BANISHING SHALL FROM BUSINESS CONTRACTS:
Throwing the baby out with the bathwater

In Australia, bastion of clearer, ‘plain-language’ drafting, it’s now the orthodox view among commentators that contracts should be purged of shall. For example, the best-known Australian text on drafting, Peter Butt’s Modern Legal Drafting 262 (3d ed. 2013), says that “shall is attended with so many problems that the need for banishment is beyond argument.”

But as explained below, the justification for getting rid of shall falls short. Dispensing with shall entirely in business contracts comes at a cost – you’re throwing the baby out with the bathwater. In the context of a rigorous framework for using verbs to express the categories of contract language, using shall to impose an obligation on the subject of a sentence, and for no other purpose, offers advantages.

Overuse of Shall

In traditional contract language, shall is used to excess – it can seem as if drafters worry that if a provision doesn’t use shall, it won’t be enforceable. Drafters use shall in all sorts of different contexts to express obligations, to express conditions, and to refer to the future (as in shall have the right to).

Yet shall doesn’t feature much in everyday English. Its use is mostly limited to stock phrases (we shall overcome) and to questions in the first person that seek direction or suggest politely (shall we dance?). The old ‘rules’ regarding the ostensible distinction between shall and will are preposterous and are now ignored by everyone except sticklers, mostly in England.

Those who seek to banish shall from contracts have in mind that if you eliminate shall, drafters will use other verb structures, ones less prone to misuse and more consistent with everyday English.

Alternatives to Shall

As for alternatives to shall, another Australian text, Michèle A. Asprey, Plain Language for Lawyers 209 (3d ed. 2010), says, “There is no doubt that must is an appropriate alternative for the imperitive shall” And Modern Legal Drafting, says that when drafters are looking for something more idiomatic and unambiguous than shall, the usual choice is must.

On the other hand, a U.S. reference work, Bryan A. Garner, Garner’s Dictionary of Legal Usage 953–54 (3d ed. 2011), endorses using will to replace shall, although the rationale offered is perplexing.

So those who wish to banish shall don’t agree on what to use instead. That suggests that the issue is more subtle than it appears. In fact, both alternatives are problematic. Using must instead of shall results in must being used to express an obligation, whether it’s imposed on the subject of a sentence (the company must reimburse the consultant for all authorised expenses) or otherwise (the closing must take place at Acme’s offices). Furthermore, must also features in language of obligation used to express a condition (to exercise the option, Acme must timely submit the option notice), so also using must to state obligations results in must being used to convey two very different meanings.

Similarly, using will instead of shall results in will being used not only to impose obligations but also to express future time. (This agreement will terminate if the Market Price falls below A$10).

Using one verb structure to express multiple meanings is what afflicts traditional use of shall, and it makes both must and will less than ideal as candidates to replace shall.

Missing the Broader Problem

The focus on shall has drawn attention away from the broader problem, namely the chaotic verb structures on display in traditional contract drafting. Banishing shall would address a symptom of that chaos, but not the cause – drafters being oblivious to nuances of verb structures.

Review of a random assortment of publicly available Australian contracts that don’t use shall suggests that dispensing with shall hardly guarantees rigorous verb use – even in the absence of shall, contracts tend to shuffle haphazardly between different verb structures to express obligations. A contract might alternate between agrees to, will, and must to impose obligations on the subject of a sentence. Plenty of other problems are on display, including use of many different ways to express discretion.

Eliminating shall is a simple fix, and its proponents get to congratulate themselves
on their modernity. But it’s flawed, as the proposed replacements themselves give rise to multiple meanings, and the broader problem remains unaddressed.

**Using Shall to Mean Has a Duty To**

To address the broader problem, I have provided a comprehensive framework in my book *A Manual of Style for Contract Drafting*, that is referred to as ‘the categories of contract language’. A given provision in a contract will fall into one of the categories – language of obligation, discretion, prohibition, policy, and others.

In that context, *shall* has a useful role to play. I recommend a ‘disciplined use of *shall*’ – using *shall* only to impose an obligation on a contract party that is the subject of a sentence (*Acme shall purchase the shares*). An initial diagnostic test for that use of *shall* is whether the provision would still make sense if you were to replace *shall* with *has* [or have] *a duty to*. If it doesn’t, you should use something other than *shall*. (Even if a given *shall* passes the ‘has a duty’ test, you should also check whether the provision in question should instead be expressed as a condition.)

Using *shall* in this manner frees up *must* and will for use in other categories of contract language. And using *shall* solely to impose an obligation on the subject of a sentence would encourage drafters to think twice before imposing the obligation on someone else. Imposing the obligation on someone other than the subject routinely results in – among other problems – drafters using the passive voice (*The Deposit shall promptly be repaid*), which at best is wordy but can also create confusion.

Warnings that using *shall* can lead to litigation are overblown. Courts in all common-law jurisdictions have long acknowledged that *shall* serves to express obligations. For purposes of business contracts, as opposed to statutes, I haven’t encountered an instance of someone arguing, even unsuccessfully, that instead of expressing an obligation, a particular *shall* is ‘directory’ (or ‘discretionary’) and means *may* or *should*. And when contract parties fight over a given *shall*, usually it’s over confusion between obligations and conditions. Getting rid of *shall* wouldn’t eliminate that as a source of potential confusion.

I’m no dinosaur – my writings show that I’ve long been a critic of traditional contract usages. I recommend disciplined use of *shall* in business contracts not because I’m a slave to inertia but because it offers the best way for drafters to gain control over verb structures.

My recommendation is limited to business contracts. For example, I wouldn’t use *shall* in consumer documents. That doesn’t undercut my recommendation – different considerations apply to different kinds of writing.

**Rehabilitating Shall**

It’s too pessimistic to say that disciplined use of *shall* is beyond the reach of most lawyers. The test for disciplined use of *shall* – use it to mean only *has a duty to* – is simple.

In Australia, the bigger question is whether it’s realistic to expect individuals and organisations to reconsider their across-the-board repudiation of *shall*, given that Australian practitioners have gone further than others in purging *shall* from their contracts. But that doesn’t mean that the trend against *shall* is irreversible. For one thing, review of a random assortment of Australian contracts suggests that plenty of Australian legal departments and law firms still use *shall* in contracts.

Furthermore, although *Modern Legal Drafting* notes that “most experts in legal drafting” recommend eliminating *shall*, one shouldn’t feel intimidated. Good drafting practices aren’t subject to a vote – drafters are free to do what makes most sense. It’s perhaps relevant that of the three commentators cited in *Modern Legal Drafting*, two don’t have a background in contract drafting. Unless you work regularly with contracts, you’re unlikely to appreciate that the prose of contracts is much more limited and stylised than the prose of litigation writing – it’s analogous to software code – and so different considerations apply.

For those law departments that have decided to do without *shall*, it might be awkward to rehabilitate it. But they should know that their simple gesture toward plain-language drafting comes at a significant cost – muddled verb structures.

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**Footnotes**