

# WHEN ‘PLAIN LANGUAGE’ LEGISLATION IS AMBIGUOUS — SOURCES OF DOUBT AND LESSONS FOR THE PLAIN LANGUAGE MOVEMENT

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*['Plain language' techniques of legislative drafting seek to ensure that legislation is easily understandable to lay people affected by its terms. This article critically examines the effectiveness of plain language techniques in achieving that goal. Four cases involving the interpretation of plain language legislation are considered in detail. These cases illustrate some of the limits of plain language legislation in practice and show that sources of doubt in statutory interpretation have complex origins. Ultimately, it is argued that while the plain language method of drafting is on the whole a welcome improvement on previous drafting conventions, it is not by itself sufficient to eradicate doubt as to legislative meaning.]*

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## I INTRODUCTION

In the landmark 1987 report of the Law Reform Commission of Victoria on plain English and the law,<sup>1</sup> we find this key proposition: it is the task of the ‘people involved in legislative drafting to prepare Acts which communicate their message efficiently and effectively.’<sup>2</sup> The Commission was careful to explain what it meant by ‘communication’. It described the audience for legislation and how the legislative ‘message’ is to be received by that audience. As to the audience for legislation, the Commission noted that it is not enough to communicate the law to lawyers and judges. They are an important, though secondary, audience:<sup>3</sup> ‘Once a Bill has been passed, the primary audience is the group of people who are affected by it and the officials who must administer it.’<sup>4</sup> As to how the law should be received by the intended audience, the Commission took the view that the need for interpretation signified inefficiency.<sup>5</sup> The law should be drafted in such a way as to be ‘intelligible — and immediately intelligible — to as many of those as possible who are concerned with the relevant activities.’<sup>6</sup> The Commission was neither the first nor the last to utter these or similar views. Indeed, those who hold the conventional view — that law is an expertise and cannot be reliably understood by a lay person<sup>7</sup> — may be surprised by the

<sup>1</sup> Law Reform Commission of Victoria, *Plain English and the Law*, Report No 9 (1987) (*Plain English and the Law Report*). For a survey of subsequent developments, see generally Jeffrey Barnes, ‘The Continuing Debate about “Plain Language” Legislation: A Law Reform Conundrum’ (2006) 27 *Statute Law Review* 83.

<sup>2</sup> *Plain English and the Law Report*, above n 1, app 1, 1 [2]. Plain English advocates often acknowledge the utility of the rules of ‘simple writing’: see, eg, I M L Turnbull, ‘Clear Legislative Drafting: New Approaches in Australia’ (1990) 11 *Statute Law Review* 161, 166.

<sup>3</sup> *Plain English and the Law Report*, above n 1, 43 [67].

<sup>4</sup> *Ibid* 44 [69]. The *Report* goes on to reject the idea that the ‘average citizen’ is the audience: at 45 [71]–[72]. However, the lay person who is directly affected by legislation falls within its ‘primary audience’: at 44 [69]. Therefore, the *Report* adopts a modified ‘lay person’ audience.

<sup>5</sup> *Ibid* app 1, 11 [24].

<sup>6</sup> *Ibid* 45 [71]. See also at 44 [69].

<sup>7</sup> See F A R Bennion, *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford University Press, 2009) 9; F A R Bennion, *Bennion on Statutory Interpretation: A Code* (LexisNexis, 5<sup>th</sup> ed, 2008) 593. See also Barnes, ‘The Continuing Debate about “Plain Language” Legislation’, above n 1, 105–6.

popularity of this strain<sup>8</sup> of the plain language<sup>9</sup> movement. Many examples are found in the literature.<sup>10</sup>

<sup>8</sup> The plain language movement has a number of strains. For an analysis, see Barnes, 'The Continuing Debate about "Plain Language" Legislation', above n 1, 103–10.

<sup>9</sup> I use the terms 'plain language' and 'plain English' interchangeably. Trischa Mann (ed), *Australian Law Dictionary* (Oxford University Press, 2010) 436 gives an entry for 'plain language' but not 'plain English'. The entry notes that the term 'plain English' is now less common. The term 'plain language' is widely used in the literature on legislation in recognition of the fact that the plain language movement is global, with English speaking and non-English speaking countries sharing similar concerns about legislative drafting: see, eg, Anne Wagner and Sophie Cacciaguidi-Fahy (eds), *Legal Language and the Search for Clarity: Practice and Tools* (Peter Lang, 2006).

<sup>10</sup> See, eg, Richard Castle, 'What Makes a Document Readable?' (2007) 58 *Clarity* 12, 13; Tom Campbell, 'Legislative Intent and Democratic Decision Making' in Ngairé Naffine, Rosemary Owens and John Williams (eds), *Intention in Law and Philosophy* (Ashgate, 2001) 291, 291; Philip Knight, *Clearly Better Drafting: A Report to Plain English Campaign on Testing Two Versions of the South Africa Human Rights Commission Act, 1995* (Plain English Campaign, 1996) 2, quoting comments by delegates to the National Consultative Legal Forum, Cape Town, 1994; *Interinstitutional Agreement of 22 December 1998 on Common Guidelines for the Quality of Drafting of Community Legislation* [1999] OJ C 73/1, 1, cited in Edwin Tanner, 'Clear, Simple and Precise Legislative Drafting: Australian Guidelines Explicated Using an EC Directive' (2004) 25 *Statute Law Review* 223, 224; Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Checks and Imbalances: The Role of Parliament and the Executive* (1993) 49 [2.94]; Duncan Berry, 'Audience Analysis in the Legislative Drafting Process' [2000] (June) *The Loophole* 61, 61; Dennis Murphy, 'Plain English — Principles and Practice' (Paper presented at the Conference on Legislative Drafting, Canberra, 15 July 1992) 6; Paul O'Brien, 'Use and Misuse of Examples' [2005] (March) *The Loophole* 47, 53; Joseph Kimble, 'Plain English: A Charter for Clear Writing' (1992) 9 *Thomas M Cooley Law Review* 1, 9; Peter M Tiersma, *Legal Language* (University of Chicago Press, 1999) 211 (nevertheless, Tiersma argues that strong consumer-oriented views are unrealistic: at 212–13); Tom Campbell, 'Ethical Interpretation and Democratic Positivism' in Suzanne Corcoran and Stephen Bottomley (eds), *Interpreting Statutes* (Federation Press, 2005) 83, 84; *Plain English and the Law Report*, above n 1, 12 [25]; Richard M Coe, 'Three Approaches to "Plain Language": Better, Best, and Better than Nothing' in Plain Language Institute (ed), *Proceedings: Just Language Conference* (Plain Language Institute, 1992) 99; John Bowring (ed), *The Works of Jeremy Bentham Published under the Superintendence of His Executor, John Bowring* (Russell and Russell, first published 1843, 1962 ed) vol 3, ch XXXIII, 207; Robyn Penman, 'Legislation, Language and Writing for Action' (Paper presented at the Conference on Legislative Drafting, Canberra, 15 July 1992) 6–7; *Merkur Island Shipping Corporation v Laughton* [1983] 2 AC 570, 612 (Diplock LJ); *McGinn v Grangewood Securities Ltd* [2002] EWCA Civ 522 (23 April 2002) [1] (Clarke LJ); Lord Oliver of Aylmerton, 'A Judicial View of Modern Legislation' (1993) 14 *Statute Law Review* 1, 2; *Wings Ltd v Ellis* [1985] AC 272, 297 (Lord Scarman); Eamonn Moran, 'The Relevance of Statutory Interpretation to Drafting' in Law Reform Commission of Victoria (ed), *Drafting for the 21<sup>st</sup> Century: Conference at Bond University* (Law Reform Commission of Victoria, 1991) 100, 111; Sir Alison Russell, *Legislative Drafting and Forms* (Butterworth & Co, 4<sup>th</sup> ed, 1938) 13; George Tanner, 'Law Reform and Accessibility' (Paper presented at the Australasian Law Reform Agencies Conference, Wellington, 13–16 April 2004), 28–9 <<http://www.lawcom.govt.nz/SpeechPaper.aspx>>; Department of Premier and Cabinet (Qld), *The Queensland Legislation Handbook: Governing Queensland* (Queensland Government, 2004) [3.5.1]; Lord Goldsmith, 'Parliament for Lawyers: An Overview of the Legislative Process' (2003) 45 *Amicus Curiae* 3, 3; *Knill v Towse* (1889) 24 QBD 186, 196 (Mathew J); Robert A Duperron, 'Interpretation Acts — Impediments to Legal Certainty and Access to the Law' (2005) 26 *Statute Law Review* 64, 65; Daniel Greenberg, 'Access to Legislation — The Legislative Counsel's Role' [2009] (October) *The Loophole* 7, 12; Anthony Watson-Brown, 'Defining "Plain English" as an Aid to Legal Drafting' (2009) 30 *Statute Law Review* 85, 86, 96; Attorney-General's Department (Cth), 'Reform of Anti-Discrimination Legislation' (Joint Media Release, 21 April 2010), quoted in Jason Gregory, 'Wrong Turning on Rights Act' (2010) 84(6) *Law Institute Journal* 20, 20; Richard Chisholm and Garth Nettheim, *Understanding Law: An Introduction to Australia's Legal System* (LexisNexis Butterworths, 7<sup>th</sup> ed, 2007) 98–9; Matthew T Stubbs, 'From Foreign Circumstances to First Instance Considerations: Extrinsic Material and the Law of Statutory Interpretation' (2006) 34 *Federal Law Review* 103, 110, quoting Justice

Despite the confidence of many plain language advocates, debate rages about its effectiveness.<sup>11</sup> While a number of studies appear to demonstrate that the application of plain language techniques generally leads to improvement in understanding and efficiency of reading,<sup>12</sup> one of plain language's leading advocates, Professor Joseph Kimble, acknowledges that

in some of these studies the level of comprehension remained lower than the revisers might have hoped. That serves to remind us: revising documents is difficult work involving many variables, there are *limits* to the level of comprehension we can expect with legal documents, and we still have a lot to learn.<sup>13</sup>

What I wish to take up for discussion in this article is Kimble's concession that there are 'limits' to the effectiveness of plain language legal documents. In the case of legislation, what might those limits be, and what are the implications for the plain language movement? A number of frameworks offer potential insights.<sup>14</sup> As I have made clear elsewhere,<sup>15</sup> the law reform process is an appealing framework. What is meant by the law reform process in this regard? Put simply, it is the process of law reform from emergence of a law reform proposal through to drafting, parliamentary consideration and enactment, implementation and, finally, impact and evaluation.<sup>16</sup> The law reform process is a logical

Lionel Murphy, 'Comments' (Paper presented at the Symposium on Statutory Interpretation, Canberra, 5 February 1983); Office of the Chief Parliamentary Counsel, Parliament of Victoria, *Plain English Policy* (21 January 2008); Office of Parliamentary Counsel, Parliament of Australia, *Plain English Manual* (11 March 2003) 6–7 [15]–[20] ('*Plain English Manual*'); Janice Redish, 'Defining Plain English' (1996) 4(3) *Australian Language Matters* 3, 3; Australian Language and Literacy Council, *Putting It Plainly: Current Developments and Needs in Plain English and Accessible Reading Materials* (Australian Government Publishing Service, 1996) 36–7; Robert Eagleson, 'Plain Language: Changing the Lawyer's Image and Goals' (1998) 7 *Scribes Journal of Legal Writing* 119, 134; Office of the Scottish Parliamentary Counsel, Parliament of Scotland, *Plain Language and Legislation* (8 March 2006) 4; Christopher Balmford and Georgina Frampton, 'This Issue' (2007) 57 *Clarity* 3, 3.

<sup>11</sup> See generally Barnes, 'The Continuing Debate about "Plain Language" Legislation', above n 1, 127–31.

<sup>12</sup> See, eg, Joseph Kimble, 'Answering the Critics of Plain Language' (1995) 5 *The Scribes Journal of Legal Writing* 51.

<sup>13</sup> *Ibid* 65 (emphasis added).

<sup>14</sup> Francis Bennion, a former legislative drafter, has developed a framework of 'drafting parameters', being the constraints which operate on legislative drafters: F A R Bennion, *Bennion on Statute Law* (Longman, 3<sup>rd</sup> ed, 1990) 28–40. These are 'preparational drafting parameters' (procedural legitimacy, timeliness, comprehensibility, debatability, acceptability and brevity) and 'operational drafting parameters' (legal effectiveness, certainty, comprehensibility and legal compatibility): at 29. Parameters such as brevity may constrain drafting but they are not necessarily sources of doubt — the Achilles heel of the plain language movement. Bennion himself distinguishes between the requirements upon drafters (the drafting parameters) and sources of doubt by developing a separate set of 'doubt-factors': at chs 15–19.

<sup>15</sup> See Barnes, 'The Continuing Debate about "Plain Language" Legislation', above n 1. The approach of looking at the effect of the plain language movement on the reform process has been expressly endorsed and followed in the commentary: see, eg, Bernard Bekink and Christo Botha, 'Aspects of Legislative Drafting: Some South African Realities (or Plain Language Is Not Always Plain Sailing)' (2007) 28 *Statute Law Review* 34, 35; Sophie Cacciaguidi-Fahy and Anne Wagner, 'Introduction: The *Chiaroscuro* of Legal Language' in Anne Wagner and Sophie Cacciaguidi-Fahy (eds), *Obscurity and Clarity in the Law: Prospects and Challenges* (Ashgate, 2008) 1, 5.

<sup>16</sup> The law reform process is elaborated in Barnes, 'The Continuing Debate about "Plain Language" Legislation', above n 1, 88–96.

framework for analysing plain language reform since, in comparison with other law reformers, plain language legislation reformers take a similar general approach to the development of a legislative proposal (instrumentalism), and after enactment are subject to a similar operational environment. That environment contains hazards for the reformer. It is a well-known fact that the implementation of a law reform is rarely a straightforward progression from its enactment to the achievement of its objectives.<sup>17</sup> Throughout the law reform process a law reformer can normally expect to encounter a range of 'countervailing forces'.<sup>18</sup>

Elsewhere, I have traced the 'sources of doubt' within legislative texts to gain a sense of the limits likely to be faced by plain language legislation in the implementation phase.<sup>19</sup> Sources of doubt, also called 'conditions contributing to a doubt'<sup>20</sup> and 'doubt-factors',<sup>21</sup> may be defined as 'the factors from which doubt may arise in a particular case.'<sup>22</sup> The limitations of language are obviously important,<sup>23</sup> but they are not the stopping point. I drew upon the seminal work of Twining and Miers,<sup>24</sup> whose premise was that commentators had hitherto concentrated far too narrowly on the inherent problems of language as a cause of doubt.<sup>25</sup> Twining and Miers propounded that, for legal and non-legal rules, '[i]nterpretation does not take place in a vacuum';<sup>26</sup> and that

any particular problem of interpretation needs to be set in the context of some conception of a wider process — a series of events and decisions which have led up to the moment when the interpreter is faced with a choice and which will continue after that moment.<sup>27</sup>

Adapting their model<sup>28</sup> to legislation, I analysed the sources of doubt for legislation in terms of the following domains:<sup>29</sup>

- underlying conditions, being sources originating prior to the legislative process;<sup>30</sup>

<sup>17</sup> See generally Stephen Bottomley and Simon Bronitt, *Law in Context* (Federation Press, 3<sup>rd</sup> ed, 2006) 223.

<sup>18</sup> R A Samek, 'A Case for Social Law Reform' (1977) 55 *Canadian Bar Review* 409, 411.

<sup>19</sup> See Jeffrey Barnes, 'Sources of Doubt and the Quest for Legal Certainty' (2008) 2 *Legisprudence* 119.

<sup>20</sup> William Twining and David Miers, *How to Do Things with Rules: A Primer of Interpretation* (Cambridge, 5<sup>th</sup> ed, 2010) 176.

<sup>21</sup> Bennion, *Bennion on Statute Law*, above n 14, 213.

<sup>22</sup> Barnes, 'Sources of Doubt', above n 19, 119.

<sup>23</sup> A point made forcefully by Felix Frankfurter in a famous 1947 address. 'The problem derives from the very nature of words. They are symbols of meaning. But unlike mathematical symbols, the phrasing of a document, especially a complicated enactment, seldom attains more than approximate precision': Felix Frankfurter, 'Some Reflections on the Reading of Statutes' (1947) 47 *Columbia Law Review* 527, 528.

<sup>24</sup> See Twining and Miers, above n 20.

<sup>25</sup> *Ibid* 186. The authors discuss language as a factor that can give rise to conditions of doubt in ch 5, especially at 162–8.

<sup>26</sup> *Ibid* 4, 177.

<sup>27</sup> *Ibid* 4.

<sup>28</sup> *Ibid* 177–83.

<sup>29</sup> Barnes, 'Sources of Doubt', above n 19, 127.

- difficulties and errors arising in the legislative process;<sup>31</sup>
- events occurring after the commencement of legislation;<sup>32</sup>
- special features of the present case,<sup>33</sup> and
- the all-pervasive limitations of language.<sup>34</sup>

I found that sources of doubt for legislation have the following characteristics:

- they are potentially numerous and diverse, and go far beyond problems associated with drafting;<sup>35</sup>
- they are not restricted to events and processes occurring before the Act is passed, but are capable of arising after legislation is made;<sup>36</sup>
- they are ineradicable from statute law, the utmost professionalism in drafting not being a panacea;<sup>37</sup>
- a source of doubt is not necessarily present in a particular application of statute law; whether a particular doubt-factor is manifested depends on the legislation and the surrounding circumstances;<sup>38</sup> and
- sources of doubt are not wholly unmanageable: policy makers and drafters do have some capacity to minimise their occurrence.<sup>39</sup>

As already noted, my earlier article drew upon an analysis of the sources of doubt literature — a body of knowledge comprising the aggregated experience of commentators and analysts of legislation in many countries, especially from those in the common law world. However, while acknowledging the value of case analysis and illustrations, it was not possible in the space available to undertake that level of analysis.<sup>40</sup>

The point of the present article is to undertake this kind of case analysis. Four cases are studied in detail: *Smoker v Pharmacy Restructuring Authority* ('*Smoker*'),<sup>41</sup> *Director of Public Prosecutions (Vic) v Williams* ('*Williams*'),<sup>42</sup> *Goldie v Minister for Immigration and Multicultural and Indigenous Affairs* ('*Goldie*'),<sup>43</sup> and *East Melbourne Group Inc v Minister for Planning (Vic)* ('*East Melbourne*').<sup>44</sup> In Part II, I discuss the methodological issues of a study based on selected cases. In Part III, informed by the literature on sources of doubt, I

<sup>30</sup> Ibid 128.

<sup>31</sup> Ibid 131.

<sup>32</sup> Ibid 140.

<sup>33</sup> Ibid 141.

<sup>34</sup> Ibid 145.

<sup>35</sup> Ibid 126–47.

<sup>36</sup> Ibid 140–1.

<sup>37</sup> Ibid 151–5.

<sup>38</sup> Ibid 152.

<sup>39</sup> Ibid 150.

<sup>40</sup> Ibid 128 n 49.

<sup>41</sup> (1994) 53 FCR 287.

<sup>42</sup> (1998) 104 A Crim R 65.

<sup>43</sup> (2002) 121 FCR 383.

<sup>44</sup> (2005) 12 VR 448.

analyse the dispute in each case study over the meaning of plain language legislation in order to determine what were the sources of doubt in each case. In Part IV, I consider what the cases as a whole tell us about the sources of doubt which may infect 'plain language' legislation. Part V concludes by examining the implications for the plain language movement and the lessons which may be drawn from these cases.

## II METHOD

A sceptic might question how an article based on four individual cases (and, indeed, cases in which there was an obvious breakdown in plain language drafting) can help us to better understand plain language legislative drafting. To understand the method, it is necessary to explain the following:

- what is presently meant by plain language legislation;
- the analytical technique employed;
- how detailed studies of particular applications of plain language legislation can help us to better understand the limitations of plain language techniques; and
- how the cases were selected.

By 'plain language' legislation, I mean legislation which evidences well-known plain language techniques. This is legislation that is described by its promoters as plain English or plain language legislation, or is legislation prepared by a drafting office that promotes itself as drafting in plain English or plain language. Even if legislation is written in a plain language style and is claimed by its proponents as plain language, some plain language advocates dismiss legislation which raises unexpected interpretation issues as *by definition* not plain language. A project such as the current one, on this view, is therefore not directed at plain language. Only clear English is 'plain English' or plain language. With respect, this tactic is fallacious. In philosophy, there is an informal fallacy known as a 'definitional retreat'. 'A definitional retreat takes place when someone changes the meaning of the words in order to deal with an objection raised against the original wording.'<sup>45</sup> Here, the well-accepted meaning of 'plain English' is conveniently changed when it is pointed out that plain English techniques are not foolproof. The tactic avoids analysing the question I wish to raise: *why* is it that plain language legislation is ambiguous or uncertain in particular cases?

The present study draws on the public record for evidence as to the sources of doubt. This goes beyond analysis of the reasons for judgment, and draws on a variety of evidence including official reports to government, explanatory memoranda to bills, second reading speeches in Parliament, the pre-existing law

<sup>45</sup> Madsen Pirie, *The Book of the Fallacy: A Training Manual for Intellectual Subversives* (Routledge & Kegan Paul, 1985) 47. This fallacy is popularly known as the 'no true Scotsman' fallacy: Antony Flew, *Thinking about Thinking: Or, Do I Sincerely Want to Be Right?* (Fontana Press, 1975) 47.

and legal texts, official manuals on the legislative process, literature on the process by participants and newspaper accounts of the implementation of legislation. Because I have looked to only the public record for evidence, the inquiry is accordingly restricted. Whether this means it cannot then be described as a social science ‘case study’ is an interesting, though moot, point. Some social science definitions of a case study suggest that the inquiry must be exhaustive to attract that kind of label:

by studying a single case the researcher is able to take full account of the social, or historical, context of the phenomenon in question.<sup>46</sup>

the case study’s unique strength is its ability to deal with a full variety of evidence — documents, artefacts, interviews, and observations — beyond what might be available in a conventional historical study.<sup>47</sup>

Other social science definitions are less exacting, however, requiring only ‘systematic’, ‘detailed’ or ‘in-depth’ examination.<sup>48</sup>

Regardless of the correct label to be given to the present inquiry, careful examination of the four cases selected in this article is worthwhile and is informed by the high ideals of the social sciences:

- A case study should achieve depth or a ‘thick description’ of a phenomenon of scientific interest.<sup>49</sup> In the present study the phenomenon is a dispute in the courts over the meaning of plain language legislation and the description, given in Part III, pertains to the sources of doubt.
- A case study should probe ‘the intricate complexities of specific sites or processes and their origins, interrelations and dynamics.’<sup>50</sup> In the present study the ‘sites’ are four legal cases and the process examined is the generation of doubt as to the meaning of legislative texts. These complexities are probed in Part IV.
- A case study examines a case ‘to provide insight into an issue or to redraw a generalisation.’<sup>51</sup> In the present study the issue is the likely effectiveness of plain language techniques of legislative drafting. The generalisations considered relate to the potential sources of doubt. Connections with these broader matters are made in Part V.
- A ‘case study’ is an appropriate vehicle to understand complex social phenomena,<sup>52</sup> and is particularly well-suited to situations involving ‘a large

<sup>46</sup> A M Orum, ‘Case Study: Logic’ in Neil J Smelser and Paul B Baltes (eds), *International Encyclopedia of the Social & Behavioral Sciences* (Elsevier, 2001) vol 3, 1509, 1509.

<sup>47</sup> Robert K Yin, *Case Study Research: Design and Methods* (Sage Publications, 4<sup>th</sup> ed, 2009) 8.

<sup>48</sup> See generally Bruce L Berg, *Qualitative Research Methods for the Social Sciences* (Allyn & Bacon, 7<sup>th</sup> ed, 2009) 317–18.

<sup>49</sup> Stephen J Ball, ‘Case Study’ in Adam Kuper and Jessica Kuper (eds), *The Social Science Encyclopedia* (Routledge, 2<sup>nd</sup> ed, 1996) 75, 76, citing C Geertz, *The Interpretation of Cultures* (New York, 1973).

<sup>50</sup> Ball, above n 49, 76.

<sup>51</sup> Robert E Stake, ‘Qualitative Case Studies’ in Norman K Denzin and Yvonna S Lincoln (eds), *Strategies of Qualitative Inquiry* (Sage Publications, 3<sup>rd</sup> ed, 2008) 119, 123.

<sup>52</sup> See, eg, Yin, above n 47, 4.

number of variables'<sup>53</sup> pregnant with 'rich ambiguity'.<sup>54</sup> These observations resonate with legal disputes over the meaning of legislation. Such disputes are often complex matters, and the general literature on sources of doubt points to a large number of variables, most obviously the inherent limitations of language.<sup>55</sup> In addition, there are numerous potential sources of doubt in the legislative process.<sup>56</sup> Twining and Miers' general model for rules catalogues 36 conditions that cause doubt to arise in the rule-making process.<sup>57</sup>

A second reason why in-depth case studies can assist our understanding of plain language techniques is that such studies can have scientific value. They can shed light on plain language techniques even though the cases involve 'breakdowns' in plain language technique. Case studies of such breakdowns provide evidence of the operation of plain language legislation.<sup>58</sup> They can lend 'a sensitivity to the issues at hand that cannot be obtained from theory.'<sup>59</sup> The fact that an individual case or a select series of cases cannot *itself* be the basis for 'abstract, causal or law-like statements'<sup>60</sup> does not mean that it cannot be useful from a knowledge point of view. In the arena of knowledge accumulation, they can produce 'context-dependent knowledge that research on learning shows to be necessary to allow people to develop from rule-based beginners to virtuoso experts.'<sup>61</sup>

In selecting the cases for examination, a number of considerations were taken into account. One consideration was the appropriate number of cases. An attempt to study a single case *exhaustively* could have been made, but attending to matters beyond the public record would have been difficult. Also, looking at one case only might lead a sceptical reader to regard such a case as truly exceptional and of little inherent value. Looking at a number of cases lessens that possibility and enables a variety of circumstances to be examined, albeit perhaps in less depth. Further, this variety makes it possible to examine each of the major domains of sources of doubt, both types of plain language process (a rewrite of existing legislation and an original preparation of legislation), and both early and more recent applications of plain language techniques.

Another consideration in selecting the cases was their subject matter. It was considered that a range of subject matters would expose a wider range of drafting issues. The selected cases deal respectively with the regulation of pharmacies

<sup>53</sup> David A de Vaus, *Research Design in Social Research* (Sage Publications, 2001) 231.

<sup>54</sup> Friedrich Nietzsche, *The Gay Science* (Walter Kaufmann trans, Vintage Books, 1974) 335 [trans of: *Die fröhliche Wissenschaft* (first published 1882)], quoted in Bent Flyvbjerg, 'Five Misunderstandings about Case-Study Research' (2006) 12 *Qualitative Inquiry* 219, 237.

<sup>55</sup> See Barnes, 'Sources of Doubt', above n 19, 145–7.

<sup>56</sup> *Ibid* 148.

<sup>57</sup> Twining and Miers, above n 20, 178–83.

<sup>58</sup> See generally Martyn Hammersley, 'Case Study' in Michael S Lewis-Beck, Alan Bryman and Tim Futing Liao (eds), *The SAGE Encyclopedia of Social Science Research Methods* (Sage Publications, 2004) vol 1, 92, 93.

<sup>59</sup> Flyvbjerg, above n 54, 238–9.

<sup>60</sup> Ball, above n 49, 76.

<sup>61</sup> Flyvbjerg, above n 54, 221.

(*Smoker*), drink-driving (*Williams*), procedure in the Administrative Appeals Tribunal (*Goldie*) and planning law (*East Melbourne*). A spread of jurisdictions was also sought, with both federal (*Smoker* and *Goldie*) and state (*Williams* and *East Melbourne*) legislation at stake.

### III THE CASES

#### A *Smoker*

##### 1 *The Case and Its Legislative Background*

Under s 99K(1) of the *National Health Act 1953* (Cth), the Pharmacy Restructuring Authority ('the Authority') had the function of making recommendations to the Secretary to the Department of Health on applications by a pharmacist to supply pharmaceutical benefits from nominated premises. Approval by the Authority was a condition precedent to the giving of ultimate approval by the Secretary.<sup>62</sup> Section 99K(2) of the Act provided:

In making a recommendation under subsection (1), the Authority must comply with the relevant guidelines determined by the Minister under section 99L.

Section 99K and related provisions had been inserted into the *National Health Act 1953* (Cth) by s 29 of the *Community Services and Health Legislation Amendment Act 1990* (Cth).

It is apparent that the provision uses a number of plain language strategies. First, it employs 'must' to refer to obligations. The Commonwealth Office of Parliamentary Counsel's *Plain English Manual* explains why 'must' came to replace 'shall' when imposing an obligation:

The traditional style uses 'shall' for the imperative. However, the word is ambiguous, as it can also be used to make a statement about the future. Moreover, in common usage it's not understood as imposing an obligation. Say 'must' or 'must not' when imposing an obligation, not 'shall' or 'shall not'.<sup>63</sup>

Also, on its face the provision is free from jargon and technical terms. It uses familiar words such as 'comply with' and 'guidelines'. This is also encouraged by the *Plain English Manual*:

<sup>62</sup> *National Health Act 1953* (Cth) s 90(3B).

<sup>63</sup> *Plain English Manual*, above n 10, 19 [83]. A plain English office manual dates from 1993–94: Office of Parliamentary Counsel, Parliament of Australia, *Annual Report 1993–94* (1994) 35. However, a plain English policy was operating well before that time. In an article written in 1990 by the then head of the Office, Ian Turnbull QC, it was stated that the Commonwealth Office of Parliamentary Counsel had a plain English policy: Turnbull, 'Clear Legislative Drafting', above n 2, 165. The annual report of that Office for 1992–93 later set out elements of the Office's 'policy of plain English drafting': Office of Parliamentary Counsel, Parliament of Australia, *Annual Report 1992–93* (1993) 9–10. In the 1990 article, Turnbull referred with general approval to the report of the Law Reform Commission of Victoria on plain English drafting and the law while expressing 'some' disagreement with how the Commission sought to achieve the goal of plain English: at 163. That report had recommended the use of 'must' rather than 'shall' to refer to obligations: *Plain English and the Law Report*, above n 1, app 1, 61 [137]. Curiously, Turnbull uses 'shall' for expressing obligations in an example, but it is apparent that that mode of expression was subsequently dropped: see Turnbull, 'Clear Legislative Drafting', above n 2, 175.

Avoid jargon, legalisms and foreign language if you can use familiar words or expressions instead. On the other hand, use technical words and phrases if they're generally understood by most of the users of the law or you can't find simple alternatives that are precise enough.<sup>64</sup>

The meaning of s 99K(2) was thrown into doubt in *Smoker*. The applicant, Mr Smoker, had applied to the Authority for approval to supply pharmaceutical benefits at or from the nominated premises. However, although he telephoned the Authority before the existing approval was cancelled, his formal application was not made until after the cancellation. The Authority refused to recommend approval of his application on the ground that the requirement in paragraph 3(f) of the guidelines had not been met. This decision was affirmed on appeal by the Administrative Appeals Tribunal. Mr Smoker challenged this decision by way of appeal under s 44(3) of the *Administrative Appeals Tribunal Act 1975* (Cth) and by way of judicial review including under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). Mr Smoker argued, among other things, that the Tribunal had wrongly considered the guidelines to be mandatory and binding upon it. Under s 44(3) the appeal was heard by the Full Court of the Federal Court. That Court held that the guidelines were mandatory and dismissed the application.<sup>65</sup>

## 2 Sources of Doubt

The most obvious source of doubt, as Hill J observed in the Full Court, was 'an inherent tension between the concept of a "guideline" on the one hand and a mandatory requirement that the "guidelines" be complied with, on the other.'<sup>66</sup> In other words, there appeared to be a drafting error evidenced by 'internal inconsistency'.<sup>67</sup> In both ordinary English and 'legal English' a tension was created. The words 'must' and 'comply with' suggested that the Authority *was* under an obligation to act in accordance with the commands of the Minister.<sup>68</sup> However, the word 'guideline', in its ordinary usage, suggested otherwise. In the ordinary dictionary meaning of the word, guidelines provide information and point the way to a particular conclusion without dictating that conclusion.<sup>69</sup> Moreover, 'guideline' had an accepted legal meaning in statutory interpretation of 'rules or standards which are not binding and may be relaxed when it is expedient to do so in order to do justice in the particular case'.<sup>70</sup> Subsequent legislation, substituting 'rules' for 'guidelines',<sup>71</sup> further indicated that the use of

<sup>64</sup> *Plain English Manual*, above n 10, 16 [66]. See also the comments in above n 63.

<sup>65</sup> *Smoker* (1994) 53 FCR 287, 288 (Wilcox J), 291 (Burchett J), 301 (Hill J).

<sup>66</sup> *Ibid* 298.

<sup>67</sup> Twining and Miers, above n 20, 180 (condition 13(h)).

<sup>68</sup> *Smoker* (1994) 53 FCR 287, 299 (Hill J). Wilcox J agreed with Hill J's judgment: at 288.

<sup>69</sup> *Ibid* 289 (Wilcox J), 298–9 (Hill J), both citing Arthur Delbridge et al (eds), *Macquarie Dictionary* (Macquarie Dictionary Publishers, 2<sup>nd</sup> ed, 1991).

<sup>70</sup> *Smoker* (1994) 53 FCR 287, 299 (Hill J), quoting *Norbis v Norbis* (1986) 161 CLR 513, 520 (Mason and Deane JJ).

<sup>71</sup> *National Health Amendment Act 1995* (Cth) sch 1 item 17 substituted 'rules' for 'guidelines' in s 99K(2) and related provisions of the *National Health Act 1953* (Cth).

guidelines was a drafting error; Parliament had *intended* to confer on the Minister the power to make a rule.

But there were other sources of doubt. Different standpoints amongst the judges can be sources of doubt.<sup>72</sup> In finding the guidelines valid and mandatory, Wilcox J defended the absolute nature of parliamentary supremacy:

Parliament's choice of the word 'guidelines', to describe the contents of a Ministerial determination, was unfortunate. ... However, like Humpty Dumpty in 'Alice Through the Looking Glass', Parliament can give a word any meaning it wishes: 'When I use a word, it means just what I choose it to mean — neither more than [sic] less ... The question is, which is to be the [sic] master — that's all.' ... Provided it makes its intention clear, Parliament can use any word it wishes, however much this may offend linguistic purists.<sup>73</sup>

However, Burchett J was *prima facie* of the mind to find the guidelines invalid and not mandatory.<sup>74</sup> He also drew on the doctrine of parliamentary supremacy. He said:

In my opinion, it is important that the Court should give no countenance to a loose usage which might introduce doubt wherever a statute refers to guidelines. It would be particularly unfortunate if this decision not only introduced doubt, but suggested that discretions actually conferred by Parliament, subject to guidelines, in other cases, might be eroded away to binding rules stated, not by Parliament, but by some subordinate authority in a document called guidelines.<sup>75</sup>

It is apparent that while both Burchett J and Wilcox J were applying the basic rule of the supremacy of Parliament, they did so from different standpoints. Burchett J operated from the standpoint of the reader. Wilcox J operated from the standpoint of the omnipotent parliamentary institution.

A primary source of doubt then appears to be poor drafting — poor word choice — which led to interpreters taking different positions on basal legal considerations. However, this does not explain fully *why* the drafter made this apparently poor choice. Unusually, the public record reveals the reason. Before the Act was drafted an agreement had been reached in 1990 between the Minister and the Pharmacy Guild of Australia, an organisation of employers, on the restructuring of the pharmacy industry. The agreement concerned the rationalisation of the number of pharmacies and recorded that the new Authority would consider applications for approval '[s]ubject to the guidelines issued under the

<sup>72</sup> Twining and Miers, above n 20, 182 (condition 36) classify this situation as a 'difference of views between interpreter(s)'.  
<sup>73</sup> *Smoker* (1994) 53 FCR 287, 289. The correct quotation, abridged, is:

'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean — neither more nor less.' ... 'The question is,' said Humpty Dumpty, 'which is to be master — that's all.'

Lewis Carroll, *Through the Looking-Glass* (Cosimo Classics, first published 1872, 2010 ed) 57.

<sup>74</sup> *Smoker* (1994) 53 FCR 287, 290.

<sup>75</sup> *Ibid* 291.

Act'.<sup>76</sup> It was a purpose of the Act to give effect to the agreement.<sup>77</sup> So, it is clear where the word came from.

### 3 Findings

Despite appearances, this case is not solely an example of drafting error, but in fact an instance of a chain of errors reaching back to an agreement with industry. The agreement used the language of 'guidelines' while at the same time implicitly insisting on their mandatory nature.<sup>78</sup> The Minister approved the draft legislation intending the guidelines to be mandatory.<sup>79</sup> And by using the word 'guidelines', the drafter continued the mistake even though he or she was not bound to follow the wording of the agreement to the absolute letter.

What was the role of language in this dispute? Unusually, the limitations of language were not a direct cause of doubt. 'Guidelines' did *not* have a multiplicity of dictionary meanings. Further, its general legal meaning was clear and coincided with the dictionary meaning. However, the language employed could not prevent sources of doubt arising from the rule-making process.

## B Williams

### 1 The Case and Its Legislative Background

Section 55(1) of the *Road Safety Act 1986* (Vic) regulated drink-driving. It applied after a driver had undergone a preliminary breath test which had indicated to a police officer that the person's blood contained alcohol in excess of the prescribed limit. The section provided that a police officer may require a person to accompany him or her 'to a police station or other place where the sample of breath is to be furnished'. An aim of the Act was to set traffic legislation 'in a form that the ordinary motorist can follow and understand'.<sup>80</sup>

The Victorian government had at the time a policy of drafting legislation 'as clearly as possible'.<sup>81</sup> The Attorney-General had complained about the 'inability of legislators, bureaucracies and large corporations to tell their stories simply'.<sup>82</sup> He claimed that 'things can be stated simply and shortly in a way which at once makes them easier to understand and does not diminish their legal effective-

<sup>76</sup> Senate Standing Committee on Community Affairs, Parliament of Australia, *Implementation of Commonwealth Pharmaceutical Restructuring Measures* (1990) app 6 [8.5].

<sup>77</sup> See Commonwealth, *Parliamentary Debates*, House of Representatives, 20 September 1990, 2344 (Peter Staples, Minister for Aged, Family and Health Services): 'This Bill introduces one of the key elements of the agreement between the Government and the Pharmacy Guild of Australia'.

<sup>78</sup> *Smoker* (1994) 53 FCR 287, 301 (Hill J).

<sup>79</sup> The Minister's intention seems clear from his statement to Parliament that 'no new approval ... will be granted without the approval criteria being met': Commonwealth, *Parliamentary Debates*, House of Representatives, 20 September 1990, 2345 (Peter Staples, Minister for Aged, Family and Health Services).

<sup>80</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 11 September 1986, 227 (Thomas Roper).

<sup>81</sup> Victoria, *Parliamentary Debates*, Legislative Council, 7 May 1985, 434 (James Kennan, Attorney-General).

<sup>82</sup> *Ibid* 433.

ness.<sup>83</sup> The Act showed many signs of a simplified drafting style. As it happens though, s 55(1) was not recognisably in plain language.<sup>84</sup>

Section 55(1) was amended in 1989 by the *Road Safety (Miscellaneous Amendments) Act 1989* (Vic). Prior to the amendment, the Act had provided that a person was to furnish a breath sample for analysis at ‘a police station or the grounds or precincts of a police station’.<sup>85</sup> The subsection was amended by replacing the words ‘the grounds or precincts of a police station’ with ‘other place where the sample of breath is to be furnished’.<sup>86</sup> The stated reason for the amendment was to allow ‘booze buses’ to take the samples of breath.<sup>87</sup>

By the time of the amendment in 1989, the Law Reform Commission of Victoria had handed down its landmark report on plain English and the law.<sup>88</sup> The Minister responsible for introducing the amendment was the same Minister who had given the Commission its reference to report on plain English and the law, and who had in a ministerial statement to Parliament said that ‘things can be stated simply and shortly’.<sup>89</sup> The Commission’s report was not entirely consistent in relation to simplification. On the one hand, it purported to distinguish simplification from plain English drafting, stating that ‘[plain English] is not a simplified statement’.<sup>90</sup> On the other hand, the report also advocated the use of a generic term instead of a string of overlapping words.<sup>91</sup>

In the amendment there are several indications of a plain language style:

- The legislation was simpler and shorter. For example, the reference to ‘other place’ could hardly have been simpler and shorter. No specific places were identified other than the (already covered) police station. Even though booze buses were clearly intended to be caught, the legislation did not specify them.
- Consistent with the report of the Law Reform Commission of Victoria, the drafter used a generic term (‘place’) rather than a string of terms. The latter would have eventuated if the drafter had merely added to the pre-existing places outside of a police station.

<sup>83</sup> Ibid 436.

<sup>84</sup> For some reason, s 55(1) of the *Road Safety Act 1986* (Vic) as a whole was not simplified. With its excessive sentence length (257 words) and unnecessarily complicated sentence construction, it does not meet the plain English guideline that sentences are to be ‘as brief as possible and well constructed’: *Plain English and the Law Report*, above n 1, app 1, 35 [72].

<sup>85</sup> *Road Safety Act 1986* (Vic) s 55(1) as it stood before amendment.

<sup>86</sup> *Road Safety (Miscellaneous Amendments) Act 1989* (Vic) s 21(2), amending *Road Safety Act 1986* (Vic) s 55(1).

<sup>87</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 3 November 1988, 508 (James Kennan, Minister for Transport). A ‘booze bus’ is ‘a bus fitted out to function as a mobile police breath analysis station’: Susan Butler (ed), *Macquarie Dictionary* (Macquarie Dictionary Publishers, 5<sup>th</sup> ed, 2009) 196 (‘*Macquarie Dictionary*’).

<sup>88</sup> See *Plain English and the Law Report*, above n 1.

<sup>89</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 7 May 1985, 436 (James Kennan, Attorney-General).

<sup>90</sup> *Plain English and the Law Report*, above n 1, app 1, 4 [9].

<sup>91</sup> Ibid app 1, 46 [100].

- By not defining 'place' the drafter avoided a definition which would have added to the complexity of the provision and which, in the Commission's view, was to be used as a 'last resort'.<sup>92</sup>
- The absence of a definition also indicated the drafter was following the guideline 'to use words in their ordinary sense so that they do not need to be defined.'<sup>93</sup> If that was the case the drafter was meeting the overarching goal of plain language, which is to use 'language which is immediately intelligible to their audience.'<sup>94</sup>

A dispute as to the meaning of 'other place' arose in *Williams*. In that case, police intercepted the respondent driving her motor vehicle at about 12.30am on 22 June 1997 on a road outside Melbourne. After a preliminary breath test was taken which indicated the presence of alcohol in the respondent's blood, the respondent was required to accompany the officer to the rear of the police vehicle to supply a breath sample for analysis. The reading was taken not in a random breath testing station but in a marked police car. The breath analysing instrument showed she had a reading of 0.093 per cent blood alcohol content. The respondent was charged with driving or being in charge of a motor vehicle while more than the prescribed concentration of alcohol was present in her blood, contrary to s 49(1)(b) of the *Road Safety Act 1986* (Vic). In the Magistrates' Court, counsel for the respondent argued that there was no case to answer since there was no power to demand that a person accompany a member of the police force to a *police car* for the purpose of a breath test. This was because the words 'other place' did not include a police car. As a result, the demand was unlawful and the evidence of the breath test should be excluded. The Magistrate upheld the submission of the respondent and dismissed the charges. On appeal by the Director of Public Prosecutions, the Supreme Court agreed that 'other place' did not include a police car. The Court accordingly dismissed the appeal.<sup>95</sup>

## 2 Sources of Doubt

Although there were several apparent conditions contributing to the doubt about the scope of 'other place' in s 55(1), a dominant source was a '[c]hange in [the] factual context since creation of the rule'<sup>96</sup> or, in other words, an 'unforeseeable development'.<sup>97</sup> As mentioned already, Parliament clearly had booze buses in mind when the rule was drafted. The old law had not catered for them unless they were set up in the grounds or precincts of a police station — hardly a convenient place. However, it is most unlikely that the *drafter* had, or could have had, an ordinary police car in mind because the practice of using such vehicles had not then commenced. Advertising campaigns announcing that 'every police car is now a booze bus' did not begin until eight years after the amendment was

<sup>92</sup> Ibid app 1, 48 [104].

<sup>93</sup> Ibid.

<sup>94</sup> Ibid app 1, 3 [6].

<sup>95</sup> *Williams* (1998) 104 A Crim R 65, 77 (Smith J).

<sup>96</sup> Twining and Miers, above n 20, 180 (condition 17).

<sup>97</sup> Bennion, *Bennion on Statute Law*, above n 14, 252.

passed.<sup>98</sup> The changed factual context did not mean that the rule would necessarily fail to catch a police car. But if the changed enforcement practice were to be caught, it would have to be fortuitous: the drafter had seemingly intended to provide specifically for booze buses, but at the same time had used a more general word capable in theory of extending beyond booze buses.

Even though the drafter could not be responsible for envisaging an unforeseeable event, the drafter and his or her instructor *were* responsible for ensuring the provision caught the events that were the subject of Cabinet policy and the instructions flowing from that policy. Arguably, it was some oversight in the carrying out of instructions for the amendment which, together with an unforeseeable event, created the main conditions of doubt. Let me elaborate. Curiously, the amendment contained no express reference to booze buses, yet it was the government's primary purpose in amending the Act to include booze buses within the scope of the provision.<sup>99</sup> If the drafter *had* referred to booze buses, by using words such as 'police station or place where a booze bus is set up' or 'police station or booze bus', or by defining 'place' so as to catch explicitly the policy intent, there would have been no doubt that a police car was *not* caught. The drafter's decision to leave out any reference to booze buses even caused doubt about whether a booze bus was caught.<sup>100</sup> More relevantly for *Williams*, it also raised doubt as to the meaning of 'other place'.

It is possible that the drafter did not make such a reference for a number of reasons, all of which are somewhat speculative. The drafter may have relied on an extrinsic document such as the Minister's speech to Parliament to indicate Parliament's intention. The problem with such reliance, however, is that an extrinsic document does *not* form a necessary part of the interpretative context for a court under s 35(b) of the *Interpretation of Legislation Act 1984* (Vic)<sup>101</sup> and, even if considered, it cannot be determinative on its own of the meaning of the law.<sup>102</sup>

A second possible reason is that the drafter may have (in his or her mind) *deliberately* used a broad term, namely 'place', to encompass booze buses and the places where booze buses are situated as well as, possibly, future developments in police enforcement practices. Creating a broad space for interpreters is

<sup>98</sup> See, eg, Jason Koutsoukis, 'Get Pulled over and You're Bound to Be Breath-Tested', *The Age* (Melbourne), 16 October 1997, 3; Greta McMahon, 'All out Booze Blitz', *Herald Sun* (Melbourne), 16 October 1997, 11. The offence in *Williams* took place in June 1997.

<sup>99</sup> The Minister had indicated the scope of the provision: Victoria, *Parliamentary Debates*, Legislative Assembly, 3 November 1988, 508 (James Kennan, Minister for Transport).

<sup>100</sup> See *Williams* (1998) 104 A Crim R 65, 75 (Smith J).

<sup>101</sup> *Masters v McCubbery* [1996] 1 VR 635, 646 (Winneke P, Ormiston and Callaway JJA), approving an earlier comment in *R v Kean* [1985] VR 255, 259 (Young CJ, Murray and Ormiston JJ). A similar position applies under s 15AB of the *Acts Interpretation Act 1901* (Cth): *Brennan v Comcare* (1994) 50 FCR 555, 573 (Gummow J).

<sup>102</sup> See *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 518 (Mason CJ, Wilson and Dawson JJ). For warnings by drafters, see Moran, above n 10, 108–9; Paul Lanspeary, 'Statutory Interpretation for Drafters' (Paper presented at the 4<sup>th</sup> Australasian Drafting Conference, Sydney, 3–5 August 2005) 16 <<http://www.pcc.gov.au/pccconf/conference-paper-index.htm>>.

a frequent drafting strategy<sup>103</sup> and is not in itself a bad one if used appropriately. But, legally, the word 'place' is chameleon-like; it has been given a variety of meanings depending on its legislative context.<sup>104</sup> This is a fact of which the drafter ought to have been aware. Further, there is *the immediate context* of the word 'place': 'the grounds or precincts of a police station or *other* place'.<sup>105</sup> The context hinted at the scope of the word 'place', but was in itself ambiguous. As the Court reasoned, the insertion of 'other' could be read in two ways. It could be read as merely 'something additional',<sup>106</sup> the effect being that 'place' was unqualified by 'police station'. Or it could be read as 'other *such* place', the context pointing to 'some relation between the classes of things'.<sup>107</sup> In the latter case, 'place' was qualified by 'police station'. By causing this ambiguity to arise, the drafter can be seen to have contributed to the doubt.

A third possible reason for the lack of a reference to the specific places where the test could be taken may have been the influence of plain language understandings about the proper role of statutory definitions. As pointed out above, it was the Law Reform Commission's view that the use of a definition was a 'last resort'.<sup>108</sup> Such advice, which seems to have been motivated by a desire to create a text which on its face is readable by the 'person on the street' affected by the law, conflicts with the accepted need for precision<sup>109</sup> and is not accepted by most drafting offices.<sup>110</sup>

Other sources of doubt arose from the historical context of the statutory provision. This was evident in the way the Magistrates' Court and the Supreme Court took different views of the evolution of the relevant provisions. Comparing the

<sup>103</sup> See generally Bennion, *Bennion on Statute Law*, above n 14, ch 16; Bennion, *Bennion on Statutory Interpretation*, above n 7, 1167–70; D Murphy, 'Plain English in Drafting Legislation and Regulations' (Paper presented to the Plain Legal Language for Public Sector Administrators Conference, Parliament House, Sydney, 29 July 1992) 10.

<sup>104</sup> See, eg, *Williams* (1998) 104 A Crim R 65, 75 (Smith J) where it was observed that:

The word 'place' has been considered in a variety of contexts. It has been given a broad construction in the area of industrial safety (*Ganion v Roche Products Ltd* [1995] SLT 38 at 39). It has been narrowly construed in legislation authorising the issue of search warrants to require 'a part of space of definite situation' and held not to include a motor vehicle (*Coward v Allen* (1984) 52 ALR 320). In legislation controlling betting or retail trading, a degree of permanence has been required. Thus in retail trading legislation, the boot of a car has been held not to be a 'place' unless it is used on a regular basis in the same location (*Maby v Warwick Corporation* (1972) 2 QB 242 at 247; *Jarmain v Weatherall* (1977) 75 LGR 537; *Palmer v Bugler* (1988) 87 LGR 382).

<sup>105</sup> *Road Safety Act 1986* (Vic) s 55(1) (emphasis added), as amended by *Road Safety (Miscellaneous Amendments) Act 1989* (Vic) s 21(2).

<sup>106</sup> *Williams* (1998) 104 A Crim R 65, 73 (Smith J), citing *Aryton v Abbott* (1849) 14 QB 17.

<sup>107</sup> *Williams* (1998) 104 A Crim R 65, 73 (Smith J).

<sup>108</sup> *Plain English and the Law Report*, above n 1, app 1, 48 [104].

<sup>109</sup> See generally *ibid*, 40–3 [61]–[66].

<sup>110</sup> Most drafting and interpretation manuals explain the wide potential of definitions and only warn against their overuse: see, eg, New Zealand Law Commission, *Legislation Manual: Structure and Style*, Report No 35 (1996) 24–6; *Plain English Manual*, above n 10, 15 [58]–[62]. See also Bennion, *Understanding Common Law Legislation*, above n 7, 58–62; Bennion, *Bennion on Statutory Interpretation*, above n 7, 561–75. See also Office of the Scottish Parliamentary Counsel, *Plain Language and Legislation*, above n 10, 37, which has similar advice to that of the Law Reform Commission of Victoria. It advises drafters to '[d]efine terms sparingly. Try to use words in their ordinary sense so that they do not need to be defined.'

1989 version of the *Road Safety Act 1986* (Vic) with the 1986 version, the Magistrate in the case acknowledged that Parliament had intended to *broaden* the places where breath tests could be conducted.<sup>111</sup> In contrast, the Supreme Court took a more restrictive view by referring to pre-1986 versions of the law which had expressly permitted breath analysis at or in the vicinity of where the person was driving. In the Supreme Court's view, the lack of a reference to such places in the 1989 version indicated that the provision contemplated 'taking the suspect away from the place of the driving'.<sup>112</sup>

A further source of doubt was the standpoint of the 'interpreters', using that term in its broad sense to include government officials administering the Act. The government and Parliament had very different social outlooks to the courts. The Director of Public Prosecutions had argued that a very large number of people submit to breath analysis each year and that on-the-spot breath testing is much less inconvenient, particularly for the innocent. The courts did not find this policy argument compelling. Both courts were concerned about the consequences for motorists and the police if a wide construction of 'any place' were upheld. The Magistrate thought that privacy was important 'for the welfare of the defendant and the police members'.<sup>113</sup> In a similar vein, the Supreme Court was concerned about the desirability of avoiding error and minimising the potential for dispute and false allegations against the police, which would be inherent in the testing of suspects in the back of police cars.<sup>114</sup>

After the Supreme Court's decision, the difference between the Victorian government and the courts on the policy of breath testing in police cars was made clear. The Victorian Parliament legislated quickly to reverse the effect of the Supreme Court's interpretation of 'other place'.<sup>115</sup> In introducing the corrective legislation, the Minister made it clear that the courts' policy priorities were not shared by the government:

The bill will allow alcohol breath tests to be administered in places other than police stations and booze buses, such as police cars and hospitals. The present restrictions on where breath tests may be administered cast an unnecessary burden on both police and motorists in rural and remote areas. In remote areas, the requirement to take the person to a police station can delay the testing process by several hours. By allowing testing in police cars or other places, the test can be completed as soon as practicable and the motorist would be free to go.<sup>116</sup>

<sup>111</sup> See *Williams* (1998) 104 A Crim R 65, 68 (Smith J).

<sup>112</sup> *Ibid* 76 (emphasis added). The statutory provisions which expressly referred to the place where the driving occurred were: *Crimes Act 1958* (Vic) s 408A, inserted by *Crimes (Breath Test Evidence) Act 1961* (Vic) s 2; *Motor Car Act 1958* (Vic) s 80E(2)(b), inserted by *Motor Car (Driving Offences) Act 1971* (Vic) s 7.

<sup>113</sup> See *Williams* (1998) 104 A Crim R 65, 68 (Smith J).

<sup>114</sup> *Ibid* 77.

<sup>115</sup> See *Road Safety (Further Amendment) Act 2001* (Vic) s 16.

<sup>116</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 1 November 2001, 1499 (Peter Batchelor, Minister for Transport).

### 3 Findings

The doubt in *Williams* arose for a number of interrelated reasons. Primarily, it arose because of an unforeseeable event (the change of police practice to use police cars instead of only booze buses), coupled with, it would seem, undue reliance by the drafter on an extrinsic source to evidence the real intent. With an unnecessarily broad term being deployed ('place'), other sources of doubt were brought into play. The long legislative evolution of the provision gave rise to differing interpretations of that history. The surrounding text in the Act itself gave conflicting indications as to the scope of the word 'place'. Finally, when consideration inevitably turned to the question of the consequences which ought to be avoided, this brought out the courts' and the government's different policy priorities in the area in question.

## C Goldie

### 1 *The Case and Its Legislative Background*

The Administrative Appeals Tribunal hears and decides, on the merits, appeals from decisions made or purportedly made under certain federal legislation. In 1993, s 42A of the *Administrative Appeals Tribunal Act 1975* (Cth) was amended by the *Administrative Appeals Tribunal Amendment Act 1993* (Cth). The amendment inserted s 42A(10), which provided:

If it appears to the Tribunal that an application has been dismissed in error, the Tribunal may, on the application of a party to the proceeding or on its own initiative, reinstate the application and give such directions as appear to it to be appropriate in the circumstances.

The amendment is plain language legislation. It was drafted by an office with a plain English policy.<sup>117</sup> Further, s 42A(10) evidences plain language techniques:

- It refers simply to 'an application' rather than 'an application referred to in sub-section (1)'. In other words it avoids the traditional form of expressly connecting associated provisions within a section.<sup>118</sup>
- To indicate the circumstances in which the legislation is to operate ('the case'), the shorter 'if' is used rather than longer forms such as 'in a case to which s 5 applies'.<sup>119</sup>
- The sentence is expressed in the active voice rather than the passive voice.<sup>120</sup>
- The provision avoids 'jargon and unfamiliar words'.<sup>121</sup>

<sup>117</sup> See above n 63.

<sup>118</sup> See Turnbull, 'Clear Legislative Drafting', above n 2, 167.

<sup>119</sup> See *ibid* 167–8.

<sup>120</sup> See *ibid* 166; Office of Parliamentary Counsel, *Annual Report 1992–93*, above n 63, 9.

<sup>121</sup> See Turnbull, 'Clear Legislative Drafting', above n 2, 166; Office of Parliamentary Counsel, *Annual Report 1992–93*, above n 63, 9.

- While plain language guidelines state that the main clause should precede any series of conditional clauses, it is acceptable for a single conditional clause to precede the main clause where it ‘fits in with the structure of the discourse.’<sup>122</sup> In the present instance, the provision fits within this exception.

In *Goldie*, a dispute arose over the meaning of ‘error’ in s 42A(10). The applicant before the Full Court of the Federal Court had sought a permanent visa under s 501 of the *Migration Act 1958* (Cth) but this had been refused by a delegate of the Minister.<sup>123</sup> An initial appeal to the Tribunal had been unsuccessful but a later appeal to the Full Court of the Federal Court resulted in the Court remitting the matter to the Tribunal for further hearing.<sup>124</sup> A large volume of new material was forwarded by the Minister to the applicant just three days before the hearing date of 16 December 1999. This material was to be formally admitted into the proceedings, and the solicitor for the Minister claimed that counsel for the applicant had previously seen almost all of the material. The applicant’s counsel, who only had instructions to seek an adjournment, appeared and requested a substantial adjournment, but was granted a day only. On the next day, counsel renewed his application for a substantial adjournment but was refused, and so counsel withdrew with leave. The Tribunal consequently dismissed the application pursuant to s 42A(2),<sup>125</sup> which provides, among other things, that, if a party fails to appear in person or by a representative at a hearing, the Tribunal may dismiss the application without proceeding to review the decision.

Later, the applicant applied to reinstate the application that had been dismissed by the Tribunal. A differently constituted Tribunal found that it had ‘no jurisdiction’ under s 42A(10) to reinstate the original application for review because the provision applied only to administrative errors and not to errors of law such as a denial of natural justice, and, in any case, there had been no such error.<sup>126</sup> The applicant then appealed the decision to refuse to reinstate the application to the Full Court of the Federal Court.<sup>127</sup>

Before the Federal Court, the availability of s 42A(10) as a means to reinstate an application was disputed by the parties. The applicant submitted that a wide construction of ‘error’ should be taken so as to include an error of law as well as an administrative error.<sup>128</sup> The respondent Minister submitted that a narrow construction should be taken so that ‘error’ would capture only administrative

<sup>122</sup> *Plain English and the Law Report*, above n 1, app 1, 35 [73]. The *Report* was described by the head of the Commonwealth Drafting Office as expressing an ‘ideal’ of plain English: Turnbull, ‘Clear Legislative Drafting’, above n 2, 163.

<sup>123</sup> *Goldie* (2002) 121 FCR 383, 384 [2] (Wilcox and Downes JJ).

<sup>124</sup> See *Goldie v Minister for Immigration and Multicultural and Indigenous Affairs* (1999) 56 ALD 321.

<sup>125</sup> See *Goldie* (2002) 121 FCR 383, 385 [7] (Wilcox and Downes JJ).

<sup>126</sup> *Ibid* 386 [13], 387 [18].

<sup>127</sup> The applicant formally lodged an application for an extension of time, but the merits of the proposed appeal were also canvassed: see *ibid* 386 [14].

<sup>128</sup> See *ibid* 387 [18].

errors.<sup>129</sup> The Full Court held that the Tribunal had erred in its interpretation of the meaning of 'error' in s 42A(10); the wider construction was correct. The Tribunal accordingly did have the power to make a reinstatement order under that provision in the circumstances.<sup>130</sup>

## 2 Sources of Doubt

On the one hand, the narrow meaning of 'error' urged by the Minister was supported by two extrinsic and legally admissible documents. The first was the *Report of the Review of the Administrative Appeals Tribunal*,<sup>131</sup> which had directly prompted the insertion of s 42A(10). The *Report* had recommended a power to 'vacate the dismissal of any application for review where such dismissal has occurred through administrative error on the part of the Tribunal'.<sup>132</sup> The Explanatory Memorandum for the Bill which proposed the insertion of s 42A(10) also stated that the provision enables the Tribunal 'to reinstate an application which has been dismissed through administrative error on the part of the Tribunal'.<sup>133</sup> On the other hand, the wide meaning of 'error' was supported by the ordinary meaning of 'the word adopted by Parliament'.<sup>134</sup> Unusually, the Court itself in this case zeroed in on the central source of difficulty: 'For reasons unknown to us, [Parliament] did not include the adjective "administrative" as a limitation on "error"'.<sup>135</sup> In other words, by reason of the material before Parliament at the time of consideration of the Bill — including the Explanatory Memorandum — doubt arose about the *intention* of Parliament, specifically whether it wished 'error' to have a narrow or wide meaning.<sup>136</sup>

Logically, there is an explanation somewhere for this discrepancy between the extrinsic documents and the wording adopted by Parliament. If the *Report* was mirrored in the drafting instructions, it was a clear oversight by the drafter not to have fully expressed the instructions in legislative form. But even if the instructions were followed (ie the instructions did not particularise the 'error' as 'administrative'), the drafter ought to have been aware, or at least have been made aware, of the concept of error employed in the *Report*. It is the instructor's duty to supply the drafter with 'any useful supporting or background material which would help Parliamentary Counsel draft the requested legislation'.<sup>137</sup> If, as should have been the case, the drafter was supplied with the *Report*, then the

<sup>129</sup> See *ibid* 387 [22].

<sup>130</sup> *Ibid* 390 [36]. However, the Court dismissed the application for leave to appeal because there was no material before the later Tribunal which would have justified it in determining that the proceeding had been dismissed in error by the earlier Tribunal: at 391–2 [42]–[43].

<sup>131</sup> Administrative Appeals Tribunal, *Report of the Review of the Administrative Appeals Tribunal* (1991).

<sup>132</sup> *Ibid* 296.

<sup>133</sup> Explanatory Memorandum, Administrative Appeals Tribunal Amendment Bill 1993 (Cth) 11 (emphasis altered), quoted in *Goldie* (2002) 121 FCR 383, 390 [34] (Wilcox and Downes JJ).

<sup>134</sup> *Goldie* (2002) 121 FCR 383, 390 [34] (Wilcox and Downes JJ).

<sup>135</sup> *Ibid* 390 [33].

<sup>136</sup> Twining and Miers, above n 20, 178–9 (condition 8) classes these sources of doubt as 'doubts about intention'.

<sup>137</sup> Department of the Prime Minister and Cabinet, Parliament of Australia, *Legislation Handbook* (1999) 27 [6.7] (emphasis altered).

drafter contributed to the doubt (regardless of the instructions). However, the public record does not make it clear whether the drafter was supplied with the *Report*, and so it can only be suspected whether the drafter was a party to the doubt which subsequently arose.

Regardless of the drafter's contribution, if any, to the doubt, it seems clear that there was an oversight by the departmental sponsors of the legislation, it being their duty to give instructions and to approve the draft legislation in the first instance.<sup>138</sup> Clearly, they were aware of the *Report* and, furthermore, were responsible for the preparation of the Explanatory Memorandum which followed the *Report*.<sup>139</sup> Any inconsistency between the Memorandum and the legislation lies at the door of the Department and the responsible Minister who must formally approve the Bill.<sup>140</sup> Ultimately, a share of responsibility also lies with the Parliamentary Affairs and Legislation Section of the Department of Prime Minister and Cabinet, the body responsible for preparing a submission to the Parliamentary Secretary to Cabinet containing the draft Bill and the Explanatory Memorandum for his or her approval of the introduction of the Bill.<sup>141</sup> Members of Parliament were also responsible for the doubt. They did not pick up the inconsistency between the Memorandum and the Bill,<sup>142</sup> and neither did they debate the clause in any detail.<sup>143</sup>

In addition to oversights in the rule-making process, other factors operated to intensify the doubt so created. A relevant condition in the Twining and Miers model is condition 24: 'Past authoritative interpretations of this rule [that are] in conflict or unsatisfactory'.<sup>144</sup> Before *Goldie*, obiter dicta of the Full Court of the Federal Court in *Brehoi v Minister for Immigration and Multicultural Affairs* ('*Brehoi*')<sup>145</sup> contributed to the doubt over the meaning of the provision. In that case, the Court opined that the 'purpose of the enactment of [the] provision' was to confer a power in relation only to administrative error.<sup>146</sup> This could suggest that the Court was of the opinion that the legal meaning of 'error' was to be 'administrative error' in this context. If so, the Court's opinion was unsatisfactory, as the High Court's view is that legislative purpose must be found in the provisions of the statute.<sup>147</sup> 'The words of a Minister must not be substituted for

<sup>138</sup> See *ibid* 36 [7.6]. Error in drafting instructions is included as a source of doubt as to the meaning of legislation in Barnes, 'Sources of Doubt', above n 19, 131–2. For the capacity of the drafter to contribute to doubt, see Twining and Miers, above n 20, 179–80 (condition 13).

<sup>139</sup> See Department of the Prime Minister and Cabinet, above n 137, 38–9 [8.4].

<sup>140</sup> See *ibid* 36 [7.6], 47 [9.6].

<sup>141</sup> See *ibid* 46 [9.1], [9.4].

<sup>142</sup> Parliamentary error is not specifically mentioned in the Twining and Miers model. Condition 16 of that model, however, covers '[d]ifficulties occasioned during the post-drafting stage': Twining and Miers, above n 20, 180. This would broadly include parliamentary error.

<sup>143</sup> See *Goldie* (2002) 121 FCR 383, 389 [32] (Wilcox and Downes JJ), citing *Brehoi v Minister for Immigration and Multicultural Affairs* (1999) 58 ALD 385, 390 [28]–[29] (Whitlam, Moore and Katz JJ).

<sup>144</sup> Twining and Miers, above n 20, 181.

<sup>145</sup> (1999) 58 ALD 385.

<sup>146</sup> *Ibid* 392 [44] (Whitlam, Moore and Katz JJ).

<sup>147</sup> *Bropho v Western Australia* (1990) 171 CLR 1, 22 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

the text of the law'.<sup>148</sup> An Explanatory Memorandum can only *support* an inference of legislative purpose.<sup>149</sup> It cannot alone be determinative of the legislative purpose let alone of the legal meaning of the statutory provision.

If the view of the provision in *Brehoi* was legitimate (which is very doubtful), this points also to the role of language in the present case. The fact that the word 'error' could be read literally or subject to an implied qualification indicates the malleability of the statutory text. As G C Thornton says, words have a 'readiness to derive colour from their surrounding context'.<sup>150</sup> In the present case the context that conditioned the text included the extrinsic documents.

The obiter dicta of the Full Court of the Federal Court in *Brehoi* led to yet another source of doubt in the present case, which is echoed in condition 36 of the Twining and Miers model: 'Difference of views between interpreter(s) and others'.<sup>151</sup> The different interpreters here were the Tribunal and the Full Court of the Federal Court in *Goldie*. Although the Tribunal was not bound by the Full Court's opinion in *Brehoi*, it considered that view to be 'clear guidance regarding the correct interpretation'.<sup>152</sup> In contrast, once the Full Court in *Goldie* had concluded that the Court in *Brehoi* was wrong, it felt bound to give effect to its different view.<sup>153</sup> The different views flowed from the different standpoints of the interpreters. Situated below the courts in the legal system, the Tribunal felt bound (and rightly so, the Full Court in *Goldie* said<sup>154</sup>) to follow the observations in *Brehoi*, although it was not strictly bound to do so. But the Court in *Goldie* was freer than the Tribunal and able to take its own view on the question.

### 3 Findings

At the level of public record, a number of sources of doubt are readily apparent. The overarching source of doubt was the doubt about *Parliament's* intention regarding the meaning of the word 'error' in s 42A(10). Lying beneath this doubt were a number of factors: conflict between, on the one hand, the literal text of the statute and, on the other hand, the intention in the background report and, in the Explanatory Memorandum, the failure of the sponsoring Department to ensure congruence between the Memorandum and the Bill; the problematic Full Court dicta in the earlier case of *Brehoi*; and the later differing standpoints of the Tribunal and the Full Court of the Federal Court in *Goldie*. However, there is uncertainty surrounding the contribution of the drafter regarding the doubt which arose in this case. The public record does not make clear whether it was an entirely innocent involvement, or whether it too was a case of oversight. Finally, one can note that although plain language guidelines and their application were

<sup>148</sup> *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 518 (Mason CJ, Wilson and Dawson JJ).

<sup>149</sup> *Lacey v A-G (Old)* (2011) 85 ALJR 508, 521–2 [44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

<sup>150</sup> G C Thornton, *Legislative Drafting* (Butterworths, 4<sup>th</sup> ed, 1996) 8.

<sup>151</sup> Twining and Miers, above n 20, 182.

<sup>152</sup> *Goldie and Minister for Immigration and Multicultural and Indigenous Affairs* [2001] AATA 513 (12 June 2001) [40] (Hotop DP), quoted in *Goldie* (2002) 121 FCR 383, 397 [72] (Carr J).

<sup>153</sup> See *Goldie* (2002) 121 FCR 383, 390 [35] (Wilcox and Downes JJ).

<sup>154</sup> *Ibid* 390 [36].

not a direct source of doubt, these techniques could not prevent other sources of doubt from arising.

#### D East Melbourne

##### 1 *The Case and Its Legislative Background*

The purpose of the *Planning and Environment Act 1987* (Vic) 'is to establish a framework for planning the use, development and protection of land in Victoria'.<sup>155</sup> The Act does not directly impose planning controls; rather, it authorises the making of planning schemes. The Act empowers the Minister to prepare amendments to any provision of a planning scheme. Part 3 of the Act deals with amendment; for instance, s 19 requires a planning authority to give notice of the preparation of an amendment to Ministers, public authorities and municipal councils, and to owners and occupiers of land that it believes may be materially affected. Section 20 of the Act enables a planning authority to apply to the Minister to exempt it from any of the requirements of s 19 in respect of the amendment. Section 20 also empowers the Minister to exempt himself or herself from any of the requirements of ss 17–19 in respect of an amendment which the Minister prepares, if the Minister 'considers that compliance with any of those requirements is not warranted or that the interests of Victoria or any part of Victoria make such an exemption appropriate.' Section 39, as amended in 1989,<sup>156</sup> is headed 'Defects in Procedure' and provides in part as follows:

- (7) An amendment which has been approved is not made invalid by any failure to comply with Division 1 or 2 or this Division or Part 8.

The *Planning and Environment Act 1987* (Vic) 'was one of the first Acts drafted in Victoria using a [contemporary] "plain English" method'.<sup>157</sup> The Minister introducing the Planning and Environment Bill 1986 (Vic) into Parliament claimed that it had been drafted using a 'straightforward approach' and in 'plain English', and that in its drafting the government had realised its goal of making the law accessible to those whom it affects.<sup>158</sup> The Act was strikingly different from its predecessor in form. Its predecessor in this regard was s 30(7) of the *Town and Country Planning Act 1958* (Vic), which read as follows:<sup>159</sup>

A planning scheme approved by the Governor in Council shall not be invalidated or affected by reason only that any omission defect failure irregularity or

<sup>155</sup> *Planning and Environment Act 1987* (Vic) s 1.

<sup>156</sup> See *Planning and Environment (Amendment) Act 1989* (Vic) s 10.

<sup>157</sup> *East Melbourne* (2005) 12 VR 448, 478 [91] (Morris J).

<sup>158</sup> Victoria, *Parliamentary Debates*, Legislative Assembly, 18 September 1986, 668 (Frank Wilkes, Minister for Housing).

<sup>159</sup> Technically, the immediate predecessor to the present s 39(7) was s 39(2) of the 1987 Act. However, as noted by the Court in *East Melbourne* (2005) 12 VR 448, 478 [89] (Morris J), s 39(2) was similar to s 39(7). For plain English purposes, the relevant comparison with s 39(7) is s 30(7) of the 1958 Act.

informality in or in relation to the preparation exhibition or submission thereof is subsequently discovered.<sup>160</sup>

In comparison with its predecessor, s 39 of the *Planning and Environment Act 1987* (Vic), and sub-s (7) in particular, reflects many common markers of plain language drafting. These markers include the following:

- Section 39 uses few words in the legislative sentence.<sup>161</sup> It is close to the recommended average sentence length of 20–5 words.<sup>162</sup>
- It omits unnecessary material.<sup>163</sup> It refers simply to 'an amendment which has been approved' instead of 'an amendment approved by the Governor in Council'. Instead of 'invalidated or affected' it refers simply to 'made invalid'. Instead of 'preparation exhibition or submission thereof' the newer version refers more precisely and straightforwardly to Divisions and a Part of the Act. And instead of specifying each and every one of the express requirements in the relevant Divisions and Part, it refers globally and broadly to 'failure to comply'.
- The section uses 'by' instead of the inflated, multiple-word preposition 'by reason of'.<sup>164</sup>
- On some views of plain language, the law ought to be rendered simple.<sup>165</sup> By using the generic expression 'failure to comply' instead of setting out each of the express and implied requirements, a complex statement identifying the relevant provisions and requirements is avoided.
- It avoids overlapping concepts.<sup>166</sup> The words 'omission defect failure irregularity or informality' were replaced by the generic expression 'failure to comply'.
- Unlike the previous version the newer version does not fail to adhere to generally accepted conventions in the community. The earlier version did so by leaving off appropriate punctuation in the phrase 'omission defect failure irregularity or informality'.<sup>167</sup>

<sup>160</sup> *Town and Country Planning Act 1958* (Vic) s 30(7), quoted in *East Melbourne* (2005) 12 VR 448, 478 [90] (Morris J).

<sup>161</sup> See *Plain English and the Law Report*, above n 1, app 1, 33 [70].

<sup>162</sup> See *ibid* app 1, 33 [71].

<sup>163</sup> See *ibid* app 1, 13–15 [29], 23 [49].

<sup>164</sup> See *ibid* app 1, 47 [101]. See also Joseph Kimble, *Lifting the Fog of Legalese: Essays on Plain Language* (Carolina Academic Press, 2006) 170.

<sup>165</sup> See, eg, Victoria, *Parliamentary Debates*, Legislative Council, 7 May 1985, 433, 436 (J H Kennan, Attorney-General), complaining of the 'inability of legislators, bureaucracies and large corporations to tell their stories simply', and stating that 'things can be stated simply and shortly in a way which at once makes them easier to understand and does not diminish their legal effectiveness'. In contrast, the *Plain English and the Law Report*, above n 1, app 1, 4 [9] rejected simplification and declared that '[plain English] is not a simplified statement'. However, as mentioned above, some of the suggestions in the *Report*, such as the preference for generic terms over a string of words, did cut across that general policy: see at app 1, 46–7 [100].

<sup>166</sup> See *Plain English and the Law Report*, above n 1, app 1, 46–7 [100]. However, see below Part V for critical comment.

<sup>167</sup> See *ibid* app 1, 60 [133].

- The newer version avoids the lawyerism ‘thereof’.<sup>168</sup>

In *East Melbourne*, a dispute arose over decisions made under the *Planning and Environment Act 1987* (Vic). This called into play the meaning of ‘failure to comply’ in s 39(7) of the Act. Two interrelated decisions were the subject of dispute.<sup>169</sup> The first was the decision of the Minister to adopt and approve a site-specific amendment to the Melbourne Planning Scheme. This had the effect of allowing the redevelopment of land in the vicinity of the Hilton on the Park Hotel in East Melbourne. The Minister also ‘exempted herself from the requirements of the *Planning and Environment Act 1987* ... with the result that the amendment was made without the knowledge of nearby residents.’<sup>170</sup> The plaintiff was an association that represented residents in the East Melbourne area. It brought an action before the Court claiming that the Minister had acted unlawfully in adopting and approving the amendment and in exempting herself from the notification requirements. This claim was resisted by the Minister and by the owner of the land directly affected by the amendment. The plaintiff argued that the Minister’s decisions were visited with various administrative law grounds of error which arose from implied limitations on the exercise of power: *Wednesbury* unreasonableness;<sup>171</sup> the taking into account of irrelevant matters; and an unauthorised purpose. Denial of the obligation to accord natural justice was also argued. Additionally, the plaintiff sought to enforce various express statutory requirements: that the Minister had failed to comply with ss 7(6) and 12 of the Act, in that the Minister had not ‘prepared’ the amendment as required by those provisions, there being no instrument of delegation empowering any other person to prepare the amendment; and that the Minister had failed to comply with s 12(2) of the Act, which required the Minister to have regard to ‘the Minister’s directions’ and to ‘the Victoria planning provisions’.

Section 39(7) came into the dispute because the second defendant (the landowner) argued that the application of s 39(7) meant that the action must fail.<sup>172</sup> The second defendant submitted that the words be given a wide effect such that ‘failure to comply’ takes in all errors in decision-making under the specified parts of the Act, including all the grounds advanced by the plaintiff. In contrast, the plaintiff sought to give s 39(7) a narrow construction. The plaintiff argued that ‘failure to comply’ ought to be construed as only applying to a failure to comply with ‘defects in procedure’, procedure not going to the substantive questions on which its case rested.<sup>173</sup> The plaintiff argued, it would seem, that the implied limitations on the power and the express conditions laid down by the

<sup>168</sup> See Kimble, *Lifting the Fog of Legalese*, above n 164, 174.

<sup>169</sup> The following facts are taken from the judgment of Morris J: *East Melbourne* (2005) 12 VR 448, 450–1 [1].

<sup>170</sup> *Ibid.*

<sup>171</sup> *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.

<sup>172</sup> See *East Melbourne* (2005) 12 VR 448, 478 [88] (Morris J).

<sup>173</sup> See *ibid.*

statute which conditioned the power were not matters of 'procedure'. The Court upheld the narrower construction of s 39(7) advanced by the plaintiff.<sup>174</sup>

## 2 Sources of Doubt

How did s 39(7) come to have this latent ambiguity? Chronologically speaking, several factors seem to have contributed to it. First in time, there is the complex background situation which the provision sought to regulate: planning.<sup>175</sup> Section 1 of the Act provides:

The purpose of this Act is to establish a framework for planning the use, development and protection of land in Victoria in the present and long-term interests of all Victorians.<sup>176</sup>

This self-evidently large and complex task naturally leads to claims being made that are based on differing interests. Section 1 itself nominated the use and development as well as the protection of land as purposes of planning in Victoria. Section 4(1) elaborated the relevant, though potentially conflicting, objectives of the Act. On the one hand, there is a 'development' objective: '(a) to provide for the fair, orderly, economic and sustainable use, and development of land'. On the other hand, a 'protection' objective was elaborated in several paragraphs including a stated aim '(c) to secure a pleasant, efficient and safe working, living and recreational environment for all Victorians and visitors to Victoria'.

These potentially conflicting objectives of the Act are but the backdrop, however, for the particular conflict that underpins s 39(7). On its face the provision purported to dictate and restrict the legal consequence of contravening certain provisions of the Act. While the Act sought, by laying down various requirements, to make the process 'fair' (s 4(1)(a)) and 'to secure a pleasant environment for all Victorians' (s 4(1)(c)), s 39(7) apparently sought to promote merely 'orderly' development of land by immunising from review a decision to amend a planning scheme where there has been a 'failure to comply'. It was the scope of these words which was the interpretative issue in *East Melbourne*.

Section 39(7) directly grappled with a further conflict in the objectives of the Act: the rule-maker wished to have rules which ensured the process was fair but did not want some of the rules to be legally enforceable if they might prevent merely orderly development from occurring. The rule-maker thus enacted s 39(7) — a 'no invalidity clause' — to achieve the latter end. Though s 39(7) did not directly prevent the courts from reviewing planning assessments, it substantially achieved that effect<sup>177</sup> by turning 'mandatory' requirements<sup>178</sup> into 'directory'

<sup>174</sup> Ibid 482–3 [101]. However, this was technically dicta as the Court found that the plaintiff had failed to prove any of the grounds of review: at 478 [88].

<sup>175</sup> Twining and Miers, above n 20, 178 (condition 5) posits the 'sheer complexity of the original situation' as a source of doubt.

<sup>176</sup> (Emphasis added).

<sup>177</sup> See Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2008) 208–9. The High Court has recently confirmed this effect of no invalidity clauses in *Federal Commissioner of Taxation v Futuris Corporation Ltd* (2008) 237 CLR 146, 156–7 [23]–[24] (Gummow, Hayne, Heydon and Crennan JJ) ('*Futuris*').

requirements.<sup>179</sup> The conflict in s 39(7) was therefore an acute one. It was not simply a conflict over social purposes (development versus protection of the environment); it was a conflict over how the resolution of such a conflict was to be managed. That is, between the strict enforcement of rules and a merely orderly management of the process by government. These conflicting objectives, if they did not inevitably raise doubt as to the scope of s 39(7), problematised any attempt to immunise amendments from legal challenge. In any case, other sources of doubt can be seen to be operative in relation to the 'failure to comply' formula.

The drafting (but not necessarily the drafter<sup>180</sup>) was apparently a further source of doubt<sup>181</sup> because of an unnecessary conflict between the text of and the heading to s 39. Whereas the text of s 39(7) was unqualified in terms of the *kinds* of matters to which it applied (being 'failure to comply with Division 1 or 2 or this Division or Part 8'), the heading to the section referred to 'Defects in procedure'. The word 'procedure' is not a term used in the provision and is itself ambiguous. In one sense it could refer loosely to all steps required by the statute, reflecting the dictionary meaning of 'the act or manner of proceeding in any action or process; conduct.'<sup>182</sup> Or it could be read, as it is elsewhere in the law,<sup>183</sup> as a reference to steps of a particular character. Now, from an interpretative point of view, the heading was not then part of 'the Act',<sup>184</sup> which lessened the likelihood of an interpreter relying on the heading. But the law reports nevertheless had recorded disputes involving headings, so the drafter and instructor ought to have been aware of their potential to influence interpretation.<sup>185</sup> The Minister added some support to the narrower 'defects of procedure'

<sup>178</sup> A 'mandatory' requirement is a condition regulating the exercise of a power which, if the condition is breached, invalidates the purported exercise of that power.

<sup>179</sup> A 'directory' requirement is a condition regulating the exercise of a power which, if the condition is breached, does *not* invalidate the exercise of that power.

<sup>180</sup> The drafter is 'responsible for decisions as to the format and structure of the Bill and the language used': Office of the Chief Parliamentary Counsel, Parliament of Victoria, *The Legislative Process* (March 2010) 33 [5.2]. However, the drafter can never insist on questions of policy: see, eg, George Tanner, 'Confronting the Process of Statute-Making' in Rick Bigwood (ed), *The Statute: Making and Meaning* (LexisNexis, 2004) 49, 63.

<sup>181</sup> Twining and Miers, above n 20, 180 (condition 13(h)), under the heading 'Poor drafting', describes '[i]nternal inconsistency or other logical flaws [and] contradictory provisions' as a condition of doubt.

<sup>182</sup> *Macquarie Dictionary*, above n 87, 1323.

<sup>183</sup> Elsewhere in the law 'procedure' often has a narrower meaning than the dictionary meaning and refers to steps of a particular character. For instance, the High Court has distinguished between steps along the way and steps of a procedural character in reading the jurisdictional provisions of the *Administrative Decisions (Judicial Review) Act 1977* (Cth): *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 337–8, 341–3 (Mason CJ). Similarly, the Administrative Review Council has distinguished 'procedural decisions' from decisions having a substantive effect: Administrative Review Council, *What Decisions Should Be Subject to Merit Review?* (1999) [4.3] <<http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Home>>.

<sup>184</sup> *Interpretation of Legislation Act 1984* (Vic) ss 36(2A), (3) provide that headings to sections inserted on or after 1 January 2001 form part of an Act, but not otherwise.

<sup>185</sup> See D C Pearce and Robert Geddes, *Statutory Interpretation in Australia* (LexisNexis, 6<sup>th</sup> ed, 2006) 147 [4.35].

construction by referring to that construction in passing in the second reading speech to the proposed s 39.<sup>186</sup>

Yet even if the heading had not been written this way, a dispute over the meaning of s 39(7) may have otherwise arisen given the nature of the provision as a 'no-invalidity' clause and the differing standpoints that the judiciary and the executive take towards clauses that restrict judicial review.<sup>187</sup> As pointed out in *East Melbourne*,<sup>188</sup> s 39(7) was a form of privative clause because it purported to immunise action taken under statute from challenge in the courts. Judges tend to read these provisions as narrowly as possible.<sup>189</sup> As recorded by the Court in *East Melbourne*, over a long period the courts have been reluctant to recognise that, notwithstanding the wide and strong language in which these clauses have been expressed, such clauses can protect a decision infected by jurisdictional error from the supervision of superior courts.<sup>190</sup>

Coming back to the drafter and the Department's instructions, would they not have been aware of this likely judicial attitude? And could they not have attempted to draft a provision which could survive judicial scrutiny? However, it is unclear whether the drafter erred by formulating the privative clause in relatively general terms (a failure to comply with certain parts of the Act) rather than specifying the particular provisions and the particular requirements which, if breached, would not lead to invalidity of a specified act (here the amendment of planning schemes). On one view it might be argued that the drafter erred as such provisions, which are common in other Acts,<sup>191</sup> have passed judicial scrutiny.<sup>192</sup>

On another view, it may be questioned whether specific no-invalidity clauses which are directed at what would otherwise be fundamental considerations would be effective. First, a set of specific no-invalidity provisions would be very lengthy. Secondly, such clauses would likely be read as only applying to the express requirements in the statute and not to the requirements implied by operation of administrative law. Thirdly, a lengthy set of no-invalidity provisions might not pass judicial scrutiny because it might be seen as 'arguably [giving]

<sup>186</sup> See Victoria, *Parliamentary Debates*, Legislative Council, 16 November 1989, 1377 (Barry Pullen), quoted in *East Melbourne* (2005) 12 VR 448, 480–1 [95] (Morris J).

<sup>187</sup> See Twining and Miers, above n 20, 182 (condition 36): 'Difference of views between interpreter(s) and others'. One commentator has opined that: 'Courts generally seem to regard ouster clauses as an institutional affront and this is not surprising insofar as such clauses are predicated on the courts' inability to handle legal disputes properly': Roger Douglas, *Douglas and Jones's Administrative Law* (Federation Press, 6<sup>th</sup> ed, 2009) 735. The courts themselves defend their approach on the basis that judicial review is 'a beneficial facility' and 'the ultimate machinery to protect the rule of law': *Osmond v Public Service Board of New South Wales* (1984) 3 NSWLR 447, 451 (Kirby P).

<sup>188</sup> (2005) 12 VR 448, 480 [95] (Morris J).

<sup>189</sup> See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 505 [72] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *ibid* 481 [98].

<sup>190</sup> (2005) 12 VR 448, 481–2 [98]–[99] (Morris J).

<sup>191</sup> See, eg, Roger Douglas, *Administrative Law* (LexisNexis Butterworths, 2<sup>nd</sup> ed, 2004) 80 [4.4.6]. No-invalidity provisions applying to single sections or subsections are common in legislation.

<sup>192</sup> See, eg, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212. This case dealt with a single power being protected from review for breach of a condition.

rise to an “internal contradiction” within the statute which a court would be entitled to resolve’.<sup>193</sup> This is because the statute would on the one hand be mandating things to be done, but on the other hand attempting to prevent their enforcement for the most part. In short, it is unclear whether the inclusion of a simple but relatively general no-invalidity provision in s 39(7) was an error because specifying serially the particular provisions covered by s 39(7) might still have given rise to doubt about its legal effect.

In the context of sources of doubt, another event that should be mentioned is the interpretation of an earlier version of s 39, before that section was substituted in 1989, in *Grollo Australia Pty Ltd v Minister for Planning and Urban Growth and Development* (‘*Grollo*’).<sup>194</sup> The Court in that case observed that the heading was not part of the Act, and gave the provision a wide meaning: the provision did indeed extend ‘to a case of total failure to comply, at all events where that is not a knowing failure.’<sup>195</sup> This case therefore read the privative clause as effective except where there was a knowing failure. Naturally, the second defendant in *East Melbourne* placed much reliance on this authority.<sup>196</sup> However, being a single judge decision,<sup>197</sup> and one that is out of line with the general judicial approach to privative clauses, *Grollo* could not offer great precedential weight. *Grollo* illustrates Twining and Miers’ condition 24: ‘Past authoritative interpretations of this rule [that are] in conflict or unsatisfactory’.<sup>198</sup> The case was unsatisfactory because it was inconsistent with the general judicial approach to privative clauses, yet, because it was right on point, it gave support to the literal reading of the provision advanced by the second defendant.

A final source of doubt inhered in the very limitations of language. The language of the provision was inherently ambiguous and could not foreclose alternative readings. The section could be read widely and literally to include any failure to comply with identified parts of the Act, and even with implied requirements under the Act such as may be found using the ‘relevant considerations’ doctrine in administrative law. Or it could be read narrowly and subject to an implication: a failure to comply with defects of a procedural nature. It has been said that ‘reading down merely makes explicit what the court finds to be implicit in the legislative text.’<sup>199</sup> But, if so, this nevertheless illustrates how explicit legislative language is not itself determinative of meaning. Legislative language cannot prevent the making of implications arising from a consideration

<sup>193</sup> Cane and McDonald, above n 177, 208. Cf *Futuris* (2008) 237 CLR 146, 167 (Gummow, Hayne, Heydon and Crennan JJ). For detailed discussion of the problematic nature of no-invalidity clauses in the light of *Futuris*, see Leighton McDonald, ‘The Entrenched Minimum Provision of Judicial Review and the Rule of Law’ (2010) 21 *Public Law Review* 14.

<sup>194</sup> [1993] 1 VR 627.

<sup>195</sup> *Ibid* 646 (Brooking J), quoted in *East Melbourne* (2005) 12 VR 448, 479 [93] (Morris J).

<sup>196</sup> See (2005) 12 VR 448, 479 [88] (Morris J).

<sup>197</sup> See *La Macchia v Minister for Primary Industries and Energy* (1992) 110 ALR 201, 204 (Burchett J). See also Alistair MacAdam and John Pyke, *Judicial Reasoning and the Doctrine of Precedent in Australia* (Butterworths, 1998) 177 [8.50].

<sup>198</sup> Twining and Miers, above n 20, 181.

<sup>199</sup> Ruth Sullivan, *Statutory Interpretation* (Irwin Law, 2<sup>nd</sup> ed, 2007) 121.

of the text and the context, which then alters the prima facie grammatical meaning of the text.

### 3 Findings

*East Melbourne* shows, in different ways, multiple doubt-factors at work. The complex and conflicting planning objectives of the Act prompted the inclusion of s 39(7). More directly, by attempting to restrict judicial review, the provision itself reflected conflicting objectives underlying the requirements in the Act. History shows that doubt often arises when Parliaments attempt to restrict judicial review of executive action. In attempting this difficult drafting task, arguably the drafter erred by including a heading which was in different terms from the provision to which it referred. The drafter possibly erred also in formulating the law as a general principle, rather than choosing a more complex style specifying serially each of the requirements and formulating those requirements in 'directory' and not 'mandatory' terms. But it is disputable whether these last-mentioned errors were truly sources of doubt in the sense that, but for these errors, doubt would not have arisen. Privative clauses are by their nature prone to give rise to doubt. Added to this strong brew was a non-orthodox interpretation of an earlier version of the provision in *Grollo*. Finally, the language of the text was a source of doubt only in the indirect sense that it could not prevent these external doubt-factors from arising.

#### IV WHAT DO THE CASES AS A WHOLE TELL US ABOUT THE SOURCES OF DOUBT WHICH MAY INFECT LEGISLATION DRAFTED USING PLAIN LANGUAGE TECHNIQUES?

At the factual level the case studies discussed in Part III are unique. But this does not mean that they are without wider significance for legislative drafting practitioners and would-be reformers of legislative drafting. From the cases we can derive knowledge about the sources of doubt which operate in respect of legislation, including legislation drafted according to plain language techniques. This knowledge can in turn be factored into what we already know about sources of doubt generally.

##### A Concrete Knowledge

In the first place, the cases give us 'concrete, context-dependent knowledge'<sup>200</sup> about sources of doubt. When one compares the origins, dynamics and interrelationships of the sources of doubt they can reveal at least some of the intricate complexities of the generation of doubt *in those cases*. The doubts in each case had different origins. In *East Melbourne*, the origins may be traced to the conflicting planning objectives. In *Smoker*, the originating doubt-factor appears to be the terms of an agreement between the federal government and a group of pharmacy employers. In *Williams*, it was an unforeseeable event — a change of enforcement regime after the Act had been passed — which was the source of

<sup>200</sup> Flyvbjerg, above n 54, 224.

doubt. In *Goldie*, it is difficult to identify the originating source other than to say that it was doubt about parliamentary intention. A range of sources — drafter error, instructor error and Ministerial error — may each be considered a principal source of doubt.

As for the dynamics, we can see that the different sources of doubt reflect differences in the way they operated as moving forces. In *East Melbourne*, conflicting statutory objectives were more apparent than in the other cases. In *Smoker*, the error in the background agreement was distinctive. In *Williams*, the combination of an unforeseeable event and a complex legislative evolution marked it out as different. In *Goldie*, there is significant uncertainty concerning the nature of the drafter's contribution. However, there were also similarities between the moving forces. Legislative language was a factor in all cases. Drafter error was a factor in *East Melbourne*, *Smoker* and *Williams*, and a possible factor in *Goldie*. An unorthodox judicial interpretation was a source of doubt in *East Melbourne* and in *Goldie*.

The interaction between the factors was also different in the cases. In *Smoker*, the one error (the use of 'guideline') was repeated down the line in the legislative process. No such chain of causation was apparent in the other cases. In *East Melbourne*, there is a sense that the factors were linked invisibly as one factor which tended to raise doubt was followed by another, and another, until events occurred and doubt was laid bare. In *Williams*, there were two events without which there would not have been any doubt. They were the changed police practice for enforcing the drink-driving law — the use of police cars — and the drafter's choice of a broad term instead of expressly specifying the use of booze buses. As a result, other doubt factors were brought into play in that case: the complex legislative evolution, the language of the provision, and the different social outlooks of the judge and the government. In *Goldie*, the mystery of the originating cause suggests a lack of communication in the drafting and instructing process as the link between the factors.

### B *Illustrating the Literature on Legislation*

The knowledge we can derive from the cases discussed in this article has a wider significance as it illustrates themes in the literature on legislation and lends support to claims made in the literature.

#### 1 *More than a Language Problem*

In their seminal text on rule-making, Twining and Miers diverged from previous thinking that doubt over the meaning of rules was largely a problem of language.<sup>201</sup> They propounded a model which emphasised rule-making processes as the setting for conditions contributing to doubt. The cases under consideration support their theory in two ways. First, as apparent from the above discussion, many factors other than the limitations of the legislative language contributed to the doubt. Secondly, problems with language were not a direct cause of doubt in

<sup>201</sup> See Twining and Miers, above n 20, 186.

two of the four cases. In *Smoker*, the term in doubt had a clear meaning in ordinary and legal usage, but it was the misuse of this term which caused the doubt. In *Goldie*, the use of the word 'error' was undermined by a mistake in the process of preparing the legislation; again, there was nothing inherent in the word which caused the doubt. However, in *Williams* and *East Melbourne*, the limitations of language assumed a larger role. In both cases broad terms were used ('place'; 'failure to comply') and this level of generality contributed to the doubt, particularly in *Williams*. In *Williams*, the contextual phrase 'or other' was also ambiguous.

## 2 Characteristics of Sources of Doubt

As mentioned above, elsewhere I have suggested that, for legislation, sources of doubt have certain key characteristics.<sup>202</sup> A number of these characteristics are evident in the cases presently studied.

First, numerous and diverse sources of doubt were evident in each case. The drafter contributed to the doubt in at least three of the four cases studied.<sup>203</sup> However, in none of the cases was drafting the sole originating cause, let alone the sole contributing factor. Many other factors intruded in each case.

Secondly, the sources of doubt were not restricted to events and processes taking place before the Act was passed. In each of the cases, the doubt-factors could be traced to both pre-enactment and post-enactment phases. For example, in *Williams*, drafter error and a complex legislative evolution combined with an unforeseeable event and differing standpoints between interpreters. In *East Melbourne*, conflicting objectives and drafter error combined with an unorthodox judicial interpretation. In *Smoker*, a chain of errors by those responsible for policy and drafting combined with an unorthodox judicial interpretation. In *Goldie*, failures by the Department to ensure congruence of the Bill with the Explanatory Memorandum combined with a subsequent problematic judicial interpretation.

Thirdly, ineradicable sources of doubt were evident. Due to the nature of the problems confronting legislators, conflicting objectives, such as those in *East Melbourne*, cannot always be eliminated completely from the law. Further, while it is trite to observe that human error cannot be eliminated from the legislative process, it is interesting to observe how widespread was the capacity for such error in some of the cases studied. In *East Melbourne* and in *Williams*, it is possible to pinpoint drafter error. But in *Smoker*, the fault lay with each of those in the industry being regulated: the instructor, the drafter, the Minister, and Parliament; in short, with everyone who had a decision-making role in the legislative process. *Goldie* was similar in scope: the instructor, the Parliamentary Affairs and Legislation Section of the Department of Prime Minister and Cabinet, members of Parliament and possibly the drafter all contributed to the doubt. The courts were not immune either: a problematic judicial interpretation was a contributing factor in *East Melbourne* and in *Goldie*.

<sup>202</sup> See Barnes, 'Sources of Doubt', above n 19.

<sup>203</sup> Whether the drafter contributed to the doubt is unclear in *Goldie*.

Fourthly, it is evident that the circumstances of each case impacted on the significance of a source of doubt. Let us consider drafter error as an example. In *Smoker*, drafter error was readily apparent. But in the other cases, drafter error had less significance. In *Williams*, the doubt would not have arisen but for a matter entirely out of the drafter's control: the post-enactment changes in enforcement practice. In *East Melbourne*, the drafter was probably faced with an undraftable task: preventing the courts from reviewing a failure to comply with mandatory requirements in the statute. In *Goldie*, the drafter's contribution is unclear; the drafter may not have erred at all.

It is only the fifth characteristic of sources of doubt — the capacity to minimise sources of doubt by using plain language techniques — which is not evident in the cases studied. But selecting cases which have been the subject of interpretative dispute in the courts made it inherently unlikely that this characteristic would be demonstrated. Nevertheless it is apparent how plain language techniques *could* have prevented at least one of the disputes. In *Smoker*, the drafter went against the principle of plain language drafting that words in their ordinary sense be used where possible:

Efficient communication depends on writers using words in the same way as the rest of the community does. They only create confusion and hinder communication if they give words unusual meanings. ... The primary goal for drafters is to use words in their ordinary sense so that they do not need to be defined.<sup>204</sup>

By using 'guidelines' in an unusual and idiosyncratic way, the drafter contributed to the doubt arising in that case.<sup>205</sup>

## V WHAT ARE THE IMPLICATIONS FOR THE PLAIN LANGUAGE MOVEMENT?

The present study has closely examined the implementation of plain language law reforms in four legislative contexts. The focus has been on the sources of doubt as to the meaning of legislative texts. A case-based study of sources of doubt is starkly different from the approach to sources of doubt hitherto taken in the general literature on legislation. That literature usefully catalogues potential sources of doubt but, inevitably, such theoretical models cannot capture the intricate complexities of sources of doubt in the way that case studies can. Nor does that literature focus on legislation written in a plain language style. The cases studied illustrate some of the limits of plain language legislation in practice. They evidence how sources of doubt have different and complex origins, dynamics and interrelationships. They make us more aware of the potential obstacles that stand in the way of making laws easier to understand.

The questions to be asked now are: what are the implications for the plain language movement of the above analysis? Are there lessons to be drawn? Of course, any lessons can only be tentatively put given that the study is based on only four cases. My general conclusion is that the cases presently studied raise a

<sup>204</sup> *Plain English and the Law Report*, above n 1, app 1, 48 [104].

<sup>205</sup> See *ibid*.

number of concerns about the claims commonly made in support of plain language legislation. Some of the concerns are relatively minor; others are of major significance and go to the root of plain language legislative drafting as it has been advocated.

Of relatively minor significance are certain questionable guidelines advocated by members of the plain language movement. I am not questioning the vast bulk of plain English guidelines, which appear sound. But some of the guidelines do not give sound advice. It is arguable that, to a limited extent, plain language guidelines contributed to the doubt arising in two of the four cases examined. In *Williams* and in *East Melbourne*, the drafters oversimplified the law by falling back on a shortened form of language ('place'; 'failure to comply'). It is acknowledged that many theorists of plain language have been at pains to emphasise that plain language involves no necessary loss of precision<sup>206</sup> and that plain language text may indeed be longer.<sup>207</sup> But, as noted above, *some* 'plain English' guidelines have advocated stating the law in a shortened way, confusing general principles drafting with plain English.<sup>208</sup> As Turnbull has pointed out, it is necessary to keep separate the notion of a plain English style from a general principles style of drafting. He observes that

a style which avoids detail and concentrates on general principles ... may be easier to read than the traditional style, but when the law is applied to particular circumstances, the effect is often unclear. The details have to be worked out by the courts.<sup>209</sup>

Another blemish on plain language guidelines that is exposed in the present study is the attitude to statutory definitions taken by some plain language advocates. As discussed above, some manuals suggest that statutory definitions should be avoided except as a last resort. It is quite possible that this attitude influenced the drafting decision not to define 'place' in the legislation considered in *Williams*. Defining 'place' could well have avoided the doubt which subsequently arose in that case.

Of much greater significance and concern is the goal set by many members of the plain language movement and the social problem which it assumes. The Law Reform Commission of Victoria's position on this is illustrative. Its goal was to achieve the immediate intelligibility of legislation by people who are affected by legislation. This goal assumes that legislation as traditionally drafted cannot

<sup>206</sup> See, eg, Turnbull, 'Clear Legislative Drafting', above n 2, 165; I Turnbull, 'Legislative Drafting in Plain Language and Statements of General Principle' (1997) 18 *Statute Law Review* 21, 23. See also *ibid* app 1, 4 [9].

<sup>207</sup> See Murphy, 'Plain English — Principles and Practice', above n 10, 10. See also Duncan Berry, 'Reducing the Complexity of Legislative Sentences' [2009] (January) *The Loophole* 37, 56–7.

<sup>208</sup> See above n 165. In contrast, the Office of Parliamentary Counsel took the view that a simpler legislative 'statement' can be combined with a definition to achieve the necessary precision, directing drafters to '[a]void strings of alternative words, especially if they appear more than once in the sentence. Use a short generic word to cover the alternatives, and define it separately if necessary': *Plain English Manual*, above n 10, 14–15 [57] (emphasis added).

<sup>209</sup> Turnbull, 'Clear Legislative Drafting', above n 2, 164. For further elaboration of general principles of drafting, see Turnbull, 'Legislative Drafting in Plain Language', above n 206; *Plain English Manual*, above n 10, 6–7 [15]–[20].

readily be understood by such persons. The present case study questions whether such a goal is realistic, whether the problem has been wrongly defined, and, if so, the consequences of a poorly directed program of reform of legislative drafting.

To be blunt, on the evidence of the present study, supported by the general literature,<sup>210</sup> the goals of a great number of members of the plain English movement, including those of the Law Reform Commission of Victoria, are misleading. In the cases it was found that the application of sophisticated plain language techniques could not prevent numerous external sources of doubt from arising — that is, those sources that were not derived from the principles of plain language or their application. This experience suggests that it is naïve to claim or assume, as so many less compromising advocates of plain English do,<sup>211</sup> that legislation has the capacity to ‘communicate’ the law, across the board, unhindered by sources of doubt.<sup>212</sup> The cases and the general literature on legislation demonstrate that there are simply too many uncontrollable factors potentially at work. Further, such doubt requires resolution according to the law of interpretation — a matter of expertise. To be realistic and workable, the goal of immediate intelligibility — especially if the audience is said to be ‘the persons affected’ or lay persons/the citizenry — needs to be wound back. Whatever the position with respect to private law documents, in legislative drafting more modest claims for plain language reforms are appropriate.

If the plain language goal as commonly advocated is mistaken, we need to re-examine the assumed ‘problem’ with traditional legislative drafting. Is it correct to focus on the text of legislation as the problem? Without suggesting that there are no problems with traditional legislative drafting, might it be more appropriate and realistic to define the problem of ‘communication’ of the law as a problem of inadequate communication of the law by the executive government (rather than by Parliament) to those who are likely to be affected by it? This perspective is not new. In 1988 a legislative drafter wrote that what the person affected by legislation really needed was a set of instructions similar to ‘tax guides, rates guides, insurance guides, traffic codes, customs and export control instructions, cultural heritage handbooks and announcements such as those appearing in government gazettes.’<sup>213</sup> In the language of the era, he called this information ‘the law of the common man.’<sup>214</sup>

<sup>210</sup> See especially Barnes, ‘Sources of Doubt’, above n 19.

<sup>211</sup> See above n 10 for references to relevant views of members of the plain English movement. The reference to ‘less compromising’ echoes the work of Jan Pakulski who has made a detailed study of social movements. Pakulski has made the point that ‘[social] [m]ovement concerns resemble sacred causes in the intensity of commitment they evoke, and the uncompromising stance they induce’: Jan Pakulski, *Social Movements: The Politics of Moral Protest* (Longman Cheshire, 1991) 85 n 15.

<sup>212</sup> However, as I have argued elsewhere, it is the conventional view that the application of legislation in routine cases does not give rise to doubt: see Barnes, ‘Sources of Doubt’, above n 19, 122–4.

<sup>213</sup> Maurice Kelly, ‘The Drafter and the Critics’ (1988) 62 *Law Institute Journal* 963, 964.

<sup>214</sup> *Ibid.* I have made a similar point elsewhere: see, eg, Barnes, ‘The Continuing Debate about “Plain Language” Legislation’, above n 1, 99.

If it is accepted that many members of the movement, including the Law Reform Commission of Victoria, have set unachievable goals based on a flawed diagnosis of the problems with legislation, what follows from this? Only a qualified answer can be given at this stage. First, it does not follow that legislative drafters and their instructors should be discouraged from continuing to experiment with plain language reforms. Nothing in this article is intended to discourage efforts to engage with the plain language movement and the means which members of that movement have suggested, particularly those which are substantiated by empirical research. Nor does it follow from the concerns raised in this article that the plain language legislative drafting reforms have had no, and will have no, benefit for the public or the legal profession. Encouragingly, recent analysis demonstrates that a number of the reforms are supported by empirical studies of how language generally works.<sup>215</sup> But if the argument above is correct, the benefit that the reforms may have will be different from that suggested by many members of the plain language movement. Further research is required before we come to general conclusions about the efficacy of plain language legislative drafting. We need to determine its overall impact from as many angles as possible.

<sup>215</sup> See, eg, Berry, 'Reducing the Complexity of Legislative Sentences', above n 207.