

Clarity

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Submissions

We encourage you to submit articles to be considered for publication in *Clarity*. Send submissions directly to editor in chief Julie Clement. Please limit submissions to approximately 1,500 or 3,000 words.

This issue

Devoting an issue of *Clarity* to Robert Eagleson's work was not an easy decision. It was clear that neither Robert nor his family wanted anyone to make a fuss. Yet how could *Clarity* let Robert's loss pass without doing anything? In the end, devoting an issue to Robert's work—rather than to the man himself—seemed to achieve a balance between acknowledging his incredible contributions to plain language and honoring his family's wishes. I hope I've made the right decision.

I spent several weeks reviewing every issue of *Clarity*—all 70 issues—and selecting articles. But it wasn't until I read the first full draft of this issue that I realized what we have: a plain-language primer from one of our most passionate advocates. In a perfect world, this issue would be required reading for all law students (and every other writer). For now, I hope it inspires you and provides you with a tool (weapon?) to help you further the cause.

You'll also find a couple of other items in this issue. First is a narrative about what we can expect at the upcoming conference in Antwerp (and Brussels). I look forward to seeing many of you there (and maybe elsewhere, as my husband and I do a little traveling before the conference). Second, you'll also find *Clarity*'s new constitution. Congratulations to all who worked on this over the past several years.

With this structure in place, we have an exciting future, building *Clarity* for the next chapter of plain legal language. And that future will start with a new design for the journal. That design was generously created by More Carrot (thank you, Si). I hope you will like it, and I look forward to editing future issues. (I also hope the new look serves us as well as the design introduced over a decade ago under Michèle Asprey's leadership.) See you in Belgium!

—Julie Clement, editor in chief

Remembering Robert Eagleson

As many of our Clarity members will have heard, Professor Robert Eagleson died late last year. Robert was a pioneer of plain language. He was a professor of English at the University of Sydney, Australia, initially specialising in linguistics and Shakespeare, and later moving to the language of the law. His initial work was on plain language insurance policies in Australia—probably the first in the English-speaking world. He came to international prominence with his ground-breaking report for the Victorian Law Reform Commission, *Plain English in the Law*. Later, he co-founded the Centre for Plain Legal Language at the University of Sydney, and then spent a generation training lawyers, linguists, public servants and parliamentary drafters in the techniques of plain language. Those who knew him marvelled at his knowledge, his wit, his teaching ability, and his genuinely humble and self-effacing nature. A fuller acknowledgment of his life and work will appear in a forthcoming issue of *Clarity*.



— Peter Butt

I have been very touched by the many condolences I have received from Clarity members. They all spoke of Robert with great fondness and admiration. I trust you will understand if I do not reply personally to every one, but I have been quite overwhelmed by the number and warmth of the messages.

— Muriel Eagleson, Robert's widow



Aarhus, Denmark, 1994

[Readers: memories are a bit short; we apologize. If you can identify the rest of the people from this photo, we'll print their names in a future issue.]

Front row, left to right: Mark Adler, Christopher Balmford, David Elliott

Middle row: Mark Duckworth, Amanda Bear, Audrey Blunden, unknown

Top row: Duncan Berry, Dennis Kurzon, unknown, Peter Butt, Robert Blunden, Robert Eagleson, Katrina [last name unknown.]

Australian Note

High Court of Australia condemns legalese

Number 16, page 7, July 1987

The High Court of Australia has severely censured legalese and indirectly helped to advance plain language drafting. In a ruling concerning the Regulations under the Student Assistance Act 1973, Mr Justice Stephen commented [Australian Law Reports, Vol 34, pp 489–90]:

Amended on more than 40 occasions in their 6 years of existence, these Regulations now represent an administrative scheme of great intricacy and much ambiguity. No applicant is likely to gain from them any clear impression of his entitlement to a benefit and this case suggests that even those who have to administer the scheme have great difficulty in understanding it

The dispute arose from the interpretation of regulation 34(1)(k) which, the judge continued, “is even more obscure in its meaning than much else in these Regulations.” It reads:

Ineligibility—previous study and other reasons

34. (1) Subject to the succeeding sub-regulations of this regulation and to regulations 34A, 34B and 34C, an applicant who is undertaking, or proposes to undertake, in a period in a year at an education institution an approved course (including an approved course that is the combination of two courses each of which is also an approved course) is not eligible to be granted Assistance in respect of any part of the year—

. . .

(k) if he, not being an applicant to whom subparagraphs (1)(i) and (ii) apply, has completed, before the relevant day, a course of study or instruction that—

(i) in the case of a course that the applicant undertook in Australia before the commencement of the Act or a course

that the applicant undertook elsewhere than in Australia—is; or

(ii) in the case of a course that the applicant undertook in Australia after the commencement of the Act—was, at the time the applicant completed the course, an approved course,

of the same level as the approved course that he is undertaking, or proposes to undertake, in that first-mentioned year and the work that he successfully undertook in the completed course exceeds, by more than one half of one year’s normal full-time amount of work of the approved course that he is undertaking, or proposes to undertake, in that first-mentioned year that part (if any) that he has successfully undertaken before the relevant day including any part that, by reason of studies he has undertaken, he is credited with having successfully undertaken;

. . .

However, this is only part of the story and to get the full legal effect readers have to consult other paragraphs. As there are few cross-references readers are thrust into a tangled maze.

The High Court’s ruling against the authorities has had an excellent benefit. It has given the Commonwealth Department of Employment, Education and Training, which is responsible for administering the scheme, and the Attorney-General’s Department, which is responsible for drafting the Regulations, the impetus to rewrite the Regulations in plain English. They have invited me to collaborate with them in the exercise, thus bringing together in one team policy, legal and language specialists. It is this kind of approach, in which we can draw on expertise from all relevant areas, that we need to follow more regularly.

I have produced a plain version which is about to be tested. The exercise has meant not only reshaping sentences and eliminating verbiage but also recasting entirely the arrangement of the content. Through the process of clarifying the wording, the Department is being helped to reconsider aspects of the scheme to reduce its complexity. The new Regulations are to be tested during 1990 and published in final form by the middle of the year for operation in the 1991 academic year.

The Australian Court’s decision demonstrates again that lawyers can no longer take refuge

in traditional legal drafting. More and more judges are ruling against organisations if their documents are obscure. They do not accept that all the responsibility falls on members of

the public to understand but recognise that drafters also have responsibility to be comprehensible. The claim that courts prefer legalese is fast becoming a myth.

SPECIMEN

Each quarter we will publish a short precedent for members (only) to use or amend at their discretion. CLARITY is not insured and accepts no liability, leaving it to members to check that the drafts are good for their purpose. The following issue will contain any criticism received, so you might think it prudent to wait 3 months before using the drafts. Contributions will be welcomed and will be added to the precedent library kept by Katharine Mellor.

NOTICE OF ASSIGNMENT AND MORTGAGE

Landlord:

Landlords agents or solicitors:

Property let:

Date of lease:

Original parties to the lease: 1.
2.
3.

Seller:

Buyer:

Lender:

Date of transfer and mortgage:

Landlord's registration fee enclosed: £

The Lease has been assigned to the Buyer and mortgaged to the Lender.

Please sign and date the receipt on the enclosed copy and return it to us.

Dated:

Signed:

Diskens&Co
Solicitors for the buyer
16 Bond Street
Dewsbury
West Yorkshire WF13 1AT

RECEIVED a notice of which this is a copy

Date:

Signed:

Ed. note: This was such a good idea! I don't know when the practice stopped, but I'd like to hear from our readers: Would you like to see us try to start this again? Are you willing to submit a short precedent (document) from time to time? Please email me at julieannclément@gmail.com.

Discourse and the professions

Number 25, page 27, September 1992

*International conference at Uppsala, Sweden
August 1992*

'CLARITY was well represented at this conference of linguists, thanks to the efforts of Robert Eagleson. Professor Eagleson is an Australian whose prominence in the field of plain language law leads people to overlook that he is by training a linguist rather than a lawyer.

He chaired an all-morning discussion on The reform of official language: its impact on social justice and professional perspective on language, and invited CLARITY members Martin Cutts, David Elliott, Mike Foers, Joseph Kimble, Chrissie Maher, and Mark Adler to the conference to join the discussion. Ms. Maher was not there, but was represented by Frankie and David Bray of the Plain English Campaign.

Robert Eagleson said:

It is now 17 years since the first document appeared in the current movement for plain language in government, law and business. The movement has now taken hold in many countries, and it is time to consider its impact.

One of the reasons behind the drive to reform official language was the recognition that many people were at a disadvantage when they could not understand documents setting out their rights or obligations. One object of the discussion would be to explore the effect of the reform of official language on social justice.

Professionals' misconceptions about language had impeded acceptance of clearer writing. What changes to their linguistic perceptions had those in the plain language movement experienced? Are we seeing shifts in discourse structures as well as attitudes? Are the reforms bringing changes to genres and even the disappearance of some types?

The discussion was lively and useful, and the following points were made:

- The linguists at this conference used gobbledegook incomprehensible to the CLARITY group. (Robert Eagleson was the bridge between the two groups, having a foot in each camp.)
- Certain landlords rewrote a standard tenancy agreement in plain English to avoid compulsion by the government. In rewriting, they discovered some provisions that were so unfair that they dropped them.
- Trade union officials fearful about loss of their role had been the only dissenters when plain language employment documents were approved by management and workers.
- In an Australian experiment a group of lawyers were given legal research problems. Half had plain language sources and half had traditionally written sources. They all reached the right solution, but the plain language group were quicker.
- Important information was often unavailable to medical patients: for instance, those undergoing surgery were not aware of the after effects so had not made adequate arrangements for post-operative care.
- We are told by packets that food and medicines contain certain percentages of certain substances with scientific names, but we have no idea of the significance of the information.
- Professional specialists must work with plain writing experts to simplify documents.
- Lawyers have an exaggerated fear of change, and exaggerate the precision of traditional documents.
- Research had found that only 3% of the terms in traditional legal documents had had their meanings defined in litigation.
- The definitions supplied by the courts were often mutually inconsistent. *Tried and tested* often meant "extensively litigated because of ambiguity", and the most recent case would not necessarily be the last.

- Practising lawyers tended not to know the results of that litigation in sufficient detail to justify their claim to precision.
- Senior lawyers often disagree with the view of junior lawyers that the meaning of a particular expression has been precisely defined.
- Prof Eagleson's experience was that senior lawyers were more open to plain language improvement than their younger colleagues.
- Documents are insufficiently tested.
- Safety instructions required by law in the workplace were pitched not at the workforce but at the lawyers who might have to rule on their adequacy.
- Over-informality in consumer documents misled the public into thinking it was dealing with a friendly document when in fact it was hostile.

One of the linguists said that he would be suspicious of a plain language contract, and would rather trust his lawyers. He was promptly sat upon:

- People shouldn't trust lawyers, whose ruling body (in England) paid out large sums to compensate defrauded clients.
- Plain language should not and need not mean loss of precision.
- Many documents are unnecessarily difficult.
- We should not give in to the argument that legal documents could not be written plainly; resistance IS emotional and self interested.
- Lawyers starting to write plainly have found that clients who previously accepted draft documents without comment offered improvements when they could understand what they were shown.
- A lot of non-lawyers have to interpret legal writing in their work, and have difficulty with traditional language.

- It is vital that clients understand what is written in their names, so they can correct the inevitable mistakes and omissions.
- The research CLARITY did last year showed (a) that clients understood a lot less than lawyers think they do, and (b) that they understood a lot less than the clients themselves realised.
- A danger is that clients tend to think they are wrong and their lawyer right.
- Most legalese has nothing to do with precision.
- Legalese is linguistic fancy dress, which should be discarded with the wigs and gowns whose future is now under discussion in Britain.
- Shorter lines make a document easier to read. A lone lawyer who disputed this admitted two weeks later that he had been wrong.
- Citibank reduced many default provisions in their standard loan document to a mere two, deciding that all the others were unnecessary because they dealt with circumstances which never arose.
- We need lawyers who know what they are doing, and open-minded people. These are not easy to find, but it is worth persevering.

Robert Eagleson said that he had never found a legal document which was entirely free from error.

How to join Clarity

The easiest way to join Clarity is to visit <http://sites.google.com/site/legalclarity/>, complete an application, and submit it with your payment. You may use PayPal or a credit card to pay.

If you prefer to submit a hard copy of the application, you may contact your country representative for submission instructions. Country reps are listed on page 2.

Little Red Riding Hood as written in legalese

Number 26, page 37, December 1992

Dr Robert Eagleson entertained the conference at dinner with a report of the massacre of the English language by lawyers

Extract from a transcript of the original version of little Red Riding Hood, which had been written by a lawyer

Once upon a time, and from time to time, and when, where, and so often as shall be, there was a person who, not being a boy pursuant to subsection 93(1)(b) of the Natural and Unnatural Persons Act as amended, notwithstanding sub-paragraph 152(1)(b)(ii) of the same Act, was a girl described in the schedule hereto (hereinafter called "Red Riding Hood")

One fine morning on or about the date specified, the mother of the said Red Riding Hood instructed her, "Take this cake and bottle of wine in a basket described in clauses 175T and 209F of the temporary regulations for containers, carriers and other instruments of conveyance. Notwithstanding the provisions of subsection 14 of section 3424 of the Wayfarers Wandering in Buchart Gully Act 1732, go straight to your grandmother's house"

A competition

Number 28, page 41, August 1993

In *Clarity* No 27 readers were asked to list the faults in the text [below], taken from the lease of a flat in a Surrey block.

Dr Robert Eagleson wins the prize for the list below, and has chosen Bryan Garner's *Dictionary of Modern Legal Usage*. Numbers refer to the footnote numbers in the text. Tedious repetition of errors has been avoided.

Original

2. The Tenant hereby¹ covenants² with the Lessor³ and with and for the benefit of⁴ the owners and lessees from time to time⁵ during the currency⁶ of⁷ the term hereby¹ granted^{8,9} of the other flats¹⁰ comprised in¹¹ the Building¹² that the Tenant and the persons deriving title under him¹³ will at all times¹⁴ hereafter¹⁵ observe¹⁶ the restrictions¹⁷ set forth¹⁸ in the First Schedule hereto¹⁹

3. The Tenant hereby covenants with the Lessor²⁰ as follows^{21,22,23}

(1) . . .

4. The Tenant hereby covenants with the Lessor and with and for the benefit of the owners and lessees from time to time during the currency of the term hereby granted of the other flats comprised in the Building that the Tenant will at all times hereafter during the said²⁴ term^{25,26} so repair²⁷ maintain²⁷ uphold and keep²⁸ the Flat as to²⁹ afford³⁰ all necessary support³¹ shelter and protection³² to the parts of the Building other than the Flat³³ and to afford³⁴ to the lessees³⁵ of the neighbouring³⁶ or adjoining flats or premises³⁷ access for the purposes and conditions^{38,39} set out⁴⁰ in Clause 3(9) hereof⁴¹

Dr Eagleson's winning analysis

1. *hereby* is unnecessary.
2. *covenant* in this context is archaic.
3. *with the lessor* is unnecessary. Who else would the covenant be with?
4. The structure *covenant with and for the benefit of* is ungrammatical. It should read *covenant with the owners for their*

benefit or, better still, covenant with X to do Y for their benefit.

5. *from time to time* is unnecessary. They are either owners or lessees or not.
6. *currency* is erroneous. A lease may have currency, not a term.
7. *currency of* is verbiage.
8. *term . . . granted*. As in note 6, a lease may be granted, not a term.
9. *during the currency of the term hereby granted*. The whole phrase is unnecessary. The tenant's obligations end with the lease.
10. *comprised in* is a misuse. Is it meant to be *comprising*?
11. The separation of *of other flats from owners and lessees* is awkward. The sentence needs restructuring if all the items are to be included.
12. *comprised in the Building* is unnecessary. Where else could the other flats be?
13. The use of *the persons deriving title under him* is inconsistent. Why does this qualification occur only here and not in clauses 3 and 4?
14. *at all times* is verbiage because *covenants* is the universal present.
15. *hereafter* is unnecessary, not only because of point 14 but also because the tenant could hardly be bound for periods before the lease begins. [*Does hereafter release the tenant from breaches committed between the beginning of the term and the date of the lease, when the latter is later? –ed.*]
16. *observe*: lucky tenant—he or she only has to watch the restrictions!
17. *restrictions* is semantically incongruous with *observe* in the sense of *comply with*. Better *conditions* or *requirements*.
18. *set forth* is unnecessary.
19. *hereto* is unnecessary.
20. *The tenant . . . as follows* is repeated.
21. *as follows* is unnecessary. The conditions obviously follow.
22. is equivalent to *as follows*. So a double tautology here.
23. The dash after the colon is triply unnecessary.
24. *said* is covered by *the*.
25. *during the said term* is unnecessary for the same reason as the wording criticised at note 9.
26. The wording is inconsistent with the wording at note 9.
27. The comma is missing.
28. *repair maintain uphold and keep* is tautologous.
29. *as to: to* is sufficient
30. *afford* is quaint.
31. *afford . . . support* is a nominalisation. Replace with *support alone*.
32. *shelter and protection* is tautologous.
33. *as to afford . . . other than the flat* is unnecessary. If the tenant has to keep the flat in good condition then other flats could not be adversely affected.
34. *and to afford* is grammatically wrong. The second *afford* is governed by *will*, not *so . . . as to*. The current wording suggests that the repair is to give access.
35. *lessees*: what of the owners, as before?
36. *neighbouring* is ambiguous. Could these flats be in the building next door?
37. *premises* definitely suggests other buildings. Only flats have been mentioned up to this point.
38. *purposes and conditions* is tautologous.
39. *conditions* is semantically incongruous. You cannot give *access for conditions*.
40. *set out* is inconsistent with *set forth* in clause I, but just as unnecessary.
41. *hereof* is unnecessary.

Judicial decisions: acts of communication

Number 29, page 11, December 1993

This article also appeared in the December 1993 edition of the Judicial Officers Bulletin of New South Wales

In giving a decision we are communicating the law. We are drawing on our training and knowledge to make the law available to others to enable them to recognize that they have been treated justly and fairly in terms of the law. While one side may not like the decision purely for reasons of self interest, nonetheless both sides should be able to appreciate that the decision is sound and all that could be done under current law.

Because banding down a decision is not just an application of the law to a particular situation but also an act of communication to win acceptance from others, then we need to recognise that we are engaged first in a thinking activity. We cannot communicate successfully and clearly unless we have thought clearly and rigorously about the information that has been presented on the case. Communicating and thinking go hand in hand.

Secondly, communication is a purposeful activity: we have a message—in this instance, a ruling—we want to convey. We are talking or writing because we have something of substance to pass on.

To succeed we have to be clear about the message. We have to determine rigorously what is the real issue in the case and how the law applies to it. Because we are dealing with the law and with the interests of human beings, we must be accurate. There is no reason for error or imprecision. And we must be strictly relevant. The message must shine through clearly and unencumbered. Whatever is not pertinent must be excluded, no matter how interesting or correct it may be in itself. Anything that does not contribute directly to the thrust of the message must be excised. The audience must be left free to

concentrate on the message: it should not be distracted by peripheral information.

But more, we are also engaged in a social activity. We not only have a message we want to convey but also people to whom we want to convey it. Accuracy or correctness of content is not sufficient. There also has to be comprehension. If parties to the proceedings are going to appreciate the reasonableness of the ruling—or at least grant it some credence—then they must be able to understand it. If it is obscure, unintelligible, outside their ken, then they can feel cheated, deceived even. Think of your own reactions in disputes with organizations when they have fallen back on convoluted provisions in small print to snatch a victory over you. Have you not felt antagonised? So also in court: if one side cannot make sense of what the decisionmaker is saying, that side is going to leave court disgruntled, with the belief that the law has been mysteriously used against him or her and not administered fairly.

Presenting the ruling

This social context of our communication requires us to consider the traditional approach to arranging our material. We have been taught to set out the problem, to produce and discuss the evidence, and then to present the findings. It is the classical *beginning—middle—end* approach to organisation. Certainly this is the way we should go about reaching our decision. But it is not the best way of presenting it. The courtroom is not the same as the university or research setting. The communication environment is entirely different. In the courtroom we have people who are anxious for a ruling. They are emotionally involved, strained and agitated. We must satisfy their most pressing need before they can take in the reasons.

Until they know the outcome, they will be only half listening—if listening at all—to our words. So it is best in most cases to organise the decision along the lines:

Issues—ruling—reasons

This is far from a novel suggestion. There is a lot of support for it even within legal circles. The common practice of executive summaries and abstracts at the front of papers and reports highlights the desire of readers for overviews. The tendency nowadays to list recommendations at the beginning of proposals points in the same direction.

Along with organisation goes the obligation to take account of general matters of language. Our sentences should be short and straightforward. There should be a greater number with main clauses first and subjects first. When we are requiring someone to do something, we should use the active rather than the passive.

You must return the goods by 30 November is preferable to

The goods must be returned by 30 November in which the actor is not expressed.

Inflated and archaic words are to be avoided. If technical terms are necessary, they should be accompanied by some explanation. We do not know the technical terms of other activities and feel no obligation to acquire them. We should not expect others to know ours; nor should we look down on them if they don't.

The greater demands of speech

Many decisions are given orally. The audience has to absorb the ruling on the first hearing or lose the thread. Unlike a written decision, where readers have the opportunity to backtrack, no such option is available to listeners. So there is even greater pressure to be clear and to provide listeners with all the aids we can to help them manage the task.

It is useful, then, to provide them with oral flagposts to show where you are—spoken headings, as it were. It is considerate and wise, for example, to announce each segment of the decision with introductory words such as:

The issues in this case are . . .

My ruling is . . .

My reasons are:

first, . . .

secondly, . . .

The real test

We must always return to the purpose of a decision: it is to communicate the law. Its success is judged by the correctness of the ruling and the reception of the message, not by the fancifulness of the language. Too many speakers and writers—and sadly judges among them—feel that they have to display erudition and exhibit a breadth of language. They let their attention shift from the audience to their image. Despite their intentions, however, they do not impress their hearers. It is the judges and registrars who make themselves clear who impress because the hearers go away satisfied. They have understood the law—and that is what they came to court for.

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Gentle persuasion: Memories of Robert Eagleson

by Michèle M Asprey

I vividly recall the moment in 1987 when Kevin Burges, a tax partner, came bursting into a room at the law firm Mallesons Stephen Jaques in Sydney. He announced that on the weekend he'd attended a Continuing Education seminar at Sydney University. The lecturer was Robert Eagleson. The topic was plain language writing. "We must have him come and talk to us!" Kevin cried, his eyes blazing. We had never seen him so inspired!

And so Robert Eagleson came to give a lunchtime lecture to a full house of lawyers, most of whom would have entered the room skeptical. Robert was courteous, softly-spoken, funny, sympathetic – and persuasive. By the end of the hour he had most of the audience in the palm of his hand.

I was Precedents Manager of the firm at the time and I helped to convince the Precedents Committee, and then the whole firm, that plain language was the way to go. It would set us apart from other law firms at a time when legal competition was really getting fierce in Australia. It would give us a competitive edge. It would make us better lawyers. Clients would appreciate being empowered in legal transactions. And, fundamentally, it was a matter of justice and equity. The partners agreed, and we began a huge effort to convert all of the firm's documents (including all the precedents – or forms) into plain language. To help us, the firm engaged Robert Eagleson.

I remember so well the document we started with: a Guarantee. We figured it would raise almost every legal issue possible – and it just about did. It was an exhilarating and exhausting process. A team of partners, plus Robert and I, went through the document line by line, negotiating as if it were a live transaction.

Robert would advance iconoclastic idea after idea, all in the cause of simplifying language. He would cut all unnecessary words and concepts, and eliminate any Latin. I would provide legal arguments in favour of his suggestions, and possible alternative wordings. The partners would go away to cogitate on our proposals, and then a week later we would reconvene to thrash things out.

It was a slow process, but it worked. It was astonishing to see the way Robert stood up to high-powered legal experts, questioning their logic and challenging their long-held beliefs. His gentle persuasion and persistence was just what was needed to turn the tide of hundreds of years of legal practice.

I saw what Robert was doing, and I began to do it too. My life was changed forever.

Farewell, Robert, and thank you. I know you wouldn't approve of "Vale"!

Judicial decisions: a riposte and a retort

Number 30, page 31, March 1994

Although it may seem illogical to include a commentary attacking one of Robert's earlier articles (found on p 11 of this issue), I included it here because Robert's response is delightful. And of course, without the Bennion piece, the response would have no point of reference. Enjoy! —Ed.

a riposte

by Francis Bennion

In our zeal for clarity we must not distort the realities of legal practice. At the Law Society's last annual conference the Vice-Chancellor, Sir Donald Nicholls, won easy applause for his condemnation of the White Book (*Clarity* No 29, p. 4), but he ought to know that it is just not possible to rewrite this "in a form that anyone can understand." Lord Renton asked the Prime Minister to insist that all legislation should be "clear, simple, concise and unambiguous" (*Clarity* No 29, p. 5), which he ought to know is another impossible task. Dr Robert D. Eagleson's article *Judicial decisions; acts of communication* (*Clarity* No 29, p. 11) presents a travesty of the judicial function and is open to a number of objections. Here are some of them.

The article is written as if all judicial decisions are of the same type. In fact they are of widely differing types. Advice on how to present them must differ accordingly.

Dr Eagleson says "the purpose of a [judicial] decision . . . is to communicate the law." It is not. The purpose is to resolve a dispute by applying the law to it. The dispute may be about the facts, or the law, or both. Presentation of the decision will reflect this.

The article assumes the parties to the litigation form the only audience. However, their advocates also form an audience, as does the profession at large and indeed the public at

large. The way a judicial decision is formulated must take account of all the audiences.

The author confuses understanding a judicial ruling with accepting it as reasonable. He equates a case where antagonism is aroused because "organisations . . . have fallen back on complicated provisions in small print to snatch a victory over you" with a case where one side cannot make sense of what the decision maker is saying and so feels disgruntled. The two are obviously different.

Then there is the usual blanket assertion that "we should use the active rather than the passive." But sometimes the passive is better, as in the very example Dr Eagleson gives. He says, as if the two variants meant the same, that an order stating "You must return the goods by 30 November" is preferable to one saying "The goods must be returned by 30 November." They don't mean the same. The first suggests, without being quite clear on the point, that the goods must be returned by the "you" in question and no-one else. The second allows for the possibility that the person might die or become incapacitated before 30 November, or the goods might pass into the possession of someone else. There is a possible difference in the persons bound by the order.

Technical terms, says Dr Eagleson, should always be explained. But do we really want judgments to be lengthened, and the time taken to prepare them extended, so that judges can pepper them with little homilies on the relevant law? Isn't that a job better done by the parties' legal advisers? (In the rare case where a party appears in person I accept that judicial explanations may be needed.)

Dr Eagleson says it is those judges who make themselves clear who impress "because the hearers go away satisfied." He adds: "They have understood the law—and that is what they came to court for." In my experience of litigation, extending over more than forty years, parties come to court to win their case. They go away satisfied when they *have* won the case, and not otherwise. Understanding the law is little comfort when your case has gone down, whether you think it went down justly or unjustly.

Of course these criticisms do not mean I am unsympathetic to attempts to improve the

form and quality of judgments. I agree when Dr Eagleson says that judges must determine rigorously what is the real issue in the case and how the law applies to it. I note what is reported in (*Clarity* No 29, p. 5) about Dr Eagleson's understandable dissatisfaction that in the important *Mabo* case there are five separate judgments totaling some 200 pages. But in his article Dr Eagleson misses the one point that really could make a significant difference to the quality and usefulness of many judgments, namely the inclusion of a statement *in legislative form* of the rule(s) of law applied by the judge. This is particularly important when the applicable law is in dispute between the parties.

In this connection I refer the reader to the passage on interstitial articulation on page 20 of my article *Statute Law Reform—is anybody listening?* also published in *Clarity* No 29. I suspect Dr Eagleson would condemn the phrase *interstitial articulation* as “inflated” or infected by what he considers the vice of “breadth of language.” So I will conclude by explaining what I mean by it in contracted or narrow language.

The adjective *interstitial* refers to the interstices within a legislative formulation. Dr Eagleson might prefer to call them gaps, but there is a difference. A chain-link fence has interstices between the links; it does not have gaps unless it is broken. The interstices in a passage of legislation mark the places where the drafter has not felt able to be more detailed. Yet the court may find more detail necessary in order to decide the point at issue. If a previous reported decision does not settle the point, the court must do so itself. What I am suggesting is that the court should do it by *articulating* the missing words. It should do this in legislative form, that is by devising a form of words which the drafter might have used if he or she had gone into more detail.

This process of articulation is occasionally carried out by judges today, but it is rare. Yet it has great advantages. If either party wishes to consider an appeal on a point of law, the articulation makes it crystal clear just what the point of law is. It is that the judge's articulation is an incorrect formulation of the missing statutory rule. In future cases, if the judgment is reported or otherwise available for reference, the articulation makes it clear

just what the case decided. The future court may follow it or (if it has the power) overrule it.

If the law in question is later reduced to code form (as I believe it should be whenever this is helpful), the codifier can use the articulation as part of the code. Wide availability of such articulations would simplify the process of codification and make it more likely to be carried out.

Finally, the articulation would tell the litigant precisely what rule of law the judge had used to decide the case. I'm sure Dr Eagleson would approve of that.

... and a retort

by Dr Robert Eagleson

Francis Bennion is recognised for his work on statutory interpretation. It is unexpected, then, to find him lapsing into misinterpretation and self-contradiction in his riposte, which he has labelled well. It has more the marks of a quick thrust than a considered response, as his introductory, tetchy parries at Sir Donald Nicholls and Lord Renton reveal.

My article, which was written to the tight limit of 1500 words imposed by the original editor, was commissioned to encapsulate the essence of a 7-hour workshop on communicating judicial decisions presented at their request to judges and registrars in one of our courts. This segment had been preceded by a 3-hour workshop on making decisions, led by a judge. The workshop has since been repeated for judges and registrars in a different court.

I do not give these background facts to excuse the article. It ought to be capable of standing on its own and it certainly should not contain error. But the facts have some pertinence to a discussion of Mr Bennion's riposte.

1. Mr Bennion is mocking words when he argues that the purpose of judicial decisions is not to communicate the law but 'to resolve a dispute by applying the law to it'. Because the resolution is in terms of the law, and not on any other basis, judgments set out the law. Judges and registrars—or at least the ones I was in the workshops with—do not simply

declare the finding, but also add their reasons, and they see it as essential that the finding emerge from the reasons. The participants in neither workshop disputed that their role was to make the law clear to the parties so that they would recognise that the finding flowed unequivocally from it and was proper.

Mr Bennion himself would seem to lean in this direction. Later in his riposte he argues that “the inclusion of a statement in legislative form of the rule(s) applied by the judge could make a significant difference to the quality and usefulness of many judgments,” and he renews his advocacy of “interstitial articulation.”

In its favour, he asserts that “the articulation would tell the litigant precisely what rules of law the judge had used to decide the case.” At this point to separate resolution of the dispute and communication of the law seems to be splitting hairs.

2. Mr Bennion seems to want authors to cover every aspect of a topic whenever they write. He chooses to ignore social context and current concerns. The fact that my article does not mention other members or potential members of the audience does not mean that it assumes that “the parties to the litigation form the only audience.” Instead it takes for granted that lawyers already receive sufficient attention in the courtroom: their cause does not warrant further advocacy. The article and the workshop were concerned to promote a greater awareness of the parties to the litigation and an understanding of their condition and needs. It does assume—I think justifiably—that if they can grasp the decision, then their advocates should be able to do so. There is also a good probability that many in the public at large will be able to follow the ruling.

In his opening paragraph, Mr Bennion takes Sir Donald Nicholls to task for wanting the White Book to be written “in a form anyone can understand,” but he seems to decide decisions be formulated [sic] to “take account of all the audiences.”

3. The article does not make “the usual blanket assertion” (Mr Bennion’s

words) that “we should use the active rather than the passive” and Mr Bennion’s use of these words confirms the hastiness of his response. I was careful to preface my remarks on voice with the words “when we are requiring someone to do something”. It is only in this context that the stated preference for the active should be read and I selected this item as an example of language issues in the short article because it occurs frequently in the decisions of the workshop participants.

Nor did I imply, as he suggests, that the two voices meant the same, but instead concentrated on the fact that the actor (or agent) was expressed in the active but not in the reduced version of the passive, which is used so commonly.

Mr Bennion’s argument that the passive is “better” in this particular context is shaky. At least the active “you must return the goods by 30 November” captures the 90+% who survive to fulfill the requirement. By mentioning no-one, the passive “the goods must be returned by 30 November” could allow everyone to evade responsibility. If it is argued that this is an over-literal interpretation of the passive, so also is Mr Bennion’s interpretation of the active—an interpretation which very few in the community would adopt. Mr Bennion is wielding a two-edged sword in this riposte. (In passing, I could add that we did discuss and confirm uses of the passive in the workshop. That I might do so is confirmed by my other writings on plain English. Mr Bennion might have acknowledged this.)

4. Mr Bennion disagrees with my proposal that judges and registrars should explain technical terms. He believes that this task might be better undertaken by the parties’ legal advisers but gives a desire to keep judgments shorter as the only reason that the responsibility should be shifted from judge to adviser. However, having judges and registrars provide the clarification encourages them to be controlled in their use of terms and guarantees that all sides receive the same message.

5. Mr Bennion may have long experience with clients but it may not always have been very illuminating for them. Clients often hold back in the presence of their professional advisers, especially bewigged ones. They can be overawed and so may not reveal all their thoughts. Patients—if I may use another example—often enquire of nurses and pharmacists rather than their medical practitioners for much the same reasons.

Obviously, in a court case winning is the immediate concern, but that gives way later to other interests, especially if one has lost. Then it is that understanding takes on more importance. It is not just a question of comfort, as Mr Bennion suggests, but can also be a crucial determinant for future action.

Clients' failure to complain to barristers that they did not understand the ruling does not mean they do not complain at all nor that they do not want to understand. Even the winners in the *Mabo* case have criticized the obscurity of the ruling.

- 7.¹ In an argument it is wrong to attribute to others lower standards than one's own, as Mr Bennion does when he takes up interstitial articulation. He knows my writings. I have never condemned richness of language itself as a "vice" but, as the article itself testifies, I oppose a mere display of language for self-aggrandisement or

personal image without concern for other human beings. Never have I downgraded precision; always have I insisted that clarity must accompany accuracy, not replace it.

In the article I propose that judges explain technical terms, not substitute inexact words for them. He has no grounds to say that I would prefer *gaps* to *interstices*. To caricature another's position and thereby seek to overthrow it by mounting a fake argument is unscholarly.

In the midst of this sorry segment, Mr Bennion once again borders on the contradictory.

He had argued earlier that judges could leave it to lawyers to explain technical terms to their clients: the judges need not trouble themselves and lengthen their judgments. Yet fit when he is writing to the learned legal readers of *Clarity*, he inserts a long explanation of interstitial articulation, even though readers had read about it in the previous issue and in his publications.

But this inclusion of the explanation has a happy side. It shows that Mr Bennion does not follow his own precepts but rather practises what I preach.

Endnote text

¹ The original version of this article, published in *Clarity* No 30, is missing item 6, and we were unable to find Robert's original draft to make the correction here.

The Incomparable Robert Eagleson

by Joe Kimble

The cause of plain language has lost one of its patriarchs. Robert Eagleson's death is a heavy blow—and almost more than his many friends and colleagues around the world can bear.

Robert's accomplishments are the stuff of legend. It's not an exaggeration to say that his speaking tour of Canada in the 1980s galvanized the plain-language movement in that country. He was a primary author of the monumental report *Plain English and the Law*, issued by the Law Reform Commission of Victoria (Australia). His book *Writing in Plain English* is a classic. He worked on one of the earliest high-profile plain-language documents, the NRMA car-insurance policy, in Australia—and on many other projects after that. He cofounded, with Peter Butt, the Center for Plain Legal Language at the University of Sydney, which had a very successful run in the 1990s. He was a *Clarity*

continued on page 18

continued from page 17

Committee member for many years. He helped train generations of lawyers and public officials. He was a wonderful speaker—entertaining, learned, inspirational, and insightful. He will be forever quoted and cited on the subject of plain language. And on top of all that, he was a professor of Modern English Language at the University of Sydney.

Robert had a great influence on my own work, so I'd like to share a few memories.

- Seeking his help on an early article, I called him in Australia. Unfortunately, I had forgotten about the time difference and called during the middle of his night. But Robert never mentioned it (I only learned later); instead, he got up, talked with me, and dug out papers to get some information that I was looking for.
- In 1992, I presented a resolution in support of plain language to the Legal Writing Institute. Whether it would pass was far from certain. After a panel debate, during comments from the audience, Robert stood up and told about testing on legal documents done by the Law Reform Commission of Victoria—and how the reading time improved substantially with plain-language documents. I suspect that most of the legal-writing professors in the audience had not heard much about this kind of testing. I could tell that it made an impression.
- Robert's editing suggestions were like gold. He was that rarest of editors—someone who could improve the substance. I remember bringing an article to an international conference and asking Robert if he would be able to look it over. The very next day, he returned the article, loaded with comments. I can still see him walking in the room that morning, article in hand. And I still remember one of the comments. On the subject of guidelines for plain language, he had written something like this: "The guidelines developed by writers and editors over time have proven themselves in practice. We do not have to start all over again with every new document." Perfect.
- As late as June 2012, Robert was kindly commenting on a section of my book *Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law*. He was concerned about distinguishing between words that exhibit different degrees of vagueness: words that are vague in all circumstances, and words like *good cause* or *within a reasonable time* that are less vague in certain circumstances. In a lengthy e-mail, he wrote:

Readers bring to the interpretation of any term their knowledge and experience of the world. Over time the community has built up a sense of what is intended by within a reasonable time in a range of situations: they'll accept 6 days as reasonable in some situations, but not 6 months. Too much of the discussion on vagueness ignores this community store of meaning attached to words. Of course, there will be debate in some situations, but it will be minor in proportion to the overall scheme of things. Many times the meaning is simply and deliberately not closely specified or defined because the writers know that they can depend on the community's knowledge of how the world works. If there is an occasional dispute, it can be resolved by a court.

Such was Robert's careful thinking on fundamental questions.

Above all, Robert was a kind, humble, gracious, and generous man. I only wish that I could tell him how much I'll miss him. Toward the end of an article he published in *The Scribes Journal of Legal Writing*, he wrote:

There is an even higher gain than respect for the law and lawyers in writing plainly. Because its overarching goal is the understanding of the audience, it is the one style that enables us to serve others. And service to others is the quintessence of living.

That was the spirit of Robert.

A singular use of THEY

This article differs slightly from the original to follow Clarity's current style preferences. —Ed

Number 34, page 29, January 1996

Extracts from a leaflet produced under the auspices of the Australian Attorney-General's Department as part of the Corporations Law Simplification Program

We are grateful to Robert Eagleson and his colleagues on the Task Force for allowing us to reprint this

The issue

In the First and draft Second Corporate Law Simplification Bills, they has been used to refer to an indefinite noun, rather than the traditional legal he or the cumbersome he or she. Proposed new subsection 242(5) in Schedule 6 of the First Bill, for instance, reads:

A person is entitled to have an alternative address included in notices under subsections (1), (2) and (8) if:

(a) their name, but not their address, is on an electoral roll . . .

This paper sets out the reasons for this decision.

What the dictionaries say

The 3 great unabridged dictionaries of the English language are the *Oxford English Dictionary* (Clarendon Press: 1989), *Webster's Third New International Dictionary* (Merriam-Webster: 1986), and the *Dictionary of the English Language* (Random House: 1987). Here are extracts from their entries for *they*, *them*, *themselves* and *their*.

Oxford

they

2. Often used in reference to a singular noun made universal by *every*, *any*, *no*, etc., or applicable to one of either sex (=‘he or she’).

1759 CHESTERF.Lett.IV.ccclv.l70 If a person is born of a . . . gloomy temper . . . they cannot help it

their

3. Often used in relation to a singular sb. or pronoun denoting a person, after *each*, *every*, *either*, *neither*, *no one*, *every one*, etc. Also so used instead of ‘his or her’, when the gender is inclusive or uncertain . . . (Not favoured by grammarians.)

Webster's third

they

1b: he or she: . . . –used with an indefinite singular antecedent <everyone tries to make the person they love just like themselves—H.D. Skidmore> . . . <the liability for damages lies against whoever is knowingly involved in such sale whether or not they receive any part of the consideration—U.S. Code>

themselves

3: HIMSELF, HERSELF—used with a singular antecedent that is indefinite or that does not specify gender <nobody can call themselves oppressed—Leonard Wibberley>

Random House

they

3: (used with an indefinite singular antecedent in place of the definite masculine *he* or the definite feminine *she*) : *Whoever is of voting age whether they are interested in politics or not, should vote.*

- Usage. Long before the use of generic HE was condemned as sexist, the pronouns, THEY, and THEM were used in educated speech and in all but the most formal writing to refer to indefinite pronouns and to singular nouns of general personal reference probably because such nouns are often not felt to be exclusively singular. Such use is not a recent development nor is it a mark of ignorance.

It isn't new

The entries from the *Oxford English Dictionary* forcibly demonstrate that the use of *they* to refer to a singular noun is not an innovation of recent decades or even of this century. The first citation in the Dictionary's files is from the 14th century so that we know that

the practice had been adopted in writing at least by then. There may have been much earlier examples which have been lost and the practice may well have been established in speech before it found its way into writing.

In adopting *they* with singular reference we are simply following a long established convention of the English language.

Furthermore, as our illustrations from literature on this page demonstrate, the usage has enjoyed continued strong support down the centuries. Even those who are universally regarded as among the finest composers of our language can be found using *they* with singular antecedents and as far back as 1926 H W Fowler declared in *Modern English Usage* that *as anybody can see for themselves* was the 'popular solution' (pp 391–392).

Equally significant, the editors of the *Oxford English Dictionary* prepared the entries for the letter *t* between 1909 and 1915. In other words, lexicographers have been recognising this use of *they* as normal standard practice—despite what some grammarians say—all this century.

How popular is *they*?

Up to the 1960s at least English teachers conducted campaigns against the use of *they* in such contexts as: *Everyone has their off days*.

In 1974 Robert Eagleson conducted a series of usage tests in Sydney to see how much support remained for *he* in a universal or indefinite context and how effective the efforts of teachers had been ('Anyone for his' in *Working Papers in Language and Linguistics* (1976) 4: 31–45).

One area investigated was the use of pronouns in the environment of question tags, for example:

Somebody showed her the way, didn't . . . ?

In tests in which 95 informants had to write their answers, 87% favoured *they*. In 2 items in the test, of the 190 potential occurrences, 168 were *they*, 7 were *he* or *she*, 1 was *one*, and 1 was an aberrant *we*. Very much to the point, most of the answers with *he*, *she*, or *one* were produced by graduate teachers or lecturers of English. Even so, there was regular support for *he* only among 20% of the English teachers: 80% of the teachers never used *he* or *she*.

These findings have been confirmed by a recent survey conducted by the Dictionary

Research Centre at Macquarie University (*Australian Style* (December 1994) 3:1: 13–14). Again, the use of *they* with *everyone* and *anyone* was strongly preferred overall, and with the under 25 age group reached 98%. However, older participants, especially those in the 65+ group, were less supportive, perhaps still feeling the chastisements of school lessons. The results are unmistakable, however: there is a widespread acceptance of *they*.

Both studies concentrated on single sentences, for instance, *A doctor has a responsibility of care to . . . patients*. Higher scores in favour of *they* might well have been obtained if participants had been confronted with several consecutive sentences, such as:

If a person was asked to define a zebra, *he* or *she* could do this quite efficiently without calling up a whole 'zoo' or 'safari' frame. But if *he* or *she* overheard someone talking about a zebra seen in London earlier in the day, then *he* or *she* could go deeper into *his* or *her* memory, and call up a zoo frame, which would allow *him* or *her* to fit the narrative into a predicted set-up.

We may be prepared to accept a sole use of *he* or *she* but in a string of sentences it becomes far too cumbersome and *they* is the happier solution. (*They* was actually used by the author of these sentences, Jean Aitchison, Professor (Language and Communication, Oxford University.)

That we are not exaggerating the continued—and increasing—use of *they* is evidenced by the range of examples in these pages. They all come from written—not speech—texts and from a wide variety of sources.

A miscellany

Literary critic

It is therefore the first duty of any teacher of literature to give their pupils a chance of enjoying it.

The Times

Political commentator

. . . further amendments which will outlaw discrimination against a person because of the identity of their husband or wife.

The Australian

Education commentator

A mission statement that is sufficiently bland to encompass everyone's conception of their role.
Daedalus

University

This certificate lists the four courses for which the student was registered, showing both grade assessments of their work over the year and grades for their examination performance.
University of London

If somebody earns \$40,000 a year we would expect them to pay for their course.
a Vice-Chancellor

Linguist

To turn to badness, someone bad commits anti-social actions, is aware that their actions are anti-social and could control their behavior if they wished.
Words in the Mind

Critic

The poem exists if everyone who finds it finds themselves in it.
The Listener

Financial—legal

Prospectus

If a licensed financial adviser in Australia or a registered broker in New Zealand introduces you to the trust we can pay them commission.

Financial planning brochure

For example, to set up a protective trust for a child who may not be able to look after their own affairs.

Bank technical bulletin

Currently the concessional component of an ETP can be made up of the following:

- payments made to an employee as a consequence of physical or mental incapacity that renders them unable to fulfill their particular employment.

Bank guarantee and indemnity

Each guarantor is liable for all the obligations under this guarantee and indemnity both separately on their own and jointly with anyone or more other persons named as "Guarantor".

Literary examples

Now leaden slumber with life's strength
doth fight,
And every one to rest themselves betake.
William Shakespeare

So likewise shall my heavenly Father do
also unto you, if ye from your hearts for-
give not everyone his brother their
trespasses.
The Bible (King James Version)

God send everyone their heart's desire.
William Shakespeare

Little did I think . . . to make a . . . com-
plaint against a person very dear to you,
but don't let them be so proud . . . not to
care how they affront everybody else.
Samuel Richardson

Everybody fell a laughing, as how could
they help it.
Henry Fielding

A person can't help their birth.
William Thackeray

But how can you talk with a person if
they always say the same thing.
Lewis Carroll

Some people say that if you are very fond
of a person you always think them hand-
some.
Henry Jones

I know when I like a person directly I see
them.
Virginia Woolf

Everyone was absorbed in their own busi-
ness.
Andrew Motion

'There s a bus waiting outside the termi-
nal to take everybody to their hotels,' said
Linda.
David Lodge

Nobody would ever marry if they thought
it over.
George Bernard Shaw

You just ask anybody for Gordon Skerrett
and they'll point him out to you.
Scott Fitzgerald

His own family were occupied, each with
their particular guest.
Evelyn Waugh

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It has happened before

In earlier centuries English had a regular system of pronouns which distinguished between singular and plural:

<u>Person</u>	<u>Singular</u>	<u>Plural</u>
First	I	we
Second	thou	ye (you)
Third	he, she, it	they

Gradually through the late Middle Ages *you* came to supplant *thou* and by the end of the 17th century held virtual sway as the pronoun for the second person. It has continued now as the sole form for singular and the plural for 3 centuries.

It is critical to remember this episode in the linguistic history of English. It illustrates that the language can—and does—change without a collapse in successful communication.

Again, English speakers have demonstrated by their usage that they are not disturbed by using the one pronoun in both a singular and a plural sense. Indeed, some speakers who boast a knowledge of grammar—including those who now oppose a singular use of *they*—soundly condemn other members of the community who want to introduce a distinctive plural form *yous* to escape the potential ambiguity! If *they* as a singular is wrong, ungrammatical or whatever, so also is *you* as a singular on this score.

... and in legislation

The Task Force cannot claim to be innovators in taking this decision on *they*. It has occurred as a singular before in legislation, as this example from section 9 of the Nurses (Amendment) Act 1985 (Victoria) establishes:

(10) *The Council may charge the fee (if any) prescribed by the Governor in Council for-*

...

(b) *the provision of a copy of any roll or a part of a copy of any roll to a person for their own use.*

Does it work?

If we would listen to ourselves and reread our writings, we would realise that *they* serves us most successfully without causing any confusion. All of us say: *If anyone calls, tell them I'll be back at 4 O'clock* and write: *No-one in their right mind would do that.*

We use *they* often without qualm or disquiet. Indeed, it comes out so naturally that we are scarcely aware of our practice. And we are never misunderstood or misinterpreted.

An area for caution

There are some situations in which the use of *they* could lead to ambiguity, for example:

Where an applicant notifies the other residents, [?] must lodge a section 12 notice within 14 days.

To insert *they* in the blank here would not work if we want it to refer unequivocally to *an applicant*. Readers could quite legitimately—and most probably would—interpret *they* in this sentence as referring to *the other residents*.

The answer

Two observations are in order.

First, the number of times sentences with this potential ambiguity actually arise in legislation and legal documents is relatively rare. We should not allow exceptions to frustrate us from using a valuable device and force us into a cumbersome one.

Rather than using *they*, we should reconstruct the original sentence to remove the potential ambiguity or, for this rare occasion, use another device, such as repeating *applicant* or *resident*.

Secondly, to offer this solution is not to resort to a ruse in order to avoid a difficulty for our proposal. If we were to allow the possibility of ambiguity to dominate, then we would have to eliminate many valuable resources from the language. Even the singular pronouns would have to be abandoned for they too can be ambiguous. For example:

The matron told the nurse that she was ill.

To whom does she refer to: the matron or the nurse? Nor will replacing *she* with a noun help here:

The matron told the nurse that the matron was ill.

The second *matron* would be interpreted as referring to a different person and not the first matron. A similar interpretation would follow if we substitute *nurse*. To resolve this problem, we have to reframe the sentence.

Examples like this do not mean that we should abolish third person singular pronouns just because they fail us and produce ambiguity in these situations. The instances are too small for this drastic remedy. What these examples confirm instead is the principle that writers are always responsible for

what they write and cannot follow rules of language mindlessly.

Just because the rules of grammar say that we may substitute pronouns for nouns does not mean that we should always do so. So it is with *they*. Writers may—and should—use it in the contexts we recommend because it produces a smoother, less cumbersome text, but writers need to exercise care with it as with every other item of language to avoid any ambiguity or trace of confusion.

Used judiciously, *they* as a singular is effective. Because it is the established practice of the community, it enables us to offer legislation in a language form that is familiar and obviously congenial to the community, yet clear in meaning.

Robert Eagleson—A Tribute

by Martin Cutts

Before email and the web, news of plain-language ideas travelled only slightly faster than a mule train and often became garbled along the way – especially in the distance from Australia to England. So when in 1976 Robert Eagleson helped an Australian insurer to write a clearer car-insurance policy, it took a couple of years before General Accident picked up the idea in the UK and asked me to endorse their attempt at something similar. They spoke glowingly of Robert, so I heard about him long before I met him. The GA policy interleaved commentary pages with the legal text, which seemed innovatory at the time. It was far clearer than other policies I'd seen.

Robert, as a professor of English literature, was steeped in authors who, like Jane Austen, would happily call a hill a 'considerable eminence'. Of course, in literary works anything goes. But instinctively Robert understood that humdrum documents meant for the public to understand and use should not be so gnomic.

Robert lent our emerging movement valuable academic weight. Critics who dismissed plain-language advocates as semi-literate yokels 'trying to dumb down our beautiful language' might find themselves skewered by a gentle homily from Robert on why the words of Wordsworth weren't always suitable for a tax form.

I first met Robert around 1979 when he visited the National Consumer Council's offices in London on a fact-finding mission. Robert and Muriel became good friends of mine, though mainly at a great distance. In the mid-1990s I had the pleasure of giving them a tour of Derbyshire's scenic Peak District. Robert was avid for historical details of Chatsworth House (Pemberley in Austen's 'Pride and Prejudice') and of Eyam, the village afflicted by a plague that seemingly arrived in a bolt of cloth from London in the 1660s.

Robert battled patiently with lawyers who held exaggerated opinions of their ability to write clearly or thought plain language was only for lesser mortals. In typically laconic style, he once said to me: 'Lawyers. Lovely people. Terrible writers.'

Plain English
changing the lawyer's
image and goals

Number 42, page 34, September 1998

[This is a shortened version of an article that [later appeared in Volume 7] of The Scribes Journal of Legal Writing.]

Towards the end of 1997, Judge A Callaway commented in a ruling:

The provisions of the Corporations Law that include s.553C are, as I observed in the course of the argument, drafted in the language of the pop songs. Section 435A speaks of "maximis[ing] the chances" and s.435C of "[t]he normal outcome" and "the deed's administrator," Section 435C(3) begins with the word "However" and a comma, a style that, at least until recently, has been eschewed by good writers. I am aware, of course, that there are those who believe that a statute should be drafted like a notice to quit or even a novel: their distinguished predecessors were the draftsmen of the *Code Napoleon*, later called the *Code Civil*: but an Australian Stendhal would not refresh his spirit or purify his style by dipping into legislation where the quest for simplicity pays the price of vulgarity and ends in obscurity.¹

Given my involvement on the Corporations Law Simplification Task Force, perhaps I should hasten to observe that Judge Callaway was referring to sections of the Corporations Law that we had not yet touched! Nonetheless, his remarks are revealing. He worries about what an Australian Stendhal would think of a newer style drafting; but he seems not to have contemplated what a renowned writer might think of traditional legal drafting.

[Omitted: Quotations from Jonathan Swift, Charles Dickens, James Joyce and Groucho Marx that condemn and mock legal language.]

Consider subsection 87(2) of the Complaints (Australian Federal Police) Act 1981:

87(2) Subject to this section, a person who is, or has been, a person to whom this section applies, shall not, either directly or indirectly, and either while he is, or after he has ceased to be, a person to whom this section applies, except in the performance of his duties or with the consent, in writing, of the appropriate person, make a record of, or divulge or communicate, prescribed information acquired at any time by him by reason of his being or having been a person to whom this section applies.

Add to this piece of tortuous prose a few other examples of real-life legalese. First, from our Primary Producers Act 1958:

35H The provisions of sections 43 and 48 shall with such modifications as are necessary extend and apply to and in relation to this Division and, without affecting the generality of the foregoing, in particular with the modifications that—(a) a reference to eggs or to eggs or egg products or to eggs and egg products shall be construed as a reference to citrus fruit.

For the heights—or perhaps more accurately, the depths—this from a lawyer in Texas:

It fully appears from the affidavit of the publisher thereof heretofore herein filed.

With examples like these coming to light every day, it is little wonder that lawyers have such a poor image among writers of literature and the public in general. How can the legal profession profess to respect the law, uphold its dignity, and promote its virtue in the community at large when lawyers present the law in misshapen and disheveled language? The linguistic deeds of lawyers belie their avowals. If we hold something precious, we strive to present it in the finest of displays, not in rags that will be scorned. Scorned by the community it certainly is. Think of the constant flood of jokes at the expense of lawyers.

Q: Why does New Jersey have more nuclear waste dumps while Washington has more lawyers?

A: New Jersey got the first choice.

Q: What is the difference between God and a lawyer?

A: God never thinks He is a lawyer.

Members of the community react this way because they feel that they are being cheated,

that a grand deception is being played on them. Worse, they believe that lawyers defraud them deliberately because it is inconceivable to them that anyone with an ounce of literacy would produce such tangled, labyrinthine documents naturally. They see legalese as a shabby device to line legal pockets. This is the common perception. At social junctions whenever people discover what I do, they voice immediate support, for they complain that “lawyers only write the way they do to force us to go back to them so that they can make more money!” As soon as Professor Peter Butt, my fellow co-director in setting up the Law Foundation Centre for Plain Legal Language in New South Wales, finished addressing a monthly meeting of his local Rotary Club, the whole discussion turned on the practice of lawyers writing legalese just to enrich themselves—and these comments despite the fact that he was their guest.

A few years ago at Mallesons Stephen Jaques we produced a lease in plain language for a government agency. A senior manager in the agency rang a senior partner to be assured that the lease offered the agency full protection. Questioned, he acknowledged that he could find no loopholes in it, but it was so clear that he wondered whether it was legal. This is sad. We have so conditioned the community that it doubts comprehensible language.

Tragically, lawyers are bringing not only themselves into disrepute through their shoddy writing, but also the law. Many in the community condemn it and are ready to dispense with it because they have suffered at the hands of its convoluted small print. It is grievous that lawyers should betray themselves and destroy what they are seeking to uphold. The community cannot appreciate what they are trying to do for it and how solidly based and wise their schemes are because they persist in clinging to such deplorable conventions of writing.

The wounding of the lawyer’s image is all the more tragic because it is a self-inflicted wound. They do not have to write the way they do: the solution is to hand in plain English.

Does It Have To Be Like It Is?

[Omitted: Several examples of convoluted legal writing converted to plain language.]

It is critical to recognise that there is no difference in meaning, no loss in law, between these examples of legalese and the plain-English solutions I have offered in their place. Indeed, each one of the plain-English versions has been subjected to close scrutiny by experts in the particular areas of law, who have continued their accurate representation of the originals. Plain English does not place the law’s precision in jeopardy. It does not seek as a matter of principle to change laws or policies or to tamper with their content.

What it challenges—and what the complaints against legalese challenge—is the quality of the current expression of laws and policies. Essentially, a plain-language project is concerned with communication and efficiency. It aims to produce documents that are written in such a way that their intended audience can read them easily and understand them readily. Where it touches most centrally on equity is where the form of expression disadvantages and even disfranchises one of the parties.

This is not to say that the plain English is not concerned with matters of justice and fair play, that one would be content to have bad laws so long as they were written clearly. On the contrary, plain language projects regularly lead to the removal of injustices and the elimination of cumbersome and costly procedures. One project I worked on—a residential tenancy lease—exposed clauses that were so outrageously unfair that when the landlords saw them in plain language, even they felt the clauses had to be abandoned. When we rewrote the Takeovers Code in plain language, we uncovered errors in law, ambiguities, and uncertainties, for example, in sections 16, 17, 18, 34, and 48. There has hardly been a legal document that I have worked on in the past 22 years where we have not exposed mistakes.

Any properly conceived project to increase comprehensibility will begin with an examination of the underlying policy content. We cannot make an artificial division between content and language, for it is frequently an overly intricate policy that lies behind an impenetrable publication. The trouble with many legal documents is that they retain provisions that are either obsolete or inapplicable. Sometimes, we expect the 1 contract to serve all purposes when it would be better to have 2 or more different types of contract, thereby enabling at least one of them to be

simpler. At other times, several forms could satisfactorily be merged into one to reduce the burden on the public or business. But the ultimate responsibility for these changes and simplification in content rests with the professionals in the area because only they are expert enough to know what is necessary and what can be omitted safely.

This point must be emphasised: the thrust for plain English is concerned with communication, not with the law or policy as such. We are seeking to improve the quality of that communication. The central platform of the plain language movement is the right of the audience—the right to understand any document that confers a benefit or imposes an obligation. It reminds us of the ethical dimension of writing: documents are not equitable if they cannot be understood by all parties who have to read them and comply with their requirements. Plainness encompasses language both to express a message accurately and to convey that message to an audience readily and without confusion or misunderstanding. In the past we have been content just with getting the message right. Now we embrace a more challenging task: not just accuracy but also clarity; and it is only when we have both these qualities present that we display a proper mastery of and full competence in language. Plain English will never reduce the scope of the law, but will rescue the law's expression from the obscurantism and mumbo-jumbo in which it is often encased. Above all, plain language will help us come closer to a clarity of expression and an ease of comprehension which should be the goal whenever one human being speaks to another.

It intrigues me that I should have to give these assurances about the commitment of plain language drafters to precision. Told that a document is in plain language, lawyers will stand on their heads to find a fault in it. They do not exercise the same stringency with traditional legal documents. Instead, there seems to be a blind, unthinking acceptance of them. It is a misplaced trust, as countless examples demonstrate.

For Lawyers Also, Not Just The Public

It should not be imagined, however, that plain language is only valuable for members of the public not trained in the law. On the contrary, it has equal—if not more—value for the legal profession.

In 1989 I was asked by the Department of Employment, Education and Training to help it rewrite the Austudy Regulations. The Department had just lost a case in the High Court, where the judges had struggled long over a couple of clauses in the Regulations and eventually condemned them as among the most incomprehensible they had seen.

In *The National Bank of Australia Ltd v Mason*, Justice Stephen commented about one of the documents involved:

However the remainder of Cl. 1(I) must be read, no easy task consisting as it does of one unpunctuated sentence of over 450 words of small print which is presented to the reader in twenty five closely set lines, each of excessive length. There, the resolute and persevering may find, in the midst of much else, the phrase 'and whether contingently or otherwise.'²

It is proper that judges might have to equip themselves with resolution and perseverance to come to grips with the complexity of the law in particular cases, but it is worrying when even they—expert as they are—have to call on these attributes just to unravel the expression of the law. It is not efficient to distract them in this way.

In 1986 we conducted tests with lawyers in Melbourne. They were presented written problems that required consulting legislation to solve them. At times, the lawyers were given the legislation as it had been written in the traditional style; on other occasions, they had to deal with versions written in plain English. By and large, they managed to come up with the correct answers whether they used the traditional or the plain versions, but when they could consult the plain versions they arrived at their solutions on average 30% more quickly. This is a significant gain in reading efficiency and a great saving in costs for the community. We cannot afford to tie up our legal profession needlessly in legalese. Clearly, lawyers and judges are not so adept with it and do not find it so much easier than the rest of the community.

There is more to the value of plain English for lawyers than just efficiency. It can also save them from making errors and from advising their clients wrongly. A few years ago I was part of a team developing a revised lease that a major organisation decided to introduce for

its clients at the same time as it released innovations in its products. Clause 12 read:

You must get our written consent before you can act as a handling agent for another [company]. We have absolute discretion in giving approval for this.

Two major legal firms responded angrily on behalf of their clients:

- This clause is absolutely unacceptable and it should be deleted in its entirety.
- This would seem to be an unreasonable fetter. If a [company] wishes to act as a handling agent for another [company] what business is it of [the lessor]? Is there some industry problem of which I am unaware which has lead (sic) the [lessor] to include this clause.

We politely reminded the lawyers of the corresponding clause (14) in the earlier version of the lease, which they had allowed their clients to sign each year for the past 20 years:

Not to assign charge underlet or part with the possession of the demised premises or any part thereof nor to hold or occupy the demised premises or any part thereof whatsoever as trustee or agent or otherwise for the benefit of any other person without the written approval of the [lessor].

Both outstanding leases turned up signed without further comment! Whether the lawyers had just not taken any notice of the original clause 14 or had not understood its cumbersome language, I suppose, must remain an open question. I suspect incomprehension rather than carelessness on the part of 2 major legal firms. Whatever the cause, the episode illustrates that plain language is more effective for lawyers as well as for the rest of us.

Image And All That

A few years ago, I was conducting jointly with a senior judge a workshop for registrars on how to develop and communicate decisions, with an emphasis on plain language. We had combined and supported each other admirably all day, but going down the lift at the end of the workshop, the judge commented:

What you said about writing plainly was excellent but of course I cannot present my judgments like that. I have to appear erudite.

Unwittingly, in those closing words he put his finger on a major cause of difficulty and incomprehensibility in legal writing. Too often legal writers are concerned with establishing an image rather than concentrating on the needs of the audience. They become preoccupied with demonstrating that they know technical terms and arcane vocabulary, for example preoccupied with sounding like lawyers and learned people—and lose sight of the fact that the primary goal of lawyers is to convey a message to others.

It's baffling that for all their concern to impress, lawyers have not sought to consider what really impresses. They delude themselves that legalese and inflated language are the way. There are the comments of Swift, Dickens, and so many others that should have made them question their practices. There is the illuminating work of Christopher Turk in Great Britain.³ He presented over 400 scientists at a conference with 2 versions of a report on a piece of medical research—1 version in the traditional scientific style as it had been written originally by the researchers, and the other in plain language. He asked the scientists to answer the following questions:

- 1.1 Which passage is more interesting?
- 1.2 Which passage is more difficult to read?
- 2.1 Which style seems more appropriate for scientific writing?
- 2.2 Which style is more precise?
- 3.1 Which writer gives the impression of being a more competent scientist?
- 3.2 Which writer inspires confidence?
- 3.3 Which passage shows a more organized mind?
- 4.1 Which passage seems more dynamic?
- 4.2 Which passage seems more stimulating?

The scientists voted overwhelmingly that the plain-English version was more interesting, more precise, more stimulating, showed a more organised mind, and gave the impression of a more competent scientist. They voted that the traditional passage was more difficult to read. As for question 2.1, they voted that the traditional style was more appropriate for scientific writing.

It may be comforting to realise that scientists can also be irrational, but irrational their response certainly is. They want every other scientist to write to them in the plain style: it will be easier to read, more dynamic, inspire confidence, and so on. But when they themselves come to write, they are going to write in the traditional way. They are unthinkingly acting from convention, not principle. They are turning their back on what really impresses them to compose in an unappealing manner.

Lawyers are acting in the same illogical way. Friends in the profession are constantly sending me extracts of gobbledegook from commercial legal documents that they have received from other lawyers. Judges are frequently castigating the endeavours of legislative drafters. But these same lawyers and judges are equally guilty of producing legalese as they strive to impress us.

Robert Benson and Joan Kesler have conducted among lawyers in the United States similar experiments to those conducted by Turk among British scientists.⁴ The American lawyers rated the passages in legalese to be “substantively weaker and less persuasive than the plain English versions.” Even more fascinating, they inferred that the writers of the plain-English versions came from the more prestigious law firms!

When it comes to writing, so many are widely mistaken on what really impresses. As Dullah Omar, the South African Minister of Justice, observed:

The use of language above the heads of the average citizen may swell the heads of its users but it does little else.

It certainly does not create a good image.

Words, Words, Words

Another area where lawyers need great help is in language and communication. They know too little about them, and what they do know is frequently misguided or hopelessly outmoded.

This may seem an outrageous suggestion to make, given that lawyers often claim for themselves that they are wordsmiths and that words are the life-blood of their activities. Yet if not ignorance about language, how else are we to explain the long cumbersome sentences of 200, 300, even 800 words that still appear; the absence of coherent organisation in documents;

the misunderstanding about punctuation; the attachment to so-called “settled terms,” no matter how ill-chosen they might be.

Lawyers have a great fear of departing from terms whose meanings they imagine have been determined by a court. It is a debilitating fear. Let me illustrate from the recent experience of a friend who is head of a communications and public relations section within a large organisation. Since her section endeavoured to practise plain English in the documents they produced, she thought it only proper that the contracts they entered into with freelance writers, designers, and photographers should be in plain language. She set about amending the standard contract and then sent it to the firm’s legal section for checking. She had modified clause 1 as follows:

1. This Agreement shall **commence start** on 20 January 1992 and **expire finish** on 23 December 1992.

The legal section responded:

Clause 1

We would prefer to retain the words “commence” and “expire” rather than “start” and “finish.” The words retained are quite clear and have accepted meanings in law whereas the words “start” and “finish” do not yet have established meanings, although we concede they would be unlikely to cause concern.

The craven dread that is expressed here is too sad: how could *start* possibly get the lawyer into trouble? But worse, the response is so erroneous. Lawyers are too concerned with how courts have ruled on certain words in the past. They do not ask whether the courts should have had to rule in the first place. If a word needs interpretation, then perhaps it was the wrong word to choose originally. What we could have is a deficiency in drafting. Rather than clinging to a faulty term because a court has ruled on it, we should be getting rid of it altogether. If not, everyone is being asked to be aware of the court’s ruling to interpret their documents aright. We are maintaining a patched-up precision rather than striving for a pristine precision.

In passing, it is worth recording that in our experience in Australia plain-language documents have led to less litigation. We need have no fear of going down the path of rethinking our terminology and of making new solutions.⁵

[Omitted: A discussion of the linguistic misconceptions behind the long sentence.]

Not Wordsmiths—Only Lawyers

Let me return to the remarks of Justice Callaway with which I began this paper. In the midst of them is the comment:

Section 435C(3) begins with the word “However” and a comma, a style that, at least until recently, has been eschewed by good writers.

How does he come to hold such an idea? I know some benighted teachers used to teach this as a rule, but surely Justice Callaway is not harking back to his distant school days. Surely he has read more widely since then and listened intently. *However* has never had a fixed place in the English sentence; it has always been mobile, and this characteristic has enabled us to achieve different emphases. What of the practice of Shakespeare and Burke? Are they poor stylists because they placed *however* first on occasions? Why do we have to be so hide-bound? *However* is frequently more effective as a signal of contrast or qualification in the initial position in a clause. God gave us language as a liberating, enriching gift so that we could communicate with each other and share ideas. It is not an arbitrary, burdensome yoke under which we should be enslaved. Yet it is on the foundation of unenlightenment—of poor learning rather than a true knowledge of language—that Justice Callaway mounts his condemnation of plain language.

Because a limited and uncertain knowledge of language—but not of law—is the central cause of incomprehensible legal documents and lest it be thought that I am constructing this argument on flimsy evidence, let me cite another instance from the many that may be quoted. We have ignored this deficiency for too long; we need to become alive to it, not to despise lawyers but to help them.

Justice Tadgell of the Supreme Court of Victoria has an aversion to the replacement of *shall* by *must* in legislation and legal documents generally. In a ruling in 1995 he devoted some 3 pages to berating the change, even calling on Queen Elizabeth I to uphold him. While virtually every line of the ruling gives us ammunition, I want to quote portions that are particularly telling for our present discussion:

Positive obligations are expressed in the Act, in some instances understandably, by force of “must,” rather than by means of “shall.” This practice makes the questionable assumptions, first, that “shall,” in order to be understood, needs to be fixed and absolute in meaning and, secondly, that the average reader is incapable of perceiving that it need not

Even those who do not tolerate much history might admit that there are places where “must” carries its own stamp of absurdity; and that “must not,” when ill-used, is even worse. There are several examples of the latter in the Planning and Environment Act 1987. One is to be found in s.100(2), which proclaims that “The amount paid under this section must not exceed 10% of the amount of compensation which would have been payable except for this section”. Again, s.180 provides that “An agreement must not require or allow anything to be done which would breach a planning scheme or a permit.” Who in these two cases is enjoined? Who “must not”? Is there any sanction? What if that which “must not” happen does happen? Is it to be treated as a nullity? Is the blow of the blunt instrument to be as effective as the senseless thunderbolt? Even more grotesque is s.122(4), which asserts that “A person must not be convicted of an offence against any other section of this Act if” Who is being prohibited here?⁶

Justice Tadgell could replace *must* with *shall* in each of the sections he has referred to, he could even print it in block letters and bold, and he would still not remove the imprecision he complains of. It is not an issue of shall or must but of the passive voice in s.122(4), for example. He has missed the point completely, and all he has done is to expose an ignorance of quite elementary grammatical matters. He and numbers like him should be far less confident of their linguistic knowledge. He would be better served sticking to the law, in which he has some qualifications.

There is no need for us to go searching for these embarrassing pronouncements of lawyers on language. Lawyers continually confirm by their actions that they have little understanding of language and little appreciation of how readers tackle texts and what they find congenial.

Write The Speech

The misconceptions and myths that lawyers have about language manifest themselves predominantly in the domain of writing. Most speak clearly and plainly. Time and again lawyers with whom I am rewriting documents answer my requests for explanations of the law underpinning a document with admirable lucidity. We need to help them carry over the plainness of their spoken words appropriately into their written words. Because they use words to express the law, they need more training about words. I am not thinking of the weary, unimaginative solution of some first-year writing courses, but more effective professional programs that develop a knowledge of the reading strategies of audiences, of the knowledge they bring to a text, and of the language they use; that promote understanding that one structure in language may be equivalent to another; and that foster a recognition that many of the conventions lawyers currently revere emerged in a time when they were paid by the word and have to do with economic factors and not the requirements of legal accuracy. As well, just as other specialists freely call on lawyers for their expertise, so lawyers need to be encouraged to combine more willingly, freely, and respectfully with other specialists in the writing segment of their undertakings so that they can broaden their linguistic competence and elevate their language performance.

The Benefits Of Plain Language

Plain-language legal documents have now been in use for 22 years in Australia. They have not led to the disasters predicted for them, but have continued to notch up impressive gains.

- They have reduced the number of invalid claims in many enterprises.
- There has been much less litigation over them than over the former legalese versions.
- They save lawyers from making mistakes. (With the pre-1995 Family Court form, 25% of divorce application forms submitted by lawyers were rejected. Within 1 month after the new plainer form was introduced, the error rate had almost halved to 14%.)
- They save lawyers' time. (While brevity as such is not the goal of a plain-language project, it is regularly the result as verbiage

is eliminated. I have just been converting a contract that we have reduced from 12 to 3 pages and yet have included extra items. The Corporations Law Simplification Program to date has shrunk the text from some 580 pages to 340 pages, a saving of 240 pages—the size of many novels.)

But most significantly, plain legal language upholds the law and promotes respect for it and for lawyers. Rather than concealing the law in mumbo jumbo and confounding understanding with humbug, it communicates the law and illuminates the minds of clients. Rather than bespeaking a low professionalism and a limited competence in language, it evidences an expertise in subject and a mastery of words.

There is an even higher gain than respect for the law and lawyers in writing plainly. Because its overarching goal is the understanding of the audience, it is the one style that enables us to serve others. And service to others is the quintessence of living. It enables lawyers to reach out from the confines of the law to use their legal qualifications for the elucidation of their clients and the well-being of the community. It constrains them to put their skills at the disposal of the community for the benefit of the community rather than the elevation of themselves. It does not turn the clients into lawyers: they need training for that. But it does foster a greater sense of comfort in and serenity with the law. The principles of plain language suffuse the law and lawyers with a human and a humane sensitivity.

Endnotes

- ¹ *GM & AM Pearce and Co Pty Ltd v RGM Australia Pty Ltd* (1998), 16 Australian Company Law Cases 429 at p. 432.
- ² (1975) 133 Commonwealth Law Reports 191 at p. 203.
- ³ *Do you write impressively*, 9 Bulletin of the British Ecological Society (1978: 5–10).
- ⁴ *Legalese v Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing*, 20 Loyola of Los Angeles Law Review 301 (1987).
- ⁵ There are other problems with settled terms, but they have been discussed elsewhere.
- ⁶ *Hallwood Corporation Ltd v Roads Corporation* (unreported, Victorian Court of Appeal, 30 June 1997; case no 6596 of 1995).

Robert Eagleson—A Tribute

by Ted Kerr, former partner Mallesons Stephen Jaques (now known as King & Wood Mallesons)

Robert consulted to Mallesons from 1987 until the early 2000s. He was introduced to the firm by Kevin Burges who had attended one of Robert's drafting seminars at Sydney University.

In 1987, shortly after Mallesons and Stephen Jaques Stone James merged, the firm engaged on a major exercise of updating and harmonising its precedents across all practice areas. Our precedents manager at the time, Michèle Asprey convinced the partners that we should adopt plain language in this exercise and Robert was engaged to assist. A wide range of partners including Ted Kerr, John Stumbles, Greg Hammond, Michael Gammans, David Rohr, John Edstein, Jim Higgins, David Bretherton, Belinda Gibson, Jeff Mansfield and Nikki Wakefield Evans entered into this exercise enthusiastically. I think it is fair to say that the resulting intellectual property positioned the firm as a brand with outstanding and market leading documents.

Robert played a fundamental role in this work. He gently, yet persuasively, forced us to question the status quo. He gave us the confidence to try new things. And he had a way of cutting through gobbledegook and producing clarity.

In addition to helping with the firm's precedents Robert helped on many client projects, producing a wide variety of standard form documents including in the areas of insurance, banking and funds management which are now in wide use across Australia. And he was a great teacher. Many in the firm remember fondly attending his seminars on plain language drafting.

Much of his work was ground breaking. For example, he assisted the NRMA produce the first plain language insurance policy. This was revolutionary in its day. He worked on many government projects aimed at producing better legislation, including for the Victorian Law Reform Commission and the Commonwealth Government. This resulted in enormous improvements in the wording of legislation.

He had a worldwide reputation, and travelled frequently spreading the word of plain language.

Robert was a great friend and colleague to many in the firm. We appreciated his contributions enormously and he will be missed.

Drafting Tip

Definitions—cross references in disguise

Number 43, page 56, May 1999

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

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

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

The 1-off definition

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

sub-clause, when all is made clear. Back they have to go to the beginning of the clause again to insert the appropriate meaning and reach the proper interpretation.

An example

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

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

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

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

A double whammy

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

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

- (a) instead of offers being made to issue the shares to the foreign members, rights are granted to a nominee for the issue of those shares
 - (b) the nominee is approved by . . .
 - (c) . . .
 - (d) the nominee sells the rights at a price and on terms approved by the stock exchange or the ASC
 - (e) the nominee distributes the proceeds of the sale to the foreign members in the same proportion to which they would otherwise be entitled to the shares.
- (5) The foreign members are those whose addresses, as shown in the register of members, are places outside Australia and the external Territories.
- (6) In determining the proceeds of the sale of the rights, deduct:
- (a) the expenses of the sale; and
 - (b) amounts payable to the company for making the rights available to the nominee.

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

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

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

- (4) The exception in subsection (1) applies to members of the company whose addresses as shown in the register of members are outside Australia and the external Territories if under the terms of the offer:
- a) the company must appoint a nominee . . .
 - b) the company must transfer to the nominee the shares that would otherwise be issued to those members who accept the offer; and
 - c) the nominee must:
 - i) sell the shares . . . ; and
 - ii) distribute to each of the members their proportion of the proceeds of the sale net of expenses.

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

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

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

- (c) the benefit is . . . ; and

[Omitted: A challenge to *Clarity* readers to rewrite a section of a form (by 1 September 1999), with a prize awarded for the best rewrite.]

Personal remembrances of Robert Eagleson

by Phil Knight

Several years ago at its Annual General Meeting, *Clarity* honoured Robert Eagleson for his lifetime dedication and contributions to reform of legal language. Because Robert was unable to attend the meeting in London, Mark Adler requested that I accept the award on Robert's behalf. I was honoured to do so, for Robert's enthusiasm and ideas had stimulated my own interests, had influenced many Canadians and, directly or indirectly, had reached much of the English-speaking legal world.

In the early 1980's—20 years after David Mellinkoff's seminal *Language of the Law*—the idea that law might be written clearly had gained only limited traction in the world of consumer contracts, and even there was honoured more in the breach than the observance. Robert Eagleson changed all that with his charm, his wit, his gentle manner and his persuasive examples. But even more, he transformed attitudes with the depth of his thinking about language, thinking that went far beyond mere concerns about words, usage, syntax, grammar and sentence structure.

He began with audience and purpose, and reminded us that form should follow function in every aspect and detail of a legal text, that the most important test of writing is how well it achieves its purpose. Difficult as it may be to imagine now, this message was startling news to a legal profession that was steeped in ritual and tradition, and inculcated in a myth of formal linguistic certainty.

Back in the 17th century, the English jurist Sir Matthew Hale had observed that "[t]here is about our profession a superstitious veneration of form above what is just or reasonable". Read it again: *a superstitious veneration of form*—in other words, a ritualized deference to form, born out of ignorance. Robert's great achievement was to quietly shine the light of reason, dispel the ignorance, and free us from the ritual and deference, by teaching us how to think different, and write better.

It was a delight and personal pleasure to know Robert as a friend, and to entertain him in 1992, when he came to Vancouver as keynote speaker for *Just Language*—the first international conference for clarity and plain language, where his ideas found a global audience. The rest, as they say, is history. Three years later, his thoughts and message would be reflected by Dullah Omar, the South African Minister of Justice in the Mandela administration, who wrote in *Clarity* No 33:

"If we write laws in complicated and difficult language, how can we possibly expect the citizens of this country to understand or obey those laws?"

...

Clear, simple, understandable communication is a whole lot more than just something we should be dreaming about. It is an absolute and critical necessity for democracy. People have a right to understand the laws that govern them, to understand court proceedings in matters that affect them, to understand what government is doing in their name.

...

Simplicity of language reflects a commitment to democracy.

...

... [P]eople must know and understand their rights And they must have an internalised sense of themselves as citizens living in a democracy with rights that they can exercise and obligations they must meet.

...

Only when people feel that democracy is theirs and for real, will they be prepared to defend it."

The global acceptance of that ethos, and the transformation of the language of law that followed, are Robert's legacy. We thank him for it from the bottom of our hearts.

Bringing the audience to the fore

Radical approaches to preparing legislation

Number 49, page 14, May 2003

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

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

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

Thirdly, a plain language expert was associated with the exercise also from the beginning. This allowed every step of the way to be illumined by plain English principles and practices. The way was also opened for traditional approaches

to the composition and drafting of legislation to be challenged and new ways to be explored. (Appointments like this had already been made in other countries, such as Sweden and Switzerland.)

[Omitted a cross-reference to two articles in *Clarity* No 49 that are not printed in this current issue. –Ed.]

Testing

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

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

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

Testing the content

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

Once decisions had been made on the changes that seemed necessary, we returned to the audience to probe whether the proposals had general appeal or needed further modification. This step was tackled in 2 ways. A Proposal Paper which set out the proposals and raised a series of questions to stimulate thinking was distributed widely to individuals, industry associations, regulatory and market bodies to elicit written responses. As well, we returned to the relevant focus groups for further exchanges of opinion. These procedures yielded both a breadth and depth of coverage.

Testing organisation

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

Plan 1	Plan 2
Appointment	Powers
Powers	Duties
Duties	Appointment
Termination	Termination

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

This type of testing was also used to examine the total structure of the Law as well as the ar-

range of sections within a part or chapter. It had 2 significant benefits. The end product fitted neatly into the expectations of users and the ways in which they searched for and handled information. It made the writing task speedier as the drafters did not have to experiment with the direction to take.

Testing the draft text

The first activity took participants through the text section by section, eliciting their responses both to the ease with which they could understand and to the language forms used. To some extent this was investigating readability, but at various points participants would spontaneously propose different wording for a clause or sentence, thereby indicating that the wording in the draft was less easy or less familiar.

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

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

Specialised consultation

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

The challenge to traditions

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

Tables as operative provisions

In recasting the chapter on share buy-backs, it emerged that the clearest way to express the rules was to present them in a table. Up

to this point in legislative drafting it had not been accepted that a table could be an operative provision. Instead, the information would be set out in consecutive prose and at times—though not always—the table would be added as a supplementary aid.

We broke with this convention and as appropriate elevated the table into an operative provision in this manner: ‘The following table specifies the steps required for, and the sections that apply to, the different types of buy-back.’ (The table followed immediately.)

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

Guides in legislation

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

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

The weakness in this line of reasoning is that it does not investigate the past tradition with sufficient rigour. It challenges the new but tends to accept the old as granted. However, a government introduces legislation on behalf of the community it serves and for its success compliance is as important as knowledge. The Task Force argued that the guide would

help citizens both to understand the law and to comply with it. That should be the goal and benefit of any piece of legislation. To insist on all occasions for only a statement of the law is too inflexible and too restrictive a view of an Act as communication.

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

A validation of plain language

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

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

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

islation reached Parliament and readers could understand what was being enacted.

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

While it is true that the costs in producing legislation in this way are greater, they are 1-off and have to be evaluated in the light of

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

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



The poster features a background of scattered letters and symbols. On the left, a speech bubble contains the word 'clarity' with a magnifying glass icon. To its right, another speech bubble contains the 'IC Clear' logo, which includes the text 'International Consortium for Clear Communication'. On the right side, a hand is shown holding a megaphone. A central text box reads: 'kindly invite you to their conference in Belgium 12 -14 November 2014'. Below this, it says 'with the support of the European Commission's Clear Writing Campaign'. At the bottom left, it states 'This project has been funded with support from the European Commission' and lists 'Partners' (M RE, SFU, Eesti Keele Instituut, EADTU, SFU) and 'Associated Partners' (TALLINN UNIVERSITY, Stockholm University, PARIS IDIDEROT, IIID, ess, PLAIN LANGUAGE ASSOCIATION INTERNATIONAL). At the bottom right, it says 'for the latest news visit www.icclear.net' and 'karine.nicolay@icclear.net'.

Writing for DOLLARS

Writing to PLEASE

The case for plain language
in business, government, and law

Joseph Kimble

Available from
Carolina Academic Press
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This book gathers a large body of evidence for two related truths: using plain language can save businesses and government agencies a ton of money, and plain language serves and satisfies readers in every possible way. The book also debunks the ten biggest myths about plain language. And it looks back on 40 highlights in plain-language history. The book's message is vital to every government writer, business writer, and attorney.

Praise for *Writing for Dollars, Writing to Please*

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"Usability in Civic Life" Blog



Muriel and Robert Eagleson, and Joe Kimble at Uppsala, Sweden, 1992.

Numbers: figures or words?

a convention under the spotlight

Number 50, page 32, November 2003

In *Clarity* No 49 we presented all numbers as figures, not as words, even single- and double-digit numbers:

This step was tackled in 2 ways.

This article explains why we abandoned the convention on numbers.

The advantages of figures

In legal documents—as in most documents—it is the quantity or value expressed by a number that is significant for readers. Printing numbers as figures rather than as words helps readers grasp the message more readily. A figure stands out sharply from the rest of the text, as this example illustrates vividly:

A wealthy father cut the throats of his four daughters . . . killed the girls, aged nine, 12, 14 and 18

The age of the first child is lost among the words whereas the other 3 can be identified immediately.

Moreover in calculations we are used to dealing with numbers as figures rather than as words. Using words for numbers moves readers into less familiar patterns.

There is a subsidiary advantage in allowing all numbers to appear as figures rather than insisting that some must appear as words. Writers are not burdened with trying to remember and cope with arbitrary rules and so can concentrate on the critical goal of achieving clarity. The less we distract them from this task with unnecessary variations the better the results.

A teetering convention

For all its widespread acceptance among writers and editors, the convention that certain numbers must occur as words has a strong streak of irrationality about it. Its persistence despite this attribute probably arises because

few have closely analysed formulations of the convention but have simply bowed to it on the word or command of others.

To avoid the possibility of bias in the selection of a formulation, I reproduce a statement of the convention as it appeared in *Clarity* No 29 (page 14):

Where science and mathematics are not involved, the best practice is to spell out all numbers, cardinal or ordinal, smaller than 101. (Another common practice—the convention followed in science and mathematics—is to spell out only numbers smaller than 11; this less formal practice is perfectly acceptable in legal writing.)

This was reprinted from Bryan Garner's *The Elements of Legal Style* (though he may simply have been setting the convention out and not necessarily advocating it). It is not idiosyncratic and can be found in similar if not exact formulations in most house style manuals. (Some put the boundaries for words to be used at numbers smaller than 100 and 10.)

Displayed in cold light like this, the convention becomes puzzling. It immediately prompts the question why the rule applies only to single- and double-digit numbers. If 8 and 88 have to appear as words, why not 888?

Again, if double-digit numbers can be liberated to appear as figures in mathematical documents, why cannot single-digit figures be freed also? Surely *4 days* is more in keeping than *four days* with the nature of a mathematical work? It certainly would be preferable in a legal text. The mind boggles at such fastidious distinctions.

Equally puzzling is the insistence that in texts other than science and mathematics numbers are best spelt out. The [Australian] *Style Manual* (AusInfo: Canberra 1998 fifth edition: 185) provides a clue:

Words are preferred . . . in descriptive and narrative texts where figures would be unduly prominent and generally unsympathetic to the flow and appearance of the text.

This is highly subjective given that the *Style Manual* restricts the rule to numbers under 100 (page 189). Wouldn't 4,257 be even more unsympathetic! It is somewhat precious,

perpetuating the myth that figures are too forbidding for the artistic.

It is also becoming an unsteady convention. My impression is that more and more in Australia are limiting the rule to numbers under 10 in all types of texts. The *Australian Journal of Linguistics* states in its house-style:

Numbers from one to nine should be written out in full: figures should be used for numbers above 10.

The *Sydney Morning Herald*, a major newspaper, exhibits the same practice:

. . . a spiral ramp nearly 35 metres long (2 August 2003)

Over the past 20 years . . . (2 August 2003)

Random questioning of writers confirms that this is their notion of the convention. Perhaps the drift will continue until all numbers are presented as figures. Since people have been prepared to exclude 10-99 from the ambit of the convention, it is surprising the final step has not already been taken.

A neglected modification

The last part of the formulation of the convention in *Clarity* No 29 introduces a modification:

When, in the same context, some numbers are above the cut-off point and some below, the style for the larger numbers determines the style for the smaller ones.

The amendment is commendable but many are either not aware of it or do not support it. Here are just 2 examples picked up in casual reading in the days before I was preparing this article:

WCM, which employs 85 nationals and five expatriates, runs grassroots community activities in around 160 remote rural communities.

Go (continue 2003) 12

There were 16 people in our group-14 paying customers and two guides.

The Sydney Morning Herald 19 July 2003

It would appear that the base form of the rule has become so firmly ingrained that many follow it rigidly, unaware of its scope for some variation.

A host of exceptions

While advocating the rule, most style manuals proceed to list copious exceptions. The article in *Clarity* No 29 had 5; other manuals run to 8 or 10. They include:

- dates: 7 August 2003—not Seven August two thousand and three
- monetary amounts: \$5—not \$ five
- percentages: 5%—not five %
- fractions: 4.3.

On the basis of these exceptions—or loopholes—a lot of numbers end up as figures in texts. Why then bother with the rule at all? If so many numbers can appear as figures, why not let all of them?

In the beginning

In her article in *Clarity* No 49 (page 5), Claire Grose began a sentence—and a paragraph—with a figure:

3 examples of changes to the law . . . demonstrate some of the benefits . . .

According to the convention this is taboo. 'Always begin a sentence with a word, not a figure' (*The Little Book of Style* page 69). But as so often in the plain language environment, one is constrained to ask 'Why not?'

Perhaps the prohibition on figures at the beginning of sentences is an issue of typographical or design taste: in the past people may not have liked the look of figures in the first position, just as the first paragraph used not to be numbered in a document, with the numbering starting only at the second paragraph. It cannot be that sentences are supposed to begin with a capital. Such a rule can only apply to words that do not normally begin with an upper case letter. The concepts of upper and lower case do not apply to figures: they are both or neither. Nor can the objection to having a figure at the beginning of a sentence be based on the fact that a single-digit number might look too nondescript, because many sentences already start with a single letter—or A—not to mention the poets' O (which tantalisingly could also represent the mathematicians' zero).

A book on theology, N Weeks *The Sufficiency of Scripture* (Edinburgh: 1988), offers an interesting, if unintended, illustration of the issue. Following custom, the publisher, Banner of

Truth Trust, does not italicise the individual books of the Bible, with the result that we find sentences such as:

- Hebrews is full of arguments from Old Testament history. (page 48)
- Psalm 17 is the most interesting of them. (page 17)

However, some books of the Bible occur in pairs or triplets, for example 1 Samuel, 2 Samuel, 3 John. The publisher has grasped the nettle and allowed these books to appear at the beginning of sentences also:

- 1 Corinthians 15:21, 22 confirms Paul's approach . . . (page 109)

This is a far better solution than having to switch, as we did in the past, to clumsy circumlocutions such as:

- Verses 21 and 22 in 1 Corinthians 15 . . .

How unremarkable and inoffensive the solution is comes to light when a sentence beginning with a figure occurs in the midst of a paragraph:

- We are told of the disease in his old age (v.23). 2 Chronicles 14–16 is also a description of Asa's reign. It is clearly based on the account in Kings . . . (page 57)

An open-minded perspective

I do not regard this matter as a major battleground in plain language but its exploration exposes how we can lapse into accepting—and even maintaining—conventions uncritically—conventions that only place fetters on language, hampering it from fulfilling its real purpose of transmitting a message clearly and enlightening others.

Nor does it bother me that plain language practitioners move to figures while others in the community hold to the old convention. Having both practices in operation would not create any disturbance for readers. After all we already cope with variation in texts comfortably. We adjust readily to different practices in spelling when reading American texts (*installment for instalment*), and to different senses when reading British texts (*spring* referring to March–May). There is some point in requiring consistency within a document but not across documents or continents.

When the drive for plain language sprang to life in the 1970s, we were constantly confronted by the argument that 'you cannot change this clause. This is the way it has always been written.' If we had not challenged this adherence to convention, there would be no plain language documents today.

We should adopt the same pose with numbers. There is no principled reason that they should not all appear as figures. Certainly we should not block authors if they want to use figures or look down on them as if they acted in ignorance. On the contrary, they are showing a commendable preference for plainness over empty tradition.

It is instructive how few people notice—or comment—when all numbers occur as figures in a document. I suspect that, if we abandoned the convention quietly and without fuss, within a short time everyone would have forgotten its existence, as has happened in our plain language experience with so many other conventions. It serves no real purpose in conveying meaning or helping readers.

Conjunctions in lists

Number 50, page 39, November 2003

In discussing conjunctions in lists in his article 'Some thoughts on lists' in *Clarity* No 49:29–30, Richard Castle animadverted on a procedure that has been adopted by some in Australia:

1 parliamentary counsel office stipulates that a linking word (usually either 'and' or 'or') should be inserted after every item in a list unless there is a good reason not to. (*then quoting the offices manual*) 'If they appear only after penultimate paragraphs, users might be prompted to apply the linking word only to the last 2 paragraphs.'

He observed that 'this rule is not one which commends itself either to the general writer of standard English or to parliamentary drafters in other jurisdictions. Its use makes the text seem unduly fussy.'

However, the practice is rooted firmly in plain language principles. During investigations into writing legislation in plain language, we discovered that a sizeable proportion of readers—including senior bureaucrats—interpreted lists in the form of:

- a) ,
- b) ,
- c) ; or
- d)

as '[(a) and (b) and (c)] or (d)'. The serious consequences following this interpretation led us to introduce the rule cited by Richard. It was a response to the needs of the audience: the central reason behind any decisions we take in plain language. To ignore readers' difficulties—exposed either by their practice or in testing—is to abandon our principles.

There was independent evidence to support the action. In handling university examinations, I had discovered quite separately that when confronted with question of the form

'answer 1 of the following: (a) (b) (c) or (d),' some 20% of the students answered all 4. Their conduct is explicable: the pressure and stress of the examination had induced their error. When the practice was adopted of inserting an outsized OR into questions of this type to result in '(a) OR (b) OR (c) OR (d),' the error disappeared. This is a neat confirmation from elsewhere that the rule adopted for legislation was both necessary and effective.

It has been taken up by some private legal firms and individual lawyers as well.

Is it standard English?

The procedure may not be the more frequent practice—the norm—in general writing but it does not breach any rules of English grammar, and it does occur in the works of authors, such as Jane Austen, Ernest Hemingway, William Faulkner, Graham Greene, James Joyce, Somerset Maugham, and Alan Paton, to name just a few. A couple of examples:

- For thirteen years had she been doing the honours, and laying down the domestic law at home, and leading the way to the chaise and four, and walking immediately after Lady Russell out of all the drawing-rooms and dining-rooms in the country.

Jane Austen *Persuasion*

- He smiled and took her hand and pressed it... Cabs and omnibuses hurried to and fro, and crowds passed, hastening in every direction, and the sun was shining.

W Somerset Maugham *Of Human Bondage*

- I have forgotten their names—Jacqueline, I think, or else Consuela, or Gloria or Judy or June.

F Scott Fitzgerald *The Great Gatsby*

The Bible also provides an example:

- Terror and pit and snare confront you.

New American Standard Bible *Isaiah 24:17*

Admittedly the authors were striving after a special effect, but so are we seeking a particular outcome for readers.

Even if there was not this support from literature, I would still be prepared to adopt the procedure of repeating the conjunctions on the grounds that it is better to rescue readers from misinterpretation than to hold rigidly and inflexibly to a convention of language.

Is it fussy?

Much depends on whether we are drafters or readers. While drafting a document, the practice can seem tedious and monotonous, especially if there are many lists. But readers are less likely to be aware of the tedium. Frequently they consult only 1 section at a time. Even if they consult several sections, they concentrate on the content and the repetition of the conjunctions serves as an aid to understanding. When it comes to who we should be considering, drafters do not—and should not—feature large.

A minor, supplementary benefit

Lists can contain many items and can spread over to the next page. Repeating the conjunction after each item can save readers having to turn over the page to discover whether the list is accumulative or exclusive.

The 3 possibilities

The approach yields 3 forms depending on whether the list is accumulative (when all items must be included), exclusive (when only 1 item operates), or open-ended (when any or all of the items can be taken into account).

Accumulative

- a); and
- b); and
- c); and
- d)

Exclusive

- a); or
- b); or
- c); or
- d)

Open-ended

- a)
- b)
- c)
- d)

The doleful grip of convention

Number 52, page 37, November 2004

In recent issues of Clarity there have been 4 letters and 1 article reacting negatively to the use of figures in all contexts. But have the critics touched on substantive issues and real weaknesses or have their responses been sparked by sentimental attachment to a convention familiar to them? Do we need instead more generous consideration of the practices and needs of all readers, not just our own, and more rigorous thinking on the development of language and on the standing of conventions?

Webster's Third New International Dictionary of the English Language Unabridged was published in 1961. A magnificent contribution to the development of English lexicography, it recorded that *infer* and *imply* now overlapped in meaning, that *transpire* had acquired as 1 of its senses 'come to pass, happen', and that *due to* now operated as a preposition with the sense of 'because of,' objectively without condemnation because the practice of the community had developed along these lines. Prescriptivists condemned this approach as "accelerating the deterioration of the language" and "renouncing the duty to defend the niceties of the language against the erosion of vulgar usage."

I was reminded of this episode when 4 letters on the use of figures for numbers were published in *Clarity* No 50 and No 51. For Christine Mowat 'starting a sentence with a number is like going to a party bare-chested.' Ken Bulgin holds that using figures for numbers under 100 is 'slipping into the stunted vulgarity of textspeak.' And Nick Lear dismisses the universal use of figures as 'silly.'

Protestation without proof

For all their emotive force these protests come strangely without proof. Ken makes no attempt to explain why *by 5 August* preserves the fineness of the language but *within 5 days* hurtles us into tastelessness. Nick does not explain how *The company has 5 directors* is 'silly'

but somehow *The company has 5 directors and 612 shareholders* (as required by the convention on numbers set out in *Clarity* No 29) returns us to soundness. Nor do we learn why a sentence beginning with a single digit figure can cause Christine to feel in dishabille but a sentence beginning with a single letter word (even 1) leaves her demurely clad!

All we have from the objectors are assertions and denigrations. Mysteriously, they are reticent to substantiate why they consider words better than figures. It would be especially good to have evidence from them that less-able readers find words more comprehensible and more effective in some contexts in helping them reach the right message. It is their needs that should be our uppermost concern.

But then, they cannot even agree about the scope of the convention: Ken wants words for numbers 'under 100;' Christine, for numbers 'under 10;' and Nick for 'low numbers' (*sic*).

Some substance to explore

To his credit, Don Revell offers a concrete reason. He finds the typographical similarity between *I* and *1* together with the lack of context creates difficulty for him when *1* occurs at the beginning of a sentence. It may be that the figure and the letter are not differentiated clearly enough in the typeface we used and that we need to select faces that are stronger in this regard. Don's factual observation opens the way for us to test this.

On the other hand it may be more a question of familiarity, as we discovered once when we were converting the text of a contract into plain English and introducing a new layout, including shorter lines, as part of the process. At the first drafting session 1 lawyer announced that he much preferred the more traditional line length (about 170mm). At the next session 2 weeks later he declared that he had come to find the shorter line was much better. He needed a little time to adjust.

It is at this stage that some hesitation creeps in over the thrust of Don's objection. There is a revealing comment in his letter: 'Virtually all your audience has been taught since grade school that where a number appears at the beginning of a sentence it should appear in words'. Could his then be an instantaneous, knee-jerk reaction? Certainly, there is no

reflection on change in language in his observations. Yet in recent decades we have seen punctuation in addresses abandoned and rules on the indentation of paragraphs in letters modified. The old conventions on these matters were also taught tediously at school and admittedly some had trouble converting to the new procedures, but change we all did over time. Those who are currently having difficulty with sentences beginning with a figure—and many do not—may find with more exposure to the practice that their difficulty disappears.

We should still investigate Don's objection because it is a genuine one. But our testing procedures must encompass all angles.

Fact or theory

Failure to take account of the processes of change in language also undermines Richard Lauchman's arguments on pages 34-36 in this issue. We cannot invent examples in the privacy of our studies and extrapolate from them: instead we must see what actually happens in the real world. Then we discover that people cope with both new and hither to unknown existing words without feeling "ambushed" as Richard portrays. It is not reasonable to expect readers to know every word they come across and not valid to always confine the compass of a writer's vocabulary. This is why we have dictionaries and insert explanations in plain language documents.

In other areas of language, variations arrive unsystematically and piecemeal, not changing a whole domain at once. The history of numbers testifies to this gradual process. The territory for the use of words has been progressively whittled away. Today there are newspapers in the UK, Canada, USA, New Zealand, Singapore and Australia that restrict words to 1-9, and have handed over 10-99 to figures, no doubt to the chagrin of Ken Bulgin but unremarked by the general population. Using a figure for every number within a sentence is only a small extension of this development. On this point it is illuminating that Don Revell does not report figures as a stumbling block when they are within a sentence. Placing a figure at the beginning of a sentence is only the next small step, not requiring the community to adopt a new sign but simply to use a much-used sign in yet another position. Some have already

taken this step, logically standardising the system. Whether others follow them is their choice. We have managed to live with linguistic variations among English speaking communities for centuries.

Again, our grammatical structure has witnessed change. *Thou* has vanished from general use; meanwhile *they* is expanding into the singular. *Than* is classified as a preposition nowadays and *taller than me* is winning out. Some of these changes come about as a result of the innocent actions of members of the community who are oblivious to existing “rules” or have forgotten them. We may regret the loss of useful distinctions, but we have also learnt to work our way around any problems without a nervous breakdown. Otherwise how did we manage to move from Old English to Middle English, let alone to Modern English?

Insular speculations

At the beginning of his letter of protest, Nick Lear opined that the use of figures in *Clarity* No 49 was an experiment and went on to quote Joe Kimble’s dictum ‘wherever possible, test consumer documents on a small group of typical users.’

The use of figures for all numbers in *Clarity* No 49 was no experiment but only the continuation of a well established practice. For example, the Singapore Land Authority, which has extensive contacts with all sections of the community, has been using figures in correspondence, circulars, reports and forms since at least 2001, and possibly earlier. The Authority has never received any protests from members of the community. The reasons are obvious. Most readers are concerned with the message. Few have endured the scourges of doctrinaire editors to make them conscious of alternatives. Moreover, figures are likely to be their natural response. Say a number aloud, and most people will conjure up a figure in their mind’s eye, not a word.

To cite 1 other example from another country. Parliamentary counsel in Australia have used figures for words for some 30 years. Section 52 of the Companies (Acquisition of Shares) (Victoria) Code 1986 contains ‘not exceeding 5 years’ and ‘within 2 months,’ to quote 2 of a continuous stream of occurrences.

From 1993 to 1997 the Australian Govern-

ment appointed a task force to supervise the rewriting of the Corporations Law in plain English. During that period 2 Acts containing rewritten portions of the Law were prepared and passed by parliament. Draft texts of each Act were tested in every capital city, with over 40 test groups and some 500 participants. As well, we met every Law Society and Bar Council in the country. Although other points of language, such as the use of *they* as a singular pronoun, were queried, at none of the tests or meetings was the use of figures challenged. Nor is it the case that their use could have been overlooked. In section 169 there are 3 figures in 13 consecutive lines of text and the number 1 occurs in the headings of consecutive sections 248A and B, and a further 2 more times in the 3 lines immediately following the second heading. It can be fairly claimed that in the extent of our testing we had out-Kimble Kimble!

Insularity also bedevils the speculations in Richard Lauchman’s article. At 1 point he writes:

As an American, I put my period inside quotation marks. If you were a Canadian, you would put yours outside quotation marks. Ichabod will use whichever placement conforms to his experience. But one thing is certain: as readers, when we see a number at the beginning of a sentence, all three of us expect that number to be spelled.

In addition to the information just discussed, contrary facts were to hand in *Clarity* No 49 and No 50 to indicate a more complex linguistic setting. Moreover, why does Richard tolerate a Canadian placing periods in a different position but not Singaporeans placing figures in new positions? Why does he assume that everyone will react negatively rather than see the advantages in another option and adopt it? There is the evidence from practitioners of plain legal language and members of the public that many welcome enthusiastically change from legalese. And an American should not doubt the adaptability of a community given the readiness of so many in his own to adopt Noah Webster’s innovations.

We need to step outside our own group if we are to make reliable and realistic observations on the community’s usage and conduct.

Blind spots

We are all likely to have blind spots on language. We usually acquire them as students or young writers. A teacher requires *different from*, a law lecturer insists on the spelling *judgment*, a publisher holds that a sentence cannot end with a preposition or that some numbers must be presented as words in a certain context. We conform out of respect, or to avoid penalties, or to have our articles published. Over time we lose sight of the fact that as language these items are only arbitrary, and therefore mutable, signs. They take on the status of unbreakable laws and unthinkingly we come to accept them as marks of the literate person. We then feel the need to resist any proposed change as a lowering of standards and as a threat to what we have (wrongly) come to hold as cultured.

A classic example is *program*. This was the accepted spelling from the time the word was introduced into the language until the early 19th century when the British adopted *programme* from the French. In recent decades there has been a trend to return to the historic spelling, which has been resisted by some “educated” people ironically in the belief that they are preserving the pure spelling.

Another example is the presentation of dates. Beginning with words, *the fourth of May*, we abbreviated to half-and-half ordinals, *4th May*, and then reduced further to the stark *4 May*. That we can also have *May 4* further re-

flects the mutability of the convention. None of this implies that we must rush to embrace any change that appears on the scene but it does mean that in the environment of change we must exercise rigorous thinking and suppress false notions of what is correct and what it means to be literate. It is always well to remember that many of the forms that we use today without qualms, such as *it's me* and *ice cream*, were heavily criticised by the “purists” of yesteryear.

Convention or principle

We reach its true objective when we have used language to enlighten others. There is always a danger in seeking to maintain a convention that we lose sight of our audience and ignore the more critical principle that language was made for man, not man for language, to adapt a saying of Jesus Christ. It is this principle that moved us in plain language to bring the audience back into the centre of the stage, insisting that its rights to understand were paramount and that clarity was as important as precision. This principle constrained us to reject the time-honoured convention of lawyers that exceptions had to be expressed with the main proposition, thus producing inordinately long sentences. It impelled us to challenge the notion of settled terms. It is this principle that guides us in striving to produce documents that readers can comprehend—and with the greatest ease to them.



Robert Eagleson and Peter Butt, PLAIN 2009, Sydney

Robert Eagleson, a skillful plain-language expert and writer

by Christine Mowat

Robert Eagleson was not a lawyer: he was a Professor of English. That gave him an advantage that many lawyers do not have—being an extremely skillful writer.

Instead of referring to “overly complicated, legal sentences”, he referred to traditional legal drafters’ “labyrinth of clauses”. In presenting one example, he took the reader through several stages, but not the usual *before-and-after* steps. Beginning with a plain-language legal contract clause, he then added, one by one, the usual redundancies, ambiguities, legalese and extra language often embedded in legal text. “Now doesn’t that have more legal weight and precision?” he asked. The reader is completely persuaded: No!

He also discusses unnecessary material from drafters who “fail to treat their documents as coherent text and proceed as if each sentence occurred in isolation. The result is a mass of repeated material which readers have to scrape away to find the core message.” Eagleson was a master of metaphor and image-evoking language.

He emphasized the *dual* nature of language, that is, its content and its communication, and that plain language is more demanding and intellectually challenging than just creating accurate content. Drafters must indeed be accurate, but they must also be clear to their audiences.

Even today, we specialists in the plain-language field continue to debate how to define plain language. It is hard to find a better perspective on what plain language means than Eagleson’s summary below:

As well as recognising the dual character of drafting, it is equally important to grasp the meaning of *plain* in the phrase *plain language* or *plain English*. There is no one absolute form of *plain language*. It does not consist only of one syllable words and one clause sentences. It is not simplified or reduced English. It is the opposite not of elaborate language but of obscure language, seeking to have the message understood on the first reading. The plainness of a passage is defined in terms of the audience for that passage. It is clear, straightforward language for that audience.¹

He developed carefully nuanced qualifications, not absolute rules, as he described plain language drafting. Here are some I heartily agree with:

1. The use of technical terms *may be* appropriate and no bar to comprehension when written for specialists or advanced students.
2. The message does not *have to be* understood at first reading to be plain, but the writer “seeks to” achieve that understanding at first reading. However, it is simply not always possible. (My italics emphasize Robert’s fastidiously careful wordings.)
3. The plain-language movement has restored the rights of the audience. But it did not try to replace concerns for accuracy with concerns for audience. It just brought the advocacy of audiences’ rights to the forefront, instead of leaving them off the stage.

continued on page 49

continued from page 48

4. The plain-language movement has gone far beyond its initial exposing of weaknesses in traditional drafting. It now has a large body of research-based knowledge to support its practices.
5. Adhering with unthinking inflexibility to the old practice of having only one sentence in a section or sub-section inflicts a heavy burden on readers. It is bad writing and reveals a poor knowledge of drafting principles. He referred to drafting experts who correctly observe that the habit of having only one sentence in a section is merely a convention, not an obligatory rule.
6. When one word will do, it is inefficient to use more. And, with couplets, innocent readers are enticed to search for some unintended nuance. Eagleson washed his hands of such doublets as “observe and perform”, “permit or suffer”, “agreed and declared”, “due and payable”, and “on behalf of and for”.
7. He rested his case for plain-language drafting by rebutting the defence of traditional drafting practices, i.e., that they produce legally accurate statements. And his evidence was Australian and U.S. examples of the errors, ambiguities, inadequacies, omissions, poor organization, and inconsistencies in traditional legal documents before rewriting them in plain language.

Robert Eagleson’s ideas about plain language are clear and classic. And they are as relevant today as 25 years ago. We will miss him sorely.

Endnote

- ¹ Robert D Eagleson: “Efficiency in Legal Drafting”, in *The Loophole*, Commonwealth Association of Legislative Counsel, 1989, p. 2.



The Honorable Michael Kirby, Peter Butt, Christine Mowat, and Robert Eagleson, PLAIN 2009, Sydney

Drafting tips recasting a document

Number 56, page 55, November 2006

Commentary

As we take up plain English in our practice, we frequently need to recast documents or precedents we have previously prepared so that they comply with our new, more effective approach to drafting. As well, clients will approach us to rework a contract or form they have been using so that they can give better service and fairer treatment to their customers.

This note explores some of the steps we should take in approaching such a task. Because of space we cannot reproduce the whole document; so instead we are limiting our remarks to a lengthy clause or section from a document. The general principles we apply are essentially the same whether we are dealing with a whole document or only part of it.

In this column we explain the steps in our procedures. In the right hand column we have first reproduced the section as it appeared in the document, but have added in line numbers to aid references to it during the discussion. Then come various types of reworkings of it, linked as appropriate to the steps in the discussion.

Step 1

The first step is to leave the editorial pen on the desk: don't start by changing a word or phrase here and there. Instead read the entire document to get a feel for what it is trying to do and what it is covering.

The document: original and recasts

The original version

7. Confidentiality

1. The Contractor agrees that the Contractor
2. will hold in strictest confidence, and will
3. not use or disclose to any third party, any
4. confidential information of ABC. The term
5. "confidential information of ABC" shall
6. mean all non-public information that ABC
7. designates as being confidential, or which,
8. under the circumstances of disclosure
9. ought to be treated as confidential.
10. "Confidential information of ABC"
11. includes, without limitation, the terms
12. and conditions of this Agreement,
13. information relating to products of ABC,
14. the marketing or promotion of any
15. products of ABC, business policies or
16. practices of ABC, and customers or
17. suppliers of ABC. If the Contractor has any
18. questions as to what comprises such
19. confidential information, the Contractor
20. agrees to consult with ABC. The Contractor
21. shall guarantee and ensure its employees'
22. compliance with this Section. The
23. Contractor's obligations under this
24. Section shall survive any termination of
25. this Agreement. "Confidential
26. information of ABC" shall not include
27. information that was known to the
28. Contractor prior to ABC's disclosure to the
29. Contractor, or information that becomes
30. publicly available through no fault of the
31. Contractor.

<p>Step 2</p> <p>List the topics covered—and in the order in which they are covered.</p> <p>Don't spend time at this stage re-arranging them into what might appear to be a more reasonable order: this can be done more efficiently later. Just make sure you know what is there.</p>	<p>Topics covered in original</p> <ul style="list-style-type: none"> a) Obligation to hold certain information in confidence b) Obligation not to disclose to others c) Meaning of confidential information d) Other items included e) What to do if in doubt f) Obligations of employees g) Duration of obligation h) What is not included in confidential information
<p>Step 3</p> <p>List any topics that seem to be missing and could be important for the effectiveness of the document. A danger in legalese is that its convolution often makes it hard for a drafter to recognise whether crucial material has been included or not.</p> <p>Just set the missing items down as they occur to you: once we have the full set we can start making decisions about how to arrange them.</p>	<p>Topics not covered</p> <ul style="list-style-type: none"> i) Can confidential information be disclosed to certain consultants? j) Any obligation to notify ABC of improper disclosure? k) Indemnity for improper disclosure l) ABC's rights to reclaim the information m) What if court order requires disclosure? n) Obligations to keep the confidential information secure o) Ownership of the confidential information <p><i>This list is illustrative only; it may not be exhaustive!</i></p>
<p>Step 4</p> <p>Decide which topics are necessary for the particular circumstances you are trying to cover. It may not be essential to include all these topics in every contract or agreement. Some issues may never arise in certain business contexts. To overload the document could distract readers from the crucial obligations. It depends on the real, as opposed to the hypothetical, risks involved.</p>	
<p>Step 5</p> <p>Once we have a full list of essential topics, we can proceed to arrange them in a suitable order and to bring closely related topics next to each other or even merge them. For the purposes of this step, we will assume that the circumstances require all the topics listed under steps 2 and 3 to be covered. All of them were essential in the context for which the original was prepared. During the discussion in step 6 we will take up when and why some of the material may be safely excluded.</p>	<p>A possible organisation for the topics</p> <ul style="list-style-type: none"> p) Obligation to keep certain information confidential (= a) q) What information is involved and what isn't? (= c + d + e + h) r) Who owns the information? (= o) s) When and how can it be used and disclosed by the contractor? (= b + f) t) What if there is a court order? (= m) u) What steps must be taken to keep the confidential information secure? (= n)

(continued from page 51, left column)

What we are presenting here is only 1 way of organising the material. Other arrangements could also be suitable and efficient. The order we choose depends on the audience and our knowledge of its needs.

Remember that people are involved in learning when they are reading a document. If they already know the content, there would be no reason for them to read the document. Learning becomes easier if items of information are arranged in an order that makes sense to readers, that fits in with their notions of importance, and that brings related items together. Haphazard arrangements of material increase the task of learning. Many manuals prove this point over and over again!

Step 6

*The comments marked #, *, etc relate to the parallel items in the recast text.*

Once we have established the topics to be covered and an appropriate organisation for them, we are in a good position to start fleshing out the content. Much of the critical thinking has now been done and our writing can flow more speedily.

Fixing on an organisation also makes it easy to see how the material can be divided and presented in blocks of information so that it is easy for readers to absorb. It lets us escape from 1 long paragraph, which bedevils the original version. The process also points the way to suitable headings, which improve the access to the content for readers.

Spending time on what to include and how to arrange it reduces drafting activity later on.

General readers find *you* and *we* (the personal pronouns of address) easier to comprehend. The use of more abstract terms, such as *contractor*, involves readers in an additional process of interpretation. (The practice of using a capital letter with *Contractor* in the original (line 1, etc) to indicate a defined term is largely ineffectual as this device is hardly recognised in the general community.)

(continued from page 51, right column)

- v) What must be done if there is improper disclosure (= j)
- w) Compensation for improper disclosure (= k)
- x) How long must the information be kept confidential? (= g)
- y) ABC's right to reclaim the information (= l)

A complete recast

*The items marked #, *, etc link to the explanations on the text in the left hand column*

7 Confidential information

7.1 What information must be kept confidential?

#You ^must keep confidential:

- a) *information about our products and how we market or promote them
- b) information about our business policies and practices
- c) information about our customers and suppliers
- d) the conditions of this agreement
- e) any other information that we mark 'confidential'
- f) any other information that, in the circumstances surrounding the disclosure or in the nature of the information, ought in good faith be treated as confidential.

<Confidential information does not include information:

- that was known before this agreement was entered into, or becomes publicly available subsequently
- that is received from another source that can reveal it lawfully on a non-confidential basis.

(continued from page 52, left column)

^ There are several choices available in modern English to express obligation: *must*, *need to*, *have to*, *agree to*. *Shall* is now obsolete in this sense in general usage and has been abandoned for this purpose by lawyers who have adopted plain language because it puzzles general readers.

In Old English *shall* was used by everyone to express obligation, and only obligation. As English had no distinctive future tense, over the centuries *shall* came also to be used to express the future, a practice encouraged by the fact that most obligations fell due in the future. By the 17th Century this future use had all but displaced the sense of obligation associated with *shall* in general usage, but the old practice lingered on in legal usage. Over time this meant that the forms of language lawyers used in everyday situations differed from the forms they kept in professional contexts. The result was that they became confused on how to use *shall* and frequently made mistakes. Lines 5, 24 and 26 in the original attest this claim. In line 5 there is no obligation on 'confidential information' to mean something; it has its meaning as a matter of fact. What is required is *means* (the universal present tense). Here is another good reason for abandoning *shall*, which in any case has largely disappeared from modern usage in all situations.

* The items included in this list depends on the context of the agreement.

Another solution would be to move the specification of the information involved to the particulars or details portion of the document. This would then allow us to refer simply to 'the confidential information' throughout section 7 and to start with 7.2. This is a convenient solution if you are aiming at a standard form of agreement to be used with many different clients and in various contexts as only the particulars portion would need to be varied.

(continued from page 52, right column)

7.2 Who owns the confidential information?

The confidential information always remains our property. Our disclosure of it to you for the purposes of this agreement does not give you any right, title or interest in it.

7.3 Use and disclosure of confidential information

You can disclose, use or summarise our confidential information and copy or distribute materials containing it only for the business purposes set out in this agreement and only in accordance with this agreement.

You can disclose our confidential information to your employees and contractors and to your legal and financial consultants, but only on a 'need to know' basis and subject to the confidentiality obligations in this agreement.

You can disclose our confidential information if required by a court order or statutory notice but you must:

- a) give us sufficient notice of the requirement so that it can be contested; or
- b) seek to limit the disclosure in any way we reasonably request; or
- c) >obtain written assurance from the judge or regulator that they will give the confidential information the highest level of protection available.

You must not:

- a) use our confidential information for your own benefit; or
- b) disclose it to ∞ anyone else without our prior written consent.

7.4 Protecting the security of the information

You must:

- a) take reasonable steps to protect our confidential information and keep it secure from unauthorised persons

(continued from page 53, left column)

The original version resorted to the device of a definition to present the material at this point (see lines 5–17). The definition comes in 2 parts: a specification of the meaning in general terms, introduced by *mean*; and a part providing precise examples, introduced by *include* (line 11). This 2-step approach is familiar with lawyers, but many readers prefer a more concrete approach to the material. It is more congenial for them to be presented with specific items which they can recognise. Any broader statement becomes easier for them to cope with if they have the light of the concrete examples to guide them. The broad, general statement can fit nicely as a final catch-all in this approach, as happens in 7.1.

< It is safer for readers to hold all the material on the meaning of ‘confidential information’—what it isn’t as well as what it is—together, especially when they are checking the facts on a later reading.

> This option may not be available in all countries nor required in all situations.

∞ *anyone else* will be more readily recognised than *any third party* (see line 3) and functions satisfactorily in most situations. We have to be alert about slipping into set legal phrases unnecessarily.

≈ This clause 7.4 (a) would be all that was necessary in many agreements. Clause (b) applies in sophisticated contexts.

≠ This requirement would suit only specialist circumstances; it would seem excessive in many agreements.

The bare bones

The original—and hence the complete recast—were prepared for a specific and more complex situation. There can be other situations in which no confidential information may be explicitly made available to contractors but they have to be given access to the owner’s premises to carry out repairs, maintain equipment etc. Inadvertently they may see confidential information or hear staff talking about it. The owner may want to try to exercise some control. In this circumstance it could be possible to reduce the whole section on confidentiality to:

“You must keep confidential any information you learn about our business while you are working on our premises.”

(continued from page 53, right column)

- b) segregate all materials containing our confidential information from the materials of others to prevent them being mixed together
 - c) return any confidential information that is no longer needed to carry out an obligation under the agreement.
- ≠ After giving you reasonable notice, we can visit your premises during normal business hours to review how well you are complying with these requirements for protecting our confidential information.

7.5 Prompt notice of improper disclosure

You must:

- a) notify us immediately if you become aware of any unauthorised use or disclosure of our confidential information
- b) co-operate in every reasonable way to help us regain the materials containing our confidential information and prevent further unauthorised use or disclosure of the information.

7.6 Compensation for improper use or disclosure

You indemnify us against all loss, damage, expense and costs arising because you do not keep these conditions on the use and disclosure of our confidential information.

7.7 Duration of obligations

Your obligations regarding our confidential information continue even if this agreement has been terminated.

7.8 Right to reclaim the confidential information

At the end of the agreement, or if we ask for it earlier, you must return our confidential information, and all copies, summaries, notes and memorandums relating to it, to us as we

Drafting matters— letters of advice

direct.

Number 58 Page 23, November 2007

This article on drafting considers letters of advice that arise in those situations where the client has approached the lawyer for a solution to a problem.

The content of the letters is not at issue. No matter which approach they adopt to drafting—traditional or plain language—all lawyers endeavour to supply their clients with all the information they require to receive satisfactory and satisfying advice. Their letters cover the same range of items and contain virtually the same blocks of information. There is no essential difference in the material covered by both approaches, and cannot be if the lawyers are to fulfil their duty of care to their clients. Notwithstanding this similarity, there are critical variations in where and how the content is organised and presented in a letter of advice. It is the reasons underlying these variations that we are concerned to explore, and where the advantages lie.

The 2 approaches

Here are common arrangements of the blocks

of material that appear in traditional and plain language approaches to letters of advice. (*T1, P1, etc* are added to aid cross-referencing in the following discussion.)

The major divergence

T2-3 versus P2-4

Immediately after an opening sentence acknowledging receipt of the client's request, traditional letters of advice move to confirm the nature and extent of the instructions received. The initial sentences launching this activity ordinarily proceed along the lines of:

You have instructed us to . . .

Although this segment amounts largely to a repetition of the instructions which the client had given previously, possibly orally at a meeting or conference, it is reasoned that this step is essential to avoid misunderstanding between the lawyer and the client.

On the heels of this opening gambit clarifying the instructions comes, where necessary, a statement of relevant background information on the client's business. Initiating sentences here take the form of:

We understand that . . .

We note that . . .

Again, most if not all of the material in this section would have been communicated to the lawyer by the client earlier. The purpose of the repetition is to compel clients to check any details they had given for accuracy and for omissions and to clear up any misconceptions the lawyer might have formed.

Traditional approach	Plain language approach
<i>addressee</i>	<i>addressee</i>
<i>T1 Subject title of letter</i>	<i>P1 Subject title of letter</i>
<i>T2 Confirmation of instructions</i>	<i>P2 Issue</i>
<i>T3 Relevant background information</i>	<i>P3 Findings/Recommendations</i>
<i>T4 Assumptions of lawyer in arriving at solution</i>	<i>P4 Important considerations/Scope/Assumptions</i>
<i>T5 Evidence forming the basis for a solution</i>	<i>P5 Explanations/Reasons for findings</i>
<i>T6 Findings/Recommendations</i>	<i>P6 Applicable legislation and court rulings</i>
<i>sign off by lawyer</i>	<i>P7 Further action/What you need to do/How we can help you</i>
	<i>sign off by lawyer</i>

It is proper and prudent for lawyers to be clear about instructions and background information and to assemble evidence before they develop solutions to problems. But this is from their perspective and how they should tackle problems. But well before the time they post off their letters of advice, events have moved on as far as the clients are concerned.

Clients go to lawyers with the assumption that they are reasonably intelligent and capable of understanding ordinary conversation, and consequently they do not expect to have to confirm that the lawyers have understood their instructions accurately. Nor for the same reasons are they looking for a repetition of all the details that they had given to the lawyer and that are familiar to them. What they want to learn first and foremost is whether the lawyer has been able to come up with a solution to their problem—even if it turns out to be an unfavourable one. In short, they want section T6 (=P3) as near to first in the letter as possible.

Traditional letters of advice rarely ask clients explicitly to check and confirm details. At the same time it is naïve to imagine that clients would conceive that their instructions had been unclear or incomplete. Who of us—including lawyers—ever entertain the possibility that what we have said or written might be obscure or deficient? It just does not occur to us, as some of our past endeavours testify. As a result, clients often do not see the repetition in sections T2 and T3 as sagacious but only tiresomely overcautious, unnecessary and time-wasting.

Several consequences follow from this predominant desire of clients. First, will they read sections T1–5 carefully, as their lawyers hope, or just skim them? Are they in a calm enough state to pay proper attention to the details in these sections until they have the satisfaction of knowing that there is a solution?

Secondly, will clients go back to read sections T1–5 more carefully once they come across the solution? And if they do, will they be lulled into thinking that they have already read these sections, when all they did on the first reading when they opened the letter was to skim them? The result could be that they quickly slip into skimming again and so overlook salient facts and crucial assumptions. This is especially likely to happen if the rec-

ommendation suits them. If it goes against their interests, they might scrutinise the earlier material looking for possible loopholes or errors on the part of the lawyer, but this means that only the disappointed part of the audience will engage in this careful reading.

Wise as the traditional arrangement and valid as the arguments used to bolster it might seem to lawyers, it does not avoid the dangers it aims to elude.

Resolving the conflict

The organisation adopted by the plain language approach relieves the conflicting tensions flowing from the arrangement of the material in the traditional approach and in the process offers a rounded solution—not a compromise that encompasses the legitimate interests and considerations of both clients and lawyers and that goes a long way to counteracting feared dangers of inattention to details.

P2 The issue

The plain style letter starts with a concise statement of the matter at issue in the advice, which provides a context for the information that follows. It is necessarily brief because the objective is to get to the recommendations or findings as quickly as possible for the benefit of the clients. 1 sentence is usually sufficient—or at most, 2. There is no need for a heading, such as *Issue*, as the section comes under the umbrella of the subject title of the letter and is an elaboration of it.

Sample sentences take the form of:

- We have considered whether the Financial Transaction Reports Act 1998 requires Outback Bank to carry out identification procedures, as requested in your letter dated 15 March 2007.
- We have examined the constitution of CHT to determine whether it can undertake a renounceable rights issue rather than an institutional placement.

P3 Findings/Recommendations

In a plain language letter, an announcement of the findings or recommendations follows immediately on the statement of the issue. This is the core of the advice which clients are eager to discover. They are hard-pressed

by a problem; they are anxious to learn if their lawyers have unlocked a solution for them. At the first instant they are happy to entrust the details to their lawyers' professional expertise: it is the answer that they desire at once. Only then can they relax to turn their attention to the accuracy of what seems to them secondary matters of detail.

Once more, unless the problem has several branches, this section is not ordinarily lengthy. 1 or 2 succinct sentences regularly are sufficient. For example:

- We recommend that you ...
- You will need to review the structure of ...
- We consider that the replacement of the refrigeration pipes is a deductible repair for income tax purposes.

Appropriate headings are *Findings* or *Recommendations*. In some instances *Implications* might be applicable, or some other term that more nearly matches the character of the advice being given.

P4 Important considerations/Scope/Assumptions

Some sample sentences from actual letters of advice give the flavour of the content in this section.

- Our proposal is only valid if
- Our finding is based on ... (details from instructions)
- In making this recommendation we have only examined ABC, as you directed. We have not examined XYZ.
- We have assumed that DEF does not hold 15% or more of the shareholding of an Australian company.

The material in P4 is essentially the same as that in T3, but the clients are being asked to engage with it in a vastly different manner. Rather than being involved in a more superficial activity of confirming whether they had given their lawyers the necessary information and whether the lawyers had understood them, now the clients are tackling a challenging task of problem solving with vital consequences for them. In the context of P4 they are assessing whether there is a congruence between the characteristics of the solution proposed by the lawyers and the

characteristics of their circumstances. The comparative assessment involved forces to the surface any contradictions or mismatches. It promotes meticulous reading.

Locating the background material and assumptions at P4 after the statement of the solution then is a far more effective strategy for the integrity and success of a letter of advice. With the material at P4, clients are scrutinising it against the backdrop of the proposed solution, a more productive and interesting task, whereas with the material at T3 (the traditional approach) they are only assessing it against the instructions previously given. The solution, the real core of a letter of advice, receives more searching attention in the plain language approach.

If we are worried that clients may not give due attention to this section, then headings such as *Important Considerations* or even *When this solution will work* may be apposite.

P5 Explanations/Reasons for Findings

As everywhere else, be as brief as possible in this section. Do not overload it with minuscule items that do not add to what has already been stated.

Arrange the evidence or reasons in order of importance, starting with the most significant. Clients will expect such an arrangement, will be puzzled if you begin with a minor point, and may have their confidence in your judgment unsettled.

Do not quote large slabs of legislation or court rulings. Instead show clients how a piece of legislation or a court ruling applies to their situation. They have come to you as the expert in law. They want you to unravel the law for them, and not just locate it. If lawyers have trouble at times comprehending laws and rulings, how much more do clients?

Introductory sentences could be general:

- Federal law requires you to submit 2 additional reports each quarter if the mine is open cut.
- Several recent court cases have established that the conversion of an asbestos tile roof is tax deductible.

or more specific:

- Under section 10 of the Financial Services Act you must hold a current fiscal trader licence from the Finance Commission.

However, do not let citations even of a section as well as the title tempt you into quoting the section or portion of a court ruling. Concentrate on its implications and applications, using your own words.

Although lawyers put the evidence (P5) after the solution (P3) in composing plain language letters, nevertheless they still tackle the concerns raised with them by their clients in the accepted sequence for problem solving. First they identify the issues, then assemble relevant evidence, and finally—and only then—develop the solution. It is just that when they come to write their letters of advice, they do not record the material in the chronological sequence in which they handled it and through which they reached their decision. Instead, they change the order to put the solution earlier to meet the expectations of their clients and for their benefit.

But this action of rearrangement is not only for the benefit of clients: there are advantages for lawyers also. With the solution already set down in front of them, they have a yardstick with which to check whether any piece of evidence they are proposing to include is actually relevant and telling. At the same time there is a curb on them to avoid inconsequential and unrelated material. Equally important, they are induced to make explicit how a fact applies so that clients do not have to work out the connections for themselves and are not left mystified.

P6 Applicable legislation and court rulings

This section appears only in those letters of advice which address situations that require wider consultation of legislative and judicial sources. It lists the legislation and court rulings that inform the findings or recommendations in section P5. Some of these may have been alluded to directly in P5.

The intention is not to impress clients with how much material their lawyers have covered but to give them essential information if they want to follow up a matter. It sometimes happens that clients have separately become aware of the likely impact of a particular Act or court ruling on their affairs and it is convenient for them if they can confirm from the letter of advice that their lawyer has taken it into account.

Introductions to the lists can take the form of:

- In arriving at these findings we considered:
 - The Credit Act 1984 (Victoria)
 - The Income Assessment Act sections 89–95.
- We also examined the rulings in the following court cases:
 - Halwood Corp v Road Corp, No. 6596 (Victoria Supreme Court 30 June 1997)
 - GM & AM Pearce and Co v RGM Australia Pty, 26 ACSR (1998).

The entries for each item can provide precise references to sections or parts of an Act where suitable. Annotations on special items, but not all, can also be in order. It may be, too, that we could improve the details in the citations of court cases to make it easier for clients to track down the rulings.

To reduce disturbing the flow of the letter, there is a good case for putting this section P6 into an appendix, especially if it is lengthy.

P7 Further action

This is another optional component which has a place only in some letters. If in scattered parts of a letter of advice you have pointed out obligations that the client must comply with to implement your recommendations, then it is a constructive practice to gather them together in a checklist at the end of the letter. For example:

- You will need to:
 1. lodge an application with the Securities Commission by 10 May
 2. file a VAT return by 30 June
 3. notify your customers of the changes by 31 July.

Clients do not regard these final checklists as patronising. On the contrary, they see them as further proof of a quality of genuine helpfulness on your part.

The checklist could lead to a further positive ending:

- We would be pleased to help you with any of these matters.

The wording of the heading could be varied depending on the types of actions listed in the section.

Are lawyers so different?

So different from clients, that is.

To the point here is the behaviour of lawyers. Many have confessed to me that, when faced with letters of advice written in the traditional format by other lawyers, they immediately go to the end (the recommendation) and then work their way back to the beginning. In handling exercises in redrafting traditional letters of advice during workshops I have run on plain language, I have regularly noticed many of the lawyers starting by reading the first couple of paragraphs then quickly switching to the last page to examine the recommendation before taking up the beginning again. When challenged about their practice, they openly confessed that knowing the recommendation made it easier for them to follow the letter because it provided a context in which to make sense of the facts and information the lawyer writer was presenting in the earlier sections.

Again, the in-house lawyers (numbering 10–12) of a large commercial company in Australia took up with their external lawyers whether they could present their letters of advice in a more readily accessible form. The in-house lawyers wanted to be able to adapt the letters easily, mainly by extracting specific components of the advice, for distribution to different divisions within the company. Using a letter that was in preparation at the time, we presented a version in the traditional style, which the external lawyers had normally been following, and another version in the plain language ap-

proach to provide a concrete and comparative base for discussion on how we might proceed to develop a solution. The in-house lawyers instantaneously voted for the plain language version. To some divisions within the company, they could simply send off sections P1–4; with others they might include P5 as well. Their preference was to move section P6 (Applicable legislation and court rulings) to an appendix, because they would rarely distribute it outside their own legal division.

Because of the confusion in the community over the implications of the *Mabo* ruling on Aboriginal land rights of the High Court of Australia, in 1993 Peter Butt asked me to collaborate with him in preparing a plain language version of the ruling, which appeared as *Mabo: What the High Court Said* (Sydney: Federation Press). The first edition was widely reviewed in legal journals in Australia. Pertinently for our present interest, many reviewers went out of their way to comment favourably on our approach of starting with a statement of the issue giving rise to the case, followed immediately by the ruling, and only thereafter progressing to set out the evidence amassed by the judges. The reviewers found it a much easier way to come to grips with a long and intricate ruling, which is after all similar in nature to a letter of advice. All the reviewers were lawyers!

We can safely jettison past myths, traditions and methods of drafting letters of advice in favour of the plain language approach. Its appeal is comprehensive and well nigh universal.



Peter Butt and Robert Eagleson, PLAIN 2009, Sydney

Robert Eagleson—A Tribute

by David Kelly

I first came in contact with Robert when I was at the Australian Law Reform Commission in the late 1970s—the glory days when Michael Kirby presided over it. I had been put in charge of work on a reference on Insurance Law. Robert contacted me. He was convinced that the rewriting of insurance policies should be a major focus of our work. I decided that, attractive as that might be, we had first to focus on amending the arcane rules of that subject.

Perhaps it was a lost opportunity. But we did follow his general advice in other ways. First, we established the rules that ‘unusual’ clauses in policies would be ineffective; and that, whether they said so or not, all domestic policies would cover a ‘standard’, or expected, range of risks. Second, we imposed on insurers an obligation to *clearly* inform insureds in relation to a number of matters on which they were likely to be at risk of confusion.

I took up the Plain English baton in a more dedicated way in 1985, when I became Chairman of the Victorian Law Reform Commission. We received a reference that was mainly focused on Legislative Drafting. The reference came from the Attorney-General, Jim Kennan QC, who became an enthusiastic supporter of the cause. Victorian legislative drafting, in particular, needed an overhaul.

I immediately contacted Robert Eagleson, and invited him to become a consultant to the Commission. Thankfully, he accepted that appointment. He was an immediate inspiration to the Commission and its staff. He was an extraordinarily courteous and gentle colleague, but quietly firm and persuasive. He worked tirelessly in furthering the cause of Plain English, despite considerable bureaucratic difficulty, and even obstruction. His contribution to the success of the Commission’s work, and to its outspoken reports to Parliament on the subject, was outstanding.

The world was, of course, not transformed overnight as a result of the Commission’s work. Legislative drafting in Australia still has a long way to go. But the flame has been lit! Robert changed the minds and hearts of numerous legal sceptics in the course of his work with us. He devoted the latter part of his career to that cause in the wider legal profession. May his followers continue to advance it until Plain English is universally practised in the way Robert so deeply wanted. He deserves, and has, our deep gratitude and respectful admiration.

Ensnaring perceptions on communication: underlying obstacles to lawyers writing plainly

Number 62 Page 9

Down the centuries, lawyers have regularly been the butt of criticism and cruel jokes because of the convoluted way they write. From certain perspectives these unfavourable judgments are appropriate and fair; yet, in over 30 years experience working closely with lawyers, I have come across none who deliberately produce obscure, cumbersome documents. They intend to be lucid and, like writers in many other professions, believe their documents are clear when they release them.

Moreover, lawyers are not born speaking legalese: it is not natural to them. They begin practising it only as they take up legal studies and proceed in their profession. Along the way, they also absorb perceptions and conventions about communication that turn them aside from plain writing.

These perceptions lie beneath the surface of our consciousness, and it is only as we have insights on their existence and their impact on documents that lawyers can be released to produce highly comprehensible and efficient documents that will earn them the appreciation of the community. This paper looks at five of these perceptions.

Perception 1: The paramountcy of precision

It is incontestable that accuracy of content is vital in any legal document. But in preparing their documents, lawyers often give the impression of a single-minded commitment to precision. Other considerations—and especially ease of comprehension for the audience—do not seem to come into play.

The experience of writing at university and law school contributes to the development of this restrictive outlook. Students prepare papers for readers (their professors) who can be taken to know more about the topic than they do.

As a result, there is not the same pressure to explain explicitly the connection between items of information or to help readers understand the flow of the arguments. Instead, the main thrust is to impress the professor with the students' knowledge of the law. The emphasis is on providing correct and ample information.

These experiences get transposed into practice in the legal office. As soon as they include all the correct and necessary information in a document, many lawyers see the writing task as finished. It does not seem to concern them that the material is not tightly organised, or that they have assumed knowledge that their clients would not have. The difficulties that inexpert readers could have with their documents seem outside their ken simply because their previous major writing experiences have not called upon them to give attention to these matters.

Unfortunately, comments of practitioners of legal writing in highly respected positions have encouraged this unbalanced emphasis on precision. Sir John Rowlatt, a former First Parliamentary Counsel in Great Britain, observed:

The intelligibility of a bill is in inverse proportion to its chance of being right.²

How we can tell if the contents of a bill are correct the more unintelligible the bill becomes is something of a mystery, but we can recognise how Rowlatt's forceful pronouncement promotes undue, if not exclusive, concern with precision.

Incongruously, Sir Ernest Gowers, of *The Complete Plain Words* fame, expressed similar thoughts:

being unambiguous ... is by no means the same as being readily intelligible; on the contrary the nearer you get to the one, the further you are likely to get from the other.³

During the 1970s, legislative drafters in Australia seized on these words to justify their own excruciatingly entangled compositions when the drafting of legislation came under renewed attack from the plain language movement.

The notion that there is an inherent antagonism between precision and intelligibility or clarity, that where one is achieved the other must suffer, is palpably false and contrary to

the true purpose of language—which is to inform, to edify, to illumine. We write so that another will understand us, and not be left in a fog. If we cannot express our ideas clearly, then we have to question how sure and clearcut is our understanding of them.

Examples abound to demonstrate that there is no real opposition between accuracy and clarity, and that the attainment of comprehensibility does not jeopardise precision. To select a straightforward illustration, *The Accident Compensation Act 1985* (Victoria) followed the then normal practice in legislation of this type by first establishing the legal and administrative frameworks by which the legislation was to be conducted before setting out the substantive matters of the legislation:

The Accident Compensation Act 1985

Part 1 Preliminary

Part 2 Accident Compensation Commission

Part 3 Accident Compensation Tribunal

Part 4 Types of compensation

This arrangement is puzzling and frustrating to members of the public, ignoring their expectations and order of priorities. Their major interest lies in what forms of compensation are available to them—the details of how the scheme is administered is of little immediate concern. In short, the Act should have begun with the contents of Part 4, and this is now the approach to this type of legislation in Australia. Importantly, the change in organization has no impact on the precision of the material but greatly increases its accessibility for general readers.

The same may be said for new ways of organising letters of advice, court rulings, and contracts, and for different choices of grammatical structure. The actual details of the content and its exactitude are left untouched. Only the comprehensibility of the documents is improved.

Perception 2: Inseparability of related details

The second ensnaring perception intertwines somewhat with the first one. A lot of drafting has been influenced by the belief that every qualification and exception relating to a proposition must be held together in the one sentence. This leads to the production of

overlong, convoluted sentences—often of 200, 500 or even 800 words in length. The worst I have seen is a sentence with over 1200 words in a residential mortgage!

A shorter example comes from a superannuation policy for the staff of a major Australian bank:

The total number of shares issued in consequence of acceptance of the share offers made on a particular occasion shall not exceed the number which is equal to 0.5% of the aggregate number of shares that were on issue on the first day of the year in which that occasion occurs, and if the number of the shares the subject of all such acceptances exceeds that limit every such acceptance and the contract constituted by it shall be deemed to relate to that number of shares (being a whole multiple of 10 shares) which is the greatest that can be accommodated within that limit having regard to the number of acceptances.

As the staff was having so much difficulty in understanding the clause, the editor of the staff magazine decided to run an article on it in the hope of throwing some light on its meaning.⁴ During an interview for the article, the Chief Legal Counsel acknowledged the trouble the clause was giving staff and that it was “a good example of legalese.” The journalist queried:

“Couldn’t this clause be at least divided into two sentences? That would make it at least a little easier to read.”

The lawyer responded firmly:

“No. You can’t afford to separate the two ideas in that paragraph with a full stop. It would be encouraging people to ignore the second clause, which tends to qualify the first. It might just possibly lead to misunderstanding”

He preferred to concentrate on a risk that was minute—“just possibly” are his words—and to ignore the massive likelihood, and in the bank’s case the reality, that by not dividing the sentence many would be bamboozled and never arrive at the meaning. Worse still, this approach ignores the natural reading processes of people who, when faced with contorted language, will stop reading altogether or, in despair of unravelling the message, will guess at it.

Some studies have shown that the limit of frustration for most readers is 80–90 seconds. If they cannot decipher the meaning of a sentence in this period, they will guess at a meaning and pass onto the next sentence. They can hardly be blamed for this action. While readers have a responsibility to approach a document with interest and commitment, writers have an equal responsibility to shape their message in a way that is congenial for readers.

This type of frustration is not limited to nonexperts, but professionals also yield to it. When asked what he thought of the plain English NRMA car insurance policy when it first appeared in 1976 (a first for Australia), and in particular whether he thought it was better than the old one, the then Chief Justice of New South Wales responded that “he could never bring himself to read the old policy: he just trusted that the NRMA was an honourable company”!

Perception 3: The pre-eminence of custom

We can all be bedevilled in various ways by an unthinking, blind acceptance of what has been, investing it with an unchallengeable superiority, and persisting with using it.

The action of over 400 scientists in Great Britain is instructive.⁵ When asked to assess two versions of a technical article—one which had been prepared in the traditional style for science and a second version rewritten according to the principles of plain language—the scientists favoured the rewritten version overwhelmingly in answer to these questions:

Which style is more precise?

Which writer gives the impression of being a more competent scientist?

Which writer inspires confidence?

Which passage shows a more organised mind?

The scientists nominated the original version when the question became:

Which passage is more difficult to read?

Yet many felt constrained by convention to follow this more difficult style in their own writing. Their behaviour is irrational, but it shows the force of custom. Writers need to be given confidence to adopt what their judgments tell them is clearer and more effective.

The conventionally held view that writing is a more elevated form of speech largely lies behind the bloated, obscure form of advice offered by the Heart Foundation:

Severe dietary restriction is usually unnecessary.

The recommendation started out in the more direct form of:

You usually don't have to diet strictly.

Mixed in here too is the notion that utterances of an organisation with the important status of the Heart Foundation call for inflated language.

Similarly, at the end of a workshop a senior judge in the Court of Appeal complimented me on the instruction I had given to the junior judges and registrars on how rulings should be expressed and on how to write plainly, but went to add, “But I can't write like that. I must appear erudite.”

And so our perception of our supposed status in the community and what it requires of us comes to overrule other considerations, and in particular that language was given to us so that we could help others to understand and acquire knowledge. We may not change the message, but it becomes harder for others to perceive it. There is also the danger that others may not value our efforts as erudite!

Perception 4: The permanence of language

Many have also come to hold that the lexical and grammatical structures established in past documents are fixed and permanent, and essential to preserve the intended precision. Change is seen as decadent. As a result, we can still find clauses holding onto words in senses they no longer carry, such as *severally*:

The defendants are jointly and severally liable under the Home Loan.

This practice ignores the fact that when Elizabethan lawyers framed the clause they did not hesitate to use current words in the current senses of their times. They believed that the language of their day could cope. To prevent a gulf developing between the usage of law and the usage of the general community, we too should turn to the words of our day to help us. We can safely do so, as the use of *individually* demonstrates:

The defendants are jointly and individually liable under the Home Loan.

Change, when it is rigorously selected, is possible without destroying meaning.

This fourth perception encourages slavish subservience to grammatical conventions that have become outmoded, and so leads to graceless and unnatural writing. The singular use of *they* is a good case in point. The Australian project to rewrite the Corporations Law in plain language exploited its convenience and familiarity:

*A person is entitled to have an alternative address included in notices if their name, but not their residential address, is on an electoral roll . . .*⁶

This practice avoids the cumbersome repetition of the noun (*the person's name, the person's residential address*) or the equally awkward *his or her*.

During the testing sessions held on the new version of the law in all states in Australia, most participants—including the legal and other professionals taking part—welcomed this development. The small number who objected on the grounds that it was “ungrammatical” were unaware that the practice had begun in the Middle Ages and that by the twentieth century had become dominant. Nor did they seem to realise that the English language had experienced a similar change in the sixteenth and seventeenth centuries when *thou* virtually disappeared from the language and *you* came to serve in both singular and plural contexts.

A major legal firm has adopted the same contemporary approach in its style book:

When a partner signs their own name

Perception 5: The narrowness of plain language

There is a misconception that plain English is a basic form of the language, one that is severely reduced and truncated. As well, it is wrongly imagined that it has only one form, without variation and variability. Instead it is a full version of the language, calling on all the patterns of normal, adult English. It embraces in its scope:

The three terminal gills of zygoterous larvae are borne by the epiproct and the paraprocts.

Usually they have the form of elongate plates, but in certain species they are vesicular.

This is an instance of plain (scientific) writing, but it is plain only for its particular, intended audience: advanced students of entomology. Despite the inclusion of several less familiar words, it is easy to recognise the direction of the sentences and any of us could answer a question like *What is the function of the paraprocts?*

Plain language does not ban or exclude technical terms, or any other of the varied structures in the language. Lawyers, for example, are free to use terms of art when writing to colleagues because they are efficient and effective in these contexts. Shakespeare demonstrated this flexibility and freedom when in *Macbeth* he first penned:

The multitudinous seas incarnadine

This line no doubt would have appealed immensely to those in the audience who had an education in the classics and who were aware of the tremendous number of borrowings from the classical languages that was occurring in English at the time. But Shakespeare realized that the line would have been meaningless to another important segment of the audience, and so he added:

Making the green one red

We all need a similar facility and fluency in language. To write plainly does not call on us to abandon any portion of our language or restrict our linguistic repertoire, but rather to enlarge and enrich it so that we can encompass the demands of our diverse audiences dynamically and incisively. What shapes our repertoire, what determines our choice in any given document, is the needs and capacity of our audience. Only as we achieve clarity of expression and ease of comprehension can we genuinely serve the members of our community.

Endnotes

¹ This paper was originally delivered at the seventh biennial conference of Plain Language Association InterNational, Sydney, 15-17 October 2009. It is also being published in the *Michigan Bar Journal*, and is reproduced here with many thanks to Joseph Kimble.

² Cited in H. Kent, *In on the Act*, London, Macmillan, 1979, p. 79.

³ Ernest Gowers, *The Complete Plain Words*, London,

Pelican, 1962, p. 18-19. A careful reading of Gowers shows that he was not talking about intelligibility at all but rather grace or elegance of style.

⁴ *Changes*, Sydney, Westpac, May 1987, p. 5.

⁵ C. Turk, "Do you write impressively?" in *Bulletin of the British Ecological Society* 9, 1978, pp. 5-10.

⁶ Commonwealth of Australia, *First Corporate Law Simplification Act 1994* section 242 (5).

Come to Dublin for PLAIN 2015, September 17-20 at Dublin Castle

Clearer language, greater efficiency and effectiveness



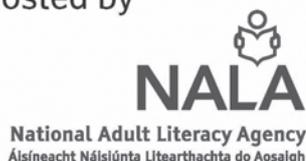
PLAIN 2015

The theme of clear language as a means to greater efficiency is key for the climate we are in today. It is increasingly important for information providers to be efficient and effective in their communications with their customers.

The PLAIN 2015 conference will show how organisations can improve their efficiency and effectiveness. It will:

- present and discuss research-based plain language initiatives;
- share best practice in – written, verbal, numerical and visual communication; and
- consider communication developments in Europe and further afield.

Hosted by



The National Adult Literacy Agency of Ireland (NALA) is a membership organisation and a registered charity. Our mission is to promote the development of adult literacy. An important part of our work is to support organisations to become more accessible to the public. As part of this, we offer a Plain Language Editing and Training Service.

We have worked with most Government Departments and a wide range of public and private bodies. **NALA is delighted to be the host of PLAIN 2015 and look forward to welcoming you.**

Dublin, Ireland

The conference will be held in Ireland's capital city, Dublin, a city that is steeped in over a thousand years of history yet buzzing with energy.

Dublin is easily accessible from the UK, continental Europe, the east and west coasts of the USA and Canada and the Middle East. More than 36 airlines fly regularly into Dublin Airport, which is located 12 km from the city centre.

Further information

Please contact **Claire O'Riordan**, Plain English Coordinator, NALA
Tel: + 353 1 412 7922
Email: coriordan@nala.ie

Websites: www.simplyput.ie www.nala.ie

Join us in Belgium for the 6th Clarity conference

'Learning to be clear'

Clarity and IC Clear (www.icclear.net) are jointly hosting this year's Clarity conference in Belgium (www.icclearclarity.com). The conference's theme is 'Learning to be clear'. It is a unique opportunity for you to join clear communication professionals and plain language experts from around the world who will share their best teaching and learning practices. Focus is on the latest initiatives and research in clear communication and plain language in both the public and the private sector, with an emphasis on legal language as a prime example.

The conference is being held in two exciting historical cities in Belgium: in the medieval heart of Antwerp on 12 and 13 November, and in the capital city of Brussels on 14 November where you will meet with the European Commission's clear writing experts.

Get on the bus from Antwerp to Brussels and back!

Don't worry about getting from Antwerp to Brussels and back on the 14th! When registering on the conference website (icclearclarity.com/registration) you can reserve your seat on a private bus that will take you in the morning from Antwerp to Brussels and back on time to Antwerp in the evening for the conference dinner.

Learn from like-minded people

Like Clarity's last conferences in Lisbon (2010) and in Washington (2012), also this year's conference will bring together clear communication practitioners, lawyers, business people, policy makers and other professionals. Professor Joe Kimble generously accepted to speak at the pre-conference welcome in Antwerp on 11 November.

After the first conference day on the 12th, we will gather for a reception at the impressive Antwerp City Hall. We hope to meet you there! Just let us know whether you will join us when registering at the conference website (www.icclearclarity.com/registration).

The conference will be a great opportunity to meet with people of similar interests and be inspired by their work. Speakers from a range of professions will present their different perspectives to a multidisciplinary audience. About 80 speakers from over 20 countries will share their expertise and knowledge.

Learn more about our speakers and the rest of the programme and social activities on www.icclearclarity.com/programme/

Find out more about the IC Clear course

IC Clear's online course on clear communication, supported by the European Commission, will be officially presented at the conference. Since October 2011, six partners from international institutions and universities have worked together on this online course. Between April and July of this year pilots of three different course modules ran. Participants and instructors will testify about this fascinating and rich learning experience for all.

Visit the European Commission

On 14 November Rytis Martikonis, Director-General of the Directorate-General for Translation since 2011, welcomes you at the European Commission in Brussels. The multilingual environment of the European Commission, with many non-native English speaking staff, calls for clarity in writing. That's why, already in 1998, the commission started its campaign 'Fight the Fog' against bureaucratic and difficult language. In 2010, this initiative was taken to a higher level with the Clear Writing Campaign. This year, to stress the importance the Commission attaches to clear writing, their annual 'Clear Writing Awards Ceremony' will be a part of our conference programme.

Have a session 'en français'

Next to the 60% of Dutch (Flemish) speaking Belgians, 40% of the Belgian population is French speaking. Clarity has a strong base in the French speaking part of Canada and France is getting a bigger role in the international field. Good reasons to integrate also a French part into the programme. Our Belgian colleagues from 'Droits Quotidiens' (<http://www.droitsquotidiens.be/fr>), the representatives of Clarity in Belgium, take care of it and

offer French sessions about clarity in the judicial system, clear writing, consumer protection, contract drafting and information design.

Take a legal writing seminar on Saturday

Additionally to the conference, on Saturday 15th November, you have the opportunity to take a three-hour seminar in English, Dutch or French. The seminar aims at legal professionals, lawyers and judges. You will learn to apply a range of techniques to write clear legal documents.

Professor Joe Kimble introduces all sessions followed by a practical and interactive part with experienced clear legal language instructors. Professor Joe Kimble takes care of the seminar in English.

You can register for this seminar separately through the conference website: icclearclarity.com.

Explore two exciting historical cities

The dual location of the conference offers you the opportunity to explore two exciting cities. Antwerp is a vibrant, welcoming metropolis and a real cultural capital, with impressive architecture and splendid art. Explore the port on the river Scheldt, admire the works of the painter Rubens (who spent much of his life here) and discover Antwerp's world famous diamonds and fashion designers. Brussels with its fascinating history dates back to the 11th century. It has been the capital of Belgium since 1830, when Belgium became an independent country. Nowadays,

Brussels is the headquarters of European Union institutions such as the Commission and Parliament, and NATO is also based here.

Thanks to the organizing committee

Special thanks go to the members of the organizing committee

- Olivier Beaujean for taking care of the French part of the programme
- Nicole Fernbach for putting together the programme with us and for her input on the part on the judicial system and legal writing
- Malachy Hargaddon for taking care of the programme at the European Commission
- Joh Kirby and Christopher Balmford for their input and feedback on the programme
- Aino Piehl for bringing together partners from the Nordic and Baltic countries
- Gonnie Put for her help with press contacts
- Ginny Redish for taking the lead in organizing the panel discussion with Steven Pinker.

and to many others who gave us valuable input and ideas.

We can't wait to meet you on 12, 13 and 14 November in Belgium!

—*Karine Nicolay and Ingrid Adriaensen*

All further information on the conference website www.icclearclarity.com.

Contributing to the journal

Clarity often focuses on a specific theme (like conferences or drafting or standards), but we also publish articles on a variety of other plain language topics. Please submit your articles to the editor in chief for consideration.

Would you like to be a guest editor? Our guest editors gather articles, work with the authors, make layout decisions, and edit and proofread a single issue. If you would like to guest edit an issue of the *Clarity* journal, send an email to the editor in chief.

Finally, if you have ideas about improving the journal, the editor would like to hear from you, as well. Our editor in chief is Professor Julie Clement, with the Thomas M. Cooley Law School. Email her at julieannclement@gmail.com.

Clarity Constitution

Background

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Background

The association Clarity was founded in the United Kingdom in 1983 to promote plain legal language. Since then the association has grown, and now there are around 650 members in 50 countries. Clarity is managed by a committee that includes representatives from more than 25 countries.

The members consider that it is expedient to adopt a Constitution to govern the association’s administration in the following terms:

1. Name

The name of the association is Clarity.

2. Objective

Clarity's objective is to promote using, appreciating and developing plain language in legal and other formal texts, anywhere in the world, and for that objective to do any of the following:

- (a) maintain and expand an international network of people interested in using plain language in legal and other formal texts;
- (b) facilitate access to information and materials relating to plain language;
- (c) promote high standards for using plain language in legal and other formal texts;
- (d) support and encourage using plain language generally.

3. Powers

Clarity has the following powers, which may be exercised only in promoting Clarity's objective and in compliance with any applicable law:

- (a) to hold conferences either alone or jointly with other bodies;
- (b) to publish a journal;
- (c) to maintain a website accessible to members and to the public;
- (d) to publish or distribute information;
- (e) to cooperate with other bodies that promote using plain language in legal and other formal texts;
- (f) to encourage local meetings;
- (g) to raise funds;
- (h) to borrow money;
- (i) to make financial grants;
- (j) to maintain insurance policies against risks from Clarity's activities;
- (k) to engage or employ paid or unpaid agents, staff or advisers;
- (l) to enter into contracts to provide services to or for other bodies;
- (m) to do anything else that helps promote Clarity's objective.

4. Membership

- (1) Membership of Clarity is open to any individual or organization interested in promoting Clarity's objective.
- (2) The Board may establish different membership categories, set out the rights, powers, duties and entitlements, and set the amounts of any subscriptions.
- (3) The Board must ensure that a register of members is kept.
- (4) A member may resign by notifying Clarity in writing.
- (5) Membership is cancelled if the member's subscription is more than 12 calendar months in arrears. The member is reinstated on paying the amount due.
- (6) The Board may cancel a membership if, in the Board's reasonable opinion, the continued membership would harm Clarity.

- (7) Before cancelling a membership, the Board must notify the member in writing and set out the grounds for cancellation. The member has 14 days to write to the Board about why their membership should not be cancelled. After considering anything the member has written about this, the Board must decide whether to cancel the membership.

5. General meetings

- (1) The Board must hold a general meeting in every second year (biennial general meeting).
- (2) In addition to the biennial general meeting, other general meetings may be held at any time. All general meetings other than the biennial general meeting are special general meetings.
- (3) Members are entitled to attend general meetings either in person or, in the case of a member organization, through an authorized representative.
- (4) At least 21 days' written notice of a general meeting must be given to the members specifying the business to be transacted.
- (5) A special general meeting must be called if the Board receives a written request to do so from at least ten members.
- (6) A quorum for a general meeting consists of the members present in person or, in the case of a member organization, through an authorized representative.
- (7) The President or, if the President is unable or unwilling to preside, some other member elected by those present presides at a general meeting.
- (8) Except for amending this Constitution or dissolving or merging Clarity with another body (see clause 7(2)(c)), every issue at a general meeting is decided by a simple majority of votes cast by the members present in person or, in the case of a member organization, through an authorized representative.
- (9) Except for the chair of the meeting, who has a second vote, every member present in person or, in the case of a member organization, through an authorized representative has one vote on each issue.

6. Biennial general meeting – general business

- (1) The Board may determine the date, time and place of the biennial general meeting.
- (2) The notice convening the biennial general meeting must specify that the meeting is a biennial general meeting.
- (3) The ordinary business of a biennial general meeting is:
 - (a) to confirm the minutes of the previous biennial general meeting and of any special general meeting held since that meeting;
 - (b) to receive from the Board a report on Clarity's activities since the previous biennial general meeting;
 - (c) to receive from the Board a report on Clarity's accounts for the previous two financial years;
 - (d) to elect Board members to hold office from the end of the meeting until the end of the next biennial general meeting.
- (4) Any other business of which notice has been given in accordance with clause 5(4) may be conducted at a biennial general meeting.

7. Special business

- (1) Special business is any business conducted at a special general meeting and (except for the ordinary business described in clause 6(3)) at a biennial general meeting.
- (2) Without limiting the special business that may be conducted, at a general meeting the members:
 - (a) may confer on any individual (with his or her consent) the honorary title of Patron of Clarity;
 - (b) may amend this Constitution by a two-thirds majority of members present at the meeting if the terms of the proposed amendment have been notified to the members with the notice of the meeting;
 - (c) may decide to dissolve Clarity, or merge it with another body established to promote plain language, by a two-thirds majority of members present at the meeting if the terms of the proposed dissolution or merger have been notified to the members with the notice of the meeting;
 - (d) may discuss and decide any issues of policy or deal with any other business notified to the members with the notice of the meeting.

8. Email resolution of members

- (1) Any question that could be decided by the members at a general meeting may be decided by the membership by email resolution.
- (2) A member of Clarity may ask the Board to put a proposed email resolution to the vote of Clarity members. If so, the Board:
 - (a) may send the proposed resolution to members if it considers it appropriate to do so; or
 - (b) must send it to members if at least ten members in writing ask the Board to do so.
- (3) The Board's email sending a proposed email resolution to members must:
 - (a) set out the terms of the proposed resolution; and
 - (b) specify a response date (which must be at least 21 days from the date of the Board's email).
- (4) An email resolution is binding if passed by a majority of those members whose written response is received on or before the response date.
- (5) No member has a second vote on an email resolution.

9. The Board

- (1) Only individuals may be appointed to the Board. Individuals appointed to the Board must be Clarity members.
- (2) The Board consists of:
 - (a) the President;
 - (b) the Secretary;
 - (c) the Treasurer;
 - (d) the *Clarity* journal editor;
 - (e) the country representatives.
- (3) The Board may co-opt up to three other Clarity members to be Board members until the end of the next biennial general meeting.

- (4) A co-opted Board member has the same rights, powers, duties and entitlements as any other Board member.
- (5) A retiring Board member who remains qualified may be re-elected.
- (6) A Board member automatically ceases to hold office if he or she:
 - (a) is absent without good reason from three consecutive Board meetings and is asked by a majority of the other Board members to resign;
 - (b) ceases to be a Clarity member;
 - (c) resigns by written notice to the Board;
 - (d) is removed by a resolution passed by all the other Board members after they have invited the views of the Board member concerned and considered the matter in the light of those views.

10. Proceedings of the Board

- (1) The Board must hold at least one meeting each year.
- (2) A Board meeting may be held either in person or by suitable electronic means agreed in advance by the President and in which all participants may communicate with all other participants.
- (3) A quorum at a Board meeting is 30%. This may be made up of Board members personally present or present through Board members they authorise in writing to represent them at the Board meeting. If the meeting is conducted electronically, a member who votes is considered present.
- (4) The President or, if the President is unable or unwilling to preside, some other Board member elected by the Board members present presides at each Board meeting.
- (5) Every issue may be decided by a simple majority of the votes cast at a Board meeting.
- (6) Except for the chair of the meeting, who has a second vote, every Board member has one vote on each issue.

11. Board's decision-making

The Board has the following powers in administering Clarity:

- (a) to appoint advisory sub-committees of two or more individuals;
- (b) to make rules consistent with this Constitution to govern the Board's proceedings;
- (c) to resolve, or establish procedures to help resolve, disputes within Clarity.

12. Benefits to Board members

- (1) Clarity's property and funds must be used only for promoting Clarity's objective.
- (2) No Board member or connected person may receive any money or other material benefit (whether direct or indirect) from Clarity except for:
 - (a) reimbursement of reasonable out-of-pocket expenses (including hotel and travel costs) actually incurred in administering Clarity;
 - (b) a reasonable rent or hiring fee for property let or hired to Clarity;
 - (c) an indemnity for any liabilities properly incurred in administering Clarity (including the costs of a successful defence to criminal proceedings);
 - (d) other payments or material benefits for which the Board has given prior written approval.

- (3) Whenever a Board member or a connected person has a personal interest in a matter to be discussed at a Board meeting, the Board member concerned must:
 - (a) declare the nature and extent of the interest before the meeting or at the meeting before discussion begins on the matter;
 - (b) be absent from the part of the meeting at which the matter is discussed unless expressly invited to remain to provide information;
 - (c) not be counted in the quorum for that part of the meeting;
 - (d) be absent during the vote and have no vote on the matter.

13. Property and money

- (1) The Board may place any money not required for immediate use on deposit or may invest it until it is needed.
- (2) Bank deposits, investments and other Clarity property must be held in Clarity's name.

14. Records and accounts

- (1) The Board must ensure that Clarity keeps financial records and produces a biennial statement of account.
- (2) The Board must ensure that Clarity keeps proper records of:
 - (a) all proceedings at general meetings;
 - (b) all proceedings at Board meetings;
 - (c) all recommendations by advisory sub-committees;
 - (d) all professional advice obtained.
- (3) The Board must make accounting records relating to Clarity available for inspection by any member on giving ten days' notice to the Board.
- (4) Copies of this Constitution and the current biennial statement of account must be posted on Clarity's website.

15. Notices

- (1) Notices under this Constitution may be sent by post or by suitable electronic means or may be published in the *Clarity* journal.
- (2) The address at which a member is entitled to receive notices is the postal or electronic address noted in the register of members (or, if none, the last known address).
- (3) Any notice given according to this Constitution is to be treated for all purposes as having been received:
 - (a) 15 days after being sent by post;
 - (b) seven days after being sent by electronic means to the relevant address;
 - (c) seven days after it is published in a journal containing the notice;
 - (d) immediately if handed to the member or their authorized representative personally;
 - (e) if earlier, as soon as the member acknowledges actual receipt.

16. Dissolution and merger

- (1) If a general meeting decides to dissolve Clarity or merge Clarity with another body, the Board members then holding office will remain in office as long as necessary to bring about the orderly winding up of Clarity's affairs.
- (2) If after being dissolved, after providing for all of Clarity's outstanding liabilities, the Board must apply the remaining property and funds in one or more of the following ways:
 - (a) by transfer to one or more other bodies established to promote plain language;
 - (b) directly for a specific project or projects designed to further Clarity's objective;
 - (c) in another manner consistent with Clarity's objective as the members in a general meeting approve.
- (3) On dissolution or merger, the Board must prepare and make available to the members a final report and statement of account.

17. Interpretation

In this Constitution:

connected person means a Board member's spouse, civil partner, cohabitee, parent, child, sibling, grandparent or grandchild, any firm in which a Board member is a partner or employee, any company of which a Board member is a director or employee or a shareholder who is beneficially entitled to more than 1% of the share capital.

material benefit means a benefit that may not be financial but has a monetary value.

When calculating days, the first day is excluded and the last day is included.

18. Review history

Version	1
First adopted by resolution	March 2014
Review history	None

Message from the President

From president Joh Kirby

I hope that this copy of *Clarity* finds you and your families well. It was with great sadness earlier this year that we learnt of the passing of Professor Robert Eagleson, one of the members of the Clarity family. This issue highlights many of his significant contributions to Clarity and the world of plain language. Our thoughts are with his family.



Planning is well underway for the joint IC Clear and Clarity Conference to be held in Brussels on the 12 to 14 November 2014. We have been fortunate once again to work with a fantastic conference partner this year in IC Clear. Thanks to the conference organising committee for their tireless work in developing such a strong program, particularly Karine Nicolay, Ingrid Adriaensen and Nicole Fernbach (our Clarity representative).

I encourage you to attend the conference if at all possible. Our conferences are an important opportunity to meet and share knowledge as well as make plans for the future work of Clarity. If you are able to attend make sure that you come along to the members' meeting and become more involved in Clarity. Clarity is an organisation run by volunteers and can only be

as good as the contribution that we all make to its future. This year's members' meeting is particularly significant, as it will begin the process of implementing our new constitution passed earlier this year. There will be an election of new office holders so please consider putting your name forward. A copy of the constitution has been included in this journal. Please take the time to read it.

The passing of the constitution is part of a continuing focus on governance and how we can make Clarity more sustainable into the future. As I have previously mentioned governance is of particular interest to me and I have been looking at some of the issues we face. This topic will form the core discussion at the members' meeting, so think about any issues and particularly solutions you might have and bring them along.

We also continue to work on a new look and feel for *Clarity*. This process is almost completed and we hope to be able to launch it fully at the conference. You can get a hint of this with the new logo that is being used on the conference website. Other changes you will see are a new design for the journal to be launched next issue and a new website. All of this has been through the support of More Carrot.

I look forward to meeting as many of you as possible in Belgium. Consider taking on a greater role in our organisation. If you can't get there please don't hesitate to email me with queries or questions.

Joh Kirby
September 2014

