
Book Review

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Piesse, *The Elements of Drafting*, 9th edn, JK Aitken
Law Book Company Sydney 1995, 137 pp.

The use of plain language in the writing of legal documents is rapidly gaining support in Australia. The phenomenon is more noticeable to the consumer because of exposure to plain language in instruments such as insurance policies, and consumer credit documentation. Further, large and not so large legal firms are consciously redrafting their precedents to conform to what they see as plain English requirements. We even are assured that the 'Tax Pack' is written in plain English for its users.

In the last decade, the most significant boost given to proponents of plain language has been the 1987 Victorian Law Reform Commission Report (No 9) *Plain English and the Law*. While directed towards statutory language and style, its recommendations have been applied to private legal drafting as well. It has performed a most useful function; legislation in Victoria and elsewhere has become easier to read for all concerned and improvements have spilled over into the drafting of legal instruments.

In 1991, the Centre for Plain Legal Language was established at the University of Sydney. This Centre promotes the use of plain legal language by a variety of means; preparing standard legal documents, providing consultancy services in the area, developing training programs and providing advice on plain legal language drafting and, if further evidence was needed on the enhanced position of plain English in the lexicon of legal language, the Queensland Law Society has recently (in 1995) created a Law Society committee on plain English.

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The first edition of *The Elements of Drafting* was compiled in 1946 from a series of articles written in 1941 by Mr E I Piesse and used by tutors when lecturing to law students at the University of Melbourne. Over the years and editions since, this book has been at the forefront of those Australian texts advocating the use of plain language and clarity of expression in legal instruments. It has had a lot of work to do. The Preface to the ninth edition takes some of the credit for the changes now sweeping the legal profession —

Mr Piesse's criticisms of faults then evident in drafting and the advocacy by him and in successive editions of this book of more modern methods have helped to contribute to the simpler and more straightforward style of drafting in use today and to the discarding, to a marked extent, of old-fashioned terms and unnecessary legal jargon ... Because many practices recommended by this book have been widely adopted and those condemned have become less prevalent, the text has been substantially revised.

The ninth edition covers much the same topic areas as the eighth edition, published in 1990. These relate to general principles — the intention of the parties as expressed in a legal instrument, and the basic drafting rules (as expounded in Davidson¹ in 1885; paragraphing; definitions; problems with particular language and words; drafting aids, expressions relating to time — as well as a discussion of words to which legal drafters seem emotionally drawn, but which serve no useful purpose. These words include the archaic words (this list is not exhaustive) 'heretofore', 'thereof', 'said' and 'aforesaid', 'hereinafter', 'hereunto', 'witnesseth', 'presents', to name a few but the book only deals with a select few — 'said', 'aforesaid', 'the same' and 'herein', the rationale for not covering the expanded list no doubt being that the other words are less commonly used and do not warrant special mention. This is perhaps a minor failing of the book, in that it is still necessary to provide reasons to some drafters, for wanting to eliminate the use of any one or more of these words — if it is there in a text, then they may accept that their favourite word is indeed redundant.

A chapter of the book is dedicated to the use of 'shall'. This is a particularly important subject; 'shall' is a word which to this reviewer's mind should never be seen, in either legislative or private legal drafting. Legislatively it is no longer used in Victoria — it still appears in the plain English drafting style employed in Queensland. In most modern legal precedents 'shall' is present. Why is this so? Even Mr Aitken states that 'shall' can be used — but is it necessary?

Of late, there has been a lot written on the subject of whether 'shall' should continue to be used in legal drafting. Arguments have been raised for its retention², however the more logical arguments are for its removal from legislation and

1 Davidson, *Precedents and Forms of Conveyancing*, 5th edn, Wright and Darley, 1885, p 15.

2 See the reply to Miss Michele Asprey and Professor Robert Eagleson, "Must we continue with 'shall'?" in (1989) 63 *ALJ* 75, by Mr J M Bennett "In defence of 'shall'" in (1989) 63 *ALJ* 522, and a further rejoinder "Final observations on the use of 'shall'" in (1990) 64 *ALJ* 168.

from legal documents.³

'Shall' has been used in legal drafting to indicate futurity and to indicate a mandatory action, though in the latter context, it may indicate, on a proper construction of the instrument, a discretionary action. Attempts have been made in interpretation statutes⁴ to overcome the problems associated with the mandatory and discretionary results of using 'shall', but not always with success. The point to be made in the chapter on the use of 'shall' in this book is that though the author says it is no longer necessary to use 'shall', (although it may be used to express futurity (along with 'must')), the examples utilised to illustrate the alternatives, do not consistently follow the author's recommendations.⁵ While 'shall' may be removed in one part, it is alive and kicking in another.⁶

Other changes slowly making inroads into the drafting of legal documents are the use of gender neutral language, drafting in the present tense and in the active voice, and the replacement of Latin expressions by their English equivalents. The latter issue is not dealt with at all by the author and the use of gender neutral language is referred to, but not always followed in passages of the text. There is a paragraph on the preferred use of the active voice in drafting legal instruments (which incidentally uses 'shall').

One chapter which this reviewer finds most helpful is the chapter on expressions relating to time. While acknowledging that wherever possible precise times should be specified, this chapter assists in the drafting of time provisions where exact certainty is not possible.

One may feel justified in thinking that the reviewer does not advocate the acquisition of this text by those wanting to hone their drafting skills. On the contrary, it is a most useful text on modern drafting techniques and provides support for those wishing to re-draft law office precedents into modern form but facing opposition from within. However, though this book has been advocating modern drafting techniques since 1946, the author needs to utilise them fully and, at the risk of increasing the size of the book, cover all the facets of modern legal drafting.

3 See a reply to Mr Bennett by Professor Eagleson and Miss Asprey, "We must abandon 'shall'" (1989) 63 *ALJ* 726; Watson-Brown, Anthony, "Shall revisited", (1995) 25 *QLSJ* 263.

4 For example *Acts Interpretation Act* 1954 (Qld), s 32CA.

5 See at p 65 —

If the purchaser *shall fail* to pay when due any instalment of principal or interest, the whole of the principal and interest with interest to date of payment shall become immediately payable.

This becomes:

If the purchaser *fails* to pay when due any instalment of principal and interest, the whole of the principal with interest to date of payment shall immediately become payable.

'shall immediately become payable' would be better expressed as 'immediately becomes payable', or 'is payable immediately'.

6 In fact throughout the book, 'shall' is used unnecessarily, eg pp 32, 40, 41, 58, 92, 103.