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Editor's notes

This edition of *The Loophole* contains four of the papers delivered at the very successful CALC conference held in Hong Kong from 1 to 4 April, 2009. I was privileged to attend the conference and listen to all presentations, including these. The theme of the conference was a question that should be asked whenever any provision of law is being drafted: "Whose Law is It?"

The papers come from four disparate and yet relevant interdisciplinary sources, underpinning the different audiences to whom legislation is addressed, as well as the diverse expertise of persons who analyze what we draft. The articles come from: a distinguished visiting professor of English at the City University of Hong Kong; a senior legislative counsel from Australia; a quantity surveyor with an array of interdisciplinary qualifications and interests, whose paper was prepared with an Associate Professor from the Department of Civil and Environmental Engineering, University of Auckland, New Zealand; and an experienced legislator from the Legislative Council in Hong Kong. This diversity reflects the continuing policy of CALC to remain relevant to other disciplines and the public.

Professor Bhatia discusses the role of the legislative counsel in relation to the executive, legislature and judiciary, and to the citizen. Citing the writings of both lawyers and non-lawyers, and his own published works, he gives a highly analytical insight into the issues that we grapple with everyday as legislative counsel. The paper includes practical illustrations.

The second paper is by Daniel Lovric. It discusses the topic of principles-based drafting, which he divides into two styles: top-down drafting and ground-up drafting. I personally found the analysis very useful especially when you have to draft legislation from scratch as opposed to using - or slightly improving upon - a precedent.

N A M Ameer Ali and Dr S Wilkinson, in a paper presented by Naseem, provide a useful synthesis and analysis of styles used to draft a number of pieces of legislation relating to the building industry in various jurisdictions in Australia, as well as similar legislation from Malaysia and New Zealand. The paper includes at least one survey carried out among users of some of the statutes. These kinds of surveys are of course sometimes used in the older Commonwealth countries. My experience in less well-resourced jurisdictions is that there are hardly ever undertaken. I would strongly recommend this approach to these countries. The results, as exemplified in one survey cited in the article, can be surprising.

To top it all, we have a paper by the Honourable Margaret Ng. This paper provides a window into not only the legislative processes of the Hong Kong Legislative Council but also insight into Hong Kong's rare constitutional system. Some of the specific pieces of legislation that are considered will also be of interest to readers.

We hope to see you all at the next CALC Conference in Hyderabad, India, from 9 to 12 February, 2011 — *Bilika Simamba* (Guest Editor)

Drafting Legislative Provisions: Challenges and Opportunities

Vijay K Bhatia[1]

Introduction

The general function of legislative discourse is directive: to impose obligations and to confer rights. As legal counsel are well aware of the age-old human capacity to minimise obligations and to maximise rights, in order to guard against such eventualities, they attempt to define their model world of obligations and rights, permissions and prohibitions as precisely, clearly and unambiguously as linguistic resources permit. Another factor that further complicates their task, especially within the common law jurisdictions, is the fact that they deal with a universe of human behaviour, which is unrestricted, in the sense that it is impossible to predict exactly what may happen within it. Nevertheless, they attempt to refer to every conceivable contingency within their model world, and this gives their writing its second key characteristic of being all-inclusive. In this paper, I would like to examine the complexities involved in the process of the construction, interpretation and use

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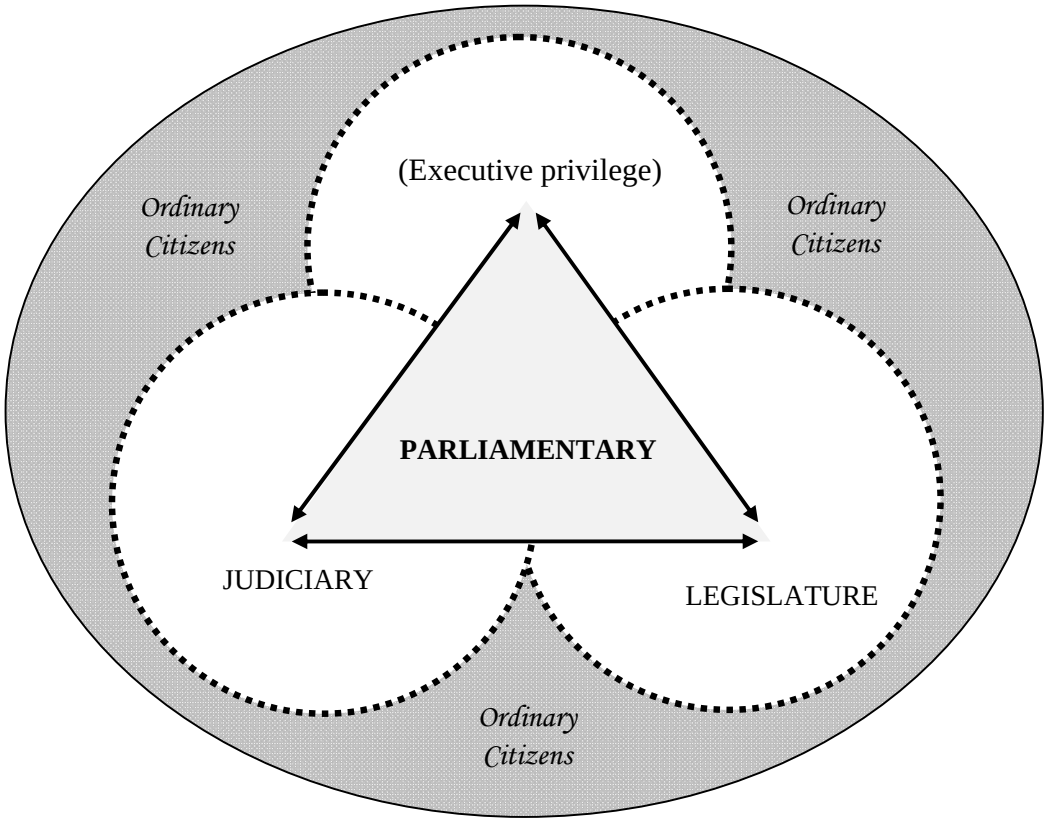
of legislative provisions, considering the challenges, and opportunities confronting a legislative counsel to make such provisions clear, precise, unambiguous, and all-inclusive, paying particular attention to the nature and function of participant management which constrain legislative actions. In spite of the challenges associated with legislative drafting, in particular those of accessibility, transparency of information, and the related opportunities of power and control in and through its interpretation and application, there seems to be a window of opportunity to make some changes to the way legislative provisions are drafted.

In order to identify and discuss a detailed framework for the analysis and drafting of legislative action, I would like to draw on Goffman's notion of participation framework (1981) taking into account the nature and function of the legislative provision and its organization, identifying the role of participants and institutions, which seem to influence and constrain the construction, accessibility, and interpretation of relevant and appropriate legislative action in a given socio-legal context. Referring to spoken interaction, Goffman provided an insightfully powerful model of a speaker-hearer participation, which can be decomposed into a range of different categories. About the speaker, he suggested four different kinds of roles. The *Animator* is the one who actually produces the talk, whereas the *Author* is the one who is responsible for putting speech acts into words and sentences. Similarly, the *Principal* is the party who is socially responsible for what is said, and the *Figure* is a character depicted in the Animator's talk. On the other side of the interaction, he classifies the *Hearer* in various categories, deconstructing it into different participants, who include bystanders, eavesdroppers, addressed and unaddressed hearers, and so on. He also points out that the talk can be embedded not simply in any speech event, but in action that the speech or talk is trying to achieve, and therefore he argued for the use of primary context for making sense of what the speaker is trying to do.

When we look at the contextual configuration of legislative construction and interpretation, we find a dynamic complexity of participation structure which is rarely seen in any other form of professional writing. In Goffman's terms, the legislative counsel is the *Author*, and legislative institution (whether a legislative assembly, Parliament or any other statutory body) is the *Principal*; however, the factor that really complicates the construction process is the role of the governmental institution in the form of the Executive, which often has some role to play, not only in the construction, but more importantly, in the interpretation and execution of the legislative provisions. So from the point of view of the construction of legislative actions, we find two major participating institutions (not necessarily individuals as is often the case in a number of other professional contexts), i.e., the legislature, which has the political power to negotiate legislative intentions, and the government executive bodies, in particular the legal affairs division, which has the executive privilege to give expression to legislative intentions, which is then passed on to the legislative counsel to put it in appropriate and acceptable words. Unfortunately the legislative counsel, who has the main responsibility of giving expression to the will of the Parliament is never present in the Parliament when the intentions are being discussed, which makes his task difficult.

This represents only one side of the coin, as it were. What adds additional complexity to his task is the other side of the coin, which concerns the nature of the recipient structure, the

complicated relationship they seem to have with different recipients, and the nature of loyalty they are required to display in their drafting practice. On the one hand, their addressed readers are the members of the judiciary, legal community, including judges associated with the system of courts; on the other hand, they have the ordinary people with no legal background at all, who are often referred to as their unaddressed audience, although it is possible to claim that they are the real audience, who are governed by what the legislative provisions they draft. So who the legislative counsel is supposed to be loyal to, the judiciary, who has the primary duty to interpret what they write, or the ordinary people, who are ultimately governed by these provisions, or the legislature or Parliament who are referred to as the *Principal*? It is impossible to satisfy all these requirements at the same time because the three sets of audiences have very little shared background knowledge, although believers in plain language law claim that it is possible to write in language equally accessible to all of them, including the ordinary people as well as to the judiciary. The truth however lies somewhere in between. I shall come back to this issue a little later, but first I would like to make the recipient structure a bit more complex by adding one more participant to it, that is, the Executive with the privilege to interpret legislative intentions to suit socio-political decisions of the government, as far as possible. The complexity of participant structure can be visually represented as in the following diagram:



Dynamics of participation framework in Legislative Drafting

The participation framework briefly discussed here offers an interesting tool, not simply for the analysis of legislative drafting contextual constraints, but also a set of three other important related legal concepts, that of *Transparency*, *Power*, and *Control*. Power and Control are seen as the function of the relationship between some of the main participants involved, directly or indirectly, not only in the drafting process, but also in the interpretation and use of legislative provisions. Different parties have some degree of power and hence control over the construction and interpretation of legislative processes, though the amount is limited by their role, as well as their access to discursive resources. The real challenge in the construction of legislative discourse is the nature and extent of under and over specification of legal scope in the expression of legislative intentions. This also raises the issues of accessibility (comprehensibility and interpretability), transparency, power, and control in specific socio-political and legal systems. The issue of specification, or rather lack of it, was initially mentioned in the paper, and has been summed up in Bhatia (1982) as follows: 'Legislative expressions are required to be clear, precise and unambiguous, on the one hand, and all-inclusive, on the other'. It may appear to be a contradiction, but a close analysis reveals that a clever balance between the two is the essence of the craftsmanship of legislative intent. As an outsider, I believe that legal draftsmen have always been conscious of the institutional conflicts involved in the specification of legislative intentions as well as the legislative authority, especially in parliamentary democracies, where legislative authority is invested in the legislature as it represents the people who elect them. As a result, they (Parliament and the drafting community) zealously guard this right (Renton, 1975) and would not like to handover this role either to the judiciary or to the executive, which creates the possibility of a three-way institutional conflict. Edward Caldwell, a senior parliamentary counsel, frames this tension quite nicely as follows:

> There's always the problem that at the end of the day there's a system of courts and judges who interpret what the legislative counsel has done. It is very difficult to box the judge firmly into a corner from which he cannot escape … given enough time and given enough length and complexity you can end up with precision but in practice there comes a point when you can't go on cramming detail after detail into a bin...
>
> (Quoted in Bhatia, 1982:25)

Another factor that makes their task even more difficult is that they also need to construct their legislative provisions in such a way as to avoid any potential conflict with any preceded or preceding legislation. Caldwell, (Quoted in Bhatia, 1982), once again, points out,

> Very rarely is a new legislative provision entirely free-standing ... it is part of a jigsaw puzzle ... in passing a new provision you are merely bringing one more piece and so you have to acknowledge that what you are about to do may affect some other bit of the massive statute book.

Crystal and Davy (1969), in a somewhat similar manner, point out,

> The legal draftsman often goes to great lengths to ensure that a legislative provision says 'exactly what he wants it to say, that is precise or vague in just the right parts and just the right proportions, and that it contains nothing that will allow a hostile interpreter to find in it a meaning different from what he intended.
>
> (Crystal & Davy 1969: 212)

On the other side, to make matters even more difficult, draftsmen are almost universally criticised for making their provisions inaccessible to ordinary citizens often questioning their loyalty to their so-called 'real readers'. Proponents of plain English movement claim that legal writing is 'wordy, unclear, pompous, and dull' (Mellinkoff, 1963:24), 'the largest body of poorly written literature ever created by the human race'. (Lindsey, 1990), and 'the blind pursuit of precision will inevitably lead to complexity; and complexity is a definite step along the way to obscurity' (Thornton (1996:52-53). It has also been claimed that legal discourse, especially in common law jurisdictions, is the function of a conspiracy theory, according to which—

> … the professions use language in ways that mystify the public or at least stultify critical thinking…Critics argue that the language of the professions is both a symbol and a tool of power, creating dependence and ignorance on the part of the public ... it creates the illusion of authority.
>
> (Danet, 1980: 452)

However, the legal discourse written in civil law jurisdictions, which may appear to be simple and plain as compared with similar discourse in common law jurisdictions, presents a different kind of accessibility issue, which is the other side of the coin (Bhatia, 2005). The crucial issue here is whether there is a conspiracy of the other kind in civil law jurisdictions, by which simple enactments are used as instruments of socio-political control. Ghai (1997), a prominent specialist on constitutional law, rightly identifies this lack of specificity in drafting as one of the main reasons for contentious interpretations in the 1984 Joint Declaration on Hong Kong.

> The two broad areas on which there was considerable contention were the relations between the Central Authorities and the HKSAR and the political structure of the HKSAR. China had fought off the British during the negotiations for the Joint Declaration on these issues, and an appearance of consensus was purchased at the expense of ambiguity and obfuscation.
>
> (Ghai, 1997:61)

Challenges in legislative drafting

In the context of what we have been discussing, I think there are two ways of looking at lack of 'comprehensibility' in legislative discourse, one resulting from syntactic complexity and all-inclusiveness leading to over-specification of legal scope as in common law drafting practice, and the other resulting from syntactic simplicity and under-specification of legal scope, as in civil law drafting tradition. The first one is likely to be more comprehensive and transparent, but may be relatively more difficult to comprehend, especially for the non-

specialist ordinary readers. The second one, on the other hand, is likely to be more accessible to lay persons, but can be contentious when it comes to interpretation in real life contexts, as in a court of law, giving the Judiciary and/or the Executive extensive discretionary powers to interpret the legislative intention (for more elaborate evidence of this issue, see Bhatia, 2005). In the context of legislative drafting in the common law tradition, I would now like to propose two ways of handling legislative provisions for ease of accessibility and interpretation.

Opportunities legislative drafting (easification v. simplification)

As in most technical discourses, especially those which have public implications, we need at least two versions: one for specialists, and the other for ordinary citizens. It is a common practice in sciences, where we have the original reports on experiments, and also a popular version for uninitiated readers. The two versions would serve two very different communicative purposes, one legislative, and the other informative. Both will need to have their own respective mechanisms, depth of specificity and levels of reader accessibility. In order to make the specialist versions easier for processing and interpretation, I would like to suggest 'easification' of legislative provisions, keeping them clear, precise, unambiguous, and all-inclusive, and as transparent as linguistic resources permit. However, they can still be relatively more accessible to its intended readership. The provision will still be equally authoritative, detailed, and adequately specified, serving the same legislative function in the court of law. However, greater accessibility can be achieved by using a number of easification measures, which I will discuss next, but before that, I would like to mention and distinguish the other 'simplified' version I have in mind for the ordinary non-specialist readers.

Simplified versions for non-specialists should be like popular or simple accounts of authoritative versions to inform the citizens about some of the main legislative intentions and their implications for their personal and public affairs. This can be a plain language version, not necessarily all-inclusive, but informative, not authoritative, authentic, or complete in all respects, but easily accessible to larger non-specialist readers. Such simplified versions should be meant for public awareness, which may even include legal intentions, explanations, and typical examples. A reasonable degree of awareness can also be achieved by involving ordinary people in the public consultation exercises, which are being increasingly used in many of the democracies almost everywhere. Let me now suggest and illustrate some of the common easification devices for making legislative provisions more accessible.

Easification devices

Of the many easification devices I have discussed elsewhere (Bhatia, 1982, 1983, 1987, 1993), I would like to mention a few here, in particular what I call 'Clarifying cognitive structuring', 'Reducing information load at specific syntactic points', 'Minimising the use of syntactic discontinuities', 'Avoiding excessive and non-essential nominalisations', 'Indicating legislative intentions', 'Illustrating legislative issues', 'Choosing referential links wherever necessary', etc. Let me give more substance to what I have been suggesting by taking a couple of examples to clarify legislative intentions.

Clarifying cognitive structuring (for easy processing)

In common law jurisdictions it is considered advantageous to condense all the necessary information in a single sentence so as not to allow interpretation of any part of the provision out of context, but, at the same time, it tends to carry too much of information load and hence adds to the problem of lack of accessibility for its intended readers. This is the function of syntactic complexity, which makes cognitive processing almost beyond uninitiated non-specialist readers. Bhatia (1982, 1987, 1993, and 2004) suggests a number of 'easification' devices one of which clarifies cognitive structuring by clarifying syntactic complexity. Let me illustrate this by taking the following example:

> AGREEMENT BETWEEN PUBLISHER AND AUTHOR
>
> The author hereby warrants to the Publishers that the author has the right and power to make this Agreement and that the Work is the Author's own original work, except for material in the public domain and such excerpts from other works as may be included with the written permission of the copyright owners, and will in no way whatever give rise to a violation of any existing Copyright, or a breach of any existing agreement, and that the Work contains nothing defamatory or libellous and that all statements contained therein purporting to be facts are true and that nothing in the Work is liable to give rise to a criminal prosecution or to a civil action for damages or any other remedy and the author will indemnify the Publishers against any loss, injury or expense arising out of any breach or alleged breach of this warranty. The Publishers reserve the right to alter or to insist the Author alter the text of the Work in such a way as may appear to them appropriate for the purpose of removing or amending any passage which on the advice of the Publishers' legal advisers may be considered objectionable or likely to be actionable at law without affecting the Author's liability under this Clause in respect of any passage not so removed or amended. The foregoing warranties and indemnities shall survive the termination of this agreement.

The same provision can be rewritten to make cognitive structures somewhat more accessible and easier to process, as in the following version.

(1) The author hereby warrants to the Publishers that—

(a) the author has the right and power to make this Agreement, and

(b) the Work is the Author's own original work,

except for material in the public domain and such excerpts from other works as may be included with the written permission of the copyright owners, and will in no way whatever give rise to a violation of any existing Copyright, or a breach of any existing agreement, and

(c) the Work contains nothing defamatory or libellous, and

(d) all statements contained therein purporting to be facts are true and,

(e) nothing in the Work is liable to give rise to a criminal prosecution or to a civil action for damages or any other remedy, and

(f) the author will indemnify the Publishers against any loss, injury or expense arising out of any breach or alleged breach of this warranty.

(2) The Publishers reserve the right to alter or to insist the Author alter the text of the Work in such a way as may appear to them appropriate for the purpose of removing or amending any passage which on the advice of the Publishers' legal advisers may be considered objectionable or likely to be actionable at law without affecting the Author's liability under this Clause in respect of any passage not so removed or amended.

(3) The foregoing warranties and indemnities shall survive the termination of this agreement.

Let me now take Chapter 148, Amendment to Gambling Ordinance 1977 (Hong Kong).

Section16. Cheating at gambling

Any person who, by any fraud, misleading device or false practice, before or after or in the course of or in connection with gambling or a lottery, wins from another person, for himself or for any other person ascertained or unascertained, any money or other property; or fraudulently or by any deception whatsoever by words or conduct, including a deception relating to the past, the present or the future and a deception as to the intentions or opinions of any person, directly or indirectly persuades, incites or induces another person to take part in gambling or a lottery, commits an offence and is liable on conviction on indictment to a fine of $1,000.000 and to imprisonment for 10 years.

This lengthy provision, once again can be rewritten as follows:

(1) Any person who —

(a) by any fraud, misleading device or false practice, before or after or in the course of or in connection with gambling or a lottery, wins from another person, for himself or for any other person ascertained or unascertained, any money or other property; or

(b) fraudulently or by any deception whatsoever by words or conduct, including a deception relating to the past, the present or the future and a deception as to the intentions or opinions of any person, directly or indirectly persuades, incites or induces another person to take part in gambling or a lottery,

commits an offence and is liable on conviction on indictment to a fine of $1,000.000 and to imprisonment for 10 years.

Now I would like to take another example from the U.K. to illustrate various levels of easification and also simplification.

REGISTRATION OF CLUBS (IRELAND) ACT, 1904 (THE ORIGINAL VERSION)

> If any excisable liquor is sold or supplied in a registered club for consumption outside the premises of the club, except as provided in section four, paragraph (h), every person supplying or selling such liquor, every person who shall pay for such liquor and every person authorising the sale or supply of such liquor shall be liable severally, on summary conviction, to a fine not exceeding for a first offence seven pounds, for a second offence fifteen pounds and for a third or subsequent offence thirty pounds, unless he proves to the satisfaction of the court that such liquor was so sold or supplied without his knowledge or against his consent, and, where it is proved that such liquor has been received, delivered or distributed within the premises of the club and taken outside the premises, it shall, failing proof to the contrary, be deemed to have been so taken for consumption outside the premises.

A possible easified version could be as follows:

> If any excisable liquor is sold or supplied in a registered club for consumption outside the premises of the club, except as provided in section four, paragraph (h),
>
> then
>
> every person supplying or selling such liquor, every person who shall pay for such liquor and every person authorising the sale or supply of such liquor shall be liable severally, on summary conviction, to a fine not exceeding—
>
> (a) seven pounds, for a first offence,
>
> (b) fifteen pounds, for a second offence, and
>
> (c) thirty pounds, for a third or subsequent offence;
>
> unless he proves to the satisfaction of the court that such liquor was so sold or supplied without his knowledge or against his consent, and,
>
> where it is proved that such liquor has been received, delivered or distributed within the premises of the club and taken outside the premises, it shall, failing proof to the contrary, be deemed to have been so taken for consumption outside the premises.

However, if one were to write the same provision in simplified manner for informative purposes meant for ordinary non-specialist audiences, the depth of specification can be compromised, as in the following version.

> **Registration of Clubs (Ireland) Act, 1904 (Simplified Version)**
>
> If any excisable liquor is sold for consumption outside the club, then every person who either pays for or authorises the sale of such liquor shall be liable to a maximum fine of—
>
> (a) seven pounds for the first offence,
>
> (b) fifteen pounds for a second offence,
>
> (c) Thirty pounds for a third or subsequent offence.
>
> OR, simply—

> It is unlawful to sell or buy excisable liquor for consumption outside a club and is punishable by fine to a maximum of thirty pounds.

There could be a number of other rhetorical and syntactic strategies that can be used to make legislative provisions somewhat more accessible, and yet equally effective in terms of adequate specification of legal scope, with the expression of required number of qualifications and contingencies.

Concluding remarks

In this brief paper I have made an attempt to indicate the enormous complexity of the legislative drafting process, identifying a number of contextual factors which contribute to the complexity of the entire process. I have also tried to highlight some of the main challenges facing the drafting community. In doing so, I have also suggested ways of meeting some of the challenges, which are unlikely to solve all the problems and overcome all the challenges, but certainly open a window of opportunity to understand and meet some of these challenges in an informed and principled manner. Since the legislative provisions are addressed to very different audiences, who do not share the same level of legal background, I argued for two different versions of the provisions, a simplified version for informative communicative purposes, and an easified version for specialist audiences meant to serve the authentic legislative communicative purposes. I also suggested a number of different rhetorical strategies useful for drafting legislative provisions in an informed principled way. Although it is not possible to illustrate all the rhetorical strategies in a paper of this kind, I have illustrated one of them taking examples from available legislative and other relevant contexts. I am also aware of the fact that there is greater awareness of these issues now than it was some time ago; however, I still feel that there is a need to pay more attention to some of these rhetorical and syntactic resources on a regular basis, rather than using them occasionally.

References

Bhatia, Vijay K., (1982). An Investigation into Formal and Functional Characteristics of Qualifications in Legislative Writing and its Application to English for Academic Legal Purposes, Ph.D. thesis, University of Aston in Birmingham.

Bhatia, Vijay K., (1983) ‘Simplification v. Easification: the case of legal texts’, in *Applied Linguistics*, 4, 1, (42-54).

Bhatia, Vijay K., (1987) ‘Textual-Mapping in British Legislative Writing’, *World Englishes*, 6, 1, (1-10).

Bhatia, Vijay K., (1993) Analysing Genre—Language Use in Professional Settings, London: Longman.

Bhatia, Vijay K., (2004): *Worlds of Written Discourse: A Genre-Based View*, London, Continuum International.

Bhatia, Vijay K., (2005) 'Specificity and Generality in Legislative Expression: Two Sides of the Coin' in Bhatia, Vijay K., Engberg, Jan, Gotti, Maurizio and Heller, Dorothee (editors) *Vagueness in Normative Texts*, Bern: Peter Lang.

Bhatia, Vijay K., Engberg, Jan, Gotti, Maurizio, and Heller, Dorothee (2005) *Vagueness in Normative Texts*. Bern: Peter Lang.

Caldwell, Richard, (1982): *Specialist informant interviews*, reported in Bhatia, 1982.

Coode, George, (1845) *On Legislative Expression, or, The Language of the Written Law*, Oxford, Oxford University.

Crystal, David, and Derek Davy, (1969) *Investigating English Style*, London, Longman.

Danet, Brenda. (Ed.) (1984) 'Special Issue: Studies of Legal Discourse' in *TEXT*: An Interdisciplinary Journal for the Study of Discourse. 4:1/3.

Ghai, Yash, (1997): Hong Kong's New Constitutional Order: The Resumption of Chinese Sovereignty and the Basic Law, Hong Kong: Hong Kong University Press.

Goffman, E. (1981). *Footing.* In E. Goffman, *Forms of Talk* (pp. 124–159). Philadelphia: University of Pennsylvania Press.

Government of Hong Kong, (1984) Sino-British Joint Declaration 1984.

Lindsey John M., (1990) 'The Legal Writing Malady: Causes and Cures' in New York Law Journal, December 1990 (12).

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

Renton, David, (1975) The Preparation of Legislation, London: HMSO.

Thornton, G.C., (1996) *Legislative Drafting*, [4 Edn] London, Butterworths.

Principles-based drafting: experiences from tax drafting

Daniel Lovric[1]

1. Introduction

Principles based drafting has a lot to offer. It can be easier for the public to understand, avoids loopholes and gaps in the law, and brings order to complex regulatory systems. Critics say that it leads to uncertainty, or gives too much power to the executive and the judiciary. Nevertheless, the supporters of principles-based drafting have scored some recent victories, at least in Australia. For example, Australian income tax laws are now often developed according to a "coherent principles" approach. More broadly, however, the debate over principles-based drafting is ongoing, and it is difficult to tell how much impact it will have across the entire statute book.

My main experience with principles-based drafting has been in drafting income tax laws for the past 9 years. This has been a busy time in Australian tax law, with the introduction of major new schemes for corporate group taxation, superannuation and the taxation of financial arrangements. Each of these schemes has involved principles-based drafting, at least to some extent. I'll come back to some examples later.

This paper focuses on 3 aspects of principles-based drafting. Firstly, I will define what makes a draft principles-based, and identify particular kinds of principles-based provisions. Secondly, I will briefly run through the arguments for and against principles-based drafting. Thirdly, and lastly, I will describe 2 processes of principles-based drafting that I have seen in drafting tax law, which I call *top-down principles-based drafting* and *ground-up principles-based drafting*.

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2. What makes a draft principles-based?

A principles-based draft states a *broad* and *operative* principle. In many cases, such principles will be accompanied by surrounding provisions that provide examples, clarifications, add-ons and carve-outs. These surrounding provisions illustrate how the principle works in practice, or make explicit add-ons or carve-outs to its operation.

A provision states a *broad* principle if the principle is flexible and covers a wide range of circumstances at a high level of abstraction. Broad principles have a degree of uncertainty at their edges; they have a core of relatively clear application surrounded by a penumbra of uncertain application. Some aspects of this uncertainty may be clarified by surrounding provisions (as we will see later). Other aspects of this uncertainty may be clarified by subsequent amendments or case law.[2] Yet even with such clarifications, the entire operation of a broad principle is never fixed in a bright-line way.

A provision is *operative* if it is the source of rights, duties, powers or privileges. It states the preconditions for a legal result, and provides for that result. By contrast, if a provision merely provides context for the operation of other provisions (as is the case with an objects clause), it is not operative, and is therefore not principles-based in the sense used in this paper.

2.1 Examples of principles-based provisions

A good example of a broad principle is contained in subsection 6-5(1) of the Income *Tax Assessment Act 1997*:

> **6-5 Income according to ordinary concepts (ordinary income)**
>
> (1) Your ***assessable income*** includes income according to ordinary concepts, which is called ***ordinary income***.
>
> Note: Some of the provisions about assessable income listed in section 10-5 may affect the treatment of ordinary income.

Clearly, this subsection states a broad principle. The idea of "income according to ordinary concepts" covers a very wide range of circumstances, is flexible, and has a degree of uncertainty at its edges. This is not to say that the principle is totally plastic. A huge amount of case law surrounds it, concretises it, and gives it substance in particular situations.[3] Yet subsection 6-5(1) is clearly not drafted in a black letter or bright line style.

The principle in subsection 6-5(1) is also *operative*, because it is the legal source for the

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[2] There is an important choice to be made in drafting principles-based provisions as to whether to resolve a particular uncertainty immediately, or to leave this to further amendments, administrative practice and/or the courts. In practice, if an issue is raised during the initial drafting process, it tends to be resolved expressly in the first set of provisions, unless it is seen as merely theoretical, unimportant or clearly resolved by the basic principle standing alone.

[3] This surrounding case law is not a necessary feature of a principles-based provision. Nevertheless, it is likely to be a feature such a provision if it is important, and has been in existence for some time.

calculation of the ordinary income aspect of assessable income. Because of subsection 6-5(1), "income according to ordinary concepts" is included in assessable income. If the subsection were removed, there would be no legal basis for including ordinary income in assessable income. It is the legal source for the inclusion of ordinary income in assessable income, and is therefore an *operative* principle.

Subsection 6-5(1) is not surrounded by *examples, clarifications, add-ons and carve-outs*. However, some tax provisions do include this feature. An example is section 770-10 of the *Income Tax Assessment Act 1997*:

770-10 Entitlement to foreign income tax offset

(1) You are entitled to a *tax offset for an income year for *foreign income tax. An amount of foreign income tax counts towards the tax offset for the year if you paid it in respect of an amount that is all or part of an amount included in your assessable income for the year.

Note 1: The offset is for the income year in which your assessable income included an amount in respect of which you paid foreign income tax—even if you paid the foreign income tax in another income year.

Note 2: If the foreign income tax has been paid on an amount that is part non-assessable non-exempt income and part assessable income for you for the income year, only a proportionate share of the foreign income tax (the share that corresponds to the part that is assessable income) will count towards the tax offset (excluding the operation of subsection (2)).

Note 3: For offshore banking units, the amount of foreign income tax paid in respect of offshore banking income is reduced: see subsection 121EG(3A) of the *Income Tax Assessment Act 1936.*

Taxes paid on section 23AI or 23AK amounts

(2) An amount of *foreign income tax counts towards the *tax offset for you for the year if you paid it in respect of an amount that is your *non-assessable non-exempt income under either section 23AI or 23AK of the *Income Tax Assessment Act 1936* for the year.

Note 1: Sections 23AI and 23AK of the *Income Tax Assessment Act 1936* provide that amounts paid out of income previously attributed from a controlled foreign company or a foreign investment fund are non-assessable non-exempt income.

Note 2: Foreign income taxes covered by this subsection are direct taxes (for example, a withholding tax on a dividend payment) and not underlying taxes, only some of which are covered by section 770-135.

Exception for certain residence-based foreign income taxes

(3) An amount of *foreign income tax you paid does not count towards the *tax offset for the year if you paid it:

(a) to a foreign country because you are a resident of that country for the purposes of a law relating to the foreign income tax; and

(b) in respect of an amount derived from a source outside that country.

Exception for previously complying funds and previously foreign funds

(4) An amount of *foreign income tax paid by a *superannuation provider in relation to a *superannuation fund does not count towards the *tax offset for the year if:

(a) the tax was paid in respect of an amount included in the fund's assessable income under table item 2 or 3 in section 295-320; and

(b) the provider paid the tax before the start of the income year.

Note: Table items 2 and 3 in section 295-320 include additional amounts in the assessable income of superannuation funds that change their status from complying to non-complying or from foreign to Australian.

Exception for credit absorption tax and unitary tax

(5) An amount of *credit absorption tax or *unitary tax you paid does not count towards the *tax offset for the year.

The broad principle here is in subsection 770-10(1):

> An amount of foreign income tax counts towards the tax offset for the year if you paid it in respect of an amount that is all or part of an amount included in your assessable income for the year.

Here we have a *broad* principle: the idea of an amount of foreign tax in respect of an amount included in assessable income is flexible and has uncertainty at its edges. The principle is also *operative*: it is the legal source of the rule determining the amount of foreign income tax counting towards a foreign income tax offset.

Yet section 770-10 does not rely just on a broad and operative principle to achieve its purpose: it contains several carve-outs, add-ons and clarifications. For example, subsection (2) is an add-on, which extends the class of amounts counting towards the offset to include certain amounts in respect non-assessable non-exempt income. Subsections (3), (4) and (5) are carve-outs, restricting certain amounts from counting towards the offset. Notes 1 and 2 to subsection (1) clarify the operation of the basic principle.

Some more needs to be said about clarifications, as opposed to carve-outs and add-ons.

Clarifications can be divided into 2 broad classes. Firstly, there are clarifications that merely restate what is the clear operation of the broad principle. Secondly, there are clarifications that resolve real uncertainty in the operation of the broad principle. This is an important distinction, as it determines the form in which a clarification is drafted. The first type of clarification can be achieved by non-operative provisions such as an explanatory note (an example of which is given by Notes 1 and 2 to subsection 770-10(1) of the *Income Tax Assessment Act 1997*). Such clarifications can even be made in the Explanatory Memorandum to a Bill, as they merely

restate the operation of the law. By contrast, the second type of clarification must be achieved by an operative provision, as it may alter the content of the law.

An example of the second type of clarification is the kind of provision that clarifies that a particular matter is within the scope of a legislative principle. An example here can be seen in recent provisions dealing with foreign hybrid entities. These are entities that may be treated (particularly in the United States) as a flow-through entity for tax purposes, but as a separate legal entity for tax purposes in Australia. Subdivision 830-B of the *Income Tax Assessment Act 1997* essentially treats them for certain Australian tax purposes as a flow-through entity in the form of a partnership. The central provisions of Subdivision 830-B make this clear:

> **830-20 Treatment of company as a partnership**
>
> If a company is a *foreign hybrid company in relation to an income year, *[most Australian income tax provisions]* apply as if the company were a partnership, and for that purpose the following provisions of this Subdivision have effect.
>
> **830-25 Partners are the shareholders in the company**
>
> The partners in the partnership are the *shareholders in the company.
>
> **830-30 Individual interest of a partner in net income etc. equals percentage of notional distribution of company's profits**
>
> The individual interest of a partner in the *net income or *partnership loss of the partnership of the income year is equal to the percentage that, if the profits of the company for the income year were distributed at the end of the income year to its *shareholders:
>
> (a) if paragraph (b) does not apply—as dividends; or
>
> (b) if the company's *constitution or other rules provide for the distribution of profits other than as dividends—in accordance with the constitution or those rules;
>
> the partner, as a shareholder, could reasonably be expected to receive of the total distribution.

The central principle in section 830-20 is operative and broad, deeming a company to be a partnership for Australian income tax purposes. The consequences of the principle are, however, not entirely clear in a number of respects.[4] Firstly, it seems likely the partners in the notional partnership are the shareholders in the company - but there may be residual doubt here. Thus an

[4] Other provisions in Division 830, not reproduced here, provide further clarification of the general principle.

operative clarification is needed in the form of section 830-25. Secondly, the mere deeming of the company to be a partnership does not resolve the question of what interest each individual partner has in the annual income or loss of the notional partnership. By itself, the general principle in section 830-20 could allow a range of answers to this question. Thus section 830-30 provides certainty here with an operative clarification, using the benchmark of a shareholder's percentage share of the company's profit distribution.

The key point for our purposes is that the clarifications in Subdivision 830-B are not clear-cut applications of the broad principle. They therefore need to be expressed as operative provisions rather than as explanatory notes.

The practical problem for the legislative counsel is to distinguish between operative and non-operative clarifications, and between clarifications, add-ons and carve-outs. In many cases in the tax field, the difference between these categories can be hard to see. For example, it requires a fine judgement to say whether a broad principle achieves a particular result (thus allowing a clarification to be made by a non-operative note, or in the Explanatory Memorandum), or whether the degree of uncertainty involved is more than theoretical (in which case the clarification must be made by an operative provision). Similarly, there is a degree of judgment involved in distinguishing between an operative clarification on the one hand, and an add-on or carve-out on the other hand. Here, the legislative counsel must rely substantially (but not entirely) on the advice of experienced policy instructors, who should have a practical idea of how a principle will be applied by tax practitioners, the tax authorities and the courts. The importance of such policy expertise in principles-based drafting is a theme I will return to later in this paper.

For the present, it is enough to acknowledge that the concepts of principle, carve-out, add-on, operative clarification and non-operative clarification are not always easy to distinguish from one another. They tend to merge into one another at the margins. But we should still pay attention to them! They are ideal types that are very helpful design tools for the legislative counsel. It is a very useful discipline in designing principles-based legislation to classify each proposed provision into one of these categories. The result will be a much better organised draft - and presuming the principles are well-chosen - a draft well suited to apply in the real world.

One can contrast this approach to principles-based drafting with several similar-looking approaches that are not principles-based (at least, in the sense of principles-based drafting dealt with in this paper).

2.2 Examples of some provisions that are not principles-based

Several kinds of drafting styles produce provisions that look similar to principles-based provisions. However, they are not principles-based in the sense used in this paper. This is because they lack either or both of the essential characteristics of principles-based provisions: the characteristics of being both *broad* and *operative*.

I stress here that this is not a criticism of other drafting styles: each style has its appropriate role and its appropriate place.

A good example of a principle that is *not operative* is an objects clause. Here, the principle may be broadly expressed, with flexibility of application and grey areas at its edges. However, it is

not operative in the sense of being the source of rights, duties, powers or privileges. Other provisions create these legal results, while the objects clause merely colours the meaning of those other provisions.

There is a rather delicate judgement involved in choosing whether to express policy through an objects clause or through an operative principle. An operative principle is naturally more ambitious in its scope, while an objects clause is somewhat more conservative in its aims. The important point here is that the two styles of drafting are built on fundamentally different foundations. An operative principle is the source of legal rights, duties, powers and privileges, and is surrounded by specific rules that clarify the operation of the principle or provide carve-outs and add-ons. By contrast, where an objects clause is used, the source of such legal consequences are the specific rules and the objects clause merely alters the operation of those rules in cases of uncertainty or ambiguity.

This can be seen in the following example of an objects clause. Section 205-45 of the *Income Tax Assessment Act 1997* imposes a liability for franking deficits tax (under Australia's dividend imputation system, franking accounts can sometimes have a negative balance):

> **205-45 Franking deficit tax**
>
> *Object*
>
> (1) While recognising that an entity may anticipate *franking credits when *franking *distributions, the object of this section is to prevent those credits from being anticipated indefinitely by requiring the entity to reconcile its *franking account at certain times and levying tax if the account is in *deficit.
>
> *Franking deficit at end of income year*
>
> (2) An entity is liable to pay franking deficit tax imposed by the *New Business Tax System (*Franking *Deficit Tax) Act 2002* if its *franking account is in *deficit at the end of an income year.

Here, subsection (2) is the source of the legal operation of the provision. The subsection is not drafted in a principles-based style, but rather utilises a black letter approach. It imposes a liability for franking deficit tax where an entity's franking account is in deficit at the end of an income year: this is a bright line criterion for establishing a legal result. By contrast, the objects clause in subsection (1) is drafted using a broad principle, namely, the prohibition of indefinite anticipation of franking credits. Should a situation arise in relation to which subsection (2) has an indefinite operation, the objects clause will have the effect of encouraging any uncertainty to be resolved in harmony with this principle. However, the principle itself is not the source of legal consequences in the form of a liability for franking deficits tax; these consequences are provided by the black letter rule in subsection (2).

We can now see that objects clauses are broad but not operative, and are therefore not the kind

of principles-based drafting discussed in this paper. Let us now contrast objects clauses with a style of provision that is *operative but not broad*. An example here is what I call *results-based drafting*,[5] such as in subsection 301-35(2) of the *Income Tax Assessment Act 1997*:

> **301-35 Superannuation lump sum—taxable component taxed at 20%**
>
> (1) If you are under your *preservation age when you receive a *superannuation lump sum, the *taxable component of the lump sum is assessable income.
>
> ...
>
> (2) You are entitled to a *tax offset that ensures that the rate of income tax on the *taxable component of the lump sum does not exceed 20%.

Subsection 301-35(2) is drafted in terms of *results*. It does not tell you how to calculate the amount of the tax offset, but merely says that you must make that calculation so as to end up with an effective tax rate of 20% on the amount of the superannuation lump sum. In other words, its deals with results, not means. This is a very helpful way to avoid masses of complicated detail that can arise, for example, if the receipt of the lump sum brings the taxpayer into a higher tax bracket in Australia's system of marginal personal tax rates. Results-based drafting is quite a useful tool in avoiding complicated formulas and method statements.

Nevertheless, subsection 301-35(2) does not express a *broad* principle. There is no flexible principle here with greyness and uncertainty at its edges. The 20% rate cap on the lump sum is calculated with mathematical precision. There is no uncertainty or flexibility of operation of the rule.

Thus subsection 301-35(2) is not a principles-based provision. It is certainly operative in the sense of being the source of rights, duties, powers or privileges. However, it contains no broad principle.

> "Results-based" drafting often produces narrow operative provisions. They are extremely useful in dealing with particular mathematical problems such as that posed by the receipt of a superannuation lump sum. However, they are less useful in dealing with more complex situations involving unpredictable and unquantifiable matters, particularly those arising in more sophisticated commercial transactions. It is in dealing with these more complex situations that principles-based drafting shows its true worth.

This is now a useful point to turn briefly to the debate about whether principles-based drafting is

3. The debate over principles-based drafting

Opinions differ about the basic desirability of principles-based drafting. At the one extreme, one

[5] I have drawn on this term as used by Mr Keith Byles in a paper produced for internal use at OPC in Canberra.

may consider principles-based drafting to be a dangerous development that leads to uncertainty in the law and unrestricted administrative discretions. At the other extreme, one may see principles-based drafting as a universal cure for complexity in legislation. I think that very few legislative counsel take either of these extreme views. Instead, most legislative counsel see principles-based drafting as one approach among many, which is suited to some projects but not others. One should also not forget the political factors that may motivate a principles-based approach.[6]

The great advantage of principles-based drafting is its breadth and flexibility. Drafting in principles allows many rules to be compressed into one principle. This can be easier to read, can avoid loopholes and is often closer to original policy decisions. I'll give one example here. An Australian sociologist, John Braithwaite, compared principles-based nursing home regulation with a system of rules-based regulation.[7] The principles-based system required nursing homes to maintain a generally "home-like" atmosphere, whereas the rules-based system had detailed prescriptions, such as those requiring a particular number of pictures to be on bedroom walls. This led to situations where, prior to inspections, nursing staff would rip pictures out of magazines and sticky-tape them on to the walls. Another rule required recorded levels of participation in leisure activities. This led nursing staff to bring out sleeping residents in their wheelchairs so that they could be counted on the participation record. Braithwaite found that the principles-based system was applied with more empathy and common sense. This was due, in part,8 to the focus of the relevant legislation on intuitive principles rather than on complex rules.

The great disadvantage of principles-based drafting is the uncertainty that it can introduce into the law. Black letter drafting, for all its faults, at least provides certainty in the situations it deals with. Principles tend to advantage expert users of legislation, who are familiar with the various applications of broad principle. Occasional users of the legislation are left struggling without clues as to what the principles mean in practice. Furthermore, critics say that principles-based drafting leaves too much decision-making power to administrators and judges in applying the legislation.

My own view is that the uncertainty of principles can be dealt with quite well by extra provisions providing clarifications, add-ons and carve-outs. I take some heart here from the remarks of Anthony Mason, a well-known former Australian High Court Chief Justice who

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6 See R (on the application of Morgan Grenfell & Co Ltd) v Special Commissioner [2002] 1 All ER 776, [2002] 2 WLR 255, para. 45.

7 John Braithwaite, "Rules and Principles: A Theory of Legal Certainty", Australian Journal of Legal Philosophy, Volume 27 (2002) 47 at p. 60.

8 Another important reason was the skill and common sense displayed by the people administering the legislation. The skill of administrators should never be underestimated in making complex legislative schemes work. Indeed, it could be argued that the skill of the administrator is far more important than the good design of the legislation in the first place.

commands respect internationally: [9]

> The view that a taxing Act is to be construed literally has given way to the modern view that such an Act is to be subject to the ordinary principles which govern the interpretation of statutes. Once this is accepted, there is no reason for rejecting "general principle" drafting of a Tax Act except to the extent that, in many areas, precision is required.
>
> … I see no reason why the general provision and the particular exemplifications should not be included in the statute with an appropriate provision expressing the relationship between the two. I have a strong objection to splitting provisions between the Explanatory Memorandum and the statute.

Here is some support for a principles-based structure in tax law from the very highest levels of the judicial profession.

Nevertheless, the former Chief Justice is cautious in his support here. He stresses that "in many areas, precision is required". Furthermore, he warns against putting too much clarifying material in extrinsic material. Principles-based drafting is not an exercise to be undertaken with one's eyes closed to its risks.

Indeed, one can place too much reliance on principles in any scheme of legislation. Some legislative schemes are by their nature based on historical practice or political compromise, and are not well suited to principles-based drafting. Furthermore, developing good principles takes a lot of time - probably more time than developing black letter rules - and requires a fairly high level of policy expertise and drafting expertise. Finally, even if an initial draft uses principles successfully, later developments in the political process can result in urgent amendments that destroy the delicate harmony between operative principles and various clarifications made in the legislation.

These difficulties mean that principles-based drafting should be undertaken cautiously and without a crusading attitude. Depending on the time available, the experience available and the nature of the regulatory system, designing an entire piece of legislation around principles may be impractical.

We also have to keep in mind that some projects are ideally suited to principles-based drafting! Principles-based drafting has so much to offer in the regulation of complex situations, in terms of flexibility and durability. With well designed clarifications, a principles-based statute can also provide more clarity and certainty than a mass of black letter rules. Thus, principles-based drafting cannot be ignored - rather, it should be used with caution.

With these thoughts in mind, we can now look at two particular styles of principles-based drafting. These styles will illustrate some of the points made earlier in this paper.

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[9] Anthony Mason, "Part IVA Income Tax Assessment Act 1936: An Insoluble Problem?", ANU Staff Seminar, 23 August 2006.

4. Top-down drafting and ground-up drafting

From my experience in drafting tax provisions, it seems to me that there are 2 basic styles of principles-based drafting. I call these top-down drafting and ground-up drafting.

Top-down drafting is where the legislative counsel starts with an overarching principle, and then builds down by filling in its applications and details. This is what we traditionally think of as principles-based drafting. Here, the principle is defined from the outset, usually by policy experts. The task of the legislative counsel is to draft specific examples, add-ons, carve-outs and clarifications in a coherent way. It is a bit like building a house according to a framework supplied by an architect. The legislative counsel's job is to fit the examples, add-ons, carve-outs and clarifications into this framework. Sometimes, the framework needs to be altered in a minor way to accommodate a particular fitting. Most of the time, however, the structure is pre-determined.

By contrast, ground-up drafting does not begin with a principle. Rather, it begins with a mass of loosely linked specific rules. Traditionally, such rules would be drafted in a black letter way, without the use of principles. However, it is open to the legislative counsel to suggest a principles-based approach, by constructing a principle out of the mass of detail. This is ground-up drafting. It could also be called inductive drafting, as the basis process is to build principles through a process of induction. Again, the analogy of building a house is useful. In ground-up drafting, all that has been supplied is a pile of unorganised building materials. The legislative counsel's job is to figure out a way to put these materials together in a way that forms a coherent whole. That is, the legislative counsel does not merely fit the examples, add-ons, carve-outs and clarifications into a pre-determined framework, but also designs that framework (on the basis of the nature of the materials supplied).

We now turn to some practical issues in ground-up and top-down drafting principles-based drafting.

4.1 Ground-up drafting in practice

How can the legislative counsel help the ground-up process to succeed? I suggest 2 basic ideas here. Firstly, the situations to be regulated must be *identified*. Secondly, various candidate principles need to be developed and *tested* against those identified situations. Both points involve a fair amount of work for the legislative counsel: ground-up drafting is a rigorous process requiring a fair amount of discipline. It is not a process of sudden and spontaneous inspiration. Rather, ground-up drafting is an organised process involving the disciplined identification and testing of information.

The first basic point is an obvious one, but is often missed: the various situations to be dealt with by the provisions need to be identified in an organised way. It is not enough merely to identify one or two situations, devise a principle to deal with them, and then hope that this principle deals adequately with all other situations. The strength of a principle is proportionate to the variety of situations considered in devising it - much like a scientific hypothesis. Therefore, it is good practice in ground-up drafting first to identify (in a rigorous way) a wide range of situations that need to be regulated.

It is important to create a written record of the situations identified. It is too risky merely to

identity situations in a discussion, and hope to remember them later. If the regulatory system is complex, the relevant situations will be numerous: without a written record, many of them will be forgotten.

This might seem very familiar to a legislative counsel who is familiar with the process of drafting black letter rules. Indeed, the ground-up approach to principles-based drafting is very similar to black letter drafting in many ways. Using both styles, one must identify rigorously and systematically the individual rules that apply in specific cases. However, ground-up drafting goes a step further, and identifies operative principles that restate those rules in a more abstract form.

But where are these overarching principles to be found? There is no easy answer to this question. In some cases, the process of setting down the rules in a systematic way will make the principle obvious. In other cases more inspiration is needed. It certainly helps the legislative counsel to have a detailed understanding of the general policy area in which he or she is working. This understanding provides a bank of relevant concepts that can be drawn upon in developing new concepts. Also, as mentioned earlier, the expertise and experience of the instructor is crucial here. When inspiration is needed, it most often springs from a policy knowledge rather than a knowledge of legislative drafting. Thus the legislative counsel should be alert to remarks by instructors that reveal the way they think about a policy issue. It is my experience that the best principles in ground-up drafting often emerge from a passing comment, or from a remark in an informal conversation in a corridor. The legislative counsel should be alert to such fleeting comments, as they often supply very useful principles.

Having identified a possible principle to deal with the mass of relevant situations, the second basic point becomes relevant. One should not accept the first plausible principle that comes into view. Rather, one should identify a couple of competing principles, and test them against the identified situations. In other words, one should not accept that a principle is optimal until it has been tested against particular situations, and compared with other possible principles.

When one has reached this stage, the written list of the situations to be regulated becomes invaluable. This list forms the basis of testing the various candidate principles. The first round of testing will probably suggest refinements to one or more of the candidate principles. A second round of testing may also produce further refinements. Most probably, after the first or second round of testing, one of the candidate principles will become the frontrunner. The crucial point here is not to identify a frontrunner before doing the testing.

Of course, this is a somewhat idealised description of ground-up drafting, and the process may in reality involve many compromises. In many drafting projects, time and access to expertise are limited. However, the process as described can be a useful way give some order to what can otherwise be a rather chaotic process.

4.2 Top-down drafting in practice

Much of the legislative counsel's job in ground-up drafting is in the construction of the framework principle. If the framework is well designed, it should be obvious where all the identified parts fit into it. By contrast, in top-down drafting, much of the legislative counsel's role is to work out how best to fit in the various parts into the pre-determined framework. In

other words, in top-down drafting, the legislative counsel needs to ensure that various clarifications, add-ons, carve-outs and examples are expressed in a coherent way in accordance with the basic principle.

The task of the legislative counsel here is to ensure that each specific rule is compared against the basic principle, and ensure that the coherence of that principle is not compromised by the rule. If the example does not fit well with the principle, it should be drafted as a clear add-on or carve-out. If the rule is covered by the principle but needs to be stated for the sake of clarity, it should be drafted as an example or non-operative clarification of the principle and not as an add-on or carve-out. The difficult cases are where the legislative counsel is not sure whether the rule is covered by the principle or not. One possible solution here is to draft an "operative" clarification.

However, the best-designed draft will inevitably attract suggestion for change. Often such suggestions come at the very end of the design process, and come with an irresistible political force behind them. Here, the legislative counsel can play a useful role by examining each suggestion in the light of the basic principle, and advise whether it is best drafted as add-on, carve-out, non-operative clarification or operative clarification.

In summary, in top-down drafting, the legislative counsel should not simply add new rules to a draft in a higgledy-piggledy way. Rather, the legislative counsel needs to go the extra mile and analyse each new instruction in the light of the pre-existing principle. This analysis will indicate how the new rules will relate to the existing principles.

5. General comments

Some commentators call principles-based provisions "fuzzy law". However, in many cases the process of drafting such provisions is anything but "fuzzy". Drafting such provisions will usually consume more time than drafting black letter provisions, and often requires a very high degree of rigour and good organisation. Nevertheless, this work can save a lot of time and effort for later users of the provisions. Principles-based provisions - if well-designed - are easier to read than black letter law, and are flexible enough to deal with unexpected and changing situations. This is especially useful in complex regulatory areas such as taxation.

Yet, there are risks to drafting in principles. There may be insufficient time available to carry out a proper ground-up or top-down drafting process. Alternatively, the nature of the situation to be regulated may not allow a principles-based approach. An example is where accepted practices have solidified over a long period, without a particular organising theme. Another example is where the need for certainty is so great that clarifications, add-ons and carve-outs are not enough to support an effective principle.

One needs to keep in mind here that legislative provisions need to achieve a basic minimum of certainty. This is a basic principle of the rule of law, and is a constitutional requirement in most developed legal systems. This basic level of certainty varies according to the relevant subject matter. The requirement for certainty is particularly high in areas of vital interest to the citizen,

such as intrusions into protected areas of human rights, the definition of criminal offences and the definition of the jurisdiction of a court.10 In these and similar areas, the need for a high degree of certainty may rule out a principles-based approach. In other areas - such as the calculation of a tax liability - concerns with certainty can often be addressed by clarifications, add-ons and carve-outs.

Drafters therefore need to appreciate the advantages and limitations of principles-based drafting, its demands on the drafting process, and it potential benefits for the users of legislation. It is not an exercise to be started without considering the availability of time, drafting expertise and policy expertise. Nor can one try to impose principles-based provisions on any type of regulatory system. But in many cases, principles-based drafting can be the optimal drafting approach. It is likely to be an increasingly-common feature of modern legislative systems.

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[10] See for example cases from the European Court of Human Rights: *Sunday Times v. The United Kingdom*, 25 Mar. 1983, Series A, No. 30, para. 49; *Vogt v. Germany*, 26 Sep. 1995, Series A, No. 323, para. 48.

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]

2 FCIArb, FCIOB, MRICS, ICECA, MAPM, PPISM, FISM, Reg QS, Accredited Mediator (CIDB, M'sia), BSc (Hons) QS (Reading), CDipAF, MSc Arch (University College London), MSc Construction Law & Arbitration (Kings College London) Chartered Quantity Surveyor (UK), Chartered Builder (UK), Registered Quantity Surveyor (M'sia), Accredited Mediator (M'sia). Naseem is now doing a PhD in the area of statutory adjudication at the University of Auckland. He used to serve as President of the Institution of Surveyors Malaysia, Vice-Chairman of the Chartered Institute of Arbitrators UK Malaysia Branch, and Vice-President of the Chartered Institute of Building UK Malaysia branch. Naseem also served on the Advocates and Solicitors' disciplinary committee in Malaysia for several years. He has also been appointed (visiting) Adjunct Associate Professor to the MSc programme in Construction Contract Management at the Technological University of Malaysia where he delivers the occasional lecture. naseem6864@yahoo.com,

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

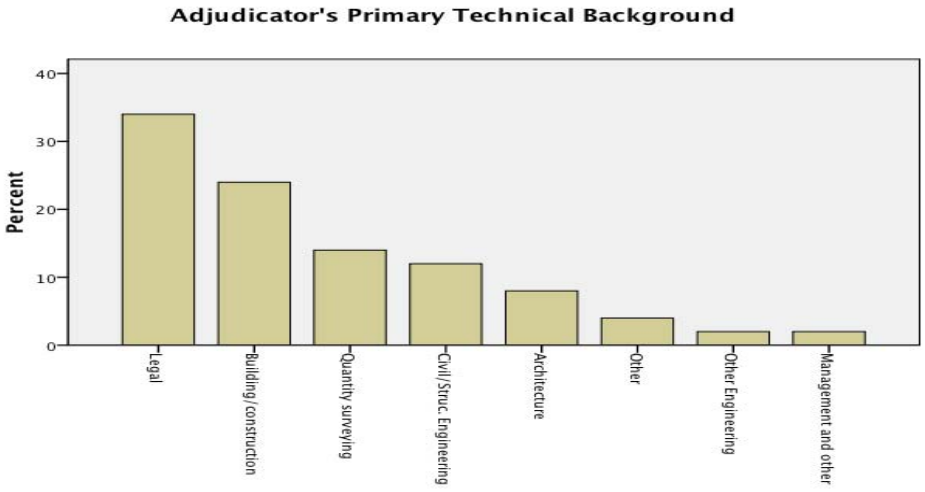
prior approval of the University of Auckland, which has strict ethics committee approval requirements. Among the many assurances given to participants to the questionnaire was that no name will be associated with any one specific response.

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:

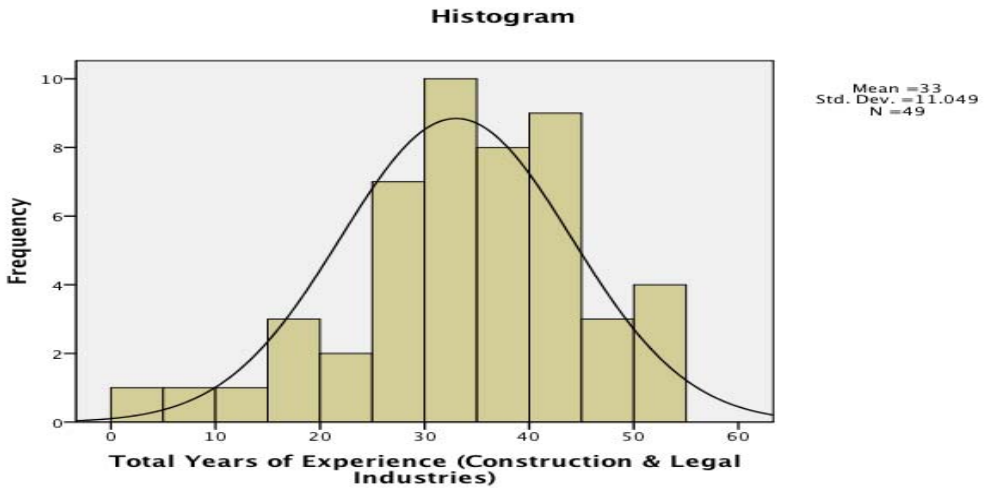


[47] Ameer Ali, N A N and Wilkinson, S *Analysis of the adjudication process and determinations made under the New Zealand Construction Contracts Act 2002.* Presentation at the Asia-Oceania Top University League on Engineering (AOTULE) Postgraduate Conference. Auckland. November 2008

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

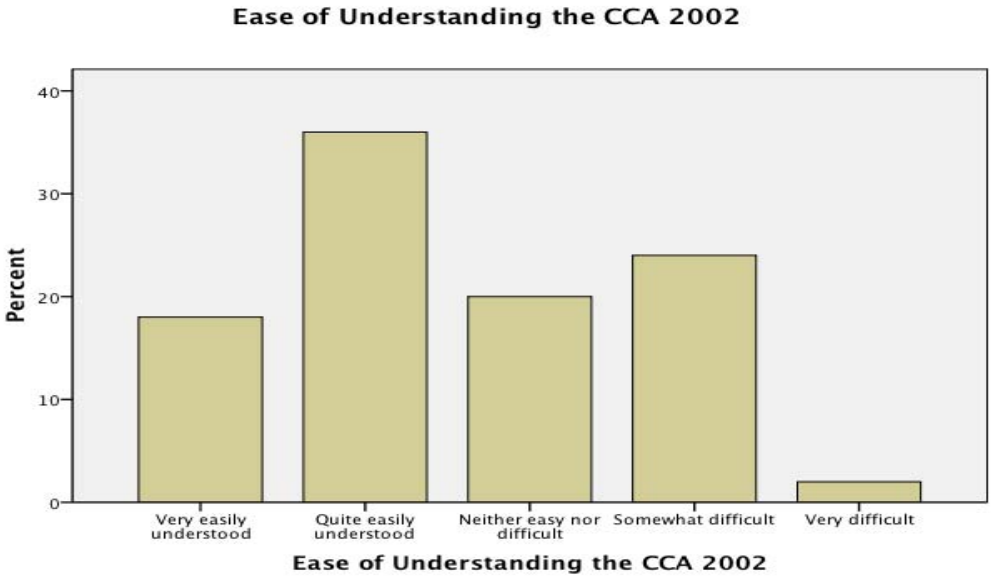
The adjudicators were asked to state the total number of years of experience they had, whether in the construction industry or in law.



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

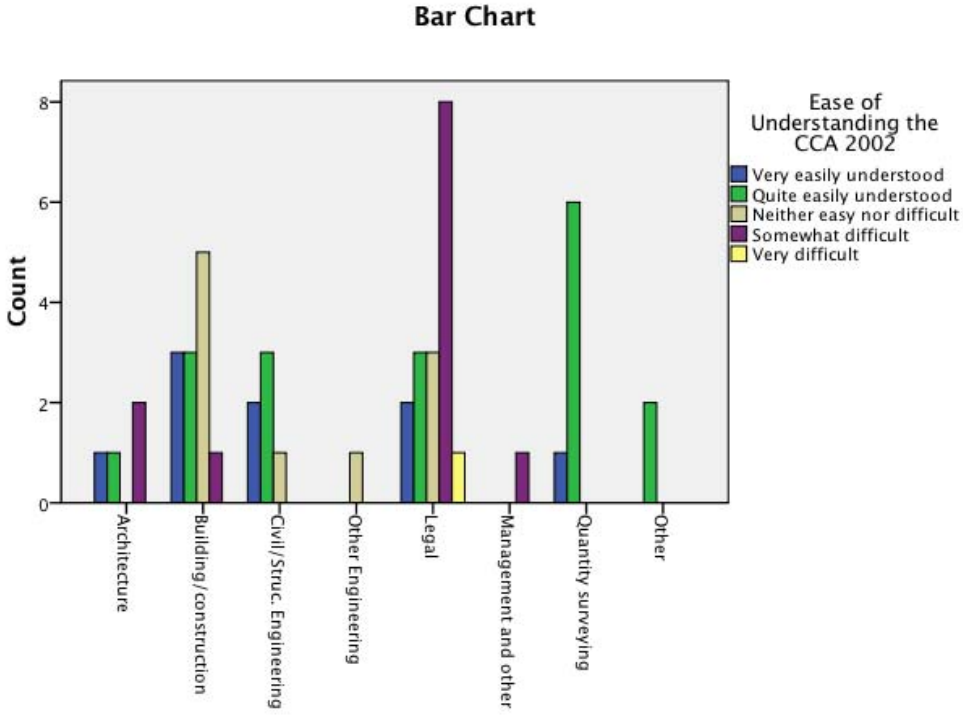
Of the respondents, 54% thought the NZ Act was either very easy to understand or quite easy to understand, and 28% thought it was neither easy nor difficult. Together that adds up to 74%.

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—

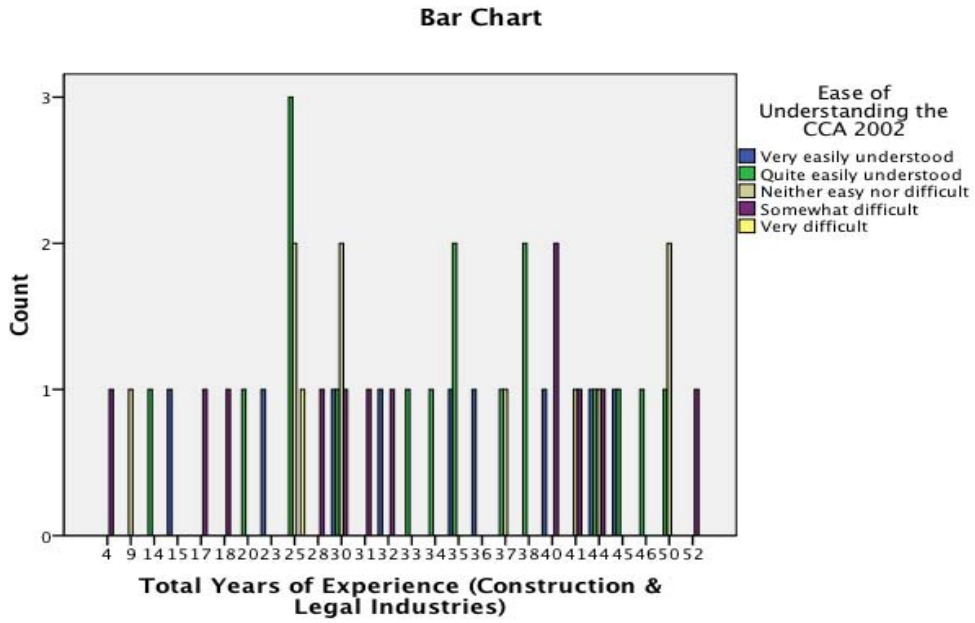
- the adjudicators' years of experience and their views on ease of understanding the NZ Act; and
- the adjudicators' primary background and their views on ease of understanding the NZ Act.

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.

Legislative Drafting: A Lawmaker's Perspective

Margaret Ng[1]

The BL 23 legislation

The most well known legislation I have been involved participated in as a legislator is undoubtedly the *National Security (Legislative Provisions) Bill*, introduced by the Government in February 2003. It was known as "Article 23 legislation" for short, because the Bill's objective was to implement Article 23 of the Basic Law under which the Hong Kong Special Administrative Region (HKSAR) was required to "enact laws on its own to prohibit any act of treason, sedition, subversion against the Chinese Central People's Government, or theft of state secrets". The intention of the SAR Government was to have the Bill passed in July, before the Legislative Council (LegCo) rose for the summer break, but the Bill disturbed much of the Hong Kong population, many of whom had escaped from Communist China in the 1950s and 60s. The memory of the June 4 incident of 1989 was still fresh in the minds of the rest.

The Bill, drafted as an amending Bill, amended three existing Ordinances. It was complex and in obscure language alien to the public.[2] The legal profession's warning and concerns were ignored. The demand for a 'white Bill'[3] was rejected because the Government was worried about delay. It also believed that a majority of LegCo members supported the Bill.

In the event, mistrust in the Bill grew into a movement, and in that year when Hong Kong already faced an economic recession and alarm over the spread of the SARS disease, sparked

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1 Legislative Councillor, Hong Kong Special Administrative Region (HKSAR). Appendix 1 to this article contains the legislation in which Hon. Ng has participated, reproduced here to give an indication as to the number and range of subjects that the Hong Kong legislature has passed.

2 A summary of provisions relating to voting procedures is at Appendix II to this article, and the provisions governing the introduction of Bills in the Legislative Council and their amendment are at Appendix III to this article.

3 I.e., a draft Bill published for consultation.

off a march of 500,000 people in the streets on 1 July 2003. A consequence of the march was that the Bill was eventually withdrawn. Its other consequence was that, a year later, the Chief Executive, Tung Chee-hwa, stepped down for reasons of "ill health", and was replaced by Donald Tsang the present Chief Executive. So legislative drafting is no joke in Hong Kong.

The Basic Law: Hong Kong's constitution

Hong Kong's constitutional arrangements are unique. In consequence, its legislative process and practice are similarly unique. Nevertheless, Hong Kong does have a great deal in common with many other jurisdictions that are also derived from the Westminster system.

This means, broadly speaking, Hong Kong's aims regarding legislative drafting are similar, and the rules and procedures governing the legislative process are similar. Most politicians are in Parliament because they want to influence public policies which implement certain values, and policies frequently require legislative underpinning. Of course, sometimes a situation has arisen which provokes a social outcry that politicians should 'do something', or that 'there should be a law against it!', and passing a law becomes the substitute for real action or policy. Personally, I hope that this does not happen too often, because law made under such circumstances lacks circumspection.

The role and operation of the Hong Kong Legislative Council

The political aims of Hong Kong's legislators are quite distinctive, in my view, because of Hong Kong's particular political circumstances and recent history. The fact of transfer of sovereignty from Britain to China has dominated us for the past 30 years: from the first Sino-British talks on the future of Hong Kong and the run-up to 1997, and then from the establishment of the HKSAR under the Chinese Constitution from the 1 July 1997 to today. We are still in that process of establishing the HKSAR under our "mini-constitution" the Basic Law, and in the totally unchartered waters of "one country, two systems". Thus, much of our political aims have to do with institution building, including the legislature itself as an institution, to adapt to Chinese sovereignty on the one hand and, on the other hand, to preserve the fundamental values such as the rule of law, democracy, and individual rights and freedoms.

Although LegCo has adopted the Westminster style of rules and procedure and even some of the language – such as the absurd title of "the Honourable", there are missing blocks in the structure, the most obvious one being a workable party system. The large number of unaffiliated members, of course, affects the way LegCo can realistically conduct its business, including the core business of legislation at every step.

Also arising from our historical and constitutional background, LegCo is not divided by political creeds reflecting class interests. The Government is appointed, not elected[4] and has no seat in LegCo. LegCo is elected by a large variety of methods, and split into geographical constituency seats and functional constituency seats, but politically divided into the "pro-Government" or

[4] The Chief Executive of the HKSAR is nominated and elected by an Election Committee of 800 and appointed by the Central People's Government. The appointment is a substantive exercise of power and not merely formal or nominal.

"pro-China camp", which may be counted to support the Government and Beijing, and is opposed to challenges of their authority; and the "pan-democrats" or the "opposition camp", who press for democracy, advocate universal human rights and mistrust the SAR Government and Central Authorities.

I have annexed to the text of this speech some essential features of the composition, voting procedure and powers of LegCo (See Appendices I, II and III), and I invite you to bear them in mind.

Quite apart from social policies, then, there is the underlying programme of pushing for democracy and autonomy on one side of the House, and maintaining supremacy of the executive authority, particularly Beijing's authority, on the other side of the House. Since the Government has no seat in LegCo and the Chief Executive is not allowed to belong to any political party, it has to push its proposals through LegCo through influence and patronage. The outcome may be reasonably assured, but the process is, I am sure, exhausting. Government officials have frequently complained that the so-called "pro-Government camp" is even harder to deal with than the so-called "opposition camp".

The legislative process

From this very rough sketch, it can be seen that interests in LegCo are highly complex and fragmented. Politics is notoriously short-term anywhere in the world. In Hong Kong it can be even more short-term and volatile. This brings in a large measure of unpredictability. It also means that the heart of parliamentary business – the enactment of laws – is a lengthy and tortuous business.[5] Members can be overly cautious sometimes, and insufficiently painstaking at other times. The Government, for a variety of reasons, is rarely flexible enough to take members' concerns into account. In recent years, scared of amendments moved by members, Bills have tended to be drafted with greater and greater rigidity, all to ensure that the number issues that can be considered to fall within its scope is minimised.

To both officials and members, the legislative process can be very frustrating. It can be a huge waste of expensive time and effort on all sides, including the drafting team and the LegCo Legal Services Division. The end product of such a process is often a clumpy piece of legislation which nobody is happy with.

In dealing with a Bill, the legislators and the Government may focus on different things. Legislators want to know the impact on the public, especially their electorate. The Government is mostly concerned with administrative convenience and the needs of the particular department responsible for its implementation. Many clashes between legislators and Government originate from this difference of focus. When the Government is exclusively concerned with its own political aims, especially when it is pressed for time, there can be serious oversight.

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[5] See Table A and Table B appended which set out the length of deliberations in Bills committees.

Revenue (Abolition of Estate Duty) Bill

One example of this is the *Revenue (Abolition of Estate Duty) Bill 2005*. In his budget speech on 16 March 2005, the Financial Secretary proposed to abolish estate duty. He wanted that to come into effect in July. The Bill that he introduced on 11 May 2005 purported to abolish the then existing Estate Duty Ordinance, but overlooked the whole probate practice which underpinned by the EDO, and which effectively protected beneficiaries of a deceased's estate. In the end, the Bill that was passed, without any prior consultation, introduced a new scheme that had far-reaching effects for ordinary families and not just those who died billionaires.

The "Spy Bill"

A much more dramatic example is the *Interception of Communications and Surveillance Bill 2006*.[6] The Government's law enforcement agencies such as the police and the Independent Commission Against Corruption (ICAC) had been telephone-tapping without lawful authority, contrary to Article 30 of the Basic Law. Judicial review proceedings were brought. The Government lost before the Court of First Instance, lost again on appeal and also on appeal to the Court of Appeal, and had to have a law enacted before the suspension of the court's declaration expired. The Government rushed to push through legislation in a matter of month.

The subject matter of the Bill was politically sensitive. It was feared that people with unwelcome political views will be interfered with. The "pan-democrats" were up in arms because the Government showed itself to have scant respect for privacy of communication, in defiance of basic rights. The "pro-Government" groups were determined to overcome opposition and ensure that Government law enforcement agencies have the power they wanted to investigate crime and threats against security. The Secretary for Justice played only a backroom role. The Secretary for Security was the minister who sponsored the Bill, but the police and ICAC, the main operator of wiretapping, were the real driving force.

The Bill introduced a two-tier system of authorization. Wiretapping required the authorization of a 'panel judges' appointed in an administrative and not juridical role. The whole system operates in secret, but a Justice of Appeal, again appointed in an administrative capacity as Commissioner, is given certain powers to monitor the implementation of the system and report to the Chief Executive.

During the intensive vetting process, many ambiguities and gaps were pointed out, and numerous amendments were suggested, but the Government was unwilling to accept most of the material suggestions. Second reading debate was resumed just before the deadline. The debate took 58 hours, spread over 3 days. The Government moved 189 amendments, all of which were passed; members moved 187 amendments, all of which were defeated. Most legislators could not, and the pro-government members did not, follow the debate. The public had little idea of what happened, but a survey of "opinion leaders" by the SCMP was highly critical of the Bill.

The Government paid a heavy price. In February this year, the Commissioner reported

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[6] This Bill was referred to as the "spy Bill" for short.

'irregularities', notably by the ICAC. The public learnt that the ambiguities of some provisions resulted in ICAC officers disregarding the views and orders of the panel judges and the Commission where the ICAC took a different view of what the law meant. The disclosure and obvious dissatisfaction of the Commissioner put the integrity of the ICAC in question.

To say the very least, the rush plus rigidity to meet an immediate need make poor legislation. The rush is not confined to the vetting process. Often, the Government's procrastination means a decision is not made until late in the day, uncertain drafting instructions are thrust upon the Law Draftsman, and things are turned upside down when the Bill goes to LegCo.

It is worth pointing out that a member who moves an amendment to a Bill is responsible for drafting it. The draft is vetted by LegCo's Legal Services Division for language and technical correctness. It was no small task for me to draft the 120 amendments in two languages within the short time available, and I would not have done so if I had not felt it was a matter of fundamental principle.

How amendments to Bills are dealt with

By our rules, an amendment that has the support of the majority in a Bills committee is drafted by the Legal Services Division. I have that luxury as Chairman of the Bills Committee when we considered the *Race Discrimination Bill* in 2007. There was no dire pressure of time in this case, but the Government's rigidity about the provisions was extreme. Government officials just repeated set responses verbatim when confronted with queries and criticism.

In that case, there was a large degree of consensus among members of the Bills committee in favour of greater racial equality. Not only is this a basic right, but minorities are becoming an important constituency. My belief is that the Government's rigidity stems from its inability either to promote racial equality across the board in its departments or in the community where racial discrimination is deep seated and pervasive, though not often manifest directly or viciously.

Naturally, most Bills are relatively mundane and passed without even a Bills Committee being formed. On my own count, from 1995 to 2008, a total of 127 Bills committees were formed of which many were short and uncontentious.

Mainland Judgment (Reciprocal Enforcement) Bill

My last example is chosen to give the story a happy ending. The *Mainland Judgment (Reciprocal Enforcement) Bill* was, admittedly, a "technical" Bill that put into effect an agreement between the mainland of China and the HKSAR on the mutual enforcement of judgments in certain types of cases and under a set of conditions. It was nevertheless of great symbolic significance and the vetting required meticulous care because our two systems of law are profoundly different, and if mainland judgments can reach property in Hong Kong, we have to be sure that there is clear justification and adequate safeguards. On the other hand, links with mainland courts are inevitable and desirable for good reasons.

A number of amendments resulted from the vetting process, all of which were agreed and considered to be improvements. The reason for the smooth process was undoubtedly the knowledgeable Government team and their good working relationship with the mainland

officials responsible for the mutual enforcement agreement in the first place. Perhaps there is one other reason. Being "technical", the Bill was thought to be boring and has no political appeal. The lack of excitement was conducive to rational scrutiny!

Conclusion

Let me conclude with a few observations and some pious hopes. I am here giving you only this lawmaker's perspective and cannot speak for others.

It is essential to the rule of law and so a categorical imperative with our profession that no law should be passed which does not conform to the fundamental principles of clarity, accessibility, constitutionality and due process. By constitutionality I mean particularly due regard for the rights of the individual under the constitutional settlement. By clarity and accessibility I mean the same as King James I when he said: "Every subject ought to understand the law under which he lives". If the law is meant to be obeyed other than as an instrument of tyranny, then it must be based on consensus, and to be based on consensus, it must first be understood. By due process I mean not just the letter of the rules of procedure, but first of all, consensus through consultation and rational debate, and secondly the fairness that underlies these rules and procedures.

I believe that much of the problems of Hong Kong's legislation have to do with the fact that the legislative process has become almost unmanageable. But to make it manageable the Government must recognise the proper political interest of the legislator, and be prepared to come to a reasonable settlement at the stage the policy is being formulated, before law drafting even begins. Then, once the process has begun, it must go at a good pace without losing its momentum. To achieve that, sensible decisions have to be made along the way, and this can happen only if there is sufficient trust and give and take. When consultation in broad general conceptual terms is inadequate and may lead to mistrust and controversy, the publication of a 'white Bill'[7] is often a good idea, and I urge that Government to make more use of it.

I have long advocated a process for LegCo whereby the Government takes seriously the obligation to consult the legislature on its policies and for legislators to indicate their support or opposition, and take responsibility for it, so that drafting can proceed on the firm basis of that bargain. A Bill that correctly implements that bargain should in the main be supported. Such a Bill will have a much better chance of being a cogent piece of legislation, and then we need not look to interminable debates to fit in or reject illogical or prolific amendments.

In the context of Hong Kong's present political framework, I believe this simple proposal may not be entirely practicable. That is one of the main reasons why I think the sooner the SAR Government and Beijing make up their minds to give Hong Kong democracy the better it will be for the integrity of our legal system. In the interim, I believe the following steps can bring improvement to the efficiency of the process and quality of the product:

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[7] I.e. a draft bill intended for public consultation.

- More communication between the legislators and the drafting team to give legislators a better understanding of law drafting.
- Greater discipline instilled into policy bureaux to keep to a viable timetable from drafting instructions to the final draft.
- Greater use of white Bills for consultation where the technical language is material.
- Simpler and more accessible drafting, including the development of a more felicitous Chinese drafting language.

Appendix 1

Margaret Ng's involvement in Bills committees 1995 – 2009 (as at 31.3.09)

Total number of Bills committees on which she sat as member: 128

The total number of Bills committees on which she served as Chairman: 43

1995 - 1997[8]

**	Legal Aid Services Council (No/2) Bill Intellectual Property (World Trade Organization Amendments Bill) 1995 Costs in Criminal Cases Bill Rehabilitation of Offenders (Amendment) Bill 1995 Crimes (Amendment) Bill 1995 Immigration (Amendment) Bill 1995 Criminal Procedure (Amendment) Bill 1996 Mental Health (Amendment) Bill 1996 Immigration Service (Amendment) Bill 1996 Coroners Bill Legal Practitioners (Amendment) Bill 1996 Evidence (Amendment) Bill 1996 New Territories Lands Exchange Entitlements (Redemption) Bill
*	Legal Services Legislation (Miscellaneous Amendments) Bill 1996 Independent Police Complaints Council Bill

[8] ***** Served as Chairman;

** Served as Deputy Chairman

	Patents Bill
	Crimes (Amendment) (No.2) Bill 1996
	Official Secrets Bill
	Government Rent (Assessment and Collection) Bill
	Immigration (Amendment) Bill 1997
	Copyright Bill
	Supreme Court (Amendment) Bill 1997
	Registered Design Bill
	Jury (Amendment) Bill 1997
**	Long Term Prison Sentences Review Bill
	Mutual Legal Assistance in Criminal Matters Bill

1998 – 2000

*	Evidence (Amendment) Bill 1998
	Securities (Amendment) Bill 1998
	Securities (Insider Dealing) (Amendment) Bill 1998
	Adaptation of Laws Bill 1998
	Adaptation of Laws (No. 2) Bill 1998
	Adaptation of Laws (No. 3) Bill 1998
	Adaptation of Laws (No. 4) Bill 1998
	Adaptation of Laws (No. 6) Bill 1998
*	Theft (Amendment) Bill 1998
	Adaptation of Laws (No. 12) Bill 1998
*	Legislative Council (Amendment) Bill 1999
	Interpretation and General Clauses (Amendment) Bill 1999
	Adaptation of Laws (No. 5) Bill 1999
*	Adaptation of Laws (No. 9) Bill 1999
	Revenue Bill 1999
	Trade Marks Bill
	Adaptation of Laws (No. 16) Bill 1999
	Statute Law (Miscellaneous Provisions) Bill 1999
	Legal Practitioners (Amendment) Bill 1999
*	Evidence (Amendment) Bill 1999
	Arbitration (Amendment) Bill 1999
*	Adaptation of Laws (No. 10) Bill 1999
*	Legal Aid (Amendment) Bill 1999
	District Court (Amendment) Bill 1999
*	Companies (Amendment) Bill 2000
	Road Traffic (Amendment) Bill 2000
	Family Status Discrimination (Amendment) Bill 2000
**	

2000 - 2004

	Immigration (Amendment) Bill 2000
	Drug Trafficking and Organized Crimes (Amendment) Bill 2000
	Adaptation of Laws Bill 2000
*	Securities and Futures Bill
	Banking (Amendment) Bill 2000
**	Land Registration (Amendment) Bill 2000
**	Chief Executive Election Bill
	Revenue Bill 2001
	Revenue (No.2) Bill 2001
	Revenue (No.3) Bill 2001
	Copyright (Suspension of Amendments) Bill 2001
*	Boilers and Pressure Vessels (Amendment) Bill 2001
*	Massage Establishments (Amendment) Bill 2001
*	Mandatory Provident Fund Schemes (Amendment) Bill 2001
	The Ombudsman (Amendment) Bill 2001
	Hong Kong Court of Final Appeal (Amendment) Bill 2001
	Statute Law (Miscellaneous Provisions) Bill 2001
	Companies (Corporate Rescue) Bill
	Inland Revenue (Amendment) Bill 2001
	Juvenile Offenders (Amendment) Bill 2001
	Inland Revenue (Amendment) (No. 2) Bill 2001
*	Immigration (Amendment) Bill 2001
*	Adaptation of Laws Bill 2001
	Copyright (Amendment) Bill 2001
*	Interest on Arrears of Maintenance Bill 2001
*	Registration of Persons (Amendment) Bill 2001
	Prevention of Child Pornography Bill
*	Revenue Bill 2002
	Revenue (No. 2) Bill 2002
	United Nations (Anti-Terrorism Measures) Bill
*	Land (Miscellaneous Provisions) (Amendment) Bill 2002
	Evidence (Miscellaneous Amendments) Bill 2002
	Land Titles Bill
	Copyright (Amendment) Bill 2003
*	National Security (Legislative Provisions) Bill
	Legislative Council (Amendment) Bill 2003
	Buildings (Amendment) Bill 2003
*	Deposit Protection Scheme Bill
	United Nations (Anti-Terrorism Measures) (Amendment) Bill 2003
	Public Officers Pay Adjustments (2004/2005) Bill
	Adoption (Amendment) Bill 2003
*	Criminal Procedure (Amendment) Bill 2004
	Merchant Shipping (Security of Ships and Port Facilities) Bill
**	

2004 – 2008

*	Trade Descriptions (Amendment) Bill 2004
	Transfer of Sentenced Persons (Amendment) (Macau) Bill
	Statute Law (Miscellaneous Provisions) Bill 2005
*	Aviation Security (Amendment) Bill 2005
*	Securities and Futures (Amendment) Bill 2005
*	Chief Executive Election (Amendment) (Term of Office of the Chief Executive) Bill
	Building Management (Amendment) Bill 2005
	Revenue (Abolition of Estate Duty) Bill 2005
	Civil Aviation (Amendment) Bill 2005
	Marriage (Introduction of Civil Celebrants of Marriages and General Amendments) Bill
	Accreditation of Academic and Vocational Qualifications Bill
	Chief Executive Election and Legislative Council Election (Miscellaneous Amendments) Bill
	Copyright (Amendment) Bill 2006
*	Interception of Communication and Surveillance Bill
*	Safety of United Nations and Associated Personnel Bill
	Race Discrimination Bill
	Employment (Amendment) Bill 2006
	Shenzhen Bay Port Hong Kong Port Area Bill
	Mainland Judgment (Reciprocal Enforcement) Bill
	Patent (Amendment) Bill 2007
	Statute Law (Miscellaneous Provisions) Bill 2007
	Civil Justice (Miscellaneous Amendments) Bill 2007
	Attachment of Income Order (Application to Government and Miscellaneous Amendments) Bill 2007
*	Domestic Violence (Amendment) Bill 2007
	Independent Police Complaints Council Bill
*	Prevention of Bribery (Amendment) Bill 2007
	Legislative Council (Amendment) Bill 2007
	Prevention and Control of Disease Bill
*	Trade Descriptions (Amendment) Bill 2007
*	West Kowloon Cultural District Authority Bill
	Statute Law (Miscellaneous Provisions) Bill 2008

2009

*	Adaptation of Laws Bill 2009

Total number of Bills: 128 (43 as Chairman)

Appendix 2

Subcommittees on Subsidiary Legislation

1995-1997

	Subcommittee on the Immigration (Amendment) Bill 1996
	Subcommittee on the Resolution under Section 100A of the Interpretation and General Clauses Ordinance (Cap.1)
	Subcommittee on Sewage Services (Sewage Charge) (Amendment) Regulation 1996 and Sewage Services (Trade Effluent Surcharge) (Amendment) Regulation 1996

1998-2000

	Subcommittee on five resolutions made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance (Cap.525)
	Subcommittee on Public Revenue Protection (Revenue) Order 1999
*	Subcommittee on resolution under the Immigration Ordinance
	Subcommittee to study issues relating to the tabling of Subsidiary Legislation in Legislative Council
	Subcommittee on Immigration (Amendment) Regulation 1999
	Subcommittee to study the Italy Order, the South Korea Order and the Switzerland Order made under section 4 of the Mutual Legal Assistance in Criminal Matters Ordinance
*	(Cap.525)
*	Subcommittee on Rules of the District Court and District Court Civil Procedure (Fees) (Amendment) Rules 2000 (Chairman)

2000-2004

*	Subcommittee on Solicitors (Professional Indemnity) (Amendment) Rules 2001 ©
	Subcommittee on Attachment of Income Order (Amendment) Rules 2001
	Subcommittee on Fugitive Offenders (Sri Lanka) Order and Fugitive Offenders (Portugal)
*	Order
	Subcommittee on Mutual Legal Assistance in Criminal Matters (Canada) Order, Mutual Legal Assistance in Criminal Matters (Philippines) Order and Mutual Legal Assistance in Criminal Matters (Portugal) Order
	Subcommittee on the Resolution of the Board of Directors of the Po Leung Kuk
	Subcommittee on Revenue (Variation and Reduction of Fees and Charges) Order 2002
	Subcommittee on Solicitors (Group Practice) Rules
	Subcommittee on Solicitors (Professional Indemnity) (Amendment) Rules 2001
	Subcommittee on United Nations Sanctions (Afghanistan)(Amendment) Regulation 2002 & United Nations Sanctions (Angola)(Suspension of Operation) Regulation 2002
	Subcommittee on the draft Criminal Jurisdiction Ordinance (Amendment of section 2(2)) Order 2002
	Subcommittee on the motion to amend the Resolution of the Land Fund under section 29 of the Public Finance Ordinance (Cap. 2)
	Subcommittee on the Mutual Legal Assistance in Criminal Matters (Ireland) Order and the

*	Mutual Legal Assistance in Criminal Matters (Netherlands) Order
*	Subcommittee on Patents (General) (Amendment) (No.2) Rules 2002
	Subcommittee on Prevention of the Spread of Infectious Diseases (Amendment) Regulation 2003
*	Subcommittee on Quarantine and Prevention of Disease Ordinance (Amendment of First Schedule) Order 2003 and Prevention of the Spread of Infectious Diseases Regulations (Amendment of Form) Order 2003
	Subcommittee on Rules of the High Court (Amendment) Rules 2003
	Subcommittee on Trade Marks Rules and Trade Marks Ordinance (Cap.559) (Commencement) Notice 2003
	Subcommittee on United Nations Sanctions (Afghanistan)(Amendment) Regulation 2002 and United Nations Sanctions (Angola)(Suspension of Operation) Regulation 2002
*	Subcommittee on Commencement Notices under the Chinese Medicine Ordinance, Chinese Medicine (Fees) Regulation and Chinese Medicines Regulation
	Subcommittee on the draft Criminal Jurisdiction Ordinance (Amendment of section 2(2)) Order 2002
	Subcommittee on proposed resolution under section 7(a) of the Legal Aid Ordinance
	Subcommittee on the Mutual Legal Assistance in Criminal Matters (Ukraine) Order and the Mutual Legal Assistance in Criminal Matters (Singapore) Order
*	Subcommittee on Summary Disposal of Complaints (Solicitors) Rules
	Subcommittee on United Nations Sanctions (Liberia) Regulation 2003

2004-2008

	Subcommittee to Study Four Items of Subsidiary Legislation under the Road Traffic Ordinance
	Subcommittee on Mutual Legal Assistance in Criminal Matters (Belgium) Order and Mutual Legal Assistance in Criminal Matters (Denmark) Order
	Subcommittee on Proposed Resolutions under the Road Traffic (Driving-offence Points) Ordinance (Cap. 375) and Fixed Penalty (Criminal Proceedings) Ordinance (Cap. 240)
	Subcommittee on Subsidiary Legislation Relating to Consular Matters
	Subcommittee on Closed Area (Hong Kong Ministerial Conference of World Trade Organization) Order
*	Subcommittee on Fugitive Offenders (Finland) Order
	Subcommittee on Mutual Legal Assistance in Criminal Matters (Poland) Order and Mutual Legal Assistance in Criminal Matters (Israel) Order
	Subcommittee on Fugitive Offenders (Germany) Order and Fugitive Offenders (Republic of Korea) Order
	Subcommittee on Fugitive Offenders (Malaysia) (Amendment) Order 2007 and Fugitive Offenders (Suppression of the Financing of Terrorism) Order
	Subcommittee on Mutual Legal Assistance in Criminal Matters (Germany) Order
	Subcommittee on Mutual Legal Assistance in Criminal Matters (Malaysia) Order
	Subcommittee on Official Languages (Alteration of Text under section 4D) (Miscellaneous) Order 2007
	Subcommittee on Subsidiary Legislation to Implement the Obligations under the United Nations Convention Against Corruption
	Subcommittee on Subsidiary Legislation Relating to the Shenzhen Bay Port Hong Kong Port Area
	Subcommittee on Securities and Futures (Contracts Limits and Reportable Positions)

	(Amendment) (No.2) Rules 2007

Appendix 3

LegCo members' power to introduce Bills and amendments

Under Article 74 of the Basic Law—

- Members may introduce Bills in accordance with the provisions of the Basic Law and legal procedures;
- Bills which do not relate to public expenditure or political structure or the operation of the government may be introduced;
- Bills relating to government policies can be introduced only with the written consent of the Chief Executive.

Under the Rules of Procedure passed by LegCo—

Amendments

LegCo does not regard Art. 74 to intend to refer to amendments of Bills. However, the following restrictions are imposed under Rule 57 (4) of the Rules of Procedure:

- An amendment must be 'relevant' to the subject matter of the Bill (the 'scope' rule);
- An amendment the object or effect of which is to dispose or charge the revenue or other public moneys can be proposed only with the approval of the government (the 'charging effect' rule).

Table A[§]

Term	*Total Bills studied by Bills Committees (names of Bills in Appendix I)*	*Duration of scrutiny (number of days between date of First Reading and date of passage)*		
		Longest	*Shortest*	*Average*
1995 - 1997	94	533	20	207
1997 - 1998	27	131	8	50
1998 - 2000	71	644	28	192
2000 - 2004	105	1 319	22	290

2004 - 2008	72	719	22	235

Table B[§]

Term	*Longest duration*		*Shortest duration*	
	Days	*Bill (further details in Appendix II)*	*Days*	*Bill (further details in Appendix II)*
1995 - 1997	533	Estates Agents Bill	20	Judicial Service Commission (Special Provision) Bill 1997
1997 - 1998	131	Occupational Deafness (Compensation) (Amendment) (No. 2) Bill 1997	8	Legislative Provisions (Suspension of Operation) Bill 1997
1998 - 2000	644	Human Reproductive Technology Bill	28	Human Organ Transplant (Amendment) Bill 1999
2000 - 2004	1 319	Inland Revenue (Amendment) Bill 2000	22	Inland Revenue (Amendment) Bill 2001
2004 - 2008	719	Building Management (Amendment) Bill 2005	22	Mandatory Provident Fund Schemes (Amendment) Bill 2008

§ Courtesy of the LegCo Secretariat

Employment opportunities

Government of Northern Ireland

LEGISLATIVE COUNSEL GRADE 5 (2 Posts) [REF: IRC77807]

SALARY: £57,300 to £116,000 (Under Review)

DEPARTMENT: Office of the First Minister and deputy First Minister

LOCATION: Parliament Buildings, Belfast

Opportunities exist to join an expert team of legislative drafters working in the Office of the First Minister and deputy First Minister drafting Bills for introduction to the Northern Ireland Assembly.

The job involves working with all the Northern Ireland government departments in delivering the Northern Ireland Executive's legislative programme across a wide range of devolved responsibilities.

The restoration of devolved government and the recent devolution of policing and justice have created increased demand for primary legislation and we wish to recruit experienced drafters to augment our team.

These posts may be filled by the secondment of the successful candidates from their current posts.

Further appointments may be made from this competition should NICS positions become vacant which have similar duties and responsibilities.

For an application form and more detailed information, including the duties and responsibilities of the post, and the criteria to be used during the recruitment and selection process, please write to, email or telephone HRConnect at:

> HRConnect, PO Box 1089, The Metro Building, 6-9 Donegall Square South, Belfast, BT1 9EW. Telephone: 0800 1 300 330. Email: recruitment@hrconnect.nigov.net

Applicants are encouraged to submit an online application at the following address: www.nicsrecruitment.gov.uk However, requests for hard copy applications are welcomed and all applications will be treated equally regardless of whether they are hard copy or online.

All requests must include your name, address and reference number IRC77807.

Completed application forms must be returned to arrive not later than 12:00 noon (UK time) on Friday, 7 January 2011.

The Northern Ireland Civil Service is an Equal Opportunities Employer.

ALL APPLICATIONS FOR EMPLOYMENT ARE CONSIDERED STRICTLY ON THE BASIS OF MERIT.

Positions of Director and Assistant Director, Legislative Counsel

About the Company

The QFC Regulatory Authority is the independent regulatory body of the Qatar Financial Centre (QFC) located in Doha, Qatar. It was established in 2005 to regulate firms that conduct financial services in or from the QFC. The QFC Regulatory Authority has a broad range of regulatory powers to authorise, supervise and, when necessary, discipline firms and individuals. The QFC Regulatory Authority regulates firms using principle-based legislation of an international standard, in line with other major financial centres. For more details on the QFC Regulatory Authority please visit www.qfcra.com.

About the Division

The Policy and Enforcement Division is responsible for the development of the QFC's legislative and regulatory regime in a manner that enables the QFC Regulatory Authority to meet its regulatory objectives and to address new opportunities, initiatives and risks and market and regulatory developments. In addition to developing and drafting legislation required by the Authority, the Division is responsible for publishing legislation in hard copy and electronic format. This includes legislation produced by the Authority and legislation produced elsewhere in the QFC.

Director, Legislative Counsel

Narrative Description

The Director of the Legislative Counsel Team leads a unit of 3-4 other professionals Division and will be responsible for the development of the QFC regulatory and legislative regime, and the development of legislation for the proposed integrated Financial Regulator for Qatar, through the drafting of laws, regulations, rules, guidance, and other legislative instruments within the financial sector and regulatory services environments. The goal will be to ensure that the QFCRA remains at the forefront of industry developments by providing an appropriate regulatory and legislative framework.

Interested applicants are invited to confidentially submit their CV online via the careers section at www.qfcra.com or forward their CV to k.matta@qfcra.com

Associate Director, Legislative Counsel

Narrative Description

The Legislative Counsel (Associate Director) will be primarily responsible for contributing to the work of the Policy and Enforcement Division in the development of the QFC regulatory and legislative regime, and the development of legislation for the proposed integrated Financial Regulator for Qatar, through the drafting of laws, regulations, rules, guidance, and other legislative instruments within the Financial Sector and Regulatory Services environments. The goal will be to ensure that the QFCRA remains at the forefront of industry developments by providing an appropriate regulatory and legislative framework.

Interested applicants are invited to confidentially submit their CV online via the careers section at www.qfcra.com or forward their CV to k.matta@qfcra.com

Commonwealth Association of Legislative Counsel

Membership application form for new members

Apply to: Dr D.E. Berry, Secretary, Commonwealth Association of Legislative Counsel, Room 107, State Law Office, PO Box 40112, Nairobi, Kenya §

I, ……..,

wish to apply to become a full member/an associate member# of the Commonwealth Association of Legislative Counsel.

(signed) …….. Applicant

#Note: A p*erson is eligible to become a full member of CALC if he or she is or has been engaged in legislative drafting or in training persons to engage in legislative drafting and is a Commonwealth person. A "Commonwealth person" is a person who is a citizen or a permanent resident of, or who is domiciled in, a country or territory that is a member of the Commonwealth of Nations. Any other person who has an interest in legislative drafting is eligible to become an associate member of CALC, whether the person is a Commonwealth person or not.*

Please specify *all* of the following:

Your office name and address ……...……..

……..……. *Post code* ….……

**Your home address*..……...…….……*

……..…… *Post code* …..……

Your office e-mail address ……..…….…....

Your personal e-mail address ……..……...

§*Your office telephone no.* ……... §; **your home telephone no.* …….

§*Your office fax. no. (if any)* ……

After completing the form, send it to me electronically (e-mail) or by ordinary post. The e-mail address is dr_duncan_berry@yahoo.co.uk

§ Please do *not* forget to include your country code and area code.

* If you have any objection to particulars of your residential address or home phone number being published, please specify.