

BANISHING SHALL FROM BUSINESS CONTRACTS:

Throwing the baby out with the bathwater



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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 imperative *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 perplexing¹.

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. ¹

Footnotes

¹ See Kenneth A. Adams, *A Manual of Style for Contract Drafting* ¶¶ 3.67–68 (3d ed. 2013).