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Too Many Words

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Abstract

[Extract] We are all pleased to see a writer of skill on any Bench. To find such a writer in the taxation courts is a greater pleasure. BJ McCabe has recently joined the Administrative Appeals Tribunal and threatens to produce the sort of clarity, precision and liveliness brought to that Tribunal's tax decisions by Dr Paul Gerber.

TOO MANY WORDS

Obsolete laws ought to be expunged from the books; what remained should be shorn of contradiction and confusion, remodelled and reduced to a 'sound and manageable body.'¹

Francis Bacon

We are all pleased to see a writer of skill on any Bench. To find such a writer in the taxation courts is a greater pleasure. BJ McCabe has recently joined the Administrative Appeals Tribunal and threatens to produce the sort of clarity, precision and liveliness brought to that Tribunal's tax decisions by Dr Paul Gerber.

In July 2002, Professor McCabe wrote his decision in *Trustee for the Estate of EV Dukes v Commissioner of Taxation*. He grapples with the meaning of sections 97-99A of the Income Tax Assessment Act 1936: 'The rules are complex and rigid. They cry out for simplification'. He finds no fault with the Commissioner's actions, but rather, 'If blame [for a possibly "absurd" result] is to be apportioned, a large part of it must rest with the legislative provisions that dictate the result in this case.' The Member echoes the laments of every tax practitioner and tax official who ponders on the uncertain drafting of the tax statutes.

'The public grows more and more discontented'

David C Elliott despairs that legal documents remain, 'mired in convoluted language and burdened with a format that discourages reading'.² No matter how unhappy the people become, the problem persists. Elliott has drafted a *Model Plain-Language Act*. Not entirely tongue in cheek, it proposes a duty to communicate clearly in legal documents. Such a statute would require those who cannot write clear legal documents to make their case for exemption from the statute. Elliott points out that while politicians often call for clear writing, they often do not produce it. Under his statute, though, there would be an obligation to write clear legislation. There would be a *Goddledygook Fee Scale*. Using 'saith' would cost \$75; 'thereunto' \$100, but 'hereinbefore' and 'witnesseth' the full \$200. Sadly, 'know all men by these presents' is only \$200.³

1 Catherine D Bowen, *Francis Bacon: The Temper of a Man* (1963) 147.

2 David C Elliott, 'A Model Plain-Language Act' (1992) 3 *Scribes Journal of Legal Writing* 51, 51.

3 Ibid.

Taxes intrude on practically every transaction in modern society. Because we have to define precisely how and where those taxes fall, tax laws can indeed become complex. So, they ought to be drafted with great care by the best of drafters. This rarely happens. Moreover, some of the judges who struggle to interpret these convoluted laws write badly. A poor situation gets worse.

The costs that the Act imposes on taxpayers because of its incomprehensibility must be enormous. Think of the additional time that has to be spent training officials in the Tax Office to understand and administer its complex provisions. Think of the time needed to train accountants, tax agents and lawyers in the private sector. Think too of the time that both groups, in turn, have to spend keeping on top of the huge mass of opaque material, either to administer it or advise clients about its application to particular circumstances.⁴

Be concise

A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts. This requires not that the writer make all his sentences short, or that he avoid all detail and treat his subject only in outline, but that every word tell.⁵

Conciseness is an essential characteristic of good writing. Most writers use too many words. Lawyers write at appalling length. John Doyle, Chief Justice of South Australia (and a fine writer), reports that state and federal court judgments in Australia averaged 6 and 18 pages respectively in 1935, but have *tripled* in average length in the 60 years since.⁶

Justice Bryan Beaumont agrees with Doyle CJ: 'It is difficult to justify an increase in the size of our judgments. Length per se, let alone prolixity, is neither essential nor desirable, and may disguise the real basis for a conclusion. The essential quality of a judgment is clarity, with as much brevity as the subject will permit'.⁷

Australia's High Court judges, with the exception of Lionel Murphy, are rarely feted for their brevity and clarity. Sir Owen Dixon and Sir Garfield Barwick spent long hours interpreting our tax statutes. But they spent too many words on the task.

4 David Kelly, Chairman, Victorian Law Reform Commission, 'How Plain English Would Benefit Taxpayers' (1990) 15 *The Taxpayer* 230, 230.

5 Strunk and White, *The Elements of Style* (3rd ed, 1979) 23.

6 (1999) 73 ALJ 737 at 740.

7 (1999) 73 ALJ 743 at 744.

Take Sir Owen Dixon, writing in the important case, *W Nevill & Co Ltd v FCT* (1936-1937) 56 CLR 290 at 307. Said he; 'But it is not correct to look only to the purpose actuating the expenditure in the state of facts in which it was resolved upon'. And a little later on the same page: 'On reconsideration, it appeared that the purpose would be better fulfilled by a rearrangement involving an expenditure made in commutation of that undertaken'.

In the first sentence, the great judge meant to say: 'But we do not look only at the purpose of the expenditure'. That's all. Who knows what he meant in the second sentence?

In the pivotal *Lunney v C of T* (1957-1958) 100 CLR 478 at 486, the Chief Justice struggles to disallow home to work travel costs. A strict legalist, he follows authority, but with a backward glance: 'I confess for myself, however, that if the matter were to be worked out all over again on bare reason, I should have misgivings about the conclusion'.

We know what he means, but why this beating about the bush? Why could he not write: 'I have misgivings about that conclusion'?

Australia's top poet Les Murray is a legendary editor as well as author. His advice on writing poetry should be branded above the tax writer. 'Cultivate concision, try to be more vivid ... cultivate precision, avoid waffle, don't rely on vague generalisations ... avoid ancient poeticisms...'⁸

Heaven forbid that we remove the poetry and flair from tax writing, in particular, and make it too spare and muscular. But poetry and flair are not the casualties but rather the clever results of concise writing. A flight of fancy looks best when its wings are taut. See this in the writing of famed US Judge Learned Hand. In *Inecto v Helvering* 193-6 (31 May 1934), he described a beautician taxpayer: 'She was a wild, untamed thing out of a Wisconsin newspaper office, full of the wisdom of the badger and the winged freedoms of Lake Michigan fish hawk.' No wasted words, there.

The legislature can do better

Not only judges compose at length. The legislature also writes too quickly and too voluminously on tax. Jokes about the volume of drafting are way beyond the guffaw stage.

8 Les Murray, 'Locum at Lyons Road - My Years at Poetry Australia' in *Persistence in Folly*, 136: cited in Peter F Alexander, *Les Murray: A Life in Progress* (2000) 165.

Justice Peter Hayne of the High Court points out that the size of the annual volume of Acts of the Commonwealth Parliament increased from 488 pages in 1901 to an extraordinary 7521 pages in 1997.

Australia now passes over 10 times as much federal legislation annually as it did in 1960. The prolix pen often scribbles out new provisions for the Income Tax Assessment Acts. The ITAA (1936 and 1997 statutes together) is 50 times longer than when first introduced in 1936. Once 120 pages, the document now bulges at what may be a planetary record of over 5,000 pages. Some of its terms defy understanding.⁹ There are, of course, several other tax statutes, remarkable too in their length and complexity. The Goods and Services Tax legislation of 1999¹⁰ is hard labour. Laced with jargon like 'creditable acquisitions' and 'input tax credits', this young monster has over 1,000 pages of legislation and explanatory memoranda. In three years, there have been hundreds of amendments.

And so on we could go. Modern legislatures are treating too lightly their duty of drafting laws for the people, especially tax laws. The power to make laws should be used sparingly. And the drafting should be of the highest quality. Yet nothing stems the avalanche. Even the simplification efforts yield longer documents.

Our free society is undermined by long and complex laws that few understand. David C Elliott is quite right in saying that our societies have arrived at a stage, 'where their members enter binding obligations they do not understand and are governed from cradle to grave by legislative texts they cannot comprehend'.¹¹

RH Hickling¹² reckons that the custom in the Isle of Man was for the people to gather on a hill one day each year when all the laws passed in the previous year were read. What a day that would be in Canberra.

Clear thoughts: clear expression

Some old-fashioned remedies had appeal. In 1556, the Lord Chancellor resented a long 120 page document – a 'replication' - that appeared in his court:¹³ 'The plaintiff for putting in a long replication was fined ten pounds, and imprisoned, and a hole to be made through the replication, and hanged about his neck, and he to go from bar to bar ...'

9 Deane J in *Hepples v FCT* 91 ATC 4818 at 4819 called the ITAA a 'legislative jungle': Toohey J at 4824 thought the capital gains tax provisions were 'unduly labyrinthine'. The 1997 ITAA tries to clarify and simplify the legislative provisions, and with some success.

10 The main statute (there are several) is called A New Tax System (Goods and Services Tax) Act 1999.

11 (1997) 3 *NZ Journal of Taxation Law and Policy* 153, 154.

12 RH Hickling, *Malaysian Law* (2nd ed, 2001) 143.

13 *Milward v Welden* (1565-1566) Tothill 101; 21 ER 136.

The *Dictionary of National Biography* lauds revenue lawyer and King's Bench justice Sir Sidney Rowlatt for his 'clear reasoning and crisp style', even in the parched lands of a tax statute. South Australian Chief Justice John Bray was also an able tax law writer. His thinking was clear; his writing was clear. Lord Denning wrote on tax with rare skill. Bray CJ and Lord Denning's gift for clarity is displayed in the s 260 ITAA saga. Denning masterfully clarified a dividend strip of a company and s 260's application in *Newton v FCT*,¹⁴ and Bray adeptly applied the *Newton* test in *Bayly v FCT*¹⁵ and *Jones v FCT*.¹⁶

It was not so much Lord Denning's short sentences and humour that ensure his immortality. It was his clarity of thought and expression. We must find tax drafters and tax judges with those qualities.¹⁷ To help relieve those insidious dangers to our free society – incoherence, prolixity and excessive complexity in our tax laws.¹⁸

Jim Corkery
Duncan Bentley

14 (1958) 98 CLR 1. Lord Denning had to handle the losing counsel, Sir Garfield Barwick's meticulous and convoluted arguments on s 260, and he did so surely and lucidly.

15 (1977) 77 ATC 4045.

16 (1977) 77 ACT 4058.

17 Martin Smith, (1997) 3 *NZ Journal of Taxation Law and Policy* 168, 175 makes his plea: 'it is clarity of thought and expression that is really our primary hope for intelligent and helpful future tax legislation'.

18 To improve your writing, to make it plainer, clearer and more lively, you can do little better than read the booklet of plain English pioneer, Richard Wydick, *Plain English for Lawyers* (3rd ed, 1994). See also that incisive writing handbook, Martin Cutts, *The Quick Reference Plain English Guide*.