Plain Language Association International (PLAIN)
Fourth Biennial Conference Proceedings
Toronto, Canada — September 26 - 29, 2002

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The Assumptions Behind Plain Legal Language

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Presented to the Fourth Biennial Conference of the PLAIN Language Association International, September 27, 2002

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THE ASSUMPTIONS BEHIND PLAIN LEGAL LANGUAGE

Some thoughts for the PLAIN conference, Toronto 2002

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The title for today's seminar is in the form of a question: "The Law: Why change time-honoured practices?" The question is directed, of course, to the issue of legal language – why change the language of the law? But to many of us here today it is rather late to be asking this question. For the fact is that the language of the law *is* changing, whether people (especially lawyers) like it or not. In many countries, the plain language movement in law is now well-established. In its modern phase, it has been going for over 20 years. In countries such as Australia, New Zealand, and Canada, legal practitioners and parliamentary drafters now feel no compunction whatever in boasting about the "plainness" of their documents and legislation. In other countries, such as England, Ireland and the United States of America, my impression is that many lawyers still have strong reservations about using plain language.

But despite this, I think that the question – "Why change time-honoured practices?" – is still worth asking. Some legal practices are hallowed by time for good reason – they have been found to be efficacious. Long use has shown them to be worthwhile.

They serve a useful purpose. But does time-honoured legal language serve a useful purpose? That is the real question today.

I would like in this short paper to discuss the assumptions that lie behind the move away from time-honoured legal language and towards plain legal language. When the modern plain language movement was in its infancy, many of these assumptions were untested. We simply *assumed* that plain language was a "good thing". We had very little evidence to back up our assumptions. Now, however, I think we have the evidence — the evidence to give us confidence that our assumptions are justified.

What is plain legal language?

I should begin by asking: what do we mean by "plain language" in law, or (as it is usually called) "plain legal language"? "Plain language" is a term used by many, and I suspect its meaning varies considerably from user to user. By "plain language" I mean language that is clear and idiomatic – for those who write in the English language, it is modern, standard English.

For some, the term "plain language" carries connotations of "dumbing down" the language – a kind of Dick-and-Jane style of writing that panders to the lowest common denominator. But this is a misunderstanding of the true nature of "plain language", at least as practised by skillful proponents. In skilled hands, plain language uses the techniques of the very best writers, to produce legal prose that communicates directly and effectively with its intended audience.

Traditional legal language

To put "plain legal language" into context, we should contrast it with some examples of "traditional" legal drafting. I will take the examples from the area of property law, because that is the area I know best; but you can find similar examples in any area of law. We will see that the examples illustrate two main features – verbosity and undue technicality. Most also ooze archaic language, illogical word order, complex grammatical structures, and sentences of excruc iating length. I will take examples from both private legal documents and statutes.

Private legal documents

Leases are a prime example of all that is bad in traditional legal drafting. Suppose you want to impose on a tenant the obligation to repair the leased premises. You could write: "The tenant shall repair the premises" (or, preferably, "The tenant *must* repair the premises"). There is no doubt that, legally, this would suffice. "The premises" would be defined elsewhere in the lease. There would be no need list the various *parts* of the premises, because the term "the premises" would include all parts of the premises. And there would be no need to expand on the term "repair", as it is an ordinary English word, whose meaning when used in leases has been elucidated by many judicial decisions. Yet compare that wording – "The tenant must repair the premises" – with the verbal excesses that appeared in the "repairing" covenant which gave rise to litigation in the English case of *Ravenseft Properties Ltd v Davstone (Holdings) Ltd*:[1]

[1]. [1979] 1 All ER 929.

> "[The tenant shall] when where and so often as occasion requires well and sufficiently ... repair renew rebuild uphold support sustain maintain pave purge scour cleanse glaze empty amend and keep the premises and every part thereof ... and all floors walls columns roofs canopies lifts and escalators ... shafts stairways fences pavements forecourts drains sewers ducts flues conduits wires cables gutters soil and other pipes tanks cisterns pumps and other water and sanitary apparatus thereon with all needful and necessary amendments whatsoever ...".

This is rampant verbosity, a verbosity which makes the clause far more difficult to read than its subject matter requires. Probably, the verbosity was prompted by a desire to be legally precise. If so, it failed, because the clause still ended up in court in a dispute over meaning. This demonstrates one of the great misconceptions of traditional legal drafting — that somehow a complex, traditional style is more precise than modern, plain language.

As you will know, this traditional style is not unique to English law and practice. It is found in all countries where English is the language of the law. One Australian lease which crossed my desk some time ago featured a tenant's repairing covenant – one single sentence – containing 424 words. If you looked hard you would find 2 commas, but no other punctuation. (Lack of punctuation is a hallmark of traditional legal drafting.) Lord Hoffmann once called this style of legal drafting "torrential".[2] In leases it is nothing short of endemic. Commercial leases, in

[2]. *Norwich Union Life Insurance Society v British Railways Board* [1987] 2 EGLR 137 at 138.

particular, commonly run to 50 or 60 pages, making them impossible for lay readers to comprehend and forcing lawyers to trawl through reams of turgid prose to advise clients about the obligations the documents contain.

Of course, the problem is not confined to leases. Mortgages are just as bad — perhaps worse. One of Australia's leading banks uses a standard mortgage which contains a sense-defying clause of 763 words; the clause contains 2 commas, 1 semi-colon, 3 sets of brackets, but no other punctuation.[3] As if not to be outdone by this Australian leviathan, a New Zealand bank's standard guarantee form features an entirely punctuation-less sentence of 1299 words; and the same document has an *average* clause-length of 330 words. As the great English conveyancer, Davidson, once wrote: the legal profession prefers "to seek safety in verbosity rather than in discrimination of language".[4]

To some, these drafting feats may evoke admiration: after all, it takes skill to write a grammatically-perfect sentence of 1299 words. But for most readers the drafting serves only to bewilder. Sometimes it bewilders even the drafters themselves. In a 1992 Australian case, a bank tried to enforce a guarantee which a customer had signed. One of the customer's defences was that certain clauses in the guarantee were meaningless. The guarantee form proved so tortuous that even the bank manager, when challenged in the witness box, had to admit that he could not understand some of the clauses; and it got worse – for, when challenged by the judge, nor could counsel for the bank.[5]

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3. See Memorandum filed in New South Wales Registrar-General's Office No V581852, clause 1(g).
4. *Davidson's Conveyancing Precedents*, 3rd ed 1860, Vol 1, p 67.
5. *Houlahan v Australian and New Zealand Banking Group Ltd* (1992) 110 FLR 259.

Statutes

Many statutes exhibit the same regrettable verbosity. They also often retain the archaic language of earlier statutes. This produces a heady mix that tests both concentration and knowledge. The result is incomprehensible to all except hardened lawyers. I won't bore you with quotations; you will all have come across plentiful examples. To me they call to mind Lord Justice Harman's experience on reading the English *Housing Act* 1957:

> "To reach a conclusion on this matter involved the court in wading through a monstrous legislative morass, staggering from stone to stone and ignoring the marsh gas exhaling from the forest of schedules lining the way on each side. I regarded it at one time, I must confess, as a Slough of Despond through which the court would never drag its feet, but I have by leaping from tussock to tussock as best I might, eventually, pale and exhausted, reached the other side."[6]

If you will allow me to mention one last example: the worst perpetrators of statutory obscurity are the four so-called "covenants for title", used in conveyances and similar deeds to warrant title to land. They are so tortuous that no-one seems to have noticed that one of their sentences lacks a main verb. The English Court of Appeal described them as a "jungle of verbiage".[7] Perhaps their verbal eccentricity is not surprising: they were drafted by Sir Orlando Bridgman in England in the 1660s

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6. *Davy v Leeds Corporation* [1964] 3 All ER 390 at 394.

and are still used, virtually unaltered, to this day[8] – illustrating how precedents preserve not only yesterday's legal concepts but also yesterday's legal language.

The assumptions we make

I hope I have said enough to persuade you that traditional legal language is not all that its exponents make it out to be. This brings me, then, to consider the assumptions we make when drafting legal documents in plain language. I think we make at least four assumptions. Let me consider them one by one.

Assumption 1: that it is possible effectively to express legal concepts in plain language

This is the first assumption we make, and it is a central one: that it is possible to express legal concepts in plain language, without loss of certainty and precision, even in areas of law that are complex.

The validity of this assumption is, I think, borne out by evidence from several different – and difficult – areas of law. One is corporations law. In Australia, much of our corporations law is now drafted in plain language – with (so far as I know) no litigation over meaning. This gives the lie, I think, to those who would say "complex law requires complex drafting". Another example is taxation law. In a study back in 1991, the Victorian Law Reform Commission tested the comprehensibility of part of the then-current Australian income tax legislation. The result? To understand the

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7 Slade LJ in *Meek v Clarke* (unreported, 7 July 1982).

legislation required 12 years of schooling plus 15 years of university — 27 years' education in all.[9] But this is now changing. Australia now has tax statutes drafted in language that is brutally plain; New Zealand is following suit; and the UK government has established a tax rewrite program to introduce plain language taxation laws.

The validity of this assumption – that it is possible effectively to express legal concepts in plain language – is also borne out by experience with private legal documents. There is no evidence that plain language legal documents are more prone to litigation than conventionally-drafted ones. Indeed, the reverse seems to be the case. To illustrate: for more than 20 years, Australia's largest car insurance company has been using insurance policies that are exceedingly plain. Some time ago the company's managing director went into print to say that their policies had been entirely free of litigation.[10] Now, a cynic might put this down more to good luck than good management – for eventually some plain language documents will end up in court; drafters are only human. But at least the evidence to date gives the lie to any argument that plain language documents are inherently prone to litigation.

This is not to say that writing legal documents in plain language is easy. Legal writing poses problems not usually found in other forms of writing. A leading issue is, what do we do with legal "terms of art", particularly those terms whose meanings have been judicially-defined? Here there are some differences of approach. Some

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8 Harpum, (1995) *Clarity 33*, p 24.

9 See *Australian Financial Review*, 27 September 1991, p 19.

10 Neville King, "An Experience with Plain English" (1985) 61 Current Affairs Bulletin (January), p 21. To similar effect, in its submissions to the Australian Parliamentary Inquiry into Commonwealth Legislative and Legal Drafting (18 September, 1992), the same company

plain language proponents do their best to eliminate terms of art altogether — they find some other way of expressing the legal ideas inherent in the term. The danger with this, of course, is that legal precision can be lost unless the new words accurately capture the legal nuances of the original. This may require real skill, and a great deal of research. And so another way is to retain terms of art, but then to add an explanation of what the legal word or phrase means – a sort of "best of both worlds" approach.

But whichever approach we adopt, we should not exaggerate the problem of terms of art. The problem is not nearly as great as many opponents of plain legal language seem to imagine. Research shows that, in any given area of law, the number of legal terms which have been judicially-defined, is likely to be quite small. For example, studies in the United States of America show that the proportion of judicially-defined terms in standard form contracts for the sale of land may be as low as three percent.[11] The implication is that you can play with the other 97% without losing the benefit of judicial exegesis. And some of the three per cent required judicial exposition for the very reason they were inherently uncertain – those terms it would be best to avoid altogether.

But of course, there are yet further problems for legal drafters. They must take care not only at the micro-level of words or phrases, but at the macro-level of legal concepts. A document must be effective to create the legal entity or concept the drafter intends. This may require the use of particular words, phrases or structures.

(the NRMA) stated: "The NRMA has not experienced any adverse court decisions by reason of the 'Plain English' and subsequent 'user friendly' documents."

11. Barr, Hathaway, Omichinski and Pratt, "Legalese and the Myth of Case Precedent" (1985) 64 *Michigan Bar Journal* 1136.

For example, consider the lease/licence distinction. To create a lease, the tenant must be given the right to exclusive possession; otherwise a mere licence results. This is not to suggest that the phrase "exclusive possession" must be used; but it might well be prudent to do so. A New South Wales judge has said that in discerning whether a document creates a lease or a licence, a general imprecision of language can point to a licence rather than to a lease; so too can the labels the parties use (for example, "agreement" rather than "lease", and whether payments are described as "rent") and also — significantly for plain language drafters — the absence of technical words of grant.[12] Again, in the area of securities, failure to use the precise word "mortgage" could result in some lesser kind of security being created, with a consequent diminution in the remedies given to the lender. And yet again, when creating an easement or restrictive covenant, it is important to use language which shows that what is created is a proprietary right that runs with the land, not a mere contractual right that binds only the parties.

That said, none of these matters justifies using jargon for its own sake. None justifies perpetuating linguistic eccentricities that serve only to enhance mystique, not legal effect. And yet lawyers still introduce documents with "whereas". They "execute" them rather than sign them. They "demise" rather than lease. They require a tenant to "well and sufficiently repair" when "repair" will do. They declare something "null and void", when "void" will do. They insist on "shall" when the rest of the community uses "must".[13] And so on. None of these hallowed words and

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12 *National Outdoor Advertising Pty Ltd v Wavon* (1988) 4 BPR 973.

13. On the use of "must" instead of "shall", see correspondence in the Australian Law Journal: (1989) 63 ALJ 75-78, 522-525, 726-728; (1990) 64 ALJ 168-169. For a more detailed survey, see Kimble, "The many misuses of *Shall*" (1992) 3 Scribes Journal of Legal Writing, 61-77. At least one Australian case has expressly recognised that "must" is quite sufficient to impose

phrases is a true term of art. All can be simplified, and some can be discarded completely.

Assumption 2: that plain legal language saves money

Here the evidence is unequivocal and overwhelming. Many studies show that plain language is more "efficient" and therefore saves money.

By "efficient", I mean that plain language documents are easier to read and comprehend. Numerous organisations attest to saving substantial amounts of money by converting their documents into plain language. Insurance companies are a prime illustration: by rewriting documents into plain language, enquiries from customers about meaning are reduced; this allows the company to redeploy enquiry staff to other tasks. And by redrafting forms in plain language, error rates are reduced; this saves time and money for the company, and helps cut down frustration for the customer. Studies of other organisations – including government bodies – show similar results. To take a stark example: some years ago, British Post redrafted its redirection-of-mail forms. Before the re-draft, there was an 87% error rate when customers filled out the form. Royal Mail was spending over £10,000 a week to deal with complaints and to reprocess the incorrect forms. The new form reduced the error rate dramatically – so much so that Royal Mail saved £500,000 in just the next nine months.[14]

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an obligation: *South Australian Housing Trust v Development Assessment Commission* (1994) 63 SASR 35 at 38.

[14] This and similar examples are given in Kimble, "Writing for Dollars, Writing to Please" (1996-1997) 6 *Scribes Journal of Legal Writing* 1. For other studies, see Kimble, "Plain English: A Charter for Clear Writing" (1992) 9 *Thomas M Cooley Law Rev* 1 at 25-26; Mills

These efficiencies are not unique to lay readers. Lawyers, too, save time and money when documents are in plain legal language. Lawyers find plain language easier to read and digest, cutting down time and effort for them almost as much as for their clients. These efficiencies have been documented in a study by the Law Reform Commission of Victoria (Australia). In the study, lawyers read counterpart versions of the same statutes, one version written in plain legal language and the other in traditional legal language. The time taken to understand the plain language version was between one-third to one-half less than the time taken to understand the traditional version.[15]

Assumption 3: that judges prefer plain language

This assumption is perhaps not as important as the others, but studies have borne it out just the same. Opponents of plain language have been heard to argue that plain legal language is "dangerous" because judges don't like it. The argument goes that documents must be drafted to be litigation-proof, and for this it is important to get the judge "on side"; and as judges prefer traditional styles of drafting, it is safer to stick to traditional styles of drafting. This argument seems (to me) rather facile; but even if we accept this view of judges, the evidence is that, given a preference, judges would choose plain language. Studies in the United States show that something like 80% of judges surveyed prefer pleadings to be in plain language rather than in the traditional, convoluted American style.[16] Interestingly, the same judges also thought that lawyers

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and Duckworth, *The Gains from Clarity* (Centre for Microeconomic Policy Analysis and Centre for Plain Legal Language, University of Sydney: 1996).

15. Eagleson, "Plain English - A Boon for Lawyers" [1991] *The Second Draft* (Legal Writing Institute) p 12.

16 Harrington and Kimble, "Survey: Plain English Wins Every Which Way" (1987) 66 *Michigan Bar Journal* 1024; Kimble and Prokop, "Strike Three for Legalese" (1990) 69 *Michigan Bar*

who drafted pleadings in plain language were better lawyers than those who stuck to traditional drafting. I don't know of any similar studies outside of the USA, but I would imagine that similar results would follow in most jurisdictions.

Certainly, in recent years some English and Australian judges have shown an increased willingness to condemn from the bench legal drafting that is convoluted and unclear. Epithets heaped upon offending clauses have included "botched",[17] "half-baked",[18] "cobbled-together",[19] "doubtful",[20] "tortuous",[21] "archaic",[22] "incomprehensible legal gobbledegook",[23] and "singularly inelegant".[24] (If I may be allowed some free advertising: you will find these and other examples in Butt and Castle, *Modern Legal Drafting*, Cambridge University Press, 2001, chapter 2.)

To be even-handed here, some Australian judges have also been less than enthusiastic about plain language in law. For example, an appeal court judge from Victoria recently described certain provisions of the *Corporations Law* as being drafted "in the language of the pop songs".[25] In this judge's view, the quest for simplicity "pays the price of vulgarity and ends in obscurity".[26] (A prime, but

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Journal 418; Child, "Language Preferences of Judges and Lawyers: A Florida Survey" (1990) 64 *Florida Bar Journal* 32. For articles by judges themselves, see Mester, "Plain English for Judges" (1983) 62 *Michigan Bar Journal* 978; Cohn, "Effective Brief Writing: One Judge's Observations" (1983) 62 *Michigan Bar Journal* 987.

17. *Re Gulbenkian's Settlement* [1970] AC 508 at 517 (Lord Reid).
18. *Alghussein Establishment v Eton College* [1988] 1 WLR 587, HL.
19. *The Alexion Hope* [1988] 1 Lloyd's Rep 311 at 320, CA (Purchas LJ).
20. *Overseas Union Insurance Ltd v AA Mutual International Insurance Co Ltd* [1988] 2 Lloyd's Rep 63 at 69 (Evans J).
21. *London Regional Transport v Wimpey Group Services Ltd* (1987) 2 EGLR 41 (Hoffmann J).
22. *Trafalgar House Construction (Regions) Ltd v General Surety & Guarantee Co Ltd* [1995] 3 WLR 204 at 212 (Lord Jauncey of Tullichettle).
23. *Houlahan v Australian and New Zealand Banking Group Ltd* (1992) 110 FLR 259.
24. *NSW Rifle Association v Commonwealth of Australia*, unreported, New South Wales Court of Appeal, 15 August 1997, Powell JA.
25. *GM & AM Pearce and Co Pty Ltd v RGM Australia Pty Ltd* (1998) 116 ACLC 429 at 432 (Callaway JA).
26. Ibid.

somewhat puzzling, concern of this judge seemed to be the drafting technique of starting a section with "However,".) Another Australian appellate judge decried as "grotesque" the use of "must" in statutes, especially the phrase "must not".[27] Yet another appellate judge, when criticising a clause in a plain language insurance policy, caricatured "plain English" as meaning "confused thought and split infinitives",[28] as if it served no useful purpose at all. And another described a plain language insurance policy as "one of those new fangled plain English policies which is, accordingly, a little hard to construe".[29] But these are isolated voices and the tide of time will pass them by. I suspect that most judges would accept that modern Australian statutes and documents, which are now increasingly being drafted in a plainer style, are far easier to read and apply than their traditionally drafted forebears. Other appellate judges – more farsightedly – have made constructive comments, accepting change as inevitable and moving on to wrestle with the very real issue of the extent to which settled case law can be applied in interpreting plain English revisions of statutes and standard documents.[30]

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27. *Hallwood Corporation Ltd v Roads Corporation* [1998] 2 VR 439 at 445-446 (Tadgell JA). For criticisms of the judge's comments, see Eagleson, "Plain English: Changing the lawyer's image and goals", a paper delivered to Literature and the Law Seminar, Perth, Australia, 16 May 1998; extracts published in (1998) *Clarity* 42, p 34.

28. *NRMA Insurance Ltd v Collier* (1996) 9 ANZ Insurance Cases 76,717 at 76,721 (Meagher JA).

29. *Re Network Welding Pty Ltd (in liquidation) (No 2)* [2001] NSWSC 809 at para 3 (unreported, 28 August 2001).

30. See, for example, Justice G Hill, "A Judicial Perspective on Tax Law Reform" (1998) 72 *Australian Law Journal* 685; Justice K Lindgren, "Interpretation of the Income Tax Assessment Act 1997" (1999) 73 *Australian Law Journal* 425; Justice D Mahoney, "A Judge's Attitude to Plain Language" [1996] *New South Wales Law Society Journal* (September) 52.

Assumption 4: that clients prefer plain legal language

This last assumption is also borne out by evidence – not just anecdotal evidence, but empirical evidence from large-scale research. Non-lawyers prefer legal documents and statutes to be in plain language. Amongst the research is a Canadian survey,[31] which showed a widely-held public perception that lawyers care little about whether they communicate effectively with their clients. Lawyers, the public thinks, are pre-occupied with legal precision at the expense of clear communication – they are indifferent to whether their clients understand the documents they are asked to sign. Lawyers may *think* that they do care whether they communicate – but the public perception seems to be otherwise.

The evidence is clear. Members of the public – particularly those with no legal learning – prefer plain legal language. If they are clients, it gives them a better chance to understand the legal consequences of the documents they sign; if they are citizens, it gives them a better chance to understand the laws that bind them.

Conclusion

I said at the beginning that the plain language movement is now reasonably well-established. In its early days, it made the assumptions I have listed – assumptions about the benefits of plain legal language – without at that stage having verified the assumptions by empirical research. But now, about 20 years on, research has proved the assumptions to be correct. The evidence is overwhelming. Plain legal language

brings substantial benefits to lawyers, to clients, and to citizens at large. It can be legally safe; it saves time and money; clients and citizens have a better chance of understanding it; and most judges prefer it. The evidence is all one way. I would suggest that there is no substantial reason to resist it.

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[31] Survey carried out by the Plain Language Institute of British Columbia: see the Institute's *Preliminary Report*, "Critical Opinions: The Public's View of Legal Documents" (1992).

The Assumptions Behind Plain Legal Language

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