

A Clear Policy: Plain English and Life Insurance

BRYAN DWYER*

Paradoxically, a law may be improved without changing its substance: a good rule, clearly expressed, is superior to the same rule expressed obscurely, for the clear rule is understood more readily and so is likely to have a greater impact on how people behave. Accordingly, plain English drafting has been a concern of the Law Reform Commission of Victoria, which has produced two reports on the subject, one directed to legislative drafting,¹ the other to both legislative drafting and the drafting of private agreements.² These reports have influenced the style of legislation in this state, particularly in regard to the regulation of consumer transactions. Now Norwich Union Life Australia Ltd has issued a personal investment and superannuation policy, called Executive Dimension, which is drafted in plain English. As this policy appears at a moment when the Federal Government has announced sweeping reforms in the regulation of the insurance industry, an examination of the issues raised by the Executive Dimension policy is particularly appropriate.

For at least twenty years, standard form private agreements have been drafted in plain English. In the United States, Citibank³ issued a standard form loan agreement in 1973.⁴ In 1974, the United States Congress resorted to this mode of drafting in a pension reform law;⁵ the following year, it made use of plain English obligatory in certain warranty agreements.⁶ In Australia, a plain English car insurance policy was introduced by NRMA in 1976 and other plain English policies quickly followed.⁷ The intellectual roots of the plain English movement extend further into the past,⁸ perhaps as far as the nineteenth century.⁹ The Executive Dimension policy is therefore timely rather than novel, important in the present climate of change as an exemplification of plain English drafting, whatever its broader implications.

* Senior Lecturer in Law, Monash University.

¹ Law Reform Commission of Victoria, *Access to the Law: the structure and format of legislation* (Report No 33, Melbourne, Victorian Government Printer, 1990) (subsequently: Access). See also: United Kingdom, *Report on the Preparation of Legislation* (the Renton Report) (Cmnd 6053, 1975).

² Law Reform Commission of Victoria, *Plain English and the Law* (Report No 9, Melbourne, Victorian Government Printer, 1987) (subsequently: Plain English). See also R D Eagleson, *Writing in Plain English* (Canberra, AGPS, 1990). The approach to plain English adopted below reflects the two Victorian reports.

³ Known then as the First National City Bank.

⁴ M M Asprey, *Plain Language for Lawyers* (Sydney, Federation Press, 1991) 32.

⁵ R Flesch, *How to Write Plain English* (New York, Harper and Row, 1979) 1.

⁶ *Ibid*; Asprey, *op cit* 32.

⁷ Asprey, *op cit* 36.

⁸ Sir Ernest Gowers' *Plain Words* was published in 1948 (London, HMSO, 1948), though it did not suggest change in legal drafting. Reed Dickerson's *Fundamentals of Legal Drafting* (Boston, Little Brown and Company, 1965) stressed clarity in drafting, devoting a chapter to the question of how to make legal documents more readable.

⁹ A J G Mackay, 'Some General Rules of the Art of Legal Composition' 32 *Journal of Jurisprudence* 169, reprinted in S Robinson, *Drafting* (Sydney, Butterworths, 1973) 399-410.

PLAIN ENGLISH DRAFTING

Plain English drafting is a style of legal composition calculated to fashion documents that are as easy to understand as the circumstances permit, documents written in English that is clear, concise, direct, exact and readable. It is a style of drafting concerned not merely with language and syntax but also with logical organisation and format. Although it employs, where possible, straightforward, everyday language, it does not reject the use of technical legal words for which there are no satisfactory alternatives. And whilst it leans towards the statement of principle rather than multiplication of detail, it does not modify or abridge rights or duties merely to facilitate their clear expression.¹⁰

The goal of plain English drafting is difficult to define. A distinction must be made between what is ideal and what can be achieved. Ideally, people on whom a document confers rights or imposes duties should be able, albeit with effort, to find their way around its provisions and understand them. This objective, however, may not invariably be attainable. Every legal document is located in a matrix of common law or statutory rules which must be understood in order to interpret the document but cannot be set forth in it. And many standard transactions are so complex, at least in their detail, that only those with special training or experience can comprehend them fully. Moreover, whilst a drafter should have regard to the skills of the persons likely to be affected by a transaction, those affected may differ significantly in their level of education or even their command of English. For these reasons, the aim of plain English drafting is, perhaps, to ensure that as many people as possible understand as much of a document as is feasible, by removing unnecessary impediments to its comprehension¹¹ through clear, well-planned drafting and modern formatting.

By improving communication,¹² carefully designed documents in plain English achieve a number of desirable ends. As consumers are more likely to understand their rights and duties, legal advice is less necessary; unintentional breach of agreement, less likely; litigation, less frequent; the relationship between the parties, affected by fewer misunderstandings.¹³ In a bureaucracy, as clear agreements are more speedily read and comprehended, costs of administration are significantly lower. Moreover, in today's better educated community more people expect to understand their legal agreements, particularly those in regard to which lawyers are not used as a matter of course. Sometimes plain English is required as a matter of law. Whilst plain English drafting may be more costly than traditional drafting,¹⁴ in regard to standard agreements in wide use this cost is well justified.

A compelling justification of plain English drafting may be perceived in the deficiencies of traditional drafting, deficiencies of language, organisation,

¹⁰ Plain English, *op cit* Appendix A, 1.

¹¹ *Id* 9.

¹² *Id* 55.

¹³ *Ibid*.

¹⁴ *Access*, *op cit* 16.

and document layout. Many legal documents in wide use are characterised by long, verbose sentences, involved and unnatural syntax, and the use of technical or uncommon words. Each of these features stands between the reader and the substance of a document. Long, complex sentences are not understood readily; involved syntax defies comprehension; Latin words, archaic words, words that are infrequently used in speech, such as 'to wit', 'hereinafter' and 'the said', annoy and discourage readers. Moreover, poor organisation of a document or its unsatisfactory formatting may constitute a serious stumbling block. Many older documents present a mass of unbroken legal text without headings, cross-references, or any apparent organisation to aid the reader in the absorption of material or the location of key provisions. In consequence, few people venture beyond the opening clauses of most standard form documents, unless they are paid to do so. Plain English drafting makes legal documents more readable and more accessible, an important justification for its use.

THE POLICY

Two of the objectives of the Executive Dimension policy and of the Policy Information Statement which accompanies it are to improve consumers' understanding of their rights and duties¹⁵ through the use of plain English, and to decrease consumers' reliance upon oral information provided by insurance agents.¹⁶ The Executive Dimension policy was a response¹⁷ to a report by the Trade Practices Commission¹⁸ which called for policy documents to be written in 'clear, comprehensible non-technical language'¹⁹ and pointed to the dangers of consumers relying too heavily upon oral advice from agents, who are remunerated by commission on sales of policies. The Trade Practices Commission's enquiry into the life insurance industry disclosed that although consumers place a high level of trust in insurance agents, most relying on agents' explanations of life products and their financial advantages,²⁰ it seems that some agents²¹ recommend products that do not reflect their clients' needs, fail to disclose crucial information, or misrepresent it.²²

The Executive Dimension policy is well organised, its language clear and free of legalese and its layout helpful. In appearance, it is more like a government or corporate report than a legal document. The policy, in effect, is divided into some nine chapters or segments by the use of white spaces,

¹⁵ Norwich Union Life Australia, media release dated 16 March 1993.

¹⁶ Speech by D Purchase, Executive Director, Life Insurance Federation of Australia, at the launch of the Executive Dimension policy in March 1993.

¹⁷ Id 3; Norwich Union Life Australia media release dated 16 March 1993.

¹⁸ Trade Practices Commission, *Life Insurance and Superannuation* (Canberra, The Commission, 1992) (subsequently: *Life Insurance and Superannuation*).

¹⁹ Id 136.

²⁰ Id xii, 106–107.

²¹ The Trade Practices Commission was unable to determine the prevalence of misconduct by agents for the industry resisted a 'shadow shopping' survey: id 26–27.

²² Id 17–18, 106–107.

coloured and running headings. Within each of these segments, the topic of each clause is identified by sub-headings which assist the consumer to find particular provisions and furnish a context in which to read them. The traditional mode of numbering the provisions of legal documents and the use of clauses, sub-clauses, paragraphs and sub-paragraphs has been replaced by a decimal system of numbering and the use of dots and dashes to introduce points and sub-points, lending informality to the document. The central point of each clause appears first in bold type, qualifications, exceptions and other matters following, so that the important material is distinguished from the peripheral. More important clauses of the document, in turn, appear as early as possible, definitions being relegated to the end of the policy. Readers are alerted to words that are defined by placing them, on their first use, in italics and by marking them with an asterisk; on subsequent use, defined words are marked with a plus sign. Marginal notes refer readers to allied clauses and definitions.

Absence of legalese is a striking feature of the policy: little use is made of technical words; no use is made of Latin phrases, archaic language, or strings of legal synonyms. One may search the document in vain for expressions such as 'hereby' or 'whatsoever' or for the traditional provisos. Syntax is straightforward, if not always simple; certainly, it owes nothing to Coode's rules, which dominated drafting for more than a century.²³ Long sentences are avoided as far as possible by dividing clauses into shorter sentences, though at least one sentence exceeds ninety words. Whilst the document is concisely written it covers some twenty pages and is accompanied by a four page information statement (which might almost stand as an executive summary), a combined package that could take a lay reader an hour to read and longer to digest.

A CRITICAL APPRAISAL

As the Executive Dimension policy so well illustrates the advantages of plain English drafting, one is reluctant to find fault with it. Nevertheless, an evaluation of the policy in the light of the objectives of the plain English movement, the aims of the Norwich and broader community concerns should be attempted.

The plain English movement recognises that a consumer should not need to read the whole of a long document in order to locate a single pertinent clause and accordingly recommends use of indexes and cross-referencing devices.²⁴ The Executive Dimension policy has a detailed table of contents, uses headings and sub-headings, but has no index. This arrangement is adequate when consumers can guess the section of the policy most likely to contain the material they seek. The difficulties that may arise when a consumer is unable

²³ G Coode, 'On Legislative Expression' (1843) reproduced in Robinson, *op cit* 337-398.

²⁴ Plain English, *op cit* 93, 97; Access, *op cit* 13; Asprey, *op cit* 72.

to do so is illustrated by the instance of a person who wishes to discontinue a policy. This example is of significance as about 50% of consumers who take savings policies discontinue them within six years,²⁵ often at a loss.

Consumers who wish to terminate their savings policies will find in the Policy Information Statement a heading 'Ending the Contract'. This states that consumers may end a policy at any time but that the full value of the policy might not be refunded; it also refers consumers to a schedule which illustrates surrender values based on a hypothetical earning rate for the policy, which is unlikely to be closely approximated. The Policy Information Statement does not refer to the relevant clauses of the policy. A check of the table of contents of the policy may lead the reader to what appears to be the corresponding policy heading 'Joining and Leaving' and consequently to clause 24. This clause sends readers on an arduous chase, one likely to defeat all but the most determined. A marginal note to clause 24 refers consumers to clause 11, which commences with the statement that the insurer may terminate the contract if the consumer fails to pay contributions on time. At this point some consumers may notify the insurer pursuant to clause 24 that they do not wish to pay further contributions, a course that would entitle the insurer to absorb the surrender value of the policy.²⁶

But if consumers were to persevere with clause 11, despite its apparent irrelevance, reading as far as its third paragraph, they would find it implied (not stated) that the policy might have a surrender value under clause 1.4. This clause provides that consumers may notify the insurer in writing that they wish to withdraw and in that event they will be paid the amount credited to their account, less deductions made in accordance with clauses 1.4.1 and 1.4.3. Clause 1.4.1 in turn refers consumers to another schedule whilst a marginal note takes them to yet another clause. If consumers wish to verify that the amounts standing to the credit of their accounts have been correctly calculated, a further nine clauses may be in point. No doubt consumers, as before the introduction of the new policy, can ask the insurer what they are entitled to, without bothering about their contract, but this defeats the purpose of plain English drafting. Although better cross-referencing or an index would assist the consumer, in view of the large number of consumers who surrender policies before they mature the correct solution is surely to collect the provisions relating to termination of policies in one place. This matter is of general concern for the Trade Practices Commission has recommended²⁷ that life insurance products use a standardised structure and the structure adopted by the New Dimension policy is apparently that suggested by the Law Reform Commission of Victoria.²⁸

The New Dimension policy will achieve the objective of reducing the dependence of consumers upon information provided orally by insurance agents only if it is read and understood by them and properly taken into account in making purchasing decisions. There are several reasons to suppose

²⁵ Life Insurance and Superannuation, *op cit* 73.

²⁶ Under clause 17.2 of the policy.

²⁷ Life Insurance and Superannuation, *op cit* 136.

²⁸ *Id* 116-117.

the objective will not be achieved. First, consumers will not, presumably, be issued with the policy documents until a contract has been made, and whilst the Policy Information Statement accompanying the policy allows them fourteen days to withdraw from the transaction,²⁹ they will receive the documentation at a time when they have made a decision and are least likely to read the policy carefully. Second, the documentation (a twenty page policy, a four page information statement and two schedules) must seem dull and tedious reading to many consumers, despite the fine drafting. Third, an investment or superannuation policy is inherently complex, making use of a number of difficult concepts and closely interrelated clauses, the effect of which in combination may be obscure. For example, the policy requires consumers to distinguish between investments in 'growth funds' and 'balanced funds', but offers no explanation of the distinction; it uses the words 'Investment Account' in a number of clauses without defining the special meaning attached to those words in the document; it excludes liability for illness resulting from 'carcinoma in situ', leaving the consumer to determine how far cancerous melanoma falls within the ambit of the policy. And the interrelated provisions which govern the valuation of a consumers 'Investment Account' seem likely to defeat the naive reader, particularly as they do not disclose certain critical matters, such as the basis upon which interest rates on capital guaranteed products are fixed by the insurer or the principles which govern transfers of moneys to and from reserves. An insurer's adoption of the canons of plain English is not of itself sufficient to ensure comprehension of insurance policies.

Consumers are also likely to place reliance upon the oral advice of agents because the purchase of an insurance policy is a difficult financial decision. A choice must be made between insurance and other investment products and amongst a range of complex insurance products, which are often hard to compare. Rightly or wrongly, the public believes that insurance agents know what products are available and when their use is appropriate.

BEYOND PLAIN ENGLISH

The new policy has been released at an unfavourable time for the life insurance industry, a time when more is at stake than the right of consumers to understand the words of a complex insurance agreement without the aid of professional advice. Sales of life insurance products have been affected by the current down turn in the economy, by increased competition from banks and financial advisers, and by an emerging perception³⁰ that some insurance

²⁹ As the right to terminate the contract within 14 days is not embodied in the policy its status is unclear. The *Insurance Contracts Act 1984* (Cth) does not seem to apply to investment and superannuation products: Life Insurance and Superannuation, op cit 142-143.

³⁰ J Kavanagh, 'Life Federation Flags Its Code of Practice' *Business Review Weekly* (11 June 1993) 86.

agents are unreliable, give poor advice and use unethical selling methods.³¹ In the year to December 1991, premiums from new life insurance business decreased by 19.1%,³² in the year to December 1992, they decreased by a further 18.9%.³³

Information gathered by the Trade Practices Commission shows the range of consumer dissatisfaction.³⁴ It is alleged that agents recommend policies that their clients cannot afford or which are not suitable; they misrepresent the terms of policies, particularly those which govern their surrender value; they overstate the likely yield from policies; they fail to disclose information crucial to a decision whether to purchase a policy, especially in relation to costs and charges. And when consumers make complaints, insurers do not adequately investigate them.³⁵ Whilst use of policy documents in plain English might eliminate some of these grievances, many would obviously remain untouched. A search for additional solutions must have regard to the reasons these grievances arise.

Misconduct by insurance agents is possible because they and their clients do not meet on equal terms.³⁶ Few consumers have an expert knowledge of insurance products and most are unaware of what matters should be taken into account in selecting an insurance policy. Seventeen factors that a competent investment adviser would consider pertinent to the choice of a life product have been identified by the Trade Practices Commission. A recent survey conducted by the Commission found that most consumers asked their agents for information concerning two only of the seventeen relevant matters.³⁷ On average, insurance agents volunteered information about nine further matters, leaving six matters undiscussed.³⁸ Moreover, many consumers place a high level of trust in insurance agents,³⁹ being imperfectly aware of the extent of the agent's financial interest in a sale.⁴⁰ Indeed, before seeking advice concerning life insurance, two-thirds of consumers knew the insurance agent from whom they ultimately purchased.⁴¹ And the method by which agents are remunerated, commissions on sales, unfortunately encourages some to behave unethically.

The Federal Government, responding to the report of the Trade Practices Commission and a further report of a Senate Select Committee, in July 1993 decided to establish a compulsory code of practice for the life insurance industry.⁴² It requires agents to be adequately trained, to be competent to offer

³¹ Life Insurance and Superannuation, loc cit.

³² Insurance and Superannuation Commission, *Annual Report 1991-1992* (Canberra, AGPS, 1992) 16.

³³ Kavanagh, op cit 86.

³⁴ Life Insurance and Superannuation, op cit 96, 106-109, 121-122.

³⁵ Id 107.

³⁶ Id 84-85.

³⁷ Id 10, 95-96.

³⁸ Ibid.

³⁹ Id 107.

⁴⁰ Id xii, 85, 96.

⁴¹ Id 3.

⁴² E Longo, 'Insurers Will Have to Reveal Commissions Under Code' *Age* (14 July 1993) 4, col 1; G Megalogenis, 'Cabinet Agrees to Tougher Rules for Super Firms' *Australian* (14 July 1993) 1, col 1.

advice concerning the products they sell, to analyse the needs of their clients before recommending policies, and to furnish a range of information to enable clients to make informed choices. This includes information concerning the nature and provisions of the policy, the financial performance of the insurance company, the fees and charges levied by the company and the amount of commission paid to the insurance agent. Clients who have purchased policies in the last few years are to be entitled to similar information.⁴³ In addition, better means of resolving disputes with clients will be instituted and agents who breach certain provisions of the code will incur civil liability or criminal penalties.⁴⁴ Further, life insurance companies must meet new capital adequacy and solvency standards.⁴⁵ These changes are as timely as they are necessary.⁴⁶

In the light of the Trade Practices Commission's report and the matters discussed above, three final comments should be offered concerning the Executive Dimension policy. First, plain English drafting, though to be applauded, does not necessarily ensure that consumers comprehend their insurance policies. Second, in a transaction as complex as the purchase of life insurance, additional measures may be essential to protect consumers, such as the disclosure of agent's commission, disclosure of the investment performance of insurance companies, regulatory control of selling practices, and the establishment of better consumer remedies. Third, whilst any agreement with a consumer must be judged by a variety of criteria, clear drafting in plain English, such as that found in the Executive Dimension policy, represents a long stride in the right direction.

⁴³ G Megalogenis, 'Dawkins Extends Crackdown on Insurers' *Australian* (21 July 1993) 4, col 1.

⁴⁴ D Brewster, 'Commissions Snag in Life-Insurance Review' *Age* (15 July 1993) 17, col 1.

⁴⁵ T Blue, 'Actuaries Oppose Big Changes to Life Groups' *Australian* (15 July 1993) 21, col 2.

⁴⁶ The insurance industry produced a rival code of practice: A Lampe, 'Life Insurance Industry Presents Reform Code' *Age* (29 July 1993) 23, col 1.