

# LEGAL LANGUAGE AND THE NON-LAW RESEARCH STUDENT

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The article isolates and explicates those characteristics of legal language which may cause difficulties to non-law graduate students undertaking interdisciplinary research theses requiring an understanding of law. These characteristics consist of three categories. The first category relates to the vocabulary of the law. The second relates to the continued use by lawyers of over-long syntactically complex sentence structures. The third relates to what James Boyd White has called the 'unstated conventions' by which legal language operates: a second layer of meaning underpinning legal language, but which is seldom stated in it. Linguistic schema theory is applied to these 'unstated conventions' to explicate them.

## I. INTRODUCTION

Supervising research students is a time consuming task for the supervisor, requiring dedication and a sensitive awareness of the many potential difficulties facing research candidates. These difficulties are compounded when candidates are non-law graduate students undertaking interdisciplinary research theses requiring an understanding of law or when the candidate's first language is not English. The purpose of this article is to explain the nature of the challenges which legal language and its multiple layers of meaning pose for such research students and their supervisors.

In this article the author has divided into three categories the characteristics of legal language which are likely to cause difficulties to non-law students undertaking interdisciplinary research requiring an understanding of legal language. The first category relates to the vocabulary of the law. The second category relates to the continued use by lawyers of excessively long syntactically complex sentence structures. The third category relates to what James Boyd White<sup>1</sup> has called the 'cultural syntax of the law' or the 'unstated conventions' by which legal language operates: a second layer of meaning underpinning legal language, but which is seldom stated in it. Linguistic schema theory is applied to these 'unstated conventions' to explain them.

## II. THE VOCABULARY OF THE LAW

Non-law postgraduate students undertaking research containing a legal component are going to have to read legislation and private legal documents which exhibit characteristics that are extreme enough to mark legal English as a distinct variety of English. It looks like everyday English, but it isn't. Indeed, legal English has been variously labelled. Bentham referred to it as a 'cant' or 'jargon',<sup>2</sup> Forshey,<sup>3</sup> Charrow and Crandall<sup>4</sup> all suggest that it is a 'dialect'. Danet

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1 James B White, *Heracles' Bow: Essays on the Rhetoric and Poetics of the Law* (1985) 85.

2 Jeremy Bentham, *The Works of Jeremy Bentham* in J Bowring, *1843* (Tait (ed), 1975), Volume 8, 280-3.

3 John Forshey, 'Plain English Contract: the Demise of Legalese' (1978) *Baylor Law Review* 765.

4 Linguist Brenda Danet notes that sociolinguists Veda Charrow and Jo Ann Crandall believe the lexical and syntactic differences between legal English and ordinary English are significant enough to warrant legal English being called a distinct dialect. See Brenda Danet, 'The Language of the Legal Process' (1980) 14 *Law and Society Review* 470-5.

suggested that any of the three labels, 'dialect', 'register' or 'High' language in a diglossic situation, are applicable.<sup>5</sup> Allen and Burrige concluded that legal English is a 'jargon'.<sup>6</sup>

What does this mean for your non-law postgraduate students undertaking research containing a legal component? Or more properly put, what does it mean for the supervisors when confronted by confused and sometimes frustrated students? So how can non-law postgraduate students be alerted to some of the lexical differences between ordinary English and legal English? How can a supervisor approach the task of explaining the legal lexicon to non-law postgraduate students undertaking research containing a legal component?

It is important to explain that the law as it is today is the result of evolution. Changes in social structure and the growth of social institutions, together with the imposition of a different variety of language (French) on the population of England, caused the growth of specifically legal concepts and a lexicon to match. As the social structure developed and increased in complexity and technicality it generated a need for a legal lexicon with agreed meanings. This coupled with a trend, which began in the 14<sup>th</sup> century, for judges to interpret statutes strictly, led to a recognition of the separation of powers between legislature, executive and judiciary.<sup>7</sup> The text (the enacted words and the judicial decisions) became the common link<sup>8</sup> and the functional basis on which the legislature and judiciary exercised their respective powers. Within this framework developed a many-tiered lexicon, including terms of art (eg natural justice), technical terms (eg manslaughter, trust), stylistic terms (eg covenant instead of promise), and referential terms (eg aforesaid). David Mellinkoff<sup>9</sup> suggested that those words, which have the same meaning in all contexts within the adversary system, are 'terms of art'. By contrast, he argued, technical terms like 'murder' have relatively fixed meanings. Lon Maley suggested that technical terms are legal constructs whose meaning is 'time-bound, institution-bound, and culture-bound'.<sup>10</sup> Stylistic and archaic terms are used to give the language of the law increased formality and convey a sense of legality. Once alerted to the tendency, non-law students should have few problems with these terms. Referential terms are items used to reinforce the referential process. More often than not they cause confusion and, thankfully, today most lawyers avoid them. The remainder of the lexicon includes technical terms drawn from other disciplines.

Terms of art and technical terms are essential to legal language in that they enable lawyers to communicate complex concepts concisely and precisely within the profession. The postgraduate non-law research student is most unlikely to understand the precise meaning of these terms. However, once a supervisor has identified and distinguished between terms of art and technical terms, non-law research students only have to refer to a legal dictionary to gain some insight into their meaning. If problems arise, then the student can approach the supervisor for a more detailed explanation.

Specific problems arise for non-law research students when technical legal terms are borrowed from ordinary English. For example, where the item 'trust' in ordinary English means 'reliance on the integrity and justice of person or on some quality or attribute of a thing: confidence',<sup>11</sup> in law it embodies a concept that has developed over the centuries originally to frustrate the Monarch's ability to collect feudal dues. Similar difficulties arise with words like 'unconscionability', 'offer' and 'guarantee'.

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5 Ibid, 470–5. 'Diglossia' refers to the situation where two varieties of language exist in a community, each used for a separate purpose, and where one of those two varieties is a learned language.

6 Keith Allen and Kate Burrige, *Euphemism and Dysphemism: Language used as a Shield and a Weapon* (1991) 195.

7 T Plunkett, *A Concise History of the Common Law* (1988) 297.

8 Ibid.

9 David Mellinkoff, *The Language of the Law* (1964) 391.

10 Yon Maley, 'The Semantic Field of Homicide' in James Benson and William Greave, *Systematic Perspective's on Discourse Volume 2: Selected Applied Papers from the 9<sup>th</sup> International Workshop* (1985–1988) 141.

11 *The Macquarie Dictionary* (1987) 1821.

### III. EXCESSIVELY LONG SYNTACTICALLY COMPLICATED SENTENCES

A major cause of comprehension difficulties for postgraduate non-law students undertaking research with a legal component is the continued, but erroneous belief<sup>12</sup> held by many parliamentary drafters (and some private practitioners) that the semantic links within a single sentence structure are clearer and more precise than where the same information is drafted in a series of shorter, carefully semantically linked sentences. The author knows of no contemporary linguist who would support this contention and has established the falsity of the view in an article published ten years ago.<sup>13</sup> Much of this argument rests on research by cognitive psychologist, George Miller.<sup>14</sup> Miller established that the short-term memory can hold about seven unrelated units<sup>15</sup> of information at any one time before it fails. It follows that long syntactically complex sentences are likely to contain too much information for the short-term memory to process.

Whilst law students are compelled to train their short-term memories so that they can understand long syntactically complex sentences, few non-law postgraduate research students have acquired this skill. For that reason, supervisors may find themselves having to assist research students to unpack the meaning of legal rules expressed in syntactically complex sentence structures.

An extreme example of an excessively long sentence has been provided by S6/147 Australian and New Zealand bank guarantee document.<sup>16</sup> This document was considered in *KG and SB Houlahan v Australian and New Zealand Banking Group Ltd*<sup>17</sup>. In that case, Higgins J asked Counsel for the ANZ Bank to construe the first clause. That clause was 57 lines long, expressed in a single sentence of 1688 words. Counsel for the ANZ Bank was unable to construe the sentence and, as a result, Higgins J decreed that it was ‘incomprehensible legal gobbledygook’.<sup>18</sup> In addition, he suggested that, if the plaintiffs had read the document before they signed it they ‘would have been little the wiser’.<sup>19</sup> In fact, after six months slaving over this ‘sentence’ the author managed to unpack its syntactic structure and establish that it was grammatically flawless.<sup>20</sup>

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, there is potentially a vast number (ie  $9.6 \times 10^{35}$ ) of different versions of the sentence. Processing this amount of information would seriously overload the short-term memory.<sup>21</sup> Many provisions (sections and subsections) in contemporary legislation exceed 50 words in length. Some of the longer ones are masterpieces of grammatical construction, but are often difficult for lawyers to understand, let alone non-law postgraduate research students.

12 The author established the erroneous nature of ‘the belief’ — Edwin Tanner, ‘The Sanctity of the Single Legal Rule/Single Sentence Structure?’ (2000) 26 *Monash University Law Review* 203.

13 Ibid.

14 George Miller, ‘The Magical Number Seven, Plus or Minus Two: Some Limits on Our Capacity for Processing Information’ (1956) 63 *Psychological Review* 81.

15 A word is not necessarily a unit of information. Several words taken together can form one unit of information. For example, the words ‘bacon and eggs’ go together so often, that they may form one unit.

16 As a result of *K G and S B Houlahan v Australian and New Zealand Banking Group* (Unreported, Supreme Court of ACT, Higgins J, 16 October 1992) (*Houlahan*); the ANZ had this document redrafted in simpler English. However, the drafters retained the single provision/single structure convention.

17 Ibid.

18 Ibid 8.

19 Ibid 9.

20 Edwin Tanner, ‘The Comprehensibility of Legal Language: Is Plain English the Solution?’ (2000) 9(1) *Griffith Law Review* 62.

21 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 Miller, above n 14.

The ANZ document considered in *KG and SB Houlahan v Australian and New Zealand Banking Group Ltd*<sup>22</sup> reminds the author of the tale of the brilliant Swiss clock maker who was commissioned to make a town hall clock that kept perfect time. He laboured long and hard on this task and eventually installed it in pride of place. The only problem was that he did not give the clock any hands, so that each time someone wanted to know the time, he had to climb the scaffolding and carefully calculate the time by observing the internal mechanism of the clock. In this story, the absence of the hands of the clock is a metaphor for the total reliance on the creator to interpret meaning.

But many lawyers still fiercely adhere to the convention that the semantic links within a single sentence structure are clearer and more precise than the same information expressed in a series of shorter carefully semantically linked sentences. Jeffrey Barnes<sup>23</sup> asserted, for example:

respondents from two drafting offices in a recent survey expressly queried whether relaxing [the ‘belief’<sup>24</sup>] was required by plain language principles. The writer has been informed by a senior drafter who drafts in an office with a plain language policy that it may be that the convention is maintained to avoid rules being ‘buried’ in a narrative.

The argument that a parliamentary office has a plain English policy means little unless it is applied. The author has established that the Victorian,<sup>25</sup> Commonwealth of Australia<sup>26</sup> and the European Community (EC) Legal Service<sup>27</sup> all have plain English policies which are seldom rigorously applied, and that the average sentence length of provisions exceeds 50 words. The suggestion that legal rules can become buried in a narrative demonstrates a lack of knowledge of developments in linguistics, particularly schema theory, which the author deals with later.

*Socpen Trustees Ltd v Wood Nash & Winters*<sup>28</sup> provides another example of ambiguity rising from adherence to the ‘belief’. In that case, a client sued their lawyers in negligence for sending them a letter drafted in legalese. The letter was intended to advise the client (a landlord) of the right to evict a tenant under a ‘break clause’ in a lease. But the letter was drafted in language that was so convoluted and tortuous that the client misinterpreted it and, as a result, acted to its detriment on the basis of the misinterpretation. Jupp J awarded the client 95,000 pounds in damages and told the court that the letter was drafted in ‘very obscure English’ and ‘anaesthetized [the client] into an oblivion’.<sup>29</sup>

A more recent example which the author analysed for *The Statute Law Review* (2006)<sup>30</sup> was the European Commission Legal Service’s Directive 2002/2/EC. This Directive was drafted in excessively long, syntactically complicated sentences. Article 1.4.6 was one of several such sentences which were also demonstrably ambiguous. The EC Legal Service claims to draft its legislation in plain language. It is important to note that the Service drafts its original documents in English and French and it is from these precedents that the other 25 member States draft their own corresponding legislation. Furthermore, this particular Directive should have posed few conceptual difficulties for the drafters because it dealt with the straightforward topic of ‘the sale, distribution and storage of animal feedingstuffs’.<sup>31</sup>

22 *Houlahan* (Unreported, Supreme Court of ACT, Higgins J, 16 October 1992).

23 Jeffrey Barnes, ‘The Continuing Debate About ‘Plain Language’ Legislation: the Law Reform Conundrum’ (2006) *Statute Law Review* 115.

24 In other words that the semantic links within a single sentence structure are clearer and more precise than the same information presented in a series of carefully semantically linked shorter sentences.

25 Edwin Tanner, ‘Seventeen Years On: Is Victorian Legislation Less Grammatically Complicated?’ (2002) 28(2) *Monash University Law Review* 403, 403; Edwin Tanner, ‘Communications Strategies: Understanding the Racial and Religious Tolerance Act 2001 (Vic)’ (2003) 27(1) *Melbourne University Law Review* 139–62.

26 Edwin Tanner ‘Legislating to Communicate: Trends in Drafting Commonwealth Legislation’ (2002) 24(4) *Sydney Law Review* 529–57.

27 Edwin Tanner, ‘Clear, Simple and Precise Legislative Drafting: Australian Guidelines Explicated Using an EC Directive’ (2004) 25(3) *Statute Law Review* 223–50. Edwin Tanner (2006) ‘Clear, Simple and Precise Legislative Drafting: How does an EU Directive Fare?’ *Statute Law Review* 150–75.

28 Unreported, Queens Bench Division, Jupp J, 6 October 1983.

29 Peter Butt, ‘Plain Language in Property Law: Uses and Abuses’ (1999) 73 *Australian Law Journal* 807.

30 Tanner, ‘Clear, Simple and Precise Legislative Drafting: How does an EU Directive Fare?’, above n 27.

31 *Ibid.*

#### IV. SCHEMA THEORY AND THE SECOND LAYER OF MEANING

This section applies linguistic schema theory to show how non-law postgraduate students seeking to undertake theses containing a legal component are likely to be confused by what James Boyd White referred to as the ‘*cultural syntax*’ of the law.<sup>32</sup> White argued that the most serious obstacles to the comprehensibility of legal language are not the *vocabulary* and *sentence structure* employed, but the unstated conventions by which the language operates: what he called the ‘*invisible discourse*’ of the law.<sup>33</sup> As a result, even where legal rules are drafted in a clear, simple and precise form, non-law postgraduate research students are unlikely to fully understand them because they are unacquainted with the schemata (the ‘*cultural syntax*’ or ‘*invisible discourse*’) on which they are based.

##### A. Schema Theory Explained

Schema theory holds that prior knowledge is highly organised in the memory and forms patterns by which future events are interpreted. Each pattern, or mental structure, is called by one of the synonyms, a ‘schema’, a ‘scenario’, a ‘script’ or a ‘frame’.<sup>34</sup> Schemata represent the relationships underlying concepts, events, situations or objects. Each schema may be a composite of several sub-schemata. Once acquired, schemata are used to interpret the world.<sup>35</sup> They are, in a sense, the scaffolding upon which the meaning of an event, situation, or the language of a text, is constructed.

Initially, schema theory was explained in terms of restaurant etiquette which is learnt from experience.<sup>36</sup> As a further illustration, consider people who have never been to court. They have no schemata for determining, for example:

- the roles of the participants,
- the way they should conduct themselves, and
- the way in which the court should be addressed.

Once they have attended a court in session, an overall mental structure has been established. This may be modified, or extended, by subsequent visits to this and other courts, but a basic schema has been established. From this example it can be seen that a ‘schema’ consists of a set or pattern of pieces of information.

##### B. Speech Act Form Schema

Speech act form is a schema. It is fundamental to the adversary system and exists where the words themselves perform the act. For example, apologising, welcoming, and resigning, are all speech acts in which uttering the words achieves the outcome. Speech acts depend heavily on shared conventions and expectations. They also depend on the words used, and on the acts that those words perform.

Certain criteria, known as ‘felicity conditions’, have to be satisfied for a speech act to be successful.<sup>37</sup> These conditions are that:

- there must be a conventional procedure having a conventional effect;
- particular persons and the circumstances must be appropriate;
- the procedure must be executed correctly and completely by all participants; and
- the persons must have the requisite thoughts, feelings, and intentions.

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<sup>32</sup> White, above n 1, 85.

<sup>33</sup> *Ibid.*

<sup>34</sup> David E Rumelhart, ‘Schemata: the Building Blocks of Cognition’, in [R. Spiro, B. Bertram and W. Brewer (eds)], *Theoretical Issues in Reading Comprehension: Perspectives from Cognitive Psychology, Linguistics, Artificial Intelligence, and Education* (1980) 33–4.

<sup>35</sup> *Ibid.*

<sup>36</sup> Charles A Perfetti, *Reading Ability* (1985) 42.

<sup>37</sup> See generally J L Austin, *How To Do Things With Words* (1962); and J Searle, *Speech Acts: an Essay in the Philosophy of Language* (1969).

Although not confined to the law, speech acts permeate and underpin its language and processes. They may appear to be ‘spun of cobwebs’,<sup>38</sup> but are, in fact, integral to the English language.

The facilitative and regulative functions of the law are empowered by two kinds of speech act. These are directives and commissives. Directives include begging, commanding, or requesting. Commissives include, promising and guaranteeing.

Legal rules in *legislation*, command, empower, define or repeal. This is their illocutionary force. This force is given authority by electors speaking through their parliaments. The inclusion of the enacting formula at the commencement of a statute is an indication that the words which follow, are to have the illocutionary force of a speech act. This can only occur if they have been through a set parliamentary and executive procedure which has been followed meticulously. The words of the law will then be the law. They are authoritative as words and assumed to be ‘always speaking’.<sup>39</sup> Even if they are ambiguous, or do not accurately convey Parliament’s intention, the words must stand as they are unless amended or repealed.<sup>40</sup>

Rules arising from *case law* have a similar illocutionary force. Their legitimating authority originally derived from sovereign command, but more recently from the State.<sup>41</sup>

In both legislation and case law, the illocutionary force of the words of the law is strong. The words of the law must ‘count’<sup>42</sup> if they are to regulate behaviour.

When judges say they are adhering to the principle of *stare decisis* they are merely saying that they are applying the doctrine of precedent. In other words, there is a previous decision on a similar issue in the court hierarchy which the court must apply to the case before it. *Stare decisis* is a schema.

One manifestation of speech act form in legislation is the use of the deontic modals<sup>43</sup> ‘shall’ and ‘may’. These modals have special significance to lawyers in that they indicate, respectively, mandatory and discretionary authority. They have no special significance to non-law postgraduate research students. These students are unlikely to be familiar with the deontic force of these words. They may take ‘shall’ as indicating the future, and ‘may’ as conveying lack of certainty. In common usage, ‘shall’ as a deontic modal is obsolete. For example, to non-lawyers the sentence, ‘You shall do it’, no longer expresses an order. To make that sentence into an order, the word ‘shall’ has to be replaced by the word ‘must’ or some form of ‘have to’. Most drafting books acknowledge that ‘must’ is now preferable to ‘shall’ to express mandatory force.<sup>44</sup> Rendering the modal ‘shall’ as the more commonly used ‘must’, does not remove its illocutionary force if used in the appropriate setting.

The drafting and interpretation of legislation assumes a knowledge of the rules of statutory interpretation. These rules form a specialised schema. They are the body of principles developed through the courts, and subsequently by Parliament, to assist in the drafting and interpretation of statutes and subordinate legislation.

The specialised technical language (ie jargon)<sup>45</sup> of the law has developed within the matrix of legal schemata (the enacted words and judicial decisions). Professional ‘jargons’ exist because ordinary language cannot adequately capture all the precision necessary to express technical concepts concisely.<sup>46</sup>

### C. Discourse Structure Schema

The way in which the parts of a text are organised and related to each other is referred to as discourse structure.<sup>47</sup> It is a schema. The discourse structure of *narrative material* is different

38 Bentham, above n 2.

39 D Pearce and R Geddes, *Statutory Interpretation in Australia* (1988) 69.

40 Occasionally Parliament will give legislation a finite life by inserting a sunset clause.

41 George W Paton, *A Text-Book of Jurisprudence* (1946, 1972) 85.

42 Danet, above n 4, 448.

43 A ‘deontic modal’ is an auxiliary which expresses duty or obligation.

44 See Peter Butt and Richard Castle, *Modern Legal Drafting: a Guide to Using Clearer Language* (2001) 150–2.

45 ‘Jargon’ here refers to a technical and specialist language.

46 Allen and Burridge, above n 6, 201.

47 For a discussion of three types of discourse structure analysis see Tanner, ‘The Sanctity of the Single Legal Rule/ Single Sentence Structure?’, above n 12.

from that of *legal material*. Stories, that is narratives, consist of a number of sentences and paragraphs and the schema for narrative material dictates that each sentence and paragraph is to be linked to those that precede and follow it. The linkage is provided when information *given* in one sentence is restated as *old* information in a following sentence and *new* information is added to it.<sup>48</sup> This also applies to paragraphs. This process is recursive. The alternation of *old* and *new* information helps to ensure both cohesion and coherence. An example of the *old/new* discourse strategy can be found in the following narrative passage:

The man called himself Mark. He was in civilian clothes, short hair, clean shaven, probably not very much older than myself. He was left alone with me in the interrogation room. I knew that was unusual, and I wondered what was coming. He said he was with the CIA, and had previously been stationed in Syria. Now he was here to ask me if I was willing to work for them.<sup>49</sup>

The first sentence is *given* information. In the second sentence, the *old* information is 'he' and the *new* information consists of the rest of the sentence. In the third sentence, the *old* information is 'he' and 'with me' and the *new* information is 'left alone' and 'in the interrogation room'. In the fourth sentence, the *old* information is 'I' and the *new* information is 'unusual' and 'wondered what was coming'. In the fifth sentence, the *old* information is 'he' and the *new* information is 'with the CIA' and 'had previously been stationed in Syria'. In the last sentence, the *old* information is 'he was here' and the new information consists of the rest of the sentence.

The discourse structure of legal material drafted in conventional legal language is *not* based on the *old/new* strategy. In legislation, sections and sub-sections (provisions) are expressed in single sentence structures. Expressing each provision in a single sentence structure is a schema. For example, subsection 54(4)(a) of the *Police Offences Act 1892-1972* (WA) states:

Every person who, without lawful excuse, carries or has on or about his person or in his possession any rifle, gun, pistol, sword, dagger, knife, sharpened chain, club, bludgeon, truncheon, or any other offensive or lethal weapon or instrument is liable on conviction to imprisonment not exceeding six months.

The subsection illustrates both the precision and generality of the legal rule. Legal rules in legislation cannot be drafted to cover every possible situation. As a result they combine words which illustrate classes of persons, things, actions and circumstances. These classes need not be natural classes. They are classes to which the legal rule applies. Some rules are more general than others and can apply to wider classes. Some rules contain specific examples of the class along with an invitation to the interpreter to infer that the class can be extended. For example, in subsection 54(4)(a) appear the words 'or any other offensive weapon or instrument'. These words invite lawyers to apply the rules of statutory interpretation (a schema) in order to decide whether a particular instrument not mentioned in the subsection falls within the class. Supervisors of research students with a non-law background will need to alert their candidates about the schema (ie the rules of statutory interpretation).

Expressing each provision in a single sentence structure has been carried through into private legal documents. As a result, sentences are usually crammed full of information. They are not semantically linked closely to sentences that follow or precede them. This is the way that legal rules are often expressed in statutes, where the links between the essentially discrete legal rules are provided by a common topic (eg bail). Within the single sentence structure of the legal rule, coherence is maintained by the use of number of conflating devices (ie ways of condensing large quantities of information into single sentence structures). This may result in a structure that is not only tightly woven and extremely dense, but also clausally complex. Legal discourse structure is likely to be foreign to non-law research students, and may make comprehension difficult, if not impossible.

48 For a discussion of the 'old' and 'new' information discourse analysis see Susan Havilard and Herbert Clark, 'What's New? Acquiring New Information as a Process in Communication' (1974) 13 *Journal of Verbal Learning and Verbal Behaviour* 512-13.

49 Moazzam Begg, *Enemy Combatant: a British Muslim's Journey to Guantanamo and Back* (2006) 150.

The grammatical complexity of subsection 54(4)(a) could be removed by redrafting it in several sentences. This would not involve the loss of any precision. Cast in revised form it might read:

Without lawful excuse, the possession of any offensive or lethal weapon or instrument is prohibited. 'Possession' includes carrying or having on or about the person. 'Offensive or lethal weapon or instrument' includes any rifle, gun, pistol, sword, dagger, knife, sharpened chain, club, bludgeon, truncheon, or any other offensive or lethal weapon or instrument. On conviction, the penalty is imprisonment not exceeding six months.

In this form the *old/new* discourse structure applies. The first sentence is *given* information. In the second sentence, 'possession' is *old* information and the *new* information includes, 'carrying or having on about the person'. In the third sentence, 'offensive or lethal weapon or instrument' is *old* information from the first sentence, and the *new* information includes, 'any rifle, gun, pistol, sword, dagger, knife, sharpened chain, club, bludgeon, truncheon, or any other offensive or lethal weapon or instrument'. In the fourth sentence, 'on conviction' refers back to the word, 'prohibited' in the first sentence. The *new* information is, 'the penalty is imprisonment not exceeding six months'.

In both forms, this subsection combines particularity and generality. Non-law postgraduate research students undertaking interdisciplinary theses involving law are likely to find the recast version easier to process. They are, however, unlikely to be familiar with the rules of statutory interpretation, that is, the schemata which underpin both its construction and its interpretation.

Despite the discrediting of the single provision/single sentence structure there are still legal drafters who argue for its retention.<sup>50</sup> In order to cram as much information as possible into the single sentence structure a number of conflating devices are employed. These include nominalisations, reduced clauses (especially relatives), excessive use of both embedding and the passive voice and the repetition of nominals in the place of pronominals. The resultant structure may not only be tightly woven but clausally complex. It may lead to unconventional information structure. Such structures may appear to non-law research students as being 'spun of cobwebs'.<sup>51</sup> Extensive research has shown that the over-use of conflating devices impedes comprehension and clouds clarity.<sup>52</sup>

#### D. Discourse Comprehension Schema

Non-law postgraduate research students may approach the task of understanding legal rules, in a number of ways. They can apply the schemata that they have acquired through their own life experience, or they can attempt to construct their own legal schema. Both these processes are likely to cause comprehension difficulties.

Such students will be familiar with narrative (story telling) material and will have evolved a schema for understanding narratives.<sup>53</sup> As a result, they are likely to impose that schema on legal documents.

Research has shown that most stories conform to stereotypical patterns which facilitate comprehension.<sup>54</sup> In stories, content schemata deal with events occurring over time. Non-law research students can be forgiven for attempting to apply narrative schemata to legal rules because legal language looks like ordinary language, particularly if cast in plain English. However, major problems occur when narrative schemata are applied to legal rules. This can be illustrated in the following way. Compare: Subsection 129(2) *Credit Act 1958* (Vic):

50 N Hom, 'Legislative Drafting in Australia, New Zealand and Ontario: Notes on an Informal Survey' (2005, March) *The Loophole* 55, 57–8. Also cited in Barnes, above n 23, at 115.

51 Bentham, above n 2, (Volume 5) 236.

52 Tanner, 'The Sanctity of the Single Legal Rule/Single Sentence Structure?', above n 12, 231.

53 Jean M Mandler, 'A Code in the Node: the Use of a Story Schema in Retrieval' (1978) *Discourse Processes* 14–35.

54 R Anderson, R Spiro and M Anderson, 'Schemata as Scaffolding for the Representation of Information in Connected Discourse' (1978) 15 *American Educational Research Journal* 433–40.



Where a regulated contract or a regulated mortgage includes a condition referred to in sub-section (1), the condition is void.

with the statement:

Where a modified car or a modified truck lacks ethanol produced from hexose sugars, the engine is non-functional.

Syntactically these two sentences are the same. Each consists of a case clause and a main clause.<sup>55</sup> Word for word each sentence contains the same parts of speech. The function of each of these sentences is, however, different. Because of their syntactic similarity it is probable that a non-lawyer would not realise that the functional difference requires the application of different schemata. Unaware of the existence of legal schemata, research students with a non-law background are likely to apply narrative schemata to the subsection, and consequently fail to appreciate the force of the legal rule expressed in it.

Narrative material contains propositions that can be assessed as being either *true* or *false* since they present a picture *of* the world.<sup>56</sup> Their function is to tell a story. Legal rules, by contrast, are *neither true nor false* and present a model *for* the world.<sup>57</sup> They prescribe or proscribe certain behaviours and state what happens when the legal rules are flouted.

Subsection 129(2) *Credit Act 1958* (Vic) states that a particular type of condition as set out in subsection (1) in a regulated mortgage or regulated contract, is void. In deciding whether a condition is void, lawyers will apply the schema associated with the categorisation of contractual terms. Lawyers understand that applying legal rules to particular fact situations requires knowledgeable discussion using both deductive and inductive thought processes.<sup>58</sup> They appreciate that no answer is necessarily correct. Non-law research students are unlikely to be aware of this.

The statement about the modified car or truck can be assessed as either true or false since it is possible to ascertain whether a lack of ethanol makes a modified car or truck non-functional. However, because of the difference in function, the application of narrative schemata to legal material will not facilitate comprehension.

Astute postgraduate non-law students, who are aware that legal language is different, but who are unfamiliar with legal schemata, may try to construct a legal schema in order to interpret a legal rule. Case studies<sup>59</sup> have shown that those familiar with technical prose construct their own schemata as reading progresses. This process may be successful with technical prose which, because it offers a picture of the world, can be evaluated as either true or false. The situation with legal rules is different.

Lawyers acquire legal schemata through education and apply them in a 'bottom up' process. They are warned (another schema) that they may have to choose between a number of possible meanings. These intellectual choices presuppose others have already acquired the necessary legal schemata.

To return to the quote from Jeffrey Barnes:<sup>60</sup>

The writer has been informed by a senior drafter who drafts in an office with a plain language policy that it may be that the ['belief'] is maintained to avoid rules being 'buried' in a narrative.

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55 In the subsection the main clause consists of the subject, 'the condition', the verb, 'is', and the complement, 'void'. The case clause consists of a conjunction, 'where', a subject, 'a regulated contract or a regulated mortgage', a verb, 'includes', and an object, 'a condition', and a reduced relative clause, 'referred to in subsection (1)', which qualifies the object, 'condition'. In the statement, the main clause consists of a subject, 'the engine', a verb, 'is', a complement, 'non-functional'. The case clause consists of a conjunction, 'where', a subject, 'a modified car or a modified truck', a verb, 'lacks', an object, 'ethanol', and a reduced relative clause, 'produced from hexose sugars' which qualifies the object, 'ethanol'.

56 Neil MacCormick, *Legal Reasoning and Legal Theory* (1978, 1994) 104.

57 *Ibid.*

58 White, above n 1, 65.

59 Perfetti, above n 36, 41–9.

60 Barnes, above n 23.

The author has discussed the difference between legal rules and narrative material. To argue that it is important to retain the ‘belief’ of drafting sections and subsections (ie provisions) in single sentence structures in order to avoid legal rules being ‘buried’ in a narrative raises the question: What *narrative* can legal rules be ‘buried in’? Certainly, recasting legalese in short carefully semantically linked sentences permits the application of the *old/new* strategy. But it does not change the character of the legal rule or any combination of legal rules.

### E. Contract Law Schema

The elements of a simple contract form a schema. A contract cannot come into existence unless both parties intend that their promises are to be enforceable at law. The commitment of the parties to the terms of the bargain must be made clear by the words used, and the acts they are intended to perform. There must be an offer and an acceptance. Sometimes this is indicated by the words, ‘I *hereby* accept your offer’.<sup>61</sup> These, or similar words, perform a dual function. One is linguistic and the other is that the words signal the *act* of entering into a legally binding contract.

Take, for example, ‘an offer’, which is one of the sub-schemata of a contract schema. The ‘offer’ must conform to the sub-schema for an ‘offer’. In *Fisher v Bell* [1961] 1 QB 394, for example, the defendant displayed a flick knife in his shop window. It had a clearly written price tag on it. Under the *Restriction of Offensive Weapons Act 1959* (UK) it was an offence to ‘offer for sale’ any offensive weapon listed by the Act. Flick knives were included. The defendant was prosecuted for *offering* a prohibited item for sale. To non-law research students, it would appear that, if a knife were to be displayed in a shop window with a price, it would constitute an *offer* to sell. But the Court held that the display of the weapon, even with a price tag, was merely an ‘invitation to treat’ ie an invitation to make an offer. Consequently, it was not an offer to sell and the offence had not been committed. In other words, not all the felicity conditions necessary for an offer were present.

‘Intention’, in contract law, involves another sub-schema. That sub-schema is in the form of a test and is objective. The test requires the court to consider what has been agreed, the circumstances surrounding the agreement, the words used by the parties, the effect of the agreement on the parties, and whether they have subsequently acted as though the agreement was binding. If the facts of the case do not fit the sub-schema, then ‘intention’ is missing. Since this ‘intention’ sub-schema was developed through case law, non-law research students are unlikely to be able to assess whether the requisite intention was present.

This case illustrates that the words used to create a binding contract perform both a linguistic and legal function. If the intention of the parties is clearly and unambiguously signaled by those words then the *act* of entering into a contract has occurred. This case also highlights that there must be a sharing of the conventions about the legal language and its effects, for a speech act to be successful. It is with those conventions that non-law research students are unlikely to be familiar.

Even where the minds of the parties to a simple contract have met in respect of a common purpose, the agreement will not develop into an enforceable contract unless it meets another legal requirement. To be enforceable, every promise must be supported by consideration. The word ‘consideration’ is another cross-varietal item with one meaning in ordinary English and another in law. Consideration in its legal sense is not known to any other system of law; it is peculiar to the common law and its historical development is surrounded by mystery.<sup>62</sup> Consideration represents a schema composed of a set of sub-schemata. It is present if the promisee has purchased the promisor’s promise, or if the promisee conferred a benefit on the promisor, or suffered some detriment.<sup>63</sup>

61 Peter Tiersma, ‘The Language of Offer and Acceptance: Speech Acts and the Question of Intent’ (1986) 74 *California Law Review* 231.

62 Bradford Caffrey, *A Guidebook to Contract Law in Australia* (1991) 118.

63 *Bunn v Guy* (1803) 102 ER 803, 823 (Lord Ellenborough).