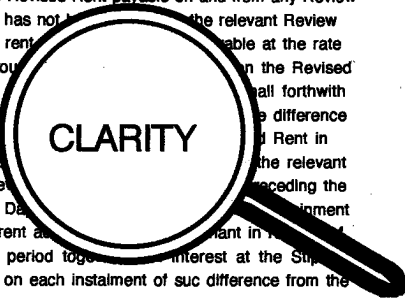


If the Revised Rent payable on and from any Review Date has not been paid by the relevant Review Date rent shall be payable at the rate previously determined in the Revised Rent in all forthwith pay the difference between the Rent in respect of the relevant Review Date and the Rent due preceding the Rent Date and such amount in such period together with interest at the Stipulated Rate on each instalment of such difference from the



# A movement to simplify legal language

Patrons:  
*The Rt Hon Sir Christopher Staughton*  
*and Justice Michael Kirby*

No. 48: DECEMBER 2002

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## Notes From the President

Many of you will have attended the Cambridge conference, which Clarity held jointly with the Statute Law Society, in July this year. This proved an outstanding success, with almost 100 participants from 17 countries. A number of Clarity members played leading roles in the conference—including one of our Patrons, Justice Michael Kirby, of the Australian High Court, who gave the keynote address (published in this issue). I have given a full report on the conference to our 2002 Annual General Meeting, and will provide a shortened version in the next issue of this Journal.

I like to think that the conference marked Clarity's "coming of age" as a genuinely international organisation, many of whose members are respected leaders in the international drive to improve the way that laws and legal documents are drafted.

Our international reach is reflected also in the growing number of country representatives we now have. Since my last message (in issue 47) we now have representatives in Italy, Malaysia, and India. You will find details later in this issue.

We are also working on other ways to promote our aims and objectives. One is by improving our website: we hope soon to be able to announce a significant sponsorship to help finance this project. Another is by providing material to members who would like to advertise our activities: we are preparing a brochure for distribution at meetings, conferences, and the like. I will expand on these and other initiatives in future messages.

I want to finish with two votes of thanks. It goes almost without saying that Clarity cannot succeed without the efforts of its committee members. Some of those members take on roles that are quite onerous—and made all onerous because they are voluntary. This was evident in the work required to organise the Cambridge conference. Our vice-President, Paul Clark, put in an enormous amount of time and effort to ensure that the conference ran smoothly. So my first vote of thanks goes to Paul.

My second vote of thanks goes to Phil Knight, who for some years has been this Journal's editor in

chief. The role of editor in chief is one of our most onerous roles; it is also one of our most important roles. Phil is internationally respected as a leading drafter, consultant, and University lecturer. He has decided to step down as editor after this issue. We owe Phil a great debt of gratitude for the work he has done in developing the Journal's comprehensive scope and ensuring its consistently high standards. To publish a journal of this breadth and variety takes a great deal of time and effort—which Phil has freely given despite all the substantial demands on his time and patience. So thank you, Phil.

**Peter Butt**

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## Clarity's Website

We are continuing to develop Clarity's website and further suggestions are welcome. In particular, we have started a page of articles on plain language matters. If you wish to offer an article of your own please send it, formatted as it is to appear (in Acrobat or HTML), to [adler@adler.demon.co.uk](mailto:adler@adler.demon.co.uk).

We now have our own address:

**[www.clarity-international.net](http://www.clarity-international.net)**

*Clarity* is the journal of the group Clarity and is distributed free to members from around the world.

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## Dues

Subscription payments for 2003 will be due on January 1, 2003. Please pay your country representative directly, if you are in a country listed on page 46. Otherwise, send your payment in US currency to Joe Kimble, at his address shown on page 46.

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## Discuss Issues of Law and Language On-line

Two years ago, in *Clarity* #44, Christopher Balmford and I announced a mail list service for discussion of language and law. At the time, we said we would review it after two years.

Earlier this year, I was going to shut it down, but many people have written, encouraging me to revive and promote it. I have decided to go ahead and attempt to do just that.

The service is not moderated, which means that no one will pre-screen material to be posted. But there are a few modest rules of etiquette, which participants will be expected to follow.

Although new participants will be introduced and welcomed after they sign up, their email addresses will remain confidential, and will not be distributed to third parties.

The list is not sponsored by Clarity but is open to anyone and may be of particular interest to Clarity members.

A discussion group is as active and interesting as the participants make it. I would be delighted if you join us, use the list to the full, and enjoy the discussion.

To sign on, go to

<http://peach.ease.lsoft.com/archives/cleardocs.html>

Click on "Join or leave the list"

In the new window, enter your email address and name, then click on "Join Cleardocs".

To protect everyone from false enrollment, you will receive an email, asking you to confirm your wish to participate. You will have 48 hours to respond. If you are unable to do so within that time, you will need to sign up again.

**Phil Knight**

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# Section 1—Articles

**Clarity and Statute Law Society  
Joint Conference  
Cambridge University 13 July 2002**

**Towards a Grand Theory  
of Interpretation**

**The Case of Statutes and Contracts**

The Hon Justice Michael Kirby AC CMG\*

## The search for meaning

The search for meaning is the preoccupation of judges. It is a task in which I have been engaged for three decades. Not the meaning of life and death, mind you. I have long since abandoned that puzzle, for I cannot solve it. Instead, the meaning of words. Words in disputed documents that come before courts for elucidation. Words in wills<sup>1</sup>, guarantees<sup>2</sup> and international treaties<sup>3</sup>. But above all, words in written contracts and in legislative enactments.

So far as contracts are concerned, the question of their interpretation lies at the heart of our theory about the enforceable civil obligations that people enter, intending to be bound by the language they use<sup>4</sup>.

Contracts afford the foundation for the market economy in which individuals, corporations and nations take part. Yet, in recent years, as appellate courts in England<sup>5</sup>, Australia<sup>6</sup>, New Zealand<sup>7</sup> and elsewhere have shown themselves readier to accept

contextual approaches to meaning, it has been said that it is now more difficult to predict the outcome of disputed cases of contractual interpretation<sup>8</sup>. Divisions of judicial opinion on such subjects have been described as “extraordinary” and “notorious” because the disputed judges all loudly proclaim their adherence to a principle of commercial realism, essential to the proper operation of the market, if not to civilisation as we know it<sup>9</sup>.

If the interpretation of contractual documents is a vital part of the modern judge’s vocation, the construction of statutes is now, probably, the single most important aspect of legal and judicial work<sup>10</sup>. In Australia, courts have discovered that many lawyers dislike this feature of their lives intensely.

They find the obligation to read Acts of Parliament, from beginning to end, so distasteful<sup>11</sup> that they will do almost anything to postpone the labour. The High Court of Australia has been moved to protest at this unwillingness to grapple with the words of the statutory text, instead of returning to the much loved words of judges, written long ago and far away, who uttered them before the legislature’s text became the law<sup>12</sup>. Whilst this tribute to the judiciary is understandable, even touching, it does not represent the law. The world of common law principle is in retreat. It now circles in the orbit of statute. Where statute speaks—and particularly a curious statute like a Constitution or a Human Rights Act—there is no escaping the duty to give meaning to its words. That is what I, and every other judge in the countries of the world that observe the rule of law, spend most of our time doing.

I want to explore the extent to which new and common themes have come to inform the task of interpretation of written contracts and statutory provisions. It would not be surprising to discover that there were common themes. After all, the basic

function involved in both endeavours is much the same. In its essence, it represents an attempt to elucidate the meaning of that mode of communication between human beings that is expressed in language.

Communication can, of course, be effected in ways other than the use of

Part of the struggle waged by courts in recent times has been directed to persuading lawyers, most of whom were brought up in earlier theories of interpretation, that giving meaning to words, read in isolation, can be misleading, artificial and even dangerous.

words—the raising of eyebrows; a grimace; a threatening look; a gentle touch; a gesture of defiance<sup>13</sup>. Such modes of communication may themselves attract legal consequences<sup>14</sup>. But this is not the subject of my concern, which is the attempt by one person through the medium of language to convey to another ideas that have legal consequences.

In its objective state, language is made up of sounds spoken in a recognisable form. But in most races<sup>15</sup>, the experience of human existence has included a capacity to divide sounds into words and sentences and then to write them down. Part of the struggle waged by courts in recent times has been directed to persuading lawyers, most of whom were brought up in earlier theories of interpretation, that

giving meaning to words, considered in isolation, can be misleading, artificial and even dangerous.

The natural unit for the communication of meaning is a sentence<sup>16</sup>. But even a sentence may be too confined a context. To discover the true meaning of a written contract or of a statute, it may be necessary to read the whole of the document, from beginning to end, so as to arrive at an appreciation of the meaning of a word and sentence in its proper context.

Surprisingly, there is not much discussion in legal texts about the common principles that inform the interpretation of contested language in contracts and in statutes. The explanation for this dearth of analysis may lie in the fact that the scholars who are interested in issues of contractual interpretation are likely to be experts in private law. Those who are interested in developments in statutory construction are likely to be devotees of jurisprudence or public law<sup>17</sup>. The twain, it seems, rarely meet.

There are certainly some common features of interpretation of contractual or statutory texts:

- In so far as each is expressed in English, it appears in a language richly endowed with “fruitful ... resonances, overtones and ambiguities” advantageous for literature and poetry<sup>18</sup>, but less efficient for the precise expression that is desirable when it comes to a legal document intended to control future conduct;
- Although rules for the construction of statutes or written contracts may be laid down in Acts of Parliament<sup>19</sup> or court decisions<sup>20</sup>, “problems of legal interpretation are not solved satisfactorily by ritual incantations which emphasise the clarity of meaning which words have when viewed in isolation, divorced from their context”. The modern approach to interpretation “insists that the context be considered in the first instance, especially in the case of general words, and not merely at some later stage when ambiguity might be thought to arise”<sup>21</sup>.
- Neither the interpretation of contracts or statutes is concerned, as such, with discovering the subjective intentions of the writers of the words in question. Thus, in the case of a written contract, uncommunicated intentions, not expressed in the instrument, could not on any view, without more, bind the other party. At least to that extent there is consensus that the interpretation of written contracts must conform to a quasi objective approach<sup>22</sup>. So far as Acts

Whether in a written contract or an Act of Parliament, the proper approach to the task of interpretation is to attempt to read the words as they would be understood in everyday life

of Parliament are concerned, it is unfortunately still common to see reference in judicial reasons and scholarly texts to the “intention of Parliament”. I never use that expression now. It is potentially misleading<sup>23</sup>. In Australia, other judges too, regard the fiction as unhelpful<sup>24</sup>. It is difficult to attribute an “intention” of a document such as a statute. Typically, it is prepared by many hands and submitted to a decision-maker of many different opinions, so that to talk of as having a single “intention”<sup>25</sup> is self deception. Clearly, it cannot be a reference to a subjective “intention”. Being objective, and therefore the meaning that the decision-maker ascribes to the words, the abandonment of the fiction is long overdue. Even as a fiction, the idea is threadbare. In both legal documents, the search cannot be one for the wholly subjective intention of the writers of those documents<sup>26</sup>.

- In both modes of interpretation, the correct starting point is the written text—all relevant parts of it. That text is examined to ascertain the meaning to be attributed to the words used. The purpose is not to ascertain the meaning that, with hindsight, those who wrote the words truly meant to say or wish they had said but did not<sup>27</sup>;
- If, when the words in question are read in this way, the resulting interpretation is unreasonable, bizarre or clearly inapplicable to the object, the person construing the document will infer, at least as a preliminary conclusion, that this was not the meaning that the document bears<sup>28</sup>. If, in those circumstances, another interpretation is available that can fit the language used, whether the document is a written contract or an Act of Parliament, a court will then tend to prefer the other meaning. In short, it will accept a non-literal meaning in preference to a wholly unreasonable construction that has the only literal interpretation to commend it<sup>29</sup>.

Whether in a written contract or an Act of Parliament, the proper approach to the task of interpretation is to attempt to read the words as they would be understood in everyday life, where words and sentences are the commonplace of human communication<sup>30</sup>. This approach, which lies at the heart of the modern approach to interpretation, facilitates the use of plain or ordinary English expression. Artificial, cumbersome, verbose and repetitious language is then replaced by clearer, simpler statements. The price of doing this is a more wholehearted effort by the courts to discover, and

give effect to, the apparent purpose of the words. To the extent that courts frustrate that objective, they encourage the drafters of contracts and statutes to stick to prolixity and complexity, in an attempt to cover all the bases.

### Plain meaning

An important trend in the interpretation of written contracts and statutes in the last quarter of the twentieth century saw the emergence of a greater willingness of courts to look beyond the literal meaning of the words in contest to a range of materials deemed useful to the ascertainment of their meaning.

In the field of statutory interpretation, this process has, in many jurisdictions, been stimulated by legislative requirements<sup>31</sup>. These requirements oblige decision-makers to have regard to the apparent purpose or object of the legislative provisions<sup>32</sup>. Such provisions, now very common, facilitate the use of extrinsic materials in the interpretation of legislation. However, it would be a mistake to think that the search for the “mischief” at which a statute was directed is something new<sup>33</sup>. The use of extrinsic materials, in aid of statutory and constitutional construction<sup>34</sup> had already begun in the common law, well in advance of legislative changes<sup>35</sup>.

In the field of contractual interpretation, the common law rule, forbidding reference to materials extrinsic to a written document, was never an absolute one. A carefully constructed (some might say highly artificial) set of sub-rules and exceptions was devised to allow extrinsic evidence to be received in aid of an understanding of what the written text truly meant<sup>36</sup>. Recently, in England<sup>37</sup>, Australia<sup>38</sup> and elsewhere, even greater flexibility has been tolerated in the search for the meaning of written contracts. The object has been to ensure that the decision-maker, struggling with contested words, is armed with “all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract”.

As if in recognition of the fact that resort to such extrinsic materials may sometimes present a risk of diverting the attention of the decision-maker too far from the primary task in hand, limits have been maintained. The key that originally unlocks the door to extrinsic materials was “ambiguity” in the written words<sup>39</sup>. Yet perception of ambiguity is itself variable. The extent to which “ambiguity” can be seen in words, read in isolation, or may be suggested by extrinsic materials themselves, is the subject of much debate. Even judges sympathetic to the use of extrinsic materials in aid of construction, recognise the practical limits that have to be observed<sup>40</sup>.

To the extent that a decision-maker widens the lens of the inquiry to allow a larger range of information to be received in the form of evidence, the area of a potential contest is expanded. The duration of trials is increased. The ambit of the factual and legal debate is enlarged. The focus of attention is changed. The efficiency of decision-making may be reduced. Ultimately, therefore what is involved is a compromise between a semi-arbitrary rule of judicial restraint that focuses attention on the written text, sometimes at a price of excessive formalism and a quest for true justice which a wider inquiry in the context might help courts to attain but at a price of longer enquiries and more contentious outcomes.

Nearly a decade ago, I tried to explain what was involved in the compromise accepted by the law<sup>41</sup>:

“The social purpose secured by [the parol evidence rule] is to discourage litigation, with the time consuming, costly and dilatory exploration of detailed facts and the resolution of conflicts of recollection and testimony. It is to discourage curial exploration of the unfathomable depths of subjective intentions. It is to add to certainty by adherence to the effect of the clearly expressed written word. But as in statutory construction, so in the construction of contracts, there is now a growing appreciation of the ambiguity of all languages but of the English language in particular. The perception of ambiguity differs from one judicial eye to the other. A realisation of the imperfections of language to express thoughts with unambiguous clarity has tended to promote a greater willingness on the part of courts (and in the task of statutory construction actually encouraged by Parliament) to have regard to extrinsic material to assist them in their task. It is obviously desirable that there be as harmonious an approach between the way in which courts give meaning to ambiguous language in statutes and the way in which they give meaning to ambiguous language in private written instruments, such as contracts. Each must respond to modern understandings of linguistics and notions of realism. Each must avoid the sense of injustice which will arise if considerations thought useful to the task of interpretation are rejected or excluded. Just as a wider range of materials is now typically taken into account in the construction of statutes so, I believe, the common law will allow access to a wider range of material in the elucidation of the meaning of private instruments, including written contracts. But in the construction of written contracts the old rule is still given judicial obeisance. ... Perhaps adherence to the narrow rule has survived because of the exceptions which are accepted and the further exceptions which the courts have developed”.

Looking back on the decade since those words were written, it is clear that the trend towards the reception of extrinsic materials in support of both forms of writing has gathered pace. True, it still has

its outer boundaries<sup>42</sup>. But the trend is probably connected with other movements in the law that challenge the conviction that it is possible, or even desirable, to observe strict and absolute rules. Such rules make the law less ambiguous and more predictable, but at the price of individual justice.

The demise of the declaratory theory of the judicial function<sup>43</sup> has been accompanied by a decline in the conviction that judges can give true meaning to words, viewed solely in their immediate verbal context<sup>44</sup>. Sometimes, the same judges who resist the use of extrinsic aids to construction also object to the notion that their function involves choices, informed not only by legal authority but also by considerations of legal principle and legal policy<sup>45</sup>. A judge who, by disposition, feels that a constitutional or statutory text or rule of the common law is “settled” or “clear” in its meaning will often be the same judge who resists an invitation to examine ministerial second reading speeches and law reform reports for the meaning of statutes or rejects the attempted proof of contextual circumstances, proffered in aid of the meaning of written contracts<sup>46</sup>.

Those who hanker after certainty can sometimes convince themselves that it exists more often than it does. The wish is parent to the fact. With full intellectual integrity, no doubt, their conviction can lead them to oppose what they see as attempts to undermine the certainties of legal interpretation. For

Those who hanker after certainty can sometimes convince themselves that it exists more often than it does. The wish is parent to the fact.

them, the search for contextual understanding and rummaging amongst extrinsic materials involve a serious departure from the proper function of a judge. That function, in disputed questions of interpretation, is to give meaning to words—a task apt to the judiciary that can usually be performed simply by examining the words in question closely, perhaps with the aid of a dictionary; nothing more.

Towards the last quarter of the twentieth century, Lord Reid and other writers of like mind, effectively demolished this approach to the judicial function<sup>47</sup>. These jurists ushered in greater transparency in judicial reasoning and a greater willingness to acknowledge the value judgments and policy choices that inescapably influence some judicial decisions<sup>48</sup>. In the tasks of construction, within limits not yet fully defined, the trend has been to claim access to contextual materials. In Australia, Chief Justice Mason and in England, Lord Hoffmann, have been leaders of this trend. There have been many others. In my view, there should be no going back.

There are other similarities that can be noticed in the contemporary approach to the interpretation of particular types of contracts and statutory provisions. Thus, in the past, it has been traditional to approach ambiguous provisions in an insurance policy (or other standard forms of written contract) in a way that is favourable to the recipient of the document, rather than the author<sup>49</sup>. Peter Butt and Richard Castles, in their splendid new book *Modern Legal Drafting—A Guide to Using Clearer Language*<sup>50</sup>, explain:

“... An ambiguous provision in a lease imposing obligations on the tenant is construed in favour of the tenant; in a contract for the sale of land, it is construed in favour of the purchaser; in a guarantee it is construed in favour of the guarantor; in a grant it is construed in favour of the grantee; and in an ambiguous provision concerning the extent of the borrower’s liability under a loan agreement is construed in favour of the borrower”.

In the past, there were similar judicial presumptions in construing particular statutory provisions. For example, presumptions were frequently given effect in relation to ambiguous Acts of Parliament imposing criminal liability<sup>51</sup> or the burden of taxation<sup>52</sup>. Likewise, statutes which, construed one

way, would diminish time honoured civil rights<sup>53</sup>, deprive people of their property without compensation<sup>54</sup>, or subject them to governmental action without procedural fairness<sup>55</sup> were construed

in accordance with a presumption that the legislature would not have had such purposes unless it spelt them out in clear and unmistakable language.

Some of these presumptions remain part of the armoury of modern judicial interpretation. For example, the *contra proferentem* rule for the construction of certain written contracts remains available to this day. However, as Butt and Castle explain, that presumption nowadays tends only to be invoked “if the ambiguity cannot be resolved by any other legitimate means. In that sense, it is a rule of last resort”<sup>56</sup>. In practice, the presumption resulted in exemption clauses expressed in the widest possible form to counteract the conventional inclination to read them narrowly. Generally speaking, the contemporary judicial interpreter tries harder to perform the task of construction without resort to such excuses<sup>57</sup>.

The same is true of statutory interpretation. Judges in England<sup>58</sup>, Ireland<sup>59</sup>, Australia<sup>60</sup> and other countries of the common law now insist that the “modern” approach to statutory construction

involves a search for the “purpose” of the text. The old presumptions in favour of the taxpayer may be less persuasive in a time of sophisticated tax avoidance and demands for more equitable sharing of the tax burden imposed by democratically elected parliaments<sup>61</sup>. Likewise, there may be less inclination to adopt a construction of narrow literalism in the case of statutes imposing criminal liability. Once it is reasonably clear that a larger operation is precisely what Parliament had in mind<sup>62</sup>, courts today will tend to give effect to that purpose. They will not now strain so much in the opposite direction. It is difficult to justify an intermittent or selective “purposive” interpretation of legislation. Yet how can this general approach be reconciled with time honoured presumptions, expressed by judges of the common law, for decades, even centuries?

In some instances, written contracts and statutes are today subject to the pressures of regionalism and globalism now operating upon contemporary legal systems. In the field of international trade law, for example, stimulated by the increasing importance of electronic commerce, the United Nations Commission on International Trade Law (UNCITAL) has established a set of legal principles to harmonise the approaches of municipal legal systems to inter-jurisdictional disputes that could otherwise impede the growth of such commerce. Developments of this kind (which, in Europe, are reinforced by the institutions and laws of the European Union) will inevitably tend to reduce the adherence of common law systems to their old literalist traditions<sup>63</sup>. So much has been acknowledged in the recent report of the Irish Law Reform Commission, *Statutory Drafting and Interpretation: Plain Language and the Law*<sup>64</sup>.

The liberalist approach to interpretation probably derived from an historical perception of the limited function of the judiciary in British constitutional arrangements<sup>65</sup>. In contemporary circumstances, especially in countries with written constitutions which judges must interpret and uphold (sometimes against the will of an elected Parliament) a different judicial role is emerging. No one now views legislation as an unfortunate exception to the desirable operation of the judge-made principles of the common law and of equity, necessary only to correct rare cases where judge-made law has proved imperfect. The old judicial attitude to interpretation may have been reinforced by a belief that the legislature, which enacted statute law, was not fully representative of the community. Half of

the community (women) played no part until the twentieth century. Whilst in all probability, that fact would not have seemed in the slightest inappropriate to the judges who expounded and applied the literalist rule, it was symptomatic of other perceived weaknesses in the legitimacy of parliamentary law.

As modern legislatures have become more representative, and much more active in lawmaking, the liberalist approach to interpretation became more anomalous. The more recent advance of attempts to express legal texts in plain language, both in private instruments (such as written contracts) and in public instruments (such as statute law) has made the rule of literalism even

more inappropriate. Purposive construction has generally replaced it. This approach is now commonly accepted in both fields. Butt and Castle put it this way<sup>66</sup>:

“To those who urge against the purposive or commercial approach to interpreting documents, two answers can be given. First, the approach is now entrenched. Judges are unlikely to return to a literal approach. This reflects a movement in the law generally, away from conformity to a strict code and towards judgment on the merits”.

## Differences

Having establishing a number of common features in each sphere of interpretation, rooted deeply in the contemporary conception of the judicial function and stimulated by global and domestic legal developments, it remains to acknowledge that there are some points of distinction. These result in differences between the way in which judges approach the construction of written contracts and the way that they approach the interpretation of legislation.

Confronted with a question about the broad trends of contractual and statutory interpretation, most scholars, whatever their specialty, would insist upon the need for caution before embracing an overarching or “grand theory”. Generalities may mask important points of difference, inherent in the task of interpretation itself. Each written contract and each legislative text is unique<sup>67</sup>. Each requires attention to its own peculiar features if its meaning is to be ascertained in an accurate and convincing way<sup>68</sup>.

This said, there are a number of general features of each form of legal instrument that may make it dangerous to assume that exactly the same approach to interpretation will be apt for both:

Each written contract and each legislative text is unique. Each requires attention to its own peculiar features if its meaning is to be ascertained in an accurate and convincing way.

- A written contract is typically an agreement between a small number of identified parties (commonly only two), to be bound to certain legal consequences in terms upon which they mutually agree. A statute, or law made under statute, ordinarily has a much wider application. It is not consensual, except in the broadest political sense. It is addressed to the entire community affected. Further, a statute typically has not only a wider ambit and application. It also generally enjoys a longer anticipated duration and typically, more coercive consequences in the case of a breach.
- The fact that, normally, a statute will have a broader and more enduring operation means, inevitably, that different considerations commonly inform the giving of meaning to the text. This is especially so in the case of a national or state constitution, expressed in writing and difficult to amend. In such a case, every word tends to take on a broader operation and hence a wider meaning. This makes notions of limiting the language of that particular from of legislation, to the “intentions” of the drafter, quite inappropriate<sup>69</sup>. Although there are still some traditionalists who adhere to the notion that constitutional language must only be construed by reference to the intentions of the founding fathers<sup>70</sup>, that naive view is now largely discarded. This point was made recently, in the context of the Australian constitutional provision referring to the federal legislative power with respect to “marriage”<sup>71</sup>. In 1900, when the Australian Constitution was enacted by the Imperial Parliament, that word would undoubtedly have been interpreted as meaning only the permanent life-long civil union between two persons of the opposite sex to the exclusion of all others. Today it might be construed as wide enough to include same-sex marriages and perhaps other personal unions. Such has undoubtedly been the advance in the concept of “marriage” in the Netherlands and possibly elsewhere. In a private written contract, the time frame is normally much shorter; the focus narrower. On the other hand, in particular circumstances, the context might demonstrate that “marriage” had a special and wider meaning in a written contract or will<sup>72</sup>. Yet, the considerations available for expanding the denotation of words are different in different instruments, having regard to their differing purposes, scope and duration.
- The same point may be made with respect to ordinary legislation. It is illustrated by the meaning given by the House of Lords to the word “family” in *Fitzpatrick v Sterling Housing Association*<sup>73</sup>. The legislation in question dated back, originally, to 1915. At that time, “family” would not, subjectively or objectively, have had, or been construed to have, application to the survivor of a same-sex relationship. Yet in 1999 the House of Lords majority held that, in contemporary England, the concept was broad enough to have such an operation<sup>74</sup>. This “purposive” construction of the statute, adopted by the majority in that case, was probably influenced by notions about the justice of the case, the avoidance of unfair discrimination and contemporary ideas of fairness. In a particular case, some of these considerations might influence the interpretation of a private instrument such as a written contract or a will. However, in the ordinary case they would be much less likely to play a role in the interpretation of such a document. This is so because the statute has a general application to society as a whole. The legal effect of the private instrument is usually confined to the parties.
- Although specific statutes have been enacted to govern the interpretation of written contracts or particular contractual provisions<sup>75</sup>, sometimes having the consequence of avoiding their legal effect, normally the interpretation of a written contract will be controlled by the rules of the common law. On the other hand, a statute, or subordinate instrument made under statute, will be governed by detailed provisions established by law, including legislation such as the *Interpretation Acts* that, in every jurisdiction, provide basic rules for elucidating statutory meaning. Such rules are often quite particular. To the extent that they depart from the principles of the common law, they impose their own peculiar regimes upon statutory interpretation which must be obeyed. Many of the rules are innocuous enough. However, some might not necessarily coincide with a contemporary common law approach. For example, in Australia, one of the general provisions of the *Acts Interpretation Act 1901* (Cth) is found in s 13(3). That sub-section provides that: “No marginal note, footnote or endnote to an Act, and no heading to a section of an Act, shall be taken to be part of the Act”. It is by no means obvious (at least in the absence of an express written provision in the contract to like effect) that the same approach would now be taken by the common law to a marginal note, footnote, endnote or heading in a written agreement. The regimes of interpretation are therefore, in such respects, different by virtue of statutory provisions. Where a statute applies, its command must be obeyed<sup>76</sup>.



- Whilst a written contract between private parties having large consequences may, on occasion, involve the need for great precision and go through many drafts, ordinarily there is less formality about the preparation of most written contracts. At least this is so when compared to the preparation of legislation. In the nature of writing that expresses binding public law, legislation is addressed to the community at large and usually has no stated termination date. It is typically prepared by highly trained and expert parliamentary counsel. It is ordinarily accompanied by explanatory memoranda. It is introduced into the legislature with a ministerial second reading speech. Typically, this degree of formality is missing from private instruments. Lacking a public purpose, they will also lack the same kinds of extrinsic materials, available on the public record to help elucidate their meaning. Different extrinsic materials may be available in the case of a written contract, including earlier drafts, if any, and any admissible details of prior negotiations<sup>77</sup>. But whereas it is possible, by the law of rectification or by invoking equitable remedies, sometimes to afford relief from, or correction of, the language of a private contract, the remedies in a case where the text of a public law has miscarried are much more restricted. Unless a court can construe the legislation to overcome a perceived deficiency, the only solution is a political one: repeal of the statute or revocation of the statutory instrument. If the statutory provision is valid and clear, a court may not ignore it or frustrate its implementation<sup>78</sup>. A contract may have legal consequences as between the parties to it. But it is not, as such, part of the general law. However, a statute, because of the democratic legitimacy of its source, has a higher force that attracts to it the greater authority.
- Whereas, in the view of some, subsequent conduct of the parties may occasionally sometimes be available to throw light on the meaning of the provisions of a written contract, it is less likely that the subsequent conduct of the Executive Government in implementing a law or of the parliament concerned, would influence a court to construe the law in a way different from the meaning conveyed by the text<sup>79</sup>. It is sometimes permissible to construe

legislation by reference to later amendments to the legislation in question. Certainly, there can be no estoppel by governmental action or inaction against the binding requirements of valid legislation.

## Conclusions

It is surprising that there has not been more consideration of the points in common, and points of difference, in the approach of the law to the interpretation of written contracts and statutory texts. Perhaps the reason for this reticence in the past is indeed the division of scholarly expertise between those who are involved in private and public law. If this is the explanation, it is breaking down. Such is the expansion of parliamentary law-making that few important written

Stimulated by international and regional developments, and by the moves for clearer drafting of legal documents in plain English, the words of contractual and statutory expression are, to some extent, coming closer together.

agreements today can be drafted without some regard to statute law, if only the law on taxation and restrictive trade practices. Stimulated by international and regional developments, and by the moves for clearer drafting of legal documents in plain English, the language of contractual and statutory expression are, to some extent, coming closer together.

This development has occurred at a time when judges have generally abandoned the pretence of the declaratory theory of their function. Most judges now candidly acknowledge the choices that they must make, including in the task of the interpretation of contested language. A notion that there is but one meaning of words, whether in a private contract or a public statute, and that the role of the judge is the mechanical one of declaring that meaning, has given way to an acknowledgment of the complexity of the process of interpretation<sup>80</sup>. This change has, in turn, been stimulated by a diminished judicial adherence to the formalism of rules and by a heightened concern, if possible, to attain just outcomes in particular cases. In the field of interpretation of private contracts, it has produced a greater willingness to adopt contextual interpretation with the benefit of a more wholehearted endeavour to construe the document in its entirety<sup>81</sup>. In the case of statutes, it has produced the gradual abandonment of literalism in favour of the “purposive approach”, stimulated by legislative instructions and encouraged by a greater judicial willingness to use extrinsic materials to assist in the task of construction.

Although the winds of change continue to blow in the field of interpretation of public and private texts, practical considerations still restrict the attempt to remove completely the focus of attention on the contested words themselves. Nor should that focus be lost. Realism requires the acknowledgment of differing judicial inclinations to look beyond the text and to utilise available extrinsic materials. Such judicial disparities of attitude are often connected with the differing judicial inclinations to let go of the declaratory theory of the judicial function in a world where there is, as yet, no agreement about the theory that is to take its place.

The current trend may invite a tendency for judges, on some occasions, to concentrate on the words and on others to view those words in a wider context without adequately defining the reasons for the differentiation. Interpretation is often, at base, an intuitive process of judgment. Just as the parties to contracts and the drafters of statutes sometimes have difficulties in conveying their precise meaning in language (assuming that they had a precise meaning to convey) so judges may have difficulty in explaining exactly why they chose one interpretation over another. Maintenance of the rule of law suggests that there should be a discriminating reason and that judges should be obliged to identify and justify it. Yet the limitations inherent in the communication of the thoughts of one person to another through the medium of language may laugh at our endeavours to impose on the function of interpretation of written texts a scientific precision that the task simply cannot bear<sup>82</sup>.

It is obvious enough that both for contractual interpretation and statutory construction, the doctrine of the “plain meaning” and literal interpretation have, so far as they purported to provide a self-contained universe for interpretation, been overthrown. Ironically perhaps, this is a desirable development for the introduction of simpler, plainer language in documents having legal consequences. The move to plain English in legal expression could make no real headway whilst the old doctrine prevailed. But where exactly we go from here in the task of interpretation is less certain. And it is even less certain how far public and private instruments, with their different characteristics and purposes, support a common approach.

## Endnotes

- \* the High Court of Australia. Patron of Clarity.
- 1 *Harris v Ashdown* (1985) 3 NSWLR 193 at 199-200 (The prima facie rule of construction that a “child” in a will meant only a legitimate child of the testator was overruled.)
  - 2 eg *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* (1987) 162 CLR 549 at 560, 573; cf *Tricontinental Corp Ltd v HDFI Ltd* (1990) 21 NSWLR

- 689; J Gava, “The Perils of Judicial Activism: the Contracts Jurisprudence of Justice Michael Kirby” (1999) 15 *Journal of Contract Law* 156 at 164.
- 3 *DeL v Director-General, NSW Department of Community Services* (1996) 187 CLR 640 at 683; *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 252-256, 293-295; cf *Royal Botanic Gardens and Domain Trust v South Sydney City Council* (2002) 76 ALJR 436 at 449 [69].
- 4 S van Schalkwyk, “Subsequent Conduct as an Aid to Interpretation” (2000) 7 *Canterbury Law Review* 541 at 543; cf *Royal Botanic* (2000) 76 ALJR 436 at 455 [102].
- 5 *Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896 at 912 per Lord Hoffmann; *Mennai Investments Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 774-775. See also *Bank of Credit and Commerce International SA v Ali* [2001] 2 WLR 735 at 739; [2001] 1 All ER 961 at 965 per Lord Bingham of Cornhill.
- 6 *Codelfa Constructions Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 350-352 per Mason J; *Royal Botanic* (2002) 76 ALJR 436 at 445 [39], 455 [102]; *Maggbury Pty Ltd v Hafele Aust Pty Ltd* (2001) 76 ALJR 246 at 248 [11].
- 7 *Air New Zealand Ltd v Nippon Credit Bank Ltd* [1997] 1 NZLR 218; *Attorney-General v Dreux Holdings Ltd* (1996) 7 TCLR (NZ) 617 at 632; D W McLauchlan, “The New Law of Contract Interpretation” (2000) 19 *New Zealand Universities Law Review* 147.
- 8 McLauchlan, above n 7, 175.
- 9 McLauchlan, above n 7, 175; Gava, above, n 2, 173.
- 10 Lord Hailsham, *Hamlyn Revisited: The British Legal System Today* (Hamlyn Lectures), 65 cited F Bennion, *Statutory Interpretation—A Code* (3rd ed, 1997). His Lordship said that nine tenths of the cases heard in the Court of Appeal involved questions of statutory interpretation. See also J J Spigelman, “The Poet’s Rich Resource: Issues in Statutory Interpretation” (2001) 21 *Australian Bar Review* 224.
- 11 K M Hayne, “Letting Justice Be Done Without the Heavens Falling In” (2001) 27 *Monash Uni Law* 12.
- 12 *Roy Morgan Research Centre Pty Ltd v Commissioner of State Revenue (Vic)* (2001) 75 ALJR 1342 at 1351 [46]; *Victorian WorkCover Authority v Esso Australia Ltd* (2001) 75 ALJR 1513 at 1526-1527 [63]; *Allan v Transurban City Link Ltd* (2001) 75 ALJR 1551 at 1561 [54]; *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at 1620 [249]; *Conway v The Queen* (2002) 76 ALJR 358 at 371 [65].
- 13 *Levy v Victoria* (1997) 189 CLR 579 at 637-638.
- 14 *Schenck v Pro Choice Network of Western New York* 137 Law Ed 2d 1; 117 S Ct 855 (1977).
- 15 Before European settlement, Aboriginal Australians did not communicate in a written language.
- 16 *R v Brown* [1996] 1 AC 543 at 561 per Lord Hoffmann; applied *Collector of Customs v Agfa Gevaert Ltd* (1996) 186 CLR 389 at 397; *Minister for Immigration and Multicultural Affairs v Khawar* (2002) 76 ALJR 667 at 685-686 [109]; *SGH Ltd v Commissioner of Taxation* (2002) 76 ALJR 780 at 797 [88].
- 17 cf J Hellmer, “Interpretation of Contracts under the Influence of Statutory Laws” in *Essays in Honour of John Henry Merryman* (1990), 173.
- 18 *Stock v Frank Jones (Tipton) Ltd* [1978] 1 WLR 231 at 236 per Lord Simon of Glaisdale.
- 19 eg *Acts Interpretation Acts* in the case of statutes and *Sale of Goods Acts* or unfair or unconscionable contracts

- legislation, in the case of contracts. See J Hellmer, above n 17, 173 at 178.
- 20 *eg Prens v Simmonds* [1971] 1 WLR 1381 at 1383-1384; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen* [1976] 1 WLR 989 at 996; cf *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337 at 350-352.
- 21 *K & S Lake City Freighters Pty Ltd v Gordon and Gotch Ltd* (1985) 157 CLR 309 at 315 per Mason J citing *Attorney-General v Prince Ernest Augustus of Hanover* [1957] AC 436 at 461.
- 22 *Investors Compensation* [1998] 1 WLR 896 at 912-913.
- 23 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 168-169; *The Commonwealth v Yarmirr* (2001) 75 ALJR 1582 at 1633 [261]-[262]; cf *Black Clawson International Ltd v Papierwerke AG* [1975] AC 591 at 629-630.
- 24 *Brodie v Singleton Shire Council* (2001) 75 ALJR 992 at 1056 [325] per Hayne J; 180 ALR 145 at 233 referring to *Byrne v Australian Airlines Ltd* (1995) 185 CLR 410 at 458-459.
- 25 *S van Schalkwyk*, above n 4, 552.
- 26 *Royal Botanic* (2002) 76 ALJR 436 at 455 [103].
- 27 *S van Schalkwyk*, above n 4, 543 citing *Norton on Deeds* (2nd ed, 1928), 20. The author of that text says that: “The question to be answered always is ‘What is the meaning of what the parties have said?’ not ‘What did the parties mean to say?’ ... It being a presumption ... that the parties intended to say what they have said”.
- 28 *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 251 per Lord Reid [“The more unreasonable the result the more unlikely it is that the parties can have intended it”].
- 29 *CIC Insurance Ltd v Bankstown Football Club Limited* (1997) 187 CLR 384 at 408; *Newcastle City Council v GIO Ltd* (1997) 191 CLR 85 at 112-113; *Project Blue Sky Ltd v Australian Broadcasting Corporation* (1998) 194 CLR 355 at 381 [69], 384 [78].
- 30 McLauchlan, above n 7, 150 citing Lord Hoffmann’s remarks in *Investors Compensation* [1998] 1 WLR 896 at 913.
- 31 *eg Acts Interpretation Act* 1901 (Cth), s 15AA.
- 32 *eg Acts Interpretation Act* 1901 (Cth), s 15AB.
- 33 *eg the rule in Heydon’s Case* (1584) 3 Co Rep 7a; 76 ER 637; *Fothergill v Monarch Airlines Ltd* [1981] AC 251 at 272; *Pambula District Hospital v Herriman* (1988) 14 NSWLR 387 at 410.
- 34 *Cole v Whitfield* (1988) 165 CLR 360 at 386-392 (use of the pre-constitution Australian convention debates in aid of construction).
- 35 *Black Clawson International Ltd v Papierwerke AG* [1975] AC 591 at 613-614, 629, 643-644; *Pepper v Hart* [1993] 1 All ER 42 at 50.
- 36 P M Perell, “The Ambiguity Exception to the Parol Evidence Rule” (2001) 36 *Canadian Business Law Journal* 21 at 28 referring to the uncertainty of the differentiation between “patent and latent ambiguities”.
- 37 *Investors Compensation* [1998] 1 WLR 896 at 912, per Lord Hoffmann.
- 38 *eg Royal Botanic* (2002) 76 ALJR 436 at 445 [39]; *Maggbury* (2001) 76 ALJR 246 at 248 [11]; cf *Codelfa* (1983) 149 CLR 337 at 350-352.
- 39 *Codelfa* (1983) 149 CLR 337 at 352; *Royal Botanic* (2002) 76 ALJR 436 at 445 [39]; 456 [104]. In *Manufacturers’ Mutual Insurance Ltd v Withers* (1988) 5 ANZ Insurance Cas ¶60-853 at 75, 343, McHugh JA pointed out that “Few, if any, English words are unambiguous or not susceptible of more than one meaning or have a plain meaning. Unless a word, phrase or sentence is understood in the light of the surrounding circumstances, it is rarely possible to know what it means”; cf *B & B Constructions v Brian A Cheesman* (1994) 35 NSWLR 227 at 235.
- 40 *Royal Botanic* (2002) 76 ALJR 436 at 449 [71]. See also *B & B Constructions* (1994) 35 NSWLR 227 at 234; McLauchlan, above n 7, 171.
- 41 *B & B Constructions* (1994) 35 NSWLR 227 at 234.
- 42 *Re Bolton; Ex parte Beane* (1987) 162 CLR 514 at 518; *Federal Commissioner of Taxation v Ryan* (2000) 201 CLR 109 at 145; *Saraswati v The Queen* (1991) 172 CLR 1 at 22.
- 43 M H McHugh, “The Law-making Function of the Judicial Process” (Pts 1 & 2) (1988) 62 *Australian Law Journal* 15, 116.
- 44 Lord Wensleydale’s “golden rule” originated in *Grey v Pearson* (1857) 6 HLC 61 at 106; 10 ER 1216 at 1234. It was stated in the context of “construing wills and indeed statutes and all written instruments”.
- 45 *eg James Hardie Co Pty Ltd v Wootten* (1990) 20 NSWLR 713 at 719, per Meagher JA; cf *Oceanic Sun Line Special Shipping Co Inc v Fay* (1998) 165 CLR 192 at 252; *Northern Territory v Mengel* (1995) 185 CLR 307 at 347.
- 46 *Royal Botanic* (2002) 76 ALJR 436 at 449 [68]; A Vermeule, “The Cycles of Statutory Interpretation” 68 *Uni of Chicago Law Rev* 149 at 186 (2001). In the report of the Irish Law Reform Commission, *Statutory Drafting and Interpretation* (2000) at 19 [2.34] it is stated that: “Judges have ... differed in their views as to how far one can go ...”. This is probably an Irish understatement.
- 47 Lord Reid, “The Judge as Lawmaker” (1972) 12 *Journal of Public Teachers of Law* 22.
- 48 McLauchlan, above n 7, 147.
- 49 *Johnson v American Home Assurance Co* (1998) 192 CLR 266 at 274 [19.4].
- 50 Cambridge University Press (2001) 47. Footnotes omitted.
- 51 *Scott v Cawsey* (1907) 5 CLR 132 at 154-155; *The King v Adams* (1935) 53 CLR 563 at 567-568; *Smith v Corrective Services Commissioner* (1981) 147 CLR 124 at 139; *Piper v Corrective Services Commission of NSW* (1986) 6 NSWLR 352.
- 52 *Inland Revenue Commissioners v Westminster (Duke)* [1936] AC 1 at 24-25; *Anderson v Commissioner of Taxation (Vic)* (1937) 57 CLR 233 at 239; *Western Australian Trustee Executor and Agency Co v Commissioner of State Taxation (WA)* (1980) 147 CLR 119 at 127.
- 53 *Bropho v Western Australia* (1990) 171 CLR 1 at 17-18; *Coco v The Queen* (1994) 179 CLR 427 at 437; *R(Morgan Grenfell Ltd) v Special Commissioner* [2002] 2 WLR 1299.
- 54 *Durham Holdings Ltd v New South Wales* (2001) 75 ALJR 501 at 506-507 [29]-[32].
- 55 *Re Refugee Tribunal; ex parte Aala* (2000) 203 CLR 82 at 121 [101], 130 [129].
- 56 Butt and Castle, above n 50, 58.
- 57 *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at 600-602 [74].
- 58 *Pepper v Hart* [1993] 1 All ER 42 at 50, per Lord Griffith.
- 59 *DPP (Ivers) v Murphy* [1999] 1 ILRM 46 per Denham J. See Irish LRC 61-200, 15-16 [2.18]-[2.22]; cf *Krackouer v The Queen* (1998) 194 CLR 202 at 223 [62]; *KRM v The Queen* (2001) 75 ALJR 550 at 570 [99].

- <sup>60</sup> *Kingston v Keprose Pty Ltd* (1987) 11 NSWLR 404 at 423-424 per McHugh JA; approved *Bropho v Western Australia* (1990) 171 CLR 1 at 20.
- <sup>61</sup> *Federal Commissioner of Taxation v Westraders Pty Ltd* (1980) 144 CLR 55 at 80 per Murphy J (diss); *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297 at 321 per Mason and Wilson JJ.
- <sup>62</sup> The decision of the Supreme Court of Ireland in *DPP (Ivers) v Murphy* [1999] 1 ILRM 46 is an illustration.
- <sup>63</sup> Hellmer, above n 17, 178; Spigelman, above n 10, 225.
- <sup>64</sup> LRC 61-2000 (Dec 2000), 33-34. See also Law Commission of England and Wales and Scottish Law Commission *The Interpretation of Statutes* (Law Com 21) (1969); cf *Royal Botanic* (2002) 76 ALJR 436 at 455 [103].
- <sup>65</sup> M Schwarzschild, "Mad Dogmas and Englishmen: How Other People Interpret and Why" in J Goldsworthy and T Campbell, *Legal Interpretation in Democratic States* (2002) 105-109; cf Vermeule above n 46, 161 citing Lieber's analysis (1839).
- <sup>66</sup> LRC 61-2000, *ibid.*, 50.
- <sup>67</sup> Perrell, above n 36, 22.
- <sup>68</sup> Hellmer, above n 17, 182.
- <sup>69</sup> *Grain Pool of WA v The Commonwealth* (2001) 202 CLR 479 at 522-525 [110]-[118]; cf D Meagher, "New Day Rising? Non-originalism, Justice Kirby and Section 80 of the Constitution" (2002) 24 *Sydney Law Review* 141.
- <sup>70</sup> N Scalia, *A Matter of Interpretation: Federal Courts and the Law* (1997); D Znotnik, "Justice Scalia and his Critics: An Exploration of Scalia's Fidelity to his Constitutional Methodology", 48 *Emory Law Journal* 1377 (1999).
- <sup>71</sup> *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 at 553 [45], per McHugh J.
- <sup>72</sup> cf R Sullivan, "Some Implications of Plain Language Drafting" (2001) 22 *Statute Law Review* 175 at 194-195 referring to *Canada v Perrier* [1996] 1 FC 586 (CA) [14] per Linden JA.

- <sup>73</sup> [1999] 3 WLR 113. See also *Yuill v Corporate Affairs Commission* (1990) 20 NSWLR 386 at 402; *ACCC v Daniels Corporation International Pty Ltd* (2001) 108 FCR 123 at 142 [72]. Contrast the approach of Brennan J in *Corporate Affairs Commission v Yuill* (1991) 172 CLR 319 at 322-323.
- <sup>74</sup> A Samuels, Current Developments—"How to Construe Statutory Language which has Changed its Meaning in Ordinary Usage: *Fitzpatrick v Stirling Housing Association*" (2001) 22 *Statute Law Review* 154; DC Pearce and RS Geddes *Statutory Interpretation in Australia* (4th ed, 2001) para 4.6; cf Spigelman, above n 10, 224.
- <sup>75</sup> eg *Trade Practices Act 1974* (Cth) and *Contracts Review Act 1980* (NSW). In New Zealand, Parliament has enacted the *Contractual Mistakes Act 1977* (NZ), granting power to courts to afford relief where certain types of mistakes have occurred in the formation of contracts. See van Schalkwyk, above n 4, at 551.
- <sup>76</sup> Sullivan, above n 72, 203.
- <sup>77</sup> *Prenn v Simmonds* [1971] 1 WLR 1381 at 1384-1385; *Investors Compensation* [1998] 1 WLR 896 at 912-913 (Principle 3); McLauchlan, above n 7, 149, 170-171.
- <sup>78</sup> *Durham Holdings Ltd v New South Wales* (2001) 75 ALJR 501 at 513-515 [60]-[70]; *Vanit v The Queen* (1997) 149 ALR 1 at 11; *Yuill v Corporate Affairs Commission* (1990) 20 NSWLR 386 at 402-403.
- <sup>79</sup> *White v ANZ Theatres Pty Ltd* (1943) 67 CLR 266 at 271, 281; *Royal Botanic* (2002) 76 ALJR 436 at 457 [109]-[112]; *Hide and Skin Trading Pty Ltd v Oceanic Meat Traders Ltd* (1990) 20 NSWLR 310 at 315, 328; cf *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 at 268; *Attorney-General (NZ) v Dreux Holdings Ltd* (1996) 7 TCLR (NZ) 617 per Thomas J (diss); *Valentines Properties Ltd v Huntco Corp Ltd* [2000] 3 NZLR 16 at 27; McLauchlan, above n 7 at 172-173.
- <sup>80</sup> See eg *Malika Holdings Pty Ltd v Stretton* (2001) 75 ALJR 626 at 644-645 [103], [121]; *SGH Ltd v Commissioner of Taxation* (2002) 76 ALJR 780 at 900 [97].
- <sup>81</sup> Van Schalkwyk, above n 4, at 543; Butt and Castle, above n 50, 41.
- <sup>82</sup> R Dworkin, *Law's Empire* (1986), ch 5.

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## E-Prime, Briefly: A Lawyer's Experiment with Writing in E-Prime\*

by Christopher G. Wren\*\*

I work as a lawyer. That means I work as a professional communicator. More precisely, I work as an appellate lawyer. That means I do the majority of my professional communicating in writing, mainly in documents filed in court.

Lawyers typically do not characterize themselves as professional communicators. If you ask most lawyers what they do at work, you will often receive a casually superficial answer, something along these lines: “Well, I’m a problem-solver. I solve my clients’ problems.”

But lawyers actually possess a deeper understanding of their work and how they do it. Lawyers spend an enormous percentage of their time writing or speaking to or on behalf of their clients. Because of that fact of professional life, most lawyers (contrary to the popular view) actually understand the importance of well-developed communication skills in getting the work of a lawyer done efficiently and effectively. If distilled and articulated, that understanding would embrace this view: “My clients have problems, and my clients want me to solve those problems. I use my communication skills to help me understand those problems, to help my clients better understand those problems, to help others understand my clients’ problems, and, ultimately, to help my clients solve their problems.”

Still, despite individual lawyers’ recognition of the importance of those skills, lawyers as a class seem immune to improving them, especially written communication skills. Lawyers, of course, have a reputation for writing poorly. Mostly, we deserve the rap. Crummy writing pervades the profession—in simple letters to clients, in contracts, in briefs filed in court, in opinions written by judges. None of us intends to write poorly, but the examples we see in our daily practices reinforce bad writing. Perhaps most importantly, these examples imply that bad writing does not carry with it any significant professional stigma.

Despite these discouraging influences (or, maybe, because of them), some lawyers consciously seek to improve their written communication skills. We can find support in various law-oriented organizations, such as Clarity and Scribes, that focus on the profession’s need for sound written-communication skills and that publish journals

designed, at least in part, to help lawyers write better. Mostly, though, lawyers who seek to improve their writing skills must do so on their own and confront each writing assignment as an opportunity for improvement.

Which brings me to the purpose of this article: calling attention to E-Prime, a little-known writing technique I believe has improved my legal writing. For those not familiar with E-Prime, the term refers to a subset of English that eschews any form of the verb “to be.” According to David Bourland, credited with inventing E-Prime,<sup>1</sup> “[t]he name comes from the equation  $E' = E - e$ , where  $E$  represents the words of the English language, and  $e$  represents the inflected forms of ‘to be.’”<sup>2</sup>

I first encountered E-Prime in 1992 in one of Cullen Murphy’s columns in *The Atlantic Monthly*.<sup>3</sup> Initially, eliminating “to be” from my writing struck me as unworkable and as, probably, an overly time-consuming task. But the idea appealed to me for several reasons. Foremost, the passive voice in writing, epitomized by the use of forms of “to be,” usually bores me as a reader, and I did not want to write materials—even legal briefs—that bored me or my readers. In addition, by the time I read Murphy’s article, my wife and I had written two editions of a textbook on legal research (and knew we would write a third), had written a couple of fairly lengthy articles for a professional journal, and had written a substantial portion of another book (on computer-assisted legal research). The more we wrote, the more we found ourselves consciously attempting to minimize—if not fully eliminate—passive constructions; E-Prime looked like a useful extension of that progression. Finally, as a lawyer, I did not want to write like most lawyers (or judges), whose writing typically makes heavy use of forms of “to be.”

Despite my interest in E-Prime as a writing technique, the obstacles seemed daunting. According to Cullen Murphy, when Bourland wrote his original article about E-Prime, the experience left him with “an intermittent, but severe, headache which lasted for about a week.”<sup>4</sup> Because English-language communication relies so heavily on “to be” constructions, removing them from the written form struck me as requiring more time and dedication than I thought I could muster, then or in the foreseeable future. So, I mentally parked the idea and left it hibernating for several years.

In August 1999, after having served a stint as a government lawyer at the county level, I returned to the Wisconsin Department of Justice as an assistant attorney general in the criminal appeals

unit. With my return to appellate litigation, I began considering more systematically how I might improve my writing. E-Prime awoke and presented itself again, and I decided to use this opportunity to find out whether the technique would work.

In late 1999, for the first time, I wrote an appellate brief in E-Prime.<sup>5</sup> I did not immediately adopt the technique wholesale; for me, dropping “to be” from my writing style took some easing into. But within a few weeks, I had written a complete brief in E-Prime: except for quotations that contained “to be” in some form, I had eliminated “to be” from my brief. Now, I routinely write my briefs in E-Prime.

I think E-Prime has helped me improve my writing. In particular, I think E-Prime has made my writing clearer by forcing me to pay more attention than usual to ensuring that the reader will not have to guess who did what to whom. Eliminating “to be” made me more aware of sources of ambiguity and rhetorical flabbiness, such as the indefinite or ambiguous “it” that maintains a weed-like presence in much legal writing.<sup>6</sup> Ultimately, I believe E-Prime has made my writing more inviting to read because a writing style with a less passive voice tends to encourage the reader to keep reading—something I certainly want the appellate judges to do. I don’t know that I can demonstrate an improvement in any quantitative way; perhaps the judges and lawyers who read my briefs would even disagree that my writing has improved. But having compared briefs I wrote just a few years ago with the briefs I’ve written since adopting E-Prime, I sense that my writing works better now than it did then.

I have drawn several lessons from making the transition to E-Prime, and they might prove helpful to someone wondering whether to make a similar shift.

First, developing an E-Prime writing style doesn’t have to take a lot of time, nor need it prove as painful as the experience did for Bourland. In my case, a predisposition to avoiding passive writing probably helped; shifting to an E-Prime style felt more like sculpting my existing style with a chisel than blasting it apart with dynamite. But even for those who have never thought much about how passive constructions can affect a writing style and a reader’s interest, I think the transition can, with a bit of discipline, take place in just a matter of weeks.

Second, E-Prime can yield noticeable improvements in the clarity of writing. In general, I think using E-Prime has reduced the length of my sentences. The reduction results, I believe, because E-Prime first leads an author to write in a more active voice. In

turn, the more active voice induces a writer to minimize the number of words that convey the action. Facing fewer words in a sentence, the reader spends less time and effort untangling—and perhaps misinterpreting—the sentence. Hence, greater clarity.

But even for writers whose styles tend toward long sentences, E-Prime can, I believe, improve the clarity of those sentences. E-Prime encourages the writer to focus on and remove ambiguity, a pursuit that sharpens the communication. Consequently, longer sentences written in E-Prime don’t require as much untangling as sentences of comparable length written in standard English. As a result, the length of the E-Prime sentence recedes in significance as a factor causing ambiguity. E-Prime thus allows a writer greater flexibility to create relatively complex sentences that remain clear and in which the reader will not likely get lost due to their length.

Third, E-Prime does not cure all writing defects. In the end, a writer using E-Prime still needs a sound grasp of the things that make good writing work: a message worth communicating, a sensible organization for the piece, adherence to generally accepted principles of grammar and syntax, an understanding of the target audience, proper spelling, and so on. E-Prime complements these elements of good writing, building on whatever foundation of writing skills already exists; the stronger the foundation, the better E-Prime will serve the writer and the reader.

A writer who lacks strong writing skills can still benefit from experimenting with E-Prime, however. The effort to write in E-Prime can bring writing weaknesses into focus; for a writer seeking to build sound writing skills, identifying weaknesses begins the journey toward improvement. For example, E-Prime draws the writer’s attention to issues of agency and causation—who did what to whom. This focus, in turn, leads a writer to select words that accurately and actively convey agency and causation. This dynamic also guides the writer to consider more critically the structure of a piece, leading in turn to greater care in arranging sentences and paragraphs to keep the structure intact.

Fourth, I have found E-Prime helps me analyze and better understand others’ writings. When I read a court decision or another lawyer’s brief, I often find myself mentally rewriting passages in E-Prime. This exercise—which now occurs almost effortlessly—can clarify for me the point the writer wants to make, and can confirm whether the writer even has a point.

Fifth, although I regard E-Prime as a useful technique for writing legal briefs, I don't use E-Prime for everything I write; I don't regard myself as a hardcore acolyte.<sup>7</sup> In some settings, E-Prime strikes me as not yielding any significant benefit. When corresponding with friends via short notes or e-mail (to take two examples), I don't make an effort to write in E-Prime. Rather, I tend to scale my use: the more formal or substantive the writing, the more I make an effort to write in E-Prime; the less formal or substantive, the less I try.

In addition, I doubt E-Prime will work well for some kinds of writing. Poetry strikes me as an unlikely candidate for an exclusively E-Prime writing style.<sup>8</sup> Moreover, I have difficulty imagining some expressions recast in E-Prime:

- “To be or not to be” (Shakespeare)
- “I think, therefore I am” (Descartes)
- “And that's the way it is” (Walter Cronkite)

- “Sean Connery *is* James Bond” (movie advertising)
- “And that's the truth” (Edith Ann, a Lily Tomlin character)
- “It depends on what your definition of ‘is’ is” (President Bill Clinton)

These examples would likely lose much of their impact if converted to E-Prime analogs. “Sean Connery performs as James Bond”? Doesn't work for me.

Much legal writing, however, would undoubtedly benefit from a dose of E-Prime. Legal briefs, contracts, judicial opinions, statutes, administrative rules and regulations, jury instructions, prospectuses—all would serve their purposes better, I believe, if their authors tried the E-Prime route to clarity. In a society that prides itself on the rule of law and insists on public adherence to legal rules, a little headache seems a *de minimis* price to pay for making legal writing clearer.

## SAMPLE OF E-PRIME WRITING

### State of Wisconsin Court of Appeals District I

Case No. 00-2611-CR

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STATE OF WISCONSIN,  
Plaintiff-Respondent,

v.

ANGEL M. HERNANDEZ,  
Defendant-Appellant.

---

On Appeal From  
a Judgment of Conviction and an  
Order Denying Postconviction Relief,  
Both Entered in  
Milwaukee County Circuit Court,  
The Honorable Dennis P. Moroney,  
Presiding

---

Brief of Plaintiff-Respondent

#### Question presented

Where the circuit court regarded the conduct of defendant-appellant Angel M. Hernandez in killing his former girlfriend as an especially egregious instance of reckless behavior, did the court properly exercise its sentencing discretion in imposing on

Hernandez the maximum penalty of forty years in prison for first-degree reckless homicide?

By imposing the sentence and denying Hernandez's postconviction motion, the circuit court implicitly answered “Yes.”

This court should answer “Yes.”

#### Position on oral argument and publication of the court's opinion

The State believes the briefs will adequately address the issues in this case and, therefore, believes oral argument will not assist the court.

The State believes the court's opinion will not merit publication. The court will likely decide the case based on controlling precedent, and the court will not have any reason to question or qualify the precedent, see Wis. Stat. § (Rule) 809.23(1)(b)3.

#### Statement of facts and procedural history

On December 14, 1998, Hernandez fired a bullet from a .38-caliber pistol and killed Juanita Correa, his girlfriend of more than three years (41:136, 143, 149, 171; 42:13) and in whose house he had lived until recently.

A few days earlier, on December 11, Juanita had ordered Hernandez out of her house (42:47). The next day, around midmorning (42:15-16), Hector

Correa, Juanita's brother (42:13), encountered Hernandez running from Juanita's house (42:16). Hernandez told Hector, "I know that bitch is playing me and I am going to kill her" (42:16).

Hernandez returned again around noon on December 14, "dropped down on his knees and . . . begged [her] to forgive him" (42:24-25). When she refused his entreaties, "[h]e told her that if he can't have her no one else can have her" (42:25). He then left the house (42:25). About 2:00 p.m., he went to his daughter's house and started drinking (42:53). He drank "all day," consuming "enough to become really drunk" (42:54).

That evening, knowing that Juanita would arrive home from work around 11:00 p.m. (42:58), Hernandez returned to her house, this time with a gun in his pocket (42:55, 57). When she arrived, he encountered her "face-to-face" and said, "I want to talk to you" (42:59). "She started screaming, calling her daughter to open the door [to the house]" (42:59). Hernandez said he "gave her a hug" with his left arm (42:59-60) and "kept talking to her" (42:60). Juanita "did not respond anything. All she did was scream" (42:60). Hernandez testified that he "told her to quit screaming" (42:60), then "got the revolver" (42:60). As he held her in his left arm, he held the pistol in his right hand (42:60) with his finger on the trigger (42:66). "[The pistol] was in front of her when she pushed [him] back. That is when the gun went off" (42:60; *see also* 42:61, 62). He described himself as "[a] little" angry with her at that time (42:61). After placing Juanita's body on the ground, he did not seek any help (42:66). Instead, he laid beside her and fired a bullet into his neck (42:62), an action that left him a quadriplegic (42:46).

On August 27, 1999, the district attorney charged Hernandez with first-degree intentional homicide (2; *see also* 8).

On January 6, 2000, a jury convicted Hernandez of the lesser-included offense of first-degree reckless homicide (44:3).

On February 17, 2000, the circuit court sentenced Hernandez to forty years in prison (45:37).

In the "Argument" portion of this brief, the State will, when necessary, present additional facts.

## Argument

The Circuit Court properly exercised its sentencing discretion in imposing on Hernandez the maximum penalty for first-degree reckless homicide.

This court should affirm the judgment of conviction and the circuit court's order denying Hernandez's post-

conviction motion for resentencing. The record well supports the circuit court's imposition of the maximum sentence on Hernandez, and he does not offer any suitable reason for reversing that sentencing choice.

Sentencing is within the sound discretion of the trial court and we will not reverse absent an abuse of that discretion. The sentencing court is presumed to have acted reasonably and the defendant has the burden of showing an unreasonable or unjustifiable basis in the record for the sentence.

*State v. Tarantino*, 157 Wis. 2d 199, 221, 458 N.W.2d 582 (Ct. App. 1990) (citations omitted). Because of a "strong public policy against interference with the sentencing discretion of the trial court and . . . the presumption that the trial court acted reasonably," *State v. Harris*, 119 Wis. 2d 612, 622, 350 N.W.2d 633 (1984), appellate courts accord trial courts great deference when reviewing sentencing decisions. With appellate review limited to determining whether the circuit court erroneously exercised its discretion in imposing sentence, the defendant must show some unreasonable or unjustifiable basis in the record for the sentence imposed. *See State v. Mosley*, 201 Wis. 2d 36, 43, 547 N.W.2d 806 (Ct. App. 1996).

An appellate court "review[s] a trial court's conclusion that a sentence it imposed was not unduly harsh and unconscionable for an erroneous exercise of discretion." *State v. Giebel*, 198 Wis. 2d 207, 220, 541 N.W.2d 815 (Ct. App. 1995). When a defendant claims the trial court imposed an unduly harsh or excessive sentence, an appellate court will find an erroneous exercise of discretion "only where the sentence is so excessive and unusual and so disproportionate to the offense committed as to shock public sentiment and violate the judgment of reasonable people concerning what is right and proper under the circumstances," *Ocanas v. State*, 70 Wis. 2d 179, 185, 233 N.W.2d 457 (1975).

Hernandez concedes that the circuit court adequately considered the three primary sentencing factors under *Ocanas*. Appellant's Brief at 8. The sentencing transcript fully justifies that concession (45:31-37). Consequently, the only issue on appeal, in his view, "is whether the trial court erroneously exercised its discretion by imposing an excessive sentence," *id.*—in this case, the maximum allowable sentence of forty years in prison. He contends the circuit court erred because the court, in effect, did not agree with the jury's verdict and therefore imposed a harsher sentence than the circumstances of the crime warranted. *Id.* at 9-10.

Although Hernandez continues to minimize the seriousness of the circumstances surrounding the killing of Juanita Correa, the circuit court had



ample reason for the sentence. By his own testimony, Hernandez spent most of the day of the homicide getting himself good and drunk (42:54). He retrieved his pistol that evening and then, late that night, stationed himself near Juanita's house. When she arrived home from work around 11:00 p.m., he stepped from the shadows and confronted her. His appearance undoubtedly surprised and horrified her, for she immediately began screaming and calling for her daughter. Hernandez took hold of her and told her to stop. She continued to scream. Without letting her go from his grasp, Hernandez pulled out the pistol and held it front of her, his finger on the trigger (42:60, 61, 62, 66). As she pushed away from him, his finger pulled the trigger, sending a bullet at a forty-five degree angle from the base of her throat to an exit point about midway down her back (41:171, 173, 174). She died at the scene (41:144).

In effect, in the last moments of Juanita's life, Hernandez terrorized her—literally to death. Surprised late at night by someone she wanted out of her life, screaming with fear as Hernandez held a gun in front of her with his finger on the trigger, she sought to escape, only to find herself, within moments, bleeding to death on the sidewalk.

Despite Hernandez's effort to characterize this crime as "not the most aggravated breach of the statute," Appellant's Brief at 9, the circuit court clearly disagreed, declaring at the sentencing that "I have to consider the need certainly to punish you sufficiently for this *absolutely egregious offense*" (42:36 (emphasis added)). The circumstances surrounding Juanita Correa's death reek, if not of intent, of (for want of a better phrase) terroristic premeditated recklessness, of conduct that well deserved the maximum punishment available under the statute. On the record in front of the circuit court, the sentence neither "shock[s] public sentiment [nor] violate[s] the judgment of reasonable people concerning what is right and proper under the circumstances," *Ocanas*, 70 Wis. 2d at 185. If anything, a failure to impose the maximum sentence would have "shock[ed] public sentiment and violate[ed] the judgment of reasonable people concerning what is right and proper under the circumstances," *id.*

Hernandez offers various reasons to justify his claim that the circuit court imposed a harsh and excessive sentence. For example, he asserts that "[a]lthough the trial court disbelieved that despondency or suicide were contemplated here, the trial court's disbelief is not supported by the record. Beyond dispute, this case involved a

botched suicide attempt as well as a shooting." Appellant's Brief at 9. The circuit court, however, had good reason to disbelieve Hernandez's claim of despondency or a plan for suicide. Juanita's brother testified that two days before the killing, Hernandez threatened to kill her (42:16). Juanita's daughter testified she heard Hernandez tell Juanita "that if he can't have her no one else can have her" (42:25). At trial, Hernandez testified to anger at Juanita at the time he confronted her with a loaded pistol (42:61); he did not testify to despondency or depression then. As the circuit court suggested, Hernandez's principal sentiment seemed to consist of "self-pity" (42:35).

At sentencing, a circuit court has a right to disbelieve testimony that others have believed, and vice versa. For example, when imposing sentence, a court can take into account conduct for which a jury has acquitted the defendant. *State v. Damaske*, 212 Wis. 2d 169, 195, 567 N.W.2d 905 (Ct. App. 1997); *State v. Bobbitt*, 178 Wis. 2d 11, 16-18, 503 N.W.2d 11 (Ct. App. 1993); *cf. State v. Mercado*, 263 S.C. 304, 210 S.E.2d 459 (1974) (where the jury found the defendant not guilty of murder but guilty of grand larceny, and the trial judge stated he disagreed with the jury prior to sentencing the defendant to the maximum penalty for grand larceny, the appellate court deferred to the discretion of the trial judge who heard the evidence and saw the witnesses). The circuit court's disbelief of Hernandez's view of his case offends neither the record nor legal doctrine.

In short, the circuit court here confronted a defendant who committed a remarkably reckless homicide. The court imposed an appropriately harsh sentence. This court should affirm that sentencing decision.

## Conclusion

For the reasons offered in this brief, this court should affirm the judgment of conviction and the circuit court's decision denying Hernandez's postconviction motion.

Date: February 2, 2001

Respectfully Submitted

## Endnotes

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\*\* Assistant Attorney General, Criminal Appeals Unit, Wisconsin Department of Justice. I greatly appreciate the thoughtful comments and suggestions of my wife and frequent writing collaborator, Jill Robinson Wren, a lawyer in Madison, Wisconsin. In my writing, as in my marriage, I accept most of them, reject a few, and welcome all. Of course, she does not bear any responsibility for any errors in this piece. Nor does my employer, the Wisconsin

Department of Justice, or my colleagues there. Also, no one should construe anything in this article as representing the views of the Department or my departmental colleagues.

- 1 Cullen Murphy, "To Be" in *Their Bonnets: A Matter of Semantics*, THE ATLANTIC MONTHLY, Feb. 1992, at 18, reprinted in MORE E-PRIME: TO BE OR NOT II 25, 28 (Paul Dennithorne Johnston, D. David Bourland, Jr. & Jeremy Klein eds., 1994) [hereinafter E-PRIME II] (also available online at <http://www.theatlantic.com/issues/92feb/murphy.htm> (last visited October 31, 2002)).
  - 2 D. David Bourland, Jr., *To Be or Not To Be: E-Prime as a Tool for Critical Thinking*, 46 ETC. 202 (1989), reprinted in TO BE OR NOT: AN E-PRIME ANTHOLOGY 101, 101 (D. David Bourland, Jr. & Paul Dennithorne Johnston eds., 1991) [hereinafter E-PRIME I] (also available online at <http://www.generalsemantics.org/Articles/TOBECRIT.HTM> (last visited October 31, 2002)). Bourland writes that "[c]ritical thinkers have struggled with the semantic consequences of the verb 'to be' for hundreds of years," *id.* at 103, identifying Thomas Hobbes, Bertrand Russell, Alfred North Whitehead, and George Santayana as among those who have wrestled with the verb, *id.*
- E-Prime allows the use of "to be" in a small number of situations—for example, in quoting someone or in illustrating a difference between E-Prime and standard English.
- 3 Murphy, *supra* note 1.

- 4 Murphy, *supra* note 1, at 28.
- 5 An example of an appellate brief written in E-Prime follows this article. In the case in which I filed this brief, the Wisconsin Court of Appeals affirmed the defendant's conviction for first-degree reckless homicide.
- 6 E-Prime alone does not automatically eliminate ambiguity. For example, changing "mistakes were made" to "mistakes happened" does not get the writer (or reader) any closer to identifying the person who committed the mistakes. To eliminate ambiguity, a writer must actively seek out ambiguities and get rid of them. In my experience, though, E-Prime makes that task easier.
- 7 E-Prime has generated—and will undoubtedly continue to generate—significant disagreement about its utility. For anyone interested in an array of opinions about E-Prime, the International Society for General Semantics <<http://www.generalsemantics.org>> publishes three anthologies of articles about E-Prime: E-PRIME I, *supra* note 2; E-PRIME II, *supra* note 1; and E-PRIME III! A THIRD ANTHOLOGY (D. David Bourland, Jr. & Paul Dennithorne Johnston eds., 1997). For an example of ambivalence about E-Prime, see Charles T. Low, *E-Prime—A Layman's Personal Perspective*, at <http://www.ctlow.ca/E-Prime/E-Prime.html> (last visited October 31, 2002).
- 8 But see Risa Kaparo, *Poetry and E-Prime: Some Preliminary Thoughts*, in E-PRIME II, *supra* note 1, at 85.

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# Contracts and Letters of Agreement for Independent Consultants

By Betsy Frick

We read many articles in *Clarity* about getting plain language into legislation, government regulations, judicial writings, standard contracts from large industries such as insurance companies, and widely distributed customer documents from other sources. But what about small-business documents? What about business agreements from the smallest of businesses, the one-person shop? Those documents can include plain language, too. This article describes and provides examples of the two main documents I have been using in my business, a sole proprietorship, for the past 13 years. One of the documents was originally developed with my attorney, who spoke and wrote in plain language. Sadly, he is retired, or I would recommend him to every reader in the US!

## Introduction

For independent consultants who provide services, most of the time two documents are all that you need to protect yourself and your customers in any business project. For consultants who also provide products, additional documents may be necessary; some other member of *Clarity* might want to write about those.

These are the two documents that govern projects in my service-oriented business:

- A *contract* that defines standard conditions that don't change very often, such as a general fees and expenses policy, a commitment to confidentiality, a project cancellation standard, and a requirement for one customer representative to oversee the project.
- A *letter of agreement* (LOA) that defines the specifics for an individual project. By explicitly stating the terms of agreement with the customer, the letter ensures that both of you know what to expect from each other, and when to expect it.

Imagine that we are having a conversation. You are a consultant new to independent business; I'm an experienced consultant. You ask the questions and I'll provide some answers. Also, let me invite you to use the complete, sample documents as you develop your own versions of contracts and letters of agreement for consulting projects.

## Contracts

I'm new as an independent contractor providing services to my customers. Do I need a written contract before I start a job?

A written contract spells out the working agreement between you and your customer. As an independent contractor, you don't have the structure or support guaranteed by a large consulting agency or corporation. A contract sets the conditions for the work and protects the interests of both parties. Remember, verbal agreements last only as long as the memory of the participants, and they do not stand up in court. So the answer is yes, always get it in writing! A contract written in legalese is better than no contract; a contract written in plain language is better still.

### What items should I include in my contract?

My attorney advised me to create a standard contract detailing conditions that don't often change. A standard contract allows me to send copies to customers and prospects easily and quickly. He also suggested that I call the document "Standard Terms and Conditions" (ST&C, for short) instead of "Contract." Many customers respond more positively to the title "Standard Terms and Conditions," which may seem friendlier and more collaborative than the formal term "Contract." That's just one example of plain language at work.

My ST&C contains the following sections:

- *Fees and Expenses*: Breaks out the billable elements of any project.
- *Invoices and Payment*: Explains my invoicing schedule and expected payment schedule.
- *Customer Representative*: Identifies one person who can authorize changes and approve my work.
- *Confidentiality*: Assures the customer that I take reasonable steps to protect company secrets.
- *Project Modifications*: Outlines the process by which modifications may be made to the project. This section is similar to the change order process for a construction project or home remodeling job. Project details are defined in a separate document, often called a "letter of agreement" (LOA). My contract states that any changes to the LOA must be agreed to by me and by the customer representative, and may incur additional fees.
- *Staffing*: Establishes my identity as the independent contractor under hire.
- *Access to Customer's Staff*: Guarantees my reasonable access to the customer's staff and resources.

- *Proprietary Materials*: Declares adherence to copyright law by both parties, and establishes ownership of the work. My contract states that all work in progress belongs to me until final payment is received; that I will retain one copy for my portfolio; and sets ownership and restricts use of my workshop materials.
- *Canceling or Postponing a Project*: Outlines the process by which either party may cancel or postpone a project, including time limits and fees.
- *Limit on Liability*: Declares liability for content. My contract states that the customer is responsible for accuracy of content; my liability is limited to the amount I have been paid for the project at the time of any lawsuit.
- *Agreement and Acceptance*: Provides space for dated signatures.

Over the years, I've developed one ST&C for hourly rate projects and another for daily rate projects. Having two versions saves me from having to modify the ST&C every time I get a new project with a different rate method. Almost everything else in the contract is the same for either rate method.

Many independent consultants, me included, have an ST&C on file with ongoing customers. Then each new project for that customer requires only a letter of agreement. If a new project means a new project manager, I always review the ST&C with the new person.

Contracts always seem written in a language so "legalistic" that they are impossible to understand. Is there a simpler style I can use?

Legal language doesn't have to be impossibly complex. Find an attorney who writes in plain language. I did, and he inspired me to change my business name to Plain Language Solutions. The legal departments at several large companies have reviewed and approved my ST&C, only occasionally requesting minor changes. Refer to Martin Cutts' article "Punctuation extra" in *Clarity* No. 47, for some questions to ask when searching for a plain language attorney.

**Can I write my own contract?**

Sure you can! But I strongly recommend that you get the help of an attorney. The cost is not that great—several hundred dollars—and the comfort derived from knowing you are as protected as possible is worth every penny.

You can also find many books and websites on the subject. Read up on contracts before consulting your attorney, but get specific legal advice, too.

**My customer has a standardized contract form. Should I sign it?**

Large companies sometimes do a lot of work with consultants and independent contractors and may have their own contract form already prepared. They may insist that you sign their contract if you want the work. I've signed company contracts before; I've even worked as a vendor from time to time, invoicing with a purchase order number.

My advice is to read a company's contract very carefully and discuss any sections that you don't understand or disagree with before you sign. For example, the company's contract might be directed toward agencies that provide contract (consultant) programming services, and it might state that work space and equipment will be provided by the company, that the programmers will work on site, and so on. You may not be a programmer, you may not want to work on site, and you may not need any equipment provided. You can ask to have these statements removed before you sign.

The company might agree to modify certain sections or to insert wording from your contract in place of theirs. Remember, anything is possible, and the worst they can say is, "No, we can't do that." Then you have to make a decision about accepting the project.

Again, you might want your attorney to review the contract from another company before you sign it. When another company's contract is written in legalese, I usually do this; when it's in plain language, I usually don't need to.

**I have an opportunity to do a type of work that my standardized contract doesn't cover. What do I do now?**

You might be able to cover the new type of work in your letter of agreement, or whatever document you use to outline the specifications for each project (sometimes called "scope of work"). Try to reserve your contract for the items that don't change from project to project.

On the other hand, if the new work would require just a small change in the wording of your contract (say, a change from providing daily rate services, such as facilitating workshops, to hourly rate services, such as writing the materials for a customer's training sessions), you can tweak the appropriate sections of your contract.

**Summary of contracts**

You can protect yourself from ethical or financial trouble by developing a good plain language

contract and using it on every project. With luck, you will never need to remind your customers of the contract protection, but you both will know that it is there.

## Letters of agreement

### What is a letter of agreement?

A letter of agreement (LOA) is an actual letter printed on your business letterhead, in which you spell out the specifics of a project. You may also call this document a scope of work, project specification, or proposal. The document name doesn't matter; what matters is that you list the unique elements of the project at the time you sign on to do the work. The letter of agreement might be all you need for a very small project, but most of the time, you will also want a contract, as described in the previous section.

### What items should I include in my LOA?

The LOA includes information that helps you put some limits around an individual project. It ensures that you and your customer agree on what the project does and does not include. I include sections like these in my LOAs:

- *Statement of Purpose:* Briefly explains what the project is about and takes the form of an introduction to the LOA. A statement of purpose can be as simple as “Thank you for selecting Plain Language Solutions (my business name) to edit and revise the six sections of your grant application” or “I’m delighted to design and develop the user guide and self-study training for your new XYZ product.”
- *Deliverables:* Identifies what the final product will be (user manual, training guide, online help file, edited manuscript) and what form it will take (hard copy master, HTML file, electronic file on diskette in *Word* or PDF, single copy for production or multiple copies for distribution). This section of your LOA should state the version of the application you will use to create the deliverables, such as *Word 97* or *FrameMaker 2000*.
- *Specifications:* States the size of the deliverables (anticipated number of chapters or training modules, pages per chapter, or website pages) and layout notations (8.5 by 11-inch paper, 3-ring binder with tabs, company logo on each page, use of color).
- *Your Responsibilities:* Provides a sketchy outline of your process—for example, designing a layout and template, developing a draft of each chapter, submitting it for review, making one set

of revisions, and creating the master copy. This section should explain how you will handle changes and how you will communicate unforeseen events and issues that might affect the project deadlines. If you will do all the work on the project, say so in this section; if you will subcontract parts of the work, say so here.

- *Customer’s Responsibilities:* List the project manager’s name and the names of subject matter experts. Note whether the manager needs to sign your invoice or timesheet and submit it for timely payment. List reviewers’ names and procedures for expediting reviews. State the resources the customer is providing. In other words, specify any resources the customer has agreed to provide for you to do your job, and when you need them.
- *Schedule and Estimate:* Answers the following questions: What is the timeline for the project? What is your best estimate at this time for the size of the project? When will you begin work? What is the end date?
- *Fees and Payment:* Spells out the specifics: What is the hourly rate, how often will you invoice the customer, and how soon will you be paid? Or, if you are working at a project rate, how many payments will you receive, and when? What happens if there are changes to the project scope? In this section, I state that the final deliverable will be provided upon final payment, or that I will change the copyright notice from me to the customer upon final payment—whatever I think I need to say to ensure that the final payment is made. This section can generate interesting discussions with new customers; for ongoing customers, it becomes routine. I’m pleasantly adamant about protecting myself and my cash flow.
- *Unanswered Questions:* Lists the things you don’t know yet. Did someone mention online help as well as a printed user guide? Does the customer still need to identify the signoff person to approve your revisions? Do you need special permission to get dialup access? You might want to subdivide this section if it is longer than eight to ten items. Then make sure you don’t let these issues slide until it’s too late and they affect your success. Yes, I sign agreements and begin work before getting all of these answers, but I keep picking away for the answers at every opportunity.
- *Approval Signatures:* A place for you and your customer to sign and date the agreement. Include a note that your contract (or the customer’s) governs standard factors that affect the project. You may also state that any changes to items

listed in the letter of agreement will create the need to discuss a whole new agreement or will require a change order.

#### How does the LOA protect me and my customer?

The letter of agreement protects both you and your customer from “project creep,” that common tendency to add more content, create more graphics, make one more set of revisions, send for one more round of reviews—actions that can strip the profit right out of a fixed-rate project or break the budget on an hourly-rate project.

#### What if I don’t have many details for the project?

In your Unanswered Questions section, include as many of these items as possible. Your fees, the project schedule, and even the deliverables could be affected.

In an e-mail discussion, Carol Elkins of A Written Word in Pueblo, Colorado, said on this topic, “It never occurred to me to include a list of unanswered questions but thinking about it, why not? The time to answer those unanswered questions needs to somehow be accounted for, and including them at the get-go would help defend your actions in the event of arbitration.”

#### How much detail is enough?

Some independents provide as much detail as possible in their letter of agreement—they create a complete design document in some cases. However, there’s always a chance that an unscrupulous customer could take your detailed agreement document (developed for free as part of your selling process) and give it to some other person or agency that agrees to do the work for less money. When you prepare a letter of agreement that is very detailed, you might want to add a proprietary statement such as this: “All of the information in this letter of agreement is proprietary and intended for the exclusive review by and consideration of Such and Such Company. Redistribution or subsequent disclosure of this material requires the express written consent of My Name.” (Thanks to Pam Scott, member of the Association of Professional Communication Consultants, for this proprietary statement.)

In her letters of agreement for computer documentation, Linda Gallagher of TechCom Plus in Westminster, Colorado, often provides only the name of the manual, total estimated pages, estimated range of hours, and estimated range of costs. Sometimes she includes options on the work at different total costs. Her LOA also includes a statement that explicitly protects against project creep: “If I foresee that any portion of the project will

take longer than the upper range of the estimate, I will notify you immediately, and we can discuss the options. If the deliverables are 5 percent or more longer than the estimated page counts, the additional pages can be created at a rate of \$X per hour.”

Kim Shaw of Words & Graphics, Inc., in The Woodlands, Texas, says, “It’s now my rule to provide only enough details to let decision makers know I can do the job. I don’t even include project schedules in my proposals, beyond a very high-level timeline with a few major milestones, and sometimes not even that.”

#### What if my customer already has a corporate contract and LOA?

Only one set of agreement documents should exist for each project, whether the documents are yours or your customer’s. It’s best to use your own, because you can develop the agreement in your favor. But don’t be surprised if a large company that already works with contractors or vendors has its own agreement documents, which you must sign in order to work with the company.

Still, it’s important to discuss the agreement and ask for any changes that do not fit the way you prefer to work. Some project managers are very willing to consider other ways of conducting business. The worst the customer can say is, “No, we can’t change that.”

When a company has a contract but no project-specific agreement, you can provide it as a letter of agreement. You might even be able to make it part of the design document and get paid for writing it!

### Summary

So remember that it usually takes two documents to get you started safely in a new project: a contract and a letter of agreement. When you develop your own versions, you’ll be prepared whenever you meet a customer who doesn’t already have these written agreement forms. Good luck, and good business to you.

*Written by **Betsy Frick** and reprinted with permission from *Intercom*, the magazine of the Society for Technical Communication, Arlington, VA, USA.*

***Betsy Frick** consults on plain language projects for businesses, not-for-profit organizations, and government agencies. Her specialty is converting highly technical, complex, or bureaucratic material into documents that are complete, consistent, clear, concise, and correct. Betsy holds a Master’s degree in speech and hearing from Washington University in St. Louis, Missouri, where she teaches technical writing in the School of Engineering and Applied Science. She is an Associate Fellow of the Society for Technical Communication.*

# SAMPLE OF STANDARD TERMS AND CONDITIONS

## Standard Terms and Conditions Hourly Rate Projects

### Fees and Expenses

Fees for this project are based on the time and materials expended. The letter of agreement for the project describes the specific hourly fees. Overtime work on hourly projects (billing more than 40 hours per week, more than 8 hours per day, weekend or holiday work) may incur an extra charge of 50% over the regular hourly rate, at Betsy's discretion. The customer is responsible for out-of-pocket expenses incurred in connection with this project, such as copying, purchase or rental of special software or equipment, courier service, mailing, and out-of-city travel, meals, and lodging. Travel time for visits to customer sites located more than 30 miles from Betsy's office are billed at the regular hourly rate. Betsy Frick and the customer may agree, in writing, on expense limits before starting the project.

### Invoices and Payment

Betsy Frick invoices weekly for hourly rate projects unless she and the customer agree on a different schedule. Any project may require a percentage of an estimate of total costs paid in advance. All invoices are due upon receipt unless a separate schedule of payment is agreed to in writing before work begins. Betsy reserves the right to suspend work on any project if payments are overdue, to resume only when payment is made, and to alter the project schedule accordingly. If any portion of a bill is placed with the court, an attorney, or a collection agency for collection, all costs of such proceedings, including but not limited to reasonable attorney fees, court costs, filing fees, and collection agency fees, become a part of the indebtedness and must be paid by the debtor.

### Customer Representative

The customer will assign one person as the representative for the term of the project. This person will have authority to sign written modifications or additions to the project, and will be responsible for verifying and delivering invoices to the proper person for payment. Betsy Frick is the only person with authority to sign written modifications or additions to the project on behalf of Plain Language Solutions.

### Expansion or Modification of Projects

Each project requires a separate proposal, a project scope document, or a separate letter of agreement, developed, agreed to, and signed by Betsy Frick and the customer representative before Betsy begins work. Any expansion or modification of the project requires written approval of the representative and Betsy Frick. Pending receipt of written approval, Betsy may, at her discretion, take reasonable action and expend reasonable amounts of time and money based on oral approval of an expansion or modification from the individual representative. The customer will be responsible for payment for such action, time, and expenses. Fee quotes, fee estimates, and project schedules are based on the

### Staffing

Betsy Frick performs or closely supervises all services performed by Plain Language Solutions in a professional and workerlike manner in conformity with this agreement. Betsy and/or her staff will observe the customer's rules and regulations with respect to conduct and safety and protection of persons and property while on the customer's premises. Betsy restricts commitments to other customers to the extent necessary to complete this customer's project in a timely manner. Betsy Frick and her staff perform all services as independent contractors; none of them will be deemed an employee of the customer on account of the work done on this project.

### Proprietary Materials

Betsy Frick warrants that any material written by her will not violate any existing copyright or trademark. The customer warrants that any material provided by the customer will not violate any existing copyright or trademark. All work in progress belongs to Betsy Frick. Upon final payment, ownership of the copyright on all materials developed by Betsy in the course of any hourly project reverts to the customer. Materials owned by the customer may include a credit to Betsy and Plain Language Solutions if the customer agrees at the beginning of the project. Betsy may keep two copies of any finished materials, or a portion of the finished materials, as agreed by the customer, for use in her portfolio.

### Confidentiality

Betsy Frick agrees to take reasonable steps to maintain the confidentiality of and information relating to the customer company that she receives in the course of the project and shall hold such information confidential unless, until, and to the extent customer consents thereto in writing. Betsy further agrees to return or destroy duplicate copies of printed and diskette materials if the customer so wishes. Betsy will return any reference materials provided by the customer upon final payment.

**Access to Customer’s Staff**

Betsy Frick will have reasonable access to the customer’s staff and resources as needed to complete the project in a timely manner.

**Limit on Liability**

Accuracy of content is the sole responsibility of the customer and the customer’s representatives. Betsy Frick cannot be held liable for any inaccuracies of content in completed projects. Betsy’s liability in any case is limited to the amount she has already been paid for the project.project as originally approved, and may require revision based on agreed changes.

**Cancellation or Rescheduling**

Betsy Frick will make a good faith effort to ensure that her work meets the agreed schedule and is carried out to our mutual satisfaction. Because business conditions sometimes change, a project must sometimes be cancelled, postponed, or rescheduled after an agreement is signed. Either Betsy Frick or the customer may end this contract by sending written notice to the other at least 5 work days before conclusion of the contract. Should Betsy have to postpone a project due to unforeseen circumstances, she will find an acceptable substitute who will work under this agreement or a separate agreement, or she will reschedule at the earliest possible mutually acceptable date. If the customer cancels, Betsy will work and invoice for the notice period; if the customer prefers Betsy not to work during the notice period, payment will still be due. If the customer delays or reschedules a project, the customer agrees to pay Betsy at her full hourly rate (6 hrs/day) for up to 20 work days; thereafter the project is considered cancelled. These fees are not for services to be performed after the postponement or cancellation, but are to compensate Betsy for maintaining her availability for the project. Delays, rescheduling, or postponement may render the project agreement null and void with no further penalties to either party, and reinstatement may require a new agreement, at either Betsy’s or the customer’s discretion.

**Agreement and Acceptance**

Signatures indicate agreement and acceptance of the terms and conditions described herein. Any modifications to these standard terms and conditions must be in writing, attached to this document, dated, and signed separately by both parties. See also the Letter of Agreement for this project.

**Plain Language Solutions**

by \_\_\_\_\_  
Betsy Frick

\_\_\_\_\_  
Date

**Customer**

by \_\_\_\_\_  
Authorized Signer for Customer

\_\_\_\_\_  
Date

JAN 1991; Updates JUL 1995, MAY 1998, APR 2001

Plain Language Solutions • Betsy Frick  
7402 Weil Ave. • St. Louis, MO 63119 • 314-781-8502

ST&C Hourly  
Page #

**SAMPLE OF LETTER OF AGREEMENT**

Date

Mr. Jim Customer  
Address  
Address

*Usually, I put this document on my business letterhead*

**Letter of Agreement**

Thank you for selecting me as the independent contractor to design and develop XYZ, an intermediate level training project for *Your Customer*. Skills learned in training for new hires is a prerequisite for participation in this training and is the overall model for the design of the project.

**Audience**

- The primary audience for this project is groups of new hire associates who are participating in the lengthy (13-week) telephone service training program that follows new associate orientation.



- The secondary audience is new telephone service representatives working in departments such as HelpDesk and TaxHotline.

### **Deliverables and Specifications**

- The primary deliverable is a set of training materials suitable for a pilot session tentatively scheduled for *date*. The materials include a Participant Guide, a Facilitator Guide, and several job aids.
- Topics identified: Knowledge of risk, Service skills, Ability to resolve complaints, Resource management, Service standards, Service teamwork. *Your Customer* has not identified which topics they want included in the pilot session.
- The format is modular in design; that is, each module can be part of a classroom event or can be presented separately in approximately one-hour blocks. The contract with *Your Customer* specifies that we will deliver the equivalent of one day of classroom training (approximately 6 hours, so approximately 6 modules).
- Classroom modules will include more generic concepts, while the modules to be delivered in smaller groups will include specific topics for specific groups.
- The Facilitator Guide will be developed in “bulleted list” style, not fully scripted, and set up for 3-ring binders. See the Unanswered Questions section for the Participant Guide format. Job Aids format also TBD later.
- Betsy Frick will provide to you one master hardcopy and one copy on diskette of the pilot materials in Microsoft Word 97 for Windows 98. She will email or provide hardcopy of interim materials for review to you and to the customer representative.

### **Schedule and Estimate**

- Work can begin upon signing of this Letter of Agreement. Betsy’s Standard Terms and Conditions document on file with you applies to this project.
- These are the design and development milestones for the project:

ITEM	DESCRIPTION	ESTIMATED DATE
Develop Project Outline (design document)	List of generic topics and module breakdown for classroom event List of specific topics and audience for each Includes objectives and methods of evaluating each	March 3 Betsy, Jim, Sue <b>Obtain approval by ??</b>
Develop rough draft of one generic content module for classroom use	One complete module including participant and facilitator material from introduction to evaluation, of approximately one hour’s running time. Topic—Handling complaints (maybe)	TBD, probably late March (Betsy may be unavailable March 6-20) Betsy
Internal review & revisions Customer review	To Jim for internal review, then after revisions, to Sue. Sue can distribute to others, and will condense comments before returning material to Betsy	2 days for internal review, 1 day for revisions, 1 week for customer review Jim and Sue
First draft of rest of modules, PG and FG	See Unanswered Questions for which modules to include in pilot session	TBD, probably send each as it is completed Betsy
Review	To Jim for internal review, then after revisions, to Sue. Sue can distribute to others, and will condense comments before returning material to Betsy	2 days for internal review, 1 day for revisions, 1 week for customer review Jim and Sue
Revisions, create 2nd draft of each module, PG and FG	Time needed depends on how much content changed or added in revisions. Typically, second drafts take about <sup>3</sup> / <sub>4</sub> the time of the first draft.	ASAP, send each as it is completed Betsy
Review of 2nd draft	To Jim and Sue at the same time. Sue to condense all customer review comments into one copy before returning it to Betsy	One week after delivered Goal for late April Jim and Sue
Revisions to pilot level PG and FG	If the first draft is pretty clean, this should take only 1-2 days. Create job aids.	ASAP Betsy

- Design and development milestones for the project (continued):

ITEM	DESCRIPTION	ESTIMATED DATE
Approval and signoff of pilot materials	Sue Use Betsy's approval form throughout the project	1 day turnaround Sue
Production of pilot session materials	Jim's consulting company	<b>By May 8</b> Jim
Conduct pilot session	Jim, Sue, Betsy, Sandy, Theresa, Lila as observers Pilot session audience TBD, but real participants please	<b>Monday, May 15</b> Who facilitates?
Pilot revisions	Debrief the session and make revisions to materials	Date TBD, Betsy
Other	Not part of this project as discussed in Scoping Meeting: Development of specific topic modules, Addition of any video, Train the trainer	Unscheduled

### ***Fees and Payment***

- Betsy's fee for this project is \$5,500 per half-day classroom training and \$5,000 per 3 separate modules, invoiced as listed below, and paid on a 1099 basis. Payments are due on the same schedule as for previous projects. See also the list of Unanswered Questions.
  - ✓ First invoice—upon signing of this Letter of Agreement—\$3,000
  - ✓ Second invoice—upon submission of first draft of first module—\$2,500
  - ✓ Third invoice—upon submission of first draft of rest of pilot modules—\$2,500
  - ✓ Fourth invoice—at completion of pilot revisions—\$2,500

### **Notes**

- Any work that exceeds the estimate (see table on page 2) will be billed at Betsy's regular hourly rate of \$\$, added to the applicable invoice. Items that might exceed the estimate include additional review and revision cycles, significant content additions or deletions, and meetings not factored into the estimate. Betsy also charges double her regular fees for weekend or holiday work not of her own choosing.
- Betsy will keep Jim and Sue apprised of progress during each phase of the project, reporting successes as well as problems in time to avoid crises with this extremely tight schedule.
- Expenses, such as courier service, are extra, billed at cost plus 10%, at the time of the applicable invoice. Betsy does not anticipate any billable expenses, but you never know.
- Should the project be cancelled or postponed, Betsy will invoice for the total amount due in the phase she is working on when the cancellation occurs. Project delays outside Betsy's control may incur delay fees of 25% of Betsy's hourly rate, billed at 6 hours per day.

### ***Betsy Frick's Responsibilities***

- Meet with Sue and subject matter experts to gather the data and existing training materials and to determine the preferred topics, format, layout, and length.
- Work at my location or meet with clients on site, as appropriate to get the work done.
- Provide an "in progress" diskette or email "working" versions to Jim as a safety precaution and for review purposes.
- Develop the materials in the agreed manner (Word 97).
- Create the final master hardcopy and electronic copy.
- Attend the pilot session as an observer and make "minor" revisions to pilot materials.

### ***Jim's Responsibilities***

- Manage the project; review the design and the materials before submission to customer.
- Help get answers to questions during the project.
- Submit drafts for review to Sue.
- Assist with getting reviews back in a timely manner from customer, and convey them to Betsy for revisions.
- Inform Betsy immediately of any changes to the schedule, design, or content of the program.
- Approve invoices for payment.

**Your Customer's Responsibilities**

- These are our main contacts at the customer:
  - ✓ Lila: project owner and signoff person
  - ✓ Sue: main contact
  - ✓ Sandy: subject matter expert
  - ✓ Theresa: subject matter expert
- Provide data, existing training material, and any other information needed to develop the training.
- Be available to answer questions as needed.
- Review and approve drafts and the pilot level materials.
- Work with us in a timely manner to keep the project on schedule.

**Unanswered Questions**

We need to get answers to these questions so that we can prepare the overall program outline that is due on March 3 and to establish an accurate timing schedule.

**Jim and Betsy need to discuss the detail level expected for the overall program outline.**

- ✓ Contact information for subject matter experts?
- ✓ What, exactly, are the performance gaps that this training will address?
- ✓ What, exactly, are the topics for the classroom (generic) part of the project?
- ✓ What, exactly, are the topics for the separate (specific) modules?
- ✓ What format for Participant Guide? Does it cover only the generic, classroom topics?
- ✓ What about participant materials for the specific topics?
- ✓ What is a realistic goal for content development for the pilot session in May?
- ✓ Can we use the Telephone Skills Workshop developed earlier as part of this project? If so, can we use it as is, or do we need to fold it into this training material?
- ✓ What kind of evaluation of skills does the customer expect? Betsy and Jim prefer hands-on demonstrations of skills over paper and pencil tests.
- ✓ How complete does the customer expect the pilot session materials to be?
- ✓ How long does the customer expect the pilot session to be? One day? More? Less?

**Signatures**

Please sign both copies of this Letter of Agreement, keep one for your records, and return one to Betsy Frick.

**Plain Language Solutions**

by \_\_\_\_\_

Betsy Frick, Owner

\_\_\_\_\_

Date

**Jim's company name**

by \_\_\_\_\_

Jim, President

\_\_\_\_\_

Date

Any changes to this agreement must be in writing and be signed by both parties.

Betsy Frick • Plain Language Solutions

Page #

**Ed. Note:** Please note that these Samples are representations only. The "Standard Terms and Conditions" and the "Letter of Agreement" can be found in their original form on the Clarity website.

## Getting the Message Across in Languages Other Than English: the Canadian Example

by Nicole Fernbach

In the past 20 years, the plain English movement has become an internationally recognized school of thought. In Canada, the federal government has encouraged its growth, intervening at two levels: by raising awareness of the need for clear and simple communications and concern for literacy issues among civil servants and agencies, and by developing training programs and tools to implement the lessons from experience.

As the plain English movement gained standing as a policy in Canadian government communications, institutional bilingualism at the federal and provincial levels led to a similar undertaking in French. In Quebec, concern for clarity has always been present, although the government never made it a policy to adopt plain French in public documents. Instead, it generally promoted administrative simplification.

The plain English movement also made significant inroads in European institutions, where a more universal approach is developing. As indicated in *Clarity* No.47, plain English has become a multilingual affair, it is now more a plain **language** endeavour. Internationally, the European Commission has demonstrated a willingness to remedy problems caused by jargon and other deficiencies in many of its language groups and, notably, among European lawyers.

The Swedes were early proponents of plain language. More than 15 years ago, they took the first non-English national initiative towards plain official writing and, more importantly, plain legislative drafting. Later, in the 90's, with the help of Plain English Campaign, Swedish, French-Canadian and Basque speakers appeared in international conferences, bring a message to other cultural and linguistic groups. Nationally, German and Italian legal and administrative writers used the plain language model to outline their original processes and style of simplification, as well as their achievements. The French in Belgium, without being directly involved in the plain English networks, made a valuable contribution to plain French research by instituting a Plain Language Committee to help simplify government writing. In 2001, France took a visible stand in favour of plain French in government with the creation of the Committee to simplify official language (*COSLA*). Its work, and the tools it produced, have raised interest in Canada and in Quebec, where research

and field work had for many years taken place in a cultural vacuum, without a larger frame of reference.

### 1. From Plain English to Plain Language to Plain French in Canada

In a widely distributed booklet: *Plain Language: Clear and Simple*, (and its French equivalent *Pour un style clair et simple*), both published in 1991, the Canadian government established some general writing guidelines. A bilingual online version, called *Plain Train*, has caught the imagination of other cultures, and was translated into Galician. The stylistic recommendations are included in *Termium*, the "computerized terminology database" of the federal government, as part of its writing aids, designed to standardize official documents by making them more accessible and easier to understand.

Because French is an official language, federal communications are mostly written in English (source language) and then translated into French (target language). Any effort to write plainly in English is bound to be reflected in the French text at the translation stage; generally speaking, the plain English model has produced improvement in source texts, whether legal or not, and thus made the translator's work easier. Because the translator represents the first audience, any textual ambiguity, for instance, is usually resolved with the author before proceeding to the translation. The plain English model has evolved into a plain language model, and led to the creation of a plain French model. The application of the English solutions to French has been easy, in general, insofar as the English model meets the needs of the French audience.

At first, the general principles of plain English were not readily accepted by the legal community, whether English or French. Legal writing was not to be treated as lightly as general communications. But times change. Some statutes have now been rewritten to reflect the plain language model in both official languages, for instance, the *Employment Insurance Act*. There is still work to do in very technical fields, such as tax and finances. In many other fields of government activities and types of documents, the change has been easier, with the momentum enjoyed by the international movement within Commonwealth and American jurisdictions. However, to make the model really universal it was necessary to address the bi-juridical character of Canadian institutions with Common Law and Civil Law.

Civil Law is a factor in Canadian legal writing, with its particular vocabulary, logical framework and processes and linguistic tradition influenced by Latin. Though Civil Law applies to Quebec institutions, the Supreme Court refers to it for interpretation. The French audience is generally

inspired by a Civil Law culture, even if the substance of the communication is Common Law. If source texts are conceived in the Common Law style of expression, on the one hand, the French language used in the translation is often influenced by Canadian Civil Law as a system and as a culture. Because writing and drafting stylistic choices and decisions are made at the source and not at the target level, the assurance of clarity in the French text is sometimes difficult.

Ontario was among the first jurisdictions in Canada to design legislation according to the simplified model (Plain Language Drafting Policy) and, French being an official legislative language in the province, French legal translators apply the principles of plain language when they are followed in the source text. Because they are just translating Common Law into French, and do not have to consider a Civil Law tradition, they are not impaired by conflicts of law for lexical or syntactical purposes. However, to write plainly, they must still be aware of the influence of both legal systems and linguistic traditions. In that respect, Canada as a whole, including the two other Common Law bilingual provinces, New Brunswick and Manitoba, has now gained international recognition as a producer of Common Law in French. Its hybrid style relies on a legal and non-legal French lexicon, to a large extent inspired by traditional French Civil Law from Canada and Europe, and on an original specialized lexicon, specific to the Common Law context.

In Quebec, where French is the official language and English a target language, the plain language model has not been accepted or implemented as quickly, despite its acknowledged value. However, as early as the 80's, the government demonstrated concern for clarity and user-friendliness when the *Ministère du Revenu* (Ministry of Revenue) contracted an American firm, Siegel and Gale to simplify Quebec tax forms. Since then, administrative writers, social workers, literacy and community stakeholders, and, more recently, legal writers, have all accepted the innovative graphic and stylistic solutions put forward by the plain language movement as an efficient way to reach an audience. The advent of information technology played a major role. With the increased acknowledgement of the need to include less able readers, plain language is now well received and is referred to in some academic programs, mostly in the field of communications.

The movement for plain language seems to have taken more time to catch the writers' and lawyers' attention in Quebec for two reasons:

- France, the main player on the cultural scene, was rather indifferent to the phenomenon. This is still largely the case, in spite of the recent COSLA project. The name of the entity is self-

explanatory : *Comité d'Orientation pour la Simplification du Langage Administratif* (Committee for the simplification of administrative language) However, pressure for standardization seems to be coming from another level, namely the European Union where French is an official language, and both a source and a target language;

- Quebec is a Civil Law province, and its legislation, judicial production and government communication are traditionally influenced by the Civil Law writing style. So the application of a plain legal English model would always require some analysis and adjustments.

## 2. Plain Language and the translation process

In the Canadian federal system, and under institutional bilingualism, French is both a source and a target language. Therefore, French is both a language of translation and a language of creation. Most federal communications, including legal documents, are written in English and translated into French. Sometimes, they are co-drafted in both languages, each author writing in the language of choice. In Ontario, New Brunswick and Manitoba, legal and administrative communications are translated into French, not co-drafted. In Quebec, government communications and those of the private sector are generally written in French and translated into English and the Civil Law system applies. Bilingual or even multilingual text production is mostly done through translation, co-drafting being the best but the most expensive alternative.

For the production of bilingual legal documents in Canada, we may distinguish four (4) situations:

In the ideal (but rare) situation, a bilingual legal writer, trained in both Common Law and Civil Law, works **alone** to produce a document in both English and French. The substantive content is the same, because no jurisdiction offers Civil Law for the French-speaking and Common Law for the English-speaking. Assuming a proficient author, the texts produced will be equally readable in both versions. More precisely, the French text will be as clear as the English because the writer strives to obtain an equivalent quality in both. When the text is of a legal nature, both versions should be identical in their effect.

In the second situation, the legal writer is not bilingual and is helped by a legal translator. The legal writer, who works in English or French, aims at producing plain English or plain French at the source level. Then, the translator will be handed a "plain" original and attempt to produce a plain version in the other language. The importance of plain language training for the translators appears

obvious in this case, because they must be aware of the efforts made in the source text to make it plain and replicate them, paying attention to length of sentences and paragraphs, choice of non-technical words, clear definitions, short titles, interrogative titles, avoidance of passive, negative or archaic forms, general structure, spelling, adaptation to the audience, amongst other aspects. This joint effort results in two equally readable versions of the same text. When the source text is plain, clear and concise, the target language product matches the level of quality.

In the third (somewhat unfortunate) situation, the writer is not a supporter of plain language, but the translator is, and attempts to produce a clear and simple text from a traditional source document. In this case, the translator will be mindful of the clarity in the target language and make every effort to produce a plain text that does not betray the original. However, when the source text is not written in plain language, or is in breach of some plain language principles, the translator runs the risk of “betraying” the author’s style if, in the search for clarity, he or she makes some adjustment that goes beyond the source text. Consequently, translators generally stick to the structure, style and form of the original document, regardless of the results.

In this situation, by far the most frequent, the responsibility for clarity is not obvious. It is often difficult for translators who are aware of the plain language requirements (and often judged on the clarity of their production) not to reproduce, however, in the target text some stylistic defects that originated in the source text. Overuse of Latin or archaic phrases, for example, is condemned by both supporters of clarity in French and supporters of plain English. If a translator chooses to avoid using Latin phrases or archaic expressions (in French or in English) in order to make the translation more readable, that decision, while ensuring the quality of the target text, has usually no bearing and does not improve the source text. In law, as the substance of the original text is not to be diverged from, there are cases where the formal aspect is so important that even the number of periods in a paragraph may be imposed to the translator. Can translators then be held accountable for clarity?

In the fourth and last instance, neither the writer nor the translator are supporters of plain language. The translator still has a professional obligation of clarity, but in this case the search for quality will take place within the strict structural and lexical parameters of the source text. The readability level is usually higher in this case in the translated product, but the contrary may very well happen, because an unplain text may be difficult to understand, even for the translator who then must consult the writer

to clarify meaning. However, meaning in this case is not the only variable because structural and syntactical choices may also cause problems.

It is important for non-English translators to be aware of the requirements of the plain English model in order to offer a comparable level of clarity in the target language and, failing the cooperation of the source language writer in that respect, of the limitations encountered. Source texts play a decisive role in the quality of translations and texts that reflect plain language solutions allow for a greater quality in the target languages. The original situation of Canada comes from the fact that the French language is a source language in many instances and its clarity, or lack thereof, is key for the English translator.

### 3. The universal appeal of the Plain Language model

Plain English writers have developed a body of knowledge that refers, in large part, to common universal rules for good writing, and legal writing in particular. English and French legal writers, regardless of the legal system in which they operate, agree on some writing principles. The resistance encountered in an English-only or multilingual setting stems mostly from the fact that the examples put forward to establish principles of clarity are often extreme cases of poor writing. Good writing techniques are universal; it would be useful to reiterate them and draw a common protocol in that respect, along with a thorough examination of diverging rules.

The principles may be summarized as follows: respect for grammar, correct spelling, accurate and logical choices in vocabulary, syntax and structures, conciseness or consistency. As for reader-friendliness, most writers agree on the goal but some, in both cultures, find it hard to see the law as anything but as a formal system not designed for the layperson. There lies the original contribution of the plain language movement: the promotion of clarity through the clever use of all the resources of the language and of the technology to ensure optimal access to communications, whether legal, technical, or general.

Through recent efforts to provide good indexing, hypertexting, tables of contents or numbering, the design and layout of the law have also evolved, as is best illustrated by the Australian tax legislation. The introduction of computers has brought a greater standardization of spelling and typography, and the creation of easy-to-use templates. Research done on appropriate colour use, pictograms and highlighting techniques to improve readability leads to converging results, both in English and French. Many Canadian writers and lawyers agree on the means to

attain clarity through vocabulary, syntax, structure and design, as proposed by the plain language movement, even as they note the constraints resulting from different linguistic or legal systems.

Although similar principles exist in the French culture, there has not been a deliberate movement or will to incorporate them in a framework similar to the plain language model. In France the academics François Richaudeau and André Timbal-Duclos tackled the issue of clarity in communications, in their search for “readability”. They examined teaching manuals and journalism, with a view to promote efficiency and clarity in the written language. Their definition of clarity, although limited to their areas of work (education and medias), is still considered valid by French communications teachers. According to a French definition of clarity by Richaudeau, for a text to be readable, it must be actually read, it must be understood and it must be easy to memorize. “Readable” also means “easy”, “clear”, “transparent” as well as “intelligible”, “understandable”. The key words used to describe the search for clarity in Plain French are: “*lisibilité*”, “*style clair et simple*”, “*langage clair*”, “*langage courant*” or “*langue courante*”.

Their work did not refer to legal or administrative writing. Some publications in the French civil service made mention of the English research on clarity, but they did not have great impact on public documents or the need to simplify, amongst others, legislation, court decisions and notarized deeds. The link between the academic world and the practical applications of the research and its policy implications was never made officially in France, until recently. In Quebec, the situation was about the same as the universities have generally had little impact on government or private sector writing. The grass-roots movement that expressed an interest in Plain French was moved by literacy and adult education concerns, which reduced the scope of any intervention. The closest the French speaking population came to the “Rudolf Flesch culture” was through the introduction of the spell checking software and the Fog Index assessment scale in Word 2000, some innovations that may not be all that useful in the French context.

An interesting exception occurred in Belgium, where the government indicated the need to simplify public documents in the late 90’s with the publication of *Écrire pour être lu*, a general style guide by Michel Leys, which is quite similar to any equivalent work in English. The book is available on line, as the French language document that explains the Fight the Fog Campaign within the European Union.

With the recent online publication by the French government of the tools designed by COSLA, things may change, particularly given the culturally inherent trait in favour of equality of opportunity.

The efforts of the French Committee are inspired by a will to reach out and include and the work that was accomplished will certainly have interesting repercussions on the way public communication is made. It may also lead to the production of new style checkers and “simplifiers”. A lexicon of administrative vocabulary, a guide to administrative writing and the LARA style checking software, (in which readability and plain language are the rule), are among the tools made available free of charge. The project has produced significant results as a great number of administrative forms have already been simplified.

The research and policy developments in France have yet to be analysed to determine whether they have given birth to a Plain French movement. The project was limited to administrative forms. We are far from a general and multidisciplinary enterprise to revamp official and legal communication. French logistics has yet to benefit from the innovations. The recent publication by the European Commission of the multilingual “*Joint Practical Guide for persons involved in drafting legislation within the Community institutions*” will constitute a precious source of information regarding the integration of a plain language model in legal writing and the impact it has on French legal writing principles. There is experience of legal simplification both in the Canadian and the Quebec jurisdictions from which interesting examples may be drawn. Apart from the Canadian need for more French contributions to strengthen the foundation of a French model, all Latin languages may be interested in the debate and the solutions offered.

The stakes are high, considering the importance of the Spanish language as an official language for translation within the *North American Free Trade Agreement* (NAFTA). Its presence has yet to be fully noticed, but demographics may play a key role in the future. Latin audiences will need the same adjustments to a plain language model as has been the case for the French culture. The similarities do not end there. Mexico, within NAFTA, and Latin America are subject to Civil Law, so any reflection on the value and limitations of the plain English model for French is bound to find applications in many other Latin languages. A thorough review is to be made of the techniques and principles cherished by Civil Law writers and drafters in order to come up with a French and, more generally, Latin model that will help standardize the analysis of issues and the solutions. We may find that universality of goals and results is ensured but with some necessary compromises.

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## Section 2—Comments and Reviews

### CASE COMMENT

## Supreme Court of Canada Imposes a “Plain Language” Requirement

Smith v. Co-operators  
General Insurance Co.

2002 SCC 30

<http://www.lexum.umontreal.ca/csc-scc/en/rec/html/smithber.en.html>

by Janet Erasmus

A recent Supreme Court of Canada decision has imposed a “plain language” requirement on certain notices. Although the decision applies directly only to benefit refusals required under the Ontario *Insurance Act*, the reasoning might well be applied in other aspects of practice.

### The facts of the case

The plaintiff, Bernadette Smith, was injured in a motor vehicle accident. Her insurer paid income replacement benefits for a time, then—using a form provided by the Commissioner of Insurance—told Ms. Smith, and her lawyer, that it would no longer pay these benefits. The form sent to Ms. Smith included:

- a heading titled “Income Replacement Benefits” under which the insurer has checked the box marked “Not eligible”, and
- the following notice:

We have assessed your claim for accident benefits. This form tells you how we calculated your benefits. If you disagree with our assessment, please contact us immediately.

If we cannot settle the application to your satisfaction, you have the right to ask for mediation through the Ontario Insurance Commission. You can contact them in Toronto at (416) 250-6750 or toll free at 1-800-668-0128.

Ms. Smith asked for mediation, which was held more than a year later, but which did not change the insurer’s position. Thirteen months later still, Ms. Smith started a court action to recover the

benefits, which the insurer resisted, relying on the defence that Ms. Smith was four months too late: the Act set a limitation period for starting such proceedings as two years from “the insurer’s refusal to pay the benefit claimed.” The insurer was successful at both the trial and appeal court levels. The Supreme Court of Canada disagreed, and allowed Ms. Smith to pursue her claim, on the grounds that the insurer had not satisfied the statutory requirements for giving notice of the refusal, and therefore, “. . . a proper refusal cannot be said to have been given. Since a proper refusal was not given, and since the limitation period . . . only begins to run upon a refusal, that limitation period was not triggered by the notice sent on May 8, 1996.”

### What the legislation required

Regulations under the *Insurance Act* imposed two separate notice requirements on an insurer in relation to ending benefit payments:

- First, if the insurer was going to stop paying benefits, it had to give notice of its reasons before the day on which the next benefit would have been payable.
- Second, by a provision some nine sections later, the insurer was required to “inform the person in writing of the procedure for resolving disputes relating to benefits under sections 279 to 283 of the *Insurance Act*.”

That is, not only did the insurer have to send the notice that it would no longer pay benefits, but it also had to inform Ms. Smith of the procedure for resolving disputes. In both cases, the insurer had to give the notice in a form that had been approved by the Commissioner of Insurance.

### How the court dealt with the matter

The court held that the limitation period could not start until both notice requirements were met, and that the insurer failed to comply with the second requirement because the notice referred only to mediation and not to the other resolution procedures dealt with by the specified sections of the Act. The result was that the insurer failed to give a valid refusal to pay benefits, and therefore the limitation period against Ms. Smith had never started.



In doing this, the court noted the nature of the legislation:

... insurance law is, in many respects, geared towards protection of the consumer. This approach obliges the courts to impose bright-line boundaries between the permissible and the impermissible ...

The court also rejected the insurance company's reliance on Commissioner forms, stating that industry practice of using these forms "cannot somehow be a substitute for conformity with [the legislation]."

### The creation of a legal obligation to use plain language

The significant aspect of the decision from the perspective of clarity is how the court approached the nature of a notice that would have been valid. To do this, the court decided that it was appropriate for it to "interpret in general terms" what the legislature intended the notice to convey:

... the insurer is required to inform the person of the dispute resolution process contained in ... the *Insurance Act* in **straightforward and clear language, directed towards an unsophisticated person**. At a minimum, this should include a description of the most important points of the process, such as the right to seek mediation, the right to arbitrate or litigate if mediation fails, that mediation must be attempted before resorting to arbitration or litigation and the relevant time limits that govern the entire process. Without this basic information, it cannot be said that a valid refusal has been given. [*emphasis added*]

### Complying with the outcome-based obligation

The court emphasized that this was not a direction about specific content. Specific content was left to the insurers, subject to approval by the Commissioner of Insurance.

The *Smith* decision creates, in effect, a common law outcome-based standard: the insurance notices must be complete and they must be understandable by unsophisticated readers. (In the world of regulatory law, there is much discussion these days about replacing prescriptive standards with "outcome-based" standards. In other words, the law will not tell you what to do but rather what the results must be.)

The court did indicate that merely providing a claimant with a copy of the statute provisions was

not an approved option: "it is questionable whether this would qualify as a valid refusal as it would surely run afoul of the consumer protection purpose of the legislation." This presumably is a reference to the clear language obligation noted above. But the decision does not provide much assistance as to why the provisions would not meet the clear language test. The court pointed out that both the majority and dissent reasons of the Court of Appeal described the dispute resolution provisions as "complex". There was no other comment on language. This suggests that the legislation would fail on complexity even if it were drafted in the clearest of legislative language.

The court also indicated that setting specific content "was a task better left to the legislature"—presumably by legislatively establishing the required form or specific content. This may be taken as a vote of confidence in modern legislative drafters, but it also leaves such a drafter (like the author) with an uncomfortable uncertainty. Was the court suggesting that the clear language test would then apply to that legislation (in other words, establishing a new avenue of attack on legislative validity)? Or was it suggesting that the legislature replace the court's outcome-based standard with a prescriptive standard (which would have the potential of leaving consumers less protected than under the court's decision)?

### Will the obligation be extended to other consumer statutes? To other notices?

A decision of the Supreme Court of Canada is binding on all other courts in the country. It seems very likely that counsel will argue that this requirement for "straightforward and clear language, directed towards an unsophisticated person" should be applied to notice requirements under other consumer statutes.

The possibility of extending this principle beyond consumer statutes is even more interesting. Consider, for example, that statutes commonly require government to provide notice where it is interfering with private rights. One can well imagine creative lawyers arguing that this new "plain language" obligation should be applied to such circumstances.

Plain language may indeed become a legal requirement—not through legislation, but through the common law of our courts.

*Janet Erasmus is a Legislative Counsel in British Columbia, Canada.*

## WORDS & USAGE

### Recent decisions

by Peter Butt

#### Does “hereby” have some uses after all?

Most experts on plain language legal drafting recommend that we avoid using hereby. They make the point that nearly always *hereby* is superfluous. It adds “legal feel” to a document without adding any legal substance. For what it is worth, I would recommend avoiding it also. However, in rare cases “hereby” has proved useful as a backstop to clarify meaning, illustrating that an overly doctrinaire approach to so-called “principles” of plain legal language may be self-defeating.

An example is a recent decision in the New South Wales Supreme Court, *Riltang Pty Ltd v L Pty Ltd* [2002] NSWSC 625 (Davies AJ, 17 July 2002; available at <http://www.austlii.edu.au/databases.html#nsw>). A tenant purported to exercise an option to renew a lease by sending a letter which began, plainly enough: “We would hereby like to exercise our option to re-new the lease”. At issue was whether these words were sufficient to indicate an intention, then and there, to exercise the option, or whether they were a mere expression of intention to exercise the option formally on some later occasion. Davies AJ held that they amounted to an intent to exercise the option then and there. In reaching this conclusion, he considered that the use of “hereby” was relevant. It was “a very strong indication” that the option was being exercised by that letter (judgment para 24).

Probably, the same conclusion would have been reached even without the use of *hereby*. This is because similar wording has been held sufficient to amount to exercise of an option. For example, in another New South Wales case, this time in the Court of Appeal, the words “we intend to exercise the option to re-new the lease” were held to be sufficiently clear to amount to an operative act as opposed to a mere statement of future intention. They constituted “a clear and unequivocal act to exercise the option.” (*Young v Lamb* [2001] NSWCA 225, paras [28], [30]). But the decision in *Riltang* is a useful reminder that words which we might instinctively avoid may sometimes serve a useful purpose in clarifying disputes over meaning.

#### “Must”, “shall” and “may”

One of the many problems with *shall* is that courts can easily find precedents to justify interpreting it as *may*. What appears to impose an obligation is then construed as granting a mere discretion. The

modern trend, of course, is to replace *shall* with *must*. One reason for doing this (but by no means the only reason, of course) is the belief that courts will find it harder to construe *must* as *may*. But we should not become complacent about this: if a court can construe *shall* as *may*, it can also construe *must* as *may*. Nor, of course, should we become complacent about the reverse, for a court can also construe *may* as *must*.

These points are illustrated by a recent Australian case, *Samad v District Court of New South Wales*, heard in the New South Wales Court of Appeal and then the Australian High Court. A clause in regulations controlling the distribution of addictive drugs provided that the Director-General of Health *may* cancel a licence to distribute addictive drugs on any one or more of six specified grounds. In the Court of Appeal (reported at (2000) 50 New South Wales Law Reports 270), the three judges who comprised the Court held unanimously that *may* here meant *must*. That is, if one or more of the grounds existed, then the Director-General had no discretion—he or she *had* to cancel the licence. This was despite the standard provision in the *Interpretation Act* that *may* indicates a discretion. The Court found plenty of precedent to support this conclusion, including such famous cases (at least, famous to English and Australian lawyers) as *Julius v Bishop of Oxford* (1880) 5 Appeal Cases 214. In the Court’s view, the starting point was that *may* conferred a discretion, but that was always subject to the construction of the legislation as a whole. Specifically, where legislation confers a power for the protection of a private right if specified circumstances exist, then it is likely that the power *must* be exercised. Although the use of *may* might appear to confer a discretion to exercise the power, the context shows that the power *must* be exercised if the circumstances exist.

However, on appeal to the High Court (2002) 76 Australian Law Journal Reports 871, the five-member Court held unanimously that *may* in the regulation meant what it said: it conferred a discretion. There was no *obligation* to cancel the licence even where the specified circumstances existed. The arguments from context that had persuaded the Court of Appeal did not persuade the High Court.

So there you have it: different judicial minds came to diametrically opposed conclusions about the same word in the same context. The lesson for drafters is clear: if you use *may* to impose a discretion, make sure that a court can’t misconstrue it as *must*. Of course, this is easier said than done. In cases of possible ambiguity, a better way might

be to avoid may altogether. For example, you can provide that, if certain circumstances exist, the licensing authority “has a discretion” to cancel a licence. It would be difficult to interpret wording of that kind as imposing an obligation. Ironically, that is the approach now taken in the regulations that were the subject of the appeals in this case. New regulations have now been promulgated. Doubtless to avoid further litigation over meaning, the regulations now provide: (1) that if certain conditions are met, the Director-General “must” cancel a licence; and (2) that if other conditions are met, the Director-General “at [his or her] discretion . . . may” cancel a licence. That should put the matter beyond argument.

**Peter Butt**

Sydney, Australia

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## And Yet More on the Thorny Business of Auxiliary Verbs . . .

Nick Horn writes—

These, and more, are questions that we dealt with in exhaustive discussions in my home office (the Australian Capital Territory Parliamentary Counsel’s Office) when we made the leap from “shall” to “must” in drafting the Territory’s Acts & Regulations back in 1999.

For us in the ACT, it was a pretty big change. There are a number of issues involved:

### 1) The ambiguity of “shall”

Plain language campaigners back in the 1980s in Australia put “shall” into their sights because of its claimed confusing of a (legal) imperative sense and a future sense. In my experience of legislation in Australia, however, care has always been taken in recent times (say, since the 1970s) to avoid the use of “shall” in a future sense. In any case, traditional rules of statutory drafting involve little recourse to the future tense, due to the convention that “the law [in a statute] is always speaking” which dictates an overwhelming preference for the present tense. When I say “traditional rules” I mean those set out in standard texts such as Thornton & Driedger.

However, when we switched in 1999, our analysis showed that there were quite a few different contexts in which “shall” was used in a one-size-fits-all directory sense in our statute book. For example:

- “A person SHALL not drive in a dangerous manner.”

- “An application SHALL be completed in the prescribed form.”
- “The Minister SHALL appoint a supervisor.”
- “In this Regulation, a reference to a cat SHALL be deemed to include a reference to a dog.”
- “There SHALL be established an Advisory Board for the purposes of this Act.”

The same is still true in Ontario, where I am currently working. The replacement of “shall” with “must” is not a simple, robotic-type exercise.

### 2) The appropriateness of “must”

I argue that “must” is not quite as good a replacement for “shall” in the first sense given above as is usually thought.

In most ordinary usage, at least until it made its way into the “plain language” statute book, “must” DESCRIBED a command that has its origins elsewhere. A customs officer will tell me that I “MUST” declare any dutiable goods when I cross the border. The pamphlet he hands me will also say that “You MUST declare the following items”. Each - the officer & the pamphlet—is DESCRIBING a command. The command which is described may, however, be expressed in a federal customs Regulation as “A person SHALL declare dutiable goods when leaving the country”. The Regulation is the origin of the command, hence the use of the imperative “shall” has traditionally been seen as appropriate in a statutory context.

However, in Australia, almost all legislation is now drafted using “must” to express a direct command. Different approaches are taken to the other usages listed above—speaking for the Australian Capital Territory, I would say there is a preference for the simple present tense for most of these (eg “A corporation IS established by this Act”).

We agonized over the problem of “tone” that you allude to—how appropriate is it to say that “The Minister MUST” do such-and-such? Or, more sensitively, that “The Court MUST” do this-that-and-the-other? Basically, we bit the bullet—an obligation is an obligation, no matter who has to undertake it, and the legislature, or the legislature’s delegate (in the case of regulations) has the power under the Westminster system of government to tell both the Executive and the Judiciary what it “must” do.

### 3) Mixed usage

In Ontario, the burgeoning trend towards “must” in legislation has so far been resisted. But “must” may actually be used in a slightly different context—that of INDIRECT command. Thus,

- (a) An applicant for a licence SHALL submit an application to the Director accompanied by the prescribed fee.
- (b) The form MUST include the following information:
  - (a), (b) etc.

This is a subtle distinction, which would be lost on even legally-trained users of legislation, let alone lay readers. The practice is not followed uniformly in the office, and I am not sure whether the underlying distinction is either inherently clear, or always clearly understood by those who do use it. As such, it is always possible that a crack might be found for a “different word, different sense” interpretative piton.

I would not recommend mixed usage.

### Janet Erasmus writes—

British Columbia adopted “must” as part of its most recent statute revision. A statute revision is a consolidation of existing legislation, renumbered to eliminate the gaps and decimal additions that have accumulated through amendment since the last statute revision and rewritten to achieve consistent language to the extent possible without changing the legal effect of the law.

In addition to the usual revision consolidation, we had a specific goal of improving readability using plain language principles. The format was significantly changed (considerations included line length, font size, white space, variable paragraph spacing to indicate relationships, running headers). We replaced the “he includes she” concept of older legislation with a gender neutral style. We eliminated legal Latin phrases and generally used plainer terms where possible (pursuant to, affix and forthwith were among our to-be-replaced list). We also replaced “shall” with “must”.

We did this on the basis that “must” is more commonly used in general communication to indicate an imperative, while “shall” is used as a future tense. The example I liked was from a colleague who explained that if she told her son, “You shall do your homework before going to the movie,” he would think she was just making a questionable prediction. If she said, “You must do your homework before you go to the movie,” there would be no doubt about the rules.

There were no strong objections to the change within our office. The only concern was the legal/grammatical issue that has been well-described in other responses: “shall” has a direct imperative sense; “must” implies there may be

another source establishing the obligation. In B.C., we dealt with the matter legislatively to remove any doubt.

Our Interpretation Act establishes general rules for how legislation is to be interpreted, including defining a number of words that are used throughout our statutes. From its original enactment, there has been a statement that “shall is to be construed as imperative.” We added another statement that “must is to be construed as imperative.”

We have had only one court case that considering the shall/must change: *Lovick v. Brough*, a 1998 decision of our British Columbia Supreme Court. There is nothing in the judgment to suggest that the court’s attention was drawn to the Interpretation Act definition or to the special interpretation rules established by the Statute Revision Act. The court did decide that the change had a substantive effect: “I am bound to ask myself why the legislature made so limited a change in the wording. I conclude that it could only have been to strengthen the imposition of the duty on a Judge to take the action mentioned there. I reject Mr. Mortimer’s contention that in this context “must” means precisely the same as “shall”. In my opinion “must” entails a more mandatory obligation admitting of less discretion in the Court.” (paragraph 7 of the judgment)

Other than this one decision, there seems to be a general comfort with the change to “must”.

For those interested, the Statute Revision Act and Interpretation Act are available on the web at:

<http://www.qp.gov.bc.ca/statreg/>

The *Lovick v. Brough* decision is available at:

<http://www.courts.gov.bc.ca/jdb%2Dtxt/sc/98/03/s9>

### Simon Adamyk writes—

On the other point which I mentioned (“will” and “must”) I attach a copy of the decision in *Woodhouse v Consignia plc; Steliou v Compton* [2002] EWCA Civ 275-Court of Appeal (Civil Decision)-Brooke LJ, Laws LJ, Dyson LJ-07.03.02 (unreported except for *The Times*). This decision is now the leading authority on lifting the automatic stay imposed by CPR PD51. The relevant passages are at para. 36:

“I must reach that conclusion for two main reasons. In the first place, I reject Mr. Ralls’ submission that the word “will” in CPR r.3.9 imposes a mandatory duty on the court to deal specifically and separately in its judgement with each of the matters listed in paragraph (1). As in the case of CPR r.52.11, the word “will” in CPR r.3.9(1) is

not an imperative: the paragraph merely identifies a number of specific matters which the court “will” consider in every case. No doubt one of the reasons why the rule refers specifically to such matters is to assist litigants to focus their evidence and their arguments on relevant aspects of the particular case.”

And also in para. 41:

“The comments in these two cases were made in *ex tempore* judgements when the court did not have the benefit of the argument addressed to the court in *Audergon* about the legal effect of any failure by a judge to make it clear that he had taken express notice of the matters mentioned in CPR 3.9. To that extent, such expressions as “bound”, “required” and “obligatory” are in a very strict sense inappropriate when used in the explanation of a rule which deploys the directory word “will” rather than the mandatory word “must”. Subject to that caveat we would reiterate the message given by the court in the two earlier cases. Judges (and, particularly, less experienced judges) should submit themselves to the discipline of considering each of the matters listed in CPR 3.9 which appear to them to be relevant to the case they have to

decide. If they fail to do so, there may be a serious danger that an appeal court may overturn their decision for omitting to take a material consideration into account.”

The *Consignia* decision was approved and applied very recently (i.e., last Thursday) in *RC Residuals Ltd (Formerly Regent Chemicals Ltd) v (1) Linton Fuel Oils Ltd (2) P & O Trans European Ltd CA* (Brooke LJ, Kay LJ, Sir Swinton Thomas), 2/5/2002. A full transcript of the judgement is not yet available so I do not yet know what the CA said (if anything) on the “will” or “must” point. Realistically, I doubt if they said anything at all.

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## Website Reviewed

### Visual Thesaurus

<http://www.visualthesaurus.com/index.jsp>

Words cannot do justice to this amazing reference tool. If you love language, visit this site, explore, and have fun.

Phil Knight

## Educating Kirby J : The Mystifying Vocabulary of Intoxication

by Phil Knight

Paul O’Brien, a legislative counsel from Australia, drew our attention to the following excerpt from the transcript of proceeding of the *Australian High Court* in the matter of *Joslyn v Berryman* S122/2002 (8 November 2002).

It appears that the matter was being argued by a Mr. Jackson, before at least 4 judges, Callinan, Kirby, Hayne, and McHugh.

CALLINAN J: Mr. Jackson, it seems to me that clearly the people at the party, including Ms Joslyn and Mr. Berryman, went out with the intention of getting drunk.

MR JACKSON: It would be a big night, your Honour, big night.

CALLINAN J: With the intention of getting drunk and they fulfilled that intention.

MR JACKSON: Well, your Honour, young people sometimes ...

KIRBY J: I just think “drunk” is a label and I am a little worried about—it is not necessary to put that label. It is just that they were sufficiently affected by alcohol to affect their capacity to drive.

MR JACKSON: Yes.

KIRBY J: “A drunk” has all sorts of baggage with it.

HAYNE J: Perhaps “hammered” is the more modern expression, Mr. Jackson, or “well and truly hammered”.

MR JACKSON: I am indebted to your Honour.

KIRBY J: I do not know any of these expressions.

McHUGH J: No, no. Justice Hayne must live a very different life to the sort of life we lead.

KIRBY J: I have never heard that word “hammered” before, never. Not before this very minute.

With the greatest respect, we refer the entire court to the Visual Thesaurus website, reviewed on this page.

## COURSE REVIEW

### The Vision Thing

by Robert Diab

Over the years, I've browsed through more than a healthy share of books on writing generally, and on legal writing in particular. While finishing my law degree, I opted to complete my required credits taking Phil Knight's legal drafting course at the University of British Columbia. Like many *Clarity* readers, I can be caught in the act of recreationally reading Fowler's *Modern English Usage*, or other books of that ilk, ever prompted by the odd belief that that there might still be something new under the writer's sun.

So when my law firm presented me the option of spending a bright fall afternoon hammering away at a memo on solicitor and client privilege, or attending an in-service seminar on "effective writing", the choice was simple. With alacrity, I headed for the comforts of the boardroom, positioned myself with a spectacular view of Lake Ontario, and prepared to nod in ritual assent as *Clarity* member Clyde Leland recited the basics of better writing.

Mr. Leland's seminar was a pleasant surprise because he used technology to bring editing to life, and in the process, he revealed a novel way of understanding the act of writing. Clyde had admirably memorized the whole three hour presentation, and delivered it in smooth, unbroken prose, illustrated with a series of PowerPoint slides. I found myself staring intently at his illustrations instead of gazing out the window at the lovely, glinting white caps on the lake.

For most of the seminar, he never showed more than a sentence or a phrase on the screen at one time. The type was almost childishly large, so large it provoked me to contemplate the basic, elemental *shape* of the sentences, of words spread out in space. The progression of the slides was invisible to us, because, as Clyde clicked forward, the only thing that would change was the order of the words.

As he explained that verbs should have actors, or sentences a single main idea, the appropriate word or phrase on the screen would suddenly light up in red or blue. After he prodded us for suggestions as to how to improve the text, the faulty word or phrase would "magically" shift and the sentence would morph into something leaner, snappier.

Observing his austere and focused use of technology, I felt as if I were leaning over the shoulder of a good writer, watching him chip away at his words until the sentences were perfect. Clyde's emphasis on shifting words around in space helped me *visualize* the editing process, and conveyed to me a new awareness that editing is not just, or even primarily, a matter of sounding out sentences, but of sculpting their shape. He taught me that a good writer knows what a good sentence should *look like*. Becoming a better writer is not only about improving your ear for prose, but also your eye.

From reading in the copious literature, I was already familiar with many of the precepts Clyde rehearsed that afternoon. But seeing them demonstrated in the three dimensional style of this presentation was, if you'll pardon me, eye-opening. When I write and edit, I am now more conscious of the importance of appearance in shaping the meaning that my words may convey.

That we should come to think of writing as a spatial and visual process seems only natural, given the fact that we now write almost exclusively on word processors. It's nice to see that the people who teach writing are finding ways to highlight this. It is even better that they are doing so with sufficient panache as to distract this most jaded student of law and language from the daydreaming pleasures of sailors, surf and the open sea.

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## BOOK REVIEW

### Modern Legal Drafting

Peter Butt and Richard Castle  
Cambridge University Press

ISBN 0 521 80217 2 hardback;  
0 521 00186 2 paperback

Why do property documents talk of "exceptions and reservations"?<sup>1</sup> Who apologised for making his letter so long, because he did not have time to make it shorter?<sup>2</sup> When was a pleader fined £10 and sent to Fleet Street Prison for drafting pleadings that ran to 120 pages?<sup>3</sup> You can find the answers to these and all your questions about plain legal language here. This erudite, witty, readable little book is a delight. Every member of *Clarity* should have it.

Although the book is subtitled "A Guide to Using Clearer Language", this is not primarily a plain

English manual. The authors set out to *encourage* legal drafters to write in modern, standard English by illustrating why it is preferable to traditional legal English. You, dear readers, may already be convinced—now you will have the resource you need to convince others.

Three quarters of the book deals with influences, interpretation of legal documents, some fascinating history of the development of modern legal English and the benefits of drafting in plain English. You will not find such a collection elsewhere. It is the meat of this book.

There follow chapters on what to avoid when drafting and how to draft legal documents, with finally a short series of step-by-step examples of drafting in the modern style. These provide a useful summary of all the dos and don'ts. They include grown-up discussions about points of debate among plain language writers. For example, whether to assign capital letters to defined words, where to put the definitions and whether to use mathematical formulas (“yes” say the authors).

Many readers may find an opinion or two to disagree with. The authors don't like using both words and figures for a sum of money. They advocate shortening “shown for identification” to “shown”. Not all would agree. So much the better—let the debate go on.

Get this book. It comes in hardback and paperback. Get the hardback to keep and the paperback to give away. Read it through for enjoyment and education, and expect numerous occasions for future reference.

**Nick Lear**

## Endnotes

- <sup>1</sup> An exception is a subtraction from something already in existence, while a reservation is a creation of something new out of the thing granted. So both words *might* be justified.
- <sup>2</sup> Pascal, in a letter to the Jesuit Fathers 4th December 1656.
- <sup>3</sup> In 1596. 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.

## BOOK NOTICES

**Mark Adler** writes:

*Modern Legal Drafting* (by Clarity President Peter Butt, and Clarity's New Zealand representative, Richard Castle) is now available from Cambridge University Press and can be ordered on [www.cambridge.org](http://www.cambridge.org).

It should be of interest and use to all Clarity members, from novices to experts.

See also the review by Nick Lear on page 38.

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**Daniel Rosenberg** writes:

Have you seen the new ABA book on plain English by Howard Darmstadler? He regularly writes for an ABA publication *Business Law Today*.

His book *Hereof, Thereof and Everywhereof—A Contrarian's Guide to Legal Drafting* was published recently, although I have not had a chance to read it in any detail.

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**Norman Otto Stockmeyer, Jr.** writes:

The December 2000 issue of *Clarity* published my book review of Tiersma's *Legal Language*. Please let *Clarity's* readers know that a paperback edition is now available for US \$17.00 at [Amazon.com](http://Amazon.com).

Also, Prof. Tiersma has posted corrections and additions to his book at [www.tiersma.com/CORRECT.HTM](http://www.tiersma.com/CORRECT.HTM).

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**Ken Adams** writes:

I thought that *Clarity* might be interested in my recently published book *Legal Usage in Drafting Corporate Agreements*.

To learn more about it, you can visit my website at <http://www.adamsdrafting.com>.

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**Martin Cutts** writes:

Two books by Martin Cutts, *Lucid Law* and *Clarifying Eurolaw*, are now available on FREE download from the Plain Language Commission website [www.clearest.co.uk](http://www.clearest.co.uk).

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Carswell Publications has announced the *Pocket Dictionary of Canadian Law* (Third Edition), which they claim is the “ONLY pocket legal dictionary written for the Canadian market!”

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E-M Press, of Victoria, Canada, has published a second edition of Edward Berry's *Writing Reasons: A Handbook for Judges*.

## Section 3—News and Reports

### Presentation of the Legal Writing Institute's Second Golden Pen Award

The Legal Writing Institute, a 1300-member international organization dedicated to improving legal writing, recently presented its second Golden Pen Award to Don LeDuc, dean of the Thomas M. Cooley Law School. The Institute honored Dean LeDuc for his long-standing support of law-school legal-writing programs and teachers. The Institute presented the award in a ceremony at the 2002 annual meeting of the Association of American Law Schools, held in January in New Orleans.

More than 15 years ago, Dean LeDuc took a remarkable step in legal education: he put his legal-writing teachers on the tenure track. He was the first law-school dean to put writing teachers on tenure track and keep them there. And over the years, he has publicly and repeatedly urged the American Bar Association to improve its standards for legal-writing teachers.

In his acceptance remarks, LeDuc noted that the ABA standards for accrediting law schools require that they provide at least two *rigorous* writing experiences; in fact, the ABA standards make legal writing one of the few courses that law schools must teach. But according to LeDuc, “the ABA then endorses a scheme that relegates those who teach legal writing to the second- and third-string faculty.” The ABA standards do not require law schools to provide job security for legal-writing teachers.

Only a handful of law schools in the United States place their legal-writing teachers on tenure track. Most schools offer their teachers long- or short-term contracts only, and a number of these schools do not renew those contracts: once the contract ends, the teacher must leave, thus guaranteeing that first-year law students will receive their legal-writing instruction primarily from a corps of inexperienced teachers.

The constant turnover of a large percentage of legal-writing teachers contributes to the recurring complaints of the public—and the legal profession itself—about the quality of legal writing.

According to Dean LeDuc, “If the legal-education community wishes to respond to the criticisms of the bench and bar and to prepare its graduates for practice, it should abandon its double standard toward legal-writing and skills teachers and admit them to full partnership.” He said that law schools must overcome the elitism that favors professors who teach doctrinal courses (like contracts or property law) over teachers who teach actual lawyering skills.

Likewise, schools must recognize that legal doctrine finds its application in legal writing. A guest speaker at the Golden Pen ceremony, federal judge Lynn N. Hughes of the Southern District of Texas, said that the usefulness of whatever students learn in doctrinal courses depends on legal writing, which “fuses culture and analysis in exposition.” Thus, as Judge Hughes put it, “the work done in legal-writing courses empowers the student to have a useful role in the economy, in our society, and in law.”

Dean LeDuc acted on that same view many years ago. In accepting the Golden Pen Awards, he said that it “recognizes my support of what the Legal Writing Institute holds dear—the plain English movement, the campaign for better writing within the legal profession, and, especially, the effort to achieve equal status for legal-writing professors within law schools.”

The Legal Writing Institute (<http://www.lwionline.org>), a non-profit organization headquartered at Seattle University School of Law, is dedicated to improving legal writing and the teaching of legal writing. Through its various resources, it provides a forum for discussion and scholarship about legal writing, analysis, and research. The Institute has more than 1300 members worldwide, including members from every ABA-accredited law school in the United States, from college and university English departments, from independent research-and-consulting organizations, and from the practicing bar. Anyone interested in legal writing or the teaching of legal writing may join.

*For more information about the Golden Pen Award, contact Professor Jane Kent Gionfriddo, president of the Legal Writing Institute, at Boston College Law School 617-552-4358 or [gionfrid@bc.edu](mailto:gionfrid@bc.edu).*

*For more information about the Legal Writing Institute, visit the Institute's website or contact Lori Lamb at Seattle University School of Law 206-398-4033 or [lamb1@seattleu.edu](mailto:lamb1@seattleu.edu).*



## LETTERS

**Mark Adler** writes:

Congratulations on a good issue (and on getting it out so quickly!). I was very chuffed by Peter's editorial.

I thought you may be interested in this small piece of good news: The English and Welsh Land Registry's Customer Survey 2001 includes a question "How satisfied are you that Notices, Requisitions and Letters are written in plain language and are jargon-free?".

*Ed. Note:* Have they published the survey results?

**Christopher Balmford** writes:

*Clarity* #46 is a lively, varied and useful read. I read it over my frugal lunchtime sandwiches a couple of days a week.

I particularly valued Mary Beazley's point, "When you write, you are making a series of decisions. Unfortunately, those decisions have often been unconscious decisions."

Also, I liked the way the South African connection brought us back to democracy and consumers, etc. That side of the benefits hasn't been prominent for a while. We've been emphasizing economic and business benefits. Fair enough too.

Congratulations. Looking forward to the next one already. What will I read over lunch on Monday?

**John Fletcher** writes:

I have been puzzled by legal notices in the *London Times*. They are expensive to insert and a plain

version would save several hundred pounds. They are as good examples of concentrated gobbledygook as you could find. Words in capitals are often the most useless. Yet I am told there is a legal model behind this wording, requiring them to be like that.

Do you know anything of this?

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## Clarity Committee Meeting

### Summary of the meeting held at Peterhouse College, Cambridge on Sunday 14 July 2002 from 2.10pm to 4.30pm

Present

Peter Butt (Chair), Mark Adler (for the first hour), Christopher Balmford, Richard Castle, Paul Clark, Joe Kimble, Phil Knight, Nick Lear, Robert Lowe, Annelize Nienaber (for Frans Viljoen), John Pare.

#### 1. Action plan

Peter Butt presented the action plan he had previously circulated to committee members.

Clarity is now a world-wide organisation.

However, there are problems over finance. Not all members are paying their subscriptions. Also, we depend heavily on the efforts of volunteers and the workload is growing. It is time to take stock and consider whether the organisation should change.

He has an offer from a major Australian law firm of some part-time help, perhaps for six months, if that would assist in tackling some of the administrative problems.

#### 2. Finance

Since we have 800 members world-wide, the annual income ought to be \$20,000. That is sufficient to cover the costs of publishing two journals each year. Paul Clark wondered whether it was time to increase the subscription as it had been £15 for over 10 years.

The Committee agreed not to increase subscription rates, and to discontinue the practice of offering a separate rate for students.

The UK still has the largest number of members but it appears to have the most difficulty collecting subscriptions. Paul Clark suggested that we ought to invoice members each year. It is too easy to forget to pay, and an invoice is a prompt—and may be a requirement for those organisations that need a piece of paper to justify payment.

Phil Knight reported that he is developing a database for Canada, which could be extended to include all members. It automates the production of reminder letters, and could be tailored to each country.

Christopher Balmford suggested that it might be possible for members to update their own records on this system, but it was agreed this ought to be phase II of the project.

#### 3. Group members

Richard Castle reported that in New Zealand he had a number of corporate members who receive multiple copies of the journal. Paul Clark asked at what rate corporate members were charged. Richard charged them a special discounted rate.

Phil Knight pointed out that we had three categories of members:

- individuals
- organisations with a contact
- group members who receive more than one copy of the journal.

He suggested we should offer a group discount for Clarity membership, but “grandfather” the existing deals such as those Richard Castle had done in New Zealand. The distinguishing feature between group and individual membership is that although there would be multiple copies of the journal there would be a single point of contact and a single address. He suggested a 10% discount for between two and 10 members, a 20% discount for between 11 and 25 and a 50% discount for groups with more than 25 members.

The proposal was put to a vote and approved.

#### 4. Brochure

Peter Butt wondered whether we should have some sort of promotional material. Joe Kimble agreed to mock up an A4 sheet folded in three which would include various quotes and an application form with details of country reps and the website.

#### 5. The journal

Peter Butt reiterated the proposals he had made in his action plan—that the journal should appear twice a year, be the responsibility of an editor in chief, have regular features and engage one guest editor each year. The journal is the principal activity of Clarity. Its content has swung from academic to practical.

Robert Lowe wondered about the multinational readership. How will a guest editor from one country know what is important in another country? Phil Knight felt that was something for the country representatives to pick up. We cannot hope that every article will interest every reader. Nick Lear said that must be a matter for editorial judgement. Phil Knight added there should be something of interest in each issue for every reader.

The idea of introducing several regular topical columns was generally approved, as was the idea that individual members should accept responsibility, not for writing it, but for ensuring that it is written.

- case law and judicial interpretation—Peter Butt
- letters to the editor—Nick Lear
- news about members—Joe Kimble. We list new members but there could be matters of other interest. Some discussion ensued as to whether this was appropriate for the journal. It would be limited to matters of significance and include, for example, announcements of conferences and plain language developments.
- reviews of websites and books.

There are other columns that remain unallocated—drafting/writing in practice, drafting in public law (legislation), language matters, style and design matters. And maybe others can suggest other headings.

Joe Kimble emphasised that regular columns must not delay the production of the journal.

## 6. The Clarity Website

To date this has been maintained by Mark Adler among all the other tasks he did for Clarity. Nick Lear felt that Mark would not mind handing over responsibility for it. Peter Butt is to ask the Australian law firm if this is where they could help. We would not mind their name appearing on the site. Mark Adler could remain as website editor.

## 7. Europe

Joe Kimble pointed out that Clarity is under-represented in Europe and that we needed to find someone to take responsibility for Europe.

## 8. The chair

Peter Butt's proposal for chairmanship to be a rolling appointment once every three years was accepted as was the suggestion that the title of the chairman should be changed to president. We should institute a system for nominating and voting for a vice president every three years on the understanding that he or she would in due course become president.

Paul Clark mentioned that his appointment as deputy chairman was on the understanding that he was helping out Peter, particularly in the arrangement of the Peterhouse conference while Peter was in Australia, not that he would in due course become chairman. It was agreed that at the next AGM nominations should be received for possible vice presidents—who would take over from Peter as president when his three-year term expires in 2003.

## 9. The conference

There was considerable discussion about the conference. Feedback was awaited. It was agreed we should not contemplate a conference every year, possible every other year. Should we link with another organisation next time, possibly a Commonwealth association, with a view to meeting in the southern hemisphere? Perhaps we could link with one of the US organisations such as the Legal Writing Institute or Scribes—although then the conference would need to be in the States.

However, the focus that the link with the Statute Law Society had given was judged to be helpful. Some conferences have too broad a basis. It was agreed, however, that if the Statute Law Society asked us to repeat the exercise we would be in favour of doing so.

There was the question whether we needed a conference at all: we should not organise a conference for the sake of it. But they are promotional, they enable most of the committee to meet from time to time, they could make money. On balance an occasional conference was desirable.

The meeting ended with a demonstration by Phil Knight of his database, followed by the taking of group photographs.

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## News About Members

United Kingdom member, and recently First Parliamentary Counsel, **Mr. Edward Caldwell**, is now Sir Edward, having been knighted (KCB) at the beginning of this year. We regret we missed that for the previous issue. He has also retired as First Parliamentary Counsel.

At the beginning of October, Sir Edward took up a new position as chief drafter at the Law Commission.

USA member, and Clarity Membership Co-ordinator, **Joe Kimble** has been named the drafting consultant to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States. The committee is responsible for the five sets of federal court rules—civil, criminal, appellate, evidence, and bankruptcy.

In addition, Joe is the new editor in chief of *The Scribes Journal of Legal Writing*.

**Richard Thomas** (the lawyer, not the actor) has left Clifford Chance to take up an appointment as Data Commissioner.

## Welcome to New Clarity Members

### Australia

**Peter Carter**, attorney; Glebe Point, New South Wales

**Kay Robertson**, solicitor; Melbourne, Victoria

**Gary Thomas**, attorney; Perth

### Canada

**Robert Diab**, Vancouver, British Columbia

**Michel Gauthier**, Ottawa, Ontario

**Laura Hopkins**, Toronto, Ontario

**Linda Tarras**, Ottawa, Ontario

### England

**Omar Al-Saadoon**, London

**Greg Ashby**, Pershore, Worcestershire

**Mendel Bickovsky**, London

**Robert Brindley**, solicitor; Manchester

**David Chivers**, London

**Clarks** [Library]; Reading, Berkshire

**Nicholas Dee**, Amersham, Bucks

**Michael King**, Eastbourne, East Sussex

**The Parliamentary Counsel Office** [Ms. Caroline Joyce]; London

**David Pollard**, London

**Daniel Rosenberg**, solicitor; Blackfriars, London

**David Spooner**, Marlborough, Wiltshire

**Jessica Taylor**, London

**Joe Ukpabi**, London

### Estonia

**Richard Waterhouse**, Tallinn

### India

**Sandeep Dave**, solicitor; Mumbai

### Israel

**Myla Kaplan**, Haifa

### Luxembourg

**Emma Wagner**, Rameldange

**Edward Seymour**, Oetrange

### Malaysia

**Jurpin Wong-Adamal**, Kota Kinabalu, Sabah

### The Netherlands

**Galina Anikeeva**, The Hague

### New Zealand

**Jennie Walden**, principal, Lambton Quay, Wellington

### Scotland

**McGrigor Donald** [Christine McLintock]; Edinburgh

### Sweden

**Peter Stromberg**, director, Ministry of Justice; Stockholm

### United States

**Kenneth Adams**, attorney; Garden City, New York

**Megan Angell**, Hillsdale, Michigan

**Donald Byrne**, assistant chief counsel; Bethesda, Maryland

**M. Louise Lantzy**, professor; Syracuse, New York

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## New Clarity Representatives

We are delighted to welcome four new country representatives in India, Israel, Italy, and Malaysia.

**Sandeep Dave**, a solicitor in Mumbai, began as the representative—in India in mid 2002.

**Myla Kaplan**, a lawyer in Haifa, who also offers English legal writing courses to Israeli lawyers, has taken up the responsibilities for promoting Clarity in Israel.

**Alfredo Fioritto**, the director of a new government office called Chiaro, will be Clarity's representative in Italy.

**Jurpin Adamal**, an attorney with the State Attorney-General in Sabah, will represent Clarity in Malaysia.

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The brochure is also available from our website.

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Or go directly to the conference website:  
<http://classes.lils.edu/iafl/iafl>.

I hope to see you there!

**Peter Tiersma**

*Peter M. Tiersma  
Professor of Law, Joseph Scott Fellow  
Loyola Law School, Los Angeles  
Peter.Tiersma@lils.edu  
213-736-1162*

*See my website at [www.tiersma.com](http://www.tiersma.com) for information  
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## Clarity Membership

COUNTRY	NUMBER OF MEMBERS	COUNTRY	NUMBER OF MEMBERS
Australia	94	Italy	1
Austria	1	Japan	1
Bahamas	1	Jersey	3
Belgium	3	Luxembourg	2
Brazil	1	Malaysia	2
British West Indies	3	Malta	2
Canada	44	Netherlands	6
Denmark	5	New Zealand	20
England	410	Scotland	11
Estonia	1	Singapore	11
Germany	3	South Africa	31
Gran Canaria	1	Sweden	6
Hong Kong	12	Switzerland	3
India	6	Thailand	2
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Israel	1	<b>TOTAL</b>	<b>947</b>

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kimblej@cooley.edu

#### For members who do not have a country representative

We need a system for depositing foreign checks in Clarity's account at the U.S. bank used by Prof. Kimble. If you are from one of the countries listed below, you can send Prof. Kimble a personal check; the bank has an arrangement with those countries so that the bank will charge only \$1 to convert the check. But if you are not from one of the countries listed below, then would you please send a bank draft for \$25, payable in U.S. dollars and drawn on a U.S. bank. Otherwise, we have to pay a conversion charge that is larger than the amount of the check. Of course, in either case, the check or bank draft should be made payable to Clarity.

Austria	France	Netherlands
Belgium	Germany	Norway
Denmark	Japan	Spain
Finland	Mexico	Switzerland

Please use the back cover, or a copy of it, to apply for membership in Clarity.

W e b p a g e : w w w . c l a r i t y - i n t e r n a t i o n a l . n e t

## CLARITY: Membership Application Form

PLEASE PRINT CLEARLY

### If you are joining as an individual:

Title..... First name ..... Surname.....

Firm..... Position in firm.....

Professional qualification.....

Occupation if different from qualification.....

or

### If you are joining as an organisation:

Name of organisation.....

Nature of organisation.....

Contact name.....

### Either way: (whether an individual or organisation)

Home or business address (please specify).....

.....

DX.....

Home telephone..... Work telephone.....

Fax..... Email.....

Specialist fields..... Website.....

What is the latest issue of the journal you have received (leave blank if none)?.....

Date.....

### Please send this form:

to the CLARITY representative for your area (see page 46) with a cheque in favour of CLARITY for the subscription.

Your details will be kept on a computer; please tell us if you object. By completing this form, you consent to your details being given to other members or interested non-members (although not for mailing lists), unless you tell us you object.

