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Chapter 1 : Martineau and Salerno's Legal, Legislative and Rule Drafting in Plain English

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The Foundation has for many years placed great emphasis on the importance of communicating the law in terms that non-lawyers can understand. About 10 years ago it funded the establishment at the University of Sydney of the Centre for Plain Legal Language, to help persuade lawyers, legislators and governments that legal information could and should be written in ways that ordinary people can understand. I was privileged to be one of the founding Directors of that Centre. Surely no-one can argue that the laws that bind us ought to be obscure. Surely no-one can argue that the Acts of Parliament that regulate us ought to be incomprehensible. Surely no-one can argue that the documents we sign â€" like contracts, agreement, wills, and the like â€" ought to be impossible to understand. To put it more positively, it surely must be better if the documents we sign are understandable. It must be better if, in a democracy, we could understand the laws that parliament passes. No, there must be some good reason for using language that no-one can understand. The trouble is â€" the deeper you delve the harder it is to find a good reason; the harder it is to justify the dense, contorted, self-important style of writing we associate with legal documents and statutes. What is plain language law? I should begin by asking: I suspect its meaning varies considerably from user to user. In skilled hands, plain language uses the techniques of the very best writers, to produce prose that communicates directly and effectively with its intended audience. It involves applying to legal documents and statutes those same techniques that good writers use in normal prose. It is effective writing, in a legal context. Let me take just a few examples. We will see that they illustrate two main features â€" verbosity and undue technicality. They also ooze other characteristics: 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. There is no doubt that, legally, this would suffice. 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 â€" that somehow a complex, traditional style is more precise than modern, plain language. Of course, the problem is not confined to leases. Mortgages are just as bad â€" perhaps worse. As the great English conveyancer, Davidson, once wrote: But for most readers the drafting serves only to bewilder. Sometimes it bewilders even the drafters themselves. In a Australian case, a bank tried to enforce a guarantee which a customer had signed. 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 â€" for, when challenged by the judge, nor could counsel for the bank. The past 20 years have seen a clear trend in both public and private drafting towards a plain language style. The following are some illustrations of this growing trend: Law Societies and Bar Associations in a number of jurisdictions now actively promote plain language. Some have plain language committees, whose function is to promote the benefits of plain language. Examples are Victoria, [8] New Zealand, [9] and Ireland. Parliamentary drafters in most Australian jurisdictions now consciously adopt a plain language style. But we are seeing the same development in Australia. Other terms, derived from the names of the cases which gave rise to them, have also gone: I hope I have said enough to persuade you that traditional legal language is not all that its exponents make it out to be. I hope I have also persuaded you that the move towards using plain legal language is well-established. This brings me, then, to consider the real issue: I think there are four basic reasons for using plain legal language: It is possible to express legal concepts in plain language Plain language saves money The public prefers plain language Let me deal with each in turn. It is the assumption on which all plain language legal drafters rely. Without it, there would be no plain language movement in law. The validity of the assumption is, I think, borne out by evidence from several different â€" and difficult â€" areas of law.

One is corporations law. Much of our corporations law is now drafted in plain language â€" with so far as I know no litigation over meaning. Another example is taxation law. In a study back in , the Victorian Law Reform Commission tested the comprehensibility of part of the then-current Australian income tax legislation. Australia now has tax law 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 â€" that it is possible effectively to express legal concepts in plain language â€" 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. 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. Here there are some differences of approach. Some plain language proponents do their best to eliminate terms of art altogether â€" 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. Another problem is what to do with terms whose meanings have been judicially defined? Lawyers are afraid to dispense with those terms, in case they lose the benefit of judicial definition and risk the possibility of litigation over the meaning of new terms. However, we should not exaggerate the problem; 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. And some of the three per cent required judicial exposition for the very reason they were inherently uncertain â€" those terms it would be best to avoid altogether. And of course nothing justifies using jargon for its own sake. Nothing justifies perpetuating linguistic eccentricities that serve only to enhance mystique, not legal effect. None of these hallowed words and phrases is a true term of art. All can be simplified, and some can be discarded completely. Numerous organisations attest to saving substantial amounts of money by converting their documents into plain language. Insurance companies are a prime illustration: 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 â€" including government bodies â€" show similar results. To take a stark example: 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. 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. 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. 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. To be even-handed here, some Australian judges have also been less than enthusiastic about plain language in law. 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. Indeed, some appellate judges â€" more farsightedly â€" 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. Non-lawyers prefer legal documents and statutes to be in plain language. Amongst the research is a Canadian survey, [43] 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 â€” 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 â€” but the public perception seems to be otherwise. The evidence is clear. Members of the public â€ particularly those with no legal learning â€ 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 earlier that the plain language movement is now reasonably well-established. In its early days, it made assumptions about the benefits of plain legal language â€ 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.

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