Statutory Adjudication Under Nine Commonwealth Jurisdictions—A User's Perspective on Legislative Drafting Style [1]

Presented by N A N Ameer Ali[2]

The conference theme and this paper

The conference theme is 'Whose law is it?' Among the questions that are to be considered are: 'How can legislative counsel ensure that legislation is both *effective and clear to all those who are affected by it*, whether as legislators or *users*? Can those affected by a particular law find it [*and understand it*] easily?'[3]

We look at legislation introducing statutory adjudication provisions for construction contracts in nine Commonwealth jurisdictions with focus on the New Zealand Construction Contracts Act 2002. We look at several provisions of these Acts and consider these questions from a ***users' perspective*** or those who are ***primarily affected***

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1 This paper was co-authored by N A N Ameer Ali and Associate Professor Dr S Wilkinson, but was presented at the 2009 CALC Conference by Mr Ameer Ali[2]

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3 Emphasis and words in brackets added.

by it. All the nine Acts address the same issues (to regulate payment practice and introduce rapid statutory adjudication as a dispute resolution method in the construction industry) but do so in technically different ways. We also find that the drafting styles of these Acts are different. Some are more effective and clearer than others.

There are much wider issues to be debated on the technical concepts within these Acts.[4] That is not for this forum. Here, we are considering only drafting issues – from a users' perspective. This paper discusses some of the issues and provides feedback for consideration.

'We' and 'user'

We use *'we'* in this paper in a plebeian sense referring to the two people named as contributors to this paper and not in a Commonwealth royalty sense!

And in this paper, when we refer to *'user'* we refer mainly to people who would be classified as 'primary' or 'first instance' users or those who would primarily be affected by these Acts. By primary users we don't mean the typical 'Baltimore *milkmen'*[5] but people such as adjudicators, parties to construction contracts, and their advisors. We classify other users of these Acts as 'secondary' users. Secondary users might include judges and legislative counsel whether those looking to introduce a similar act in another jurisdiction or those looking at amending their existing Acts. Secondary users would use the Acts less regularly than primary users.

The construction industry, payment problems, and the introduction of intervening legislation

The construction industry stands among major contributors to any country's economy. The construction industry's contribution to the gross national product tends to be higher in developed countries (typically over 5%) than in developing countries (typically under 5%). That also means there is potentially more new construction work in a developing country as it moves towards becoming a developed country.

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[4] See for example—

(a) the various papers presented by experts from the UK, Australia, New Zealand, Singapore, Hong Kong, and Malaysia in the proceedings of the International Conference and Forum on Construction Industry Payment Acts and Adjudication, Kuala Lumpur, September 2005; and

(b) the proceedings of the Adjudication Society's Sixth Annual Conference on International Adjudication and Dispute Resolution. Adjudication Society UK. London. November 2007.

[5] 'Baltimore milkman' comes from a phrase attributed to a former Baltimore Sun Supreme Court reporter Lyle Denniston who once said he wrote his articles for a Baltimore milkman. His goal was to make sure everyone could understand even complicated legal issues. So suggests the blog-post on 12 March 2009 headed 'Plain English and the sciences' retrieved on 13 March 2009 at: http://gmujournalism.blogspot.com

Construction project contracts typically last months or years. Cash flow is thus particularly critical within the construction industry. Even Lord Denning said—[6]

> There must be a 'cashflow' in the building trade. It is the very lifeblood of the enterprise.

However, payment default remained a major problem in the construction industry worldwide. That is part of the reason why, in a relatively unprecedented move,[7] the United Kingdom introduced legislation to regularise payment within the construction industry and introduced rapid adjudication as a statutorily enabled dispute resolution method for those involved in construction contracts. Resolving construction disputes in arbitration and litigation has become increasingly expensive and slow, typically taking months, or more commonly, years. Statutory adjudication is a speedy, time-bound, inexpensive, contemporaneous, and binding (temporarily at least) alternative dispute resolution method. Statutory adjudication mandates the adjudicator to make binding decisions based on the facts and the law within days or weeks. It is different from mediation. Mediation is also quick, but it is not a rights-based dispute resolution method. Mediation is effectively negotiation with the assistance of a neutral third-party called adjudicator. If the negotiations are successful, it usually results in an amicably agreed settlement agreement. This agreement need not be based on rights under the contract or law.

Although there was major support within the construction industry in the UK for legislation on payment and adjudication, there were also a fair number of concerns expressed by several top construction lawyers and experts. Their concerns were most famously compiled in a book published in 1997 called: *Construction Contract Reform: A Plea for Sanity*.[8] It was a collection of papers opposing the reform proposals for the construction industry.

The *Housing Grants, Construction and Regeneration Act 1996* was nevertheless born and came into force on 1 May 1998. Only Part II, which concerns payment and adjudication, is relevant to this paper. In this paper, we refer to this Act (or more accurately Part II of the Act) as the UK Act. This Act has made a big impact on the way construction disputes are resolved in the UK since 1998. It has also made a major impact around other Commonwealth jurisdictions since. There are now nine Acts of

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6 *Dawnays Ltd v FG Minter* [1971] 2 All ER 1389, cited with approval in *Gilbert-Ash (Northern) Ltd v Modern Engineering (Bristol) Ltd* [1973] 3 All ER 195, at 214 (HL) Lord Diplock

7 See for example Uff, J QC suggesting in relation to statutory adjudication: 'It is difficult to identify any precedent for statutory intervention of this sort, into contracts made between private individuals.' Uff, J QC, Compulsory Adjudication and Its Effects on the Construction Industry in Contemporary Issues in Construction Law Volume II - Construction Contract Reform: A Plea for Sanity, Edited by Uff, J QC, Construction Law Press, London, 1997, p 39

8 Contemporary Issues in Construction Law Volume II - Construction Contract Reform: A Plea for Sanity, Edited by Uff, J QC, Construction Law Press, London, 1997

Parliament around the Commonwealth jurisdictions that deal with payment and adjudication of construction disputes. They are:

- *Housing Grants, Construction and Regeneration Act 1996*, United Kingdom, (UK Act).
- *Building and Construction Industry Security of Payment Act 1999* amended in 2002, New South Wales, Australia (NSW Act).
- *Building and Construction Industry Security of Payment Act 2002*, amended in 2006, Victoria, Australia (Vic Act)
- *Construction Contracts Act 2002*, New Zealand (NZ Act)
- *Building and Construction Industry Payments Act 2004*, Queensland, Australia (Qld Act)
- *Construction Contracts Act 2004* Western Australia (WA Act)
- *Construction Contracts Act 2004* Isle of Man (IoM Act)
- *Construction Contracts (Security of Payment) Act* 2004 Northern Territory, Australia (NT Act)
- *Building and Construction Industry Security of Payment Act 2004* Singapore (Singapore Act)

Throughout this paper, these acts are referred to in abbreviated form as shown in parentheses above.

Proposals have also been made by the Malaysian construction industry for a *'Construction Industry Payment and* Adjudication *Act'* in Malaysia[9] (in this paper referred to as the 'proposed Malaysian Act'). There has been strong support from the Malaysian construction industry for such an Act. As at mid March 2009, a government cabinet paper is awaiting distribution for a cabinet discussion on whether such an Act should be considered.

There have also been discussions in Hong Kong, South Africa, South Australia, and Tasmania on whether a similar act should be considered.

Successful legislation (from a technical viewpoint)

Despite earlier objections in the UK, there is little doubt that, after over 10 years, the UK Act is now generally considered to be successful.

The adjudication process has been hailed a 'runaway success' by a QC,10 who, nearly

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9 See the chronology of events from the initial recommendations of the Working Group on payment (WG 10) in June 2004 in *Proposal for a Malaysian Construction Industry Payment and Adjudication Act.* A report for industry and government. Published by the Construction Industry Development Board Malaysia. August 2008, p. 4.

10 Gaitskell, Dr R QC, Adjudication: Its Effect on other Forms of Dispute Resolution (The UK Experience), Proceedings of the International Conference and Forum on Construction Industry Payment Acts and Adjudication, Kuala Lumpur, September 2005, p 7

ten years earlier, questioned the justification for legislative interference that was inconsistent with the relative freedom of parties to negotiate their own contracts.[11] I respect him for his professional manner in giving his independent views—even though it has changed over the years.

'It has revolutionised the way disputes are resolved in the construction industry'.[12]

It has also been suggested that introducing statutory adjudication has at least partly been the reason for the significant decline in the number of construction arbitrations and the reduced workload of cases in the technology and construction courts dealing directly with construction disputes in recent years[13]. Arbitrations and litigation of construction disputes have typically taken significantly longer than the statutorily mandated short time scale for adjudications. Whilst arbitration and litigation on construction disputes typically takes years and occasionally months, adjudication typically takes days or weeks[14]. A reduction in disputes being resolved in protracted arbitration and litigation is, in our view, a positive development.

There is little doubt that the concepts introduced in the Acts, particularly the provisions relating to the introduction of rapid adjudication to resolve construction disputes, are a success. None of the other jurisdictions appear to have reported major adverse effects either. At the most, the initial version of the NSW Act was criticised as not having enough bite and thus ineffective, but that has since changed significantly after the amendments in 2002.

And in the antipodean furthest away from London, preliminary results from research in New Zealand suggest the New Zealand Act has been a success.[15]

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11 Gaitskell, Dr R QC, *Is Latham Correct? A survey of Construction Industry Opinion,* in Contemporary Issues in Construction Law Volume II - Construction Contract Reform: A Plea for Sanity, Edited by Uff, J QC, Construction Law Press, London, 1997, p 61.

12 Sir Vivian Ramsey, Head of Technology and Construction Court, UK , at the pre-conference dinner of the Adjudication Society's Sixth Annual Conference on International Adjudication and Dispute Resolution, London, 14th November 2007.

13 See for example Gaitskell, Dr R QC, *Adjudication: Its Effect on other Forms of Dispute Resolution (The UK Experience),* Proceedings of the International Conference and Forum on Construction Industry Payment Acts and Adjudication, Kuala Lumpur, September 2005, p 9. See also the corresponding growth of adjudication over the years in the Glasgow Caledonian reports on adjudication between February 2000 and May 2008 accessible at http://www.adjudication.gcal.ac.uk/

14 For a tabulated comparison of indicative time-scales of various dispute resolution methods see: Ameer Ali, N A N, A Construction Industry Payment and Adjudication Act: Reducing Payment-Default and Increasing Dispute Resolution Efficiency in Construction. Part One in 3rd Quarter 2006. Master Builders Journal. Published by the Master Builders Association Malaysia, p 13.

15 Ameer Ali, N A N and Wilkinson, S *Analysis of the adjudication process and determinations made under the New Zealand Construction Contracts Act 2002.* Presentation at the Asia-Oceania Top University League on Engineering (AOTULE) Postgraduate Conference. Auckland. November 2008

Could some of the legislative drafting styles be better?

There are differences in the approaches and details of the various Acts, but this paper does not deal with the conceptual and technical differences.

This paper discusses primarily the differences in the *drafting style* of these Acts and whether some of the provisions could be improved to better serve the primary users. The ideal target would be for the primary user to be able to understand the provisions in the act on *first reading*.[16] And if this is only a laudable but not always an achievable ideal, then it ought to be understood on second reading.

Whether or not a particular style is more effective could be looked at and analysed using a theoretical framework (as might be done when reporting following formal academic research), getting empirical evidence such as from a questionnaire, or analyzing text from an Act against a drafting style guideline. In this paper we illustrate the legislative writing style of a selection of provisions from the nine Acts and compare and discuss them. Our views are from a user's perspective. Towards the end of this paper, we also include some preliminary findings from a recent survey done in New Zealand. The survey was on adjudication under the New Zealand Construction Contracts Act 2002.

Selection of issues on legislative drafting style

We have selected a few provisions found in all the nine Acts. They include provisions relating to adjudication – which forms an important part of all the Acts. The following is a list of the provisions we have selected. In our explanation under each heading, we also briefly outline why we have chosen these provisions.

(a) The title of the Act

(b) Structure of the Act

(c) Purpose of the Act

(d) Definition of a construction contract

(e) Terminology – plain v complex words, single v multiple meaning words—

- *The adjudicator's 'decision' or 'determination'?*
- *To shall or not to shall?*

(f) Communicating the adjudicator's decision

(g) Sentence structure – average sentence length

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[16] See for example the Plain Language Network's PlainTrain, a Plain Language Online Training Program accessible at: http://plainlanguagenetwork.org/plaintrain/IntroducingPlainLanguage.html which suggests: 'Plain language matches the needs of the reader with your needs as a writer, resulting in effective and efficient communication. It is effective because the reader can understand the message. It is efficient because the reader can read and understand the message the first time.'

(h) Sentence structure – using possessives through the apostrophe and active v passive sentence structures

(i) Gender-neutral drafting

(i) The title of the Act

These Acts on payment and adjudication affect parties to a construction contract. These parties are usually 'lay'. Lay here means not legally qualified. For many years after an Act comes into force, the construction industry players may still have to be educated on what the Act contains and how it could affect them.

The very short timescales mandated in the Acts for responses to payment claims, and the short time scales within the adjudication process means it is vital that details of the Act are communicated to the industry as widely as possible. Even after years in operation, it might still not have been communicated to every part of the industry, and might take some parties by surprise – resulting possibly in exploitation by those who know the Act better.

It is probably partly for this reason that some of the Acts have specific provisions excluding construction contracts for a residential occupier. See for example section 106 of the UK Act.[17] The assumption here is that a one-off residential owner involved in a construction contract would not be expected to be burdened with the complex payment claims provisions and rapid adjudication as provided under the Act. Other Acts, in making similar assumptions, have detailed mandatory requirements and warnings to be included in notices that are sent out by claimants. For example, section 20(3) headed 'Payment claims' of the New Zealand Act reads:

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[17] Provisions not applicable to contract with residential occupier

(1) This Part does not apply—

(a) to a construction contract with a residential occupier (see below), or

(b) to any other description of construction contract excluded from the operation of this Part by order of the Secretary of State.

(2) A construction contract with a residential occupier means a construction contract which principally relates to operations on a dwelling which one of the parties to the contract occupies, or intends to occupy, as his residence.

In this subsection—

"dwelling" means a dwelling-house or a flat; and for this purpose—

"dwelling-house" does not include a building containing a flat; and

"flat" means separate and self-contained premises constructed or adapted for use for residential purposes and forming part of a building from some other part of which the premises are divided horizontally.

(3) If a payment claim is served on a residential occupier, it must be accompanied by—

(a) an outline of the process for responding to that claim; and

(b) an explanation of the consequences of—

(i) not responding to a payment claim; and

(ii) not paying the claimed amount, or the scheduled amount, in full (whichever is applicable).

If the title of the Act reflects and bears some resemblances to what the Act contains it will help parties that may be affected by it to take notice and read it up further.

Contrast the following titles of the Acts:

- *Housing Grants, Construction and Regeneration Act*
- *Building and Construction Industry Security of Payment Act*
- *Construction Contracts Act*
- *Building and Construction Industry Payments Act*
- *Construction Contracts (Security of Payment) Act*

Despite differing titles, they all deal with the common issues of payment and adjudication under construction contracts. While they are different in details, they all basically—

(a) attempt to regularise payment in the construction industry;

(b) introduce statutory adjudication as a rapid and time-limited method of resolving disputes in the construction industry; and

(c) attempt, in various forms, but don't guarantee, to provide some form of security for payment.

Putting aside other reasons like expediency for parliamentary time, or the need to integrate various issues into a single Act, or other political reasons, if you had a choice of naming an Act that primarily covers payment and adjudication in construction contracts, which among the names listed above would you adopt? Or would you prefer one of the following?

- *'Construction Industry Payment and Adjudication Act'*
- '*Construction Contracts (Payment and Adjudication) Act*

Or perhaps some other name might be considered?

UK Act - Housing Grants, Construction and Regeneration Act 1996

There are historical reasons for merging various parts dealing with different issues within this Act. Only Part II headed 'Construction Contracts' is relevant here. As with all the other Acts, the most significant issues the Act covers relate to payment and adjudication. But these words are only mentioned as headings to the relevant sections.

Most people in the construction industry in the UK refer to this Act as just the *'Construction Act'*. It is not necessarily an accurate reflection of the full contents of the Act, but at least it is not a mouthful. It is also affectionately known as the *'Hugh Grant Act'*. We don't know if this is because of some resemblance to the acronym *'HGCRA'* or because the English are passionate about the famous English actor – Hugh Grant[18] as they are with the UK Act!

All this may become history with the recent proposed changes to the Act. Following extensive formal consultations between 2005 and 2007, the Department for Business Enterprise and Regulatory Reform (BERR) produced a document in July 2008 titled*: 'The draft Construction Contracts Bill'*. It appears the BERR must have thought Construction Contracts Act is a better title for the Act. However, what was introduced in the House of Lords in December 2008 was:

Local Democracy, Economic Development and Construction (LDEDC) Bill 2009.

Part 8 headed 'Construction Contracts' comprising sections 133 to 139 is the relevant portion. We can only hope that the statutory payment and adjudication provisions in the UK are sufficiently well known – so those that who might be affected by the Act will know of its existence and know where to find it, whatever titles the provisions on payment and adjudication come under.

The NSW, Victoria, and Singapore Acts - Building and Construction Industry Security of Payment Act

The titles of the three Acts are identical. Their technical contents are also somewhat similar to each other when compared with some of the other Acts.

Consider the following:

- Is it necessary to distinguish the *building* industry from the *construction* industry?
- If it must, then does it have to be distinguished in the title of an Act? Or would they have been better dealt with through definitions within the Act?
- If building and construction must be distinguished in the title itself, then what about the 'engineering industry'? The Act does cover the engineering industry, which is sometimes distinguished from the construction industry.

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18 The Wikipedia entry on Hugh Grant at http://en.wikipedia.org/wiki/Hugh_Grant reads: *'Over years of fame, he has been identified in popular culture as a figure of charisma, charm, sharp tongue, and wit, who is very vocal about his disrespect for the profession of acting and his disdain toward the culture of celebrity.* Another website on the Internet Movie Database accessible at http://www.imdb.com/name/nm0000424/bio suggests under his biography he is *'one of Britain's best known faces who has been equally entertaining on-screen as well as in real life, and had enough sense of humor to survive a media frenzy.'*

See for example the *'NEC3 Engineering and Construction Contracts'* published in the UK.[19]

- If it is important that building and construction must be distinguished, then why do the contents of the Act refer to only construction contracts throughout and define construction contracts and construction work but not building contracts and building work?
- Are these Acts only, or even primarily, about providing ***security*** of payment? They do not guarantee security of payment. Might the heading the title of an Act give the false impression that they do?
- A big chunk of these Acts deal with adjudication. Yet the word '*adjudication*' does not appear in the title at all.

The Queensland Act - Building and Construction Industry Payments Act

See our comments earlier on the necessity to distinguish the building and construction industries and the missing word 'adjudication'. The absence of the word 'security' in the Queensland Act is a welcome difference. Whatever the reason was for Queensland deciding to use a title that is different from the title of the NSW or Victoria Acts, it is, in our view, a better reflection of the contents.

The New Zealand, WA, and IoM Acts—Construction Contracts Act

Distinguishing the title of their Acts totally from all the other jurisdictions, the title *'Construction Contracts Act'* was first introduced in New Zealand in 2002. Whilst it does not completely reflect the primary contents of the Act (which are payment and adjudication provisions in construction contracts), its brevity is refreshing. It is commonly referred to by its acronym CCA in New Zealand.

When proposals for a similar Act for Malaysia were first referred to as 'the proposed Construction Contracts Act' in 2003 and 2004, and road shows were held to obtain feedback from the construction industry, one of the participants said he objected to having such an Act. It was later discovered he (wrongly) thought a construction contracts act meant a single standard set of construction contract was going to be imposed on the Malaysian construction industry.

NT Act - Construction Contracts (Security of Payment) Act

This is among the most recent Acts. It keeps the attractive brevity of 'Construction Contracts Act' but also makes it clear that the Act deals with payment issues. It is

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19 NEC3 Engineering and Construction Contract originally known as The New Engineering Contract, London, ICE/Thomas Telford, 2005; obtainable via www.neccontract.com

unfortunate that the word 'security' crept in. *Construction Contracts (Payment and Adjudication) Act* would have captured the essence of the Act better.

The proposed Malaysian Act—'Construction Industry Payment and Adjudication Act'

The Malaysian construction industry Working Group on Payment (WG 10) commonly referred to the title of the proposed Act as the 'Construction Contracts Act' since its first formal recommendation in 2004.20 This was subsequently proposed to be *'Construction Industry Payment and Adjudication Act.'*[21] To date this name has been consistently used within the construction industry since.[22] It is now also commonly referred to by its acronym CIPAA. This title reflects the primary contents of the proposed Act (and all the other nine existing Acts) more accurately.

Although there is a complete draft Act proposed by the construction industry, it has not officially been passed to legislative counsel for formal drafting. As at March 2009, a government cabinet paper is awaiting to be circulated among the Cabinet Ministers for possible deliberation at Cabinet.

It is hoped that the title of the proposed Malaysian Act remains when (and if) it gets to legislative counsel and to Parliament. Perhaps an alternative could be: *Construction Contracts (Payment and Adjudication) Act.*

There has been tremendous support from the construction industry and several cabinet Ministers, but there were also some objections – in particular from the Malaysian Bar council. They had listed over 40 reasons for objecting to the proposed Act. Some of the reasons for the objections were based on wrong assumptions or speculations and some were due to ignorance of the realities in the construction industry (like the perennial payment problem). Some of their concerns reflected their ignorance of the full contents of the nine Acts on payment and adjudication in other jurisdictions and their successes. It was never established if some of their ignorance is because they did not fully study the nine Acts or because the Acts were far too complex and could not be understood easily – especially if read cursorily. If the Malaysian Bar Council had kept to the few genuine concerns, these could by now have been addressed through

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20 See the briefing presentation by Ameer Ali, N A N at the Malaysian Construction Industry Roundtable prelude conference, Kuala Lumpur, 15 June 2004; Roundtable meeting in Kuala Lumpur on 24 June 2004 chaired by the then Minister of Works, Malaysia, and presentation at the National Forum on Payment and Adjudication, Kuala Lumpur 10 August 2004, all organised by the Construction Industry Development Board Malaysia.

21 Ameer Ali, N AN N, *A Construction Industry Payment and Adjudication Act – Reducing Payment Default and Increasing Dispute Resolution Efficiency.* Proceedings of the International Conference and Forum on Construction Industry Payment Acts and Adjudication, Kuala Lumpur, September 2005, p 1

22 See for example the most recent publication on the status of the proposed Malaysian Act in *Proposal for a Malaysian Construction Industry Payment and Adjudication Act.* A report for industry and government. Published by the Construction Industry Development Board Malaysia. August 2008

negotiations – and possibly through mediation but certainly not through arbitration, litigation or even adjudication!

The real reason for the objections has been speculated by many (including renowned construction lawyers in the UK) that there may be concern that introducing statutory adjudication might lead to reduced construction arbitration. If protracted construction arbitration or litigation does taper down, that will be better for the construction industry. Parties can then concentrate on their core business of development, construction, and consultancy in the built environment – instead of feeding the industry that is only peripheral to the construction industry – the dispute resolution industry.

Future-proofing the title of an Act

There is one further comment on the title of an Act. Given the success of adjudication in various jurisdictions, there are now suggestions that the adjudication model could be extended to other industries beyond the construction industry.[23] [24] If adjudication is introduced to other industries, it could be introduced—

(i) by incorporating adjudication within existing Acts governing these other industries;

(ii) through amendments to an existing dispute resolution Act such as the Arbitration Act; or

(iii) if adjudication is adopted widely enough, through a stand-alone Act like a new Adjudication Act similar to the stand-alone Arbitration Act.

The question remains: In anticipation of what might happen in the future, should the reference to 'building' or 'construction' industry even appear in the title of any proposed new Act?

(ii) Structure of the Act

Unlike the other seven Acts on payment and adjudication, the UK and IoM Acts do not contain all the details on the adjudication provisions. They only mandate certain minimum provisions to be included in construction contracts – failing which a Scheme for Construction Contracts Regulations will apply.[25] These will be referred to as the

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[23] Ameer Ali, N A N, *A Construction Industry Payment and Adjudication Act – Reducing Payment Default and Increasing Dispute Resolution Efficiency.* Proceedings of the International Conference and Forum on Construction Industry Payment Acts and Adjudication, Kuala Lumpur, September 2005, p 6

[24] Sir Vivian Ramsey at the pre-conference dinner of the Adjudication Society's Sixth Annual Conference on International Adjudication and Dispute Resolution, London, 14th November 2007.

[25] For example the Scheme for Construction Contracts (England and Wales) Regulations 1998 or the Scheme for Construction Contracts (Scotland) Regulations 1998

'Scheme' in this paper.

As a result of this approach taken in the drafting of the UK Act, many procedures were developed in the UK by various industry bodies. Whilst the assumption may have been that these procedures were developed to be clearer than the Scheme,[26] they are also likely to have been developed as a result of competition among the various Adjudicator Nominating Bodies. The Adjudication Reporting Centre listed 22 Adjudicator Nominating Bodies in the UK in their latest report.[27]

Whilst multiple procedures may be useful to rigorously test out adjudication procedures and to compare them against the Scheme, it will be at a cost to the industry. It is a pity that the suggestion by some from the industry to adopt the Scheme as a sole procedure during the recent proposed changes to the Act does not appear to have been accepted.

(iii) Purpose of the Act

Having the purpose of an Act clearly outlined at the beginning of an Act is very useful for new readers of the Act. Not all the Acts have a clearly outlined object or purpose spelt-out. The UK Act covers many different issues, the relevant part simply reads:

> 'An Act ... to amend the law relating to construction contracts …'

The IoM Act, which is similar to the UK Act, but drafted as a stand-alone Act for only payment and adjudication, reads similarly:

> 'AN ACT to amend the law relating to construction contracts.'

Some of the other Acts provide some generic intent. The Singapore Act for example provides:

> 'An Act to facilitate payments for construction work done or for related goods or services supplied in the building and construction industry, and for matters connected therewith.'

Although the Singapore Act follows much of the NSW and Victorian models in technical content, it stops there and unlike the NSW and Victoria Acts, does not elaborate further. The NSW and Victoria Acts go further and after stating the overall intent, they provide more details on the object of the Act, including how the objects are to be achieved. The NSW Act reads:

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[26] See for example Kennedy, P, Evolution of Statutory Adjudication as a Form of Dispute Resolution in the U.K. Construction Industry, Journal Of Professional Issues In Engineering Education And Practice, April 2008, p 218

[27] Kennedy, P, and Milligan, J L, Research analysis of the progress of adjudication based on returned questionnaires from adjudicator nominating bodies (ANBs), Report No 9, May 2008, Adjudication Reporting Centre, Glasgow Caledonian University, Glasgow, UK, May 2008, p 1

An Act with respect to payments for construction work carried out, and related goods and services supplied, under construction contracts; and for other purposes.

3 Object of Act

(1) The object of this Act is to ensure that any person who undertakes to carry out construction work (or who undertakes to supply related goods and services) under a construction contract is entitled to receive, and is able to recover, progress payments in relation to the carrying out of that work and the supplying of those goods and services.

(2) The means by which this Act ensures that a person is entitled to receive a progress payment is by granting a statutory entitlement to such a payment regardless of whether the relevant construction contract makes provision for progress payments.

(3) The means by which this Act ensures that a person is able to recover a progress payment is by establishing a procedure that involves:

(a) the making of a payment claim by the person claiming payment, and

(b) the provision of a payment schedule by the person by whom the payment is payable, and

(c) the referral of any disputed claim to an adjudicator for determination, and

(d) the payment of the progress payment so determined.

(4) It is intended that this Act does not limit:

(a) any other entitlement that a claimant may have under a construction contract, or

(b) any other remedy that a claimant may have for recovering any such other entitlement.

The overall purpose of an Act is useful but it need not elaborate on details of ***how*** an Act achieves some of these objectives. These are already detailed in the rest of the provisions of the Act. Consider the more succinct provisions found in the NT and New Zealand Acts:

NT Act

An Act to secure payments under construction contracts and provide for the adjudication of disputes about payments under construction contracts, and for related purposes.

3 Object and its achievement

(1) The object of this Act is to promote security of payments under construction contracts.

(2) The object of this Act is to be achieved by –

(a) facilitating timely payments between the parties to construction contracts;

(b) providing for the rapid resolution of payment disputes arising under construction contracts; and

(c) providing mechanisms for the rapid recovery of payments under construction contracts.

New Zealand Act

Section 3 Purpose

The purpose of this Act is to reform the law relating to construction contracts and, in particular,—

(a) to facilitate regular and timely payments between the parties to a construction contract; and

(b) to provide for the speedy resolution of disputes arising under a construction contract; and

(c) to provide remedies for the recovery of payments under a construction contract.

Consider also the following, which is from one version of a draft proposed for the Malaysian Act:

> An Act to facilitate regular and timely payment, provide a mechanism for speedy dispute resolution through adjudication and provide security and remedies for the recovery of payment in the construction industry.

It is similarly worded to the New Zealand Act but the New Zealand Act is much clearer and easily found with its own section, heading, and the use of listing. The presentation of the New Zealand Act is preferable. Potential users can find out what the Act is about easily and quickly.

(iv) Definition of a construction contract

Here we look at the legal meaning of the word 'contract' against how the word is used in some of the Acts.

In law, at least under Commonwealth jurisdictions, a contract is formed when all ingredients necessary to form a legally binding contract are in place. Among these ingredients are—

(i) ***agreement*** (sometimes split into the offer and acceptance stages to establish whether and when a contract might have come into place);

(ii) consideration (or exchange of value); and

(iii) intention to create a legally binding relationship (as opposed to a mere casual discussion that might have gone on).

There are other requirements too, but not of concern here.

> Agreement in law is thus one of several ingredients required to form a contract. In this context, agreement is not the same as contract. Agreement precedes a contract.

Despite these legally established meanings, the word agreement is sometimes loosely used in some of the Acts as a replacement for the word contract. In other words, the word 'agreement' is used to mean a legally binding contract. As long as the word agreement (or indeed any other word) is sufficiently defined in any particular context, and is used consistently in an Act, there should not be a problem. But if it is not defined, or not used consistently within an Act, at best, it may create confusion or ambiguity, and at worst, result in litigation. Agreement is not defined. And it is sometimes used instead of and to mean contract as defined in law.

Ideally the word contract should be used consistently throughout and if the word agreement is used it must only be used in a different context or as a verb. For example: The parties may come to an agreement to extend the time to complete the adjudication. One must not use the word agreement to mean contract. And for sure one must not use contract and agreement interchangeably within a single legal document.

Now consider section 104(2) of the UK Act:

> References in this Part to a construction **contract** include an **agreement**—
>
> (a) to do architectural, design, or surveying work, or
>
> (b) to provide advice on building, engineering, interior or exterior decoration or on the laying-out of landscape,

Going strictly by the legal definition of contract and a (mere) agreement, was it intended that services under paragraphs (a) and (b) were to be included when there was a mere agreement or was a legally binding contract with agreement, consideration, and intention? If only a mere agreement were intended in this Act, it would have been helpful to have a definition of agreement and not just a definition of construction contract.

Contrast that with the carefully and consistently drafted NT and New Zealand Acts. Section 5 of the NT Act reads:

> *5 Construction contract*
>
> (1) A construction contract is a **contract** (whether or not in writing) under which a person (the contractor) has one or more of the following obligations:
>
> (a) to carry out construction work;
>
> (b) to supply to the site where construction work is being carried out any goods that are related to construction work;
>
> (c) to provide, on or off the site where construction work is being carried out, professional services that are related to the construction work;
>
> (d) to provide, on the site where construction work is being carried out,

on-site services that are related to the construction work.

(2) In Part 3, a construction contract includes –

(a) a **contract** modified under section 13; and

(b) a **contract** in which a provision is implied under Part 2, Division 2.

S 5 of the New Zealand Act defines construction contract, commercial construction contract, and residential construction contract carefully and consistently by referring to the word contract throughout and not (merely) agreement:

commercial construction contract means a **contract** for carrying out construction work in which none of the parties is a residential occupier of the premises that are the subject of the **contract**

construction contract—

(a) means a commercial construction **contract** or a residential construction **contract**; and

(b) includes any variation to the construction **contract**; but

(c) does not include a lease or licence under which a party undertakes to fit out, alter, repair, or reinstate the leased or licensed premises unless the principal purpose of the lease or licence is the carrying out of construction work

residential construction contract means a contract for carrying out construction work in which one of the parties is the residential occupier of the premises that are the subject of the contract

The New Zealand and NT Acts use words that are internally consistent and consistent with words that are defined in law.

Colloquial use of the word agreement might be common in the UK, but it should ideally be avoided for clarity and consistency and to prevent potential argument.

(v) Terminology—plain v complex words, single v multiple meaning words

Among the recommendations by most modern legal counsel are—

(a) Prefer plainer words to complex ones

(b) Whenever possible, use a word that has a single meaning in preference to one that has multiple meanings

(c) Heed the golden principle of legal drafting: 'Never change your language unless you wish to change your meaning, and always change

your language if you wish to change your meaning.'[28]

The adjudicator's decision or determination?

The two primary issues dealt with in these Acts are payment and adjudication. Within the adjudication provisions, the critical outcome is the adjudicator's decision that the parties are expected to comply with.

In arbitration, the arbitrator's decision has universally been referred to as the arbitrator's award. This is consistently used throughout various jurisdictions. With the arrival of statutory adjudication, the adjudicator's decisions are now referred to in the nine Acts as either 'decision' or 'determination'. If the current industry recommendations were maintained, the Malaysian Act would use 'decision' and not 'determination.'

Either decision or determination may be acceptable as long as it is properly defined, explained, and most importantly used consistently within an Act. If there is a choice, 'decision' is preferable. The potential argument that determination is used when the adjudicator only makes decisions on payment disputes and decision is used for any other disputes is not tenable because some Acts that only allow adjudications on payment disputes also use decision, whilst those that allow all disputes also use determination.

Here are some reasons why 'decision' is preferable over 'determination':

- Decision is a shorter word.
- Decision is a three-syllable word whereas determination is a five-syllable word.
- Decision is a plainer, simpler, and more commonly used and understood word than determination.

All these might seem trivial but they all add up to making an entire Act easier to read and assist the primary user. They are also consistent with Russell's advice to legislative counsel:

'The simplest English is the best for legislation … Long words should be avoided.'[29]

This is also consistent with paragraph 3.12 under 'Words' in Chapter 3 of the New Zealand's Parliamentary Counsel's Office's in-house Drafting Manual headed *'Principles of Clear Drafting'*[30] which orders:

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28 Aitken J K and Butt P, in Piesse, The Elements of Drafting (10th ed, 2004, Lawbook Co), p 19, attributing Jeremy Bentham as being the originator of this drafter's golden rule in *The Works of Jeremy Bentham* (William Tait, Edinburgh, 1859), vol VIII, "Essay on Language", Rule III 315

29 Attributed to Russell (Sir Alison), Legislative Drafting and Forms, (4th ed, 1938, Butterworths), p 12 quoted in Aitken J K and Butt P, Piesse, The Elements of Drafting (10th ed, 2004, Lawbook Co), p 5

30 Accessed on 16 March 2009 at: http://www.pco.parliament.govt.nz/clientfile/drafting/draftingmanual.shtml

Use the simplest word that conveys the meaning.

It is ironic that despite this encouraging approach in the drafting manual, and despite an otherwise relatively clearly written piece of legislation, the New Zealand Act uses determination instead of decision, which is adopted in other modern legislation like the Queensland Act. See the tabulated comparison below.

A more important reason why decision is preferable to determination is because using a word that has one meaning is preferable to using a word that has multiple meanings. Decision means 'a conclusion or resolution reached after consideration'. Whereas determination has several meanings including:

- Firmness of purpose
- Cessation or termination such as commonly used in construction contracts for example 'determination of a contractor's employment'.
- Deciding an outcome.

The New Collins Dictionary lists 8 meanings of determination.

Not all the Acts consistently use ***either*** decision ***or*** determination within a single Act. See the table below:

Act	*Terminology used*	*Frequency of use*	*Terminology used*	*Frequency of use*
UK Act	Decision	6 times in the Act, 22 times in the Scheme for Construction Contracts Regulations (England and Wales) and 25 times in the Scheme for Construction Contracts Regulations (Scotland)	Determination	Not used in the Act, used 3 times in the Scheme for Construction Contracts Regulations (England & Wales), not used in Scotland
NSW Act	Decision	5 times [used thrice in a different context in s28(2)(b), s32(3)(b); and used twice in s29(4) and s29(5)(a)]	Determination	13
Victoria Act	Decision	4 times [used twice in a different context in the note to s45 and	Determination	125

		s47(3)(b); and used twice instead of determination in s45(5) and s45(6)(a)]		
New Zealand Act	Decision	0	Determination	114
Queensland Act	Decision	117	Determination	0
WA Act	Decision	24	Determination	63
IoM Act	Decision	6 times in the Act	Determination	Not used in the Act
NT Act	Decision	56	Determination	60
Singapore Act	Decision	0	Determination	54

The New Zealand and Singapore Acts use determination consistently throughout, while the Queensland Act uses decision consistently throughout.

There are some Acts that use mainly either decision or determination and a handful of the other – either in a loose sense or inadvertently instead of maintaining consistency.

What is unacceptable and can cause confusion is where both are used sparingly and with no particular consistent basis. The NT Act is particularly inconsistent and there does not seem to be consistency in the usage of the two words. In parts, they appear to be used interchangeably. This goes against the legislative counsel's golden rule mentioned earlier:

'Never change your language unless you wish to change your meaning, and always change your language if you wish to change your meaning.'

To 'shall or not to shall'?

This should no longer be a question. Most of the modern drafting guidelines suggest that "shall" should be avoided. There are good reasons for this suggestion. Among them are the following:

- Using shall creates a distance or barrier (even if only psychological) between a lay user and the Act compared to other plainer words like must or may.
- Shall has multiple meanings. 'Must' means 'must.' 'May' means 'may.' But 'shall' can mean 'must', 'may' or several other things such as those identified by Butt and Castle including: giving a direction, stating

circumstances, negating a duty or discretion, expressing an intention, stating a condition precedent, or stating a condition subsequent.[31] Garner warns when writing about the use of shall: A word that has multiple meanings, even shifting meanings in mid-sentence, *'runs afoul of several basic principles of good drafting'*.[32]

- Shall can cause confusion when used inconsistently to mean must, may, or to indicate the future tense. Most legal documents including Acts of Parliaments that use shall use it to mean different things.
- When used to indicate an obligation, 'must' is more commonly understood than shall.
- When used to indicate an entitlement or discretionary power, 'may' is clearer than 'shall be entitled to'.
- When used to indicate the future tense like 'this Act shall apply to', dropping the 'shall' and its linked words shortens the phrase to 'this Act applies to'. The shorter phrase is clearer and does not sound as pompous.

How do the Acts on payment and adjudication fare against the suggestion to drop shall in drafting or at the very least to use shall consistently to mean only one thing.

For a start, here are the statistics:

Act	*Number of times shall is used*	*Number of times must is used*	*Number of times may is used*
UK Act	23 76 in the Scheme for Construction Contracts Regulations (England and Wales) and 66 in the Scheme for Construction Contracts Regulations (Scotland)	2 3 each in the Scheme for Construction Contracts Regulations (England and Wales) and (Scotland)	13 28 each in the Scheme for Construction Contracts Regulations (England and Wales) and (Scotland)
NSW Act	0	28	62
Victoria Act	0	94	97

[31] Butt, P J and Castle, R, *Modern Legal Drafting: A Guide to Using Clearer Language*, New York, Cambridge University Press, 2nd ed, 2006, pp 131-132

[32] Garner B A, *A Dictionary of Modern Legal Usage*, New York, Oxford University Press, 2nd ed, 2001, page 939

New Zealand Act	0	14	22
Queensland Act	0	118	121
WA Act	0	42	40
IoM Act	24	2	12
NT Act	0	72	46
Singapore Act	111	0	109

Most of the jurisdictions have completely dropped using shall. Only the UK, IoM, and Singapore Acts have opted to continue using it. It might be acceptable if shall is used consistently throughout each Act. But none of the three Acts use shall consistently in one manner. See the following extracts:

Singapore Act

Section 4(1) of the Singapore Act reads as follows:

> **Application of Act**
>
> 4. —(1) Subject to subsection (2), this Act **shall apply** to any contract that is made in writing on or after 1st April 2005, whether or not the contract is expressed to be governed by the law of Singapore.

Here shall is used to indicate the future tense. It could be dropped – making the text simpler. Instead of *'this Act shall apply'*, *'this Act applies'* retains the same meaning, is shorter, plainer, and does not sound as pompous.

Section 24(2)(c) of the Singapore Act reads as follows:

> 'If the respondent fails to show proof of payment in accordance with paragraph (b), the principal **shall be entitled to** pay the outstanding amount of the adjudicated amount, or any part thereof, to the claimant.'

Here shall is used to show entitlement. Replacing 'shall be entitled to' with 'may' shortens the sentence without losing the meaning. It helps the lay reader understand more easily.

Here is the complete section 24 of the Singapore Act , which shows how shall is used in multiple sense to indicate an obligation and as a discretionary entitlement all within one section. It also shows how on some occasions may is used to indicate discretionary entitlement instead of 'shall be entitled to'. ***Consistent drafting helps maintain clarity in any document.*** It is ***some*** comfort that section 24(2)(c) starts with 'if the respondent fails' instead of 'if the respondent shall fail'.

Direct payment from principal

> **24.** (1) Where a respondent fails to pay the whole or any part of the adjudicated amount to a claimant in accordance with section 22, the principal of the respondent **may** make payment of the amount outstanding, or any part thereof, in accordance with the procedure set out in subsection (2).
>
> (2) The procedure by which the principal **may** make payment to the claimant **shall** be as follows:
>
> (a) the principal **shall** serve a notice of payment on the claimant stating that direct payment **shall** be made, and serve a copy thereof on the respondent and the owner (if the principal is not the owner);
>
> (b) the respondent **shall**, if he has paid the adjudicated amount to the claimant, show proof of such payment to the principal and the owner (if the principal is not the owner) within 2 days after receipt of the notice referred to in paragraph (a); and
>
> (c) if the **respondent fails** to show proof of payment in accordance with paragraph (b), the principal **shall be entitled to** pay the outstanding amount of the adjudicated amount, or any part thereof, to the claimant.

The Singapore Act has 111 'shalls'. They are not used consistently to mean one thing. They are used in different contexts to mean different things – often even within even one section of the Act. It is unfortunate that although the Singapore Act derives much of the technical concepts from the NSW Act, it did not follow the NSW drafting style. This could be because of any one or more of the following reasons:

- Because of the need for consistency with the drafting style adopted across other Acts of Parliament in Singapore.
- Because the policy is to stick to traditional drafting style.
- Because Legislative counsel in Singapore believe it is safer to draft in traditional style.
- Because Legislative counsel in Singapore disagree with modern drafting style and think it is unsafe or inaccurate.
- Because Legislative counsel in Singapore are used to the traditional drafting style and would be able to draft the Act quicker and had pressure of time.
- Because Legislative counsel in Singapore don't know about plain English drafting approaches or are not trained in plain English drafting or both.
- Because Legislative counsel in Singapore don't have to time to develop newer skills in plain English drafting.

None of these reasons might be seen as justified to a user who suffers the consequences of complex drafting style. Whilst some of the reasons may be arguably justified to Legislative counsel in the short term, it is difficult to see how traditional drafting style will be sustained in the long term across any of the Commonwealth jurisdictions. This

is because there already exists an extensive wealth of experience in modern plain English drafting in many of the other Commonwealth jurisdictions.

Other jurisdictions considering legislation on payment and adjudication such as Malaysia would benefit much by drawing on the experiences on some of the more modern drafting styles already used by some of the jurisdictions. It is much more difficult to amend an Act already in force that is drafted in traditional style into plain language later.

The United Kingdom Act

Section 114 reads:

114The Scheme for Construction Contracts

(1) The Minister **shall** by regulations make a scheme ("the Scheme for Construction Contracts") containing provision about the matters referred to in the preceding provisions of this Part.

(2) Before making any regulations under this section the Minister **shall** consult such persons as he thinks fit.

'Shall' is used to impose an obligation throughout the Act and the Scheme. 'Shall' is also used in other senses. The question that perhaps only the drafters of the Act and what the original stakeholders of the Act might be able to answer what their intentions were and the courts who may provide a definitive answer is: Does the shall in section 114(2) mean the Minister ***must*** consult 'such persons as he thinks fit' before making any regulations or could it mean he ***may*** consult such persons? If the Minister has no choice but to consult, and if he prefers not to, then the choice of persons he thinks fit may well not be what other might think fit. From a practical perspective, the 'shall' here should mean 'may'. If that was what was intended, replacing the 'shall' with may would make it clearer.

Section 114 (3) reads—

(3) In this section, "the Minister" means—

(a) for England and Wales, the Secretary of State, and

(b) for Scotland, the Lord Advocate.

It is some comfort to note this was not drafted: 'In this section "the Minister" shall mean–' the current draft without the 'shall' is simpler than what might otherwise be drafted in the shall-laden style adopted in the rest of the Act.

From the Scheme for *Construction Contracts Regulations* (England and Wales):

Citation, commencement, extent and interpretation

1. (1) These Regulations may be cited as the Scheme for Construction Contracts (England and Wales) Regulations 1998 and **shall come** into force

at the end of the period of 8 weeks beginning with the day on which they are made (the "commencement date").

'Shall come' could be replaced with just 'comes'.

11(1) The parties to a dispute may at any time agree to revoke the appointment of the adjudicator. The adjudicator **shall be** entitled to the payment of such reasonable amount as he may determine by way of fees and expenses incurred by him. The parties shall **be** jointly and severally liable for any sum which remains outstanding following the making of any determination on how the payment **shall be** apportioned.

Here the three 'shall be's can be replaced with: 'is', 'are' and 'is' respectively.

If one wants to completely modernise, consideration should also be given to the suggestion by Butt and Castle to replace 'jointly and severally' with 'together and separately' or 'separately, together or in any combination'.[33] As they argue, if more than two parties are involved, there is the potential ambiguity that jointly and severally includes obligations together (X, Y, and Z) and separately by each (X or Y or Z), but not necessarily a combination of X and Y together, or X and Z together, or Y and Z together. 'Separately, together or in any combination' could remove the potential ambiguity. Perhaps this can be left to another debate in another forum.

(2) Where the revocation of the appointment of the adjudicator is due to the default or misconduct of the adjudicator, the parties shall not be liable to pay the adjudicator's fees and expenses.

The 'shall not be' here can be replaced with 'are not'.

Powers of the adjudicator

12. The adjudicator shall—

(a) act impartially in carrying out his duties and **shall** do so in accordance with any relevant terms of the contract and **shall** reach his decision in accordance with the applicable law in relation to the contract; and

(b) avoid incurring unnecessary expense.

Here all the 'shalls' are used to impose obligations. Replacing all the 'shalls' with must would make it clearer to the lay reader.

Following recent developments, there is hope that in future 'to shall or not to shall' will no longer be a question. The original bastion of traditional drafting – the UK – appears to be moving away from using shall. See the Drafting Techniques Group Paper 19

[33] Butt, P J and Castle, R, *Modern Legal Drafting: A Guide to Using Clearer Language*, New York, Cambridge University Press, 2nd ed, 2006, pp 230-231

(final): March 2008 titled: 'Shall'.[34]

Paragraph 6 provides a summary on the use of 'shall' on page 2:

> 6. In summary, the Group believes that a suitable alternative to 'shall' exists in each of the contexts mentioned above. Generally, and on the basis of the discussion in this paper, it recommends that in these contexts the starting point should be that the use of the alternative concerned is to be preferred. That is what this paper is to be taken as meaning when in any particular context it recommends a presumption in favour of a particular alternative to 'shall'. In the case of the last three contexts mentioned above, this paper recommends the use of the alternative concerned, and this reflects a corresponding recommendation (or provisional recommendation) in an existing Group paper.

The proposed Malaysia Act

Whilst the proposed Malaysian Act is relatively modern in its drafting style, over 60 'shalls' still remain in the current industry draft version. Most of them mean must, but not all. It does not heed Professor Joseph Kimble's thoughts on using shall:

> 'Give shall the boot: use must instead.'

And if Malaysian legislative counsel still feel inclined to follow the old traditional UK drafting style because of traditional style in other existing legislation in Malaysia, they may want to take heed of paragraphs 7 and 8 of the UK's Drafting Techniques Group Paper 19 (final): March 2008 titled 'shall'. Even when amending an existing Act, the conclusion suggests shall should be avoided. The relevant paragraphs on page 2 of the paper read as follows:

> 7 This paper also looks at the issue of whether, in textually amending an Act that already uses 'shall', we should follow the usage of the Act.
>
> 8 The Group's conclusion is that, similarly, there should be a presumption in favour of alternatives which do not use 'shall' in textual amendments unless (a) they involve inserting text near existing provisions that use 'shall' in the same sense or (b) the use of an alternative would raise a real doubt that a different meaning was intended in an existing provision.

There is no reason to retain 'shall' in the proposed new Malaysia Act or any other new Act in any other jurisdiction.

Perhaps by the time a formal Bill is instructed to be drafted before going to Parliament, the Legislative counsel in Malaysia may have caught up with the rest of the modern drafting style found in several of the other Commonwealth jurisdictions as highlighted in this paper. However, it may take longer to draft an Act in plain language if the

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[34] See http://www.parliamentary-counsel.gov.uk/media/15371/shall.pdf accessed on 16 March 2009.

legislative counsel is not familiar with it.

Take for example what is in the text of the 'Briefing Notes for the Attorney-General on the Role and Operations of the Parliamentary Counsel Office' dated November 2008 published by the New Zealand Parliamentary Counsel Office (PCO).[35] There are many positive modernising initiatives that David Noble, Chief Parliamentary Counsel of New Zealand, comments on in the executive summary of the report. On plain English drafting, he declares in the second paragraph on page one of his executive summaries:

> The PCO employs a plain English approach to legislative drafting and exercises controls to ensure consistency of drafting for the statue book as a whole.

The report itself also, under the heading 'Plain language drafting', clearly states the PCO's policy to draft legislation in a plain language drafting style. It goes on to suggest that although it agrees that it is generally accepted that people affected by legislation need to understand their rights and obligations under it, 'a drafter's ability to use plain language in drafting may be constrained in practice' by some external factors such as political issues, specialist legislation where some technical language may be unavoidable, when drafting New Zealand Treaty settlement legislation, and when there is 'pressure of time available for drafting.'[36]

This insinuates that on some occasions, particularly if not totally familiar with plain language drafting, plain language drafting may take longer than traditional drafting.

In the case of the proposed Malaysian Act, there are no reasons (or excuses) left why it should not be in plain language. Here are five more reasons what it must be in plain language:

1. It has now been more than five years since the working group on payment first made the recommendations for the proposed Malaysian Act,[37] and more than three years since the then Minister of Works issued a press statement calling for such an Act to be expedited;
2. Through the initiatives of the Construction Industry Development Board Malaysia, there already is a base draft Act in relatively plain language;
3. There already exist several excellent models of plain English legislative drafting manuals in many jurisdictions including those found in Australia and New Zealand that could be a substantial guide;
4. The construction industry strongly supports the initiatives in modernizing legal documents affecting the construction industry; and

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35 Accessible from: http://www.pco.parliament.govt.nz/corporatefile/summary.shtml Document downloadable directly from http://beehive.govt.nz/sites/all/files/PCO.pdf

36 http://beehive.govt.nz/sites/all/files/PCO.pdf, p 31

37 *Proposal for a Malaysian Construction Industry Payment and Adjudication Act.* A report for industry and government. Published by the Construction Industry Development Board Malaysia. August 2008, p 4

5. Although Acts of Parliament may be in two languages, the bulk of communication in the construction industry in Malaysia in the private sector and nearly all private dispute resolution such as those done under arbitrations are conducted in English. Traditional drafting style will only hinder typical primary users of such an Act because English is usually not their mother-tongue or first language.

Malaysia has a vision of becoming a fully developed country by 2020. It is becoming increasingly clear that more developed countries have advanced in the area of communication (legislation included) – moving towards plain language. Plain language drafting is consistent with a mark of maturity and developments in more advanced countries.

(vi) Communicating the adjudicator's decision

As stated earlier, among the unique provisions in all the nine Acts is the mandated fixed timescale within which an adjudicator must make a decision or determination. How such a decision or determination is communicated is thus important.

The Queensland Act

S 26(3) of the Queensland Act provides clearly:

> **26 Adjudicator's decision**
>
> (3) The adjudicator's decision must—
>
> (a) be in writing; and
>
> (b) include the reasons for the decision, unless the claimant and the respondent have both asked the adjudicator not to include the reasons in the decision.

Putting aside section 26(3)(b) for now, *'The adjudicator's decision must be in writing'* as provided in section 26(3)(a) is short, easy to read, easy to understand, and plainly suggests the necessity for the adjudicator's decision to be in writing. It also adopts a gender-neutral drafting style. Contrast this with the following:

The Singapore Act

S 16(8) reads: *'The determination of an adjudicator on any adjudication application shall be in writing'*. While this can be understood, it is longer and uses words that have multiple meanings (determination and shall). It is written in passive style that is not as direct as the active style. It is also misplaced under section 16 headed 'Commencement of adjudication and adjudication procedures' instead of being placed under section 17 – 'Determination of adjudicator'. Placing content under appropriate headings helps users find what they are looking for more quickly.

The UK Act

The Act itself only provides for the adjudicator's decision to be 'reached within 28

days'[38] and that the decision is binding.[39]

It is then left up to any of the adjudication rules and procedures to specify how such a decision is to be communicated. The default mechanism, the Scheme for Construction Contracts (England and Wales) (and the Scottish version) Regulations 1998, provides in section 19(3), Part I – Adjudication:

> As soon as possible after he has reached a decision, the adjudicator shall deliver a copy of that decision to each of the parties to the contract.

The Schemes do not expressly provide for the adjudicator's decision to be in writing. The requirement to be in writing is then left to be implied given that a copy of the decision is to be delivered to each party to the contract. And although 'he' can also mean 'she' and possibly even 'it', it is not consistent with modern drafting style. See our comments under 'gender-neutral drafting' later in this paper.

The New Zealand Act

The New Zealand Act starts off well with possibilities for the adjudicator's determination to be in a 'prescribed form (if any)'[40] failing which it 'must be in writing.'[41] But unlike the other Acts, it curiously then negates all the mandated requirements in section 47(1) by providing in section 47(2):

> A failure to comply with subsection (1) does not affect the validity of an adjudicator's determination.

This presumably means as long as a determination is made, it remains valid, even if the form is not complied with. We can only presume by implication that the determination must still be communicated in writing – in some form or other. It would seem unrealistic for an oral determination to be held to be valid.

(vii) Sentence structure—average sentence length

It is well known among those promoting plain language drafting that it helps the reader if the average words per sentence is kept to a comfortable level. Long sentences make it more difficult for the readers. Berry suggests:

[38] section 108(2)(c)

[39] section 108(3)

[40] section 47(1)(a)

[41] section 47(1)(b)(i)

> One of the major reasons why readers of legislative documents have difficulty in understanding them is that long and complex sentence structures overtax the cognitive capacity of the short-term memory.[42]

Given that most legislative counsel do use sections, subsections, and paragraphs extensively, much of modern legislation nowadays does not suffer from excessively long sentences. Further, nowadays, punctuation is also used extensively.

But there creeps in the occasional provision that makes the mind wonder if the legislative counsel really knew what they were expected to provide from the stakeholders of the Act. Even if the provision is technically complex, perhaps it may have been better for the legislative counsel to revert to the stakeholders to ask them to simplify even the technical concepts they were intending in an Act.

Consider this example from the Singapore Act:

S 10(1) and (4) read—

Payment claims

10(1) A claimant may serve one payment claim in respect of a progress payment on —

(a) one or more other persons who, under the contract concerned, is or may be liable to make the payment; or

(b) such other person as specified in or identified in accordance with the terms of the contract for this purpose.

(4) Nothing in subsection (1) shall prevent the claimant from including, in a payment claim in which a respondent is named, an amount that was the subject of a previous payment claim served in relation to the same contract which has not been paid by the respondent if, and only if, the first-mentioned payment claim is served within 6 years after the construction work to which the amount in the second-mentioned payment claim relates was last carried out, or the goods or services to which the amount in the second-mentioned payment claim relates were last supplied, as the case may be.

Section 10(4) is a complex provision. It does not help that the complex provision is drafted in a single 100-word sentence. It goes against most modern legal drafting guidelines. section 10(4) is hard to understand even after several readings. Most primary users would give up after a couple of attempts.

A re-draft should be able to provide greater clarity. If not, then perhaps in this instance, Lord Donaldson MR's advice in the Merkur case should be heeded:

[42] Berry, D, *Reducing The Complexity of Legislative Sentences* in The Loophole - Journal of the Commonwealth Association of Legislative Counsel, January 2009, p 38

'When formulating policy, ministers, of whatever political persuasion, should at all times be asking themselves and asking parliamentary counsel: Is this concept too refined to be capable of expression in basic English? If so, is there some way in which we can modify the policy so that it can be so expressed.'[43]

Whilst it is not necessary to adopt such a stand on every occasion, it highlights one of the benefits of adopting plain language drafting guidelines – it promotes clarity of thought and reveals convoluted thoughts.

(viii) Sentence structure – using possessives through the apostrophe and active v passive sentence structures

Using the apostrophe enables possessive drafting, which results in a shorter sentence. And generally sentences in the active voice are easier to read and understand than passive voice. They are also usually shorter. Berry for example, when writing on reducing complexity of legislative drafting discusses the use of active and passive sentence structures then concludes:

> In sum, the research suggests that legislative counsel should, as a general rule, draft legislative documents in the active voice. Writing experts and research studies both support the general value of active sentences for understanding.[44]

'Adjudicator's decision' or 'adjudicator's determination' or even 'adjudication determination' is shorter, easier and quicker to read, is more efficient and uses fewer words than 'decision of the adjudicator' or 'determination of the adjudicator'. Two words instead of four!

The Office of Parliamentary Counsel Australia's Plain English Manual Chapter 4, paragraph 79 instructs using examples:

> don't say "of the Minister", "of the Commissioner", "of the Corporation"; say "the Minister's", "the Commissioner's", "the Corporation's".

Some Acts consistently use the possessive form. For example: the NSW Act uses only 'adjudicator's determination'; the Queensland Act refers to only 'adjudicator's decision'; the New Zealand Act refers to 'adjudicator's determination' 19 times and on two occasions 'adjudication determination'.

The NT Act also uses the possessive form using the apostrophe with two exceptions. The two exceptions are:

> Section 48(3) 'decision or determination of the adjudicator'. Instead of 'adjudicator's decision or determination'.

And perhaps more acceptably:

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43 *Merkur Island Shipping Corp v Laughton* [1983] AC 570 at 595

44 Berry, D, *Reducing The Complexity of Legislative Sentences* in The Loophole - Journal of the Commonwealth Association of Legislative Counsel, January 2009, p 68

> Section 62(2): ' … decision of the Registrar or appointed adjudicator.' Instead of ' … Registrar's or appointed adjudicator's decision.'

The WA Act generally uses the possessive apostrophe with the occasional decision or determination of the adjudicator.

The Singapore Act combines 'adjudication determination' (21 times) with 'determination of the adjudicator' (twice - once each in section 2 and section 18(2)) and 'adjudicator's determination' (four times).

UK Act: section 108(3) refers to 'decision of the adjudicator' twice but section 108(6) refers to the 'adjudicator's decision'. The Scheme for Construction Contracts Regulations (England and Wales) refers to 'decision of the adjudicator' in section 21 and section 23(2), although the heading just before section 20 reads 'Adjudicator's decision'.

Drafting using the possessive is shorter and clearer. More importantly, there must be consistency in drafting style. There is no reason not to achieve consistency in drafting style within an Act.

(ix) Gender-neutral drafting

Gender-neutral drafting has been the practice in some jurisdictions for a long time.

Chapter 3 of the New Zealand's Parliamentary Counsel's Office's in-house Drafting Manual headed 'Principles of Clear Drafting' suggests that they have been drafting in gender-neutral language for over 20 years.[45] It is so deeply ingrained that although the New Zealand Interpretation Act 1924 provided for the masculine gender to include the feminine, the New Zealand Interpretation Act 1999 now provides this only for Acts passed earlier than 1 November 1999. Gender-neutral drafting is now taken to be the norm.

The other well established gender-neutral drafting approach is found in Chapter 4 paragraph 76 of the Office of Parliamentary Counsel Australia's Plain English Manual.

> 76. It's Office policy to use gender-inclusive language. However, this can sometimes lead to cumbersome expressions like "he, she or it", "him, her or it" and "his, her or its". Try to avoid these by rearranging the sentence so as to do without the pronouns altogether.

The UK, IoM, and Singapore Acts are not drafted in gender-neutral language. However it appears, legislative counsel in the UK may be catching up. See the Drafting Techniques Group Paper 23 (final): December 2008 headed '*Gender-neutral drafting*

[45] Accessible at http://www.pco.parliament.govt.nz/clientfile/drafting/draftingmanual.shtml

techniques'.[46]

The documents start:

> 'The Office of the Parliamentary Counsel has the following policy on gender-neutral drafting: Government Bills are to take a form which achieves gender-neutral drafting so far as it is practicable, at no more than a reasonable cost to brevity or intelligibility. It is recognised that in practice a flexible approach to this change will need to be adopted (for example, in at least some of the cases where existing legislation is being amended) …'

There are various techniques to implement gender-neutral drafting. Among them include repeating the noun, redrafting by omitting the pronoun, drafting in plural, or even drafting in passive form. Whilst using both the masculine and feminine pronouns (he or she, his or her) is also classified as gender-neutral drafting, it is somewhat cumbersome. Thus whilst the WA, NSW, and Victoria Acts do achieve gender-neutral drafting using 'he or she' and 'his or her' (but never 'she or he' or 'her or his'), other Acts (like the NZ, Qld, and NT Acts) produce a less cumbersome outcome using the other techniques of gender-neutral drafting.

Punctuation

There is little doubt that punctuation is important to reflect what the words mean. Take this breather titled *'The importance of punctuation in drafting'* found on page 25 of the June 2000 issue of *The Loophole*:

> An English professor wrote the words, 'a woman without her man is nothing' on the blackboard and directed the students to punctuate it correctly. The men wrote: " A woman, without her man, is nothing." The women wrote: " A woman: without her, man is nothing." So punctuation is everything!
>
> *Anon*

Encouragingly, there appears to be a fair degree of consistency in punctuation style ***within*** each Act although there are differences ***among*** them. Differences among Acts are acceptable but inconsistencies within an Act would not be acceptable.

Empirical evidence—Preliminary findings of survey results on the NZ Act

As part of a PhD research on adjudication at the University of Auckland, a questionnaire was sent out to all adjudicators listed on all the three Adjudicator Nominating Authorities (ANAs) in New Zealand. The questionnaire had the mandatory

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[46] Drafting techniques accessible at: http://www.parliamentary-counsel.gov.uk/drafting_techniques.aspx and the document on 'Gender-Neutral Drafting' accessible at http://www.parliamentary-counsel.gov.uk/media/15314/gnd.pdf

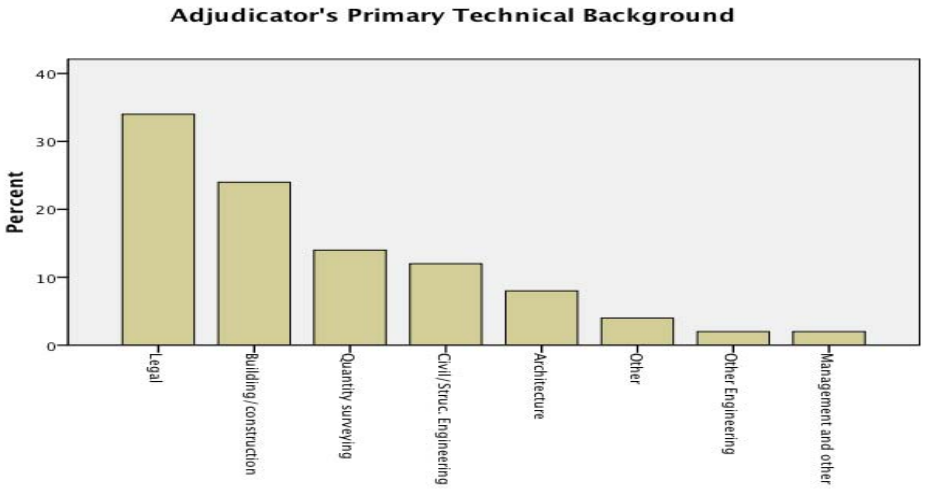
prior approval of the University of Auckland, which has strict ethics committee approval requirements. Among the many assurances given to participants to the questionnaire was that no name will be associated with any one specific response.

The total population of adjudicators listed on the three ANAs in 2008 was 71. Fifty two adjudicators responded. Given the circumstances, the response rate of just over 73% is high. The data gathered is estimated to have captured over 80% of all adjudications held in New Zealand from when the Act came into force on 1 April 2003. Preliminary results from the questionnaire indicate adjudication under the New Zealand Act is successfully achieving at least one of the stated objectives under Section 3 (b) of the Act: '*to provide for the speedy resolution of disputes arising under a construction contract*'.[47]

The full analysis of the data and results will be completed and reported later this year in a major report for industry and government titled: '*Adjudication under the New Zealand Construction Contracts Act 2002 – The First Five Years*.' While the questionnaire covered mainly details on the adjudication process, a few questions dealt with the adjudicator's views on the effectiveness of the adjudication provisions of the New Zealand Act and their views on ease of understanding the New Zealand Act. Here are some preliminary results and brief discussions:

(a) Adjudicators' primary technical background

The adjudicators were asked what was their *main* technical area. Their responses are shown by reference to the following bar chart:

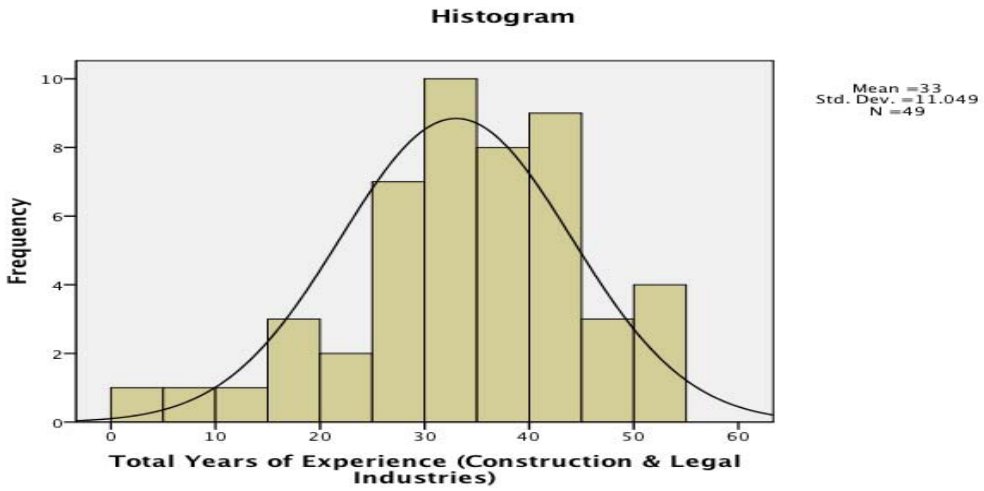


[47] Ameer Ali, N A N and Wilkinson, S *Analysis of the adjudication process and determinations made under the New Zealand Construction Contracts Act 2002.* Presentation at the Asia-Oceania Top University League on Engineering (AOTULE) Postgraduate Conference. Auckland. November 2008

The results show that at least a third were legally qualified and about a third had a primarily legal background. Nearly all the rest had some construction related technical background.

(b) Adjudicator's years of experience

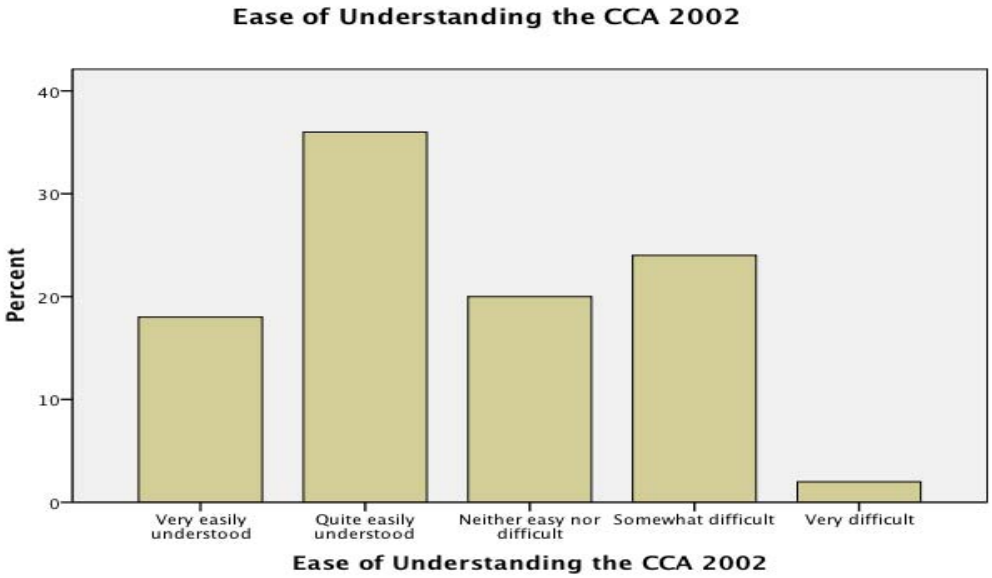
The adjudicators were asked to state the total number of years of experience they had, whether in the construction industry or in law.



The results show that the adjudicators are generally fairly experienced with the statistical mean at 33 years. Their areas of experience are either in law or construction or both.

(c) Adjudicators' views on ease of understanding the NZ Act

The adjudicators were, towards the end of the fairly extensive questionnaire, asked about their views on their ease of understanding of the NZ Act. They had a choice of classifying them as 'very easily understood', 'quite easily understood', 'neither easy nor difficult', 'somewhat difficult', and 'very difficult.' Here is a summary of their responses presented in bar chart, followed by a table showing a breakdown in percentages:



Ease of understanding New Zealand Construction Contracts Act 2002

Ease of understanding	*Percentage (%)*	*Cumulative percentage (%)*
Very easily understood	18.0	18.0
Quite easily understood	36.0	54.0
Neither easy nor difficult	20.0	74.0
Somewhat difficult	24.0	98.0
Very difficult	2.0	100.0

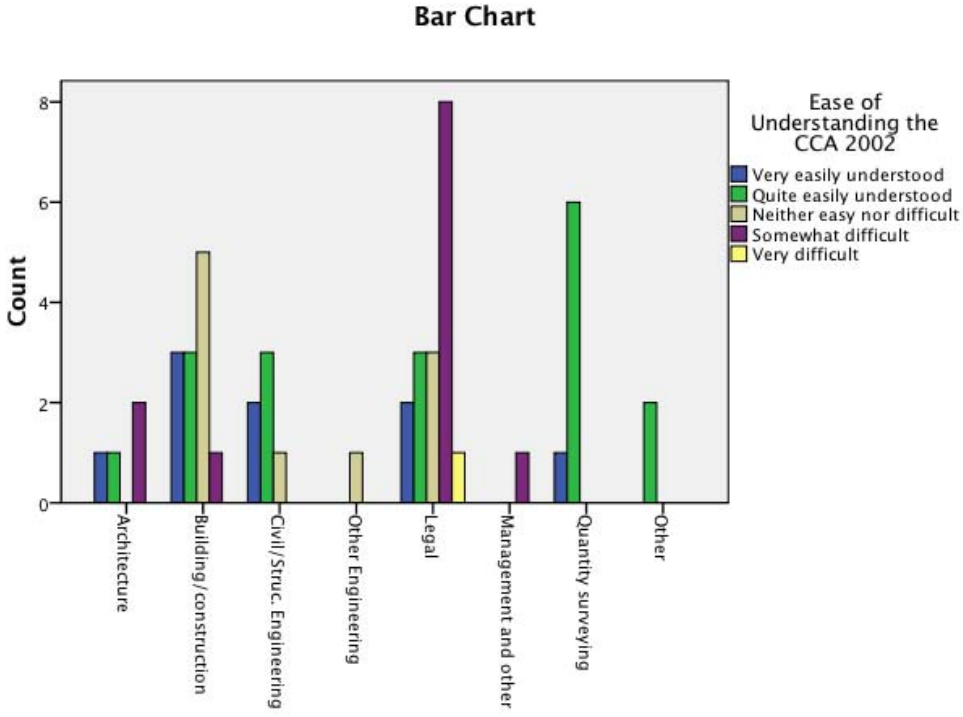
Of the respondents, 54% thought the NZ Act was either very easy to understand or quite easy to understand, and 28% thought it was neither easy nor difficult. Together that adds up to 74%.

This is somewhat surprising, because it means just over a quarter (26%) thought the NZ Act was either somewhat difficult or very difficult. These are from the pool of adjudicators with a mean of 33 years of experience. And this is despite the NZ Act being generally drafted adopting plain English guidelines.

Further investigation using statistical cross-tabulation was done to look at the relationship between—

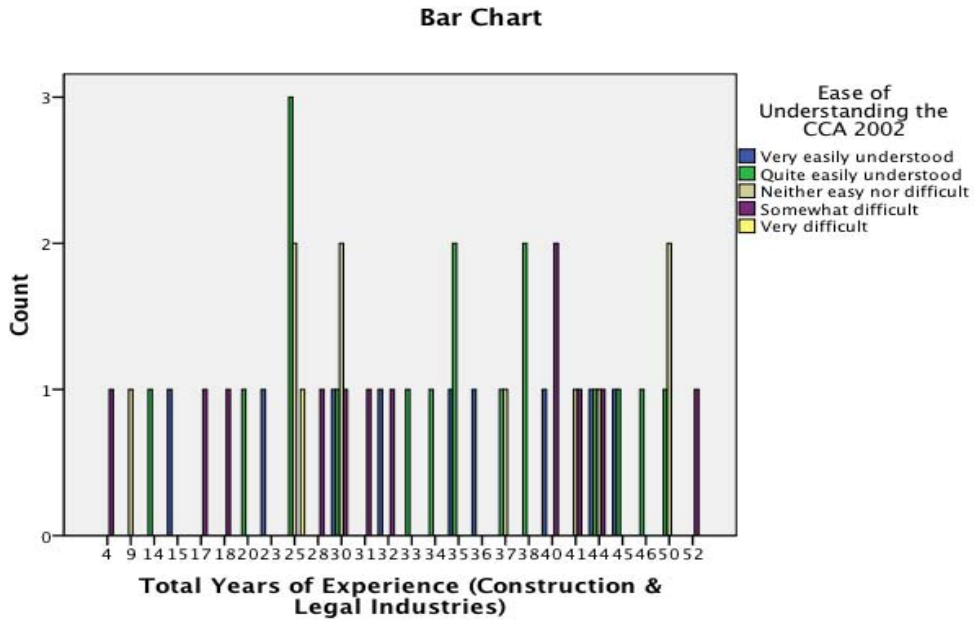
- the adjudicators' years of experience and their views on ease of understanding the NZ Act; and
- the adjudicators' primary background and their views on ease of understanding the NZ Act.

The results for the first (cross-tabulation between the adjudicators' years of experience and their views on ease of understanding the NZ Act) are shown in bar-chart format below:



There does not appear to be any clear and consistent correlation between the number of years of experience the adjudicators had and their views on the ease of understanding the Act.

Next we looked at the relationship between the adjudicators' primary area of background and their views on ease of understanding the Act. Here are the results in bar-chart format:



Here we can see some correlation between the adjudicators' technical background and their views on ease of understanding the Act. Of the total number of adjudicators who thought the NZ Act was 'somewhat difficult' or 'difficult', legally qualified adjudicators were more than twice the number compared to those with a technical background in construction related areas.

This appears to show that the NZ Act deals with fairly technical issues that some lawyers (presumably those with limited construction disputes background) find difficult to understand. More than 50% of lawyers that responded to the questionnaire found the Act either difficult or very difficult to understand. It also shows the Act deals with technical issues that adjudicators with a technical background in construction related areas are comfortable with. Nearly all those with construction, engineering, or quantity surveying background fell within the category of those who found the Act very easy, quite easy, or neither easy nor difficult to understand. A large part of the Act deals with payment issues. It is thus not surprising that all the adjudicators with a background in quantity surveying found the Act either very easy to understand or quite easy to understand.

It would be interesting to find out if these same adjudicators with quantity surveying backgrounds and adjudicators within the Singapore jurisdiction would also have found the following provision on payment claims in the Singapore Act 'very easily understood' or 'quite easily understood'. The drafting style of the 100-word sentence in section 10(4) does seem complex.

Payment claims

10. —(1) A claimant may serve one payment claim in respect of a progress payment on —

(a) one or more other persons who, under the contract concerned, is or may be liable to make the payment; or

(b) such other person as specified in or identified in accordance with the terms of the contract for this purpose.

(2) A payment claim shall be served —

(a) at such time as specified in or determined in accordance with the terms of the contract; or

(b) where the contract does not contain such provision, at such time as may be prescribed.

(3) A payment claim —

(a) shall state the claimed amount, calculated by reference to the period to which the payment claim relates; and

(b) shall be made in such form and manner, and contain such other information or be accompanied by such documents, as may be prescribed.

(4) *Nothing in subsection (1) shall prevent the claimant from including, in a payment claim in which a respondent is named, an amount that was the subject of a previous payment claim served in relation to the same contract which has not been paid by the respondent if, and only if, the first-mentioned payment claim is served within 6 years after the construction work to which the amount in the second-mentioned payment claim relates was last carried out, or the goods or services to which the amount in the second-mentioned payment claim relates were last supplied, as the case may be.*

Contrast that with the equivalent section on payment claims under the New Zealand Act:

20 Payment claims

(1) A payee may serve a payment claim on the payer for each progress payment,-

(a) if the contract provides for the matter, at the end of the relevant period that is specified in, or is determined in accordance with the terms of, the contract; or

(b) if the contract does not provide for the matter, at the end of the relevant period referred to in section 17(2).

(2) A payment claim must—

(a) be in writing; and

(b) contain sufficient details to identify the construction contract to which the progress payment relates; and

(c) identify the construction work and the relevant period to which the progress payment relates; and

(d) indicate a claimed amount and the due date for payment; and

(e) indicate the manner in which the payee calculated the claimed amount; and

(f) state that it is made under this Act.

(3) If a payment claim is served on a residential occupier, it must be accompanied by—

(a) an outline of the process for responding to that claim; and

(b) an explanation of the consequences of—

(i) not responding to a payment claim; and

(ii) not paying the claimed amount, or the scheduled amount, in full (whichever is applicable).

(4) The matters referred to in subsection (3)(a) and (b) must—

(a) be in writing; and

(b) be in the prescribed form (if any).

Improving the level of understanding of the New Zealand Act

The Act is easily understood or quite easily understood by all quantity surveyors. But quantity surveyors only make up about 12% of the total adjudicators in New Zealand. More than 50% of adjudicators in the legal field thought the New Zealand Act was either difficult or very difficult. Putting aside other questions relating to the *way the adjudicators have* responded *to the questionnaire*, for example, could it be that lawyers tend to answer more truthfully than construction technical professionals or that lawyers tend to be more conservative in their responses or that lawyers tend to 'read more into words in legislation than others'? However, the following questions remain:

- Could the drafting of the New Zealand Act be improved further so that more adjudicators, irrespective of their technical background, could understand the Act either easily or quite easily?
- If yes, would the recently amended current version of the Parliamentary Counsel's drafting guidelines result in an even more user-friendly Act than the current Act which was based on the then existing drafting manual?

- As 26% of all qualified adjudicators and over 50% of adjudicators with legal background found the Act difficult or very difficult to understand, what are the chances of a larger proportion of other ***primary*** users of the Act finding it difficult or very difficult? Other primary users here include typical parties involved in the adjudication process including contractors, subcontractors, developers, and their consultants involved in construction contracts.
- As over 50% of adjudicators with a legal background found the Act either difficult or very difficult to understand, what are the chances others with legal background might also find the Act difficult or very difficult to understand. Others here includes lawyers who are retained to advise the parties in dispute, other legislative counsel whether within the Parliamentary Counsel Office of New Zealand or elsewhere, and very importantly, judges – who make judgments based on their understanding of the Act.
- If a fair number of these 'first instance' decision-making adjudicators (who presumably would have done some training on adjudication and the provisions of the relevant Act) find the Act fairly difficult or difficult, could it be possible that some judges might also find them difficult?

Given the relatively clear drafting style of the New Zealand Act compared to some of the other Acts such as the Singapore Act, part of the overall solution to improve the level of understanding of the Act might lie in creating an enhanced system of accrediting adjudicators and possibly mandatory continuing professional development requirements. See for example the outline accreditation prerequisites suggested for the proposed Malaysian Act.[48]

A simplistic approach[49] to exclude adjudicators with a legal background, or to exclude legal representation at adjudication conferences (meetings) during an adjudication conference, would not do justice and would not be accepted by all professionals.

Adjudication (unlike mediation) is a rights-based dispute resolution method. Further, even though some of the Acts insist on the disputes being adjudicated 'informally', it is unjust to exclude any one profession from representing the parties to a dispute under a rights-based dispute resolution system such as adjudication. It would be unjust to single out and totally exclude any one profession.

Some of the Acts like the NSW, Victoria, and Queensland Acts do not expressly

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48 Ameer Ali, N A N, *A few thoughts on the Proposed Malaysian Construction Industry Payment and Adjudication Act*, Proceedings of the Adjudication Society's Sixth Annual Conference on International Adjudication and Dispute Resolution, Adjudication Society UK, London, November 2007, pp 10-11

49 Such the exclusion of legal representation under the NSW, Victoria, and Queensland Acts.

provide for the adjudicator to act impartially or fairly. However, in a rights-based adjudication system, the duty to Act impartially or fairly would be assumed. All the other Acts expressly provide for the adjudicator to act 'fairly'[50] or 'impartially'[51] and some make it clear the adjudicator must act according to the 'principles of natural justice'[52].

Even if the reason for excluding any one profession is that they tend to cause 'unnecessary procedural problems or delays', this cannot be assumed to be the case every time, nor can it be assumed that other professionals are not capable of causing 'unnecessary procedural problems or delays'.

In any case these findings point to ***two*** issues that must be considered seriously:

1. Payment and adjudication Acts must be drafted in language that is as plain as possible, without compromising on sensible legal content; and
2. Serious attention must be given to the training of adjudicators.[53] [54]

Opposition to plain language drafting

Despite many developments moving towards plain language legislative drafting –

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[50] For example section 26 of the NT Act where the object of an adjudication of a payment dispute is stated to be 'to determine the dispute fairly and as rapidly, informally and inexpensively as possible' and section 30 of the WA Act which is worded similarly 'to determine the dispute fairly and as quickly, informally and inexpensively as possible.' The only difference is the replacement of 'rapidly' with 'quickly.' See also section 16(3)(a) of the Singapore Act requiring the adjudicator to 'act independently, impartially and in a timely manner.'

[51] For example section 108(2)(e) of the UK Act and section 5(2)(e) of the IoM Act which are identical:

> The contract shall—
>
> (e) impose a duty on the adjudicator to act impartially.

The UK Schemes, both England and Wales version and the Scottish version, also provide in section **12:**

> The adjudicator shall -
>
> (a) act impartially in carrying out his duties and shall do so in accordance with any relevant terms of the contract and shall reach his decision in accordance with the applicable law in relation to the contract.

See also section 41(a) of the New Zealand Act and section 16(3)(a) of the Singapore Act. The provisions in both acts are identical. They mandate the adjudicator to *'act independently, impartially, and in a timely manner'.*

[52] For example, see section 41(c) of the New Zealand Act and section 16(3)(c) of the Singapore Act which both require the adjudicator to 'comply with the principles of natural justice.'

[53] Ameer Ali, N A N, *A few thoughts on the Proposed Malaysian Construction Industry Payment and Adjudication Act*, Proceedings of the Adjudication Society's Sixth Annual Conference on International Adjudication and Dispute Resolution, Adjudication Society UK, London, November 2007, pp 10-11

[54] Ameer Ali, NAN, *'One step at a time'*, Construction Journal, November/December 2007, RICS, p 18

particularly in developed countries – some critics of modern plain legal drafting suggest another approach. For example, Brian Hunt, from the Office of the Parliamentary Counsel in Ireland suggests:

> 'As I see it, the real answer to inaccessible legislation is good quality, plain language explanatory materials - making plain language in legislative drafting - just a laudable ideal.'[55]

Although he then implies it might be possible to simplify legislative drafting when writing for certain types of audience, he is firm about one assumption. He assumes that ordinary people don't read legislation:

> 'If it were shown that legislation was widely read by ordinary citizens, I have no doubt that the style of drafting would be altered so as to take account of that audience. However, in discussing plain language in legislative drafting, I fear that we are effectively talking in the dark. Those who advocate the use of plain language in legislative drafting are making one very large – and I say, unwise – assumption. That assumption is that members of the public are interested in reading raw legislation. However, this premise is less than well established. In the absence of substantive evidence that such public interest in legislation exists, I believe that the arguments in favour of plain language legislative drafting are very weak indeed.'[56]

What Brian Hunt says may be true of some types of legislation, but it is not true of legislation that directly affects the public or a particular sector of the public such as legislation discussed in this paper that affects those in the construction industry.

Given that some of the Acts discussed in this paper even prevent legal representation at adjudication conferences (in the Acts meaning meetings) during an adjudication57 it may be assumed that lawyers might be working behind the scenes. Alternatively, the assumption is that users would be able to deal with provisions in the Acts themselves or with the help of advisers – whether legally qualified or not.

Section 21(4A) of the NSW Act reads:

> If any such conference is called, it is to be conducted informally and the parties are not entitled to any legal representation.

Section 25(5) of the Queensland Act reads:

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55 Brian Hunt, *'Plain Language in Legislative Drafting: An Achievable Objective or a Laudable Ideal?'*, Fourth Biennial Conference of the Plain Language Association InterNational (PLAIN), Toronto (27 September 2002), page 17; downloadable from www.plainlanguagenetwork.org/conferences

56 Brian Hunt, *'Plain Language in Legislative Drafting: An Achievable Objective or a Laudable Ideal?'*, Fourth Biennial Conference of the Plain Language Association InterNational (PLAIN), Toronto (27 September 2002), page 4; downloadable from www.plainlanguagenetwork.org/conferences

57 For example the NSW, Qld, and Vic Acts

> 'If a conference is called, it must be conducted informally and the parties are not entitled to any legal representation.'

Section 22(5A) of the Victoria Act reads:

> Any conference called under subsection (5)(c) is to be conducted informally and the parties are not entitled to legal representation unless this is permitted by the adjudicator.

On interpretation of Acts, Hunt also suggests:

> 'When a person encounters a difficulty involving a statute, what is so wrong with him/her taking it to an expert in the field – a lawyer?'[58]

Whilst Hunt's advice may be good advice when dealing with ***some*** acts that are rarely referred to or used by lay people, the primary users of the nine payment and adjudication Acts referred to in this paper are mainly non-lawyers. And given the relatively short time scales provided in most of these Acts (typically stated in days), and the consequences of failing to meet these short time scales, a clear, highly readable and efficient provision in both technical content and language is essential.

A new 'plea for sanity'

Since the mid-90s, the phrase 'A plea for sanity' is famously known within the construction industry when referring to the collection of papers from leading construction lawyers and experts opposing the reform proposals for the construction industry including the reform through the then proposed UK Act. Their concerns were compiled in a book published in 1997 called: *Construction Contract Reform: A Plea For Sanity*[59]. Their plea was largely unheeded and legislative counsel pressed ahead and the UK Act was born. Over a decade later, given that the introduction of the reforms (particularly the introduction of statutory adjudication) has been 'revolutionary' and a 'runaway success', it is time to look at a new plea for sanity – a plea for legislation to be drafted in language that its primary users can easily understand – ideally on first reading. A plea that will lead to greater efficiency to ensure the current success is developed further – in the UK, in other Commonwealth jurisdictions, and beyond.

There has been a call for the proposed Malaysian Act on payment and adjudication to be drafted in plain language. We hope this paper persuades that modern plain language legislation can be achieved without compromising the effectiveness of legislative

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58 Brian Hunt, 'Plain Language in Legislative Drafting: An Achievable Objective or a Laudable Ideal?', Fourth Biennial Conference of the Plain Language Association International (PLAIN), Toronto (27 September 2002), page 13; downloadable from www.plainlanguagenetwork.org/conferences

59 Contemporary Issues in Construction Law Volume II - Construction Contract Reform: A Plea for Sanity, Edited by Uff, J QC, Construction Law Press, London, 1997

drafting. A plain language approach to legislative drafting here is particularly important given that the Act envisages the users to act within absolute and short deadlines. The Acts, supported by case law, show that in many instances a failure on the timing requirements has been fatal to the whole process of statutory adjudication. Thus efficiency in understanding the provisions of the Act is essential.

A similar plea has been made for construction contracts to be drafted in language that its primary users can better understand.60 The primary users of construction contracts are the parties to the contract and the construction professionals who act as contract administrators over the duration of the construction project – typically over months and often years.

Combining plain language construction contracts and legislation affecting the construction industry will help the construction industry focus on its core business instead of the peripheral dispute resolution industry.

Lessons from the construction industry

The construction industries around the Commonwealth jurisdictions are historically known to be fragmented. This is not surprising, given the multitude of players involved in a typical construction project. This results in a proliferation of what are supposed to be 'standard' sets of terms of construction contracts published for use in the construction industry. There are hundreds of such supposedly 'standard' terms of construction contracts within and throughout the Commonwealth construction industries. The large number of court cases on construction contracts is helpful in that many of them serve as a guide on how ***not*** to do certain things or draft in certain ways.

In 2006, (yet another) set of 'model' terms of construction contract for subcontract work was drafted and deliberated extensively within the Malaysian construction industry. But this contract was unique in several ways , with the most unusual two features being—

(1) It was drafted in modern plain language.

(2) It was structured in such a way that those adopting project management within the construction industry could comfortably relate to. The contract had all the clauses on time grouped together, all the clauses relating to financial issues grouped together, and those relating to quality issues together. In the beginning were the general obligations clauses, and towards the end the termination and dispute resolution clauses.

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60 Ameer Ali, N A N, Applying Modern Drafting Guidelines in Construction Contracts Incorporating A Case Study - 'The CICC Model Terms Of Construction Contract For Subcontract Work 2007'. Conference Proceedings of the International Conference on Modern Legal Drafting, Kuala Lumpur, July 2008

In September 2006, a final agreed version was published.[61] It had the unprecedented endorsement of 14 construction industry related bodies – which was nearly all relevant construction industry related bodies – led by the Construction Industry Development Board. This was attributed partly to the unique features of the contract – a contract that could be easily understood and one that was clearly structured. The absence of an existing similar contract for subcontracts helped.

The translation of the contract into the Malay language took much shorter time than planned because of the plain language style adopted.

In New Zealand, there had been initiatives for standardizing subcontracts through Standards New Zealand. A short article was published in the New Zealand Building Subcontractors Federation's newsletter sharing the Malaysian experience. The following two notable statements in the article may provide a lesson here:

- The success in getting consensus of the concepts of the model terms was a result of persuasion, merit, and compromise - not through any single construction industry institution muscle. A key factor that assisted this achievement is the logical appeal of the modern drafting structure and style.[62]
- When a contract is drafted in clear plain language the possibility of compromise among various stakeholders is greater. This is because risk that is clearly allocated and drafted in plain language enables the parties to price for the risks.[63]

Achieving consensus within the construction industry was historically thought unachievable. It now appears that a clear drafting structure and plain language style can help in the successful development of a construction contract that is agreeable by much of industry.

Challenge for legislative counsel

There are already drafting manuals emphasizing on modern drafting in several jurisdictions. But there still remain other jurisdictions that have continued drafting in traditional style. Part of the reason might be because they have little time to develop their own more modern drafting style manual.

The modern plain language drafting style promotes efficiency and serves the users

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61 Construction Industry Development Board Malaysia, *CICC Model Terms of Construction Contract for Subcontract Work*. Published by the Construction Industry Development Board, Malaysia. September 2006. Revised reprint May 2007.

62 Ameer Ali, N A N, *Unique Plain Language Contract A Success.* Newsletter of the New Zealand Building Subcontractors Federation, May 2008, p 15

63 Ameer Ali, N A N, *Unique Plain Language Contract A Success.* Newsletter of the New Zealand Building Subcontractors Federation, May 2008, p 16

better. The ***new plea for sanity*** is a plea for legislation to be drafted in language that its primary users can easily understand. If this plea makes good sense, then here is a challenge for CALC and its members:

> *Develop a single set of agreed standardised core legislative drafting style guidelines*

There could then be variances attached to these core style guidelines that might be necessary for different jurisdictions. Among the benefits of such standardization is the possibility of sharing drafting resources among members of the Commonwealth jurisdictions. Within the construction industry, there would be great efficiency that can be gained if new Acts on payment and adjudication were to be drafted in other jurisdictions with the assistance of drafters of the existing Acts. There could also be drafting specializations across Commonwealth jurisdictions. The chances of legislation being passed to outlaw 'freon' coated bullets within the Commonwealth may then well be reduced![64]

If the thought of achieving such standardization is considered unachievable, take lessons from the construction industry. The construction industry is historically notorious for being fragmented – yet a plain language approach to construction contract drafting brought industry together.

Imagine the various Australian jurisdictions and New Zealand having a similar set of drafting guidelines. And one that is similar cutting across Asia, Africa through the Middle East, Europe through to the UK and beyond – to America.

A dream alone may go away with a mere puff. Hard work alone may be just time passing by. A vision – combining a dream and hard work – however impossible it might seem, is achievable. Research shows a goal with a deadline increases the likelihood of being achieved ten-fold. Perhaps CALC's 30th anniversary would see a set of common drafting guidelines. Given the excellent quality of some of the existing drafting achievable. We might then see a single set of legislative drafting style

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64 See 'Freon bullets—You must be joking?'; *The Loophole*, 2000, June, p. 70:

> Recently the Oklahoma legislature passed a Bill outlawing "freon" coated bullets. Perhaps they were worried about shooting a hole through the ozone layer! It seems that the members of the legislature were unaware that freon, being a gas, would tend to evaporate awfully quickly, if applied to a bullet! That is of course unless you happen to live in the Antarctic.
>
> One John Stolz, a Texan, was working for the Oklahoma State Legislature at the time. He was also a member of a local gun club so presumably knew a lot about bullets. While working for that legislature's legislative issues committee, he pointed out to some of the legislators that freon was a gas. However, by then the Bill had gone through the committee. Apparently the legislative counsel had confused freon and teflon! Despite having the error pointed out to them, a majority of the Oklahoma Legislature voted for the Bill and the Governor of the State signed it into law.

guideline launched at the next CALC conference in 2011.