

Using Plain Language in Law Firms

By Edward Kerr

Mallesons Stephen Jaques has had a plain language policy since 1986. This paper describes what we have done. First let me tell you a little about the firm. We are a large law firm even by world standards. We have ten offices in Australia and overseas. We have large offices in Sydney, Melbourne, and Perth and quite sizeable operations in Canberra and Queensland. Worldwide, we have about 180 partners and 420 other qualified lawyers, for a total of about 600 lawyers. The total number of staff is about 1,500.

I have divided this article into three main parts:

- The first part, "Putting Our House in Order," describes how we have gone about getting our lawyers to use plain language.
- The second part, "Selling Plain Language," describes what we have done to sell plain language to our clients.
- The third part, "Reflections," summarizes what we have and have not achieved, what lessons we have learned, and the things that remain our biggest challenges.

PUTTING OUR HOUSE IN ORDER

I have found that three things are essential for a plain language policy to be successfully implemented:

- Constant planning and goal setting.
- A strong organizational structure.

- People who are committed to the effort. An organization, particularly a group of 600 opinionated lawyers, will not start writing in plain language simply because you tell them to. People need to work with it daily, and having precedents (or forms, as Americans call them) in plain language is the obvious and ideal way to give them this opportunity.

So how do you produce a high-quality precedent system in plain language which is consistent throughout ten offices and readily available to 600 lawyers? There are five aspects which should be mentioned—how it all began, the organizational structure we developed, the lawyer resources needed, the use of technology, and the training program we put in place.

The Early Days

Our long-term commitment to a fully integrated precedents system incorporating plain language principles began in late 1986. Until then, attempts at precedent development had been sporadic and died after an initial burst of enthusiasm.

In late 1986 we employed a senior lawyer, Michele Asprey, to take charge of our precedents section. Michele had great enthusiasm and vision and soon convinced us of the need to use the latest computer technology and to think nationally. At that time we set the following goals:

- We were determined to have a high-quality precedent system.
- It had to be in plain language.

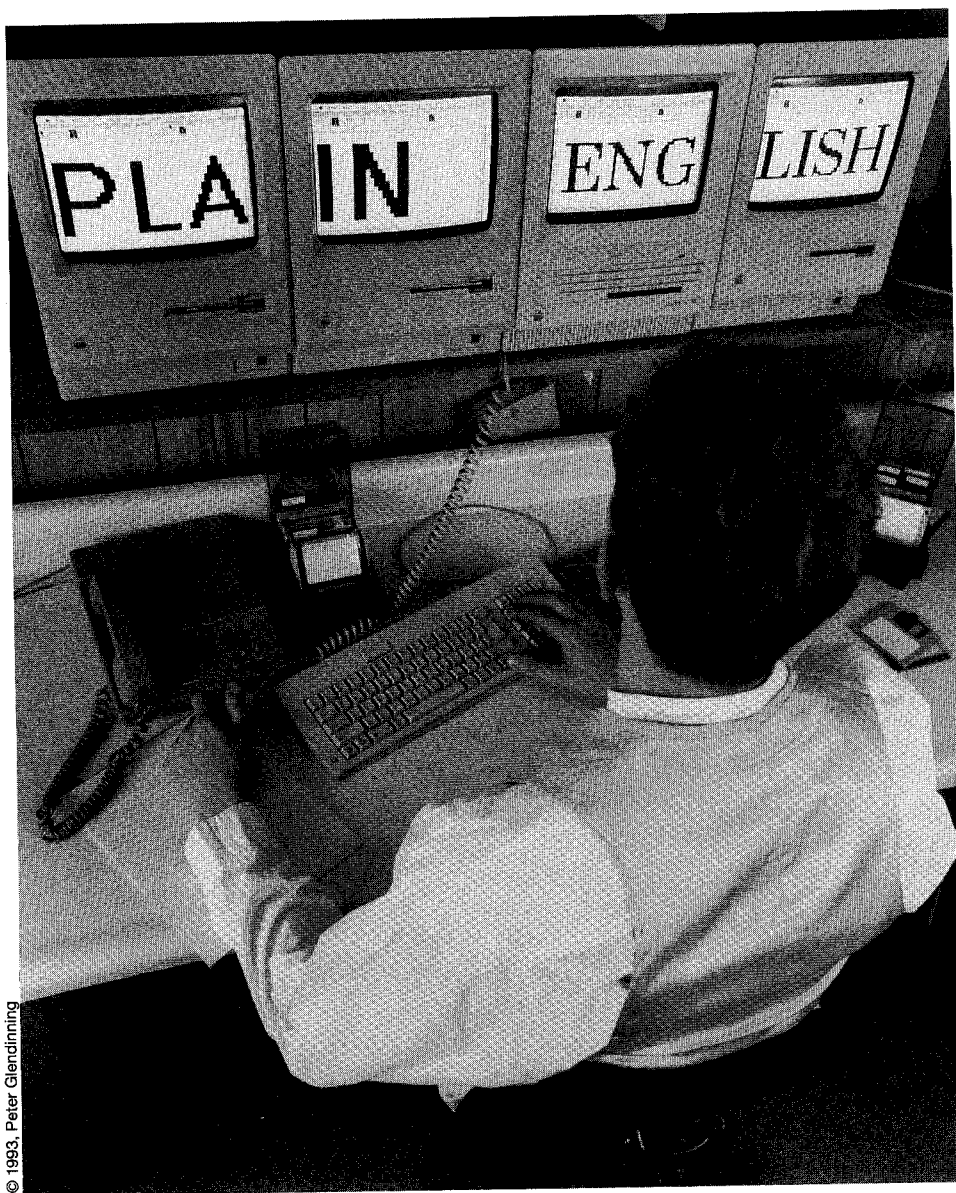
- Documents had to be consistent. This is most important. If you have a series of documents in a transaction (for example, a loan agreement, a guarantee, and a mortgage) it is unacceptable if the standard clauses in the documents are not consistent.

We started with banking and finance documents, and after about a year we thought we had developed a good set of plain language standard clauses. Then in late 1987, a turning point came when one of our senior partners attended a weekend seminar put on by Dr. Robert Eagleson. He was very taken with what he heard.

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We invited Dr. Eagleson to run a series of sessions where we worked through the documents that we thought were in plain English. As you can imagine, he pulled them to pieces—in the nicest possible way!

Probably the single most important thing that Robert taught us—you could say it was a case of light dawning on us—was to think of our audience. This might sound obvious, but I can assure you that lawyers are not



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trained that way. They are trained to write a legally binding agreement. It is irrelevant that no one can understand it. This lesson resulted in a fundamental change in how we approached our drafting.

After working on our documents with Dr. Eagleson for several months, we had, by early 1988, a very good set of basic clauses and documents in a plain language style. However, problems were beginning to develop. They were:

- The lack of an organizational structure that would facilitate the development of our program.

- Resources—principally in practicing lawyers who were both willing and available to work on documents. I say both, because often the spirit is willing, but client demands leave you unavailable.

The Organizational Structure

Up until early 1988, we had naively thought that a precedent base could be developed in a fairly short time. We had been thinking of three to six months for the 100 or so banking and finance precedents we wanted. But we began to realize that it was going to take much longer to produce the quality system we wanted.

We then established a committee made up of representatives from all our offices. One of the first things the committee did was to establish a firmwide standard format for documents and drafting guidelines. Plain language considerations were paramount in this process. We spent a lot of effort establishing guidelines to improve the readability of our documents.

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For example, we got rid of some unnecessary archaic features. I am sure that you have all seen legal documents which end with something like:

"In witness whereof the parties hereto have executed this deed on the date first hereinbefore written."

It now reads:

"Executed as a deed."

The legal effect is the same.

This firmwide committee has been an essential element in establishing a plain language policy right across the firm. It is essential to have people in each center who are committed to it and who, on a day-to-day basis, can ensure that the policy is being implemented.

The other major purpose of the firmwide committee is to control the national review of documents. Our goal is to have consistent documents in all centers. In other words, if you walk into our Perth office and ask for a guarantee, you will get the same document as you would from our Sydney office.

The firmwide committee establishes the drafting program for each expert group, sets priorities, and identifies the lawyers who will prepare the precedents. A by-product of this process is quality. Because all our effort is put into one document, it is reviewed more vigorously than if we were creating a different version in each center.

Resources

Progress was much slower than we had expected. We started a number of projects that stalled because we were unable to devote enough time to them. We then began to realize that this sort of program is extremely resource-hungry—for people and technology, which all add up to lots of dollars. We have spent over \$5,000,000 in developing our precedents. Most of this represents unbilled time of the lawyers who worked on the precedents.

In 1988, 1989, and 1990, we employed up to seven lawyers to work full-time on precedents. During this time we were able to complete a large number of banking, corporate, and property documents. The pace is not so frantic now, but we still have four lawyers working full-time on developing precedents.

In addition to the full-time lawyers, it is very important to have a network for review of documents. It is essential that the lawyers who are going to use the documents are satisfied with them. Otherwise the lawyers won't use them. This point can't be emphasized enough. Therefore, we send the documents to numerous experts within the various centers for review. This can take many months, and a lot of hounding (in the most diplomatic way) is often required. But the result is documents that are high quality and commercially acceptable.

Finding the human resources probably continues to be the biggest challenge. But at least having clear goals means that the work which is done is focused.

So implementing a plain language policy will cost money—not only in human resources, but also in technology.

Technology

You can't expect to implement a plain language policy in an organization as large as ours without a sophisticated system that makes the resources readily available.

Some years ago we purchased a fully integrated Wang information processing system (this was before the days of networked PCs). Although this system does not have the benefits of a PC-based system, it has been excellent for implementing a consistent precedents policy.

All our precedents are on a special precedents database. Everyone (including law-

yers) have screens on their desks and have instant access to those precedents. The basic layout features—for example, the layout for a letter or document or signature clauses—are programmed to appear automatically. This ensures consistency.

All but one of our centers are using Wang equipment. So it is very easy to access a document on one center's system from another center. If our London office wants to produce a guarantee, it simply calls in the latest precedent version from Sydney and prints it out in London. This happens in seconds.

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We have also made use of technology in computer-assisted drafting. This system enables a lawyer to prepare a document by simply answering a series of questions on the screen. The document is then automatically prepared by the program. The package we use is called Workform, from Analytic Legal Programs Inc., of New York.

We have produced a wide range of applications including loan agreements, guarantees, deeds of priority, legal opinions, memoranda and articles of association, and securities. All of these applications are based, of course, on our plain language precedents for those documents.

The next stage in technology will be to establish a networked PC system that will retain all the benefits of the Wang system and give the added benefit of being able to produce much better looking documents. The plain language program would break down without the technology.

Training

The plain language program would also ultimately break down if lawyers were not trained in the art of plain language drafting. It is all very well to have precedents

in plain language. It is also critically important to have lawyers who can adapt those precedents and otherwise generally draft in plain language. Precedents are only the starting point in a transaction. Every transaction involves a lot of "original" drafting. In this area we have a long way to go, but we have started.

All lawyers newly employed in the firm attend what we call the "Welcome to MSJ" course. Two hours of this course are devoted to teaching our plain language drafting style. This is very basic, but we do try to teach the lawyers to:

- Think before they draft.
- Think of their audience.
- Draft in the present rather than the future tense.
- Draft in the active, not the passive.
- Avoid "shall" and other archaic language.
- Use short sentences.

We also run a two-day live-in program. In our Sydney office (which is our largest), we run this program twice each year. All recent graduates must attend, and we also invite a number of partners and more senior lawyers. We limit the course to 25, which enables a lively interchange. Robert Eagleson teaches the course. This course has also been run in our Brisbane and Perth offices, and we are hoping to make it a regular feature in all our Australian centers. The topics covered include:

- The central principles of plain language and some causes of legalese.
- Focus—who are the readers?
- Organization—its key role in making documents intelligible.
- Grammatical structure—why long sentences fail; how to shorten them; order of elements in a sentence; active or passive; nouns or verbs.
- Punctuation.
- Matters of vocabulary such as handling technical terms and definitions.
- The proviso.
- Writing letters.
- Layout.

SELLING PLAIN LANGUAGE

Originally we adopted a policy of plain language because we wanted our precedents to be in plain language. We did not initially set out to sell plain language to our clients as a separate product.

More recently, with the growing demand from community groups, the judiciary, and the government for legal documents to be in plain language, clients are asking more and more for plain documents. As a response to this demand, we established a plain language unit in the firm about a year ago. At that time Robert Eagleson resigned from his post as Associate Professor in the English Department at Sydney University to work full-time as our consultant. He and I originally constituted the plain language unit. More recently another lawyer from the firm has joined the unit.

What have we been doing?

Visiting Program to Clients. We have established a program of visiting clients and potential clients to talk to them about their plain language needs. So far, we have targeted banks and insurance companies.

Submissions to Parliamentary Inquiries. There is a growing awareness within governments of the need to draft legislation in plain language. Two parliamentary inquiries are currently under way where there has been an opportunity to make submissions on how legislation should be drafted. We have strongly recommended the adoption of plain language principles.

We have also recommended that the legislative process entail extensive collaboration with the private legal profession. Too often, legislation is drafted by parliamentary counsel who do not consult and are not encouraged to consult with the relevant industry and the private legal profession to ensure that the legislation can be understood and is workable. We see a need for experts in plain language to work with parliamentary counsel in preparing legislation.

Preparing Pro Forma Documents. We have decided that often clients will not be convinced of the benefits of plain language until they actually see it. Accordingly, we have a program of preparing a number of commonly used documents that we can show to clients in virtually final form, subject to their own commercial requirements being incorporated in them. These documents include a short-form equipment lease, a superannuation trust deed, and a housing loan mortgage. This approach is proving particularly successful.

Although the development cost is high, we are able to recoup this gradually by selling the document to a number of clients.



It also keeps the cost for any particular client down to an acceptable level. It would be uneconomical to develop some of these documents for a single client.

Also, the spin-off effect for other work should not be underestimated. If you can provide a high-quality plain language standard document to a client, they are more than likely to come to you for other work. The plain language document can be the vehicle for attracting new clients to the firm.

Marketing Within the Firm. We have found it useful to market our skills not only outside the firm, but also within. Sometimes, partners will not realize that there is a plain language opportunity with a particular matter they are handling. One example of this was where Robert Eagleson and I were visiting an insurance company and discovered that someone else in the firm was preparing a trade-practices compliance manual for them. When we returned to our office, we obtained a copy of the manual, which had been prepared by lawyers in the firm who were not skilled in plain language writing. We were able to make vast improvements to the manual.

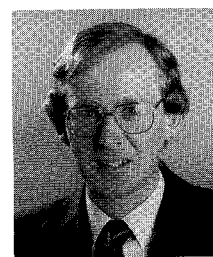
REFLECTIONS

What Have We Achieved in Seven Years?

- Standard format and drafting guidelines.
- High-quality documents in plain language—about 60 in banking and finance, all consistent with each other, and another 120 in the corporate and property areas. There are many still to be done.
- A culture where plain language has a high profile.
- A comprehensive training program.
- The demystifying of legal language, particularly for the young lawyer (they don't have to learn bad habits).
- A very solid base on which to expand.

What Lessons Have We Learned?

- Don't underestimate the size of the task. It will take you longer than you ever thought possible.
- The management of the firm or corporation must be committed to it.
- Don't try to do too much at any one time.
- Continually plan ahead and ensure that the resources will be available. Control the exercise. There is a great potential in a large firm to re-invent the wheel. You must have an organizational picture which ensures that you take advantage of economies of scale.



Edward Kerr is the partner in charge of the firm's Plain English Unit. He has extensive expertise in preparing standard documents for banks and other financial institutions. He is also in charge of the firm's precedent system. Mr. Kerr graduated with arts and law degrees from the University of New South Wales. In 1985 he joined Mallesons Stephen Jaques (becoming a partner in 1986). He is a member of the Banking, Finance and Consumer Credit sub-committee of the Law Council of Australia.

- Be flexible. Don't think that there is only one way to do things. Keep an open mind. Be sympathetic to the fears and defensiveness of others. Don't let your enthusiasm make you a tyrant.

- Be sensitive. At first, many lawyers in the firm did not wholeheartedly embrace plain language. Gradually the pockets of resistance are dying out. Some of the problems we encountered are:

(1) Lawyers who mistakenly believe that because they are good lawyers they must be good writers.

(2) Lawyers who cling to the old ways because they are "tried and true," or because they are frightened to change and don't have time to research to satisfy themselves that the change in language is safe.

(3) Lawyers who cling to outmoded practices in grammar "because that's what we were taught at school" in the 1940s or 1950s!

(4) Lawyers who are under the mistaken apprehension that clients like to read legalese.

(5) Lawyers who simply don't understand what plain language is and are afraid

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of it or mistrust it because they think it is something other than clear, simple, precise writing. An example is the "shall" versus "must" debate. This generated an enormous amount of heat within the firm. In the end it came down to a combination of what people "liked" and "didn't like" and also what they thought was grammatically correct. Five years ago, we had to compromise. Now, the resistance has disappeared.

What Are Our Biggest Challenges?

- Getting lawyers to devote time to developing precedents. The best solutions I have found are to employ lawyers to work full-time on precedents and to form project teams who meet regularly to discuss the document.

- Getting lawyers to use plain language in their day-to-day work. There is no easy answer to this because old habits die hard. Certainly having a precedent base written in plain language gives you a head start, but then it comes down to training each individual lawyer.

- Marketing plain language to clients. Most clients will say they want documents in plain language. Far fewer have the vision to see the economic benefits that could flow by converting their existing documents into plain language.

An important person to convince in any organization is the in-house counsel. Sometimes you will be criticizing the document they prepared. Often they will not appreciate the marketing benefits of having plain language documents. Usually they will have a large say in whether the document should be rewritten.

Accordingly, you need to develop an approach where the client can justify the expense on a cost-benefit analysis and the in-house counsel is supportive.

CONCLUSION

As you may have gathered by now, we have an ambitious program. It ranges across precedent development and maintenance—both of which have significant technology implications—and into marketing plain language to our clients. It has been necessary to develop databases and other systems that ensure consistency and easy access. The program also involves lawyer education.

As I mentioned earlier, we have found that implementing a plain language policy requires:

- Constant planning.
- A strong organizational structure.
- Probably above all, commitment from the people implementing it and significant resources.

But it is worth every minute and dollar we have spent! We believe that if we are to continue to be a leader in 10 to 15 years, then we must address these issues now. ■

Lawyers and Judges AA/NA Groups MEETING DATES

Monday 12:00 PM
St. Joseph Hospital East
Bailey Room A
Parkview and North Streets
Mt. Clemens

Monday 12:30 PM
Detroit Bar Association
Conference Room
23rd Floor, Penobscot Building
Detroit

Monday 7:00 PM
Prince of Peace Lutheran Church
19100 Ford Road
Ford Rd. (Altar Rd.) just west of
Southfield Freeway
Dearborn

Monday 7:00 PM
Rehmann Health Center
147 S. Saginaw
Chesaning

Wednesday 6:00 PM
Kirk In The Hills
Presbyterian Church
1340 West Long Lake Road
½ mile west of Telegraph
Bloomfield Hills

Wednesday 6:00 PM
Unitarian Church
2474 South Ballenger Road
Lower Level, Room 2C
1 block south of Miller Road
Flint

Thursday 8:00 PM
Central Methodist Church
(2nd Floor)
Corner of Capitol and
Ottawa Streets
Lansing