

Plain Language "Down Under"— Throwing Legalese on the Barbie

By Peter Butt

This is the second of our articles on the market value of plain language, or plain language in action. (The first article appeared in the February 1993 column.) As part of the series, we will include an article about the remarkable plain-language program at Mallesons Stephen Jaques, an Australian-based international firm with 600 attorneys. That article will appear in the plain-language theme issue of the Bar Journal, scheduled for January 1994.

A note about form. I moved quotation marks outside commas and periods, American style, but left the British-Australian spelling. And for clarity between countries, I did not abbreviate very much in the citations.

—J.K.

I take as my text Crocodile Dundee's televised invitation to Americans to "come on 'down under' and throw another shrimp on the barbie." Presumably, this caricatured, pseudo-barbaric exhortation has some meaning for Americans. But its meaning would be quite lost on many Australians. For us, the word is "prawn," not "shrimp." Shrimps are small crustaceans, too puny to be worth shelling to eat. And the traditional Australian barbecue ("barbie") is a series of rusty bars spaced at irregular intervals. Shrimps thrown on an Australian barbie would fall straight through, for instant incineration.

However, to adopt the metaphor for what it is worth, in recent years we "down under" have made some attempts to in-

cinerate legalese. As you probably know, we were not the first to try this. The anti-legalese, or "plain language," movement first took root in a big way here in the United States, in the 1970s.¹ And, of course, scattered forays against legalese were in evidence centuries ago. You may have heard of the old English case of *Mylward v Weldon* (1596),² where a pleader was sent to Fleet Street prison and fined 10 pounds, for drafting pleadings that ran to 120 pages. The judge thought that 16 pages would have sufficed. To add to the ignominy, the judge ordered that a hole be cut in the offending document, that the pleader's head be poked through the hole, and that the pleader be paraded around the courts of Westminster "bareheaded and barefaced," with the document hanging "written side outward." He was then sent back to prison until he paid the fine.

But to return to the theme: my impression is that, after its initial bloom, the plain language movement in the United States waned somewhat in the early 1980s—with some signal exceptions³—and has been revitalised only in the last four or five years. In the interval, the movement was taken up in other countries—notably England, Canada, and Australia. The current position, here and internationally, has been surveyed exhaustively by Joseph Kimble in the *Thomas M. Cooley Law Review*.⁴

I have been asked to tell you something of what is happening in Australia, especially in Sydney, where the Law Foundation Centre for Plain Legal Language has its offices. Perhaps I should start with some background.

The Origins of the Plain Language Movement in Australia

Like its American counterpart, the plain language movement in Australia began in the 1970s. I would like to trace three steps in the movement.

The first occurred when one of my colleagues at the University of Sydney, Professor Robert Eagleson, a linguist, developed a plain-language insurance policy for the National Roads and Motorists Association. The Association is Australia's largest motor-vehicle insurer. The new policy—an instant success with the public, though derided by some lawyers of the day—has since been emulated by many other companies. I suspect that its motivation was mercenary: to give the Association a marketing edge over its competitors. But it demonstrated several important benefits of plain drafting.

One was increased efficiency: the Association reported that the new policy led to substantial savings in staff time. Customers made fewer enquiries about the meaning of the policy, both when taking it out and when making claims under it. Another benefit was decreased litigation: it has not been necessary to litigate the meaning of any of the provisions of the new policy. This no doubt reflects Professor Eagleson's drafting skills; but it also gives the lie to fears that to tinker with time-honoured legal formulas is dangerous. The proof lies in the court lists (dockets): Australian courts (and no doubt those in the United States) are clogged with suits seeking to divine meaning from clauses in traditionally drafted legal documents.

The second step was the work of the Victorian Law Reform Commission. Professor Eagleson was invited to join the

"Plain Language" is a regular feature of the *Michigan Bar Journal*, edited by Joseph Kimble for the State Bar Plain English Committee. Assistant editor is George H. Hathaway. Through this column the Committee hopes to promote the use of plain English in the law. Want to contribute a plain English article? Contact Prof. Kimble at Thomas Cooley Law School, P.O. Box 13038, Lansing, MI 48901.

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Commission's enquiry into plain language and the law. The Commission is one of Australia's foremost law-reform bodies. Professor Eagleson was the first non-lawyer to be appointed a member. In 1987 the Commission produced a substantial report, *Plain English and the Law*, which combined scholarly research with practical applications of the plain language drafting style.

One of the Commission's theses was that no area of law is too complex for plain language. To illustrate its conviction, the Commission redrafted Victoria's securities legislation—one of the most convoluted statutes in the country. The finished product was published in a form which highlighted the end result, with the old and new versions on facing pages. A number of experts in securities law were enlisted to ensure that the translation properly captured the meaning of the original and that no difficulties of substance were glossed over. Several main lessons emerged from the exercise. The first, that it could be done at all. The second (and unexpected), that the original contained a number of errors which had been hidden by convoluted language and structures. This points up another benefit of the plain drafting style: when documents are easier to read, drafting errors are easier to find. Legalese confounds even lawyers.

The third step was the establishment in 1990 of the Law Foundation Centre for Plain Legal Language. The Centre is funded by the Law Foundation of New South Wales, a body that provides money for law-related research in New South Wales. One of the Foundation's aims is to improve public access to law and the legal process. This leads me to my main topic—the Centre and its work.

The Law Foundation Centre for Plain Legal Language

Structure and Aims

The Centre was established under an agreement between the University of Sydney and the Law Foundation of New South Wales. Its offices are within the Faculty of Law at the University of Sydney. Professor Eagleson and I were the founding directors. In addition to the directors, it now has a full-time chief executive officer, two full-time researchers, and an administrative assistant. It also has an academic director—a member of the teaching faculty



Guests at Krinock Lecture (left to right): Representative Nick Ciaramitaro, sponsor of Michigan's plain English bills; Marilyn Hall, State Court Administrator; Joseph Kimble, editor of the "Plain Language" column; Hon. Randy Tahvonen, reporter for the Committee on Standard Criminal Jury Instructions; Professor Peter Butt; George Hathaway, chair of the Plain English Committee.

of the law school—who provides a formal link between the Centre and the law school. The Centre reports to a board. Members of the board include representatives from the Law Foundation, representatives from the university (including the dean of law), a lawyer in private practice with expertise in plain language drafting, a non-lawyer with expertise in language and marketing, and the chief legislative drafter for New South Wales.

The agreement between the university and the Law Foundation sets out the Centre's chief aim. It is "to promote the study and use of plain language in public and private legal documents (including legislation and official forms)." The agreement includes amongst the functions of the Centre:

- (a) encouraging the use of plain language by lawyers, legislators, government officials, and persons concerned with the preparation and use of standard documents (such as leases, and insurance and loan contracts);
- (b) researching the use of plain legal language, and publishing the results of that research;
- (c) preparing precedents (forms) and sample documents using plain legal language;
- (d) developing training programs;
- (e) providing consultancy services in the use of plain legal language.

Projects

The Centre has been involved in many projects. Let me highlight some of those I have found the most interesting.

Words and Phrases. A common argument against using plain language in legal documents is that it is not "safe."⁵ The courts have decided the meaning of traditional legal phrases, and (so the argument runs) to substitute a modern phrase for a time-honoured one is too dangerous. Having come from a background in legal practice, I can sympathise with this argument. But it is based on several significant misconceptions. One is that legal documents—especially "standard forms" such as leases, mortgages, and contracts for the sale of land—are replete with legal phrases that have been subjected to judicial analysis. The truth is that in most legal documents the proportion of words and phrases that have been judicially defined is very small—perhaps as low as three percent.⁶ And the proportion given a meaning which cannot be translated into plain language is even smaller.

The second misconception is that strings of near-synonyms must be used to ensure that all possible nuances are covered: so we "give, devise and bequeath," or "cease and desist," or "indemnify and keep indemnified," and so on. But the truth is that in almost all instances these word-strings

are unnecessary. They are mere formulas, added for legal solemnity but achieving no purpose. And of course there are words like "such," "said," "hereby," "whereas," added (often out of habit) for effect but not meaning.

Nevertheless, conscious of the profession's fears, even if largely unfounded, the Centre decided to research the meaning of some of the more commonly used traditional words and phrases. The aim was to find the origins and judicially endorsed meanings of the phrases, and then to suggest a plain language equivalent which could be offered in the sure knowledge that it captured the legal essence of the original. This had already been done in the United States—chiefly by Professor Melnikoff—but not in Australia. We wanted to concentrate on the meanings given by Australian and English judges.

Our hope is that the research will assure lawyers that it is safe to use a plain language equivalent of a legalese word or phrase. The official journal of the New South Wales Law Society has been publishing the results of our research.

Complaints File of the Law Society. One of the more interesting projects—still in its early stages—is an investigation into whether clients complain to the Law Society (Bar Association) about the way their lawyers write to them. This project was motivated largely by anecdotal evidence from Mark Adler, chair of the English organisation "Clarity," that the official complaints files of the English Law Society contained clients' complaints about the way lawyers write. We wanted to see if clients in Australia take the same action. Relevant here is a 1983 English decision, *Sopcon Trustees Ltd v Wood Nash & Winters*.⁷ A client sued its lawyers for providing an advice letter so tortuously drafted that the client completely misunderstood it and acted to its detriment. The judge awarded the client damages of 95,000 pounds. The letter, said the judge, was "very obscure English" and "anaesthetized [the client] into an oblivion." Badly written letters can be the basis of professional negligence actions.

The aim of this project is simple enough. If a significant number of clients are unhappy about the way their lawyers write to them, the legal profession ought to be encouraged to do something about it. Clients would benefit from better communication. Lawyers also would benefit. Sur-

veys in Australia show that lawyers have a poor public image. Although lawyers seem oblivious to the reality, part of the problem lies in the way lawyers write. Improving their communication skills is one way of improving their image.

Judicial Writing. The Victorian Law Reform Commission recently made a comprehensibility study of part of the Australian income tax legislation. The result: to understand the legislation required 12 years of schooling plus 15 years of university—27 years of education in all.⁸ There are many judgments in Australia—mirrored in the United States, I am sure—where judges have railed against the writing habits of lawyers and legislative drafters.⁹ Often, judicial criticism is leavened with sarcasm, making it all the more potent. Thus, said Lord Justice Harman in an English case:

*"To reach a conclusion on this matter involved the court in wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhaling from the forest of schedules lining the way on each side. I regarded it at one time, I must confess, as a Slough of Despond through which the court would never drag its feet, but I have by leaping from tussock to tussock as best I might, eventually, pale and exhausted, reached the other side."*¹⁰

A number of surveys here in the States clearly show that, given the choice, judges prefer plain language to legalese.¹¹ However, it is also clear to anyone who cares to read judicial opinions that judges themselves are sometimes the worst perpetrators of obscurantism. (There are exceptions, of course. A notable exception in Australia is Justice Kirby, President of the New South Wales Court of Appeal. His judgments display careful crafting. In a recent paper, he said: "Brevity, simplicity and clarity. These are the hallmarks of good judgment writing. But the greatest of these is clarity."¹²)

The Centre thought it might be interesting to see how judicial writing fared when fed into plain language computer programs. There are a number of these programs around. They "test" writing by accepted comprehensibility standards. We chose the program "StyleWriter," because of its ready availability in Australia. We also chose to go straight to the top and test the 1990 judgments of our highest court, the Australian High Court (the equivalent of the United States Supreme Court).

The results so far are still preliminary. The computer program will need modifying, to deal properly with citations. (Because they are short and punctuated with periods, we suspect that citations give a falsely low average sentence length.) However, the early results are in line with what we expected. Two points are especially noticeable. First (as we already knew), the judgments contain very long sentences—the average sentence is likely to be well over 40 words. All judgments contained sentences longer than 55 words, the maximum that StyleWriter records. To give a comparison, most writing manuals recommend an average of no more than 20 or 25 words a sentence. Thomas Keneally in *Schindler's Ark* averages 16 words a sentence; Alexander Solzhenitsyn in *Cancer Ward* also averages 16; *Time Magazine* averages 20. This paper averages 18.

The second point is that the judgments contain a large proportion of passive verbs. StyleWriter rated many judgments "unreadable" on this score. Some averaged more than one passive verb every sentence. These judgments received the following admonition from StyleWriter's manual: "This is poor writing and tedious reading. Your writing [is] difficult to read and will need major rewriting."

A Plain Language Mortgage. The Centre recently finished drafting a plain language residential mortgage for St. George Building Society, which is Australia's largest home financier. This project took many months, but was valuable in allowing us to practise our principles. Essentially, we translated and reorganised the financier's existing mortgage. It was only five or six years old, but was an amalgam of boilerplate clauses cobbled together from assorted precedents going back many years. The redraft is substantially shorter than the original. It also is far less draconian. We found—like others who have gone through a similar exercise¹³—that the original contained a number of clauses conferring powers that the legal advisers thought prudent ("for more abundant caution," as we lawyers say, redundantly) but which the financier would never dream of exercising. In the redraft, we excised them. There were also many clauses that were singularly inapt for a residential mortgage—for example, requiring the borrower to keep the premises open during normal business hours. These had crept into the mortgage by slow accretion over the years. Their

presence we could only explain on the basis that complexity of drafting had obscured their inappropriateness for home mortgages.

The new mortgage will not be released until we have tested its comprehensibility with potential users. We will test it with borrowers, with the financier's employees, and with the panel of lawyers the financier uses in mortgage transactions. (In New South Wales, lawyers have a statutory monopoly in land transactions.) Adequate testing procedures are essential to the success of plain language documents.

The Design of Legislation. Legislation in New South Wales is now drafted in plain language. (Indeed, as I have already mentioned, the chief legislative drafter is a member of the Centre's Board.) However, form is often as important for comprehensibility as the words used. This is certainly true of legislation. Accordingly, the Centre is researching the design of legislation, to find ways to make the printed page more easily intelligible for readers. We are working with "information designers," not merely "graphic designers." Graphic designers make a page look attractive, but not necessarily easy to read. In order to uncover difficulties people experience with the existing design of legislation, we are consulting "users" of legislation. These include lawyers, law students, librarians handling public enquiries about law, bookstores, and the general public. Our investigations so far have covered such matters as page size, type size, fonts, bold versus italics, capitals, running heads, footnotes, the use of white space, and the use of plans, diagrams, and graphs.

Lectures and Seminars. Finally, I should mention that the Centre holds lectures for lawyers and others on plain language writing. Some are introductory, designed to convince sceptics and provide basic instruction in technique. Since a lecture format does not generally allow the hands-on experience necessary to cultivate writing skills, we have also developed "in-house" training courses for smaller groups. These

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are tailored for particular organisations or law firms, and are designed around the client's own documents. Some are as short as two sessions of two hours each; others are more substantial, running over several weeks.

The Centre also teaches a course on legal drafting at the Faculty of Law, University of Sydney. The course emphasises plain language drafting techniques and is the only one of its kind in Australia. It differs from many American courses, in that it is designed for final-year students. We can expect final-year students to have some substantive legal knowledge, so that drafting exercises can be undertaken without the need to spend time explaining the law involved. Of course, the drawback is that by the time they reach final year many students are set in their writing styles. In some respects it might be better to get to them earlier, before academics and judges have subverted them. ■

Footnotes

1. See Kimble, *Plain English: A Charter for Clear Writing*, 9 *Thomas M. Cooley Law Review* 1, 2 (1992).
2. The most commonly cited report is Tothill 102; 21 *English Reports* 136. But the case is more fully reported in Spence's *Equitable Jurisdiction*, pp 376-377 (1846).
3. One was the publication of Professor Melnikoff's *Legal Writing: Sense and Nonsense* (1982); another, the beginnings of the Plain Language column in the *Michigan Bar Journal*.

4. *Plain English: A Charter for Clear Writing*, 9 *Thomas M. Cooley Law Review* 1, 31-58 (1992).
5. See Kerr, *Plain Language: Is it Legal?*, *New South Wales Law Society Journal* 52 (1991) (Mr. Kerr is a Board member of the Centre); Justice Hwang, *Plain English in Commercial Contracts*, 32 *Malayan Law Review* 296 (1990).
6. Barr, Hathaway, Omichinski and Pratt, *Legalese and the Myth of Case Precedent*, 64 *Michigan Bar Journal* 1136 (1985).
7. Queen's Bench Division, Jupp J. (unreported), 6 October 1983).
8. *Australian Financial Review*, p 19, 27 September 1991.
9. For example, *Hepples v Commissioner of Taxation*, 65 *Australian Law Journal Reports* 650 (1991); *Re Moodie*, 34 *Australian Law Reports* 481 (1981); *Department of Social Security v Rurak*, 99 *Australian Law Reports* 17 (1990); *National Bank of Australasia v Mason*, 133 *Commonwealth Law Reports* 191 (1975).
10. *Davy v Leeds Corporation*, 3 *All England Reports* 390, 394 (1964).
11. See, for example, Harrington and Kimble, *Survey: Plain English Wins Every Which Way*, 66 *Michigan Bar Journal* 1024 (1987); Kimble and Prokop, *Strike Three for Legalese*, 69 *Michigan Bar Journal* 418 (1990); Child, *Language Preferences of Judges and Lawyers: A Florida Survey*, 64 *Florida Bar Journal* 32 (1990).
12. *On the Writing of Judgments*, 64 *Australian Law Journal* 691, 704 (1990).
13. Brownie, *Development of the FNMA/FHLMC Plain Language Mortgage Documents—Some Useful Techniques*, 14 *Real Property Probate & Trust Journal* 696 (1979).

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