

PLAIN LANGUAGE AND DRAFTING IN GENERAL PRINCIPLES

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A SPECTRUM OF STYLES

1 We are used to hearing about 3 different styles of drafting - traditional drafting, plain language (also called 'plain English'), and drafting in general principles (also called the 'European style'). It is easy to think that these are completely distinct styles, and that laws fall clearly into one group or the other.

2 However, I think this view over-simplifies the position. In the complexity or simplicity of the language, these styles are segments of a continuous spectrum. They have names because in their typical form each is easily recognisable, but in practice they can merge into each other. A law may fall anywhere within this spectrum, and indeed different provisions of the same law may have aspects of all three styles.

3 This might be regarded as purely academic, or merely obvious. But I think it is useful to recognise this fact because it helps to clear up some misunderstandings, particularly about plain language and general principles drafting. Most importantly, it has serious implications for the role of the drafter vis a vis the policy-makers.

4 The three styles can be regarded as on a continuous spectrum if one looks only at the actual writing: the use of words. The traditional style is at one end. Plain language is in the middle. General principles drafting is at the other end. At one end are long, complex provisions, long words and traditional legal expressions. Along the spectrum the sentences and the words become shorter and simpler, and at the other end are extreme brevity and simplicity. Another way of describing this is a continuous progression in readability.

5 However, the legal precision (sometimes called 'certainty') of these styles also differs, but not on a continuous spectrum, and therefore not in strict relationship to the simplicity of the language. The main purpose of this paper is to discuss this fact and its implications for drafters.

THE DIFFERENT STYLES DESCRIBED

Traditional drafting

It is unnecessarily complex

6 Most drafting offices in the English-speaking world inherited the traditional style of legislative language used in the United Kingdom in the 19th century. Not only were drafters trained in this style, but they were influenced by the language of existing statutes. Drafters learn their art from studying and amending existing laws, and in this way the language of the 19th century continued its influence into the 20th century.

7 The judiciary are not above criticising the complex language of statutes, but they are partly responsible. All lawyers learn the law from studying judgments, so they are imbued with the language of the judiciary. This too is a mechanism for perpetuating the formal style of the 19th century. With few exceptions, even today the language of judgments is full of excessively long sentences, interspersed with parenthetical phrases and qualifications.

8 Another, very important, factor in the development of the traditional style is the need for precision. Drafters formed the habit of drafting with extreme caution, in the attempt to

leave no room for misunderstanding or deliberate distortion of the meaning. They tried to avoid all possible ambiguity. This was often carried to extreme lengths.

9 These factors have resulted in a style that uses long, involved sentences, archaic legal expressions, Latinisms, and pompous language considered suitable for use in Parliamentary procedures. Not surprisingly, it is often very difficult to read and understand.

10 Modern drafting in some jurisdictions still shows the strong influence of the traditional style. It is very difficult for drafters to shake off the bad habits gained from constantly studying and amending laws expressed in the traditional style, and many traditional expressions are still being used when there are simpler forms available.

It is precise

11 Despite its bad features, the traditional style has one clear virtue: it can be, and usually is, very precise. A law drafted in this way gives effect to the wishes of the policy-makers. If they want it to do A, B and C, it does so. It does not also do E, F or G. It is also intended to have this effect from its terms, not from reliance on the courts or some other authority to flesh out the details.

Plain language drafting

The goal of simplicity

12 There is nothing new about writing in plain language. It was the style of Mark Twain, George Orwell, Ernest Hemingway, Winston Churchill and many others. Notable judicial writers of this style have been Justice Oliver Wendell Holmes and Lord Denning.

13 Rules for plain language were laid down at least as long ago as 1931, in the 3rd edition of Fowler's *The King's English*, as follows:

- Prefer the familiar word to the far-fetched.
- Prefer the concrete word to the abstract.
- Prefer the single word to the circumlocution.
- Prefer the short word to the long.
- Prefer the Saxon word to the Romance.

14 More recently, writers in the United States of America, Canada, Great Britain and Australia have laid down rules along similar lines for good style in official documents and legal writing.

15 These rules are excellent in themselves, but for legislative drafters they seldom go far enough. Drafters have a particular difficulty in avoiding the bad features of the traditional style, and at the same time keeping the right level of precision. Also, the policy of legislation is often extremely complex.

16 Laws are usually written for a variety of users, and they are also read by administrators, members of Parliament, lawyers and the judiciary. Legislative drafters are possibly the only people who habitually write highly technical documents for such a wide range of readers. This makes their task all the more difficult.

A four-fold strategy

17 The strategy of the Australian Commonwealth drafters¹ is to focus on four aspects of drafting style.

- First, to plan the draft properly. This includes:
 - identifying all the main goals and principles as early as possible, and leaving the details till the main structure is worked out;
 - reducing the number and complexity of the concepts in the scheme;
 - constructing the scheme clearly, using diagrams and flow-charts if necessary, before beginning to express it in legislative form.
- Second, to use the well-known rules of simple writing. These include:
 - using short, well constructed sentences;
 - avoiding jargon and unfamiliar words;
 - using short words;
 - avoiding double and triple negatives;
 - using the positive rather than the negative;
 - using the active voice instead of the passive voice;
 - keeping related words as close together as possible: for example, not separating subject from verb, or auxiliary verb from main verb;
 - using parallel structures to express similar ideas in a similar form: for example, not mixing conditions and exceptions, and not mixing 'if' and 'unless' clauses.
- Third, to avoid traditional legal forms of expression if simpler expressions can be used instead. These are a few examples:
 - avoiding the traditional habit of constantly referring back from one subsection to the previous one, by simply saying 'The application' instead of saying 'An application made by a corporation under subsection (1)';

¹ This paper is written in my capacity as head of the Office of Parliamentary Counsel. However, I should make it clear that the Office of Legislative Drafting in Canberra (responsible for drafting delegated legislation) shares our views.

- avoiding the expression 'Notwithstanding anything to the contrary contained in the XYZ Act' by simply saying 'Despite the XYZ Act';
- avoiding the expression 'An appointment shall not be called in question on the ground that ...' by simply saying 'An appointment is not invalid merely because';
- avoiding the traditional form 'A person who has attained the age of 18 years' by simply saying 'A person who is 18 or over';
- avoiding the traditional practice of spelling out internal references in the form 'section 5 of this Act' (or the more modern version 'section 5 above') by simply saying 'section 5'.

(There are so many of these types of traditional expression that there is not enough space to list a representative number of examples.)

- Fourth, to use aids to understanding which are not merely linguistic. These are based on the perception that making a text easy to understand is not just a matter of language. Many other factors can help the reader. Some examples of these aids used by our office are:
 - using graphics, like a flowchart showing the steps in applying for a patent, an illustration of licence aggregation under the broadcasting law, or flowcharts showing how various transactions are affected by the sales tax laws;
 - using 'Reader's Guides' to explain how to read very long Acts;
 - using examples to illustrate how a law applies in particular cases;
 - using purpose clauses, not only at the beginning of Acts, but also at the beginning of Parts, Divisions and Subdivisions²;
 - expressing calculations by directing the reader to take a series of steps, instead of just stating a formula;
 - using 'road map' clauses which tell the reader how the Act is structured and which are the key provisions;
 - using short sections, to concentrate on the main purpose of each section and also increase the number of section headings;

² The Renton Committee recommended these (*The Preparation of Legislation*, Report of a Committee appointed by the Lord President of the Council, chaired by the Rt Hon Sir David Renton, May 1975, Cmnd 6053, para 11.8). On the other hand, the Hansard Society Commission recommended against them, because of the risk of conflict with the detailed text. (Pp.60-61, recommendations 239-242. This Commission is more fully described in paragraph 35 below). We think that they are so helpful to the reader in assembling the detailed provisions that the risk is worth taking.

- using explanatory notes in the text to draw attention to important definitions and other key provisions;
- making algebraic formulas 'user-friendly' by using words instead of the traditional a, b, c, symbols;
- avoiding long slabs of unbroken text by breaking them up into smaller units. The New South Wales Parliamentary Counsel have a '5 line' rule which we are trying to emulate.

It is precise

18 All these rules and practices are designed to achieve a single purpose. That is, to make the law easier to understand, but without changing its meaning. Writers on plain language may suggest different techniques and approaches, but they agree on one thing - that the application of the rules does not change the substance of the text. It just makes the text leaner and cleaner, and therefore easier to read and understand.

19 This means that plain language drafting does not differ from traditional drafting in its legal effect. It is intended to be just as precise as traditional drafting.

Loose plain language drafting

What it is

20 Further along the spectrum from plain language drafting is what I might call 'loose plain language drafting'. This is more difficult to define than the others, but I think it should be identified, because it should be avoided.

21 In one sense it is plain language, and people who use this style call it plain language. However, it arises from emphasising simplicity at the expense of precision. In attempting to keep the text as simple as possible, drafters take a more liberal view as to the words that can be dispensed with, so that the remaining words become unclear. It is not precise, so it is not true plain language drafting.

How it happens

22 The style resembles general principles drafting, in that general expressions are used and details are left out. However the important difference between this style and general principles drafting is that in loose plain language there is no conscious intention to leave matters of detail to be determined elsewhere. The drafter intends the draft to be as precise as plain language, but the draft is not precise. The drafter inadvertently drifts into general principles drafting.

23 Reasons for this style are :

- Concentrating too much on style and not enough on the legal effect.
- Mistaken decisions as to how much detail is necessary to give precision.

- Lack of experience in legislative drafting, for example when exponents of plain language writing try their hand at legislation.

An example

24 To explain this fully it is necessary to give a real example. An Act defined an acquisition of shares in a particular company by referring to a person acquiring an interest in the shares as a result of 'a transaction ... in relation to those shares, in relation to any other securities of that company, or in relation to securities of any other corporation'. The word 'transaction' therefore had 3 qualifiers.

25 Some exponents of plain language writing (not professional drafters) produced a redraft of the Act. The redraft of this provision used the word 'transaction' but without any qualifiers. The writers thought that the qualifiers were unnecessary.

26 The unqualified word 'transaction' was certainly wide enough. However it was far wider than the qualified word in the original. The policy was therefore changed. On the other hand, a court might have come to the conclusion that the word was so wide that it had to be construed narrowly.

- The court might have construed it as acquiring an interest in the shares concerned (the first qualifier). This would have been far narrower than the original.
- The court might have construed it as acquiring an interest in the shares concerned or an interest in any shares of the company concerned (the first and second qualifiers). This would still have been considerably narrower than the original.
- Of course, the court might have construed it as meaning exactly what the original meant. However, this would have been only one of several options confronting the court.

In the result, although the 'plain language redraft' was much simpler and shorter than the original, the meaning was unclear.

Its dangers

27 Loose plain language drafting is dangerous, for two reasons. First, although it looks like plain language drafting, it is not precise. Secondly, although it resembles general principles drafting in its effect, it is not drafted under the safeguards that should apply to that style. These safeguards are dealt with below.

General principles drafting

What it is

28 By this term I mean the style used when the drafter deliberately states the law in general principles and leaves the details to be filled in by the courts, by subordinate legislation or in some other way. This has also been described as the 'European style' of drafting.

29 The distinction between this style and the traditional English style was summarised by the Renton Committee in the following terms³:

... the traditional approach in Europe has been to express the law in general principles, relying upon the courts and the executive to fill in the details necessary for the application of the statutory propositions to particular cases ... This approach appears to result in simpler and clearer primary legislation where detail is omitted, but equally it lacks the greater certainty which a detailed legislative application of the principles would provide. Here [Great Britain] on the other hand the traditional approach has been to spell out in the statutes themselves the precise way in which the law is to apply in differing circumstances. This gives greater certainty in respect of the circumstances provided for, and it is not necessary to wait for rulings by the courts on particular applications; but it leads to more complex legislation which is less clear to the ordinary reader.

Is it really the European style?

30 It is not the purpose of this paper to go into the question whether the continental Europeans really draft in general principles. The question is dealt with thoroughly by Sir William Dale in a comparison between English and continental drafting styles⁴. He is clearly of the view that continental statutes are better drafted than English statutes, but he points out that some are very detailed. On the question of general principles drafting, he concludes `... the common idea, that continental legislation is drafted only in terms of principle, is demonstrably mistaken.'⁵

31 This conclusion was supported (as regards French law) at a Franco-British Conference on British and French Statutory Drafting, held in London in April 1986. One expert on the French system explained the French drafting process. He said this⁶:

I ... think that this examination is going to have a few surprises for us. We shall probably find that, contrary to what we expect, there is in the [Acts] in France very often a great deal of substance, and sometimes almost as much as in British Acts.

He then went on to explain that the French system relies heavily on regulations to apply the principles laid down by Acts. Indeed, under the constitution, in certain areas of law such as defence, education and social security, Parliament is to lay down the fundamental principles only, while the regulations apply those principles⁷.

He then said⁸:

³ *Ibid*, para 9.14.

⁴ *Legislative Drafting: A New Approach*, London, Butterworths, 1977.

⁵ *Ibid*, p.333.

⁶ M. Jean-Paul Costa, Rapporteur-General du Section des Rapports et des Etudes, Conseil d'Etat. Report of Proceedings, published by the Institute of Advanced Legal Studies, London, p.3.

⁷ *Ibid*, pp.6-7.

⁸ *Ibid*, p.8

I should like to add here that our laws in France are very often too detailed. In 1958 we had imagined a system, particularly under the second part of article 34 of the Constitution, of laws and decrees under which the law would fix the principles and the details would be in the implementary decrees. However, in reality the Parliament, and even the Government itself when it proposes laws, tend to put a great deal into the law. That is why I said just now that when we compare French laws and British statutes we very often find there is less difference than one might have expected. I think that since 1958 the trend has been to put an increasing number of rules into the laws, which of course poses problems.

Does it fit the common law tradition?

32 Leaving aside the question to what extent the continentals use general principles drafting, it is useful to consider the style in the context of the common law tradition.

The Renton Committee

33 The Renton Committee's recommendation on general principles drafting reflects the difficulty of balancing the aims of simplicity and precision⁹:

The adoption of the 'general principle' approach in the drafting of our statutes would lead to greater simplicity and clarity. We would, therefore, like to see it adopted wherever possible. We accept, however, that this approach to a large extent sacrifices immediate - though not eventual - certainty and places upon the courts a heavier responsibility in identifying the intention of the legislature when applying legislation to particular circumstances. We recognise that this is unlikely to be acceptable to the executive and the legislature in certain types of legislation, particularly fiscal and other public law which defines the rights and obligations of individuals in relation to the State, and we consider that it would in any event be unreasonable to draft in principles so broad that the effect of the statute could not be assessed without incurring the expense of litigation to determine an issue.

Sir William Dale

34 Sir William Dale does not recommend it specifically in his book. He is more concerned with the total process of law-making on the continent, and makes a number of recommendations to bring British drafting closer to that process¹⁰.

The Hansard Society Commission

35 A Commission appointed by the Hansard Society for Parliamentary Government in 1991 reported on the legislative process in Great Britain. On the question of general principles drafting, its recommendations were as follows¹¹:

⁹ *The Preparation of Legislation*, para 10.13.

¹⁰ *Op. cit.*, pp. 331-341.

¹¹ *Making the Law*, Report of the Hansard Society Commission on the Legislative Process, chaired by the Rt Hon Lord Rippon of Hexham. Published by the Hansard Society for Parliamentary Government, London, November 1992. P.60, recommendations 238-9.

We begin by rejecting the idea that the European style of drafting should be generally adopted in this country ... we would be strongly opposed - as we believe most Members of Parliament would be - to making statute law as general as it often is in other European countries, with the almost certain consequence that there would have to be much more recourse to the courts to settle disputed interpretations of Acts. Court proceedings are expensive for all concerned and the need for people to go to court should not be expanded ... We firmly believe that certainty in the law must be the paramount aim in the drafting of statutes.

Users of the law

36 Turning to users of the law, it is not surprising that they like to know their rights and obligations. In Australia, the industry often insists on detailed statements. In the Broadcasting Act the expression 'commercially viable' was used in the early 1980's. At the request of the industry, this two-word expression was defined in 1991 in a provision 13 lines long. As the result of a further request, another definition was drafted - at first 33 lines long, it has now shrunk to a mere 17 lines.

37 The Fringe Benefits Tax Assessment Act 1986 of the Australian Commonwealth was originally criticised for its extreme length and complexity. However, in the March 1991 edition of 'Taxation in Australia' it was stated that employers and their executives are praising the Act because it has brought certainty and openness into the issue of tax liability on fringe benefits. The article also suggested one of the reasons why there is little legal activity on the Act is that while the legislation is of daunting length, its application is relatively straight-forward.

38 In the context of corporations law, speaking at a Conference held in Parliament House in Canberra on 6 March 1992, the Attorney-General of Australia said this:
The law is already too general for some practitioners. They want the law spelt out, and not left to bureaucrats or courts to interpret. For example, when I exposed the insider trading provisions for public comment a little over 12 months ago, although a few submissions called for simpler drafting, a majority sought greater detail in the provisions in order to clarify whether particular factual situations did or did not come within the provisions ...

Legislators

39 Legislators in the common law countries expect to be able to know the exact legal effect of a proposed law. Under the drafting tradition in the common law countries, even if a Bill is extremely complex, there should be a definite answer to most questions, and the responsible Minister should be able to give explanations. On the other hand, with general principles drafting there would be areas where it would be anyone's guess how the courts would interpret a provision. There would be many questions that nobody could answer until they had been settled by the courts.

40 Moreover, politicians often make deals in Parliament to get legislation passed, and these often require provisions to be worded with great precision.

The courts

41 The courts have to take the laws as they find them. However, I suspect that they would not like having a legislative role added to their existing duties. This would be a

fundamental change in the traditional role of our judiciary. Although the judiciary often criticise complex legislation, judicial statements in Australia suggest a lack of enthusiasm for such a change.

42 At the Australian Legal Convention held in Canberra in 1975, Sir Ninian Stephen, then a Justice of the High Court of Australia, said that he was not disposed to favour the judges performing the law-making role that the continental legislative system would seem to impose on them¹².

43 In construing a Victorian Act, the Victorian Supreme Court said¹³:
... the legislation is couched in general terms which omit to make Parliament's intention clear and thus greatly increase the work of the courts. If Acts of Parliament are couched in general terms which do not make Parliament's intention clear much time is taken up in the courts by arguments as to the meaning of the section and how the court should apply it. Costs and delays are increased and injustice may follow.¹⁴
In drawing attention to the problems created by legislation of this kind we do not wish to be understood as being critical of the draftsman of the legislation. We recognise the difficulties involved: but we do wish to draw attention to the consequences of drafting in general terms. No doubt such drafting is often prompted by a desire to simplify legislation. Unfortunately attempts to do so usually leave a number of questions unanswered. They also very often leave the courts without guidance as to how the questions should be answered and when dealing with legislation the court's only task is to interpret and apply the law laid down by Parliament. The courts cannot be legislators.¹⁵

44 The court was considering the Penalties and Sentences Act 1985 of Victoria. This Act was drafted in accordance with the views of certain plain language writers and was not a deliberate attempt to draft in general principles. However, it can be inferred from the judgment that the drafter had drifted inadvertently into general principles drafting, and the views of the court are relevant to that style.

45 Another judicial comment in Australia was made by the Chief Justice of Australia, Sir Anthony Mason. In an address¹⁶ in 1992, he made a number of remarks about the complexity of Commonwealth statute law, and the corporations law in particular. He criticised the corporations law because of its complexity, mainly on the ground that there was an over-insistence on detail. However he said:

... I am by no means convinced that recourse to ... drafting techniques - sketching the broad outlines and leaving the courts to fill in the large interstices and concentrating on

¹² Quoted by Geoffrey Kolts, O.B.E., "Observations on the Proposed New Approach to Legislative Drafting in Common Law Countries", *Statute Law Review*, Autumn 1990, p.148.

¹³ R v O'Connor [1987] V.R.496.

¹⁴ P.499.

¹⁵ P.500.

¹⁶ Given at a dinner following the 1992 National Corporate Law Teachers' Workshop on 3 February 1992.

plain English - will solve the problem, though I acknowledge that these techniques offer some scope for improvement. The ... techniques may create as much uncertainty of a different kind until the courts spell out the detail and may generate a greater need for recourse to the courts in order to fill in the interstices.

The Ten Commandments: an illustration

46 The advantages and disadvantages of general principles drafting are epitomised by the Ten Commandments. Take two of them - 'Thou shalt not kill', and 'Thou shalt not steal'. They are so simple that everybody thinks he or she understands what they mean. But consider how the courts have developed these statements of principle. They are still finding new things to say about murder, and they made the law of theft so elaborate that the English Parliament had to pass a series of statutes to sort it out, and we have similar statutes in Australia.

WHICH STYLE SHOULD WE USE?

Plain language drafting

Plain language: simple and precise

47 The first duty of the drafter is to give effect to the policy of the sponsors of the law. Almost as important is the duty to make the law as simple and as clear as possible. Plain language drafting undoubtedly makes the law simpler, and when done properly it is just as precise as the traditional style. The case for drafting in plain language is overwhelming.

48 Of course no sensible drafter maintains that it is possible to achieve complete certainty. This is inherent in the nature of language. However, drafters try to achieve as much certainty as they reasonably can¹⁷. By this I mean that if a draft clearly covers A, B and C, but is not clear about D, and the policy-makers want to cover D, the drafter tries to find words that clearly include D.

The drafter's role

49 How this is done, and to what extent, is the responsibility of the drafter. It often requires delicate judgment to decide whether a particular phrase is sufficient to have the right effect, or whether additional words are necessary to give the right degree of precision.

50 The obvious excesses of the traditional style must be avoided, but over-emphasis on plain language techniques, without sufficient regard to precision, can sometimes result in the law being unclear. These questions must be decided by the drafter alone. The policy-makers have no significant role in this, for the purpose of the draft is to give precise effect to their policy.

¹⁷ The Renton Committee gave an excellent description of the levels of certainty aimed at by traditional drafters and modern drafters: *The Preparation of Legislation*, para 11.4.

General principles drafting

Policy too complex for simplicity and precision

51 However, plain language drafting is not the complete solution. Sometimes the policy is so complex, and there are so many detailed rules, exceptions and qualifications, that even a plain language rendering of the policy results in the law being extremely complex or inordinately long. Then general principles drafting should be considered.

Australian developments

52 In spite of the disadvantages of general principles drafting, the sheer volume and complexity of Australian Commonwealth statutes, particularly in the areas of tax and corporations law, have given rise to suggestions that there should be fewer rules. The Commonwealth Parliament passes an enormous quantity of legislation. For example, in 1991 it passed 7,000 pages, and although the exact number for 1992 is not yet available, it is likely to be of the same order.

53 Many of these laws are long in themselves. The Corporations Law, passed in 1989 and heavily amended in 1990 and 1991, is over 1200 pages long. It was amended again late in 1992 by an Act 238 pages long. The Taxation Laws Amendment (Foreign Income) Act 1990, which amended the income tax law, was 236 pages long. Obviously, laws of this length contain hundreds of rules, and they are extremely hard to master as a whole. In addition, the corporations law and the tax laws are amended so often that users do not have time to master one set of amendments before they are deluged by the next.

54 These facts have resulted in significant moves in Australia towards general principles drafting. In 1990 the Australian Taxation Office began to discuss with our office the possibility of drafting in more general statements. Some progress has been made in this direction already, and the two offices are exploring further opportunities for using this approach.

55 This may be illustrated by two examples:

- Section 69 of the Income Tax Assessment Act allows a deduction for expenditure in respect of *'the management or administration of the income tax affairs of the taxpayer'*.
- Subsections 102AAN(2),(3)and (4) of that Act provide for a rebate of tax *'of such an amount (if any) as is necessary to ensure that the rate of tax on [a specified amount] does not exceed 10%'*.

In both cases the phrases quoted would have required very long and detailed provisions if they had been drafted in a style intended to give certainty.

56 These, and other general principles provisions, were drafted with the approval of the Taxation Office. However, other suggestions made by the drafters for using general purpose statements in the tax law have been rejected by the Taxation Office because they did not wish to accept the uncertainty in those particular areas.

57 In the area of corporations law, Mr John Green, a Sydney solicitor, argued at a number of recent conferences that the law is far too detailed and over-specific. He criticised in particular

a Part of the Corporate Law Reform Bill 1992 that dealt with the duties of directors. He strongly recommended that a different approach be adopted, namely, to draft in general principles and leave the details to be worked out by the courts. Although he recognised that this was not a new proposal, he gave it a new name, 'fuzzy law'. This caught the public's attention and helped gain support for his arguments.

58 In response to public concern, the Attorney-General appointed a working party to explore the possibility of redrafting that Part of the Bill in more general statements of principle. The working party simplified the policy, and the drafter used general statements where the working party agreed that they were appropriate. The result, now known colloquially as the 'Related Parties' provisions, was a much shorter and simpler draft. It was passed at the end of 1992. Mr John Green generously complimented the drafter.

59 An illustration of the brevity of that draft is the definition of the phrase 'giving a financial benefit', which takes up 13 lines. It is followed by 6 examples, which together take up 14 lines. The corresponding provisions in the earlier version took up 170 lines, and had no examples.

The policy-makers decide

60 These experiences have helped our office work out rules for the use of this style of drafting. The most important rule is that the drafter should not impose this style on the policy-makers. The drafter's role is to advise, but the policy-makers must decide. Although the drafter may be attracted to the simplicity of a particular general statement, the policy-makers have to decide whether they accept the lack of certainty in its effect.

61 The next rule is that each provision should be considered separately for this treatment. The policy-makers may accept uncertainty in some cases, but not in others. The question is not simply whether a Bill should be a 'general principles' Bill or not. A Bill may contain as many, or as few, general principles provisions as the policy-makers decide.

62 The next rule is that the degree of generality of each provision must be decided. Here again, the policy-makers must make the decision. There is a huge range of levels of generality. For example, the whole of the liability provisions of the Australian income tax law could be expressed in 2 subsections - one for residents, the other for non-residents. However this would create uncertainty and inequity to a wholly unacceptable degree.

The drafter's role

63 The drafter has an essential role in all these decisions, even though they are made by the policy-makers. The drafter needs to be on the lookout for cases where this style might be used, because the policy-makers seldom have the expertise to recognise them. Then the drafter has to explain the options and get the policy-makers to decide.

64 Having found a suitable case, the drafter has these responsibilities:

- To tell the policy-makers how complex the detailed form is likely to be and how it could be drafted in a simpler form.
- To tell them about the areas of uncertainty with the simpler form.

- To make sure they fully understand the likely effect of the uncertainty.
- To discuss with them the degree of generality to be used.
- To discuss with them whether the details should be filled in by subordinate legislation or administrative rulings, or whether they should just be left to be interpreted by the courts.
- To remind them that just relying on the courts may be unacceptable in some cases. For example, people should not have to go to court to find out their pension entitlements.

Conclusion

65 Plain language drafting should be the fundamental style in all laws. It can make laws very much easier to understand. Done in the proper way, it can maintain the high standards of precision aimed at by the traditional style.

66 However, if the policy is so complex that it is impossible to keep the law simple and also precise, drafters should invite the policy-makers to consider expressing it in statements of general principle. This can reduce detailed, specific provisions to very simple statements, but results in less certainty. The policy-makers must decide in each case whether the lack of certainty is acceptable. They must also decide the degree of generality to be used.

67 If drafters take this approach, it is unnecessary to resolve the dispute whether general principles drafting should be adopted or rejected as a whole. A Bill might be wholly in plain language terms, or it might combine plain language with general principles, or in a rare case it might be entirely in general principles. But, so far as it is drafted in general principles, it will have the considered approval of the policy-makers.

Office of Parliamentary Counsel
Canberra
April 1993