foul neologism and worth avoiding for that reason alone. Its main defect, however, is its ambiguity. Many people would have no difficulty in working out the message that is meant to be conveyed by:

They hopefully went to the movies.

Others would apply language standards remembered from their school days and wonder if it was supposed to mean either:

They went to the movies in hope.

or

We hope they went to the movies.

And just whose conduct is being controlled by the following instruction?

PEDESTRIANS
GIVE WAY

Proper punctuation might give a clue to mysteries such as these, but people who use the word 'hopefully' generally don't worry too much about punctuation. In my view, they're hopeless, but I'm trying to influence adherence to language rules from the top down, rather than in the traditional manner.

Have you ever walked past a building that is, according to a sign out the front, 'alarmed'? What about cars that are described as the most 'awarded' in their class? Did the authors of these atrocities really believe they were getting their message across? It seems to me that if you have to read the sentence two or three times before working out what was intended, the message isn't really getting across. And since when did the singular of 'pants' become 'pant'? Every time I see an advertisement for a 'pant', I see visions of a heavy-breathing dog. I've seen ads for 'a trouser', a 'short' and even a 'knicker'. Are we supposed to start calling a pair of glasses a 'spectacle' or a pair of scissors a 'scissor'?

Pompous and pretentious language

The constant need to find a posh or important way to say something is a real stumbling block to clarity. Using a complex way of saying something is at best an attempt to obfuscate and at worst a sign that the writer doesn't know what he or she wants to say, but complex words and expressions sound so much more authoritative.

An obvious example is the word 'refute'. It's supposed to mean 'prove beyond argument that something is incorrect'. Dictionaries still define it that way. It's a useful word. Lawyers try to refute their opponents' allegations and arguments in court. 'Deny' is a different word and describes a different concept. As anyone who's ever listened to Monty Python's 'Have you come for an argument' sketch will know,

'deny' merely means 'contradict', 'refuse to accept' and 'declare untrue', with no connotation of proof or conclusiveness. The words have two distinct and necessary meanings.

For no discernible reason, however, many people these days seem to press 'refute' into doing the work of 'deny'. Why they do this is deeply mysterious. It's not as if there was need for a new way to describe the concept of 'deny'. As a result, when someone uses the word 'refute' these days, I'm forced to wonder whether he or she actually means it or whether he or she means 'deny'. Even newspapers and television newsreaders can't seem to distinguish the two concepts. When I hear on the nightly news that 'the Prime Minister refuted allegations of incompetence', what am I to think? Did he prove his competence or did he merely say something like 'no way dude', which would at least have had the advantage of being clearer? Mostly we'll never know, and clarity goes out the window.

Our language is awash with these examples of words that are in the process of changing their meaning at the expense of clarity. 'Anticipate' and 'expect' have totally different meanings but 'anticipate' is now used almost exclusively to cover both meanings. 'Anticipate' means to 'take action to prepare for an expected event', to take advance action. Some of us anticipate going on a date by dropping in to a pharmacy. 'Expect', on the other hand, merely means to passively await or look forward to something. 'Refute' and 'anticipate' sound more posh and important than 'deny' and 'expect', but in fact, they are almost always pompous and pretentious. What on earth does 'point in time' mean that can't be expressed just as well by the word 'time'? And since 'period' means 'length of time', 'period of time' is just plain tautological.

We have all lived through the rise and rise of the expression 'in terms of', which is generally a sign that the person using it has started a sentence without knowing how it's going to finish. Next time you hear 'in terms of', ask yourself, would it change the meaning of the sentence if that expression was removed or replaced with a simple conjunction? 'Forensic' simply means 'pertaining to advocacy' but it will continue to be used as a synonym for 'scientific'. By now, it may even actually have

that meaning. 'Advise' does not mean 'inform' but 'offer an opinion as to future action'. We don't advise people of our intentions, we inform them.

I also get annoyed when I see how often 'beg the question' is being misused. When I was 10 years old, I learned that 'begging the question' did not mean 'evading the issue' or 'raising a question that's begging to be answered'. It means using an argument that assumes the truth of what is being argued, or making unfounded assumptions, but I can't remember seeing it used properly since then. I suspect that since no-one knows or cares what it originally meant and no-one uses it properly, its meaning has probably already changed—but I can't be sure. I'm left guessing and grumpy.

Ignorance

Other errors arise out of plain ignorance. Although there is a huge and significant difference between 'imply' and 'infer' (like the difference between 'throw' and 'catch'), many people never get it right.

Hyphens

Misuse of hyphens can also affect clarity. The main function of a hyphen is to indicate when two or more words should be read together as a single word with a meaning independent of its constituent words. Hyphens are an aid to understanding these composite words when the lack of a hyphen would lead to confusion or ambiguity.

Confusion might arise, for example, between the expression 'a little used car' and 'a little-used car'. If one wrote 'the car was little used', there would be no difficulty. There is a world of difference between 'a hard-working man' and 'a hard working man'. It's all very well to say 'he was attacked by two men, one armed with a baseball bat' but if 'he was attacked by two men, one-armed with a baseball bat', you might see things differently. When a solicitor decides to file a 'cross claim', I immediately wonder what made the claim angry. Would it be libelous to say that a judge had engaged in extra judicial activities or extra-judicial activities? Incidentally, some of these examples illustrate one of the main reasons to avoid passive language.

Longstanding usage

The difference between a bad haircut and a good haircut is about three weeks, while the difference between illiterate garbage and cutting edge English language usage tends to be somewhat longer. My views on the ugliness of change arise out of the 'bad haircut' portion of the process. Soon, my complaints will be seen as quaint and precious. The changes and mistakes to which the language is being subjected will be of historical value only, just as the grotesqueries of the past have evolved into good English. To illustrate that this is the process by which English has come to be in its current form, let me examine some concepts that have already made the transition. Not even I would argue that since the word 'dilapidated' is derived from the Latin for 'stone', only structures made of stone can be 'dilapidated'. That word has been used to mean 'in a state of decay, disrepair or partial ruin by neglect or misuse' for so long that it is pointless to disagree. In the same vein, it is incontrovertible that the word 'whence' means 'from where'. To say 'from whence' is therefore tautological, equivalent to saying 'from from where'. The problem is that the same mistake has been made for hundreds of years. Shakespeare, Milton, Mark Twain and the King James Bible all use the expression 'from whence'. So while it's clearly wrong, it has a long pedigree that can't be ignored, because the language has changed. As I say, it's an ugly process.

Living and dead mistakes

Should we therefore accept changes but only when they have a decent pedigree? Will this watered-down relativism meet my complaints? Maybe the solution is to distinguish between living and dead mistakes, just as we distinguish between living and dead metaphors. When we use a live metaphor, we are conscious of the fact that we have chosen to use an expression that is a substitute for the intended literal meaning. When we say 'full steam ahead', we know it is a metaphor because we can still dimly see at the back of our minds a train or a ship. Dead metaphors, on the other hand, are no longer distinguishable from literal meaning. Dead metaphors are not generally recognised because they have actually been transformed into literal meaning. Having something 'in hand' no longer brings a horse to mind and is therefore a dead metaphor.

Why don't we adopt some sort of dead error procedure, whereby any error that has been in constant use for two centuries, or 20 years, is deemed to be a dead error and therefore part of correct language, at least in an honorary capacity? If you watch people being interviewed 50 or 60 years ago or read their prose, it's possible to get a feel for the change in the way language is used. Many things look strange, from the comma minefield to the different meanings of words. In a documentary film, I heard several sailors describe the explosion that sunk their ship in 1941 as 'terrific'. Apparently, that word used to mean 'big', while now it means 'wonderful'. Of course, 'wonderful' used to mean 'full of wonder', not necessarily a good thing, while 'awful' used to mean 'full of awe' and 'vicious' used to mean 'having vices'. There were, no doubt, times when these words created the same doubt that 'refute' does today.

What's it all mean?

No, I don't think half-baked relativism is any better than the full strength stuff, even though it might tend to hide the most obvious howlers until they are well and truly part of the language. Even if the rules of grammar, punctuation and usage are subtly shifting, some ways of communicating are going to be more effective than others. If more parts of language are shared between the people who write and those who read, it means that more of the communication will be clear. Rules of language are meant to set guidelines for clarity so we don't have to change our manner of communication to meet the needs of those with whom we have to communicate. We shouldn't be required to tailor our language to suit the person who we believe is reading. How could we communicate effectively if we have no idea with whom we're communicating, or when we're communicating with many people at the same time? I suggest that the best way of ensuring that we continue to communicate clearly is to accept the need for 'correct' language, and to teach it in schools. Relativism just doesn't work in the context of language because the last thing we need is every person to have his or her own langwidge.

When confronted with one of their punctuation or grammar atrocities, many people react by saying they were never taught punctuation or grammar at school. Although that is probably true these days, it's no excuse. If 'getting the

message across' is what communication is all about, it seems to me that empathy with the reader is more important than the rules. Naturally, whatever rules there are were born out of that empathy, the realisation that communication depends as much on receiving information as giving it. If we always consider our readers and listeners, the rules will take care of themselves.

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Chris Peters is a former lawyer, former public servant and former promising schoolboy athlete. He is now semi-retired, which gives him plenty of time for ranting. Originally Dutch, he came to Australia in 1960. Like many converts to a cause, his commitment to the English language is perhaps a little obsessive.

Chris learned how to write 'formally' at Monash University Law School and it took him a number of years to unlearn it. In 1974 he joined the Australian Public Service, where he worked in the Trade Practices Commission, the Department of Foreign Affairs, the Crown Solicitor's Office and the Australian Law Reform Commission, unfortunately after the departure of Justice Michael Kirby. By that time, however, Justice Kirby had ensured that plain English would be used for all Commission publications.

Lord David Renton

Martin Cutts

Lord Renton, Britain's longest-serving parliamentarian, has died at the age of 98. Believing that the rarefied air breathed by legislators and parliamentary counsel could sometimes be exhaled as fog in the written law they produced, Lord Renton did much to advance the cause of clearer language in statutes. In 1979 he wrote, 'In Britain the drafting of legislation remains an arcane subject. Those responsible do not admit that any problem of obscurity exists. They resolutely reject any dialogue with statute law users. There is resistance to change, and to the adoption (or even investigation) of new methods. The economic cost of statute law is enormous, yet official interest has been lacking.' Lord Renton lived long enough to see some of the resistance crumbling.

A lawyer by training, David Renton was a junior minister in Conservative governments from 1955-62. In 1973 he became chairman of the Committee on Preparation of Legislation, which produced a widely admired report, *The Preparation of Legislation* (1975), aka the Renton Report. It criticized 'the tendency of all governments to rush too much weighty legislation through Parliament in too short a time' (a thing not unknown even today). The report included 10 pages of cases from the 1950s and 1960s in which judges had found the statutes on which they were supposed to base their decisions too difficult to understand. In later life Lord Renton wryly noted that admired reports were not always those of which the greatest heed was taken.

He was generous in his public and private comments about my rewrite of the UK Time-share Act 1992 (published in *Lucid Law*), noting that it began with a clear purpose statement, a device he had long championed.

He remained a stalwart of the Statute Law Society and a member of the Statute Law Review's editorial board.

A memorial service for Lord Renton is to be held at St Margaret's, Westminster, at noon on Thursday, 18 October 2007. Tickets may be obtained by writing, with a stamped, self-addressed envelope, to Room 18, The Chapter Office, 20 Dean's Yard, London SW1P 3PA.

[Sources: *The Times*, 25 May 2007; *Lucid Law*, Plain Language Commission 2000; and Pikestaff (Plain Language Commission newsletter, www.clearest.co.uk.)]

[Lord Renton was a Clarity member for 5 years and presented at a Clarity function. Ed.]

House style— whose style is it?

Suellen Thompson

Clear writing consultant

[*Suellen was recently involved in launching a new style guide for an international law firm. She discovered that many people were strongly attached to particular aspects of language. In this article she talks about the journey of creating a style guide for an organisation and about things to consider if you are undertaking this process. She also considers the purpose of the style guide.*]

I'd like to take you on a journey, a somewhat perilous journey. You will need to fight many battles, and you will need strong armour. You have to navigate dangerous mountains of syntax and forge pathways through a fog of grammatical principles. You will have many on your side helping you along the way—those who share your beliefs. But there will be an equal if not greater number who wish to cling to beliefs that were promulgated and embedded by their year-4 English teacher.

And all, my friend, in the name of clarity.

If someone had asked me to name some of the most challenging things I've ever had to do, one of them would have to be introducing a new style guide to an organisation. At first blush it would seem a fairly rudimentary process: insert a bit on grammar and punctuation and a little bit on the particular nuances of the organisation. The trouble is that every organisation is made up of a number of different 'sections'. Sections vary significantly in the way they conduct their everyday business. They all speak the voice of the organisation; they wish to conform to the 'brand'. But their expectations and needs may be quite different. And the bigger the organisation, the more stakeholders to ensure the guide is used effectively. More stakeholders, more different views.

Picture this. A room full of representatives from different parts of the organisation. Intelligent, thoughtful people who grasped their pens as if they were daggers. They were

prepared to do anything, anything to protect their tower of stylistic penchants. (Well, almost anything!) Even the question of whether we should use double or single quote marks could cause a stir.

The idea of a style guide

Let's start at the beginning. Most organisations have some form of 'house style guide'. If not, they probably need one. A style guide is a useful tool to help staff communicate more clearly and in a way that should reflect the image the organisation wants to promote.

What should a style guide contain? How should it feel?

A style guide may vary in its contents. Some style guides contain technical specifications relating to design. Some contain rules on grammar. Some are didactic. Some are breezy.

Who decides what goes into the style guide (and who cares)?

Believe me, a lot of people care about what goes into the style guide.

A large number of people become very attached to a particular grammatical principle. What I found especially surprising was just *how* attached they were.

Now I know there are many of us who love language. We love its rhythm, its nuances and the way it teases us and confuses us with its idiosyncratic ways. English is a particularly wayward child in the way it turns its back on rules and breaks them constantly. It is for this reason of course that we love it. However, the fact (and it is a fact) that language changes and is constantly evolving seems to have escaped the notice of some.

In striving to communicate more clearly with our reader, we chose to do away with archaic language. This was a battle, hard fought and won.

It seems the theory of the evolution of language is also a battle. And yes, there are good arguments on both sides. We must adhere to certain principles to maintain structure and integrity in our sentences. Otherwise, we risk clarity.

Or do we?

If I start my sentence with 'and', does the reader understand my sentence meaning? Or does the reader cringe because the reader was taught once that we should never start a

sentence with the conjunction 'and' or 'but'? It is very hard to disobey a strict primary school teacher, even 20 years after he or she last wagged a finger in your direction.

What do people care about?

It is important to ensure you capture the opinions of all relevant stakeholders in your organisation. That way you will be more likely to establish the most contentious issues early on. But beware of latecomers with a passionate conviction about a particular grammatical construction—they can throw the whole process back by weeks.

Punctuation

I remember a time when it was 'cool' *not* to care about punctuation and grammar. Now punctuation seems like an obsession. Recently, I visited my 9-year-old daughter's school and edited some of her classmates' creative writing pieces. Their thoughts and ideas were free-flowing but had little or no punctuation. Yes, it conveyed a very different message to the audience when punctuation and grammar were introduced. It made the writers start to think whether this was actually what they wanted to say. It was a very interesting exercise! It is called 'conferencing'. I think this is because it is meant to be a collaborative approach to editing. What was interesting was this. As *writers*, they did not really need much punctuation because they knew what they meant to say. But as a *reader*, I needed the punctuation to ensure I correctly understood the meaning of the story. I needed punctuation for *clarity*.

People care especially about some aspects of punctuation—for example, bullet points. Do you end a bullet point with a semi colon or a full stop? Do you need any punctuation at all? Does it depend on whether the bullet point contains a full sentence or is only part of a sentence? How many examples of the variations should you include in the guide?

Should you use double quote marks or single quote marks? Single have come into fashion, yet they can be confused with an apostrophe. Does this affect the reader? Does it impact on clarity?

Do you need to distinguish between a hyphen, an em dash and an en dash? Will the reader understand the difference between them?

Once again, canvassing the opinions of major stakeholders helps you recommend a style that people will use.

Grammar

Grammar can influence the writer's meaning and tone. You can create a more formal tone by using a higher language register. We would not normally encourage this at our organisation as we want to be more client-friendly. But—guess what—there would be occasions when you might need to vary your tone depending on your audience.

So if you are going to include information on grammar and various grammatical principles, be sensitive to whether the different factions in the organisation prefer a more formal tone. Also consider how the organisation wants to present itself.

For example, will staff be reluctant to end a sentence with a preposition?

Will staff feel comfortable starting a sentence with a conjunction? Or is this level of informality not appropriate for the organisation or its audience? Should you use contractions in your business writing? Or do 'don't' and 'won't' sound too familiar to your clients?

Do you need to mention sentence length and sentence construction in the style guide? How much detail do the staff need? Do they need some tips on grammar? Remember, a large number of generation Y did not study grammar at school. They may only have picked it up if they studied a foreign language. A few guidelines and tips on some grammatical principles may, therefore, be useful.

Spelling

People get used to spelling certain words in a certain way. Is there, or is there not, an 'e' in lodgment and judgment? When asked to conform to a new style, some people may resist unless they see a strong reason to change. Conforming to the style guide is not enough reason for some. Canvassing the opinions of major stakeholders helps ensure preferences are met with less resistance. Otherwise you may receive feedback such as, 'Well, this is just wrong, and whoever wrote this is wrong.'

The journey (or the process)

Audience

There may be very different sections within the organisation with very different needs. We found that it was important that the main sections were represented on a style committee to ensure different points of view were raised and considered. Otherwise, we'd have ended up with a style guide that was unworkable and never used by certain parts of the organisation.

In preparing a style guide, you also have a secondary audience—the clients of the organisation. Whatever house style decisions you make will impact on them. We had received some good feedback from our clients about what they wanted from us in our advices. This helped us to put some useful guidelines into our style guide.

Purpose

What exactly are you trying to achieve? What do the people in the organisation need to know to communicate more clearly and in the house style? This can actually be quite an extensive exercise because some parts of the organisation may need more guidance and more technical detail than others.

But how much is too much? How much do you need to promote a uniform voice without restricting a writer's style? What will aid the writer and what will constrain the writer? What will aid the reader and what will impede readability? These are important questions to ask continually during the process.

Structure

What should come first? The technical information? The grammatical principles? A note on spelling? Working out the structure of the guide is important to ensure the guide will be used and not left sitting on the shelf because people did not know where to locate information.

Language

What tone should you use? Should it be formal or informal? Once again, this will depend on your organisation and the various stakeholders. Some areas of the organisation would prefer a more formal tone, others less so. People feel very strongly about the tone of the style guide. It's a bit like mandating what people should

wear to work. Some would prefer there were no contractions in a sentence. Is 'it's' appropriate in a style guide?

Design

Finally, breathe; all you need to do now is consider the design of the style guide. How should the information be presented? Should it be in colour? The design will depend on the organisation, budget and how much you want to encourage people to use it. And if you think this is the easy part, think again. The design can bring out even more emotion. It can be like picking a paint colour for your bedroom. You have to live with it for a while. So make sure you consider the design early in the process.

How does the journey end?

The 'style guide' journey ends well.

A style guide will help an organisation to deliver a consistent and recognisable image to the world. It will help staff to communicate more clearly by giving them some tips to help the reader understand their message more quickly and easily.

A style guide will aid clarity. Even if the journey is a little muddy!

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Editing judgments: lessons learned in law reporting

Naida Haxton

Legal editor and barrister

[This article is in the form of a letter to someone who has just been appointed to the role of editor of authorised law reports. Its author has just retired from that position. Ed.]

Dear editorial colleague,

Again, congratulations on your new role as editor of the authorised law reports. I hope you enjoy the work as much as I did during the past 30 odd years.

As you so rightly pointed out over coffee, almost in the words of Sir Robert Megarry in *A New Miscellany at Law*: “Though justly esteemed, simplicity is not a universal judicial achievement.” You will, no doubt, find it very frustrating at times as the constraints of the medium become more and more obvious to you. You have asked me about some of those constraints. You have asked me to give you some ideas in applying the use of plain English to your editing role and particularly in relation to the reported judgments. I have spent a lot of time thinking about what you said.

The short and simple answer is, “you cannot apply plain English to editing the judgments”, but perhaps after you read this you may think up and implement ways of getting into the judicial mind. There are a multitude of reasons why you cannot simplify the judgments. I will try to explain—hopefully in plain English—by looking at the many hurdles and the perceived effects of such intervention. I will make some suggestions about getting into the judicial headspace, which you might like to take on board.

The hurdles

There are a number of hurdles.

Who owns the copyright?

The major hurdle lies in the concept of copyright. There has long been argument for and against the court, the judge, or both holding the copyright in a judgment. Whichever it is is not a topic for discussion here. However the judgment is created, it is copyright material. When a judgment is reported and hence reprinted in law reports; a considerable amount of editorial work is performed on it. This produces a new work based on a compilation. Each volume of the reports is comprised of the judgments and their additional material, including catchwords and headnote (what the layman would call a summary and an index). There seems little doubt that this compiled work is the subject of a separate copyright. The editorial licence in relation to judgments for this purpose may extend to checking and correcting citations and quotations but does not include otherwise altering or interfering with the text.

The purposes served by a judgment

The next restriction lies in the purpose that the writing of judgments serves. Judgments are written to satisfy the requirements of justice in resolving a dispute between parties. The legal meaning and effect of judgments is governed by:

- a. The Orders
- b. The reasons and the reliance therein and thereon of quoted and (mis)quoted material from a variety of sources:
 - i. Statutes
 - ii. Precedents (previous cases)
 - iii. Text books
 - iv. Research documented by third parties, such as associates and research assistants
 - v. Evidence given by the parties and transcribed by third parties.

A judgment is a compilation of all or some of these. One has only to look at the contents of a judgment to realize how little might be original material and therefore how difficult it might be to edit. In the process of checking or verifying the quoted material for reporting purposes, you will discover that material is often incorrectly quoted. What do you do about it? If it is a significant misquote, you contact the judge.

Judicial infallibility

During my time as Editor, I contacted judges on many occasions about all sorts of things. Whilst they are very approachable and convivial they are a little inclined to adhere to the view espoused by a Court of Appeal judge in 2001: "We appreciate that we're all human, except us up here of course. We never make mistakes." One of the most alarming mistakes I encountered was in relation to a judgment that interpreted a provision of a statute that had been repealed at the relevant time. This error was found in the verifying process. When approached about the matter the judge pointed out that the judgment had been delivered and acted upon by the parties without anyone else having alluded to the error in the premise upon which it was based and that, in the circumstances, it should stand. He did add that he thought that the principles enunciated might be useful in other cases. This might well be so.

What this example does is draw attention to the need for accuracy and attention to detail in drafting judgments, orders and reasons. It also highlights the reliance placed upon the content of judgments. If the content is not expressed clearly and accurately, there is a loss of clarity, meaning and usefulness.

Evolving language

On another occasion, I contacted Justice Michael Kirby [*Clarity's co-patron, see page 2 and the interview with Justice Kirby that begins on page 9. Eds.*] on what I thought was a most unusual use of the word "elided". Whilst he agreed that the word was used in a manner different to the norm, he nevertheless thought it appropriate and justified "because English is a growing language". I am glad I asked.

Old language

Most people are aware that judges rely on previous cases in coming to decisions. You and I are aware of the uses to which these precedents are put. Material from previous judgments is used as direct authority and to support argument. Often decisions are based on living but rather obscure law, a great deal of which was written before plain English was conceived. Often that law uses a word in a highly specific way so that it cannot be "brought up to date".

Many words used in a legal context have multiple meanings that make clarity rather

elusive. Legal textbooks and articles rely heavily on quotes from judgments. Often the skills in producing a textbook lie in the ability to paraphrase or summarise the meaning in plain English. But this may backfire and you will find a judge drawing attention to a misconception or misconstruction in the textbook at some later date. The same arguments apply to the use of research materials and evidence.

Misquoting misquotes or Chinese whispers

There is, as you might appreciate, a real risk of complete distortion as happens in that old game of Chinese Whispers. If you went to a school that taught grammar, you may well have learned about the difference between, "A said B was there" and "A, said B, was there". Judges, as you well know from your court work, quite often get it wrong. Justice Michael Kirby, sitting in the Court of Appeal in 1993 in a case of *Clarke v Bailey* (1993) 30 NSWLR 556 at 571, referred to "one judge's construction" as being "another's 'mangling'". If this is so, what might be the result of a plain-English edit? Even one who understands the law and the processes can mistranslate with disastrous effect.

One of my last instructions to the law reporters (those who produce the material for the headnotes) was in the following terms:

Some of you have been forgetting to produce the paragraph that describes the nature of the case before the court under such headings as APPEAL, SUMMONS, APPLICATION. This should contain as much information as to the nature of the case, the prior proceedings and the parties as an informed reader would require as an introduction to the reported case.

This was translated, without consultation, by a legal editor and self-professed expert in plain English into:

[W]hen preparing headnotes, please ensure that these contain sufficient information as to the nature of the case and the background of the case as to enable readers to understand and appreciate the context of the holding/s.

This sent triggers of alarm to the reporters who had been well trained in producing headnotes with a minimal factual background and who took it to mean, as it does, that they were now required to produce "facts" as part of the headnote. Be warned!

The impact of computer cut and paste facilities

There are a couple of other matters that might not necessarily occur to you. The first is computers. The advent of computers has meant that the use of a judicial pen has been considerably reduced. The judges, together with the rest of us, live in a world of cut and paste. This provides expediency, a degree of accuracy, verbosity and often-unnecessary complexity. The more judgments you read the more you will see the changes in style and use of language within a single judgment created by this process. The more you will recognize instances of plagiarism. Does this computer facility enhance lucidity or clarity? It probably contributes to obfuscation and ambiguity. Ask yourself how often you cut and paste in your haste to get a document out of the door.

The judicial ego

Finally the most elusive aspect is the judicial ego. Twice in my career judges have threatened to sue for defamation. Both instances related to the insertion of footnotes into the text to accord with the adopted style of the particular reports. Both judges thought that this editorial intervention in some way lessened the reputation of their judgment-writing skills. There are many more judicial officers producing judgments than ever. The warning is clear.

The possible effect of changing a judgment

Should editors try to simplify and clarify the written judgment? I think you will gather from the above that I do not think we can, desirable as we might think it is to do so. Should editors try to improve on grammar, punctuation or word choice? Quite clearly one cannot afford to risk changing meaning and effect. In addition, the possible effect of such editing would be a clear breach of copyright, a yet-to-be-tested publication of defamatory matter and perhaps a possible contempt of court.

Overcoming the hurdles

Can we change the judicial approach? If so, how? I have a few ideas. I hope you have some as well.

In the area of Child Welfare, there is constant emphasis on early intervention. In the area of legal writing generally and judgment writing in particular, we need to think about early intervention also. In an ideal world, grammar,

punctuation, simplicity and clarity of written and oral expression would be part of our early childhood training. But we do not live in an ideal world and are not likely to.

I know that the Law Schools of today are encouraging and teaching in every way possible the rewards of using plain English. Hopefully the impact of this will come when those who have gone through those early training processes are elevated to the Bench.

Contrary to popular belief, I have found all judges to be very human beings and have had some interesting correspondences and altercations with them over the years.

When you have read and analysed as many judgments as an editor of law reports does, it is assumed you know something about them. For that reason, I was once asked by the Judicial Commission to give a talk to the Judges of the Land and Environment Court on the topic, "Judgment Writing". What I think impressed the Judges of that Court most was that I turned up with a power point production and a two-page "Check List for Judgment Writing". Most instruction on the art of judgment writing is overly verbose—perhaps in the interests of obfuscation. A very interesting experience! The Judicial Commission of NSW rejected a written version containing 620 words of the clearest language for publication in the *Judicial Officer's Bulletin* as not according with the Bulletin's scope and purpose.

When Dennis Mahoney JA, retired in 1996, he penned a note to me in which he said, "I have been thinking about the form of judgments. At a rough approximation, the writing of a judgment takes 100–150% of the time taken in the hearing of an appeal. I suspect there must be a better way of performing the functions, which the preparation of judgments serves. What are your ideas? Can we set a new trend?" to which I responded:

Your note has prompted me to put some of what I call my "kitchen sink" file on paper. (When one has one's hands in warm water, the mind is free to roam.)

On writing judgments:

1. Issue quill pens;
2. Add to the oath of office taken to administer justice without fear or failure "in judgments of fewer than 20 pages and without academic aspirations";

3. Employ a judicial editor;
4. Set a paradigm for judgment writing.

From where I sit judgments need to be shortened and to be less repetitive. I envisage an appeal judgments/process in a format akin to the following:

By the COURT:

1. Where the appeal is from
2. What the appeal is about in principle
3. What the appeal is relevantly about factually
4. What statutory or other provisions are relevant and should be quoted
5. Any other material agreed upon as relevant
6. Summary of submissions of appellants
7. Summary of submissions of respondents

By the COURT/JUDGE OF APPEAL:

8. Summary of conclusions
9. Reasons for decision

By the COURT

10. Orders.

In the paradigm above I would like to think that 1–7 could be produced by a judicial assistant (assistant judges? Trial with acting judges?) for approval by the court. These are the areas where the greatest repetition and, often-differing perspectives on factual findings, occur. Matters numbered 8–10 should be produced for publication in the order specified. My feeling is that if (after research and rumination) one had to clarify one's conclusions, *then* justify them, a lot of material that is less pertinent might disappear.

Many of the Industrial Court judgments which appear in the Industrial Reports tend to follow a format which is very easy to read because one tends to read them knowing they are heading in a reasonably logical direction and will arrive at a conclusion. With the sheer volume of judgments being delivered and published to all and sundry in so many different formats, I tend to think that a greater

degree of clarity of purpose might be desirable.

I have no idea what training and/or what guidance is given in relation to writing judgments but perhaps there ought to be “meetings” (dare I say “classes”) on the matter. Sir Harry Gibbs (and no doubt others) has written on judgment writing. No doubt he or others could give direction on the “judging” aspects and others perhaps give more practical direction on form, style, methods of citing material, editing, etc, with a view to greater uniformity and less idiosyncratic production in these matters.

We never took it further, BUT there have been many changes since then and many courses in judgment writing and in using plain English, and all for the better.

I still believe that there may be some merit in Courts employing judicial editors as a further means of early intervention. Perhaps this is a place for former Editors of law reports.

Judges on editors like us?

Editors were, I found, perceived to be overly pedantic “fuddy-duddies” (unlike some judicial officers who believe they have moved with the times). Getting judges to maintain a consistent style in the use of such things as abbreviations and citations has been a constant theme in my 35-year-long editorial life. It has felt like bashing my head against a brick wall. With time some inroads were made and some converts achieved. Unless you have a magic piece of software in your portfolio, I hope you are prepared and willing to keep bashing away. With persistence some more inroads will be made and some more converts achieved. Hopefully in your time there might be “simplicity” as a “universal judicial achievement”.

Welcome to the club.

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The continuing insult to the language

Clive James

Australian born, UK-based TV critic, essayist, poet, author

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See www.themonthly.com.au/

In which English-speaking country is the English language falling apart most quickly? Britain. Are things as bad in Australia? I hope not. In Britain, in 2006, the Labour government is still trying to fix the education system, but surely one of the reasons it's so hard to fix is that most of the people who should know how are themselves the system's victims, and often don't even seem to realise it. They need less confidence. Even when they are ready to admit there might be a problem, few of them realise that they lack the language to describe it.

An appropriate sense of desperation has been far too slow to set in. As recently as 2001, one of Britain's higher-educational journals carried a letter signed by more than five hundred university professors, lecturers and teachers of English. They all concurred in a single opinion "The teaching of grammar and spelling is not all that important." But every signatory of that letter must have been well aware that a depressing number of his or her students would have written the sentence another way: "The teaching of grammar and spelling are not all that important." We can only hope that the number has since decreased. The government would like us to think it has. But the evidence from the media and everyday life suggest that most people would be at a loss to find anything wrong with the first clause of the sentence I am writing now, except, perhaps, the whining irascibility of its tone.

Unless taught better, even a quite bright student will not realise that "the evidence" is the subject, and takes the singular. The "and" linking "media" and "everyday life" makes

the noun phrase look like a plural, and so, by attraction, the plural verb is put in automatically. People who have learned English as a second language rarely make the error, because they were taught some grammar along with the vocabulary. But people who have learned English as a first language are increasingly likely to be driven to a plural verb by a plural-sounding singular subject, and precisely because they have learned the language by ear, instead of by prescription. In an infinite variety of forms, the same mistake can be seen in the feature pages of the British quality press every week. (The trash papers, oddly enough, are still relatively immune: perhaps because some of the old, unionised sub-editors are still on the case.)

Even the most intellectually up-market publications are not exempt. Before Fleet Street's necessary but regrettable disintegration, the editors and sub-editors of the quality broadsheets knew how to fix the solecisms of ambitious young journalists who had somehow dodged the school system.

But at the very time when the school system itself became a potent incubator for the semi-literate scribbler, the sudden multiplication of culture-page outlets meant that there were no longer enough cultivated editors and sub-editors to go round, and by now some of the editors and sub-editors are themselves products of the anti-educational orthodoxy by which expressiveness counts above precision. It would, if the two terms were separable. But they aren't. Beyond a certain point—and the point is reached early—precision is what expressiveness depends on.

Startled by the high-level declaration in 2001 that grammar and spelling were not very important, I began keeping a record, for the first time, of the blunders as they flooded by. I expected the flood to abate. But by now I am sitting on top of the house, and my notes for that crucial year are in my trembling hand. Things had gone haywire a long time before that, of course, but that was the year when the people in charge had the hide to tell us that it didn't matter. They could hardly have picked up even the most posh of newspapers without encountering evidence that it mattered like mad. On 12 May 2001, someone on the *Guardian's* literary page asked, "What would Philip Larkin make of a new collection of his work, *Further Requirements?*" Reasonably all right so far, although the unspecific "a" would

have been better as a “the” or a “this”. But then the literary someone answered his own question: “Having selected all the material for *Required Writing*, in 1983, and then died a mere two years later, one might regard a second volume as *de trop* ...”

The French tag is a claim to clerical expertise that the dangling participle scarcely supports. In 2001, the literary someone has failed to notice that he has composed a sentence in which he himself, and not Larkin, dies in 1985. It would be asking too much to expect the literary someone to realise that he is not qualified to read Beatrix Potter, let alone Philip Larkin: but he might at least read his own stuff with his ears open. Evelyn Waugh occasionally dangled a modifier, and Anthony Powell dangled them like a boat fishing for tuna; but a less-gifted writer would do best to avoid the practice. All too often, such blunders of mismatched apposition drive the reader to re-work the sentence himself before he can figure out what the writer must mean. When the writer is getting all of the fee, and the reader is doing at least half of the labour, the discrepancy can cause resentment.

In the *Observer* of 13 May 2001, the aviation correspondent drew on his reserves of metaphor to recreate the Concorde crash near Paris the previous year. The historical present is a bad tense in which to evoke anything, but worse than that is on offer. “Already mortally wounded, flame bleeds uncontrollably from beneath the left wing.” The bleeding flame has everything wrong with it apart from the mixed metaphor: for the aircraft to bleed flame, it would have had to have flame in its veins and arteries, whereas what it had was aviation gasoline. But what really screws the sentence is the dangler, which makes the bleeding flame mortally wounded. He means that the aircraft was mortally wounded. Luckily you know he must mean that, because he has been talking about the aircraft in the previous sentence. So this sentence counts as a mild case. In thousands of more severe cases, from hundreds of other writers, mismatched apposition introduces genuine confusion. “At the age of eight, his father died in an accident” can be construed on its own, after a brief pause for thought. “At the age of eighteen, his father died in an accident” gets you into the area of needing to look elsewhere in the piece to find out what’s going on.

In its best years, *Private Eye* was written by privately educated junior mandarins who could make a stylistic analysis of jock-speak in order to score satirical points. But in June 2001, issue 1029 carried the following sentence as straight reportage. “Unheard of before the Tories plucked them from obscurity, cynics suggested that Smith Square couldn’t afford a more established agency...” After looking back, you can deduce that an advertising agency called Yellow M was plucked from obscurity, and not the cynics. A thousand issues before, you would never have had to bother. For a long time, *Private Eye’s* literary page was free of illiteracy, but now the disease is rampant even there. In issue 1042, for 30 November 2001, Andrew Morton’s catch-penny biography of Madonna was given what was obviously meant to be an exemplary wiggling, but the reviewer calamitously proved that his grip on the language was no more firm than that of his lumbering victim. “With countless newspaper serialisations and the most fortuitously timed royal death in the history of publishing behind him, any celebrity bum-chum knows that the phone call from Morton is akin to Judas’s 30 pieces of silver.” In whatever way something is timed, it can’t be timed fortuitously: the reviewer means “fortunately”. But the real damage is done by the muffed apposition. It can’t be the celebrity bum-chum that has all that stuff behind him, so it must be Morton. Or so we presume, if we are still reading. But why would we be doing that?

The internet magazines are a rich source of tangled connections. Their contributors are computer-literate but that doesn’t make them literate, and indeed seems to ensure the opposite. Here is a sentence from the July 2001 issue of one of the glossiest internet magazines, *the net*. (The preference for lower case, incidentally, is already a bad sign about the standard of literacy in the wired world: the illustrative use of upper case amounts to an information system, and to abandon it means being less communicative, not more.) But let’s try again: here is the sentence. “Once up and running the guardians of copyright are really going to have their work cut out to close it down.”

Sad experience has already taught the reader that “it” is more likely than “the guardians of copyright” to be the noun element that will soon be “up and running”. Previous sentences reveal that “it” is the Freenet filesharing system

for pirated feature movies; and that the Freenet system is still in development, and is therefore a likely candidate for being described as not yet up and running. Armed with that information, you can put the meaning of the sentence together. But the saddest thing about the sad experience is your hard-won knowledge that if the author had meant the guardians of copyright to be the subject of description, he would have put the adjectival element in the wrong place by about the same distance: "The guardians of copyright are really going to have their work cut out to close it down, once up and running."

On the web itself, the standard of English is even worse than in the magazines. The characteristic sentence on the web is transmitted in a nanosecond across the world and then slows to a crawl within the reader's brain, almost always because the grammar is out of whack: vocabulary is abundant, but its analytical deployment is an approximate mess. Efficiency of expression is in inverse proportion to the precision of the machines. It is possible to predict a future in which anybody will be able to transmit any message at any speed but nobody will be able to say anything intelligible.

Especially in those American glossy magazines with pretensions to being investigative, there is a brand of lumpen prose that perpetrates no real howlers but still weighs like lead because the reader continually has to join in the writing. In *Vanity Fair* for May 2001, an informative article about Bill Clinton's abandoned colleague Webb Hubbell evoked the scene when Hubbell was taken back to Little Rock to testify. "He arrived in the city where he had once been mayor handcuffed and shackled." Unless he was handcuffed and shackled while he was mayor, this sentence is just a mass of raw material waiting for the reader to make something of it. Ostensibly there is nothing much wrong with the grammar, but the word order is out of control; and in English composition, because the language is relatively uninflected, word order and grammar are seldom without connection. The sentence could be mended at the price of one comma: "Handcuffed and shackled, he arrived in the city where he had once been mayor." The *New Yorker's* style police would probably want two commas ("He arrived, handcuffed and shackled, in the city where he had once been mayor") because the *New Yorker* likes

the noun stated in front of any qualification, in case the reader cancels his subscription while being kept in suspense.

But faulty word order, when it does not introduce confusion, is a secondary issue compared with faulty grammar when it does. You can write charmlessly without insulting the reader. But to write ungrammatically, and not realise it, is to insult the English language. It also removes the possibility of being ungrammatical on purpose: a real impoverishment when it comes to special effects. And in this respect the British are a long way ahead of the Americans: a long way ahead, that is, on the road to perdition.

"Even as Congress was voting," wrote Anthony Holden in his *New York Diary* for the *Observer*, 18 November 2001, "one rogue security-dodger in Atlanta was enough to grind the world's busiest airport to a prolonged halt ..." Anthony Holden once gave me some crucial help on a Washington assignment, so to quote one of his less-polished sentences might seem a harsh way to reward him, but I like to think he would do the same for me. The language, as Keats said after being repelled by Milton, should be kept up. Holden is a long-serving professional whose prose is normally as well calculated as his poker playing, and the *Observer* section editors were once the best in Fleet Street. But on this occasion both the writer and his editor must have nodded off at once. The original metaphor depends for its effect on evoking the sound of some mechanism grinding to a halt. The metaphor is fatally diluted when something grinds something else to a halt: for one thing, it would be a slow way of stopping an airport.

Usually, when a metaphor slithers into imprecision, it is because the activity from which it was drawn is no longer current practice. Nobody gets the picture, because there is no longer a picture to be got. The expression "loose cannon", for example, grew from the actuality of an untethered cannon, through its enormous weight, working havoc on the gun-deck of a wooden warship rolling and pitching in heavy weather. For a long time there have been no wooden warships, but the metaphor stayed accurate while everybody who could read was still reading CS Forester. Finally some journalist who hadn't, but who liked the ring of the expression, falsely deduced that the loose cannon caused damage because

its barrel was too big for the shot, and so we started hearing about the damage the loose cannon might do when fired.

Similarly, "he shot himself in the foot" originally referred to a soldier in the Great War who hoped that a self-inflicted wound would buy him a ticket out of the trenches. Perhaps because of the irresistible mental image of a Western gunslinger pulling the trigger while getting his revolver out of its holster, the metaphor is nowadays almost universally used to evoke clumsiness rather than cowardice. Sometimes the words within the metaphor change. "Home in" is now often written as "hone in" because the writer thinks "hone" sounds rather grand without knowing what it means: the age has passed when knives needed to be re-ground. Now they can just be replaced.

Examples of deteriorating metaphors could be multiplied. There is seldom any stopping the process after it begins to affect good writers. Bad writers can be mocked, but good writers inexorably spread the word: and if the word is the wrong one, the language changes. As I put the finishing touches to this piece in May 2006, AA Gill, the excellent television critic on the *Sunday Times*, has just used the word "solipsisms" where he obviously meant "solecisms". Gill is dyslexic, and he phones in his column to copy takers who aren't always accurate, so he had a good

excuse. But his editor had no excuse at all. The chances are that the editor simply didn't know the difference, and that on the *Sunday Times* the number of solecisms will inexorably increase, and that they will be called solipsisms if they are noticed at all.

The language has always changed, so to protest looks reactionary. If there were no reactionaries, however, deterioration would become galloping decay. In reality, decay does not gallop, but we all know what a horse is even if we have not ridden one, so everyone realises, so far, that "galloping" is being used metaphorically. When all the horses have gone, "galloping" will just mean "rapid". After a galloping shave that splattered the bathroom mirror like a loose cannon, he honed in on his car, but when he could not find his keys he was ground to a halt by the awful realisation that he had shot himself in the foot.

You know what I mean, even though every component of the sentence has lost touch with its own history. The typical prose of the present has no past. Whether it has a future remains to be seen.

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For a bio and links to profiles, see
<http://www.clivejames.com/author/bio>

Sixth International PLAIN Conference Amsterdam, 11-14 October 2007

The Plain Language Association International (PLAIN) is holding its sixth conference in Amsterdam on 11-14 October 2007. The conference brings together plain-language experts from around the world to present the latest research and techniques.

The hosts will be Wessel Visser and his colleagues at Bureautaal, a communications consultancy specialising in plain language. The historic venue, the Beurs van Berlage, is in central Amsterdam, at walking distance from the canals, several hotels, and the Royal Palace.

Registration is now open, and PLAIN members get a discount. Proposals are invited to present over 100 papers in more than 50 workshops, with a deadline of 15 June 2007.

Please visit the conference website, <http://www.plain2007.com>, for full information. You can find out more about PLAIN at <http://www.plainlanguagenetwork.org>.

Punctuation

Alec Samuels

Barrister

We all know and appreciate the richness of the English language, especially in vocabulary. However, this very richness may compromise clarity of communication. Lack of syntax and gender and structure tempt writers to prolixity, to the use of descriptive and subordinate clauses, and to excessive punctuation. The advent of the language of technology, in computers and mobile phones, has created a need for new punctuation rules. In the old days as a young lawyer I was taught to be very careful with punctuation and to use it sparsely—indeed to dispense with or to avoid punctuation where possible. Apparently by using punctuation the drafter might:

- be tempted to use unnecessarily long and unclear sentences
- inadvertently alter the meaning of words and phrases
- risk the typist or editor or printer or publisher overlooking or excising or misplacing or misunderstanding the punctuation and so inadvertently alter the meaning.

Worst of all, in a somewhat slovenly age, the drafter might not draft as thoughtfully and carefully as they could and should. Although the absence of punctuation might make a poorly drafted document even more difficult to construe—*Steel* (1979) Chancery 218.

Punctuation can be of some assistance in constructing the meaning of a document—*R v Schildkamp* (1971) Appeal Cases 1, 10E, Lord Reid; and *Hanlon v Law Society* (1981) Appeal Cases 124, 197.

Latin has no punctuation, so drafting always had to be meticulous to avoid any ambiguity.

Try drafting today without using punctuation apart from full stops. If there is any ambiguity, redraft. See what it looks like on the page or screen. Try composing to produce a pleasant

visual effect. If punctuation is used, how can its use be justified? Is punctuation necessary for the style?

The Statute Law Society is devoted to clarity in legislation. The “bible” of its members is the Report of the Renton Committee. In it Lord Renton, the doyen of the movement, urged the use of full stops and shorter sentences. However he recognised that where the thoughts in two sentences are closely linked it may be appropriate to join the sentences by a co-ordinating conjunctive preceded by a semi-colon. This would emphasise the link and, in some cases, also avoid repetition.

Any punctuation in the text forms part of the statutory text, although this has not always been the case. In *Marshall v Cottingham* (1982) Chancery 82, 88A, (1981) 3 All England Reports 8, at 12a, Megarry VC said that punctuation is normally an aid, and no more than an aid, towards revealing the meaning of the phrases used and the sense that they are to convey when put in their setting. Punctuation is the servant and not the master of substance and meaning. Punctuate the following in order to make sense of it:

Every lady in this land
Hath twenty nails upon each hand
Five and twenty on hands and feet
And this is true without deceit.

And compare “X said Y is a thief” with “X, said Y, is a thief”, says R. E. Megarry in *A New Miscellany—at-Law: Yet Another Diversion for Lawyers and Others*, The Lawbook Exchange, Ltd, 2005, p 203. The leading legislative drafting commentators naturally consider punctuation. G C Thornton, in *Legislative Drafting*, Butterworths, 4th edition, 1996, provides a detailed survey. He says punctuation makes the relationship of parts of a sentence more meaningful and apparent to the reader—that it is a device of syntax suggesting groupings, revealing structure, and the quality of connection. Thornton suggests four rules:

1. Punctuate sparingly and with purpose.
2. Punctuate for structure and not for sound.
3. Be conventional, there is no place for the virtuoso comma.
4. Be consistent.

The comma separates items, e.g. (a), (b) and (c). It breaks up long sentences. The semi-colon indicates related, but not necessarily conjoined, words and phrases, such as a series or list of items set out in a section.

“The following shall qualify:

- (a) ;
- (b) ;
- (c) ;
- (d) .”

The style of statutory drafting has changed dramatically since the mid-nineteenth century. Long Victorian sentences, heavily punctuated, directed principally at legal professionals, have given way to visually composed and more readily comprehended pages directed at “users” and “consumers”. Text is itemised and broken up wherever possible into sections, sub-sections, sub-sub-sections, using lists, tables, numbering and so on.

The late Lord Denning was a master of the short sentence—he had a most distinctive staccato style. This may be appropriate for telling a story but may not be so satisfactory for legal exposition in judgments.

In *R v Casement* (1917) 1 King’s Bench 98, (1917) 12 Cr App R 99, (1917) 25 Cox CC 480, 503, the accused, Casement, whilst in Germany, sought to persuade British prisoners of war in Germany to join the German forces. Casement came to Britain and was arrested and indicted for treason under the *Treason Act* of 1351. The charge was that he levied war against the King in the realm or was adherent to the King’s enemies in the realm, giving them aid and comfort in the realm, or elsewhere. The defence argued that either limb of the offence could only take place in the realm and not outside the realm. On the evidence the first limb did not apply. Aid and comfort could be received anywhere, but the adherence, that is to say the attempted persuasion, could only take place in the realm. The historical explanation for the statutory language was alleged to be that in 1351 many barons owed allegiance to both the English king and the French king. They therefore could not commit treason against the English king when they were in France—the realm of the French king and not of the English king.

English criminal law has traditionally been territorial in scope and effective only within the jurisdiction. The Court of Criminal Appeal held that on a proper construction of the statute the words “giving them aid and comfort” were parenthetical. The Court also held that the words “or elsewhere” were not confined to the parenthetical comment, but applied to the whole of the sentence and therefore “adherence to the king’s enemies” could constitute an offence wherever committed. Thus liability was determined under a capital offence in the English criminal calendar, in a sense all turning on a comma. See *Injustice: State Trials from Socrates to Nuremberg*, Brian Harris, Sutton, 2006.

If an agreement or statute contains the wrong word or the wrong spelling, or if the word is in the wrong place or the grammar is wrong, then the error is usually obvious and can be addressed. If a comma is in the wrong place the error may not be so obvious and may be difficult to overcome. The presence or absence of a comma between the words lamp and post can make a lot of difference to meaning—*Statutory Interpretation*, F.A.R. Bennion, 4th edition, 2005, pp 640-647.

A problem frequently arises where a sentence contains two limbs with a following qualification and the issue is whether the qualification applies to both limbs or only to the second. See “The importance of punctuation” by Professor Butt (2006) 56 *Clarity* 54. In *Bodden v Metropolitan Police Commissioner* (1990) 2 Queen’s Bench 397 CA, D was charged with “wilfully interrupting the proceedings in court or otherwise misbehaving in court”. D used a loud hailer outside the court that drowned the evidence being given in court. D did not misbehave in court (second limb); but did he wilfully interrupt the proceedings in court (first limb)? Perhaps a redrafted sentence, without any punctuation, could have prevented the problem. Perhaps a comma after “in court” might have covered conduct both in and out of court. The mischief aimed at in the statute and the intention of the legislature can be helpful in construction of a statute.

In *Sydall v Castings Ltd* (1967) 1 Queen’s Bench 303, Lord Denning MR seeking “justice” in the interpretation of a will in effect accused Russell L J of pedantry. Russell L J took this as a compliment, pointing out

that in *The Merchant of Venice*, Portia won her case on pedantry.

The lay recent classic on punctuation is *Eats, Shoots & Leaves, The Zero Tolerance Approach to Punctuation* by Lynne Truss, Profile Books, 2003. (Note the punctuation in the title.) The book is dedicated "To the memory of the striking Bolshevik printers of St Petersburg who, in 1905, demanded to be paid the same rate for punctuation marks as for letters, and thereby directly precipitated the first Russian revolution."

Amongst many compelling examples Truss gives the following:

A woman, without her man, is nothing.
A woman: without her, man is nothing.

Comfort ye my people.
Comfort ye, my people.

The prisoner said the judge was mad.
The prisoner, said the judge, was mad.

Conclusion

Drafters seeking and achieving clarity use punctuation sparingly, cautiously and carefully, but effectively, as a means or as a tool to promote clarity, style and certainty.

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Alec Samuels is a JP, Barrister, and councillor who has served in the Law Faculty in the University of Southampton for 50 years. He is a lecturer and writer on legal subjects, a contributor to many journals, and a longstanding member of the Statute Law Society and Clarity.

Letter to the editor

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Telephone 01278 653455

28 December 2006

The Editor of *Clarity*

Dear Sir,

I was interested in Peter Butt's contribution ("The importance of punctuation") to the November issue. He refers to an agreement containing a provision that it

shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one [year's] prior notice in writing by either party.

Peter Butt says:

Notice the second comma. Did it have the effect of permitting the contract to be terminated by one year's notice *at any time*, or only after the initial period of 5 years had expired?

The task of interpretation evidently fell to the Canadian Radio-television and Telecommunications Commission which, because of the presence of this second comma, opted for the first of these two alternatives.

This seems odd. It looks a bit as if the Commission was so hypnotised by the comma that it failed to consider the context in which it appeared. If the contract really was meant to be terminable at *any time*, why were the 5 year periods mentioned at all? Why did the drafter not say simply that it

shall continue in force unless and until terminated by one [year's] notice ...?

Surely, in specifying these 5 year periods, the drafter intended the contract to endure for the first one at least: otherwise why mention them? If this was indeed the drafter's intention, the second comma is by no means incompatible with it: the placing of this comma might then be irritating to a purist, but one sees commas in worse places than this nearly every day. Furthermore it seems odd that a contract of the kind which this one seems to be should deliberately be made terminable after only a year by notice given the moment it is made.

But the argument which I have just put forward is inconsistent not only with the first of

the two alternative interpretations but also (it seems to me) with the second. It explains why the drafter specified an initial 5 year period, but it doesn't by itself explain why he or she specified successive ones. If the contract was meant to endure for 5 years and *then* to be terminable at any time by one year's notice, these successive periods are meaningless.

My guess would be that the drafter intended neither interpretation. When he or she refers to one year's "prior" notice, one has to ask, "prior to what?" The word "prior" is unnecessary if it simply means "prior to the date when it ends": the notice could hardly be given after it had ended. No, my guess is that the drafter meant "prior to the start of the next 5 year period". This result gives due weight to all the words which appear in the extract and produces a perfectly sensible result: that the contract endures for successive periods of 5 years certain unless and until a 5 year period is prevented from starting by a notice given one year before the start date.

If readers' patience allow, I would add some brief comments. First, whichever of these three interpretations is the correct one, the agreement is self-evidently not clear enough to achieve it with certainty.

Second, I am very conscious that the agreement (which must, as we all know, be construed as whole) may contain something else that makes one or other of these interpretations more or less likely than I realise.

And third, what lessons about punctuation can one draw from all this? That punctuation, if used, should be perfect—yes, certainly. But in the real world people don't punctuate perfectly. At the risk of sounding like the old fogey that I am, it seems to me that they are no longer taught properly how to do it. I have to confess that when I was in practice and producing legal precedents for my firm and for publication, I didn't punctuate any of them. (I remember Joe Kimble's kind but sad reaction when I confessed this to him.) I had several reasons for rejecting punctuation, but amongst them was my feeling that other people couldn't be relied upon to reproduce it accurately, nor to punctuate accurately any changes they made, nor to punctuate accurately any other documents of their own devising.

As, perhaps, this particular case confirms.

Yours faithfully,
Richard Oerton

Improving our writing by understanding how people read personally addressed household mail

Susan Bell

Susan Bell Research

Some readers “pole vault” into the middle of a document; others take a “hop-step-and-bail-out” approach. The better we understand what readers do and what motivates them, the better we are likely to write.

The challenge of household mail

One of our daily challenges of modern life is to manage the increasing quantity of domestic mail—and all the various documents that arrive as enclosures. Many people read only a fraction of the mail they receive at home—even though in some cases the writers have clearly followed traditional plain-language guidelines. In this article, I argue that writers of public documents need to understand their readers much better. If they don’t, then it is unlikely their documents will cut through the clutter of domestic mail. Specifically, I suggest that writers need to know more about how their readers actually read.

The focus of this article is on how people read the personally addressed mail and its enclosures they receive at home from commercial and government organisations. Examples include customer letters, pamphlets and brochures. Banks, telcos, government departments and utilities all write to their customers, shareholders or stakeholders, as do many other organisations. Broadly speaking these are “public documents”.

I have based the article on the results of research that I have conducted over the last decade on documents like these, and the exploratory usability research that I conducted specifically for this article. I have become an expert at watching the way people read, and how they navigate around documents.

Different ways to read—“reading” becomes “athletics”

There are four different ways people “read”:

1. Word for word, sentence by sentence. This is very rare for public documents longer than two pages.
2. **Headline skimming:** going from headline to headline in an orderly manner from the beginning. While a common approach, this strategy is not without its flaws, described below.
3. **Pole-vaulting.** To find out whether a brochure or magazine is worth reading, some people simply “pole-vault” right into the middle of it, usually landing on a headline or diagram.
4. **The hop, skip and jump technique.** Some readers hop and skip through documents, in a state of serial distraction, hopping from one distraction to the next, and skipping large chunks of text. By “distraction” I mean:
 - words in a different font from the main font;
 - any bulleted list;
 - a table, diagram or picture.

People who hop, skip and jump read what catches their eye. The things that catch their eye include: some headings, but not necessarily all; short bulleted lists, but not long ones; and parts of tables.

In summary, writers should anticipate that the intended audience might not actually read their document word for word from the beginning, especially if the document is longer than two pages. Instead, they might pole-vault into the middle of it—and potentially straight out again. Alternatively, they might hop, skip and jump their way through it.

The reader's assumption: public documents contain relevant information

Most people expect the mail they receive at home from commercial and government organisations to be important or relevant to them, to a degree at least. They know that this type of mail usually includes information about the products or services they use—for example, whether prices have gone up, or whether certain services have been withdrawn. The consequences of not knowing these facts can be annoying or expensive.

However, because time pressures make it impossible for anyone to thoroughly read everything that seems important to them in one sitting, people use the least possible effort to gain the most information that they can at the time.

How readers try to get the most information with the least effort

When people sort through their household mail, the overriding principle is to get the most relevant information from it in a short time. This means not reading anything twice, and not starting something that cannot be finished there and then:

1. They "Never read anything twice"

Householders do not want to waste their limited time reading something they have already read, or already know. They therefore are likely to throw a document away unopened or to give it the barest of glances if it seems to be a duplicate, or to contain information they already possess.

The "never read anything twice" rule therefore states that "if a document looks too similar to something received previously, then the householder will believe that they have read this already, so don't need to look at it now."

Many organisations put considerable effort into protecting their brand image by making all their documents conform to a design template. The danger is if it seems no different from previous mail, it may never be opened, however important it is.

2. They "Don't start what they can't finish"

When people do read a document, they like to finish it. People typically do not like leaving a job half-done; they do not like to start something they cannot finish.

When people scan through their household mail, some documents will appear important enough to read, but too long to finish. They typically put this kind of important mail on top of a pile of other important mail that is too long to finish. If a document is still on the pile after a few weeks, then many people will then file it unread, or discard it. There's a paradox—some readers are more likely to read unimportant documents, than important ones. The lesson is: if you want people to read them, make your documents look easy to finish, and different from mail they have received before.

Writing for the athletic reader

If you expect your document might receive the "pole-vaulting" or "hop, skip and jump" treatment, there are two things to keep in mind:

1. They "Read below (they never go back up)". So assume your reader will never reverse

When we write headlines, we want our readers to keep reading the text below the heading; if they are interested in the topic, they will do.

When readers use the "hop skip and jump" technique, they follow the same pattern. If they have hopped to a nice short bulleted list and the topics in the list interest them, then they will keep reading the text below the bulleted list until distracted by the next list, or heading or whatever.

What don't they do? They don't go back up the page from this point of distraction. So, if page 1 of your document contains 3 long paragraphs followed by a bulleted list at the bottom, then many readers will start at the bulleted list and proceed straight to page 2. They never read the introductory paragraphs.

It is a good idea for writers:

- to include any bulleted list near the top of a section, rather than precede it with several blocks of text which some readers will skip over; and
- in the sentence after the bulleted list, to restate the topic of the section, for those readers who missed the opening paragraphs.

2. *They reckon "You are only as good as your last headline". So use effective and interesting headlines*

Readers jump from headline to headline until they encounter a headline that does not interest them. What do they do then? Do they hop to the next headline? No, they don't. They stop reading the entire document. So as a writer you are only as good as your last headline. Readers assume that writers put their interesting and relevant information early in a document, so a boring headline is a signal that "it's OK, you don't have to read any more".

Summary: watch people read.

In this article, I have tried to show that the act of reading a public document is inextricably caught up with the process of managing the quantity of mail received at home. People do not so much read public documents as navigate their way through them.

Many people know that they should read the public documents they receive. They believe the documents contain information which is relevant to them, or which they need to know. However, time pressures mean that many people deliberately use the least effort to gain the most information they can from these

documents. They avoid anything which looks like they have read it before. They put documents aside which are too long or complex to finish at the time they were opened, sometimes forever. Some people only read the headlines, until they get bored and then stop reading altogether. Others read only what catches their eye and in doing so skip over large chunks of text.

We have become accustomed to being told that readers read headlines, almost implying that it does not matter what the headline says. It turns out that some people read only the interesting headlines, and worse, that the first boring headline is the last headline they are prepared to read.

The public document paradox is that—some times—the more important information is, the less likely the public is to read it.

To write in plain language requires thinking about the way that readers will navigate through the document. To learn how readers navigate, watch how readers read.

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Susan Bell is a highly respected market and social researcher who combines considerable research expertise with a special interest in the clarity of messages.

Members by country

Australia	121	France	1	Philippines	1
Austria	1	Germany	3	Portugal	1
Bahamas	2	Gran Canaria	1	Scotland	11
Bangladesh	6	Hong Kong	18	Singapore	8
Belgium	5	India	6	Slovakia	1
Bermuda	1	Ireland	5	South Africa	144
Brazil	1	Isle of Man	1	Spain	3
British Virgin Islands	1	Israel	4	St. Lucia	2
British West Indies	3	Italy	3	Sweden	16
Canada	75	Jamaica	1	Switzerland	1
Chile	1	Japan	7	Thailand	1
China	1	Jersey	3	Trinidad and Tobago	3
Cote d'Ivoire	1	Lesotho	1	USA	200
Denmark	2	Mexico	7	Wales	6
Malaysia	1	Netherlands	6	Zimbabwe	1
England	322	New Zealand	14		
Finland	6	Nigeria	9	Total	1039

A redrafting exercise

Justin Vaughan, Ryan Thorne and Ben Zhang

Editorial introduction from Peter Butt—former Clarity President and occasional Clarity Guest Editor

[Each year I run a short course on legal drafting for final year law students at the University of Sydney. As part of the assessment for the course, students are asked to take a gobbledygook document and redraft it in plain language. The students may be as inventive as they like, but they must ensure that the redraft retains the legal nuances of the original.]

The following is a rewrite offered by three outstanding students. I hope that you will agree with me that they did a superb job. Key sections from the original clauses 5 (confidentiality) and 6 (exclusivity/non competition) are printed at the end of the redraft. Ed.]

Consulting Agreement

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Details

Parties		<i>Company and Consultant</i>
Company ("We", "our")	Name Address Telephone	<i>Company Pty Ltd</i> 123 Main St, Sydney, NSW, 2000 (02) 9123 4567
Consultant ("You", "your")	Name Address Telephone	<i>Consultant</i> 1 Accidenture Pl, Sydney, NSW, 2000 (02) 9876 5432
Consulting Services		Described in Schedule 1
Price		\$100 000
Bonus Options		12 000
Start Date		1 January 2005
End Date		1 January 2010
Governing Law		New South Wales

1. Consulting Services¹

1.1. Services you must provide

You agree² to perform the Consulting Services described in Schedule 1.³

1.2. You must comply with applicable laws

When performing the Consulting Services, you agree to comply with applicable federal, state, local and foreign laws.

2. Price⁴

2.1. What we must pay—your base fee⁵

We agree to pay the Price described in the Details.

Payments are calculated monthly and are subject to applicable statutory deductions or withholdings.

2.2. What we must pay—your expenses⁶

We agree to reimburse you for any reasonable expenses you incur while performing the Consulting Services. You must provide us with an itemised account of the expenses and reasonable supporting data.

Reimbursement is subject to our policy on business related expenses. We will give you Notice of any changes to our policy.⁷

2.3. When we will pay you⁸

We agree to pay any amount we owe under this Agreement on the 1st and 15th of every month.

Stock options⁹

2.3.1. Your bonus is subject to our Board's approval

If our Board of Directors approves, we will give you the Bonus Options described in the Details.

2.3.2. Options are over ordinary shares

The options give you a right to buy our ordinary shares at the exercise price.

2.3.3. What the exercise price will be

The exercise price of the options is the closing price on the End Date described in the Details.¹⁰

2.3.4. When we will give you the options

We will give you:

- (a) 1/3 of the options on the day the Board of Directors gives its approval ("approval date"); and
- (b) 1/12 of the options every 3 months after the approval date (until you have received all of the Bonus Options described in the details).

Example:	
If the Board of Directors agrees on 1 January 2010 to give you 12 000 options, you will receive the options on the following days:	
Day	Number of Options
1 January 2010 (“approval date”)	4 000
1 April 2010	1 000
1 July 2010	1 000
1 October 2010	1 000
1 January 2011	1 000
1 April 2011	1 000
1 July 2011	1 000
1 October 2011	1 000
1 January 2012	1 000

2.3.5. When the options will expire

The options will expire 10 years after the approval date.

2.3.6. Conditions of the options

The options are subject to our Stock Option and Restricted Stock Plan.

3. Duration¹¹

3.1. When this Agreement starts

This Agreement commences on the Start Date described in the Details.

3.2. When this Agreement ends

This Agreement ends on the End Date described in the Details, unless it ends earlier because of Clause 7 (“Ending the Agreement”).

4. Confidentiality

4.1. You must protect our confidential information

You must not disclose our confidential information.

4.2. We own the confidential information¹²

We own all documents that contain¹³ confidential information.

We own all work¹⁴ you produce based on confidential information. You must inform us promptly when you produce this work. You must transfer to us any rights you have in this work.

4.3. You must return our property¹⁵

When this Agreement ends, or at our request, you must promptly deliver to us all materials¹⁶ within your custody, possession or power¹⁷:

- (a) that contain confidential information; or
- (b) we have provided to you.

4.4. What you may disclose¹⁸

You may disclose any confidential information that:

- (a) we require you to disclose for our business purposes; or
- (b) we authorise you, by Notice, to disclose.

4.5. What is confidential information?

Confidential information is information that:

- (a) we provide to you; or
- (b) you discover¹⁹

while you perform the Consulting Services.

Confidential information includes information about us, our products, suppliers or customers.²⁰ It may take any form and is not limited to information marked “confidential”.

Confidential information does not include information that becomes public through no fault of your own.²¹

5. Restraint

5.1. You must not be involved with our competitors²²

You must not be involved with our competitors for the duration of the Agreement.

5.2. You must not interfere with our business²³

You must not interfere with our clients or employees for the duration of the Agreement.

5.3. What is being involved with our competitors?

You must not, directly or indirectly:

- (a) own an interest in; or
- (b) manage; or
- (c) operate; or
- (d) join; or
- (e) control; or
- (f) perform services for; or
- (g) lend money to; or
- (h) render financial or other assistance to

our competitors.

However, you or your immediate family may own up to 5% of any of our competitors.²⁴

5.4. Who are our competitors?

Our competitors include any:

- (a) individual; or
- (b) partnership; or
- (c) corporation; or
- (d) other entity²⁵

that is engaged in a similar business to us in one of our markets.²⁶

5.5. What is interference?

Interference includes if you, directly or indirectly, recruit or solicit persons who:

- (a) are our employees; or
- (b) were our employees within the last 12 months; or
- (c) are our clients; or
- (d) were our clients within the last 12 months.

6. Dispute resolution and remedies

6.1. How disputes will be resolved

Unless this Agreement says otherwise, any disputes about this Agreement (including tort and product liability claims) must be finally settled by arbitration.

6.2. Arbitration²⁷

6.2.1. What rules apply to the arbitration?

The arbitration will be governed by the Commercial Arbitration Rules of the American Arbitration Association, unless modified by this Agreement.

6.2.2. The place of the arbitration

The seat²⁸ of arbitration will be Maryland, USA.

6.2.3. The time of the arbitration

The arbitration tribunal will determine the time of the arbitration.

6.2.4. The language of the arbitration

The arbitration will be in English.

6.2.5. The tribunal must give reasons

The arbitration tribunal must give reasons for its award²⁹.

6.2.6. How will the award be enforced?

Either Party may apply to a court of competent jurisdiction³⁰ to:

- (a) enter the award as a judgment; or
- (b) obtain judicial acceptance of the award and an order for enforcement.

6.2.7. Who will pay the enforcement costs?

Unless the arbitration tribunal decides otherwise, the unsuccessful party must pay the successful party's reasonable costs.

Reasonable costs include legal fees, investigation costs, litigation costs and arbitration costs.

6.3. Equitable remedies³¹

We remain able to take proceedings in equity about any actual or anticipated breach by you of Clause 4 ("Confidentiality") or Clause 5 ("Restraint").

6.3.1. You submit to jurisdiction

You submit to the jurisdiction of any court in which we take proceedings in equity.³²

6.3.2. We may suspend payments

We may suspend any payments we owe you during the proceedings in equity.³³

6.3.3. What are proceedings in equity?

Proceedings in equity include proceedings for injunctions, specific performance or other equitable remedies.

6.4. Remedies are cumulative³⁴

Any remedy provided by this Agreement is in addition to any other remedy available to us.

7. Ending the Agreement³⁵

7.1. How the Agreement ends—your breach

We may end³⁶ this Agreement if you breach any of its provisions.

7.2. How the Agreement ends—your death or inability to perform

This Agreement will end if you:

- (a) die; or
- (b) are unable to perform your obligations for a continuous period of 60 days.

7.3. How the Agreement ends—by Notice

Either Party may end this Agreement by giving 60 days' Notice to the other Party.

7.4. Consequences of ending the Agreement

We must pay any amounts you have earned up to the date the Agreement ends.³⁷

Other than this, we are not obliged to make further payments to you.

7.5. What clauses survive the end of this Agreement?³⁸

If this Agreement ends, the following clauses survive:

- (a) Clause 4 ("Confidentiality")
- (b) Clause 5 ("Dispute resolution and remedies").

8. Notices³⁹

8.1. What form must notice take?

Any notice required by this Agreement must be in writing and sent to the other Party's address. That address is the Address described in the Details, unless a Party has changed its address under Clause 8.4 ("How a Party can change its address").

8.2. What is the method of delivery?

Any notice must be delivered:

- (a) personally; or
- (b) by fax; or
- (c) by registered or certified mail (with return receipt requested).

8.3. When does notice takes effect?

A notice delivered under Clause 8.2 ("Method of delivery") is effective from the time it is received.

8.4. How a Party can change its address

A Party may change its address by giving Notice to the other Party.

9. Release⁴⁰

9.1 You release these persons from liability

You release the protected parties from any legal action you may take against them, except in relation to this Agreement.

9.2 Who are the protected parties?⁴¹

The protected parties include:

- (a) us; and
- (b) our predecessors; and
- (c) our Associates; and
- (d) our Associates' predecessors;⁴²

and persons who participate in the above.

Persons who participate include:

- (a) employees; and
- (b) contractors; and
- (c) consultants; and
- (d) officers; and
- (e) directors; and
- (f) shareholders; and
- (g) limited partners; and
- (h) general partners; and
- (i) members; and
- (j) managers.

9.3 What is a legal action?

Legal action includes, but is not limited to:

- (a) litigation; or
- (b) arbitration; or
- (c) any other legal proceedings.

A legal action may occur in any jurisdiction.⁴³

10. General⁴⁴

10.1. This is the entire agreement⁴⁵

This Agreement is the final and entire agreement. It supersedes anything previously said or written about its subject matter.

10.2. What if there are counterparts?⁴⁶

If there is more than one signed copy of this Agreement, together those copies are treated as the one document.

10.3. What is the governing law?⁴⁷

This Agreement is governed by the Governing Law described in the Details, without regard to the principles of conflicts of laws.

10.4. How to interpret headings⁴⁸

Headings are for convenience only. They do not affect how a clause is interpreted.

10.5. Further steps⁴⁹

Each Party agrees to do any acts necessary to give effect to this Agreement.

10.6. You must have no conflicts⁵⁰

You guarantee⁵¹ that you do not have any other obligations that restrict your ability to perform this Agreement.

10.7. How to amend this Agreement⁵²

Any amendment to this Agreement must be in writing and signed by both Parties.

10.8. Waiver of rights⁵³

If a Party waives a right in this Agreement, that does not affect any other rights the Party may have.

A Party must give Notice to waive any right given by this Agreement.

10.9. Assigning the Agreement⁵⁴

You must not assign or deal with⁵⁵ your rights under this Agreement.

We must not assign or deal with our rights under this Agreement, except in favour of our Associates.⁵⁶

10.10. Successors are bound by this Agreement⁵⁷

The rights and obligations in this Agreement are binding and enforceable against the Parties and the Parties' agents and successors.

10.11. What happens if a clause is severed?⁵⁸

If a clause in this Agreement is held to be unenforceable:

- (a) it is automatically replaced by an enforceable clause with the closest meaning; and
- (b) the other clauses in the Agreement remain unaffected.

10.12. You are an independent contractor⁵⁹

You are an independent contractor, not an employee. You are solely responsible for your own insurance (including workers compensation), tax payments and superannuation.

DELETED:

Rights of third parties [Old 11.4]⁶⁰

This Agreement does not give rights to non-parties.

11. Definitions

11.1. Who are the parties?

"Associates" includes persons controlling us, controlled by us or under common control with us.

"You" includes the Consultant, your successors and your assigns.

"We" includes the Company, our successors and our assigns.

11.2. Other terms used in this agreement

\$ All dollar amounts are in US dollars.

"Agreement" means this entire agreement, as described in Clause 10.1 ("This is the entire agreement").

"Consulting Services" means the services described in Clause 1 ("Consulting Services").

"Details" means the summary on the first page of this Agreement.

"Notice" means a notice that is given in accordance with Clause 8 ("Notices").

"Party" and "Parties" means the Company and Consultant described in the Details.

Schedule 1—Consulting Services

You agree to perform the following services for us and our Associates:⁶¹

(a) *details of the services*

(b) ...

(c) ...

You will perform these services as requested by *the management of the Company*.⁶²

You agree to be available for *a minimum of 8 hours per working day* to perform these services.⁶³

[Insert signing clause.]

Endnotes

¹ We moved Article II “Consulting Duties and Responsibilities” to the first clause. We believe that it is most logical that the services appear first because they are the reason for the contract and the payments.

² To emphasise the exchange of consideration, we have used the phrase “agrees to” rather than “must” in the first two clauses.

³ We moved Section 2.3 “Availability” to Schedule 1. As this is a standard form contract, we wanted to ensure that all “variables” are either on the Details page or in a Schedule (for more complex information).

⁴ We moved Article IV “Compensation” to the second clause because it is the consideration for the services provided in Clause 1. Therefore, they should appear together.

⁵ Formerly section 4.1 “Base Compensation”.

⁶ We deleted Section 4.2 because (1) it was an unnecessary preamble to Section 4.3 “Expenses” and Section 4.4 “Stock Option”; and (2) we believe that people would not think that “reimbursements for expenses” are “bonuses”.

⁷ The original agreement did not provide for any changes in company policy on business-related expenses. To avoid potential disputes, we introduced a “Notice” provision.

⁸ The original agreement sets out preconditions for the payment of expenses, but not the time of payment. To fix this problem, we moved this part of Section 4.1 to a separate clause – thus covering both the payment of expenses and the base fee.

⁹ For ease of reading, we split Section 4.4 “Stock Options” into several subclauses.

¹⁰ As an aside, it would be more sensible for the company to make the exercise price an average of the closing price over a number of days. This is because the price might be artificially low on the exercise day.

¹¹ Previously Article III “Term of Agreement”.

¹² This condenses the majority of Section 5.2 and 5.3 (relating to ownership of information, inventions, etc).

¹³ We considered using the phrase “contain or refer to” instead of “refer to”. However, we decided that “contain or refer to” was too broad. For

example, this might capture memoranda that only say “bring me a copy of the Company’s business plan to the next meeting”.

¹⁴ Section 5.3. Work includes all inventions, improvements, discoveries and ideas.

¹⁵ Section 5.2.

¹⁶ All materials includes copies.

¹⁷ “Custody, possession and power” are distinct legal concepts which refer to different degrees of control of documents – see *Palmdale Insurance Ltd (In Liq) v L Grollo & Co Pty Ltd* [1987] VR 113; *Roux v ABC* [1992] 2 VR 577. We wish to encompass them all.

¹⁸ We made the last sentence of Section 5.1 a separate clause.

¹⁹ Trying to tie into the Inventions, Rights to Improvements section (5.3).

²⁰ This encompasses: (a) business practices; (b) technology; (c) business plans; (d) marketing; (e) financial information and plans; or (f) research activities.

²¹ This encompasses the “without his fault” concept in the final sentence of Section 5.1.

²² Formerly Section 6.1 “Exclusivity / No Competing Consulting”.

²³ Formerly Section 6.2 “No Interference”.

²⁴ Formerly Section 6.3 “Stock Ownership”.

²⁵ We removed “firm” from this list because it did not belong with the other terms – it is not a trading structure in the legal sense. We changed “business entity” to “entity” to ensure that we capture all manner of trusts, unincorporated associations, cooperatives, etc.

²⁶ We consolidated the territorial clause in Section 6.4 “Territorial Scope”.

²⁷ The original Section 7.1 “Arbitration” contained different concepts in no logical order. Therefore, we have split this section into many concise subclauses.

²⁸ We have used the word “seat” instead of “place”, for legal reasons. In arbitration law, a “seat” of arbitration is specified in an agreement to give a particular State jurisdiction and to activate local arbitration rules and procedures. The actual “place” or “site” of arbitration is irrelevant.

²⁹ We kept “award”, as opposed to “decision”, because it is a term of art in arbitration law. An “award” incorporates the idea that an arbitration ruling is capable of being enforced in a foreign jurisdiction.

³⁰ We are not defining court of competent jurisdiction, because a court will declare for itself whether it will accept jurisdiction.

³¹ Formerly Section 7.2 “Equitable Remedies”.

³² We have removed the phrase “in personam” because equity acts in personam.

³³ We have moved Section 7.3 into the equitable remedies section, because: (1) it refers to breaches of Articles V “Confidentiality” and VI “Exclusivity / Non-Competition”; (2) it refers to litigation; and (3) it refers to injunctive relief.

³⁴ Formerly Section 7.4 “Remedies not Exclusive”. However, we preferred to use active, positive words.

³⁵ Formerly Article VIII “Termination of Agreement”.

³⁶ We used “end” because it encompasses termination and rescission.

³⁷ We used “earned” because the only rights that survive termination are those that have accrued unconditionally, and the enforcement of which is not inconsistent with the election to terminate: *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 477 per Dixon J. If the contract is rescinded, then no payments have been earned “under” the agreement.

³⁸ We moved the survival clauses from the individual articles to this single clause. It is more logical to group them within the clause that deals with ending the agreement.

³⁹ Formerly Article IX “Notices”.

⁴⁰ Formerly Article X “Release”. We consolidated Section 10.1 “Released Parties” and Section 10.2 “Further Action” into this clause.

⁴¹ We defined “protected parties” before “legal action” because, logically, a party would first want to know who the protected parties are. Most parties will already have a basic idea of what a legal action is.

⁴² Probably need Associate’s predecessors, if an Associate is an actual person.

⁴³ See the former Section 10.1 “Released Parties”.

⁴⁴ Formerly Article XI “Miscellaneous”.

⁴⁵ Formerly 11.12 “Entire Agreement”.

⁴⁶ Formerly 11.8 “Counterparts”.

⁴⁷ Formerly 11.6 “Governing Law”.

⁴⁸ Formerly 11.11 “Headings”.

⁴⁹ Formerly 11.3 “Further Assurance”.

⁵⁰ Formerly 11.10 “No Conflicts”.

⁵¹ We replaced “represents and warrants” with “guarantee”.

⁵² Formerly 11.7 “Amendments”.

⁵³ Formerly 11.5 “Effect of Waiver”.

⁵⁴ Formerly 11.1 “Agreement is Non-Assignable”. Note that the essence of a personal service contract is that the rights are not able to be assigned: *Tolhurst v Associated Portland Cement Manufacturer (1900) Ltd* [1903] AC 414.

⁵⁵ We have added the phrase “otherwise deal with” to stop assignments or the creation of lesser interests (eg charges).

⁵⁶ “Us” includes our successors.

⁵⁷ Formerly 11.2 “Binding Effect”.

⁵⁸ Formerly 11.9 “Severability”. We moved subclause (a) before (b), as this arrangement is more logical.

⁵⁹ Formerly 11.13 “Declaration by Independent Contractor”.

⁶⁰ This clause may not be necessary because privity of contract and common sense both imply that third parties are not privy to the contract, unless expressly mentioned.

⁶¹ Contains the technical details which would have been included in Section 2.1.

⁶² Also see Section 2.1.

⁶³ Formerly Section 2.3 “Availability”.

⁶⁴ In Australia, two officers are required to sign on behalf of the company under section 127 of the *Corporations Act 2001* (Cth).

Justin Vaughan is a solicitor in the property group of the Sydney office of Mallesons Stephen Jaques.

Ryan Thorne and Ben Zhang are solicitors qualified to practice law in Australia. Justin and Ryan practice as lawyers in Sydney, and Ben is pursuing business interests in China.

This [piece] is based on work that the authors prepared for an assessment for the Bachelor of Laws degree at the University of Sydney.

CONSULTING AGREEMENT

THIS CONSULTING AGREEMENT (the "Agreement") is entered into as of the _____ day of _____, 2000 by and between [insert] Inc., and [name] ("Consultant"), residing at [_____]. Company and Consultant are sometimes referred to herein as the Parties, and individually as a Party.

WITNESSETH

WHEREAS, Consultant desires to provide [nature of services] to the Company, and the Company desires to retain Consultant to provide such consulting services;

NOW, THEREFORE, in consideration of the promises and mutual covenants herein contained, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, Consultant and the Company, intending to be and being legally bound hereby, Agree as follows:

Article V.

CONFIDENTIALITY

Section 5.1 Confidentiality. Consultant acknowledges that during the course of the period in which he provides services to the Company, he will be, from time to time, vested with confidential information (including without limitation) trade secrets relating to, inter alia, the business practices, technology, products, business plans, marketing, financial information and plans, and research activities of the Company, Associated Companies, and customers and suppliers of the foregoing. Consultant hereby agrees to keep all such information confidential, regardless of whether documents containing such information are marked as confidential, if he has been told, or should reasonably know or expect, that such information is confidential. Consultant also agrees that he will not, except as required in the conduct of Company business, or as authorized in writing by the Company, publish, disclose or make use of any such information or knowledge unless and until such information or knowledge shall have ceased to be secret or confidential without his fault.

Section 5.2 Exclusive Property. Consultant confirms that all confidential information is the exclusive property of the Company. All business records, papers and other documents kept or made by Consultant relating to the business of the Company or an Associated Company shall be and remain the property of the Company or the Associated Company. Upon the termination of this Agreement or upon the request of the Company at any time, Consultant shall promptly deliver to the Company, and shall retain no copies of, any written materials, records and documents made by Consultant or coming into his possession concerning the business or affairs of the Company or an Associated Company other than personal notes or correspondence of Consultant not containing proprietary information relating to such business or affairs.

Section 5.3 Inventions, Rights to Improvements. Consultant hereby sells, transfers and assigns to the Company any right, title and interest in any and all inventions, improvements, discoveries, and ideas (whether or not patentable or copyrightable) (collectively the "Inventions") which he may make or conceive while acting in his capacity as a consultant of the Company during the term of this Agreement, and which relate to or are applicable to any phase of the Company's and the Associated Companies' businesses. Consultant hereby agrees to communicate promptly and disclose to the Company all information, details and data pertaining to the aforementioned Inventions and to execute any documents and do any act reasonably necessary to perform his duties under this Section. Consultant also affirms that if any such Inventions shall be deemed confidential by the

Company, he will not disclose any such Inventions without prior written authorization of the Company.

Section 5.4 Survival of Article. The provisions of this Article 5 shall survive the termination of this Agreement for any reason whatsoever.

Article VI. **EXCLUSIVITY/NON-COMPETITION**

Section 6.1 Exclusivity / No Competing Consulting. For the term of this Agreement, Consultant shall not directly or indirectly, compete with the Company or any Associated Company, and he shall not directly or indirectly own an interest in, manage, operate, join, control, perform services for, lend money to, render financial or other assistance to, participate in, or be connected with, as an officer, employee, partner, stockholder, consultant or otherwise, any individual, partnership, firm, corporation or other business organization or entity that at such time is engaged in a business similar to that of the Company.

Section 6.2 No Interference. During the term of this Agreement, Consultant shall not, whether for his own account or for the account of any other individual, partnership, firm, corporation or other business organization, intentionally solicit, endeavor to entice away from the Company or an Associated Company, or otherwise interfere with the relationship of the Company or an Associated Company with any person who is employed by the Company or an Associated Company, or any person or entity who is, or was within the 12 month period immediately preceding, a customer or client of the Company or an Associated Company.

Section 6.3 Stock Ownership. Nothing in this Agreement shall prohibit Consultant from acquiring or holding any securities of any public company listed, provided that at any time during the term of this Agreement, Consultant and any members of his immediate family do not own more than five percent (5%) of any voting securities of any company engaged in a business similar to that of the Company.

Section 6.4 Territorial Scope. The prohibitions in Section 6.1 and Section 6.2 shall apply to any place where the Company or any Associated Company is doing business during the term of this Agreement.

Book review:

Mark Adler, *Clarity for Lawyers—Effective Legal Writing*,
2nd ed (2007: The Law Society, London)

Marco Stella

Special Counsel (Know How)
Mallesons Stephen Jaques

Overall impressions

Clarity for Lawyers is a practical book, written for lawyers by a lawyer. As you would expect, it's well written and easy to understand. As you might not expect, it's also entertaining. (More than once I was caught laughing out loud while reading it.) I think it will appeal to practising lawyers of all backgrounds and experience levels.

About the author

Mark is a solicitor who practises in the UK. This gives him the advantage of better understanding his readers and the sorts of problems they face on a daily basis. It also allows him to use materials that other authors may not have access to, for example actual correspondence between lawyers and their clients and between lawyers and other lawyers.

The other relevant thing about Mark is that he is a sole practitioner, which means that he runs his legal practice by himself. It also means that he can say whatever he likes without having to worry about upsetting his employer or his partners. In his book, Mark takes full advantage of this freedom by admitting previous mistakes and offering refreshingly candid views on everything from lawyers' work practices to points of punctuation.

About the book

The first thing I noticed about Mark's book is that it's a second edition; the first appeared in 1990. So I was immediately interested in Mark's assessment of whether legal writing has improved in the last 17 years. Unfortunately, the news is mixed. While significant numbers of government and industry lawyers have abandoned legalese, the same cannot be

said of those in private practice. Or, as Mark puts it, "Most lawyers now consider plain language acceptable, so long as no one expects them to write it ...". Ever the optimist, Mark expects that lawyers will adopt plain language "with increasing speed". This is deliciously (if not deliberately) vague. Although it suggests an improvement, it is a relative one. If the current speed of adoption is glacial (that is, the rate at which glaciers move, not the rate at which they are melting), then even doubling the speed won't make much difference.

Clarity for Lawyers is divided into 5 parts. In the first part, Mark convincingly argues why plain language should be preferred over traditional legal language. This leads to a critical question: if the case for writing plainly is so compelling, why don't more practising lawyers do it? According to Mark's research, there are a number of reasons. The most popular is that lawyers think using plain language may result in "error, ambiguity or unpredictable effect". And so it might, if not used properly. But I think that you have to go further down Mark's list to get to the real reasons. Implementing plain language in a law firm requires a significant initial effort which, it seems, many lawyers are not prepared to make. Mark observes that they would prefer to rely on their existing precedents, even though they might not understand them and, in some cases, without even bothering to read them properly. An example of this was reported in the Australian Financial Review recently (22.01.07, p42). On landing his first job, a newly admitted lawyer was given a copy of the proposed employment contract and was asked to read it carefully before signing it. This was in fact a test for the new recruit; the contract contained a clause requiring the employee to repay all their earnings if they left the company. The young lawyer agreed to sign the contract without mentioning this clause. Although the clause was removed before signing, the unfortunate lawyer was

told that if he'd spotted it, his starting salary would have been increased by \$10,000! The point the employer was trying to make was that it pays to read and understand every clause in a contract.

The second part is about alternative ways to communicate. That is, alternatives to sending a letter by ordinary post. I was surprised by the implication that legal business is usually done this way in the UK. In Australia, at least among the large firms, email has long been the most common method of written communication. I suspect it is the same for large firms in the UK. So, although Mark briefly outlines some of the special problems associated with email, I thought this topic could have been dealt with in more detail. That said, Mark makes some excellent points in this part, including my favourite: don't write at all! Sometimes using the telephone is the most effective way of communicating. And, as Mark points out, most lawyers only seem to use legalese when they write, not when they speak.

In the third part, Mark tells us how to make our writing more effective. It contains all the usual topics (use short sentences, use familiar words, use active verbs, etc) plus a few unusual ones. Personally, I found the unusual ones the most interesting. There is one called "Be human" which deals mainly with the tone of lawyers' communications. Many lawyers don't realise that legalese can make them sound uncaring and inhuman. There are also chapters on "The need for thought" and "Persuading your readers" which, in my experience, are often not given the prominence they deserve. And I also enjoyed Mark's thoughts on "fash-

ionable expressions". Lawyers have more than enough of their own meaningless expressions without having to import more from other disciplines like business management.

One minor criticism is that I was a bit confused by the order of the chapters in this part. Initially I thought they were in order of importance because the first one, "Be human", is a theme that underlies the entire book. However, I'm not sure that "Format" and "Punctuation" necessarily deserve third and fourth place on this basis. Perhaps Mark is suggesting that they are all equally important (like a lecturer I had once, who started each new topic by saying that it was the most important topic in the whole subject).

Part four is a short one about the common law rules of interpretation. These rules are a bit like the life jackets on an aeroplane. You should know where to find them and how to use them, but you're in real trouble if you ever have to rely on them. Avoid reading this part at your own peril!

The last part is a plain language workshop. It contains examples and exercises for teaching plain language techniques and some precedents for practising lawyers to use. The examples and exercises are like a bag of mixed lollies; there's something for everyone, including correspondence, contracts, legislation and court documents. All come with suggested solutions and explanatory notes. Not being a UK lawyer, I can't comment on the legal aspects of Mark's precedents. But I can say that they are quite unlike the precedents you will find in traditional precedent books.

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(Country Representatives *continued from page 2*)

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All other countries:

Please contact the USA
representative

From the President

Clarity plans 2007–09 Christopher Balmford

Melbourne, Victoria, Australia

Thank you to Joe—and to Cindy

My thanks—and I'm certain, your thanks—to our previous President Joe Kimble for the outstanding achievements in his term, namely: a tremendous conference in France; a review and rationalisation of our membership list and subscription timetable; an upgrade of our website and journal; and reps in 10 new countries.

But Joe's contribution to Clarity has been much more than as President. He has been a long-term editor of the Journal and even an occasional "short-term guarantor of funds" to pay for the Journal's printing and mailing. In all, Joe's contribution has been enormous. Thank you, Joe. Also our deep thanks to Joe's secretary Cindy Hurst for maintaining—and, with Joe, agreeing to go on maintaining—the address list, etc.

Anything Clarity achieves in the next few years will build on Joe's work.

What should Clarity do?

Just what Clarity should aim to achieve in the next few years is worth contemplating. Indeed, your committee has been giving this idea much thought over the last few months. We have had three rounds of discussion documents which have led to the position summarised below.

Now we would like to share our plans with you. And to seek your involvement.

Clarity's current—and broadening—purpose

1. Currently, Clarity is: a journal twice a year, a conference every few years, and a fairly static website. Clarity is interested in exploring a range of other activities—mainly online—set out below.

Existence as an entity

2. Clarity is an informal organisation. It is not incorporated—or anything else—anywhere. We plan to leave things as they are for now. (By the way, the fact that PLAIN <www.plainlanguage.network.org> is not a formal legal

organisation has been something of an issue for it in relation to the revenue from its conference. I believe this is not an issue at Clarity as our conference would be organised by another entity—with Clarity lending its name and support, etc to organise the conference.)

Democracy—electing the President

3. For the appointment of presidents, Clarity will call for nominations at least every 3 years in the May issue of the journal with a closing date of 31 July. The Committee will then make the appointment by vote. This may become an issue in the future if more than one person wants to be President. But that seems unlikely for some time given that the role takes at least half-a-day a week, is unpaid, and lasts for 3 years.

Online payment system, etc

4. Clarity will develop an online system for members to register, renew, pay and update their contact details, etc. A member in any country will be able to pay by credit card in one currency, into one account: perhaps, US\$25. It is likely that the system will be developed by the IT people at my internet business Cleardocs—for a heavily discounted cost of about AUD\$2,000. I will donate my time.

Clarity can barely afford this. But the system seems important and worthwhile—given that an increasing number of members no longer have cheque books; that people prefer to pay online; that the bank fees for transferring money from one country to another eat into Clarity's meagre revenue.

If you were willing to contribute to the cost of developing this online system, then that would be greatly appreciated. A sponsorship would be ideal. For more information, please contact me or Joe Kimble <kimblej@cooley.edu>. Payment would be made into the US account Joe uses to pay for the journal.

Using Clarity's name

5. Do you carry out any activities in Clarity's name? Some people do. The Committee is concerned to understand who is doing what and to set a policy around these activities. Please let me

know if you do anything in Clarity's name.

Conference 2008

6. We are starting to organise a conference for 2008. Clarity's previous conferences have been in the UK and France. So we are looking to hold the next conference somewhere in the Americas. We have a major partner interested. I will report to you as plans become clearer.

Website

7. Clarity is keen to broaden its role and develop other activities. Whether we can do that depends on everyone's commitment (Clarity is a voluntary organisation). Likely activities include adding facilities to the website for:

1. country reps and committee members to post news and humour
2. regular emails with news, humour etc.
3. a calendar of plain-language events
4. a FAQ and Help feature
5. hosting webinars
6. a mini-conferencing capability
7. a precedents bank
8. a general blog or forum capability encouraging discussion
9. educational capabilities and features demonstrating the methods of clear writing.

Do let me know if you are interested in contributing to these activities. They are dependent on people like you volunteering.

Budget

8. Clarity's only real cost is the journal. Our editor, Julie Clement, will monitor page length to ensure we stay on budget.

If we plan other activities, then they will be costed and budgeted for before we commit to implementing them.

Expansion—new members

9. We all need to redouble our efforts to attract new members. Could you get one person to sign up in the next week? Maybe give Clarity as a gift to someone.

We are updating the Clarity brochure. Please let us know if you would like copies.

Your involvement

10. How much of this would you like to be involved in? If you volunteer, then maybe we can achieve some of the new ideas discussed above.

If you have any concerns or comments about these plans, then please let me know.

Thank you—it is exciting

These are exciting times for plain-language everywhere. Certainly, in the UK, the USA and Australia our work is receiving greater legislative and regulator support. In turn, consumers at all levels are increasingly demanding clarity from their lawyers, from business, and from government. As demand grows, we can further research and develop our learning about how to make documents work for their readers. And that has benefits for all.

Thank you for "appointing" me.

Lastly, welcome to our new representatives in new countries: in India, Dr K R Chandratre; in Lesotho, Retsepile G Ntsihlele; in Zimbabwe, Walter N. Zure. And welcome to Lynda Harris in New Zealand who replaces Richard Castle who has returned to the UK. Welcome home Richard, and thank you for your efforts for Clarity in New Zealand.

Upwards & onwards

Christopher

PS A donation—sponsorship—for the online membership system?

If you—or your organisation—would like to contribute to the cost of the online membership and payment system, then please contact me or Joe Kimble <kimblej@cooley.edu>.

Kindest regards

Christopher

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Christopher Balmford

President of Clarity

Clarity—An international association promoting plain legal language

Clarity meeting in Wellington, New Zealand

Close on forty people attended a lunchtime seminar in Wellington on 23 February 2007 jointly hosted by Clarity and the Parliamentary Counsel Office. The speaker was Clarity member and former Law Commissioner for England and Wales Trevor Aldridge whose topic was 'Who's leading the way in drafting?'. Trevor illustrated his talk with a number of UK examples drawn from statutes and business documents, including repairing obligations, formulas, indexes of defined terms, the labelling of participants (eg 'If the expenditure is borne by P for D...') and 'full outs' (called 'sandwiching' in New Zealand). A useful discussion followed and the meeting concluded with a short address from Deputy Chief Parliamentary Counsel Geoff Lawn.

The audience included a Supreme Court judge, the president of the New Zealand Law Commission and the author of the definitive text on statute law in New Zealand. Sadly, there was not one representative from private practice. Generally the meeting was felt to be extremely worthwhile, and a possible pattern for the future. Particular thanks are due to the PCO for providing the facilities, and to Catherine Yates for much of the organising.

As reported by Richard Castle our former New Zealand representative who organised the meeting. Our thanks to Richard who has returned to the UK. Lynda Harris has replaced Richard. Welcome Lynda.

Does Clarity have your email address?

If you're willing, would you please send your email address to Mark Adler <adler@adler.demon.co.uk> so that he can add you to his email list of Clarity members. We promise not to bombard you with emails, but from time to time Mark sends out information that should be of interest to members. You will also receive a PDF version of the journal as soon as it's available.

New Zealand 2006 WriteMark conference and awards 2006

A wonderful success!

The WriteMark Plain English Conference and Awards event held at Wellington's Museum of New Zealand Te Papa Tongarewa on 6 October 2006 was an outstanding success!

Thanks to all those who made it such a worthwhile and memorable day—delegates, speakers, workshop leaders, our two MCs, those who entered the plain-English awards, and the award judges. Special thanks too to all those who worked behind the scenes to make it happen.

This event was a first for New Zealand. Over 100 delegates heard from four international plain-English experts who shared their successes and brought us up to date with the best of overseas practice and research. Plus we heard from several New Zealanders who are making a plain-English difference in their own public and private sector organisations.

Delegates came from the banking, insurance, academic, legal, government, medical, accounting, and publishing sectors.

We squeezed as much into 1 day as we could—a sit-down conference breakfast with entertaining keynote speaker Duncan Sarkies, 4 keynote addresses and 12 workshops during the day, and a glamorous awards dinner featuring Kevin Milne (MC) and keynote speaker Amanda Millar.

Conference objectives

Plain English is good for business and essential for democracy—and plain English makes sound economic sense.

The objectives of the conference were to:

- raise public awareness of plain English
- create public demand for organisations that communicate clearly
- help delegates to work towards plain English in their own organisations
- promote the importance of writing to an agreed plain-English standard—either the WriteMark or an organisation's own standard.

Award winners

The premier award for *Plain English Champion—best organisation* went to A J Park, a patent attorney firm of over 200 partners and staff. The prize of \$10,000 was awarded to the firm for ‘outstanding progress in creating a plain English culture throughout a firm steeped in tradition and legalese’. The \$10,000 prize is to be spent on a specific plain-English project designed to bring tangible, measurable results for the firm. AJ Park, who are also *Clarity* members, will report on their project at the 2007 WriteMark Plain English Awards ceremony.

In accepting the award, John Lamb, Chief Executive, said, ‘A J Park set out on this journey to improve our service quality to clients through clear, concise communication. We knew the change to our culture would not happen overnight, so it is exciting and motivating to see the success we have achieved in a short time. It’s great the firm’s decision to do things differently has been recognised in this way’.

Tanya Piejus, Communications Officer for the Department of Building and Housing, won the *Plain English Champion — best individual* award. This award recognised Tanya’s outstanding personal contribution to the introduction of a plain English culture in an area of government known for its complex forms and regulations. Speaking of Tanya, the judges commented that ‘plain English was in her heart and soul’.

Other winners included: Greater Wellington Regional Council for *People’s choice — Best plain English document*; Ministry of Fisheries for *Best public sector document*; Pharmacy Guild of New Zealand for *Best private sector document*; and Wellington City Council for *Best plain English website*.

An award for gobbledegook too

And, in a good-humoured poke at the all-too-familiar gobbledegook that still confounds us, the *Brainstrain* award went to the Ministry of Social Development for their StudyLink *Loan Schedule*. Dubbed by the judges as ‘appalling’ and ‘a shocker’, this document was a perfect example of text that created confusion, mystery, and frustration for the reader. Rather than the stunning bronze awards handed out to the other winners, the prize

for this category was a stainless steel rubbish bin filled with sour worm lollies.

Although not present to collect their prize, the Ministry of Social Development took the award on the chin and issued a statement from Chief Executive Peter Hughes saying, ‘Fair cop. We can do a lot better and we will fix it’. The loan schedule is now being redrafted in plain English—something that should bring a sigh of relief to the country’s several thousand students who apply each year for the StudyLink loan.

Other finalists in the *Brainstrain* category included the *Sky Television Service Agreement*, and the Australian New Zealand Therapeutic Products Authority Joint Agency Establishment Group’s *Description of the Joint Regulatory Scheme for the Advertising of Therapeutic Products*.

Keen media support

Kevin Milne from the consumer advocate television programme *Fair Go* was right behind the plain-English cause as MC for the evening. Likewise, keynote speaker Amanda Millar of *60 Minutes* entertained with her own tales of the ghastly and impenetrable text she so often encounters in her programme research.

Highly credible judging

The awards entries were judged by David Russell, retiring CEO of New Zealand’s Consumers’ Institute; Rachel McAlpine, web content specialist; Jacquie Harrison, Head of School, School of Communication Head, Unitec (University); and Lynda Harris, CEO of Write Group Limited and WriteMark Limited.

See page 4 about the 2007 conference and awards.

New members

Canada

Jacqueline Desorcy
Winnipeg, Manitoba

Robert Enns
Calgary, Alberta

Alison Fraser
Toronto, Ontario

Philippe Hallée
Ottawa, Ontario

Nicola Iten
Vancouver, British Columbia

Pamela Muir
Whitehorse, Yukon

Cathy Ray
Ottawa, Ontario

Andrew Sims
Edmonton, Alberta

John Spotila
Virginia

Susan Swayze
Toronto, Ontario

Côte d'Ivoire

Nadia Virginie N'guessan Bodo
Abidjan

England

Ablewisp Limited
[Stuart Miller]
Brixham, Devon

Elizabeth Childs-Clarke
Dartford, Kent

Jerome Curran
Staplehurst, Tonbridge Kent

Neville Hunnings
Leicester

Ian McLeod
Kelloe, Durham

Practical Law Company
[Catherine Soave]
London

Simona Timmins
London

Tinyquest Limited
[Dr. Ron Jones]
Penrith, Cumbria

Israel

Rachel Dayan
Ramat Gan

Italy

Jerome Tessuto
Afragola, Naples

Japan

Michael Hamalainen
Mihama-ku, Chiba-shi

Lesotho

Retsepile Gladwin Ntsihlele
Botha-Bothe

Mexico

Salvador Vega
Mexico, D.F.

Nigeria

Olubukola Olugasa
Yaba, Lagos

Scotland

Andy Beattie
Victoria Quay, Edinburgh

South Africa

Lucinda Boyd
Cape Town

USA

Robert Linsky
Massachusetts

William Walkowiak
New York

Zimbabwe

Walter Zure
Borrowdale, Harare

Member news

A message from Clarity to Annetta Cheek.

Read at Annetta's retirement-farewell by Melodee Mercer, Board Member, Center for Plain Language, see www.centerforplainlanguage.org

Dear Annetta

Thank you for editing issue 55, May 2006, of our journal, *Clarity*. In a sense, your editing role symbolises what you have done for clear-communication everywhere: and what you've done for each of us.

An editor of a not-for-profit journal like *Clarity* keeps an eye open for good ideas and interesting people. She gently—yet irresistibly—inquires of someone whether they might like to contribute an article. Then she helps that person develop, shape, and polish both their article and their ideas.

The journal brings useful and stimulating ideas forward and gives them space. By doing all this, the editor and the journal help to make things happen. In our case, they help to cause clear-communication change. They help to deliver the manifold and abundant benefits of plain-language for everyone.

Thank you Annetta for editing our journal. And thank you for your similar—but oh so much greater—contribution to plain language and to us all.

Christopher Balmford
President of Clarity—the international association promoting plain legal language

PS If any of you would like to join Clarity (it's cheap and the journal is great), then please contact our US rep Joe Kimble. Forgive me.

Application for membership in Clarity

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

1 Individuals

Title *Given name* *Family name*

Name

Firm Position

Qualifications

2 Organisations

Name

Contact Name

3 Individuals and organisations

Address

Phone Fax

Email

Main activities

Annual subscription

Australia	A\$35
Bangladesh	BDT 1500
Brazil	R50
Canada	C\$30
Finland	€ 25
France	€ 25
Hong Kong	HK\$200
Israel	NIS125
Italy	€ 25
Japan	¥3000
Lesotho	M100
Malaysia	RM95
Mexico	250 Pesos
New Zealand	NZ\$50
Nigeria	3000N
Philippines	₱1500
Singapore	S\$40
Slovakia	SKK700
South Africa	R100
Sweden	SEK250
Thailand	THB1000
Trinidad & Tabago	TT170
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 pages 3-4. 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. (Exception: our European representative prefers to be paid electronically. Please send her an email for details.) 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.