

## THE COMPREHENSIBILITY OF LEGAL LANGUAGE Is Plain English the Solution?

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It has been argued that plain English is the wrong solution to making conventional legal English more understandable. To test this assertion, three documents were selected. The first consisted of a passage from a guarantee document drafted in conventional legal English. This passage was tested for comprehensibility and found to be difficult to understand but not incomprehensible, provided readers had a knowledge of linguistics and unlimited time. The second consisted of those parts of the current plain English version that corresponded to the original passage. The third passage consisted of the plain English version redrafted in less complicated syntax. It was found that plain English provided a partial solution to making the passage more comprehensible.

### Introduction

Spun of cobwebs.<sup>1</sup>

'A flood of darkness and confusion'. An 'intricate net' and a 'mass of rubbish' which was 'physically difficult, painful and injurious' to read.<sup>2</sup>

A language of nonsense and solemn hocus pocus.<sup>3</sup>

'A thing of shreds and patches'. 'A kind of statutory Joseph's coat'.<sup>4</sup>

A sort of hieratic language by which priests incant the commandments.<sup>5</sup>

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<sup>1</sup> J Bentham (1843) Vol 5 *The Works of Jeremy Bentham*, J Bowring (ed), William Tate, p 236.

<sup>2</sup> *DeLancy v Insurance Co* (1873) 52 New Hampshire Reports, per Doe J, p 581, reported in D Mellinkoff (1982), *Legal Writing: Sense and Nonsense*, Scribner, p 206.

<sup>3</sup> F Rodell (1939, 1972) *Woe Unto You Lawyers*, Pageant-Poseidon, pp 124-25.

<sup>4</sup> Rich J, 'Unintelligible Acts' (1930) *ALJ* 105.

<sup>5</sup> Lord Radcliffe, 'Some Reflections on the Law and Lawyers' (1950) 10 *Cambridge LJ* 368.

A dark jungle, full of surprises and mysteries.<sup>6</sup>

A Slough of Despond.<sup>7</sup>

A 'luxuriant growth' and a 'legislative jungle'.<sup>8</sup>

Poetry? Prose? No! This is the way eminent lawyers have characterised the language of statutes and private legal documents. For centuries, wordsmiths have woven metaphors about it, but lacked a sufficient knowledge of language to be able to explain why conventional legal English may be difficult to understand. This is not surprising, as it has only been in the last half-century that research carried out in fields such as linguistics, cognitive psychology and educational theory has identified the causes of many of the difficulties. Plain English proponents have based their guidelines on this research.

Unfortunately today, many lawyers who believe that conventional legal English is an instrument of precision ideally suited for its purpose continue to use it. They resist attempts to make it more intelligible in case it becomes less precise. Some lawyers realise that the simplification of legal language need not affect its precision.<sup>9</sup> They have also recognised that legal sentences may 'twist on phrase within clause within clause, glazing the eyes and numbing the minds'.<sup>10</sup> They have acknowledged that a combination of sentence length and complex syntax may be a major impediment to understanding conventional legal English.<sup>11</sup>

Plain English exponents argue that the application of their guidelines 'must improve [the comprehensibility of legal language] and make it more accessible to the general public and even to lawyers'.<sup>12</sup>

There are those who argue that plain English offers little to any solution to the drafting of more comprehensible legal documents. In particular, they argue that plain English is a text-based approach which neither guarantees success,<sup>13</sup> nor solves the problem of understanding. They also claim that the guidelines for writing in plain English are inadequate.<sup>14</sup> They admit, however, that 'easier to read words' and 'simpler sentence structures' can help.<sup>15</sup> They

<sup>6</sup> *Livingston v Commissioner of Stamp Duties* (1960) 107 CLR 411, per Kitto J, p 446.

<sup>7</sup> *Davy v Leeds Corporation* [1964] 3 All ER 390, per Harman LJ, p 394.

<sup>8</sup> *The Corporation of the City of Marion v Lady Becker* (1973) 6 SASR 13, per Bray J, p 29.

<sup>9</sup> See for example, Law Reform Commission of Victoria Report 9 (1987), *Plain English and the Law, Drafting Manual*.

<sup>10</sup> R Wydick, 'Plain English for Lawyers' (1978) 66 *California Law Review* 727.

<sup>11</sup> K Allan and K Burridge (1991) *Euphemism and Dysphemism: Language used as Shield and Weapon*, Oxford University Press, p 199.

<sup>12</sup> *ibid.* p 203

<sup>13</sup> D Sless (1998) *Corporate Communication*, Communication Research Institute of Australia, p 5.

<sup>14</sup> R Penman (1998) 'Communication and the Law', (1998) *Communication Research Institute of Australia*, p 2.

<sup>15</sup> *ibid.*

have subjected plain English proponents to questionable criticism as being 'seized with a reforming zeal',<sup>16</sup> and have expressed doubts about the 'morality of plain English'<sup>17</sup> and the political motives of those who espouse it. In particular, one critic has argued that plain English is based on a conception of communication that treats language 'as if it were a system or code' — a type of Orwellian Newspeak.<sup>18</sup>

### Purpose of the Article

This article reports on an investigation into whether the application of plain English guidelines to a passage of conventional legal English improves comprehension to the extent that it becomes intelligible to those who have a need to understand it.

Three passages were selected for testing and the results were analysed to identify causes of comprehension difficulty. The first consisted of the first 80 lines of the now superseded ANZ Bank guarantee document (S6/147). It was these lines which were criticised by Higgins J as being 'incomprehensible legal goobledygook'.<sup>19</sup> The second passage consisted of those parts of the plain English version of the ANZ Bank guarantee document corresponding to the first 80 lines. The third passage consisted of the author's redraft of the plain English version using less complicated syntax.

### The Passage of Conventional Legal English

Sentences drafted in conventional legal English tend to be long and difficult to understand. The practice of drafting a section or a sub-section in a single sentence largely arises from the unsubstantiated belief that the semantic links within a sentence are clearer than those between sentences.<sup>20</sup> Maintaining the referential links within the single sentence structure often gives rise to complicated and convoluted syntax where clauses are embedded within clauses.<sup>21</sup>

The first 80 lines '(in this article called "the sentence")'<sup>22</sup> consist of a single sentence containing 1688 words in 53 clauses and 54 reduced clauses.<sup>23</sup>

<sup>16</sup> D Sless, 'The Plain English Problem' (1995) 3(4) *Australian Language Matters* 8.

<sup>17</sup> *ibid.*

<sup>18</sup> R Penman, 'Plain English: Wrong Solution to an Important Problem' (1992) 19(3) *Australian Journal of Communication* 15.

<sup>19</sup> *Houlahan and Houlahan v Australian and New Zealand Banking Group Limited* (unreported), Supreme Court of the ACT, 16 October 1992, per Higgins J, pp 6–9.

<sup>20</sup> E Tanner, 'The Sanctity of the Single Legal Rule/Single Sentence Structure' (2000) 26 *Mon LR* 203.

<sup>21</sup> The word 'clause' here refers to a group of words containing a finite verb. The word 'Clause' refers to one of the 26 Clauses (or parts) of the guarantee document.

<sup>22</sup> The 'sentence' comprises an 'introduction' and the first of 26 Clauses (i.e. parts). The 'introduction' does not finish with a full-stop. Clause 1 starts with a capital letter and finishes with a full-stop. However, since Clause 1 cannot be precisely interpreted, either semantically or syntactically, without reference to the 'introduction', the 80 lines consisting of the 'introduction' and Clause 1 are

With each full line of print 20 centimetres long, 'the sentence' stretches over 13.2 metres. Space constraints prevent the inclusion of the whole 'sentence'. An abbreviated version is given here.

In Consideration of all or any loans advances credits or banking accommodation whether made created or given on the signing hereof or that may hereafter be made created or given in its discretion by Australia and New Zealand Banking Group Ltd (hereinafter called 'the Bank') to for or on account or at the request of (a) [*space for name(s) of Customer(s) (hereinafter called 'the Customer')*] on private joint or partnership account whether by allowing the Customer to overdraw any account or accounts or by paying or discounting Bills of Exchange or Promissory Notes or by any other means whatsoever and/or of forbearance on the part of the Bank to immediately demand and sue for payment of any moneys now owing by the Customer to the Bank the undersigned (b) [*space for name of Guarantor(s)*] the Guarantor hereby (jointly and severally if more than one) agree(s) with the Bank in the manner following that is to say. 1. The Guarantor hereby guarantees the payment by the Customer to the Bank upon service upon the Guarantor of the Bank's written request for payment under the hand of any of the officers of the Bank or by the Solicitors of the Bank delivered personally to the Guarantor or any one or more of them (if more than one) or left or sent through the Post Office addressed to the Guarantor or any one or more of them (if more than one) at his or their place of abode or business or the place of abode or business of any of them last recorded in the books of the Bank the production of the receipt of the Post Office for such request being conclusive proof of the service of any request so sent at the time when the same ought to be delivered in due course of post and although such request may be returned through the Post Office undelivered) or served in any other manner permitted by law ... [*followed by 983 words concerning the Customer's financial position and his/her dealings with the Bank*] ... together with interest on all such sums of money for the time being remaining unpaid computed until payment at the rate or rates from time to time usually charged by the Bank to its other Customers on accounts of similar nature or in the case of so much (if any) of such sums of money as to which the Bank in pursuance of any agreement between the Bank and the Customer has the right at any time or from time to time to determine the rate or rates applicable thereto (irrespective of the rate or

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analysed and tested together. These lines are dealt with as a single sentence. The main message of the introduction is that the 'Guarantor agrees with the Bank THAT ...' The 26 Clauses which follow are objects of the verb 'agrees', which appears in line 21 of the 'introduction'. See K Burridge and J Mulder (1998) *English in Australia and New Zealand: An Introduction to its History, Structure and Use*, Oxford University Press, p 173, for a discussion of what marks the boundaries of a sentence.

<sup>23</sup> A reduced clause is one in which the subject is omitted and the verb is not finite. For example, in the sentence, 'The dog, frightened by the storm, ran off', 'frightened by storm' is a reduced relative clause. The full relative clause would be 'which was frightened by the storm'.

rates charged by the Bank to its other Customers on any accounts of a similar nature) at the rate or rates from time to time applicable thereto ... [followed by 209 words concerning unpaid interest, and times and dates of payment] ... shall be conclusive proof of the rate or rates therein certified to and payable hereunder and certifying to the rest period or periods and dates for payment of interest as aforesaid shall be conclusive proof of the rest period or periods and the dates therein certified to.

The clausal analysis of 'the sentence' may be represented as:

[(R)(R) M {Comp (37 R +  
8A's)}{(Comp)(Comp)(Comp)}]

[Introduction....][.....Clause 1.....]

[Lines 1-22..... ][ Lines 24-80.....]

M=Main Comp=Complement R=Relative A=Adverbial
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If the omitted words from the reduced clauses were reinstated (as is perfectly justifiable), the above formulaic presentation would have a further 54 clauses in it and the true complexity of the syntax would be much more evident. The French call this sort of complexity 'drowning the fish'.<sup>24</sup>

Although this method of presenting the analysis does not show the relationships between those clauses which are not directly subordinate to the main clause, it is possible, by spreading the analysis out in detail, to show that it is not, in fact, incomprehensible.<sup>25</sup> Higgins J's criticism of the passage as 'gobbledygook' is, however, completely justified as it is characterised by 'circumlocution and jargon'.<sup>26</sup>

This piece of conventional legal English is a prime example of circumlocution. It incorporates material on methods of service, the debtor's past, present and possible future financial liability to the Bank, and the effect of those liabilities on the guarantor, rates of interest, methods, calculations,

<sup>24</sup> G Brysland, 'Drowning the Fish' (1992) 66 *LJ* 1102.

<sup>25</sup> See E Tanner (1998) *The Comprehensibility of Legal Language: Is Plain English the Solution?*, PhD thesis, University of Melbourne, Appendix D1, p 346.

<sup>26</sup> *The Macquarie Dictionary* (1981) The Macquarie Library Pty Ltd, p 752, defines 'gobbledygook' as 'language characterised by circumlocution and jargon'.

times and dates of payment. There appears to be no rational basis for the inclusion of all these matters in a single sentence. As a result, the passage is extremely syntactically complicated with its syntax driven by the perceived but unjustifiable need to incorporate all these matters into one sentence.

The passage exhibits many examples of legal jargon. For example, the document commences with a statement containing some of the essential elements of a contract of guarantee. These are readily recognisable by lawyers, but their full legal ramifications may not be appreciated by non-lawyers.

No effort has been made to make it clear that the guarantor becomes personally responsible for all amounts payable under the loan contract. This is hidden in the following words:

The Guarantor hereby guarantees the payment by the Customer to the Bank upon service upon the Guarantor of the Bank's written request for payment ... [159 words dealing with service] ... of all sums of money whatsoever which shall for the time being be owing or unpaid by the Customer to the Bank ...

Lawyers know that the word 'guarantees' in the passage has a technical legal meaning. Non-lawyers may conclude that the word 'guarantees' in this context means no more than that guarantors will do their best to make sure that the debtor repays the loan.

### Testing Comprehension

The testing of comprehension by using the empirical methods of educational psychology is universally accepted.<sup>27</sup> Although imperfect, these methods constitute the primary approach to understanding what people understand about texts.

There are several ways of testing comprehension. These include the multiple-choice or short-answer test, the 'cloze' test and oral questioning. The first of these tests is easy to score but the creation of valid questions may be very difficult. The 'cloze' procedure<sup>28</sup> is easy and relatively inexpensive to apply. It is based on a finding of psychology that humans tend to fill in missing items to close gaps in a passage of prose to make it complete. In a 'cloze' test, every 'nth' word (usually the fifth) is replaced by a standard-sized blank. Readers who have not previously seen the text are required to fill in the blanks by guessing the deleted words. The higher the score of correct insertions, the more the reader has understood. The third type of test entails questioning readers about passages they have been given to read. Their responses are probed orally. One version of this test requires readers to tell in their own words what they have read. Paraphrasing seems to be a useful way of revealing

<sup>27</sup> R Benson, 'The End of Legalese: The Game is Over', (1984-85) 13 *Review of Law and Social Change* 536.

<sup>28</sup> W Taylor, 'Cloze Procedure: A Tool for Measuring Comprehensibility' (1953) 30 *Journalism Quarterly* 415-31

what is 'inside the reader's head'.<sup>29</sup> However, an examiner's bias may be communicated to the respondent by intonation or body language. Another version requires people to read aloud and comment whenever they have difficulties in understanding. This 'reading protocol' method<sup>30</sup> is effective but time consuming, and respondents may find it difficult to maintain the spoken communication of their thought processes.

The use of the 'cloze'<sup>31</sup> test on 'the sentence' proved to be impractical, because of the prevalence of prepositional phrases. For example, if every fifth word in the passage quoted above beginning 'The Guarantor hereby ...' is replaced by a blank space, the words that are omitted are 'the', 'to', 'upon', 'Bank's', 'under', 'of', 'Bank', 'of', 'to', 'one', 'if', 'left', 'Post'. These words have little effect on the meaning of the passage.

The reading protocol method was not applied because the amount of information incorporated into 'the sentence' is so diverse and the syntactic structure so complicated that the time required for its use would have been prohibitive.

The questionnaire method, using multiple-choice questions, was chosen for testing the comprehensibility of 'the sentence'. Other methods of text analysis were used subsequently to validate the questionnaire results. These methods are discussed below.

### Evaluating Comprehensibility

Lexical density<sup>32</sup> is a useful indicator of comprehensibility. It is calculated from the proportion of lexis words to grammatical words. Lexis words are those with semantic content. The higher the lexical density, the less comprehensible the text is likely to be. Words which have no semantic content, like 'of', 'in' and 'the', are called 'authographical' words. The higher the 'authographical' density, the more comprehensible the text is likely to be.

The understanding of a text may also depend on the reader's familiarity with the concepts expressed in the text. The 'assumed familiarity' method of discourse analysis<sup>33</sup> is based on this. The semantic content of each noun phrase in a text is examined. An assumption is then made about the degree of familiarity that a reader is likely to have with each noun phrase. Four degrees of familiarity are recognised. They are 'brand new' (i.e. unfamiliar), 'unused' (i.e. familiar), 'textually evoked' (i.e. previously mentioned in the text) and

<sup>29</sup> Benson (1984-85) p 536

<sup>30</sup> J Swaney et al. (1991) 'Editing for Comprehension: Improving the Process through Reading Protocols', in E Steinberg (ed) *Plain Language: Principles and Practice*, Wayne State University Press, pp 173-206.

<sup>31</sup> Taylor (1953) p 28.

<sup>32</sup> J Ure (1971) 'Lexical Density and Register Differentiation', in G Perrin and J Trim (eds), *Applications of Linguistics: Selected Papers of the Second International Congress of Applied Linguistics 1969*, Cambridge University Press, p 447.

<sup>33</sup> E Prince (1981) 'Toward a Taxonomy of Given-New Information', in P Cole (ed), *Radical Pragmatics*, Cambridge University Press, p 223.

'inferable' (i.e. the meaning can be inferred from the text). The greater the percentage of noun phrases identified as 'brand new', the less comprehensible the text is likely to be to the reader.

### *The Evaluation*

The questionnaire consisted of 100 questions the answers to which were to be found in 'the sentence'. The questions were straightforward but required thought. In general, they followed the information in the passage sequentially.

Of the 75 respondents, 61 were undergraduate and fourteen postgraduate university students. Another nineteen,<sup>34</sup> who had not attended at any university, agreed to take part. Of these, six subsequently refused to participate. These groups were neither random nor representative samples. They were more in the nature of network samples. Because some of the university respondents had some law training, they were not representative of tertiary educated students. It could, nevertheless, be expected that such a sample would demonstrate a greater comprehension of the material than either a random or representative sample of the general population.

Each respondent was provided with the questionnaire and a photocopy of the 80 lines. They were given 45 minutes to complete their answers. The questionnaire was administered to members of the non-university group under the same conditions.

The responses were coded on to a spreadsheet.<sup>35</sup> The design of the questionnaire was such that all responses could be coded as either '0' or '1' (i.e. true or false). Tests were scored out of 100. For ease of analysis, scores were aggregated into classes of ten — i.e. Questions 1–10, 11–20 and so on. Average scores were calculated for each class of ten questions and line graphs of the resultant data were generated.

The arithmetic mean calculated over the whole of the sample was 52.6 per cent, with a range of four to 79. The results are represented in Figure 1, where the percentage average score per class of ten questions is plotted against the autographical density where the overall average was 54.6. There was a fairly close correlation between the two except for classes 61–70, 71–80 and 91–100. The probable reason for these discrepancies is discussed later.

Data analysis involved several variables including language, age and gender. Age and gender provided no significant differences, with similar distributions for each group. Language, however, yielded some distinct patterns, as shown in Figure 2, where the results achieved by native speakers of English are plotted against the results of those whose first language was a language other than English (LOTE speakers).

Of the 88 respondents, 74 were native speakers of English, and averaged 54.4 per cent. The remaining fourteen, who were LOTE speakers, averaged 45.4 per cent. The difference of 9.0 percentage points between these two

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<sup>34</sup> The sample included people who ran small businesses, tradespersons, several performing home duties, retired and unemployed. All were native speakers of English.

<sup>35</sup> Using Microsoft Excel, Version 4.



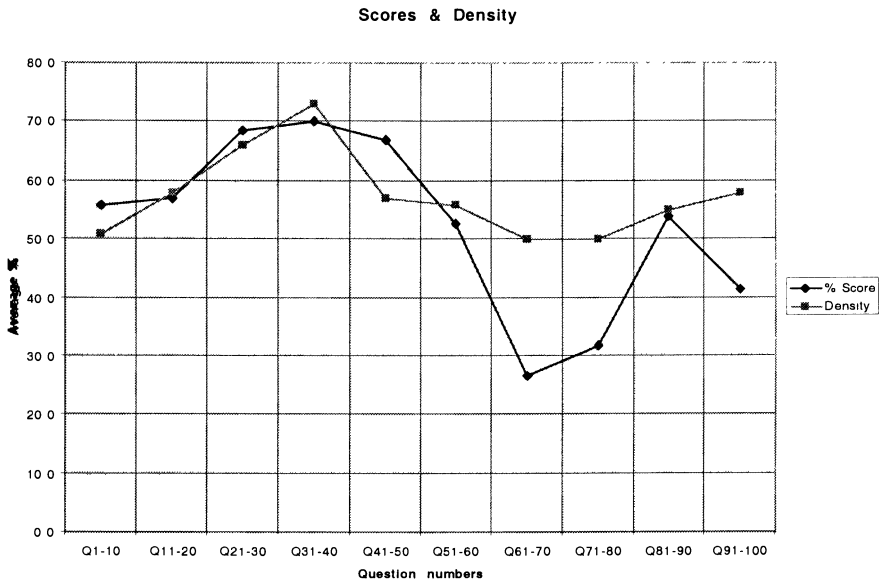


Figure 1: Percentage average score compared with authographical density

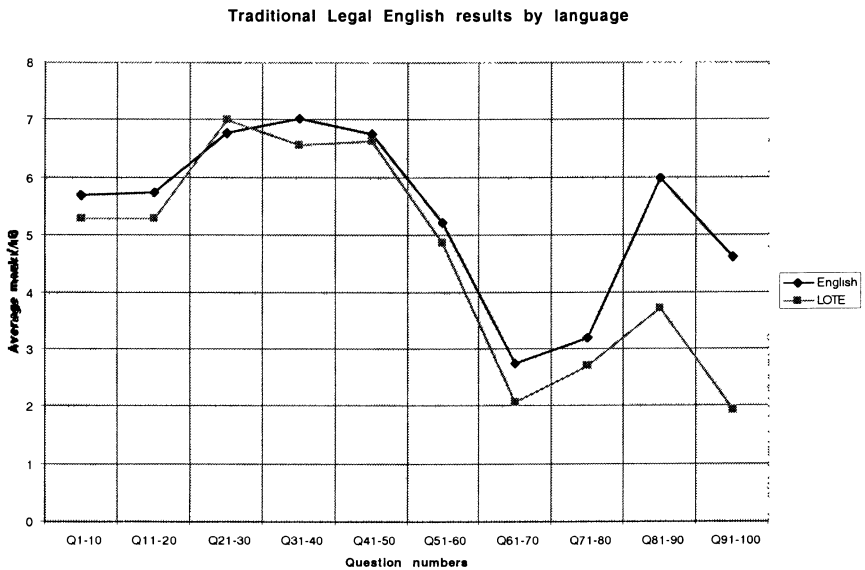


Figure 2: Native English speakers compared with LOTE speakers

means is significant since all respondents had a sound knowledge of English syntax, grammar and lexical items. There is little dispute amongst linguists that LOTE speakers who fit into this category can find written English more difficult to understand than do native speakers of English. This may have to do with the different cohesive patterns, different organisation of 'given' versus 'new' information in other cultures, or the fact that those cultures differ as to what ideas they regard as self-evident and therefore do not need to express.<sup>36</sup>

'The sentence' was also evaluated using the 'assumed familiarity' method of discourse analysis. The results are given as percentages in Table 1, for lawyers and lay persons.

**Table 1: Analysis of 'assumed familiarity' of noun phrases by number and percentage**

<i>Lawyer</i>	<i>No</i>	<i>%</i>	<i>Lay person</i>	<i>No</i>	<i>%</i>
Brand new	0	0	Brand new	54	40.0
Unused	88	65.1	Unused	26	19.3
Textually evoked	47	34.8	Textually evoked	47	34.8
Inferable	0	0	Inferable	8	5.9
TOTAL	135	99.9	TOTAL	135	100.0

Table 1 shows that no material was categorised as 'brand new' to a lawyer. It was all 'unused' or 'textually evoked'. It follows that a lawyer's comprehension should not have been hindered by semantic or conceptual difficulties. Counsel for the ANZ Bank was unable to explain the meaning of 'the sentence' to Higgins J when called on to do so. This failure is likely to have arisen from its syntactic complexity. By contrast, to a lay person, 40 per cent of the noun phrases were 'brand new'. This meant that not much more than half of the material was available to them. The syntactic difficulties confronting a lawyer would also confront a lay-person although a lawyer would be likely to have had more exposure to complicated syntax.

### *Discussion*

From an initial score of 55 per cent in the 1-10 class of questions the score rose to a peak of 70 per cent in the 31-40 class, and then deteriorated to end with a score of 42 per cent in the 91-100 class. The pattern suggests information overload. However, the normal inverted-U performance curve associated with information overload is interrupted in the 51-80 classes. Minimal performance of 26.7 per cent occurred in the 61-70 class, rising to 31.8 per cent in the 71-80 class. The last two scores fall well below the average score of 52.5 per cent. An examination of the syntactic structure, the lexical density and the familiarity of respondents with the noun phrases in the text may explain this.

<sup>36</sup> M Clyne 'Linguistics and Written Discourse in Particular Languages: Contrastive Studies English and German' (1983) 3 *Annual Review of Applied Linguistics* 44.

### Information Overload

The task confronting Counsel for the ANZ Bank in attempting to construe 'the sentence' was difficult. It is full of alternatives. The word 'or' appears 153 times. This would appear to provide 153 choices. But this is not the case. For example, the words 'loans advances credits or banking accommodation heretofore made created or given' can be redrafted into 12 different statements when each noun phrase is matched with each verb: '*loans* made, *loans* created, *loans* given', '*advances* made, *advances* created, *advances* given', and so on. Consequently, if 'the sentence' is rewritten using a different alternative each time, it is possible to write  $9.6 \times 10^{35}$  different versions of it. Processing this amount of information would seriously overload the short-term memory<sup>37</sup> of even experienced Counsel. Indeed, as Bentham might have commented 'the sentence' is 'so thick a mist, that the plain man, nay, even a man of learning, who is not in the trade, can neither see through it nor into it'.<sup>38</sup>

The causes of information overload have been identified. In stress research, increasing rates of information input are regarded as major stressors. As information input exceeds an individual's capacity to process it, the 'inverted-U stress performance relationship'<sup>39</sup> can be observed. With increasing stress, task performance increases to a certain level (peak performance), but after a given point drops suddenly and dramatically. Associated with this are heightening levels of anxiety, and partial or complete loss of previously acquired skills or behaviour. If the process continues, detrimental psychological and health effects may occur.<sup>40</sup>

Human information processing models present task performance in terms of a relationship between cognitive and situational factors — between the 'level of information processing'<sup>41</sup> and 'information load' or between the 'level of information processing' and 'environmental complexity'.<sup>42</sup>

The effect of information overload became obvious during testing. Six previously willing participants returned the questionnaire soon after commencing to read the photocopy of 'the sentence' and showed signs of agitation, aggression or humiliation and made comments such as 'I haven't got the time to do this now' or 'I left school to get away from this \*\*\*!'

Figures 1 and 2 do not exhibit the typical inverted-U shaped pattern. They show bipolar distributions. It may be that respondents became aware that the questions in the questionnaire followed the same sequence as the information

<sup>37</sup> The limitations of short-term memory were determined by Miller, who established that humans have an immediate memory span of approximately seven unrelated units. See G Miller, 'The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity of Processing Information' (1956) 63 *Psychological Review* 81.

<sup>38</sup> J Bentham (1843) *The Works of Jeremy Bentham* (J Bowring ed), vol. 5, William Tate, p 233.

<sup>39</sup> K Grosser, 'Stress and Stress Management' (1985) 15(6) *LASIE* 4.

<sup>40</sup> *ibid.*

<sup>41</sup> J Davis, 'Consumer Credit Contracts (1977) 63 *Virginia Law Review* 849.

<sup>42</sup> H Schroder et al. (1967) *Human Information Processing*, Holt Reinhart and Winston, p 52.

in the passage. This may have led them to attack the task from the end as well as the beginning. If this is the case, then the typical information overload curve covering Questions 1–70 can be seen as mirroring, to a lesser degree, Questions 71–100.

The trough occurs in the three classes associated with Questions 51–80. A close examination of the text from which these questions were drawn reveals a surprisingly large number of repetitions. For example, there are at least two places in which a large number of words in one line are repeated verbatim immediately below. The phrase 'either alone or jointly or in common or as aforesaid' occurs seven times. The word 'hereafter' also occurs seven times and with each repetition qualifies a different piece of information. Each repetition constitutes a separate chunk of information that requires processing before comprehension is achieved and the reader can move on. Furthermore, the word 'Customer' occurs fourteen times. This is three times as many as there are in the passage where peak performance was achieved. The only words that are repeated frequently where peak performance occurred are those associated with prepositional phrases and the word 'or'.

Information overload could also be traced to the conjunction 'or' which occurs 104 times in the lines associated with Questions 51–70. This is an average of more than three per line. In most cases a choice must be made not between two items, but from at least four — for example, 'official receiver trustee liquidator official manager or other person'. There are at least 180 possible choices to be made on the basis of the use of the word 'or'. It is suggested that the extraction of information became more difficult at a time when the performance had already peaked (where the conjunction 'or' occurs at a rate of less than two per line and where the choice is between two items and not four or more). In that part of the text from which Questions 71–100 were drawn, the conjunction 'or' occurs 20 times with a choice between only two possibilities in each case.

### *Syntactic Structure*

It is possible to explain the bipolarity in terms of syntactic structure. This is revealed from a careful analysis of those parts of the text from which the questions were drawn. The greatest number of correct answers (peak performance) occurred between Questions 21 and 40. Information for these questions is given in the first few lines and deals with the written request for payment. The syntactic structure of this part of the text is simple, consisting largely of at least 39 prepositional phrases, each of which contains a discrete chunk of information.

Minimum performance occurred in Questions 51–80. While there are still a large number of prepositional phrases (at least 36) in the text from which these questions were drawn, there are also 37 embedded clauses and eighteen reduced relatives. These last two types of construction have been recognised as hindering comprehension.<sup>43</sup>

<sup>43</sup> J King and M Just, 'Individual Differences in Syntactic Processing: The Role of Working Memory' (1991) 30 *Journal of Memory and Language* 580.

The syntactic structure of the text that corresponds to Questions 81–90 is similar to that from which Questions 21–40 were drawn. There are at least 68 prepositional phrases. This type of syntactic structure is easier to process and may account for the improved scores that occur for the class of Questions 81–90.

That part of the text from which Questions 91–100 were drawn is syntactically complicated. It contains twelve reduced relatives, four embedded relative clauses and one adverbial clause, along with a large number of prepositional phrases. In addition, the nexus between subject and verb is repeatedly disrupted — in one instance by 64 words.

### *Assumed Familiarity*

The bipolarity may also be explained in terms of the presence of ‘brand new’ information. Where peak performance occurred, 30 per cent of the noun phrases were ‘brand new’ to non-lawyers. At the second peak, 40 per cent were ‘brand new’. Where minimum performance occurred, 61 per cent of noun phrases were ‘brand new’.

### *Lexical Density*

Finally, the bipolarity may also be explained in terms of lexical density. Where peak performance occurred there is an average of thirteen authographical words per line. Where minimum performance occurred, there is an average of six per line.

It appears that lexical density, the degree of familiarity, syntactic complexity and information overload each had an effect on the comprehensibility of ‘the sentence’.

If a group of tertiary students could average only 52.5 per cent, it is likely that a random sample of the whole population would have scored considerably lower. It would seem that Higgins J was correct in concluding, as he did, that even had the Houlahans ‘read the document they would have been little the wiser’.<sup>44</sup>

In attempting to construe Clause 1, even Counsel for the ANZ Bank had difficulty. As an experienced lawyer, Counsel should have been familiar with this type of material. However, Clause 1 is excessively long and extremely syntactically complicated. It is not incomprehensible, but an adequate paraphrase of it requires concentrated study of it over a lengthy period.

### **Plain English Redraft**

The guarantee document currently used by the ANZ Bank is claimed to be drafted in plain English. Those parts of that document which correspond to ‘the sentence’ were selected, analysed and tested for comprehensibility, using the methods and analytical techniques described above. Respondents were chosen to match as closely as possible the original sample but selected from a new universe. Space constraints preclude a detailed description of the results.

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<sup>44</sup> *Houlahan's case*, note 19 above.

In carrying out a clausal analysis of the 1816 words in the 56 sentences of the plain English version, the probable guidelines used for drafting were isolated. For example, the drafters have:

- organised the text under well marked headings;
- divided the text into sections and sub-sections;
- used ample white space;
- restricted line length so that each line can be read with no more than two saccadic eye movements;
- generally minimised sentence length and number of clauses per sentence;
- generally minimised the use of left-branching structures;
- generally kept essential sentence together;
- used parallel construction in many of the longer sentences;
- generally used punctuation as an aid to comprehension;
- used personal pronouns;
- provided some definitions;
- largely avoided the unnecessary use of technical terms.<sup>45</sup>

However, there was no uniformity in the application of these guidelines. That lack of uniformity largely arose when the drafters reverted to the single sentence/single provision structure, which is a hallmark of conventional legal English. For example, concerning the service of written request for payment the plain English version states:

I agree that ANZ may give me a notice or demand under this guarantee:

by handing it to me; or

by leaving it at my address; or

by posting it (by ordinary mail or otherwise) in a prepaid envelope to me at my address; or

in any other way that the law allows.

3.2 I agree that a notice or demand that ANZ gives me for the purposes of this guarantee will be taken to be given and received:

if ANZ leaves it at my address, when left; or

(b) if ANZ posts it to my address, when it would be delivered in the ordinary course of post but in any event not later than six days after it is posted.

I agree that paragraph (b) applies even if the letter is returned undelivered.

ANZ may prove that it posted the notice or demand to me at my address by producing a post office receipt for it.

<sup>45</sup> Tanner (1998), p239.

In this clause:

“my address” means:

- (a) the address shown on the “Details Page” of this guarantee as my address; or
- (b) the address that the person signing the notice or demand believes from the addresses for me that ANZ has recorded in its books is my most recent address.

The clausal structure of these provisions can be represented as:

3.1 [M{R}]

[M{C(R)(Cond)(Cond)<A><A>}].

[M]{C(Cond)}

[M{C}]

[M{C(R)(C)}]

<p>M=Main  C=Complement  Cond=Conditional  R=Relative  A= Adverbial</p>
-----------------------------------------------------------------------------------------

These four subsections of s 3 contain five sentences. The first sentence in s 3.2 and the sentence in s 3.4 are relatively syntactically complicated. The whole section is, however, made more easily comprehensible by the way in which it is laid out.

The way in which the rate of interest is calculated is given in s 11.2. There are three other subsections (containing 159 words expressed in fifteen clauses and four sentences) dealing with various aspects of interest, but s 11.2 states:

11.2 If there is no such agreement or more than one of them I agree that:

- (a) ANZ may fix a rate of interest and the way in which it is calculated;
- (b) in fixing a rate, ANZ may have regard to matters that it considers appropriate (which may include the nature, purpose, amount and performance of the facility concerned and the interest rate or rates charged by it to its other customers in respect of similar facilities); and
- (c) if there is more than one agreement with the customer the rate fixed by ANZ will not be higher than the highest of the

rates under those agreements (but penalty rates are not to be calculated for this purpose).

The clausal structure of this provision can be represented as:

{Cond}M{C(R)}{C(R)(R)}{(Cond)C}{C}

M=Main C=Complement Cond=Conditional R=Relative
----------------------------------------------------------

This provision is unnecessarily syntactically complicated. In order for the guarantor to understand what is being agreed to it is necessary for the nine subordinate clauses in this 115-word and ten-clause sentence, to be unpacked and held in the short-term memory. Five of these clauses are directly subordinate to the main clause. One gives the condition under which the agreement about interest is to be considered while the four complement clauses state what is agreed to. The remaining three relative clauses and one conditional clause are subordinate to and embedded in three of the complement clauses. The constant interruption of the significant propositions expressed in the main clause with its four complement clause objects, makes it difficult for readers to extract information.<sup>46</sup> It is the combination of complicated syntax and excessive sentence length, which causes information overload and short-term memory failure with resulting comprehension problems.<sup>47</sup>

Of the 88 respondents in this sample, 15.9 per cent were speakers of a LOTE. (In the previous sample, it had been 36.7 per cent of 98 respondents.) The arithmetic mean for comprehension calculated over the whole sample was 62.6 per cent. This is an improvement of 10.0 percentage points.

An analysis of the plain English version revealed that the percentage of 'brand new' information to non-lawyers had fallen by 17.3 percentage points, and the lexical density had decreased by 4 percentage points.

When the scores from the comprehension test and those from the clausal analysis of the material from which the questions were drawn were compared, there was a striking correlation. The clausal complexity of each question was ascertained from the material required for answering it. The results were collated and the number of clauses per class of ten questions was calculated.

<sup>46</sup> Problems of this nature were identified by Allan and Burrige (1991) p 199.

<sup>47</sup> F Ferreira 'Effects of Length and Syntactic Complexity on Initiation Times in Prepared Utterances' (1991) 30 *Journal of Memory and Language* 210; G Miller et al. (1963) 'Finitary Models of Language Users', in R Luce, R Bush and E Galanter (eds), *Handbook of Mathematical Psychology Volume 2*, Wiley, pp 471-80; J King and M Just, 'Individual Differences in Syntactic Processing: the Role of Working Memory' (1991) 30 *Journal of Memory and Language* 580-602.



To make a comparison, an arbitrary maximum of 50 clauses per class of ten questions was selected. The number of clauses per class was then subtracted from this maximum and expressed as a percentage to show clausal simplicity.

An examination of the results showed that the larger the number of clauses that needed to be processed, the lower the level of comprehension. So the number of clauses per class was in inverse proportion to the mean score of that class.

Figure 3 shows the percentage average scores per class of ten questions for comprehension compared with the inverse of the percentage of clauses per class.

### **The Plain English Version Redrafted**

To test the hypothesis that syntactic complexity has a direct effect on comprehensibility, the ANZ Bank plain English version of 'the sentence' was redrafted by the author in simplified syntax. The results are summarised in Table 2.

Simplifying the syntax resulted in shorter sentences, fewer clauses per sentence, fewer left-branching structures, and generally the essential components of a sentence were kept together.

Two examples of the author's redraft are provided. Section 3 now reads:

- 3.1 ANZ may give me a notice or demand:
- (a) by handing it to me; or
  - (b) by leaving it at my address;
  - (c) or by posting it by ordinary mail (or otherwise) in a prepaid envelope to me at my address; or
  - (d) in any other way that the law allows.

Note 'my address' is defined in Part C.

- 3.2 A notice or demand which ANZ gives me will be taken to be given and received if it is;
- (a) left at my address; or
  - (b) posted to my address, allowing time for delivery (but within six days after posting).

Paragraph (b) applies even if the notice or demand is returned undelivered.

- 3.3 A post office receipt for a notice of demand from ANZ is sufficient proof of postage
- 3.4 If there is more than one guarantor, a notice or demand from ANZ will be effective if given to any one of the guarantors.

Scores &amp; clausal simplicity (PE version)

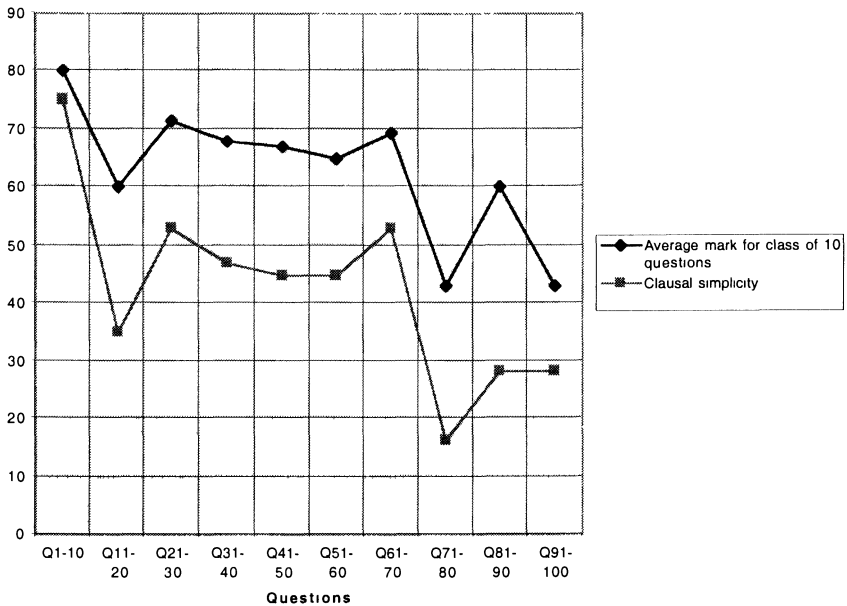


Figure 3: The percentage average scores per classes of ten questions compared with inverse of the percentage of clauses per class.

Table 2 Comparative grammatical analysis of plain English and redrafted plain English versions

<i>Grammatical analysis</i>	<i>Plain English</i>	<i>Plain English redraft</i>
Number of words	1816	1660
Number of sentences	56	78
Number of clauses	164	166
Average sentence length in words	32.4	21.2
Average clauses per sentence	2.9	2.1
Number of single clause sentences	25	33
Number of sentences with more than three clauses	16	11
Left branching: conditionals	56	6
Centre embedded clauses and phrases	11	6
Parallel constructions	11	13
Reduced relatives	26	7
Reduced conditionals	8	1

The clausal analysis of these provisions is:

- 3.1 [M{R}]
- 3.2 [M{R(Cond)(Cond)}]
- [M{Cond}]
- 3.3 [M]
- 3.4 [{Cond}[M]{Cond}]

M=Main  
Cond=Conditional  
R=Relative

These four subsections are expressed in five sentences, none of which is syntactically complicated. The layout further aids comprehensibility.

The material dealing with the rate of interest contained in s 10.2 of the ANZ plain English version now reads:

- 10.2 If no agreement between ANZ and the debtor has been made:
  - (a) ANZ may fix a rate of interest and the way in which it is calculated; and
  - (b) in fixing a rate, ANZ may consider:
    - (i) the nature, amount and performance of the facility concerned; and
    - (ii) the interest rate, or rates, ANZ charges to its other debtors for similar facilities
- 10.3 If there is more than one agreement with the debtor, the rate that ANZ fixes will not be higher than the highest of the rates under those agreements. Penalty rates are not to be counted for this purpose.

The far simpler clausal structure of this redrafted provision is evident from the formulaic representation:

- 10.2 [Cond{(M<R>)(M<R>)}]
- 10.3 [Cond{M}]
- [M]

M=Main Cond=Conditional R=Relative
------------------------------------------

The redrafted plain English version was tested for comprehensibility using the methods of testing and analysis previously used. Respondents were chosen to match as closely as possible the previous samples, but were selected from a different universe. The arithmetic mean, calculated over the whole sample, was 68.6 per cent. This represents an improvement of 6.2 percentage points over the plain English version and an improvement of 16.0 percentage points over the conventional legal English version.

Figure 4 shows the overall average scores per class of ten Questions across all three versions.

Figure 4 demonstrates that the application of plain English guidelines to a passage of conventional legal English resulted in a significant improvement in comprehension. A further improvement was obtained when the syntax in the plain English version was simplified.

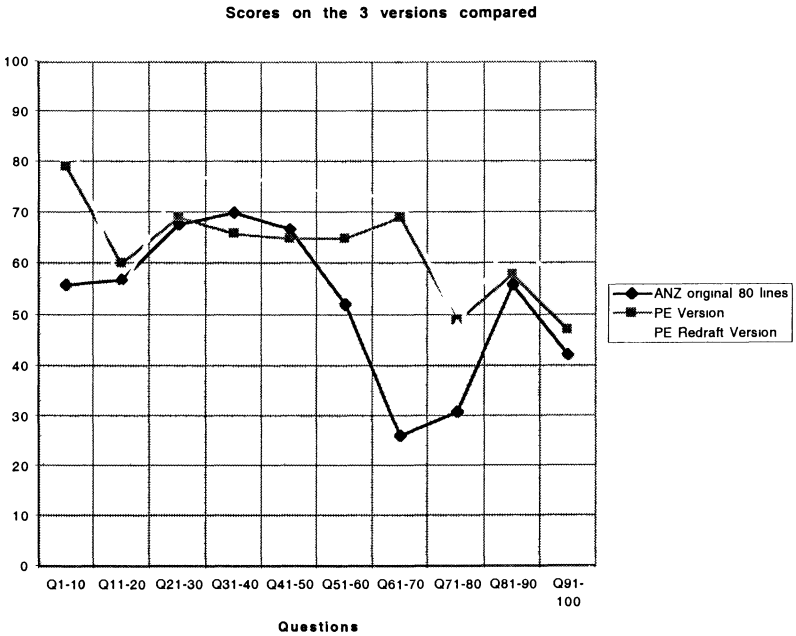


Figure 4: Average scores for all three versions

There was one sub-group that benefited most from the simplified syntax. They were LOTE speakers. Of the 114 respondents, 28.9 per cent were speakers of a LOTE. Their mean score for the plain English version was 57.6 per cent, with 66.8 per cent in the redrafted plain English version. This is an improvement of 9.2 percentage points.

## Conclusion

An overall improvement in comprehension of 16.0 percentage points between the original 'sentence' and the author's redraft of the ANZ Bank plain English version is significant. However, a mean comprehension score of 68.6 percent for the redrafted plain English version leaves almost a third of the content of the passage inaccessible. It would seem, therefore, that for documents like this, plain English does not 'necessarily guarantee successful communication'.<sup>48</sup> This research does not, however, reveal any basis for questioning 'the morality of plain English'<sup>49</sup> or the political motives of those who espouse it.<sup>50</sup>

Non-lawyers are unlikely to appreciate that underpinning all legal texts there is a second layer of meaning which is not overtly expressed in the text. It is to be found in the common law and statutory rules. Legal drafters often assume that non-lawyers possess this knowledge.<sup>51</sup> Without access to that second layer, a full understanding of the ramifications of a guarantee document cannot be achieved. This problem was identified by Fox J, who in discussing the construction of a mortgage document, said:

It is surely a sad commentary on the operation of our legal system that a borrower should be expected to execute a document which ... has a legal effect not disclosed by its language.<sup>52</sup>

In the author's redraft of the ANZ Bank plain English version, the only alterations made were to the syntax. No attempt was made to provide access to the second layer of meaning. In all three versions it can be said that the drafters have assumed that prospective guarantors are familiar with the common law and statutory rules which underpin guarantee documents. Lawyers might argue that they make this assumption in order to avoid discombobulating circumlocution and verbosity, but it is not generally lawyers who bind themselves by signing such documents.

In Australia, equity recognises that a person with a special disability *vis-à-vis* the stronger party can invoke the doctrine of unconscionability as a defence.<sup>53</sup> For the purpose of this doctrine, the 'special disability' could be

<sup>48</sup> Sless (1998) p 5.

<sup>49</sup> Sless (1995) p 8.

<sup>50</sup> Penman (1992) pp 15-16.

<sup>51</sup> B Dwyer, 'Plain English and Life Insurance' (1993) 19 MULR 335.

<sup>52</sup> *Richards v Commonwealth Bank of Australia* (1971) 18 FLR 95, per Fox J, p 99.

<sup>53</sup> See *Commercial Bank of Australia v Amadio* (1983) 151 CLR 447, particularly the reasoning adopted by Deane J (at p 475 et seq) where he listed the three necessary requirements to make out the plea.

found in a lawyer's deliberate use of conventional legal English with its esoteric vocabulary, abnormally long sentences, large numbers of passives, multiple embeddings, multiple negatives, nominalisations, intrusive phrases, and unconventional information structure.<sup>54</sup> If lawyers continue to use conventional legal English in drafting legal documents that must be understood and signed by lay persons, there should be an equitable remedy available to those who are disadvantaged. It should not be necessary for the ordinary borrower or guarantor to have a knowledge of both law and linguistics.

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<sup>54</sup> Allan and Burridge (1991) p 202.