

Lawyers, about-face: as plain as you like

By Christopher Balmford

Devastating January flooding in Australia has insurers, policy-owners, and politicians concerned about the language used to define *flood*. Thousands of people whose home-insurance policies have “flood” coverage say they didn’t understand that the policy excluded coverage for river flooding. Similarly, legal language has been causing concerns in a margin-loan agreement from one of Australia’s most prominent financial-services organizations, Macquarie Bank. Curiously, these concerns suggest that lawyers need to start rooting for plain language on the grounds that it removes legal risk for their clients.

For generations, many lawyers argued against plain language, contending that the traditional legal-drafting style was uniquely accurate, certain, and precise. Therefore, they argued, the calls for plain language should be resisted.

Remember, though, that lawyers are famed for their ability to argue one side of a point today and the other side tomorrow. In that light, the legal profession needs to complete the last steps in a collective about-face on its attitude to legal risk in writing styles.

To be fair, some lawyers write with pellucid clarity. And some support the calls for plain language. But advocates for plain

language still encounter considerable resistance from lawyers who are anxious that if a document in legalese were to be rewritten in plain language, then something might be lost in translation. So the profession’s “about-face” is not yet complete.

Moreover, many lawyers who claim to write in plain language actually write quite poorly. Although those lawyers may have abandoned the worst of the traditional style—the Latinisms, the *aforsaid*s, and the *hereinbefore*s—and although they may have shortened their sentences and added a few headings, their writing is often far from being as clear as it can be.

Yet even now, without active support from the whole legal profession, Australia’s contribution to plain language internationally is to be included in an “international plain-language top-40 highlights” being prepared by this column’s editor, Professor Joseph Kimble. Australia makes Kimble’s top-40 for two broad achievements, among some others. First, for the process through which the legal profession stopped opposing plain language. Second, for the extent to which the profession has improved the standard of its writing—even though there’s a long way to go.

The Australian legal profession’s support for plain language began seriously in 1985. The Hon. Jim Kennan, MLC, Attorney-General, made a Ministerial Statement called *Plain English Legislation* in the state of Vic-

toria’s Parliament. In his statement, Kennan announced various changes, including:

- a requirement that each legislative bill include a statement of the bill’s “purpose/objectives”; and
- a direction that *must* replace *shall* when “used to impose an obligation.”¹

A few months later, Kennan referred the topic of plain language in legislation and government communications to the Law Reform Commission of Victoria—since abolished, and replaced by the Victorian Law Reform Commission.

On plain language, the Commission produced a discussion paper, two reports, and a handful of demonstration rewrites of existing documents. Some of the Commission’s work was done by Professor Robert Eagleson, a professor of English at the University of Sydney. Eagleson went on to do important plain-language work with governments and law firms.

The Commission’s plain-language work made a real difference in two areas.

First, it rebutted the arguments that lawyers raised against plain language. The Commission’s rebuttals are often extensively quoted—for example, in reports by the law-reform commissions in Ireland and New Zealand.

Second, the Commission prepared demonstration rewrites of existing documents,

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But what the profession hasn’t done is complete the switch from arguing against plain language on the grounds of legal risk to arguing for plain language on the very same grounds.

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—Justice Margaret Stone

such as the national law governing corporate takeovers, known (in 1986) as the *Takeovers Code*; Victoria’s *Equal Opportunity Act* (1984); a standard mortgage produced by the Law Institute of Victoria (the equivalent to a state bar association); and various government letters and notices. The Commission’s rewrites were signed off by senior lawyers who were subject-matter experts in the relevant fields. Those experts included senior counsel, Law Institute representatives, professors of law, senior solicitors in private practice or in government, and Eamonn Moran, who was then Deputy Chief Parliamentary Counsel in Victoria. Moran is now the senior legislative drafter in Hong Kong—and still improving the clarity of legislation.

David St L Kelly, the chair of the Commission, drove its plain-language work. In particular, he:

- argued the case for plain language and successfully rebutted the arguments that lawyers raised in defending a traditional style of drafting;
- developed the structure for the Commission’s strikingly clear demonstration rewrites;
- reworked the draft rewrites in response to the subject-matter experts’ reviews; and
- debated and settled the final drafts with those experts.

Gradually, the quality of the Commission’s arguments and demonstration rewrites caused the legal profession to fall silent in its opposition to plain language. As that happened and in response to the publicity about the Commission’s work, major commercial organizations began demanding plain-language documents from their lawyers. But too often, the lawyers professed themselves to be unable, or unwilling, to write in the style of the Commission’s rewrites.

So some of the clients—for example Norwich Financial Services Group—moved on and approached the Commission to see if it would rewrite documents for a fee. The Commission began doing just that—rewriting draft documents for clients—and thus reducing the lawyers’ role to merely providing a legal sign-off. Although the extra revenue for the Commission was welcome, Kelly’s real aim was to compete with law firms so as to motivate them to change their writing style as part of their efforts to retain, or retrieve, the document-writing work.

Since then, Australian clients—especially commercial clients—increasingly demand clearer documents from lawyers. In response, the legal profession has generally moved steadily—though sometimes slowly, and always carefully—toward a plainer style. But what the profession hasn’t done is complete the switch from arguing against plain language on the grounds of legal risk to arguing for plain language on the very same grounds. Surely, CEOs of insurance companies—when contemplating the problems they face because of the confusing and obscurely subtle definition of *flood*—should be asking why the style of drafting they use is causing their companies such pain. Customers are furious. Politicians are taking control of the definition.

CEOs should also be asking what other documents contain similar risks. The people responsible for Macquarie Bank’s margin-loan agreement probably smarted in January when they read Justice Margaret Stone’s criticism of the “obscure and ambiguous drafting” of the bank’s agreement and her comments:

Indeed, in my view, it is the failure of the draftsman(s) of the scheme to express it in the clarity of language which ought to be expected from such a document, that gives rise to the difficulties which have arisen in this litigation.²

It is difficult to understand how the imprecision and ambiguity of the documentation could have escaped the scrutiny of competent and sophisticated parties and their advisers.³

Even better or worse, sometimes courts find obscure documents unenforceable. For example, in 1992, one of Australia’s four largest banks, the ANZ, was unable to enforce its guarantee because the document was incomprehensible. The judge said, “It was even impossible for counsel appearing in the case to construe even the first clause of it,” and he noted that it was “57 lines in length couched in incomprehensible legal gobbledy-gook.”⁴

Rather promptly, the ANZ rewrote its guarantee. Let’s hope that Macquarie is rewriting its margin-loan document.

Yet the problems with a traditional legal-drafting style extend beyond legal risk. That style is also brand-damaging: it confuses people, and it alienates them. Moreover, rewriting documents in plain language often reveals flaws in the content—the very substance—of the original document. For example, a senior life-insurance executive from Norwich once said at an industry conference:

The [rewriting] process, although very detailed and time-consuming, was most enlightening. I do not mind admitting that, on a couple of occasions during the rewrite, I was a little embarrassed by the complex, convoluted, frequently absurd and *occasionally wrong* documents on which we base our whole operation.⁵

Similarly, at a plain-language conference in Toronto in 2002, Merwan Saher, Director of Communications with the Office of the Alberta Auditor General, said of the office’s plain-language rewriting project:

What we’ve learned so far is that structure that forces the auditor to discretely set out audit criteria, findings, and implications exposes substandard work. So clear, concise writing influences our audit rigour by identifying the need for more thought or evidence. In summary, by exposing unsupported audit recommendations, plain language improves audit quality.⁶

Merwan shows us that plain language can be at the heart of more than just communication. Plain language can also be at the

heart of the substantive activities that communications relate to. It's as simple as this: by improving the communications relating to their audits, the people in the Office of the Alberta Auditor General improved the quality of their audits.

It's time for lawyers to argue for plain language on the grounds that traditional legal drafting presents increasing legal and commercial risks—and that unclear documents damage your brand.

So as a sergeant-major might put it, “Legal profession: on the legal risks in drafting styles, about-face.” ■

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FOOTNOTES

1. The Hon. J. H. Kennan, Ministerial Statement, Legislative Council, Parliament of Victoria, *Plain English Legislation* (May 7, 1985).
2. *Leveraged Equities Ltd v Goodridge*, 2011 FCAFC 3, ¶ 152 (Fed Ct. Austrl 2011), available at <<http://www.austlii.edu.au/au/cases/cth/FCAFC/2011/3.html>>. All websites cited in this article were accessed July 6, 2011.
3. *Id.* at ¶ 3.
4. *Houlahan v Austr & NZ Banking Group Ltd*, 110 FLR 259, ¶ 27 (St Ct of Austrl Capital Territory 1992), available at <[http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/act/ACTSC/1992/368.html?stem=0&synonyms=0&query=title\(Houlahan%20](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/act/ACTSC/1992/368.html?stem=0&synonyms=0&query=title(Houlahan%20)>.
5. David Johnstone, Nat'l Manager, Norwich Life, *Plain English Contracts: A New Marketing Tool?* 1 (Sydney, Austrl March 10–11, 1992) (paper copy of speech on file with author) (emphasis added).
6. Quote taken from a post-conference e-mail to author and incorporated into the author's final conference paper, *Plain Language: Beyond a Movement* 14, available at <<http://www.plainlanguagenetwork.org/conferences/2002/movement/movement.pdf>>.

Last Month's Contest

Last month, I asked you to fix the ambiguity in this sentence (which may have changed) from the website of the Social Security Administration:

“The SSI program pays benefits to people age 65 and older or blind or disabled adults under 65 who have limited income and resources.”

The central ambiguity is caused by the so-called trailing modifier, as discussed in last month's column. Everyone who entered spotted the trouble: does *who have limited income and resources* modify *people age 65 and older*? My check of the full website tells me that it does, but that's not the point. There's also uncertainty about whether a blind or disabled *child* can collect, and the website again says yes.

The intended meaning could be made clear in a number of ways—more, in fact, than I had imagined. I promised three winners, based mainly on the order I received the entries. Each winner gets a copy of *Lifting the Fog of Legalese: Essays on Plain Language*. But I'll also mention some other readers who submitted good fixes. Sorry that I can't acknowledge all the good ones.

Now, a vertical list is surefire:

“The SSI program pays benefits to people who:

- (1) have limited income and resources; and
- (2) are blind, disabled, or age 65 and older.”

You could even do that same thing in a normal sentence that repeats the *who*. I think a list makes for easier comprehension, but then again, how about this entry from Jeanne Jerow (one of the later ones)?

“The SSI program pays benefits to people with limited income and resources who are blind, disabled, or over age 64.”

At any rate, the first winner is Mark Malven, from the Dykema firm. He created a somewhat different vertical list from the one above. So did Brent Geers and Peter Katz.

“The SSI program pays benefits to people who have limited income and resources, and are:

- (1) age 65 and older;
- (2) blind; or
- (3) disabled.”

Two side points here. First, drafters might disagree on whether an *or* is needed after item #1. At least in the U.S., the tendency is to put *and* or *or* after the next-to-last item only. Second, I like to avoid a second level of breakdown in the list if I can. Thus, I'd prefer not to do some-

thing like the following, although it's often helpful with more complicated provisions:

“The SSI program pays benefits to people:

- (1) who have limited income and resources; and
- (2) who are:
 - (a) age 65 and older;
 - (b) blind; or
 - (c) disabled.”

The second winner is Scott Levinson, assistant general counsel for Con Edison of New York, who fixed the ambiguity with a midsentence dash—one of the techniques mentioned in last month's column:

“The SSI program pays benefits to people age 65 and older— or blind or disabled adults under 65—who have limited income and resources.”

The third winner is James A. Smith, a retired partner of Bodman PLC, who assumed that the trailing modifier does not apply to *people age 65 and older*. He used two sentences, as did some other persons who made the same assumption:

“The SSI program pays benefits to people 65 and older. SSI also pays blind or disabled adults under 65 who have limited income and resources.”

Here again, a list would also work nicely, as demonstrated in revisions from Richard Swanson, Michelle Horvath, and Mary Hickey:

“The SSI program pays benefits to:

- (1) people 65 and older; and
- (2) blind or disabled adults under 65 who have limited income and resources.”

And Judge William Richards of the 46th District Court was the first to note that repeating the *to* before *blind* in the original would point strongly toward this same meaning.

Finally, quite a few readers offered good revisions that used horizontal, rather than vertical, numbered lists. I think vertical lists are generally a bit more common and foolproof in drafting, but in this case the horizontal list works fine. Thus, this entry from Marguerite Donahue, taking us back to the first interpretation:

“The SSI program pays benefits to people who have limited income and resources, and are (1) age 65 or older; (2) blind; or (3) disabled.”

Stay tuned for a new contest next month. Where else can you have so much fun?

—JK