

# *Legislating to Communicate: Trends in Drafting Commonwealth Legislation*

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## **1. Introduction**

The Commonwealth Office of Legislative Drafting claims that it uses plain English<sup>1</sup> to ensure that instruments drafted by it are as easy to understand as possible. A draft of the *Australian Road Rules* has been provided on its website as an example. Links to plain English sites are provided but the plain English guidelines used in drafting these Rules are not given. However, former First Parliamentary Counsel, Ian Turnbull QC,<sup>2</sup> had earlier published the guidelines in use in the Office of Parliamentary Counsel. These consisted of:

- using shorter, better constructed sentences
- avoiding jargon and unfamiliar words
- using shorter words
- avoiding double and triple negatives
- using the positive rather than the negative
- using the active voice instead of the passive voice
- keeping related words as close together as possible, for example, not separating subject from verb or auxiliary verb from main verb
- using parallel structures to express similar ideas in a similar form, for example, not mixing conditions and exceptions, and not mixing ‘if’ and ‘unless’ clauses.<sup>3</sup>

Although Turnbull’s guidelines are discussed here in the order in which he presented them, they fall broadly into two areas — grammar and lexicon. Within each area there is an interaction between guidelines: ‘better constructed sentences’ are those in which ‘related words [are kept] as close together as possible’, ‘similar ideas in similar forms are expressed in parallel structure’ and ‘active voice is used rather than passive’.

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1 Australia, Attorney General’s Department, Office of Legislative Drafting: <<http://law.gov.au/aghome/legalpol/old/old.htm>> (24 October 2001).

2 IML Turnbull, ‘Clear Legislative Drafting: New Approaches in Australia’ (1991) 11 *Statute LR* 161.

3 Id at 166–167.

There is nothing unique about these guidelines.<sup>4</sup> Research and good writing practice suggest that they should not be seen as a final destination<sup>5</sup> — a cure for all the problems created by conventional legal English. Rather, they should be regarded as a remedial pathway towards more comprehensible legislation. Guidelines are not rules to be applied rigidly. They are suggestions and should be seen as heuristically leading to better communication.<sup>6</sup> They increase the need for lawyers to take a new approach to drafting and to broaden their linguistic skills.<sup>7</sup>

Legislation drafted in conventional legal English is often difficult to understand. It has been described as verbose and over technical — it ‘oozes archaisms, illogical word order, complex grammatical structures and sentences of excruciating length’.<sup>8</sup> Those who draft legislation in plain English seek to overcome these failings by using, where possible, the discourse structure, the syntax, and the lexicon of the target audience.

Plain English legislation retains items which express important distinctions and does not avoid technical terms or foreign phrases in common usage. It avoids antiquated words and inflated phrases<sup>9</sup> and suggests some limits on sentence length and syntactic complexity. Using plain English in law is merely a matter of writing in a clear and simple style.<sup>10</sup> This is what Turnbull’s guidelines seek to achieve. Since he simply lists them, a brief explanation of, and justification for each of them, is provided.

## 2. *The Objective of the Article*

This article explores the extent to which ‘the Commonwealth’s new approach to drafting [is] making laws easier to understand’.<sup>11</sup> The drafting of Commonwealth legislation is handled by two bodies. Commonwealth Bills are drafted by the Office of Parliamentary Counsel (OPC), while the Office of Legislative Drafting (OLD) is responsible for drafting subordinate legislation. *A New Tax System (Goods and Services Tax) Act 1999* (Cth) and the *Gene Technology Act 2000* (Cth) were drafted by the OPC while the OLD drafted the *Australian Road Rules 1999* (Cth) and the *Pig Industry Act 2001* (Cth). Each of Turnbull’s guidelines has been

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4 Compare the guidelines provided by George Hathaway, ‘An Overview of the Plain English Movement for Lawyers’ (1983) 62 *Michigan Bar J* at 945–948, with those provided by Robert Eagleson, *Writing in Plain English* (Canberra: AGPS, 1991) at 35–66, and with Law Reform Commission of Victoria, *Plain English and the Law*, Report 9 (1987) Appendix 1: ‘Drafting Manual’.

5 Janice Redish & Susan Rosen, ‘Can Guidelines Help Writers’ in Erwin Steinberg (ed), *Plain Language Principles and Practice* (1991) at 83.

6 Peter Tsingos, *An Economic Analysis of Plain English and Guarantees* (1998) LLM thesis, University of Melbourne.

7 Michael Meehan & Graham Tulloch, *Grammar for Lawyers* (2001) at 103.

8 Peter Butt, ‘Plain Language in Property Law: Uses and Abuses’ (1999) 73 *ALJ* 807 at 808.

9 Law Reform Commission of Victoria, above n4 at 39.

10 Samuel Wesley described ‘style’ as ‘the dress of thought; a modest dress. Neat, but not gaudy, will the critics please’. See ‘An epistle to a friend concerning poetry’ in JM Cohen & MJ Cohen, *The Penguin Dictionary of Quotations* (1960) at 413.

11 Above n2 at 161.

applied to the whole of the *Pig Industry Act 2001* (Cth) because of its brevity and to a purposive sample from each of the other three pieces of legislative drafting.

In 1975, linguist Gustafsson<sup>12</sup> analysed some syntactic properties of a typical piece of conventional legal English. She chose the *Courts Act 1971* (UK) because it had been asserted that legislative drafting was more syntactically complicated and more difficult to understand than any other variety of English.<sup>13</sup> Her results are given in Table A as a basis for a limited comparison with some recent Commonwealth drafting. To encompass all Turnbull's guidelines, a broader analysis has been applied to the Commonwealth drafting and the results given in Table C.

### A. *Turnbull's Guidelines*

#### (i) *Using shorter, better constructed sentences*

Extremely long sentences abound in legislation drafted in conventional legal English and are often very difficult to understand because of the limits of short-term memory.<sup>14</sup> They are usually generated when the practice of expressing each provision in a single sentence is adhered to. This practice arose because lawyers believed that semantic connections are clearer within a sentence than they are between two or more sentences. Plain English exponents argue that there is no valid reason for the retention of the single provision/single sentence structure.<sup>15</sup> They also point out that shorter sentences are likely to be syntactically simpler and more comprehensible.

But it is not sentence length alone that causes comprehension difficulties.<sup>16</sup> It is, rather, the complicated syntax which results from the incorporation into a single sentence of all necessary information. This practice may require the use of conflating devices such as reduced clauses and the excessive use of embedded clauses and phrases. Research in such fields as psycholinguistics, cognitive psychology and instructional theory has, however, shown that the overuse of conflating devices impedes comprehension and clouds clarity.<sup>17</sup> Minimising the use of these devices is therefore desirable. Wherever possible, the single sentence construction should be abandoned and the content of the provision expressed in several shorter and better constructed sentences.

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12 Marita Gustafsson, *Some Syntactic Properties of English Law Language* (1975) University of Turku, Department of English (Publication No 4) Turku, Finland.

13 *Id* at 1.

14 Miller established that the short-term memory can store, at any one time, seven unrelated units of information. George Miller, 'The Magical Number 7, Plus or Minus 2: Some Limits on our Capacity of Processing Information' (1956) 63 *Psychological Review* 81.

15 See, for example, Michelle Asprey, *Plain Language for Lawyers* (1991) at 165; Law Reform Commission of Victoria, above n4 at para 46; Edwin Tanner, 'The Sanctity of the Single Legal Rule/Single Sentence Structure' (2000) 26(1) *Mon LR* 202.

16 Alexander Wearing, 'The Recall of Sentences of Varying Lengths' (1973) 25(2) *Australian Journal of Psychology* 155.

17 Tanner, above n15 at 202–215.

(ii) *Avoid jargon and unfamiliar words*

Non-lawyers often apply the term 'jargon'<sup>18</sup> to conventional legal English. They see both its grammatical complexity and its lexicon as a form of 'jargon' which is elitist and a barrier to their entry into the world of law.<sup>19</sup>

The lexicon includes terms of art (eg 'natural justice'), technical terms (eg 'manslaughter', 'trust'), stylistic items (eg 'covenant' instead of 'promise'), and referential terms (eg 'aforesaid').<sup>20</sup> Lawyers use these words within their profession in communicating complex concepts. Few non-lawyers are likely to understand what lawyers mean by them and tend to regard them as 'jargon'. But they are 'jargon' only if they are retained when simpler or more familiar words are available.<sup>21</sup> For example, the word 'promulgate' can be regarded as 'jargon' since the word 'issue' is available. But 'plaintiff' is acceptable because it has no brief viable alternative.<sup>22</sup> The same can be said about 'trusts'. There is no other word capable of conveying its meaning even if the distinctions between many of the sub-classifications (eg unit, discretionary, secret) are ignored.

Some words have had their meanings in law narrowed, circumscribed, or specialised (eg 'consideration', 'contract', 'domicile', 'good faith', 'action').<sup>23</sup> Whilst non-lawyers may be familiar with their common-usage meanings they are unlikely to be familiar with their legal meanings. There will, however, be situations where the legal meaning of a word is essential to a piece of legislation. In this case it must be retained. Nevertheless, if the legal meaning is not essential the word should be avoided. It should be remembered that legislation should be drafted to suit its audience. But, even if the intended audience is the general public it may be necessary to include difficult legal concepts.

The use of archaisms may also justify the title 'jargon'. Items such as 'chattels', 'witnesseth' (with its archaic ending) and adverbials like 'hereunto', 'herebefore' and 'hereafter' are obsolete. Modern readers may be unfamiliar with them.

The practice of doubling and tripling synonyms<sup>24</sup> can be seen as another form of 'jargon'. It is historically based<sup>25</sup> and arose in an attempt to achieve greater certainty in a linguistically heterogeneous society. It became entrenched partly

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18 Note that Keith Allan and Kate Burridge state that 'jargon' is not a term used by linguists to define a particular type of language. See Keith Allan & Kate Burridge, *Euphemism and Dysphemism: Language used as Shield and Weapon* (1991) at 194.

19 The first reference to 'jargon' in law occurred in 1717. See *Oxford English Dictionary* (1933, 1956) at 1059.

20 David Mellinkoff, *The Language of the Law* (1963) at 391.

21 Above n18 at 195.

22 Note that following Lord Wolf's Report *Access to Justice*, in the UK, by the Civil Procedure Rules 1999, the word 'plaintiff' has been replaced by 'claimant': see above n8 at 813.

23 Above n18 at 198.

24 For example, 'null and void', which are derived from Latin and Middle English, and 'give, devise and bequeath' from Germanic, Latin and Old English, also reveal the roots of modern English.

25 David Crystal & Derek Davy, *Investigating English Style* (1969) at 208.

because cost was determined by the number of words used.<sup>26</sup> It should be avoided because it involves unnecessary duplication.

(iii) *Using shorter words*

If the signals of grammatical relationships<sup>27</sup> are ignored, conventional legal English is comprised largely of words which are polysyllabic and of French and Latin derivation. Much of the lexicon commonly used by the average person is from Germanic or Old and Middle English sources. These words tend to be monosyllabic.<sup>28</sup> Common, shorter or familiar words are better perceived, remembered and understood<sup>29</sup> and as such, should be used in law.<sup>30</sup> Not only are long words a hindrance to comprehension but they seem to invite the expression of simple ideas in inflated terms, or as Lord Radcliffe said '[they generate] a sort of hieratic language by which priests incant commandments'.<sup>31</sup> The practice was highlighted in a recent television advertisement<sup>32</sup> where an interior decorator with dramatic gestures pontificated, '[I will achieve] definition of the surface with monochromatic tones to underscore the structure and dramatise the inherent texture'. To this comment the client replied in a matter-of-fact manner, 'You mean, "Paint it white."'

(iv) *Using the positive rather than the negative*

Since people are more responsive to positive rather than negative information it is better to be told what to do rather than what not to do. There are, however, times when a negative instruction is more telling than a positive one. For example, 'DO NOT WALK ON THE GRASS'<sup>33</sup> is more effective than 'WALK ONLY ON THE PATHS'.

26 Above n20 at 190–192.

27 For example, 'was', 'to', 'in', 'if'.

28 See above n25 at 197–217.

29 Robert Charrow & Veda Charrow, 'Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions' (1979) 79 *Columbia LR* 1306. Charrow and Charrow had 35 subjects paraphrase a set of 14 jury instructions pertaining to an automobile negligence case. The mean number of correct responses for 36 difficult lexical terms was only 34%. When 17 difficult lexical items were replaced by easier ones, the mean score on correct paraphrases increased to 50%: at 1372. If the aim of the Commonwealth's new approach to drafting is to make laws easier to understand then it is better to replace 'apprise' (French) with 'tell' (Old English), 'initiate' (Latin) with 'start' (German), 'terminate' (Latin) with 'stop' (Old English), 'purchase' (French) with 'buy' (Old English), 'remuneration' (Latin) with 'payment' (Middle English), 'parameters' (French) with 'limits' (Middle English from Old English) and 'promulgate' (Old English) with 'issue' (Middle English). For a discussion of the history of the English language, see Thomas Pyles & John Algeo, *The Origins and Development of the English Language* (3<sup>rd</sup> ed, 1982), especially at 109–110 and 138.

30 Robert Eagleson, *Writing in Plain English* (1990) at 52.

31 Lord Radcliffe, 'Some Reflections on the Law and Lawyers' [1950] 10 *CLJ* 368.

32 ING Mercantile Mutual Bank advertisement screened on Channels 7 and 10. Derivations: 'Definition' (Latin); 'surface' (French and Latin); 'monochromatic' (Greek); 'underscore' (Middle and Old English); 'structure' (Latin); 'dramatise' (Latin); 'inherent' (Latin); 'texture' (Latin). Compare with 'paint' (Middle English) and 'white' (Old English).

33 Above n30 at 51.

Some actions need to be expressly prohibited and must be stated negatively. If they are rendered positively they may lose their mandatory force and may also undergo a meaning change. Compare, for example, the negative 'Pedestrians must not travel past a no pedestrian sign'<sup>34</sup> with one possible positive rendering of it as 'A pedestrian must cease travelling at a no pedestrian sign.'

Multiple negatives increase processing difficulties. Negatives include not only the obvious ones like 'not' and 'never' and the prefixes 'un', 'in', and 'anti', but also conjunctions like 'unless' and words whose meanings include an aspect of negativity (eg 'few', 'seldom', 'scarcely', 'little'). For example, the positive sentence, 'It is as feasible as you may think' is much easier to process than the negative 'It is not as unfeasible as you may think'.<sup>35</sup> The latter has two extra steps involved in the processing. However, when a double negative is recast in positive form the meaning of the sentence may be altered.

The use of multiple negatives can create comprehension difficulties as can be seen in the following sentence: 'In principle there is certainly no reason why the doctrine [of promissory estoppel] should not apply so as to preclude departure by a person from a representation that he will not enforce a non-contractual right'.<sup>36</sup> This sentence contains four negatives ('no', 'not', 'not', 'non') and three items ('preclude', 'departure', 'representation') which have negative implications. The amount of processing required to understand it is enormous.

(v) *Using the active instead of the passive voice*

When a sentence has an active verb, the agent (or doer of an action) is in the subject position and the receiver of the action is in the object position.<sup>37</sup> When a sentence is in the passive form the agent no longer holds the subject position. This position is held by the recipient of the action.<sup>38</sup> Attention is focused on the recipient by its position as subject. The active sentence is shorter and more direct and is consequently easier to process. However, there are situations where the use of the passive is desirable. The identification of the agent may be unnecessary<sup>39</sup> or withheld to keep the information impersonal.<sup>40</sup> The agent may, of course, be unknown.<sup>41</sup> If it is functionally meaningful to highlight something by using the passive then it should be used. The practice of using the passive to hide the identity of an agent may, however, give rise to suspicions of questionable intentions. Where this is the case it should be avoided.

34 *Australian Road Rules* 1999 (Cth) Rule 228.

35 Example comes from ABC/News Radio program 'Email Dumps' at 4 pm on 14 August 2001.

36 *Walton Stores (Interstate Limited) v Maher & Anor* (1988) 164 CLR 397 at 399 (Mason CJ & Wilson J).

37 For example, in the active sentence 'Tom posted the letter': 'Tom (agent/subject) posted (active verb) the letter (receiver/object)'.

38 For example, in the passive sentence 'The letter was posted by Tom.': 'The letter (receiver/subject) was posted (passive verb) by Tom (agent)'.

39 For example, 'A census was taken'.

40 For example, 'John was sacked'.

41 For example, 'John was run over'.

(vi) *Keeping related words close together*

English is a word-order language where position in a sentence determines function, and therefore, meaning.<sup>42</sup> In declarative sentences (ie statements), the usual order is, 'subject, verb, object/complement'.<sup>43</sup>

Subject and verb are the essential components of a sentence and, to maximise comprehensibility, they should occur in that order without interruption. Behagel's 2<sup>nd</sup> Law states: 'That which belongs together cognitively [should be] placed close together.'<sup>44</sup> This law is supported by research<sup>45</sup> which has shown that the short-term memory can hold approximately seven unrelated units of information at any one time. If phrases or clauses are inserted immediately after the subject they must be held in the short-term memory until the subject/verb relationship can be established by the identification of the verb. The nexus between the subject and verb is very strong and should be preserved. It is, however, disrupted when the subject is modified by a relative clause. To maintain the semantic linkage, the relative must follow immediately after its antecedent.<sup>46</sup> Both disrupting the nexus and the failure to maintain semantic linkages hinder comprehension,<sup>47</sup> but the maintenance of the semantic linkages must take precedence over the preservation of the nexus. While recasting the sentence may avoid disruptions<sup>48</sup> it may be preferable to express the required information in a number of sentences, instead of in the single provision/single sentence structure.

The nexus between the auxiliary<sup>49</sup> and the verb is also very strong and should be preserved. Disruptions are usually of adverbial function. The placing of adverbials in a sentence is not fixed under English word-order rules.<sup>50</sup> They are

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42 For example, compare 'John hit Bill' with 'Bill hit John'. See Kate Burridge & Jean Mulder, *English in Australia and New Zealand: An Introduction to its History, Structure and Use* (1998) at 183.

43 For example, 'John (subject) hit (verb) Bill (object). He (subject) is (verb) a lawyer (complement)'. For a more detailed discussion see *id* at 184–201.

44 Otto Behagel, *Deutsche Syntax Volume 4* (1923) at 4.

45 Above n14 at 81.

46 To amalgamate the two statements, 'Tom hit Bill' and 'Tom has a black eye', the subject (Tom) in one statement must be replaced by a relative pronoun. This relative pronoun and its clause must be placed immediately after the remaining subject 'Tom' (for example, 'Tom, who had a black eye, hit Bill'). If the relative clause is placed elsewhere the meaning is changed (for example, 'Tom hit Bill who had a black eye').

47 See J Fodor & M Garrett, 'Some Syntactic Determinants of Sentential Complexity' (1967) 2 *Perception and Psychophysics* 289; and H W Hamilton & J Deese, 'Comprehensibility and Subject Verb Relation in Complex Sentences' (1971) 10 *Journal of Verbal Learning and Verbal Behaviour* 163.

48 If the information in footnote 46 is given as 'Bill was hit by Tom who had a black eye' there is no disruption of the nexus between the subject 'he' and the verb 'was hit' and the relative pronoun 'who' follows immediately after its referent 'Tom'.

49 Auxiliaries include 'am', 'is', 'are', 'was', 'were', 'has', 'have' etc when combined with the participle form of the verb. For example, 'He is running' and 'They have spoken'.

50 For example, compare 'She primly covered her knees' with 'She covered primly her knees' and 'She covered her knees primly'. Compare also 'Quickly he ran to the shop' with 'He ran quickly to the shop' and 'He ran to the shop quickly'.

not essential components as their omission from a sentence does not affect its syntax. The nexus between them and their verbs is relatively weak.

Adverbials may be placed in a number of different positions in a sentence without altering meaning. With some types of phrases and clauses, meaning and function are changed with change of position.<sup>51</sup> Illogicality may result from the incorrect placing of phrases.

When objects/complements form part of a sentence, the nexus between them and the verb is relatively strong. When a disruption to the nexus is brief, comprehension may not be impeded. However, if the disruption is long, the short-term memory is likely to fail and comprehension is likely to suffer.

Deviation from the typical word-order of an English sentence is often caused by adherence to single provision/single sentence construction. This practice may result in the focus of the sentence being dislocated. This is because the structure dictates the location of the 'topic'<sup>52</sup> rather than the 'topic' dictating the structure. 'The constant shifting of topics blurs the main focus of the discourse [so that] the whole point of the passage gets lost.'<sup>53</sup> Not only may comprehension be impeded it may be impossible.

(vii) *Using parallel construction*

When several ideas need to be expressed in one sentence it may be possible to use parallel construction. This may make even an excessively long sentence easy to understand. Parallel construction is a type of listing and requires that the expressions in parallel are basically of the same grammatical structure and have a common referent. For example:

*Australian Road Rules 1999 (Cth)*

**123 Entering a level crossing when a train or tram is approaching etc**

A driver must not enter a level crossing if:

- (a) warning lights (for example, twin red lights or rotating red lights) are operating or warning bells are ringing; or
- (b) a gate, boom or barrier at the crossing is closed or is opening or closing; or
- (c) a train or tram is on or entering the crossing; or
- (d) a train or tram approaching the crossing can be seen from the crossing, or is sounding a warning and there would be a danger of a collision with a train or tram if the driver entered the crossing; or
- (e) the driver cannot drive through the crossing because the crossing or a road beyond the crossing, is blocked.

51 For example, 'John, with gusto, ate the sausage' means the same as 'John ate the sausage with gusto'. 'With gusto' is an adverb phrase. However, the meaning of 'John hit the dog in the car' differs from the meaning of 'John, in a car, hit the dog'. The phrase 'in a car' is adjectival. In the first sentence it modifies the noun 'dog' and in the second, 'John'.

52 The part of the sentence which indicates what is being talked about. A recipe may say 'As for the salt you adjust that by tasting' where 'salt' is the topic of the sentence but 'you' is the grammatical subject. For amplification see above n18 at 225.

53 Id at 200.

This sentence consists of a main clause<sup>54</sup> which is the common referent, followed by 10 coordinating conditional clauses. One of these conditional clauses has a subordinating adverbial clause of result. This in turn has a subordinating conditional clause. Another has a subordinating adverbial clause of reason. This can be seen in the following formulaic representation of Rule 123:

*Australian Road Rules 1999 (Cth)*

**123 Entering a level crossing when a train or tram is approaching etc**

M

- (a) C C;
- (b) C C C;
- (c) C C;
- (d) C [C{A(C)}]
- (e) C (A)

Where:

<p>M = Main C = Conditional A = Adverbial</p>
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The coordinating conditional clauses could have been listed separately in parallel as follows:

*Australian Road Rules 1999 (Cth)*

**123 Entering a level crossing when a train or tram is approaching etc**

A driver must not enter a level crossing if:

- (a) warning lights (for example, twin red lights or rotating red lights) are operating; or
- (b) warning bells are ringing; or
- (c) a gate, boom or barrier at the crossing is closed; or
- (d) [a gate, boom or barrier at the crossing]<sup>55</sup> is opening; or
- (e) [a gate, boom or barrier at the crossing] is closing; or
- (f) a train or tram is on the crossing; or
- (g) [a train or tram is] entering the crossing; or
- (h) a train or tram approaching the crossing can be seen from the crossing; or
- (i) [a train or tram approaching the crossing] is sounding a warning and there would be a danger of a collision with a tram or train if the driver entered the crossing; or
- (j) the driver cannot drive through the crossing because the crossing or a road beyond the crossing, is blocked.

<sup>54</sup> 'A driver must not enter a level crossing'.

<sup>55</sup> Square brackets have been used to indicate the subjects of the three finite verbs 'is closed', 'is opening', and 'is closing' which are expressed in parallel in r123(b). The square brackets are used for the same purpose in (e), (g) and (i).

In this form the rule can be expressed by the following formula:

*Australian Road Rules 1999 (Cth)*

**123 Entering a level crossing when a train or tram is approaching etc**  
M

- (a) C
- (b) C
- (c) C
- (d) C
- (e) C
- (f) C
- (g) C
- (h) C
- (i) C {A(C)}
- (j) C (A)

Where:

<p>M = Main C = Conditional A = Adverbial</p>
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Represented in this way the parallel relationship between the coordinating conditional clauses becomes more apparent. The structure may be compared to that of a ladder with identical rungs set at identical distances from each other.<sup>56</sup> Such a ladder is relatively easy to climb. A ladder with dissimilar rungs set at different distances from one another, is more difficult to climb. This can be seen from the following example in which Rule 123 has been recast as an illustration of incorrect parallel construction.

**123 Entering a level crossing when a train or tram is approaching etc**

A driver must not enter a level crossing:

- (a) at which warning lights (for example, twin red lights or rotating red lights) are operating or warning bells are ringing; or
- (b) if a gate, boom or barrier at the crossing is closed or is opening or closing; or
- (c) while a train or tram is on or entering the crossing which a train or tram is approaching; or
- (d) at which a warning is sounding and there would be a danger of a collision with a train or tram if the driver entered the crossing; or
- (e) because the crossing or a road beyond the crossing, is blocked and the driver cannot drive through the crossing

<sup>56</sup> The coordinating conditional clauses form the 'rungs' of the ladder. The subordinating adverbial and conditional clauses (i) and (j) could be seen as, say, blobs of paint on those rungs.

This recast rule can be expressed as a formula:

**123 Entering a level crossing when a train or tram is approaching etc**

M

- (a) R R;
- (b) C C C;
- (c) A A(R);
- (d) R {A(C)};
- (e) A

Where:

M = Main  
 R = Relative  
 C = Conditional  
 A = Adverbial

This recast rule consists of a main clause<sup>57</sup> which is the common referent. The five items<sup>58</sup> expressed in parallel are respectively, a relative clause, a conditional clause, an adverbial clause of time, a relative clause and an adverbial clause of reason.<sup>59</sup> Because these five clauses are of different function and grammatical form they do not fulfil the requirements for parallel construction. The rule cast in this manner is not easy to comprehend.

### 3. *The Limited Analysis*

Gustafsson's<sup>60</sup> analysis of the *Courts Act* 1971 (UK) was limited to certain grammatical features only. Her results are listed in Table A together with the results obtained from the analysis of those features in some recent Commonwealth drafting.

57 'A driver must not enter a level crossing'.

58 Relative clause (at which warning lights ... are ringing); conditional clause (if a gate ... is closing); adverbial clause (while a train ... is crossing); relative clause (which a train ... the crossing); adverbial clause of reason (because the crossing ... the crossing).

59 The different forms are: conditional clause, verb phrase, and complement clause. Each of these are the complement of the verb 'are' but they are of different grammatical forms.

60 Above n12.

**Table A: Comparison of the grammatical structure of statutes**

<b>Grammatical characteristics</b>	<i>Courts Act 1971</i> (UK)	<i>Australian Road Rules 1999</i> (Cth)	<i>GST Act 1999</i> (Cth)	<i>Gene Technology Act 2000</i> (Cth)	<i>Pig Industry Act 2001</i> (Cth)
No. of words	15895	4351	4888	5090	5540
No. of provisions	289	107	92	112	111
No. of sentences	289	109	112	114	126
Range of sentence length	10-240	8-140	6-217	9-239	5-167
Av. number of words per sentence	55	38.3	43.6	44.6	43.9
No. of sentences with 25 words or less	–	46 (42.2%)	47 (41.9%)	38 (33.3%)	31 (24.3%)
No. of sentences with more than the average number of words	–	44 (40.3%)	36 (32.1%)	41 (35.9%)	51 (40.4%)
No. of sentences with at least twice the average number of words	–	8 (7.3%)	13 (11.5%)	10 (8.7%)	5 (3.9%)
No. of clauses	827	289	467	325	310
Range of number of clauses	–	1-14	1-17	1-14	1-7
Av. number of clauses per sentence	2.86	2.6	4.2	2.9	4.1
No. of sentences with one clause only	58 (20%)	39 (35.6%)	20 (17.8%)	36 (31.6%)	41 (32.5%)
Av. number of words in one clause sentence	–	25.6	21.7	24.4	33.6

<b>Grammatical characteristics</b>	<b><i>Courts Act 1971</i> (UK)</b>	<b><i>Australian Road Rules 1999</i> (Cth)</b>	<b><i>GST Act 1999</i> (Cth)</b>	<b><i>Gene Technology Act 2000</i> (Cth)</b>	<b><i>Pig Industry Act 2001</i> (Cth)</b>
No. of sentences with less than 3 clauses	235 (82%)	63 (57.8%)	54 (48.2%)	65 (57.0%)	74 (58.7 %)
Av. number of words per sentence in sentences with less than 3 clauses	–	27.3	24.9	29.3	33.8
No. of sentences with 3 or more clauses	54 (18%)	46 (42.4%)	58 (51.8%)	49 (43.0 %)	52 (41.2%)
Av. number of words per sentence in sentences with 3 or more clauses	–	34.9	40.1	61.1	36.0
No. of sentences with 6 or more clauses	20 (6.9%)	6 (5.5%)	17 (15.2%)	11 (9.6%)	5 (3.9%)
Av. number of words per sentence in sentences with 6 or more clauses	–	113.1	104.2	98.1	81.8
Disruption of nexus between subject and verb	9.9%	28 (9.6%)	13 (2.8%)	12 (3.6%)	29 (9.3%)
Av. no. of words in subject/verb disruption	–	12.6	23.4	22.5	11.2
Disruption of nexus between auxiliary and verb	20.1%	3 (1.0%)	12 (2.5%)	16 (4.8%)	7 (2.2%)
Av. no. of words in auxiliary/verb disruption	–	7	16.4	10.1	8.7
Disruption of nexus between verb and complement	–	6 (2.1%)	0	6 (2.5%)	0
Av. number of words in verb/complement disruption	-	19.3	0	0	0

### A. The Courts Act 1971 (UK)

The following observations can be made about the *Courts Act* 1971 (UK):

- The single provision/single sentence structure is used throughout.
- The average length of sentence is 55 words.
- The average number of clauses per sentence is 2.86.
- 20 per cent of the sentences have one clause only.
- More than 80 per cent of the sentences have less than three clauses.
- Almost 7 per cent of the sentences have six or more clauses.
- Disruption of the nexus between subject and verb has occurred in almost 10 per cent of clauses.
- Disruption of the nexus between auxiliary and verb has occurred in almost 20 per cent of clauses.

It is reasonable to assume that many of the sentences will be syntactically complicated if the number of words and clauses per sentence are considered together with the single provision/single sentence structure. The breaking of the nexus between subject and verb and between auxiliary and verb provides further evidence of the complexity of the syntax. Gustafsson observed that the syntax of this statute is more complicated than even that of scientific prose.<sup>61</sup>

### B. Australian Road Rules 1999 (Cth)

Compared with the *Courts Act* 1971 (UK) the following observations can be made:

- The single rule/single sentence structure has been used in 98.2 per cent of rules.<sup>62</sup>
- The average length of sentence has decreased by 30.3 per cent.
- The average number of clauses per sentence has decreased by 9 per cent.
- The number of sentences of one clause only has increased by 72 per cent.
- The number of sentences with six or more clauses had decreased by 20 per cent.
- Breaking the nexus between subject and verb has decreased slightly.
- Breaking the nexus between auxiliary and verb has decreased by 19.1 percentage points.
- Breaking of the nexus between verb and complement has occurred in 2.1 per cent of the clauses with an average of 19.3 words per disruption.

Sentences are shorter and appear to be less syntactically complicated. However, the number of sentences with three or more clauses has more than doubled and the number of sentences with less than three clauses has decreased by about one quarter. Disruptions between essential sentence components have lessened and there is some improvement in grammatical structure.

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<sup>61</sup> Id at 13.

<sup>62</sup> Two of the rules each consist of two sentences. The definitions given in sub-rules 233(5) and 238(3) apply to the specific rules only.

**C. A New Tax System (GST) Act 1999 (Cth)**

Compared with the *Courts Act 1971* (UK) the following observations can be made:

- The single provision/single sentence structure has been used in 78.3 per cent of provisions.
- The average length of sentence has decreased by 20.7 per cent.
- The average number of clauses per sentence has increased by 46.8 per cent.
- The number of sentences with one clause only has decreased by 2.2 percentage points.
- The number of sentences with less than three clauses has decreased by 33.8 percentage points.
- The number of sentences with three or more clauses has increased by 33.8 percentage points.
- The number of sentences with six or more clauses has more than doubled.
- Breaking the nexus between subject and verb has decreased by at least two thirds.
- Breaking the nexus between auxiliary and verb has decreased by 17.6 percentage points.

Sentences are shorter and there are fewer disruptions to the nexus between both subject and verb and auxiliary and verb. Some effort has been made to break away from the single provision/single sentence structure. However, clausal complexity has increased: not only are there many more sentences with six or more clauses but there are about a third fewer with less than three clauses.

**D. Gene Technology Act 2000 (Cth)**

Compared with the *Courts Act 1971* (UK) the following observations can be made:

- The single provision/single sentence structure has been used in 92.3 per cent of provisions.
- The average length of sentence has decreased by 18.9 per cent.
- The average number of clauses per sentence has increased very slightly.
- The number of sentences with one clause only has increased by 11.6 percentage points.
- The number of sentences with less than three clauses has decreased by a quarter.
- The number of sentences with three or more clauses has increased by a quarter.
- The number of sentences with six or more clauses has increased by 2.7 percentage points.
- Breaking the nexus between subject and verb has decreased by 6.3 percentage points.
- Breaking the nexus between auxiliary and verb has decreased by 15.3 percentage points.

Sentences are shorter and there are fewer disruptions to the nexus between subject and verb and auxiliary and verb. Little effort has been made to break away from the single provision/single sentence structure. Clausal complexity has increased: although the number of sentences with one clause only has increased, the number of sentences with less than three clauses has decreased, and the number of sentences with more than six clauses has increased significantly.

### **E. Pig Industry Act 2001 (Cth)**

Compared with the *Courts Act* 1971 (UK) the following observations can be made:

- The single provision/single sentence structure has been used in 86.4 per cent of provisions.
- The average length of sentence has decreased by 18.9 per cent.
- The average number of clauses per sentence has increased by 43.0 per cent.
- The number of sentences with one clause only has increased by 12.5 percentage points.
- The number of sentences with less than three clauses has decreased by 23.3 percentage points.
- The number of sentences with three or more clauses has increased by 23.5 percentage points.
- The number of sentences with six or more clauses has decreased by almost half.
- Disruption to the nexus between subject and verb has decreased by 6.0 per cent.
- Disruption to the nexus between auxiliary and verb has decreased by 17.9 percentage points.

Sentences are shorter with fewer disruptions to the nexus between both subject and verb and auxiliary and verb. Some effort has been made to break away from the single provision/single sentence structure, but clausal complexity has increased.

Table B provides an ‘instant’ overall comparison of the results given in Table A. The comparison is limited to those characteristics for which data were supplied in Gustafsson’s study.<sup>63</sup> Each grammatical characteristic has been assigned a score from 1 to 5 points, where 1 represents the greatest deviation from Turnbull’s guideline<sup>64</sup> for that characteristic, and 5 represents the least deviation.<sup>65</sup> As a result the higher the total score for a piece of drafting the more closely Turnbull’s guidelines<sup>66</sup> have been followed.

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63 Above n12.

64 Above n2.

65 For example, the *Courts Act* 1971 (UK) scored 1 for the single sentence/single provision characteristic because every provision in that Act was expressed as a single sentence. *A New Tax System (GST) Act* 1999 (Cth) scored 5 because the single sentence/single provision structure was used the least number of times when compared with the other Acts.

66 *Ibid.*

**Table B: ‘Instant’ picture of comparative data**

<b>Grammatical characteristics</b>	<i>Courts Act 1971</i> <b>(UK)</b>	<i>Australian Road Rules 1999</i> <b>(Cth)</b>	<i>GST Act 1999</i> <b>(Cth)</b>	<i>Gene Technology Act 2000</i> <b>(Cth)</b>	<i>Pig Industry Act 2001</i> <b>(Cth)</b>
Single sentence/single provision	1	3	5	2	4
Av. number of words per sentence	1	5	4	2	3
Av. number of clauses per sentence	4	5	1	3	2
No. of sentences with 1 clause only	2	5	1	3	4
No. of sentences with less than 3 clauses	5	3	1	4	2
No. of sentences with 3 or more clauses	5	3	1	2	4
No. of sentences with 6 or more clauses	3	4	1	2	5
Disruption of nexus between subject and verb	1	2	5	4	3
Disruption of nexus between auxiliary and verb	1	5	2	3	4
<b>TOTAL</b>	<b>23</b>	<b>35</b>	<b>21</b>	<b>25</b>	<b>31</b>

It is arguable from Table B that:

- the most grammatically complicated piece of drafting is *A New Tax System (GST) Act 1999* (Cth). The drafting of this statute is more complicated than that of the *Courts Act 1971* (UK);
- the drafting in the *Gene Technology Act 2000* (Cth) is marginally better than that in the *Courts Act 1971* (UK);
- the drafting in the *Pig Industry Act 2001* (Cth) is somewhat better than that in the *Gene Technology Act 2000* (Cth); and
- the drafting in the *Australian Road Rules 1999* (Cth) is the least grammatically complicated.

#### 4. *The Broader Analysis*

Turnbull<sup>67</sup> deals with a broader range of language characteristics than did Gustafsson.<sup>68</sup> The four pieces of Commonwealth drafting were analysed with these additional characteristics in mind. The results of the analysis are given in Table C.

##### A. *Australian Road Rules 1999 (Cth)*

The additional analysis of the *Australian Road Rules 1999* (Cth) reveals the following information:

- Of the disruptions to the subject/verb nexus, four have been caused by relative clauses, six by adverbial phrases, and 18 by present participle phrases. A simple example of the last, with the present participle phrase italicised, is to be found in Rule 231(1) which reads:

Rule 231(1) *Australian Road Rules 1999* (Cth)

*A pedestrian approaching or at an intersection, or at another place on a road, with pedestrian lights and traffic lights must comply with this rule.*

In this rule the present participle phrase has been placed between the subject 'pedestrian' and the verb 'must comply'. This rule could have been written as:

Rule 231(1)

*A pedestrian must comply with this rule when approaching or at an intersection, or at another place on a road, with pedestrian lights and traffic lights.*

There is no disruption to the nexus in this form. The position of the adverb phrase has been altered and its function changed from adjectival to adverbial without changing meaning.

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67 Ibid.

68 Above n12.

**Table C: Broader analysis of grammatical structure of statutes**

<b>Grammatical characteristics</b>	<b><i>Courts Act 1971</i> (UK)</b>	<b><i>Australian Road Rules 1999 (Cth)</i></b>	<b><i>GST Act 1999</i> (Cth)</b>	<b><i>Gene Technology Act 2000 (Cth)</i></b>	<b><i>Pig Industry Act 2001 (Cth)</i></b>
Disruption of nexus between subject and verb	9.9%	28 (9.6%)	13 (2.8%)	12 (3.6%)	29 (9.3%)
Disruption of nexus between auxiliary and verb	20.1%	3 (1.0%)	12 (2.5%)	16 (4.8%)	7 (2.2%)
Disruption of nexus between verb and complement	–	6 (2.1%)	0	6 (2.5%)	0
Av. number of words in verb/complement disruption	–	19.3	0	0	0
Finite passive verb	–	15	23	70	65
Agent expressed passive	–	2	4	15	13
Passive as reduced relative	–	13	16	48	38
Use of parallel construction	–	39	34	48	40
Use of negative	–	71	20	25	18

- Disruption of nexus between auxiliary and verb has occurred only three times.
- The nexus between verb and complement has been broken in a number of clauses by an average of 19.3 words per disruption. In Rule 23(2), for example, the nexus has been broken three times by a total of 87 words. This rule reads:

*Australian Road Rules 1999 (Cth)*

**23 Speed limit in a school zone**

**(2) A school zone is:**

- (a) if there is a school zone sign and an end school zone sign, or a speed limit sign with a different number on the sign, on a road and there is no intersection on the length of road between the signs – *that length of road*; or
- (b) if there is a school zone sign on a road that ends in a dead end and there is no intersection, nor a sign mentioned in paragraph (a) on the length of road beginning at the sign and ending at the dead end – *that length of road*; or
- (c) in any other case – *the network of roads in an area* with:
  - (i) a school zone sign on each road into the area indicating the same number; and
  - (ii) an end school zone sign or a speed limit sign indicating a different number, on each road out of the area.

The essential components of the main clause<sup>69</sup> in this rule have been italicised. There are three complements<sup>70</sup> which are widely separated from their verb ‘is’. The rule is set out so that it appears that the three sub-rules in parallel are two conditional clauses and an adverbial phrase and not the three italicised complements. To enhance the nature of the parallel structure and to remove the disruptions to the verb/complement nexus this rule could be recast as:

**23 Speed limit in a school zone**

**(2) A school zone is any of the following:**

- (a) *the length of road* between a school zone sign and either an end school zone sign or a speed limit sign with a different number on it, unless there is an intersection on the length of road between the signs; *or*
- (b) *the length of road* between a school zone sign and the end of a dead end road, unless there is an intersection, or a sign mentioned in paragraph (a), on the length of road; *or*
- (c) *the network of roads in an area* with:
  - (i) a school zone sign on each road into the area indicating the same number; and
  - (ii) an end school zone sign or a speed limit sign indicating a different number, on each road out of the area.

The main clause is italicised.

69 ‘A school zone is that length of road or that length of road or the network of roads ... out of the area’.

70 The three complements are: ‘that length of road’, ‘that length of road’ and ‘the network of roads in an area’.

- With the exception of Rule 23(2) parallel construction has been used effectively. For example, Rule 123 has 112 words in one main clause, one adverbial clause, and 14 parallel conditional clauses. It is easy to understand.
- The passive form of the finite verb has been used 15 times. Although the agent has been expressed in two clauses only, no attempt has been made to conceal the identity of the agent for questionable purposes. The passive also occurs 21 times in the formation of reduced relative clauses. However, since none of these reduced relatives modify subjects they cause no disruption to the subject/verb nexus.
- The negative occurs 68 times. About half of these express prohibitions. In almost all of the remainder certain items are excluded from particular rules. It is difficult to see how any of these sentences could have been expressed in any other way.

### **B. A New Tax System (GST) Act 1999 (Cth)**

The broader analysis of *A New Tax System (GST) Act 1999 (Cth)* reveals the following information:

- All of the disruptions to the subject/verb nexus are caused by items of adjectival function — reduced relatives, relative clauses and adjectival phrases or a mixture of them. For example, s51-30(1) reads:

*A New Tax System (GST) Act 1999 (Cth)*

S51-30(1)

*GST payable on any taxable supply or taxable importation a joint venture operator of a GST joint venture makes, on behalf of another entity that is a participant in the joint venture, in the course of activities for which the joint venture was entered into:*

- (a) is payable by the joint venture operator; and
- (b) is not payable by the participant.

This provision consists of two main clauses<sup>71</sup> whose basic subject<sup>72</sup> is ‘GST’ and whose verbs are ‘is’ and ‘is’. The rest of the material in the provision (italicised) is adjectival in function and as a whole<sup>73</sup> modifies the noun phrase ‘GST’. To preserve the nexus between subject and verb the provision could be recast so that the italicised phrase assumes final position. It would then read:

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71 These clauses are: ‘GST is payable by the joint venture operator’ and ‘GST is not payable by the participant’.

72 Often called the ‘subject head’.

73 The italicised material consists of an adjectival phrase ‘and payable ... importation’, a relative clause ‘that the joint venture ... entity’ modifying ‘importation’, a relative clause ‘that is a participant ... activities’ modifying ‘entity’, and a relative clause ‘for which the joint ... entered into’ modifying ‘activities’.

## S 51-30(1)

GST is payable by the joint venture operator and is not payable by the participant *on any taxable supply or taxable importation that the joint venture operator of a GST joint venture makes, on behalf of another entity that is a participant in the joint venture, in the course of activities for which the joint venture was entered into.*

- Most of the 12 disruptions to the auxiliary/verb nexus arise from the insertion of conditional clauses. For example, in s51-75(1) the conditional clause (italicised) has been placed between the auxiliary ‘must’ and the verb ‘revoke’. This sub-section reads:

*A New Tax System (GST) Act 1999 (Cth)*

## S51-75(1)

The Commissioner must, *if the joint venture operator of a GST joint venture applies to the Commissioner in the approved form,* revoke the approval of the joint venture as a GST joint venture.

To avoid disrupting the nexus this provision could be recast with the conditional clause in either initial or final position. In final position it would read:

## S51-75(1)

The Commissioner must revoke the approval of the joint venture as a GST joint venture *if the joint venture operator of a GST joint venture applies to the Commissioner in the approved form.*

- The passive has been used effectively. When the agent is not the Commissioner for Taxation the agent has been identified.
- There are no examples of the use of multiple negatives. Most single negatives are used for exclusions or prohibitions.
- Parallel construction has been used successfully. A notable exception to this is s54(10) which reads:

*A New Tax System (GST) Act 1999 (Cth)*

## S54(10)

The Commissioner must decide the date from which registration as a GST branch takes effect. However, the date of effect must not be a day before:

- (a) the day specified in the application for that purpose; or
- (b) *if the branch is being registered only because it is intended that an enterprise be carried on through the branch – the date of effect must not be a day before the day specified, in the application, as the day from which it is intended to carry on the enterprise through the branch.*

The first sentence of this provision needs no alteration. The main clause in the second sentence is ‘the date of effect must not be a day before the day specified in the application’. This is the clause on which the parallel structure is based. The insertion of the conditional clause (italicised) has resulted in the unnecessary duplication of the greater part of the main clause. This provision would have been easier to understand if it had been expressed as:

S54(10)

The Commissioner must decide the date from which registration as a GST branch takes effect. However, the date of effect must not be a day before the day specified in the application:

- (a) for that purpose; or
- (b) as the day from which it is intended to carry on the enterprise through the branch *if the branch is being registered only because it is intended that an enterprise be carried on through the branch.*

### C. Gene Technology Act 2000 (Cth)

The broader analysis of the *Gene Technology Act 2000* (Cth) reveals the following information:

- Of the disruptions to the subject/verb nexus, three are caused by relative clauses, five are caused by reduced relative clauses, and four are caused by adverbial clauses.<sup>74</sup>
- Of the disruptions to the nexus between auxiliary and verb, two are adverbs, nine are prepositional phrases, and five are clauses.
- There are six disruptions to the nexus between verb and complement. All of these are in the form of the adverbial phrase ‘on reasonable grounds’. It is difficult to find a synonym to replace ‘believe on reasonable grounds’ and even more difficult to recast the sentence to avoid this particular type of disruption.
- There are 70 examples of finite verbs in passive form, and a further 48 occurrences of reduced relatives involving the passive past participle. In all cases the identity of the agent is either stated or obvious.
- Most single negatives are used for exclusions or prohibitions, but there is one example of multiple negative use. This is to be found in s121(2) which reads:

*Gene Technology Act 2000* (Cth)

S121(2)

Anything done by or in relation to a person purporting to act under an appointment is *not invalid* merely because:

- (a) the occasion for the appointment had *not arisen*; or
- (b) there was a *defect or irregularity* in connection with the appointment; or
- (c) the appointment had *ceased* to have effect; or
- (d) the occasion to act had *not arisen* or had *ceased*.

The negatives in this subsection have been italicised. It is difficult to see how this provision could be redrafted without altering its meaning. In its present form it is not difficult to understand.

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<sup>74</sup> Relative clauses and reduced relative clauses must follow immediately after their antecedents. When they modify subjects of sentences the subject/verb nexus is disrupted. Recasting the sentence may remedy this defect. Adverbial clauses can usually be repositioned.

- In most cases parallel construction has been used effectively. However, in s153(3), the insertion of a conditional clause and three relative clauses between the auxiliary 'may' and the verbs 'operate' and 'remove' effectively conceals the parallel structure. Section 153(3) reads:

*Gene Technology Act 2000 (Cth)*

S153(3)

If the inspector, after operating equipment at the premises, finds that the equipment, or that a tape, disc or other storage device at the premises, contains information mentioned in subsection (2), the inspector may:

- (a) operate facilities at the premises to put the information in documentary form and copy the document so produced; or
  - (b) *if the information can be transferred to a tape, disc or other storage device that:*
    - (i) is brought to the premises; or
    - (ii) *is at the premises and the use of which for the purpose has been agreed to in writing by the occupier of the premises;*
- operate the equipment or other facilities to copy the information to the storage device, and remove the storage device from the premises.

The insertions have been italicised. Parallel construction in this provision would be more obvious and disruptions to the nexus removed, if it had been cast as:

S153(3)

If, after operating equipment at the premises, the inspector finds that the equipment, or that a tape, disc or other storage device at the premises, contains information mentioned in subsection (2), the inspector may:

- (a) operate facilities at the premises to put the information in documentary form; and copy the document so produced; or
- (b) operate the equipment or other facilities to copy the information to the storage device; and
- (c) remove that storage device from the premises *if the information can be transferred to a tape, disc or other storage device that:*
  - (i) is brought to the premises; or
  - (ii) is at the premises and the use of which for the purpose has been agreed to in writing by the occupier of the premises.

The italicised material which was originally at the beginning of (b) has been transferred to the end of the subsection. This removes the disruption of the nexus between auxiliary and verb and enhances both the parallel main clause structure<sup>75</sup> and the comprehensibility of the provision.

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75 The parallel main clauses are: 'the inspector may operate', 'the inspector may copy', 'the inspector may operate' and 'the inspector may remove ... premises'.

#### D. Pig Industry Act 2001 (Cth)

The broader analysis of the *Pig Industry Act 2001 (Cth)* reveals the following information:

- Of the disruptions to the subject/verb nexus, half are caused by the insertion of relative clauses, one by a reduced relative clause, and the remainder by prepositional phrases.<sup>76</sup>
- There is also one case<sup>77</sup> in which the nexus between the verb and its complement is disrupted by an adverbial phrase. It is often difficult to avoid this type of construction.<sup>78</sup>
- In s39(2) both the subject/verb nexus and the verb/complement nexus are disrupted. The main clause of this provision has been italicised. The provision reads:

*Pig Industry Act 2001 (Cth)*

39(2) For the purposes of this section, *the question* whether the terms and conditions of employment of a person are, when taken as a whole, at least equivalent to other terms and conditions of employment, taken as a whole, that applied to the person at a particular time *is to be determined in writing by the Minister.*

In the main clause, the nexus between the subject ‘the question’ and the verb ‘is’, is disrupted by 39 words which include a noun clause<sup>79</sup> in apposition to the subject, a relative clause<sup>80</sup> and two reduced relative clauses<sup>81</sup> the first of which disrupts the verb/complement nexus. In addition, the reduced relative ‘taken as a whole’ stands between the relative clause<sup>82</sup> and its antecedent.<sup>83</sup> This provision could be recast as:

39(2) For the purposes of this section *the Minister must determine in writing* whether the following are equivalent:

- (a) the total effect of all of the terms and conditions of employment of a person;
- (b) the total effect of all other terms and conditions of employment applicable to that person at a particular time.

In this form all the criticisms listed above would be remedied.

76 Each of these insertions modify the subject and must be placed immediately after it. The defect may be remedied by recasting the sentence.

77 *Pig Industry Act 2001 (Cth)* s27(1).

78 For example, ‘believe on reasonable grounds ...’.

79 ‘whether the terms and conditions of a person are at least equivalent to other terms and conditions of employment that applied to the person at a particular time’.

80 ‘that applied to the person at a particular time’ which modifies ‘other terms and conditions of employment’.

81 ‘when taken as a whole’ modifies ‘the terms and conditions of employment of a person’. It disrupts the nexus between the verb ‘are’ and the complement ‘equivalent to ...’ ‘[T]aken as a whole’ modifies ‘other terms and conditions of employment’.

82 ‘that applied to the person at a particular time’.

83 ‘other terms and conditions of employment’.

- The disruptions to the auxiliary/verb nexus are adverbial in function and consist of conditional clauses or prepositional phrases. Recasting the sentence with the adverbial in a different position preserves the nexus. Section 26(3), for example, reads:

*Pig Industry Act 2001 (Cth)*

26(3) After the transfer time, the industry service body is, *for the purposes of applying section 71 of the SRC Act in relation to each transferring employee*, taken to be a Commonwealth authority.

If the italicised phrase were to be transferred to final position in the sentence there would be no disruption to the auxiliary/verb nexus and there would be no change of meaning. This can be seen in the recast subsection:

26(3) After the transfer time, the industry service body is taken to be a Commonwealth authority *for the purposes of applying section 71 of the SRC Act in relation to each transferring employee*.

- The passive form of the finite verb has been used 65 times. In 20 per cent of these the agent has been expressed. In most cases the passive has been used to facilitate sentence construction. In no case does its use deliberately conceal the identity of the agent.
- Negatives have been used sparingly. There is only one double negative<sup>84</sup> and there is only one example of a prohibition. The rest are used to exclude certain items from particular provisions.
- In general, parallel construction has been used effectively. However, in a number of cases the insertion of adverbials conceals the essential nature of the structure. This can be seen in s29(1) which reads:

*Pig Industry Act 2001 (Cth)*

29(1) This section applies in relation to a transferring employee if:

- immediately before the transfer time*, the employee was a female employee of a statutory authority who was on leave granted under the *Maternity Leave Act*; and
- the employee would have been entitled to have remained on that leave after the transfer time if the employee had continued to be an employee of the statutory authority.

This subsection consists, in (a), of a main clause,<sup>85</sup> an adverbial phrase<sup>86</sup> (italicised), a conditional clause<sup>87</sup> with a subordinating relative clause<sup>88</sup> and, in (b), a coordinating conditional clause<sup>89</sup> with a subordinating conditional clause.<sup>90</sup>

84 *Pig Industry Act 2001 (Cth)* s11(6) reads: 'The declaration is *not invalid* merely because it has *not* been published as required under sub-section 3'. It is difficult to express this provision in any other form without affecting meaning.

85 'This section applies to a transferring employee'.

86 '*immediately before the transfer time*'.

87 'if the employee was a female employee of a statutory authority'.

88 '*authority who was on leave granted under the Maternity Leave Act*'.

89 'the employee would have been entitled to have remained on that leave after the transfer time'.

90 'if the employee had continued to be an employee of the statutory authority'.

This may be represented as follows:

- 29(1) M
  - (a)(adverbial phrase) C(R)
  - (b) C(C)

Where:

M = Main
R = Relative
C = Conditional

This subsection could be improved in two ways. Firstly, the parallel construction of the two coordinating conditional clauses would have been more obvious if the italicised adverb phrase had been placed at the end of paragraph (a). Secondly, a further improvement in comprehensibility could have been made by changing the function of the relative clause. The antecedent of the subordinating relative clause is ‘employee’, not ‘statutory authority’. An antecedent should be placed immediately after its referent. If the relative clause<sup>91</sup> were converted to a noun phrase<sup>92</sup> it could be placed immediately after the subject ‘employee’ in apposition to it. The semantic linking within paragraph (a) would be enhanced. Both changes have been made in the recast provision.

- 29(1) This section applies in relation to the transferring of a female employee of a statutory authority if *immediately before the transfer time*, the employee:
  - (a) was on leave granted under the *Maternity Leave Act*; and
  - (b) would have been entitled to have remained on that leave after the transfer time if the employee had continued to be an employee of the statutory authority.

The recast provision can be represented as:

- 29(1) M
  - (a) C (adverbial phrase)
  - (b) C (C)

Where:

M = Main
R = Relative
C = Conditional

91 ‘who was on leave ... *Leave Act*’.

92 ‘a female employee of a statutory authority’.

### 5. *Instant Overall Comparison*

Difficulties arose in assigning points to the results in Table C in order to provide an 'instant' overall comparison of these additional grammatical features. Whilst Turnbull<sup>93</sup> suggested using the active and the positive, no problems arose from the use of the passive and the negative. To assign points to them according to the data provided in Table C would have produced an inaccurate picture. Parallel construction can, however, be scored as follows:

**Table D: Broader analysis: parallel structure**

<b>Grammatical characteristic</b>	<i>Courts Act 1971 (UK)</i>	<i>Australian Road Rules 1999 (Cth)</i>	<i>GST Act 1999 (Cth)</i>	<i>Gene Technology Act 2000 (Cth)</i>	<i>Pig Industry Act 2001 (Cth)</i>
Use of parallel construction	N/A	3	2	5	4

Parallel construction does not affect clausal complexity. It enhances comprehensibility. It is reasonable to add these scores to the totals given in Table C since the aim of Turnbull's<sup>94</sup> guidelines is to produce language that is as 'easy to understand as possible.'

**Table E: 'Instant' overall results**

	<i>Courts Act 1971 (UK)</i>	<i>Australian Road Rules 1999 (Cth)</i>	<i>GST Act 1999 (Cth)</i>	<i>Gene Technology Act 2000 (Cth)</i>	<i>Pig Industry Act 2001 (Cth)</i>
Totals from Table B	23	35	21	25	31
Totals from Table D	N/A	3	2	5	4
<b>TOTAL</b>	<b>23</b>	<b>38</b>	<b>23</b>	<b>30</b>	<b>35</b>

Making this addition does not alter the ranking of the four pieces of Commonwealth drafting. It should be noted that the relative complexity of the content of the four samples was not taken into consideration for this analysis. It is conceded that the more complex the content the more difficult it is to maintain precision while rendering it in its most comprehensible form.

93 Above n2.

94 Ibid.

## 6. Conclusion

The detailed analysis revealed a number of significant facts about this recent Commonwealth drafting:

- lexical 'jargon' and unfamiliar words have been avoided;
- shorter words have been used;
- parallel construction has been mastered, with a few exceptions;
- the conflationary device of reduced relative clauses based on the past participle has largely been avoided;
- the conflationary device of reduced relative clauses based on the present participle has not been avoided and consequently the nexus between subject and verb has been disrupted too frequently;
- little consideration has been given to repositioning adverbial phrases and clauses so that they no longer disrupt the nexus between essential components of the sentence; and
- the single provision/single sentence construction still largely prevails and at times results in long and grammatically complicated sentences.

The last three bullet points indicate the presence of some long and syntactically complicated sentences which result from the unnecessary adherence to the single provision/single sentence construction. It is this construction that results in the use of conflationary devices and misplaced clauses and phrases which disrupt the nexus between essential sentence components. If rigid adherence to this construction were to be abandoned, clausal complexity could be reduced, comprehensibility enhanced and legislation made more accessible.

This research highlights the importance in drafting of a sound knowledge of basic grammar. Drafting legislation is a difficult task. It is easier to criticise than to do,<sup>95</sup> but is evident that some drafters continue to find it difficult to resist the intoxicating 'word-music rhythms'<sup>96</sup> of conventional legal English. Present drafting practices still include some provisions which are long and syntactically complicated enough to intimidate laypersons. Drafters have shown considerable progress in their efforts to make Commonwealth legislation more comprehensible. There is room, however, for further improvement.

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95 The author is aware that he has no experience as a parliamentary drafter. Consequently, when writing this article he was very mindful of the words of Samuel Johnson in *The Idler* (1759). Johnson stated 'Criticism is a study by which men grow important and formidable at very little expense': see Ned Sherrin, *The Oxford Dictionary of Humorous Quotations* (1995, 2001) at 85.

96 Brenda Danet, 'Language in the Legal Process' (1980) 14(3) *Law and Society Review* 482.