

Ensnaring Perceptions on Communication

Underlying obstacles to lawyers' writing plainly¹

By Robert Eagleson

Down the centuries, lawyers have regularly been the butt of criticism and cruel jokes because of the convoluted way in which they so often write. From certain perspectives these unfavorable judgments are appropriate and fair, yet in over 30 years' experience working closely with lawyers, I have come across none who produce obscure, cumbersome documents wittingly and deliberately. 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 practicing 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 effect on documents that lawyers can be released to produce highly comprehensible and efficient documents that will earn them the appreciation of the community.

This article looks briefly 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 student's knowledge of the law. The emphasis is on providing correct and ample information.

These experiences get transposed into practice in the legal office. After including 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 organized, or that they have assumed knowledge which their clients would not have. The difficulties that inexpert readers could have with the documents seem outside lawyers' ken simply because their previous major writing experiences have not called upon them to give attention to these matters.

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

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

How we can tell if a bill's contents are correct the more unintelligible the bill becomes is something of a mystery, but we can recognize 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:

- 2) 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 as the plain-language movement emerged.

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,

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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 clear-cut is our understanding of them.

Examples abound to demonstrate that there is no real opposition between accuracy and clarity, and that attaining comprehensibility does not jeopardize 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.

- 3) *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 to be administered is of little immediate concern. In short, the Act should have begun with the contents of Part 4, and that is now the approach to this type of legislation in Australia. Importantly, the change in organization has no effect on the precision of the material but greatly increases its accessibility for general readers.

The same may be said for new ways of organizing 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 relat-

ing to a proposition must be held together in a single sentence. This leads to the production of overlong, convoluted sentences, often of 200, 500, or even 800 words. 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:

- 4) 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 said that it was ‘a good example of legalese’. The journalist queried:

- 5) ‘Couldn’t this clause be at least divided into 2 sentences? That would make it at least a little easier to read.’

The lawyer responded firmly:

- 6) ‘No. You can’t afford to separate the 2 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 many would be bamboozled by the undivided sentence 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 unraveling 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; 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 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 honorable company'!

Perception 3: The preeminence of custom

We can all be bedeviled 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 prepared in the traditional style for science and a second version rewritten according to the principles of plain language—the scientists favored the rewritten version overwhelmingly in answer to these questions:

- 7) Which style is more precise?
Which writer gives the impression of being a more competent scientist?
Which writer inspires confidence?
Which passage show a more organised mind?

The scientists nominated the original version when the question became:

- 8) Which passage is more difficult to read?

Yet many felt constrained by convention to follow this more difficult style in their own writing. Their behavior 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:

- 9) Severe dietary restriction is usually unnecessary.

The recommendation started out in the more direct form of:

- 10) You usually don't have to diet strictly.

Mixed in here too is the notion that utterances of an organization 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 compli-

mented 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 the past 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*:

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

The 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:

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

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:

- 13) 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 *bis 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 the 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 by the 20th century had become dominant. Nor did they seem to realize that the English language had experienced a similar change in the 16–17th 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:

- 14) 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:

- 15) The three terminal gills of zygopterous 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 recognize 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:

16) 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:

17) 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. ■

A former professor of modern English language at the University of Sydney, Robert Eagleson has been involved over many years in rewriting into plain language complex legislation for the Australian government and intricate documents for private legal firms in Australia, Singapore, Malaysia, and the United States. Recognized worldwide as an authority in this area, he has received several international awards for his work.

FOOTNOTES

1. This paper was originally delivered at the 7th biennial conference of PLAIN, held in Sydney, Australia, 15–17, October 2009.
2. Cited in Kent, H. *In on the Act* (London: Macmillan, 1979), 79.
3. Gowers, E. *The Complete Plain Words* (London: Pelican, 1962), 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), 5.
5. Turk, C. "Do you write impressively?" in *Bulletin of the British Ecological Society* 9 (1978), 5–10.
6. Commonwealth of Australia, *First Corporate Law Simplification Act 1994*, section 242 (5).

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