Book Review

Piesse, The Elements of Drafting

9th ed by J K Aitken, The Law Book Co Ltd, Sydney, 1995, xiv, 132 pp, index 125–132. Price: soft cover $32.00.

The first edition of *The Elements of Drafting* was published in 1946 as the notes of the original author, Mr E L Piesse, for his drafting tutorials at the University of Melbourne. Since then the book has been well-known for generations of solicitors as an admirable introduction to the art of legal drafting. The topics dealt with in the book have remained constant up to the present edition but the content reflects modern notions of drafting. Piesse has always been clearly and succinctly expressed, indeed the present edition covers all the important issues in drafting in only 124 pages of text. It contains much practical advice and illustrates many propositions with pertinent examples.

Piesse starts at the very beginning of the drafting process. Chapter 1 headed 'Introduction' sets the scene by emphasising the importance of the solicitor understanding the purpose of the document. Questions from the solicitor prompt the client to clarify the object of the transaction. The Introduction underlines the notion that drafting as a process cannot exist in the abstract, something must be drafted. Chapter 1, in common with other sections of the book, draws heavily on Report No 49 of the Victorian Law Reform Commission, *Plain English and the Law*. Legal documents ought to be expressed in simple language and be comprehensible to the client. There is no specifically 'legal' language, only ordinary English, although on some occasions words with an explicit legal signification are appropriate. Short words and sentences are preferable to long sentences and unusual words. This is not to deny the value of precedents. Busy legal practice precludes the original drafting of each document that a solicitor is required to prepare. Precedents are not only invaluable, they are essential. They direct attention to items the document should cover. Nonetheless, precedents must be adapted to the client's purpose. Even in the age of electronic document production, drafting skills are more important rather than less important. The author endorses the use of all the features of wordprocessing, subject to proper alteration of standard form documents to meet the specific circumstances of the transaction.

In Chapter 2 the point is made that the intention of the parties has to appear clearly from the terms of the document. It is insufficient to rely on the rules of interpretation to derive the meaning of the document. Rather, the rules of interpretation are useful in an emergency, not as a means of imparting the primary meaning of the document. Commonsense aids for producing a draft, without first resort to rules of interpretation, are set out. First, the reason for creating the document must be understood. It is then easy to design a proper draft. The draft should be set out in a logical order, with nothing admitted or omitted unnecessarily. Ordinary and accustomed forms and 'appropriate' legal terms should be used. The use of language should be consistent. Inconsistency may imply an unintended change of meaning. The mechanics of drafting are further explored in Chapter 3. The draft should be split into short paragraphs which in turn should be split into clauses and sub-clauses. The clauses and paragraphs should be adequately spaced so that the page is not cluttered. Visual impact is important in comprehension. The paragraphs and clauses must of course be identified with either numbers or letters. Cross-references should be by number, not by such archaisms as 'subject as aforesaid', which leaves the reader to find the corresponding cross-reference. Exceptions, conditions and qualifications must be

clearly expressed as such, not as provisos or by the discredited 'provided that'. In Chapter 9 the author makes the obvious point that the use of the active voice and the avoidance of negatives makes the draft easier to understand. In earlier times punctuation was eschewed in legal drafting. Words had to carry their own meaning without the aid of punctuation because of doubts about the effect of commas and semi-colons. This view stands rejected. Punctuation marks make a document more, not less, comprehensible, as the author points out in Chapter 10.

The content of Chapters 2 and 3 can usefully be considered in conjunction with Chapter 6, the topic of which is Language. Earlier generations of solicitors piled synonyms on top of each other like sand castles. Expressions like 'Lands tenements and hereditaments' and 'Covenants conditions agreements or stipulations' were strewn liberally through most documents. This practice not only lengthened the document but also made it unintelligible, except to the initiated. The author deprecates this sort of verbosity and shows how to overcome it. The answer appears to be the use of modern simple words, use a pronoun if there would be no ambiguity, if it is essential use a technical term. Gender neutral expression is necessary and the author shows how it can be achieved without resort to convolutions such as 'he or she', 's/he' 'her/his' and similar. The articles 'a' or 'the' are often adequate to replace a personal pronoun, otherwise the sentence can be cast in the passive voice or expressed in the plural.

Chapter 4 discusses the order of arrangement within paragraphs. The author recommends the order George Coode suggested in a report of the Poor Law Commissioners on Local Taxation to the English Parliament in 1843.[1] Coode's notion was that a legislative sentence should be expressed in the order:

(1) the *case*, the circumstances or occasion where the sentence is to take effect;

(2) the *condition*, what is to be done to make the sentence operative;

(3) the *legal subject*, the person enabled or commanded to act;

(4) the *legal action*, that which the subject is enabled or commanded to do.

This scheme is as applicable to commercial documents as to legislation. Arrangement in this order ensures that there is a subject who is capable of taking a defined action. There are of course other schemes of arrangement. Whichever is used however must ensure that the sentence is complete and that syntactic ambiguity is avoided. Coode's rule at least compels the solicitor to consider what is required to produce an effective result in law.

Three words have proved to be demons in drafting. They are 'shall', 'and' and 'or'. The word 'shall' is discussed in Chapter 7. Its use is relevant in the construction of paragraphs. According to the author it should be used to impose an obligation, other uses of the word are unnecessary. Care needs to be taken so that it is not used so as to create a false imperative. As an example of the improper use of 'shall' take the expression:

> The purchaser shall within 21 days of the day of sale deliver to the vendor all requisitions or objections (if any) on or to title or concerning any matter appearing in the particulars or conditions . . .

The purchaser is not obliged to deliver requisitions or objections. The expression simply means that if the purchaser intends to requisition or object it is necessary to do so within 21 days, otherwise the right to requisition or object is lost. Problems of 'and' and 'or' are the subject of Chapter 8. Here the problem is that these words have an overlapping meaning. It is necessary to be astute as to whether a conjunctive or disjunctive conjunction is apt. This determines whether 'and' or 'or' is proper. The use of 'and/or' is ruled out

1 Reprinted as Appendix I in E A Driedger, *The Composition of Legislation, Legislative Forms and Precedents* (2nd ed, rev, Ottawa: The Department of Justice, 1976) and as Appendix A in S Robinson, *Drafting* (Sydney: Butterworths, 1973).

because it is archaic and disrupts the flow of the sentence apart from having been judicially disapproved.[2] The expression is capable of assuming a variety of meanings, thus rendering it unsuitable for use in drafting: it should never be used. The issues raised by the exclusive and inclusive use of 'and' and 'or' are the subject of philosophical discussion.[3] Piesse offers a practical response to these issues. The treatment is the same as in earlier editions, which had the approval of at least one other commentator.[4]

Definitions are useful in reducing the length of a document and in avoiding repetition. Definitions are the subject of Chapter 5. There are two types of definition, namely a descriptive definition and a stipulative definition. A pitfall with definitions is that sometimes substantive material is inserted into them. This confuses the reader. If the paragraphs are arranged logically the reader instinctively looks to the paragraphs dealing with the relevant subject-matter, not in the definitions, to satisfy an inquiry. The book concludes at Chapter 11 with a discussion of expressions relating to time and fixing periods of time.

Piesse's *Drafting* is a practical book. It would, however, benefit from a greater treatment of the nature of language and the related concepts of semantic and syntactic ambiguity. These concepts underlie the principles of paragraphing. Semantic ambiguity is inherent in the nature of language. Paragraphs cannot eradicate it. They can of course be used to avoid syntactic ambiguity. Greater attention to this notion would enhance the sections dealing with paragraphs. Overall Piesse is highly recommended for junior practitioners and students approaching drafting for the first time.

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2 See the authorities cited at p 81, namely Practice Note [1940] WN 155 per Bennett J; *Bonitto* v *Fuerst Bros* [1944] AC 75, 82; *Millen* v *Grove* [1945] VLR 259.

3 See R Dickerson, *The Fundamentals of Legal Drafting* (2nd ed, Boston, Toronto: Little Brown and Co, 1986), ch VI.

4 See, G C Thornton, *Legislative Drafting* (3rd ed, London: Butterworths, 1987) 84.