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THE BAD OLD DAYS

I am a product of the bad old days in the law. I refer to the times, 50 years ago and more, of high formalism, legal positivism, strict legalism and all the other isms. So, if you are of my age, or even much younger, I know what you are thinking. Not another article on Plain English in the law! Not another attempt by those academics to make us throw out our tried and trusted precedents. Not another churlish endeavour of do-gooders, trying to undermine the mysteries and skills of the lawyer's art.

Despite these reactions, that I fully understand, I am here to urge fellow lawyers to ditch their Latinisms and to embrace their inner Germanic being, with the essential simplicities of pre Norman English. Everything went wrong, you see, in 1066. That was when the usurper, William Duke of Normandy, defeated good King Harold at the Battle of Hastings. As if it was not enough for William to bring over with him all those garlic eating Frenchman, he imposed on his royal court the French language of the time. It became the language of the clerks in the bureaucracy (a nice French word if ever there was one).It it also became the language of his judges. Under his successor Henry II, they fanned out over all of England, bringing with them the common law and legal language. But that language was not the language of us common folks. It was the language of the Conqueror and his minions. And the sad thing about it is, we have been stuck with it ever since.

What are we stuck with? Essentially a schizophrenic language. For just about any important idea, we have two words. One word is the original word of the Anglo-Saxons who ruled the place before the Norman invasion. Their language had a smattering of Latin from the time the Romans occupied Britain and built Hadrian's Wall. But basically, the language had strong Germanic roots. This is still the basic language we all use in the kitchen. It constitutes most of the *spoken* language. It is simple, direct, brief and familiar. It is very like the languages of Germany, the Netherlands and Scandinavia today. They were not conquered by the French, at least not until Napoleon came along and by then it was too late to alter the language. But the English had to suffer the indignity of three centuries of Norman rule until the glorious Tudors came along with their religious conflicts. But that is another story.

Naturally, the English parliaments, made up of the Commons of the kingdom, repeatedly protested against the use of this foreign language in the courts and in legal documents. They objected to the use of Norman French, which was a kind of doggerel language, neither wholly English nor French. But above all they objected to the intrusions of Latin, the language of their earlier and unlamented conquerors, the Romans. However, the universal Church used Latin for its services and dealings. So in the proceedings over which church officials presided, Latin was literally the lingua franca. This state of affairs continued, to a greater and lesser degree, until 1731 when An Act of Parliament banned the use of French and Latin and insisted on the use of English in courts of law and legal documents. The problem was, by then, that so many of the foreign words had grafted themselves onto the English tongue, that it was impossible to eradicate the foreign imports. In Australian terms, they were like lantana or the beautiful purple Patterson’s Curse that spread like wildfire after the settlers arrived in the Great South Land.

Similar stories can be told in India and Africa today, where court proceedings are still carried on in the English language. Only in the lowest courts are cases tried in the language understood by the local people. One day, they too may throw off the mixed blessing of this imperial legacy. Of course, it was not an entirely negative inheritance for the English. It made their language extremely rich for poetry and literature. The multitude of similar words for the same idea gave plenty of scope for variations,

although often they were variations without much difference. And lawyers, being traditional creatures, clung on to the multiple words long after ordinary folks had dispensed with them and reverted to the Anglo-Saxon term.

So this is where we are today. It is important to understand this history in order to realise the challenge that we face as modern Australian lawyers in embracing Plain Legal Language. As the following articles in this *Journal* demonstrate, there are many words and phrases that have come into regular usage in legal practice. They represent little more than a reflection, from times gone by, of the two linguistic streams that still live on in modern English. And because English today is the new lingua franca of humanity (used in outer space, airline communications, scientific literature and popular culture) this strange mixed up language reaches out to human beings everywhere. As privileged professionals, who live by the words of the English language, lawyers have a special duty to be clear in what they say and write.

So here is the rub. Ordinary people can generally understand the Germanic words of the Anglo-Saxon ancestors reasonably well. They have much more difficulty understanding the words derived from those pesky Normans, still more the Romans. This has been demonstrated in countless surveys of clients and ordinary citizens to find out how much they have understood of what lawyers have been saying or writing to them. As these articles show, even words and phrases that seem completely clear to lawyers are not understood by most clients. This is especially so if they are words derived from Latin and French. Take the phrase ‘’pro bono’’. It is used all the time by Australian lawyers, sometimes with justification, to congratulate the profession for volunteering services to help the needy. But, inherent in the expression is an ambiguity. Does it simply mean doing legal work free of charge? Or does it imply doing such work on tasks that are not simply for individual needs but have some benefit for the public generally? The overwhelming majority of ordinary citizens do not know what the expression was getting at. And the succeeding articles reveal that this is true of many of the words and phrases that we lawyers use. Truly, we appear to be the successors to the priestly caste of Norman clerks, who peopled the courts and public offices of England, nearly a millennium ago.

The challenge of this series is to get contemporary Australian lawyers to make their documents, judgments and oral arguments and explanations simpler, briefer, clearer: cutting away unnecessary complications, ambiguities and obscurities. It *can* be done by adopting a few simple rules. It *should* be done because we are people of words. We live by words and it is important that those to, and of, whom we speak should understand what we are getting at.

A DAMASCUS CONVERSION

All this is very well, I hear you say. But I am still very suspicious of this so-called Plain English or Plain Language movement. Is this not just another example of political correctness? Is this not another instance of do-gooders who end up making things more complicated than they already are? Is it not better to stick to the tried and trusted language of our ancient profession? Is this not another instance of: if it ain't broke, don't fix it.

I know all these reactions because I have seen and heard them, in my professional life, over the past 40 years. My initial training in the law, at the Sydney Law School (1958-61) was fairly orthodox for that time. Virtually all my subjects were compulsory. Success depended on rote learning of huge masses of information. Statute law had not yet reached its ascendancy, so we wandered in the imprecision of judicial language. And there was very little questioning of the law, the justice of the rules or whether ordinary people understood or not. By and large, ordinary people just had to obey the law. And we lawyers presumed that they knew the law, even though we were not always sure that we ourselves did.

One ray of light was cast during my Law School studies by Julius Stone, Professor of Jurisprudence at Sydney University. Contrary to Dixonian strict and complete legalism, he taught us, that judges were not on automatic pilot. They were exercising ''leeways for choice''. Language was only an approximate vehicle for explaining the judgements they reached. Thus, honesty and accuracy in legal language was critically important for the transparency of law. Stone's appeal for realism and empiricism in scrutinising the performance of the lawyer in society profoundly affected the generation of law students who came under his spell. This

helps to explain the big change that occurred in the Australian legal system under the leadership of Chief Justice Mason, in the *Mabo* case and many others in the 1980s and 90s. It is this change that continues to send ripple effects into the legal profession of Australia. It brings the call, and demand, for Plain Legal Language, the subject of the following articles in this series.

My first encounter with Plain Language (then called ‘’Plain English’’) came in the 1970s when I was chairing the Australian Law Reform Commission. We were working on two important projects concerned with legal language as it affected ordinary citizens of varying education and linguistic ability. One was a project to reform the federal laws on debt recovery. The other was a project to simplify and unify the Australian law on insurance contracts. Each project demonstrated clearly the vital importance of forms and documents that ordinary consumers had to read, understand and adopt. The Commissioner in charge of each project was Professor David St L Kelly. He was interested in Plain Language. He educated his fellow commissioners about it, including me. He secured the appointment, as a consultant, of an American expert in the new subject, Prof Vernon Countryman. These consultations brought home to us the importance of clear and simple legal expression, particularly where the law interacted with ordinary folks: which was most of the time.

In 1984, I returned to the bosom of the courts as President of the NSW Court of Appeal. Suddenly, I was back in the mainstream. Much of my work was interpreting documents and statutes. Under the influence of common law developments and new statutory instructions, some of the old approaches to interpretation were being replaced with a new purposive and contextual approach to deriving meaning from legal language. Occasionally, new statutes, written in ‘’Plain English’’ came before the court. I will not mention names. But one of my fellow judges famously regarded such statutes as an affront to his sensibilities. This was intolerable interference by the ignorant in the mysteries and wholesome traditions of the law. He would, in the course of his reasons, denounce the drafters, the ministers and everyone else in sight who had anything to do with this appalling innovation. I tried to defend the attempts to express language more clearly. For me, the law existed for the people and that included ordinary citizens. Gradually, over time, a more benign approach

came to be adopted by the courts. In the High Court of Australia the new purposive and contextual approach to deriving meaning from legal language came to prevail. It is an approach congenial to the fundamental objectives of the Plain Legal Language movement.

GIVING LATIN THE CHOP

It is not accidental that the first suggestion in the revised analysis of *Law Words* should retain the recommendation that we should avoid using Latin, because it is an obstacle to effective communication in the law. Latin has not gone away. Back in my Law School days, Roman Law was a compulsory subject. Actually, it was an interesting exercise in comparative law. Until not long before I started legal studies, matriculation in Latin was obligatory. The given reason was that, otherwise, lawyers would find it difficult to study Roman Law and hard to find their way through legal doctrine, often expressed in Latin words and phrases. As it happens, I studied Latin at Fort Street High School in Sydney. I had an affection for the language having read and analysed *Caesar de Bello Gallico :Liber Secundus* (Caesar's Gallic War, Book 2). But even by the time I studied law, increasing numbers of law students had no acquaintance whatsoever with this dead language.

In the Court of Appeal and in the High Court, it was embarrassing when counsel would read a decision and arrive at words, and sometimes extended passages, expressed in the Latin natural to the education of earlier judges. The lawyers would then attempt a kind of dog Latin. If this were difficult in the legal profession, it is much more the case for the population at large. The use of Latin has become an obstacle that creates an unnecessary barrier between lawyers and the laity. The law belongs to the laity. They have a right to understand what it says.

In my judicial reasons, I would try to use English expressions, or at least to provide a translation for any Latin that I used. Sometimes this doubtless caused irritation to lawyers of a more traditionalist persuasion. For example, in *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, the High Court of Australia reformulated the rules of private international law governing the law of torts in Australia. All other Justices did so by describing the relevant choices as being between the '*'lex loci delicti*'' or the

‘’*lex fori*’’. I gave the expressions their perfectly accurate and acceptable English language descriptions as the ‘’law of the place of the wrong’’ or the ‘’law of the forum’’. However, I could not persuade any of my colleagues to drop the Latin tags. This was so although they would mean nothing to the ordinary Australian, however well educated, and would not be understood by 95% of the day's law students, until it was translated for them.

There is an attitudinal question here. Some lawyers do not care very much if the law is opaque and mysterious to ordinary citizens. As I came from ordinary citizens, I do care. And I believe that lawyers, as a profession, should be working to make what they write and say more understandable and less mysterious. I suspect that most contemporary lawyers would share my opinion. I confidently expect that the judges of the next generation will quite rapidly drop the use of Latin (and also obscure Norman French language) in favour of simple English equivalents. This is not a particularly big problem for communication. But it is symbolic. And lawyers know that symbols count.

REFINING SKILLS IN COMMUNICATION

Apart from choosing the most appropriate language, and simple expressions, to communicate legal ideas, there is much that lawyers can do to improve the understandability of what they write and say. The articles that follow in this series tackle words and phrases that are needlessly repetitive, ambiguous or obscure. I can well imagine a number of experienced lawyer-drafters who will resist giving up the beloved expressions (now needlessly embedded in precedents faithfully collected in the software of computer programs, handed from generation to generation). But the authors of the original articles, now elaborated with the helpful updating offered by Professor Peter Butt, have shown that the multiple expressions (such as ‘’signed, sealed and delivered’’) are not required in law. In many cases, their redundancy is expressly stated in statutes that had been in force for many decades. Lawyers can do better. Better usually means choosing a single word rather than many. And selecting the word with the English (Germanic) derivation rather than the Latin or Norman one.

Apart from changes of this kind, there is a need for lawyers to get better in the use of techniques of communication that are not purely verbal. I refer to the incorporation of charts, diagrams, maps, photographic illustrations, all made much simpler by the new information technology. A good instance of the persuasive use of graphs in a judicial opinion exists, I suggest, in my reasons in *Forge v ASIC* (2006) 228 CLR 45 at 107, 109.

Additionally, layout, paragraphing, headings and subheadings and the greater use of full stops in an extended text can help the reader to follow more readily the propositions being advanced by the writer. The decision of the High Court of Australia in *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1 , is one of the most important in the distinguished history of the court. But it is not one of the easiest to read. In the extended reasons of the Justices whole pages go by without a single new paragraph. There are no headings or subheadings. The argumentation is detailed and sophisticated. But there is little attempt to assist the reader (even the experienced lawyer) to comprehend the important ideas being advanced.

Pity any intrepid layperson who picked up the case in a search to understand what the highest court in the nation held to be the limits on the power of our Federal Parliament to deprive individuals of basic civil rights in respect of their political beliefs. Some lawyers, and perhaps a few judges, do not care much about such difficulties. I suggest that we should all care. And that, as a profession, we can do better. Plain Legal Language is important because it sets out to provide the tools by which we can improve legal communication. We can do so in the office, in the bureaucracy, in the courtroom and in judicial chambers. Plain Language is designed to provide rules of thumb that will help in this endeavour.

THE TEN COMMANDMENTS OF CLARITY

So this brings me finally to basic rules that contemporary lawyers can adopt to improve the simplicity and comprehensibility of their legal writing. A few years back, Professor Joseph Kimble, another expert from the United States, specified 40 elements of plain language that every lawyer should learn and put into effect.

Professor Kimble, like Professor Butt, is one of the worldwide champions of Clarity International. This is the global organisation dedicated to plain language in legal expression, whatever the language or legal tradition concerned.

I took sympathy upon the hard pressed practitioners of the law. I presumed to reduce the Kimble 40 principles down to the basic 10, the same as the Almighty. With just a trace of hubris, I proclaimed the 10 Commandments in the name of Clarity International. They have been published before in (2010) 33 *Aust Bar Rev* 10. Because they are simple to learn and to apply, I repeat them now. If all the law students of Australia would only learn these simple rules, in each year of their law course, and give them effect in their later work as lawyers, the quality of legal writing and expression in Australia would be improved enormously. I tried to obey these rules myself in my judicial opinions. Doubtless, I often failed. But we can all improve our legal communication. Clarity's 10 Commandments are a way to do it.

CLARITY'S 10 COMMANDMENTS

1. Begin complex statements of fact and law with a summary (the issue, crucial facts and answer) to let readers know where they are going;
2. Break up long sections and paragraphs. Group related materials together, and order the parts in a sequence that will appear logical to readers;
3. Pay careful attention to lay out (type size, typeface, whitespace, indenting, and the like). And use plenty of headings and subheadings to identify the progression of ideas;
4. When conveying detailed information, regularly use vertical lists. Where appropriate, number the items as these Commandments are numbered, for later reference;
5. Prefer short and medium-length sentences. As a guideline, keep the average sentence length to about 20 words;
6. For continuity between sentences, put old information-some word or idea from the previous sentence-at or towards the beginning of the sentence. (‘No more legalese. It has been ridiculed long enough.’) And end sentences forcefully by putting your strongest point, your most important information, at the end;

7. Prefer the active voice to the passive. (You should know the difference.) Use the passive voice selectively, for example, if the agent is unknown or not understood. Or if you want to focus attention on the object of the action instead of the agent-typically, so that old information is upfront;
8. Prefer verbs to noun phrases (‘consider’, not ’give consideration to’);
9. Prefer the familiar words-usually the shorter ones with Germanic roots-that are simple and direct and human. Avoid old potboilers (‘whereas’, ’hereinunder’, ’cognisant’ ,’requisite’ ,’pursuant to’, and all the rest). In drafting, banish ’shall’ wherever possible; and
10. Avoid unnecessary detail and words. Take special aim at multiword prepositions (‘prior to’, ’with regard to’, ’in connection with’) and unnecessary prepositional phrases (Delete ’the duty of the landlord’ and substitute ’the landlord's duty’;’ and’ order of the court’, and replace it by ’a court order’).

Law is inescapably complicated. More so today because of the mass of legislation coming out of our parliaments all the time and the great body of decisional law pouring forth, with lengthy judicial reasons and multiple opinions. This presents a great challenge to lawyers. There has been a revolution in the past decade in access to law because of the Internet. Now we must storm the ramparts and achieve a more difficult, but equally important, revolution: to make law more transparent not only to citizens but to lawyers as well. Because this series of articles sets out to advance this revolution, I commend it. And I will myself try to apply its wisdom.