

What, how, when and why—making laws easier to understand by using examples and notes¹

Ben Piper, June 2005

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The legislative drafter also labours under another difficulty. Writers of other documents are at liberty to set their work out in the form that best suits the task of conveying their intention. However, the legislative drafter is obliged to follow a form that enables the bill as drafted to be debated in accordance with the standing orders of the parliament that is to consider it. This means that the bill must be divided into separate clauses and that for the most part material that is merely illustrative of the intended effect of the legislation must not be included.

These handicaps go to make the conveyance of meaning in legislation particularly difficult.²

It is my intention in this paper to show that it is no longer necessary for drafters to labour under the difficulty described. By using notes and examples we can now illustrate the intended effect of what we do, we can now make our laws far more accessible to readers of our work, be they judge, bureaucrat or citizen, and we can now communicate with our readers in an entirely new way.

Although this paper only talks about legislative drafting, most of what I will say applies equally well to contract drafting, which I believe is the area where examples were first explored in the legal arena, and which is an activity that is, in my limited experience of it, very similar to legislative drafting.

I should also confess that there is probably little in this paper that is original in terms of concept, and that the research I have undertaken could more accurately be described as hit and miss, rather than as

¹ I am a legislative drafter in the Office of the Chief Parliamentary Counsel, Victoria, Australia. The views expressed in this paper are my personal views and do not necessarily represent the views of that Office.

² D.C. Pearce and R.S. Geddes, *Statutory Interpretation in Australia*, 5th Edition (2001) p. 3.

scholarly and comprehensive.³ Also, I have not been able to test the examples I will be putting forward in this paper beyond their immediate audience of bureaucrats.⁴

However I am hoping that you will find all that to be irrelevant to my purpose. It is my belief that notes and examples are a very valuable drafting and plain English tool that is vastly under-used. My purpose is to attempt to get more legal writers to use this valuable tool. I intend to do this by putting forward examples of how I have used notes and examples, and showing how I believe they have improved my work and my ability to communicate. I am also hoping that some of my examples will prompt light bulbs to flash in your head and for you to exclaim “I can do better than that!”.

Potted personal and Victorian history of the use of notes and examples

I first started using notes in about 1990, when it was possible to insert the notes as footnotes on the relevant page of a law. Unfortunately soon after I began flexing my wings in this regard my feathers were trimmed by a rule that was introduced in our jurisdiction that only permitted notes to appear as an endnote in our laws. These endnotes appeared among all sorts of other material at the end of our laws and were very difficult to find.⁵ I thus only attempted to use notes on a handful of occasions in the 1990s, and during that period I only used the occasional textual example.⁶

Then in 2000, a further change occurred—our Interpretation Act was amended to recognise notes and examples as part of our laws. From the start of 2001 we in Victoria have been free to insert notes and examples immediately after the provisions to which they relate, confident that those notes and examples form part of the law in which they appear. I have taken advantage of the freedom we have had since 2001 and have used notes and examples whenever appropriate since then.

Examples—old style

Before continuing I should first mention that most English-speaking jurisdictions (including Victoria) have used what I call “textual examples” for many years. A textual example is an example that appears as part of the text of a law.

The ‘classic’ textual example is something like the following from section 6 of the *Jobseekers Act 1995* (C.18)(U.K.):

- (2) ... those regulations may ... provide that a person—
 - (b) may restrict his availability for employment in any week in such circumstances as may be prescribed (for example, on grounds of conscience, religious conviction or physical or mental condition because he is caring for another person) ...

In jurisdictions that do not expressly provide for examples, this is basically the only way that an example can be put forward with the confidence that it forms part of the law. By its nature it is clearly part of the text of the law.

There is another sort of textual example that is handled differently by different jurisdictions. The very next sub-section of the *Jobseekers Act 1995* provides an example of this alternative form:

- (3) The following are examples of restrictions for which provision may be made by the regulations—
 - (a) restrictions on the nature of the employment for which a person is available;
 - (b) restrictions on the periods for which he is available; ...

³ With respect to examples, I refer those interested in a more scholarly exposition to the paper “Shining examples” by Jeffrey Barnes, published in the June 2004 edition of *The Loophole*.

⁴ For convenience I use the term “bureaucrat” in this paper to describe government employees. Given that I am one myself, I certainly have no pejorative intentions in using it.

⁵ This material includes such things as extended publishing histories and notes, notes containing information about the parliamentary history of the Bill that became the Act, indexes and reproductions of bits of the relevant law that had been passed, but that had not yet come into operation.

⁶ These are examples that form part of the text of a law. They are discussed in more detail in the next section.

If this provision had been drafted in Victoria in 1995 the opening words would have been written along the following lines:

(3) Without limiting sub-section (2), the regulations may provide for—

In other words, in Victoria we would not have stated that the specific instances were examples, even though that is clearly what we regarded them as. Given that we have always had a concern that our specific lists of instances are in danger of causing the general empowering words to be read down despite our express words that that is not to happen (this is particularly so in the case of long specific lists), the U.K. approach has considerable attraction, as something that is explicitly called an example is far less likely to be used to read down the general words of which it is an example.

Incidentally, I have come across a number of examples in Ontario that are a hybrid of the Victorian and U.K. approaches. They adopt wording similar to the Victorian wording, but they insert a sub-section heading above that wording stating “**Examples**”.

Although textual examples have some attractions, they have the disadvantage that they are not a suitable vehicle for telling a story.⁷ This is because narrative examples often need a few sentences for their telling and usually refer to people in one form or another. Generally, if they were put into the middle of a provision it would be almost impossible to properly read the provision, as the example would be more of an obstacle than an aid to understanding.

In my opinion it is basically only narrative examples that have the potential to communicate with readers in new ways. As the now sadly neglected (in Australia, in any event) Rudolph Flesch stated years ago—

Whenever you write about a general principle, show its application in a specific case; ... tell a pointed anecdote. These dashes of color are what the reader will take away with him. Not that he will necessarily remember the illustration or anecdote itself; but it will help him remember the main idea.⁸

While at present it is perhaps a bit too radical to suggest that we illustrate every general principle in our laws with a dash of colour, I do suggest that we do it in cases where readers might have more difficulty than usual in understanding a general principle. And in those cases the only thing suitable for the job is a narrative example or a decent note.

Potted history of elsewhere

Various other jurisdictions in Australia have used notes and narrative examples in their legislation since at least the early 1990s. For instance, in our federal sphere extensive worked examples appeared in our social security legislation in 1991. A number of Australian jurisdictions do not use notes and examples at all.

In some of the Australian jurisdictions that use notes and examples it is clear that they form part of the law, in others it is not so clear, and in some it is a factor that varies from Act to Act. There are also some differences in these jurisdictions as to whether or not examples can extend the law.⁹

With respect to the rest of the world, a number of jurisdictions, including the U.K. and a number of U.S. jurisdictions, have used textual examples for quite some time. New Zealand and a number of Canadian jurisdictions occasionally use narrative examples in the way that I will be advocating in this paper. I have not had sufficient time to find out the situation in other English-language jurisdictions, but my suspicion is that they would only use textual examples. I also suspect that these other jurisdictions do not make much use of notes.

⁷ See pages 82 and 83 for examples of narrative examples.

⁸ *The Art of Readable Writing* (Collier Books, New York, 1962 edition) p. 38 [1st published in 1949].

⁹ I refer those interested in the details of this to the paper of Jeffrey Barnes cited in note 3.

A threshold issue

From a strict legal point of view there is not much point in having notes and examples in laws unless it is clear that they are actually part of the law, and have the same status as the operative provisions of the law, or, at the very least, that they are matters that can be taken into account in interpreting the laws to which they relate. More particularly, in my opinion, it is highly undesirable to have a situation where there is an express statement that if there is a conflict between a provision of a law and an example of that provision, the provision of the law prevails. This is the case in at least several jurisdictions in Australasia. It is undesirable because you then have a situation where on the face of the law it appears that the law does not achieve the intention of the writer of the law. For instance, take the following hypothetical definition and example in relation to an injury compensation scheme:

"medical service" includes—

- (c) the provision of any article needed to operate, run or repair any medical equipment;

Examples

Examples of things referred to in paragraph (c) include electricity, water, lubricating oil and replacement filters and batteries.

Paragraph (c) only refers to articles, but the very first example is "electricity", which is hardly an "article" in the strict sense of that word. It appears the drafter really intended to refer to "thing" in paragraph (c) rather than "article". If this provision appeared in a Queensland law, a court would be bound to find that the provision prevailed and that electricity therefore could not be considered to be a medical service, even though it appears to have been within the contemplation of Parliament/the drafter that electricity should be a medical service. However, in Victoria it would be open to a court to find that electricity was a medical service.

This is because in Victoria we have the following provisions in our Interpretation Act:

An example (being an example at the foot of a provision under the heading "**Example**" or "**Examples**"), diagram or note (being a note at the foot of a provision and not a marginal note, footnote or endnote) in an Act or subordinate instrument forms part of the Act or subordinate instrument ...

If an Act or subordinate instrument includes at the foot of a provision under the heading "**Example**" or "**Examples**" an example of the operation of the provision, the example—

- (a) is not exhaustive; and
- (b) may extend, but does not limit, the meaning of the provision.¹⁰

In the case of our hypothetical provision, I suggest that the Victorian result is the more desirable outcome.

At the same time as the Victorian provisions were introduced a decision was made allowing us to insert notes immediately after the provision to which the note applied.

Should other jurisdictions be tempted to introduce similar provisions (which is what I am hoping this paper will encourage to happen) I recommend, on the basis of my experience with our Interpretation Act provisions, that paragraph (b) immediately above be split into the following 2 paragraphs:

- (b) may extend the meaning of the provision; and
- (c) does not limit the meaning of the provision unless the contrary intention appears.

This rewording enables examples a bit more scope, which I will explore in a bit more detail later in this paper, and it also overcomes the possibility that it can be argued that negative examples (that is, examples of what is not covered by a provision) are not part of the law.¹¹

¹⁰ The first of these is section 36(3A) of the *Interpretation of Legislation Act 1984* (Vic.) and the second is section 36A(1) of that Act. They were inserted in 2000 with effect from 1 January 2001.

¹¹ See the discussion below under the heading "Setting limits" for more detail on this.

I should also mention that in at least one Australian jurisdiction individual Acts have set out their own interpretation provisions with respect to the examples that appear in them. This is, of course, the only option contract drafters have, but it is also something individual legislative drafters might like to consider doing in jurisdictions that have no Interpretation Act provisions dealing with notes and examples.

Introduction to the notes and examples

The examples of notes and examples that follow are only a relatively small, but hopefully representative, sampling of the notes and examples I have inserted, or attempted to insert, into Victoria's laws. I had initially intended to only use my own examples as a base, and I had fully intended to use examples from a number of my colleagues and from other jurisdictions. But once it got to the point that I was having to try to cull my own examples to keep the size of this paper within reasonable bounds before I had used any other examples, I decided to let my egocentric tendencies off the leash.

To keep faith with anyone who might have been attracted by the title to this paper, my first 4 groups of examples reflect that title. Those groups are not mutually exclusive, nor were they ever intended to be comprehensive. After the 4 groups I have taken the liberty of including some other types of notes and examples. There are undoubtedly many many other types. I doubt that there is much purpose to be served by creating these classifications other than for the sake of convenience.

What?

It is the lot of the legislative drafter from time to time to write something that, at first glance, and perhaps even at second and third glance, appears, to put it kindly, to be strange. In the past all we could do was write these provisions and hope that users would realise from the context, or from their deeper knowledge of the relevant environment, what the strange provision was attempting to do. Notes, in particular, now provide us with a means to provide all readers of our laws with an explanation of what's going on. As I write these words I can already hear in my head pleas for examples of what I'm talking about. So here goes.

Example no. 1

Recently we attempted to standardise the enforcement provisions in 3 related Acts. One of these Acts had already been enacted with the model provisions, and it was my job to insert replicas of those model provisions into the other 2 Acts. One of the provisions I had to replicate provided for the administrative review of certain enforcement decisions—these were defined as "reviewable decisions". One of the Acts that I was amending had a section 10A that also provided for the administrative review of decisions made under that Act. For purposes of uniformity, it was thus necessary to include the following provision in section 10A:

(2A) Sub-section (1) does not apply to any reviewable decision.

This had the result that on the face of section 10A any decision under the Act could be reviewed except "reviewable decisions". As I was sure that that would cause some head-scratching I therefore included the following note immediately after sub-section (2A):

Note: A "reviewable decision" has the meaning given by section 20—see section 3(1).
Reviewable decisions are excluded from sub-section (1) because they are dealt with by Part IIA. Essentially, a wider range of people may apply for the review of a reviewable decision and there is a process of internal review available in respect of those decisions.

Example no. 2

Several years ago we had an Act containing a section 20 that made some amendments to section 15(1) of another Act, which was then followed by section 21 that completely replaced section 15(1) of that other Act. On the face of the Act it looked like a mistake had been made. While the commencement section made it clear that no mistake had been made, that section was 30 pages away from those amending sections. I therefore included the following note after section 21:

Note: Section 2(2) provides for this section to come into operation on 1 July 2005. Section 20 will come into operation on a day to be proclaimed on or before 1 June 2004.

Example no. 3

A provision was inserted into our Liquor Control Act that required people who were required by another provision of the Act to complete a responsible service of alcohol course to produce evidence that they had completed the course, if they were asked to do so by an inspector. This provision had the following exception:

- (3) Sub-section (2) does not apply if the [person] has not completed the required program or course, or did not complete the program or course within a required period.

At first glance this seems to be creating a loophole by saying that a person can avoid the provision by not doing the course. A little bit of thought makes it clear that while it is a means of avoiding the provision, it would in fact be unreasonable not to have this provision. But to avoid the need for readers to have to stop to work this out for themselves I decided it would be helpful to provide the following explanation:

Note: Sub-section (3) ensures that a person does not commit an offence by failing to produce evidence that does not exist. If the evidence does not exist the person would have committed a more serious offence under section 108 in not complying with the licence or permit conditions [these conditions required that the person do the course].

Example no. 4

Another provision I had to insert into our Liquor Control Act was the following:

3B. Where supply occurs if off-premises request made

For the purposes of this Act, if liquor is provided to a person who was not on licensed premises at the time the person ordered the liquor, the supply of the liquor to the person occurs at the place where the liquor provided was appropriated to the person's order.

The phrase “appropriated to the person’s order” is not the sort of phrase I use in legislation (or anywhere else, for that matter). In fact I fought long and hard to not use it. Unfortunately it related to an issue that was of great importance to a fairly common type of prosecution under the Act, and it was a phrase on which several courts had offered their opinions in the past. So the department insisted that the phrase continue to be used. However, it also was sufficiently moved by my concerns to expressly ask me to include examples illustrating what the phrase meant. Hence:

Examples:

1. A customer sits down at a kerb-side table of premises operated by the holder of a general licence. She orders a glass of wine. The waiter takes the order to the bar, where a glass is filled. The waiter then takes the glass to the customer. In this scenario the wine in the glass is supplied to the customer at the bar because that is where it was appropriated to the customer's order.
2. A customer orders the home delivery of a carton of beer by phone from the manager of premises licensed to supply liquor for consumption off the premises. The customer pays for the beer by providing his credit card details over the phone. The manager selects the beer from the fridge, and a staff member delivers the beer to the customer's house. In this scenario the beer is supplied to the customer at the fridge because that is where it was appropriated to the customer's order.

Example no. 5

In the recent standardisation exercise I described in example no. 1, in one of the Acts we were amending it became necessary to move 2 offence provisions that were very inconveniently located for the purposes of the changes we were making. These sections had a subject matter that had nothing to do with the amendments we were inserting. The only way to move the provisions was to re-enact them in a different place in the Act. However, I was concerned that in doing this it would appear that

we were creating new offences. I therefore inserted a note along the following lines after each of the sections:

Note: This section re-enacts section 15 of the Act as it was before the commencement of section 13 of the [amending Act].

How?

Example no. 1

Several years ago the Victorian Government decided to regulate public auctions of land. Concern had been expressed, in particular, about the widespread practice of the making of bids on behalf of the sellers of land at auctions of land, without it being disclosed on whose behalf the bids were being made. Obviously those bids could not be genuine bids, and they were seen as unfairly pushing up the prices obtained at auctions, as genuine bidders at those auctions had no way of knowing that they were bidding against dummy bidders. One of the provisions of the new law stated:

A person at a public auction of land must not falsely claim to have made a bid, or falsely acknowledge that he or she made a bid.

The relevant department was concerned that readers of the new law would wonder how someone could falsely claim or acknowledge that they had made a bid. Thus, for the exposure draft that was released for public comment before the law was presented to Parliament, I prepared the following example at the department's request:

Ron is trying to sell his house by public auction. His brother Jim agrees to help him. Just before the auction starts Ron introduces Jim to Maria, the auctioneer, and all 3 of them have a chat.

The auction starts. At one point the bidding seems to stop. The reserve price is still a mere hope on the horizon. To get things going again Maria takes a bid from a convenient tree. (In doing this, she commits an offence against section 36C(2).) One of the previous bidders is suspicious and asks Maria to identify the last bidder. Maria points to Jim and asks him to acknowledge making the last bid. In accordance with his pre-auction discussion with Maria, Jim raises his hand. In doing so he commits an offence against this section. He is not guilty of an offence against section 36B because he did not make a bid at the auction.

If Jim had made a bid and Maria had accepted the bid, Maria would have committed an offence against section 36C(1).

The department was satisfied that this enabled readers to fairly readily understand how the provision worked, and, to the best of my knowledge, no concerns were ever expressed about the provision.¹²

Example no. 2

I was again asked to make an amendment to our Liquor Control Act. There was existing provision for the controllers of a liquor licence to nominate a person (“a nominee”) to operate the licence. Once a nomination took effect the nominee assumed a number of the responsibilities of the licence controllers. I was asked to insert a provision explicitly specifying certain circumstances in which a person ceased to be a nominee (this was in addition to some existing provisions that enabled a person to stop being a nominee), and to then provide that on such a cessation, the licence holders re-assumed their responsibilities. There was no problem with the first part of this instruction, and I produced the following provision:

(10) A person ceases to be a nominee on ceasing to manage or control the licensed premises in circumstances in which that cessation is, or is likely to be, permanent.

However, there was a problem with the second part of the instruction, as the existing provisions were structured in a way that made it unnecessary to do anything—those provisions already achieved the

¹² This example is a sentimental favourite of mine, as it was the first narrative example I ever drafted. Sadly, although this example, and quite a few like it, remained in the Bill when it was first introduced into Parliament, it did not survive the re-introduction of the Bill following an election. I also note that its style shows glimpses of what may be possible for drafters in the future.

desired result. The department was not happy with this advice in that they had had considerable problems in practice in getting people to understand what occurred when a person ceased to be a nominee under the existing provisions. I therefore offered to include the following note under sub-section (10):

Note: On a person ceasing to be a nominee, section 53(4) ceases to apply. This has the effect under section 53 of re-imposing liability as a licensee or permittee on the directors or members of the committee of management (as the case may be) of the body holding the licence or permit.

When?

Example no. 1

Last year I had a fairly large Act that contained a commencement section that covered a page and that provided for different parts of the Act to come into operation at 12 different times. One of those times was at a fixed date in the future. This date applied to 11 sections that were scattered throughout the Act. The bulk of the Act came in immediately. It thus occurred to me that it might be helpful to anyone looking at the Act to provide warning that particular sections had a delayed, but certain, starting date. Hence the following note appeared after each of the delayed sections:

Note: This section comes into operation on 1 February 2005—see section 2(4).

The sections with a retrospective commencement had a note along the following lines:

Note: This section was deemed to come into operation on 16 June 2004—see section 2(7).

Example no. 2

In Victoria work injuries are covered by a statutory compensation scheme. The Act regulating this scheme is frequently amended. Often when amendments are made, the provisions as amended only apply to injuries that occur after the amendments come into operation. Often in the past our practice in these situations was to include a new sub-section at the end of the section where a relevant amendment had been made stating that the section as amended by the amending Act only applied to injuries that occurred after the amendments came into operation. Often these new sub-sections appeared physically many sub-sections after the sub-sections to which they applied.

Several years ago I attempted an alternative way of dealing with these provisions. I created a Part at the back of the Act that contained details of all of the amendments that had particular starting times. In the body of the Act, after each amendment that had a particular starting time I inserted a note along the following lines:

Note: Paragraph (c) does not apply with respect to injuries that occur before the date of commencement of section 8 of the **Accident Compensation and Transport Accident Acts (Amendment) Act 2003**—see section 265.

Intuitively it seems to me that keeping all this information together should be very helpful to readers, but unfortunately I have not received any feedback to confirm this.¹³

Why?

Example no. 1

Clause 146 of a Bill dealt with the recovery of money owed to employees by an employer. Sub-clause (5) provided that a Court could order the employer to pay a penalty to the employee in certain circumstances. Sub-clause (6) imposed a cap on the amount of the penalty and sub-clause (7) provided as follows:

¹³ These sorts of notes are the only ones I have come across to date where one has to suffer for one's art. Having 20 or so of these notes in one Bill is a prescription for a quick trip to the funny farm unless one takes the precaution of waiting until the absolute last moment before inserting the relevant section numbers.

- (7) If a claim is made under this section by an employee's personal representative, sub-sections (5) and (6) apply despite anything to the contrary in section 29 of the **Administration and Probate Act 1958**.

Given that this clause appeared in a proposed Industrial Relations Act, I thought it might be useful to explain the purpose of sub-clause (7). Thus the following note:

If a person dies, section 29 of the **Administration and Probate Act 1958** enables the continuation of most legal actions the person could have taken if he or she were still alive. However, section 29 does not permit the recovery of exemplary damages. As this restriction could interfere with the awarding of a penalty under clause 146, sub-clause (7) ensures that the penalty can still be awarded if the Court thinks it appropriate.¹⁴

Example no. 2

An amendment to our workers' compensation legislation inserted a formula to be used in the calculation of certain lump sum payouts to injured workers. One element of the formula, item "A", could have one of 2 alternative meanings (either a gross amount or a net amount), depending on whether or not the relevant Minister had published a certain document. This was a very unusual provision that appeared to provide the Minister with an arbitrary power, so I provided the following note:

Note: The purpose of this provision is to enable the Minister to respond to possible policy changes in relation to the taxation of settlement payments by the Commonwealth Government.

(If certain policy changes that were in the offing had been made, recipients of the pay-outs would have suffered significant tax disadvantages unless the appropriate gross or net amount was used for item "A".)

Providing connections

So far I haven't even touched on the most common circumstance in which notes are used by drafters generally. This is the situation where a provision of a law relies on, or is significantly affected by, another provision of the law that is not in its immediate vicinity. To assist readers in this circumstance it is common to provide a cross-reference.

For example, in one of my recent Acts I inserted the following provision:

174. Liability of operator

- (1) A person is guilty of an offence if—
- (a) the person is the operator of a vehicle; and
 - (b) the vehicle is in breach of a mass ... limit

Note: The penalties that apply in respect of the offence created by this section are set out in section 178.

We don't usually now separate penalties from the offences to which they relate. This was an exceptional case because the penalty depended on whether the offender was a body corporate or not, and on which of 3 separate categories of offence the transgression fitted into. Section 178 covered the best part of 2 pages, and the penalties it contained applied to section 174 and to 4 other sections. So while that was all well and good, a reader of the law would only come across section 178 if she or he read the Act sequentially. Most people only read laws relating to heavy transport vehicles sequentially if all the other insomnia cures they have tried have failed. Notes in this circumstance are thus very helpful to readers, and I think most drafters now recognise that.

¹⁴ This Bill was introduced into Parliament in 1990, but did not become law.

Making sure it's covered

Another very common circumstance in which examples are used relates to a concern that a provision cover a specific factual situation. In the past these situations were the cause of much disputation with instructors, as they needed the certainty that a common circumstance would be covered, and drafters were worried that the inclusion of specific circumstances would risk causing the generality of the relevant provision to be read down. Examples following provisions solve both these problems, and may even enable examples of what is not intended to be covered to be given (although, as previously mentioned, the legal effectiveness of these negative examples is open to question in Victoria).

This provision appeared in a rewrite of a section dealing with how a person's pre-accident earnings were to be calculated after a compensable accident:

- (4) This sub-section applies, if during the 12 months immediately before the relevant day, there was, as a result of any action taken by the earner, a significant change in his or her earnings circumstances that resulted in the earner regularly earning, or becoming entitled to earn, more on a weekly basis than he or she was earning before the change occurred.¹⁵

The original provision contained a couple of textual examples that I took the liberty of augmenting when I included the following directly underneath this provision:

Examples

Examples of a change of circumstances to which this sub-section would apply include a change of job, a promotion, a move from part-time to full-time employment, or a pay increase arising from the achievement of performance standards. This sub-section does not apply to a pay rise applying across an industry.

Despite this example, I might also mention that it is usually my practice in relation to these sorts of examples to not restrict myself to the humdrum. I think it is generally helpful to include things as examples that are at the outer edges of the envelope of what is caught by the provision.

Maths stuff

Another very common circumstance in which examples, in particular, are used is if a provision contains anything that even vaguely looks like a calculation. For instance one of my amendments to an injury compensation scheme included the following:

- (10) A number determined under the A.M.A. Guides must be rounded to the nearest whole percent.

The department asked me to include an example of how this provision would work. In providing the following examples I also took the opportunity to make it clear that the ordinary rules of mathematics applied to this situation:

Example

A final degree of impairment of 9.5% must be rounded to 10%. A final degree of impairment of 8.4% must be rounded to 8%.

Incidentally, I chose the first example quite deliberately, as 10% was a very significant threshold in the particular scheme of things here—significant benefits were only available to those who had a 10% or more degree of impairment.

Reminder

I was re-enacting a section that conferred a power of delegation on various people and authorities. It was envisaged that the delegates would include people and bodies who were not under the administrative control of the department administering the section. It thus wanted to be able to impose

¹⁵ I had best insert a "what" note here, as this sub-section reads strangely by itself. Another sub-section in the section took effect if sub-section (4) applied. It was a device I used to break up the material.

conditions on how the delegations it conferred were exercised, and asked me to insert a provision in the section to achieve that effect. I advised that this power was already conferred by our Interpretation Act. The department was concerned that future administrators of the section would be unaware of that fact, so I was asked to add the following note to the bottom of the section:

Note: Section 42A(1)(b) of the **Interpretation of Legislation Act 1984** provides that a person delegating a power or function may specify conditions or limitations on the exercise of the power or function by the delegate.

Setting limits

In the amendments I prepared in relation to sales of land, I created the following offence:

- (5) The person must not do any thing with the intention of preventing, causing a major disruption to, or causing the cancellation of, the auction.

In thinking over what might or might not be a "major" disruption, it occurred to me that it might be helpful for me to attempt to provide some guidance, particularly as a major disruption had to be something that wasn't so major that it led to the cancellation of the auction. I was also concerned to ensure that it couldn't be argued that any disruption to an auction was a major disruption. I also thought I might have a bit of fun (relatively speaking, of course). Thus:

Example

Fred attends a public auction of a house he intends bidding for. His son accompanies him to the auction with a radio. At one point during the auction Fred's son whispers into Fred's ear. Fred immediately interrupts the auctioneer to announce that Essendon has just beaten Carlton at the match at the MCG.¹⁶ While this announcement causes the auctioneer to lose concentration and to stop taking bids, she is quickly able to resume the auction. Fred has not caused a major disruption to the auction.

Harry attends a public auction of a house he intends bidding for. Shortly after the auction starts he sets off a stink bomb. It is not possible to resume the auction until the fumes from the bomb have dissipated, which takes 30 minutes. Harry has caused a major disruption to the auction and has thus committed an offence against sub-section (5).¹⁷

Sadly this is one of the examples that didn't make it into the law that was passed by our Parliament. However, if it had been, it would have caused the courts a headache, as my first example, which arguably is attempting to limit the scope of the provision, isn't, according to our Interpretation Act, allowed to do so. On the other hand, courts follow the general principle that they must attempt to give some meaning to a legislative provision. This is the primary reason why I have recommended that other jurisdictions modify the Victorian Interpretation Act provision if they intend to head down the track we have taken.¹⁸

It doesn't take much imagination to think of some of the possibilities that would open up if examples were able to both expand and limit provisions at the same time. For instance, drafters would be able to attempt to put boundaries on concepts such as what is "reasonable" in particular circumstances by providing examples of what is, and what is not, reasonable (in much the same way as I tried to do in the last example with respect to what was, and what was not, a major disruption).

Explanatory notes in amending legislation

It has been the practice for some time now of one Australian jurisdiction, the Australian Capital Territory (A.C.T.), to include an explanatory note immediately after every one of its amending

¹⁶ For non-Australian readers, this refers to a local religion we have known as "Australian Rules football". Essendon and Carlton are 2 of its chief denominations, and the MCG is its chief shrine. I encourage you all to experience its ceremonies at least once in your life.

¹⁷ This example is critically discussed by Paul O'Brien, one of my colleagues and fellow advocates of the use of examples and notes, in "Use and misuse of examples", published in the March 2005 edition of *The Loophole* at p. 50.

¹⁸ See the discussion above under the heading "A threshold issue".

provisions in its statute law revision Acts. These are Acts that make a variety of minor technical amendments to other Acts. In Australia generally explanatory notes normally appear all together as a separate document that is either physically attached to, or that accompanies, the relevant Bill. Often these notes simply paraphrase the provisions of the Bill which they explain, but they can be used to provide material as to why an amendment is being made, how it fits into the scheme of things and how it is intended to work, among other things. They can also include examples. In some Australian jurisdictions these notes are written by the drafter of the Bill, in others by the instructing department.

The A.C.T. practice is something that I commend to your attention. There is obviously a concern that if a provision is to be inserted as an amendment, and that provision has a note or example, in the amending provision you will have both that note or example and the explanatory note that accompanies the amending provision.¹⁹ There is some danger that readers may feel overwhelmed by all of this subsidiary material, and in fact it has been my observation that the text of the law does tend to get buried a bit at times in these A.C.T. Acts, despite the fact that obviously a lot of effort has gone into making these laws both visually effective and attractive.

However, taken as a whole I believe it is an initiative that is well worthy of consideration for use on a wider basis. It is also a welcome reversal of a trend in Australia towards the increasing incomprehensibility of amending laws. Unfortunately, of course, it has significant resource implications as there is no point in heading down this path unless the notes contain helpful explanatory material. As I think it is fair to say that the majority of explanatory notes in Australia are anything but explanatory, it means that much more work than occurs now would need to be done if the A.C.T. model was adopted.

Hidden benefits

It has always been a practice of mine to test any provision I have just drafted by mentally running notional examples through the provision to ensure that the provision will work in the way that I intend it to work. I think most, if not all, drafters do the same. It has been my experience that the practice of physically writing out an example and describing how the posited scenario and the intended provision interact for the purpose of including the example as part of a Bill often results in me finding deficiencies in my work that I did not notice in running examples through my head. Although that does not seem to be a particularly startling observation, I suspect it may come as news to some drafters.

The starkest illustration of this at work occurred several years ago. I was preparing a number of examples for an exposure draft. The wording of the draft had already been approved, but I had been asked to illustrate several of its provisions with examples. I was writing a fairly straightforward and short example for a relatively minor sub-section. The section itself was the fundamental section of the particular scheme I was working on, but the particular sub-section dealt with an incidental matter. As I was writing the example and thinking through how it would work, I quickly realised that I had not drafted the section to cover circumstances like those I was setting out in the example, even though those circumstances would often occur in practice. It became necessary to completely rewrite the whole section, and to restructure the part that it was in.

Anyone looking at the law now would not realise how close it came to having a significant deficiency, nor that the act of writing an example had prevented that deficiency from being in the law.

I have also had several experiences where a department has changed its policy after seeing one of my examples illustrating a provision giving effect to its policy. In one case a department had asked me to illustrate a particular aspect of a provision. To be able to do that I had to use an example that covered the provision as a whole. The Bill into which the example went was then released as an exposure draft for public comment. The feedback was such that a significant change had to be made to the provision. No one appeared to have any concern about the aspect of the provision that had led to the request for

¹⁹ I note that the explanatory note falls by the wayside when the amendment actually occurs. I should also mention that the Victorian Law Reform Commission in the late 1980s strongly advocated the adoption of the practice of placing explanatory notes with the provisions they were explaining.

the example—the problem was that the example demonstrated the width of the provision as a whole, and this width, which had previously gone unnoticed, became noticed.

Another example I prepared, again at the request of a department, brought to light problems that had not previously been considered and that the department would have been likely to face in enforcing the provision. This resulted in a significant change to the provision.

The crowd roars

Unfortunately humble legislative drafters such as I do not have any means of testing our work with users of legislation in any sort of scientifically meaningful way. If there is something drastically wrong with what we do, we do get to hear about it fairly quickly, but otherwise our efforts usually disappear into a feedback void. This is of course very disappointing on those occasions when we try to do something to attempt to improve our work from a plain English point of view. In Victoria we have had the experience of making fairly radical changes to our Bill format without anyone really noticing.

Therefore the experiences I have had with notes and examples have come as a pleasant surprise. Not that anything earth-shattering has happened, but if you have managed to read through all of the examples I have set out above, you may have noticed that in several of the cases I noted that the note or example being described was inserted at the request of the relevant department. In fact it has been my experience that the majority of the notes and examples that I have inserted in laws have been inserted at the request of departments. This majority does not include those cases where the insertion of a note or example is the result of a compromise on some issue of contention between a department and me. Admittedly these requests sometimes occur as the result of my either suggesting or recommending the inclusion of a note or example, but by and large the most common circumstance is that I insert a note or example in a Bill, and I am then asked to insert a note or example elsewhere in the Bill, quite often in a completely different context. In a recent set of instructions the following appeared:

... To ensure clarity we suggest that a note be included under the provision to state that in addition to [various specific matters] this includes [various other specific matters]—helpful examples may be found in section xx of the xxx Act.

This was interesting because the authors of this request, unlike me, were not involved in amendments to the xxx Act which inserted the "helpful" examples, although they would have read the amendments as part of their duties. And, the context in which this request was made was very different from the examples to which it refers.

Given that bureaucrats are in practice our main audience when we write laws, although that observation may shock some,²⁰ it is quite pleasing that those bureaucrats who have been exposed to the sorts of notes and examples I am advocating find them sufficiently helpful and useful so as to actually request them.

There was also an interesting occurrence in relation to the first Bill in which I used narrative examples. The Bill was introduced into Parliament, but then lapsed when an election was called before the Bill had been passed. When the Bill was re-introduced after the election the examples had been removed (as a result of a decision made in our Office, rather than by the relevant department), but otherwise the Bill was unchanged (as the election had not resulted in a change of government). Shortly after the Bill was re-introduced an article appeared in the press reporting that the Bill had been

²⁰ To further explain my observation, I have been writing laws for almost 20 years. In that time all of those laws would have been closely read by bureaucrats, both in the process of making them, and in the process of implementing them. Those laws would also have been read by a relatively smaller number of politicians. Some of the laws, or parts of those laws, would have been read by lawyers, but relatively speaking very few lawyers would have done so (in my experience it is fair to say that the cannabilised expression that applies to laws and lawyers is: "when all else fails, but not before then, read the Act"). Some minute fraction of all that I have written would have been read by some judges. Some of my work would also have been read by those to whom particular laws apply and by members of the public, but again I suspect that the overall number of such readers is quite small.

introduced, and describing the main features of the Bill. The interesting thing was that the article used several of the examples that had originally appeared in the Bill to explain what the Bill did, even though those examples were no longer in the Bill.

This experience highlights another aspect of narrative examples, in particular, that has yet to be explored: they may enable drafters to communicate with citizens through secondary means such as the press. For instance, most of the Bills I write are reported in the press once they are introduced into Parliament. The reports are usually based on press releases issued by the government. I have never had any effect on what appears in those press releases (nor, I must admit, have I ever had an interest in having such an effect). It is very very rare for the media to reproduce any part of any Bill I have written. Yet in the case of my first narrative examples Bill, which I have just described, I had significant slabs of my examples reproduced word for word in a newspaper report. Far more citizens would have read those examples than would have ever read anything else that I have ever done.

Because narrative examples tell stories, and the prime means by which the media communicates is also by telling stories, there is potentially great scope for the media to be interested in repeating the stories in laws, particularly given that it needs to report information about laws in any event.

Finally in relation to feedback, I should also mention that I have had a situation where an Opposition member of Parliament has sought to have a detailed example inserted into one of my Bills. I assisted the member (as part of my normal duties) to prepare a House amendment to do that at the Committee stage of the Bill. The member had become aware, in consulting on the Bill before it was debated, that a particular section of the Bill was not well understood by the industry groups to which it was to apply. He had planned to move an amendment to that section which would have further complicated the section. I recommended to him that he include an example to help make his proposed amendment clearer. This was agreed to. However, he then decided not to proceed with his amendment, but thought that the example, suitably modified to remove references to the change that had been proposed, would help the relevant industry groups to understand the provision as drafted by the Government. He thus moved an amendment whose sole purpose was to insert an example to a Government provision.²¹ For various political reasons the amendment was not allowed by the Government.

The dark side

But isn't it dangerous to use notes and examples? Can't they be misused, or overused? Yes, yes and yes. They can be dangerous, they can be misused and they can be overused.

Dangerous

Anything and everything that appears in a law can be “dangerous” in the sense that it might be used in a way that was never intended, and might have the effect of causing the law to be interpreted in a way that was never intended by the drafter of the law or by the drafter's instructors. I contend that notes and examples are no more dangerous in this sense than anything else in the law, and that if they are used with a bit of intelligence and care they will considerably enhance the prospect that a law will be understood as it was intended to be understood. Used with intelligence and care, notes and examples also have an enormous potential to ensure that a law is understood by far more people than might be the case if they are not used. At the very least notes and examples have the potential to save readers of laws much time by explaining how a provision of a law fits in with other provisions of the law.

Given the potential benefits of notes and examples I think the risk of having a mistake in a note or example causing a law to be misinterpreted is well worth taking. And in a jurisdiction such as Victoria, for instance, it is possible that a note or example may help overcome mistakes in provisions themselves. I refer, for example, to the hypothetical example I posited earlier in this article which might enable electricity to be considered to be an “article” in an infelicitously worded provision.

I should also say that I hope nothing I have said in this paper suggests that I think that the drafting of notes and examples is in any way a less demanding activity than the drafting of the operative

²¹ *Hansard*, Legislative Council, p. 75 (15 December 2004).

provisions of laws. Notes and examples should be drafted as if they were part of the law even in those jurisdictions where they are not formally part of the law.

Misuse

With respect to misuse, Paul O'Brien, one of my colleagues, has already produced a paper entitled "Use and misuse of examples".²² With respect to misuses, he cites examples of examples that contain material that really should have been in the provision to which the example is attached. This is a very legitimate concern, and I have seen a number of other examples of it myself. In fact there is sometimes a very fine line as to where material should be placed. However, certainly in jurisdictions that have Interpretation Act provisions like Victoria's, this particular misuse probably doesn't matter all that much in terms of the legal effect it has, as the material in the example has to be read as part of, and as extending, the provision.

Another misuse cited is the failure in examples of offences to make it clear that various defences may apply. This is a failure of which I have been guilty, but I am not sure that I see it as a misuse. I would prefer to characterise it as an area where the wording of examples could perhaps be refined. Rather than to throw the baby out with the bathwater, in my opinion the concern expressed would be better dealt with by inserting an appropriate disclaiming phrase concerning other possible defences.

Paul's paper also examines the use of colloquial language in examples and the use of names in examples. The first does not concern me—in fact I must admit I am still exploring where the edges of the envelope are in respect of what is considered to be colloquial. My findings to date are that there is enormous variation in what people consider to be colloquial. I am also of the view that non-extreme colloquialisms may be quite helpful in making examples, in particular, more readable.

The same applies, with bells on, with respect to the use of names. Even though I agree that the use of names may raise problems with respect to gender or ethnic stereotyping if they are not used with care, these problems are far outweighed by the plain English benefits of using names. Rudolph Flesch made the following comment after reproducing several examples:

There's one flaw, however, in all these examples: the people mentioned don't have names. Yet nothing adds more realism to a story than names; nothing is as unrealistic as anonymity. Imagine a story whose hero has no name! If you ever read Franz Kafka's nightmarish novels about "K", you will know what namelessness does to a story.²³

Overuse

With respect to overuse, I do not advocate the use of notes and examples for the sake of using them. I still occasionally write laws that do not contain a single note or example. However, given that only a minority of jurisdictions appear to countenance their use, and that only a minority of drafters appear to be comfortable using notes and examples in the jurisdictions where they are countenanced,²⁴ at present I see under-use as being of more concern than overuse. I am happy to take the chance that my advocacy of the use of notes and examples will result in me having to write a paper entitled "Enough is enough—why we don't need to use so many notes and examples" in 5 years or so.

But isn't it an admission of failure?

Although I have not heard anyone state that competent drafters should not need to use notes and examples because their work should be so clear that the subsidiary explanation provided by notes and examples should be unnecessary, and that therefore the use of notes and examples is really an

²² Paul O'Brien, the work cited in note 17.

²³ Flesch, the work cited in note 8, at p. 80.

²⁴ In Victoria I would roughly estimate on the basis of my observations of Victorian laws that about a third of my drafting colleagues are regular or semi-regular users of notes and examples. In the other jurisdictions my comments are based on a quick and totally unscientific survey of randomly chosen laws or volumes of laws from those jurisdictions.

admission of incompetence or failure, that is probably only because of the hermit-like existence I lead as a legislative drafter. But it is an argument that I can see may be of concern to some drafters. It therefore needs to be addressed.

First, there are things that drafters do that, with the best will in the world and regardless of their ability, cannot be expressed in a way that is not going to cause some head-scratching by readers—for instance, there are all sorts of limits that restrict what drafters can put in a law. Notes and examples are a means by which this head-scratching can be reduced, and these limits side-stepped. It is a means that is an aid to readers, not an admission of failure.

Second, it is hopefully clear from a number of the examples of notes that I have presented in this paper that they provide information that is intended to save readers time. Sure, everything in a relevant law may be perfectly understandable if you read the whole thing, but it can be enormously helpful if you can be given a glimpse of some of the interconnections that exist without having to read each element before you are able to understand how everything works. And, of course, lots of readers of laws, particularly in this day and age, only ever read bits of laws—there is a real danger that those readers won't ever get to find out that what they read is incomplete.

Third, I refer doubters to the work of the plain English pioneers—we really are talking about a tool to make our work easier to read. In fact it is my hope that within the not too distant future the use of notes and examples in laws will be universally seen as the mark of a highly competent legislative drafter.

The frontier of a new dimension: a challenge

In conclusion, it is my strong belief that the use of notes and examples in laws places us on the edge of a new frontier—the frontier of a new dimension in communication by drafters. As I have shown, I have only taken tentative exploratory steps in this dimension, but what I have seen to date excites me tremendously. It is my hope that you will not only join me and share my excitement, but that you will leapfrog me and everyone else who has begun to explore this new dimension.