How to Promote Plain English

TALK LIKE AN ECONOMIST

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Applying economic analysis to use of plain English in legal documents.

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This article aims to demonstrate the usefulness of applying economic analysis to an area of law undergoing development (drafting in plain English), reconceptualising it and suggesting policy considerations which should be taken into account by courts, Parliament and document-drafters.

Law is concerned with regulating relations between individuals. This regulation is achieved by legal institutions (parliament, the executive and the courts) developing and applying legal rules. The essential feature of these rules is that, in providing consequences (civil or criminal) for their non-observance, they create incentives to promote or restrain certain conduct. Necessarily, the rules are created and communicated largely through language. The extent to which individuals subjected to those rules are expected to understand them has varied over time.

Arising from its behavioural assumptions, economics provides a conceptual framework for describing and predicting human behaviour. The common ground between law and economics is that legal rules form part of the environment in which individuals act. In planning an activity, individuals seek to assess its consequences. One of those consequences is potential legal liability. However, economics, in analysing human behaviour, considers not only the impact of legal rules on that activity but also cultural conventions, idiosyncratic habits and expectations which also influence human behaviour. What then is the relevance of plain English to the legal system?

By concentrating on the broadening and deepening of peoples' understanding of legal documents, plain English concerns itself with improving the functioning of a legal system. Awareness and understanding of the content and consequences of a legal document, is an essential pre-condition for an individual acting rationally with respect to that document. Before embarking on the economic analysis, a few words about plain English are in order.

The plain English movement — an overview

The misuse of language to mislead, exclude and control people has long been understood. Critics, including Thomas More, Adam Smith, Jeremy Bentham and George Orwell, have clearly identified the political and social maladies arising from the use of language as a control mechanism rather than a communication tool. However, until recently, their observations failed to provoke a broad social or political response and remained cries in the wilderness. The plain English movement gained momentum from the late 1960s — initially in the USA, and has now gained international and mainstream recognition. Its success is due to many political and academic developments.

The political development can be identified as the post WWII dominance of democratic forms of government. Democracy requires the participation of the governed, formally through voting. The quality of that participation, in turn, is dependent on the amount and quality of information provided to electors. The 1960s civil rights movement in

the USA was also influential. By questioning and ultimately undermining the, until then, prevailing view of government as benign and paternal, the civil rights movement generated a demand for greater accountability of government. One aspect of this questioning arose from the US government's deliberate misuse of language to mislead its citizens as revealed in the notorious *Pentagon Papers* exposé. The allied movement of consumerism also focused attention on the citizen as consumer. For the market system to operate, decision makers (consumers) require accurate and adequate information. The consumerist movement mobilised political forces to overcome what were perceived as producers' unwillingness to inform consumers about their products or services. Inevitably, these developments placed under scrutiny the use of language in law, administration and commerce. However, another change was required before the demands for greater and clearer communication were realised.

That development arose from within academia. The application of the scientific method to the study of language and comprehension provided the means by which the demand for greater communication would be satisfied. The fruitful product of inter-disciplinary research by linguists and psychologists shed light on the functioning of language and how information is 'transmitted' and knowledge 'constructed'. Tests were developed to measure comprehension and guidelines were formed to improve the comprehensibility of documents.

When the political demand for greater information combined with the technical know-how to improve the comprehensibility of documents, the goals of plain English received official recognition and endorsement. The point has been reached where it is now no longer necessary to engage in polemics to promote or justify the goals of plain English. Principles of plain English drafting are being adopted by academia, government, the professions and commerce. There are increasing instances of the requirement for plain English drafting receiving legislative recognition.

The heuristics of plain English are simple and self-evident. When drafting a document, an author should aim to be brief, clear, precise and sincere. This necessarily requires an understanding of the intended reader of that document. No doubt controversy remains as to how those heuristics are implemented in any particular case. Residual debate also focuses on the nature and extent of the achievements of plain English. It is in this regard that law and economics can make a contribution.

Much of the plain English movement is premised on the idea that given the opportunity to understand a document or issue, people will readily seize it. However, the fact remains that in many instances, people stubbornly choose to remain 'free' from information even when it is provided to them in a user-friendly form. The implications for the law of what has been termed 'rational apathy' are profound.

In general terms, the legitimacy of our legal system is based on a broad understanding of its content, processes and objectives. A particular example of comprehension being relevant to the operation of a rule is that of the doctrine of unconscionable conduct. An element triggering a court's jurisdiction to excuse a contracting party's non-performance, is that party's lack of understanding of the contents and significance of the document. Such a rule creates an incentive for those relying on contracts to ensure that the contract is drafted in a manner that minimises the potential for reneging by reference to unconscionable conduct. This then raises the question of how much and what kind of understanding is required to trigger liability. The level of required comprehension varies according to social trends.

Arguably, consumerism in our society has contributed to a social convention which has influenced individuals' preferences for information by creating or contributing to an expectation that being better informed is in itself a good thing. In turn, this gives rise to the question of 'how much' and what type of information should be obtained?

An economic perspective

The analytical tools

Economics is a discipline based on liberal philosophical underpinnings and employs a scientific methodology. It may be considered as a study of individual decision making under conditions of constrained choice. Economics views humans as rational, self-interested utility maximisers. Rationality involves actors who have an understanding of their own hopes, desires, fears and pains and the ability to mentally represent, in causally relevant terms, the world in which they act. Individuals understand through reason, observation and experience that all actions have consequences and that they are able to advance their own desires or avoid pain by choosing amongst the range of activities available to them. An element of rationality is causation. An appreciation of causality provides a chart with which actors navigate from their existing state of affairs to their preferred end-state. The term 'end-state' does not mean an ultimate destination for humans but rather that the contemplated action will affect the actor's present situation by moving the actor to a preferred state of affairs.

As individuals are the essential decision makers, they will act or engage in the world with a deliberate view of promoting their own interests. An individual's creation and ranking of preferred states is thought to be internally generated although external influences are not excluded. With the required information, individuals will assess the optimal path to achieve their objectives given the resources under their command. While causation may be viewed as objective, instrumental and empirically determined, the preferred end-state or interests of individuals are considered to be entirely subjective.

Utility refers to the subjective sensation of enjoyment felt by an individual. Behaving rationally, individuals will seek to maximise their utility by evaluating the costs of achieving a range of alternative states against their respective benefits. In a world where causation runs forward in time, the rational actor evaluates decisions prospectively. This requires, at the time of making the decision, an assessment of the expected benefits from the alternatives. A decision to use resources in one endeavour comes at the cost of the foregone opportunity to use them in an alternative endeavour.

Scarcity is the overarching constraint in which humans act. Individuals are thought to have infinite desires but only limited resources with which to satisfy them. The primary limit being time. At an aggregated level, economics maps the interaction and resulting relationships between individuals (as producers and consumers) and their competing demands on resources.

A commonly expressed criticism of the economic method is that it does not reflect the rich complexity of everyday life and experience. This in part reveals a misunderstanding of the scientific method of modelling and idealisation which economists have adopted. In the realm of the natural

sciences, reductionism involves the disaggregation of a complex phenomenon into its irreducible constituents. The nature and inter-relationship of the constituents is hypothesised and verified by experimentation. The resulting model is often, therefore, an idealised or simplified view of an aspect of reality. The objective of modelling is to identify some causally important relationships between certain constituents which have been distilled from the aggregate mass of human conduct. The application of this method to complex social phenomena is not without its critics. The scientific method employed by economics is an attempt to avoid argument by manufacturing truth out of empirical evidence. In turn this evidence is relied on to guide action.

This model of human nature and action has generated the economist's fundamental descriptive laws of supply and demand. Over time, a producer perceives a direct and positive relationship between the quantity of a commodity supplied and its price: the higher the price the more a producer would be willing to supply. For consumers, there is an inverse relationship between the price of a commodity and the quantity demanded: the higher the price asked for a commodity, the less the amount of the commodity that would be demanded. The term 'market' represents the interaction between producers and consumers. It translates the respective preferences of producers and consumers into actuality by signalling and co-ordinating their competing demands on resources. As with notions of causation, it is important to remember that the concept of the market is no independent reified entity but rather an intellectual descriptor of patterns of human interaction. At this point the role of law in economics deserves consideration.

Human activities necessarily take place within, and are facilitated by, the law. Contract law plays a central role in facilitating the operations of the market by providing a mechanism for buyers and sellers to formalise their interactions. It also enhances the prospect that contracts will be performed by discouraging strategic behaviour through legal liability. Strategic behaviour may be an acute problem where the parties' performance of a contract is not simultaneous. After forming a contract, the party whose performance is pending, may re-assess its decision to perform. This re-assessment may arise because of an adverse change in that party's estimate of the benefits and costs of performance as compared with the initial assessment when entering into the contract. Strategic behaviour refers to such a party opportunistically reneging on its contractual obligations. The question still remains, however, why should contracts be enforced?

The normative justification for enforcing contracts is that under ideal conditions, they allow us to infer a welfare gain to both parties. The ideal conditions for this inference require the contracting parties to be rational, voluntary and informed actors. Whether one can infer a welfare gain from exchange is itself subject to controversy. By discouraging strategic contract breaking, the law assists people in planning and realising their desires and aiding rational behaviour. While the future remains necessarily uncertain, contract law helps to reduce that uncertainty by giving people the confidence that contracts formed today but to be performed in the future, will in fact be performed. The next issue to consider is why did the language variety used by lawyers evolve to such an incomprehensible form?

Legalese — a restrictive trade practice?

Much of the literature promoting plain English, portrays 'legalese' as a means of control used by the legal profession. It is seen as part of a generalised mechanism of political control by 'elites' through the use of language. The power and control paradigm can also be re-considered through an economics perspective. In the marketplace of ideas, where different viewpoints compete, the preferred viewpoint will be selected according to the persuasiveness of its description and practicality of its solution to a given problem. The following is but one way of considering how traditional legal English evolved and why it persisted in that form.

Lawyers may be considered as producers of legal services (advice and documents) and clients as consumers of such services. Under the conditions of perfect competition, one would expect legal service-providers to ensure that clients received advice or documents in a language and style most comprehensible to them. Indeed, critics of economics often claim that if the market is such a marvel why has it not solved the problem? The response is to examine which of the preconditions for competition are absent and whether they can be restored or simulated.

The legal services industry has been characterised as one in which producers have been able to restrict competition amongst themselves and erect legally enforceable barriers to entry from other potential competitors. The requirement that parties to an exchange be equally informed is generally absent in the legal services contract. The term 'information asymmetry' describes the situation where one party (the lawyer) possesses greater knowledge about a transaction than the other (the client). Clients are, therefore, generally unable to properly evaluate the quality of legal services they receive. Lawyers possess the same attribute of self-interested utility maximisers as anyone else which, generally speaking, is not considered to be a problem. However, as lawyers are hired to protect and promote their clients' interests, this gives rise to what economists call the 'agency' problem. Where clients are unable to monitor or evaluate the quality of legal service provided by lawyers, there is a risk that lawyers will pursue their own interests at the expense of their clients. Agency problems are an inevitable by-product of specialisation and the division of labour. The reason they persist is that the alternative would be impracticable.

Why does a client have no viable alternative? For a client to be able to monitor a lawyer, the client would need to acquire a level of legal skill and knowledge equivalent to that of the lawyer. However, the very reason for engaging a lawyer is to obtain services that clients cannot provide on their own. Some suggest the use of case or transaction outcomes as a useful proxy for evaluating service quality. However, as such outcomes may depend on circumstances unrelated to the lawyer's skills, they would not provide a helpful guide. To suggest another lawyer oversee the conduct of the legal service provider would have excessive cost consequences. The twin issues of agency problems and information asymmetries, provide a justification for the use of specific arbitration over costing disputes which traditionally were provided by courts.

Restrictive trade practices among lawyers would tend to reduce clients' choice over how such services are delivered. Consequently, lawyers would have a reduced incentive to compete amongst each other by innovating and improving the mode and quality of their services. A notorious example of restrictive trade practices was the legally sanctioned ban on lawyers' advertising.

Traditional legal English to the extent that it reduces the client's comprehension of legal services, would exacerbate

the 'information asymmetry' by making it harder for the client to monitor or evaluate the lawyer's service. Where the service involves drafting a document that has an on-going impact on a client, such opaque language and text structure increases the probability that the client will return for additional explanation of the document as issues arise.

An arcane and complex language would also create barriers to entry for competing service providers, because it would make it more difficult for other service-providers to identify the boundary of services requiring legal expertise. For example, the removal of lawyers' monopoly over conveyancing work in Victoria was accompanied by a program simplifying the processes and documents used by the Land Titles Office.

Another feature of 'legalese' that reduces its comprehensibility is the use of excessive and redundant language. This can be attributed to the tradition of charging for services according to the number of words drafted or read by the lawyer. A combination of technology (word-processing), and uniform document design results in modern document-drafting vastly increasing the volume of text, much of which is irrelevant to the specific circumstances of the client. This obviously increases the costs of comprehension if only because it takes more time to go through the document.

The foregoing account runs the risk of portraying lawyers in a harsh and cynical light. Such a portrayal, however, is not necessarily justified. I have not sought to describe the conscious, subjective motivation of lawyers. Indeed, there are good reasons to suggest that lawyers' early reactions against the plain English movement were genuinely motivated. When retained to draft a document regulating a client's future plans, lawyers legitimately strive to reduce uncertainty of that document should litigation arise. By drafting with terms and structures previously considered by courts, it was thought that a client would have a greater expectation of predicting the possible outcome of litigation over that document. This view gained prominence at a time when the metaphor of judicial interpretation held that meaning was contained within the word. Lawyers believed judicially considered words contained certainty and so were legitimately reluctant to re-cast the form of a document in different words. It is also understandable that lawyers accustomed to the use of traditional legal English, would develop an aesthetic appreciation of it and therefore be reluctant to change. The following outlines an economic perspective on information production and consumption.

Information as a commodity

Information may be viewed as sharing certain characteristics of a commodity. There are costs associated with its production and consumption (comprehension). Our concern focuses on the costs of consuming information. The primary cost is the time taken and intellectual effort involved in comprehending the information.

When assessing a party's required level of comprehension before triggering legal liability, the legal system should require that level of comprehension which a rational person would seek to obtain. Rational behaviour suggests a person would consume so much of a commodity to the point where the cost of its last increment of consumption equals the expected benefits from that last increment. From the producer's perspective, the greater the competitive environment for information production, the more efficiently such information would be produced and supplied. Efficiency reduces production costs and therefore allows for greater consumption of information. What are the costs of consuming information?

The costs of consuming information can be stated at a general level as the time taken to understand it. Consistent with notions of opportunity cost, the value of time will vary among consumers. Assuming a common knowledge-base, the costs of comprehension for a successful surgeon would be markedly higher than those for a vacationing student. This is because the former's time would be valued by reference to the foregone opportunity to exercise their skill in the surgery. Not all consumers, however, share the same knowledge base. Therefore, a consumer not familiar with the subject-matter of a document may need to read more than the document to comprehend it. For example, where a document exposes a person to financial risk, that person may need to undertake a study of industry-specific risk analysis to understand its significance.

The costs of comprehension pose an acute problem in contemporary society because information is increasing in volume, complexity and importance in all spheres of life. For producers, the efficiency gains of specialisation in the production process have long been understood. A similar process of specialisation may be at play in processing information. While comprehension may be thought of as an activity integral to the individual, scarcity of time and complexity of information may lead to the creation of market mechanisms for the delegation of comprehension. For example, a patient, in consenting to a medical procedure, usually relies on the advice and experience of the surgeon.

Market responses to information overload

To illustrate how market mechanisms operate to overcome the problem of information overload, the following considers the scenario of a person (client) contemplating entering into a contract whose contents and subject matter is unfamiliar to the client. In making the decision, the client has a number of alternatives. The client may seek to directly acquire the relevant information by investing the required time and effort to understand the document and relevant contextual matters. Alternatively, the client may consult an adviser, being a person experienced in the subject matter of the contract. The adviser may provide either or both of the following: an explanation of its terms or an opinion as to whether or not the client should enter the contract. Finally, the client may choose to enter the contract without seeking any further information about it. Acting rationally, the client will choose the lowest cost alternative.

The first alternative is often impractical because of the time and effort required to master the relevant fields of learning. Few would now contest the aphorism 'jack of all trades and master of none'. In the second scenario, the adviser's services are sought. The first aspect of those services could be termed 'interpretation' services. This involves the adviser explaining the nature and significance of the contract in terms familiar to the client and could include illustrative scenarios, defining terms of art, and elaborating on contextual matters. The ensuing dialogue between client and adviser provides feedback for the adviser to concentrate on aspects of the document which the client finds contentious or difficult to understand. The objective of this process is to ensure that the client fully understands the contract.

The second aspect of these services might be termed 'comprehension agency' services. This involves the adviser

acting as a 'gate-keeper'. The adviser does not seek to explain every aspect of the document but simply expresses a judgment as to whether or not the client should enter into the contract. To carry out this task, the adviser must know the client's circumstances and be experienced with such contracts. To provide such 'comprehension agency' services, the adviser needs a point of reference for what are the usual or acceptable terms in similar contracts. The adviser will only highlight the contract's unusual or directly relevant aspects. At the end of this process, comprehension of the contract is shared between the adviser and the client.

The optimal mix of these agency services depends on their lowest cost. Interpreting services would generally be more expensive because of the greater time involved. This cost is the sum of the agent's services (fees) and the client's time taken in that process. Comprehension services, however, could be expected to be less than interpretation services because of the reduced time taken to provide them. For this to be so, the adviser would ideally be familiar with the client. Before considering the role of plain English, it is worth considering another market mechanism for reducing information overload, namely, standardisation of terms.

Where a producer supplies a consumer good or service, efficiency considerations suggest that the supplier would rely on a uniform set of supply terms. Because the supplier will seek to cover all possible circumstances in the one document, it will contain information which to any one transaction is irrelevant. From the client's perspective, however, standard-form contracts may have conflicting consequences for comprehension. Where the client uses agency services, the cost of such services could be anticipated to be less when a standard-form is used as opposed to a one-off document. This is because, the adviser will usually be familiar with the standard-form and so the cost of providing those services is reduced. However, where the client seeks to master the document without advice, the costs of comprehension would be greater because time would be wasted in understanding terms irrelevant to the client's particular circumstances. There remains a question of whether the standard-form settled by suppliers is satisfactory. This can be handled by a consultative process involving relevant stakeholders failing which Parliament retains the ultimate option to correct what might be considered 'market failures'.

Plain English contributes to reduce the cost of comprehension in a number of ways. To the extent that the client seeks to directly understand the contract, plain English drafting would reduce the required time. Where the client seeks agency services, plain English drafting allows the client greater scope in determining which aspects of the contract are comprehensible, leaving the less to be explained by the adviser. Even where the client relies purely on 'comprehension agency' services, plain English drafting would reduce the cost of these services because it could be expected to reduce the adviser's time in providing them.

Conclusion

A number of conclusions can be drawn from the foregoing. First, it is important to remember that the 'devil is in the detail' and that greater insights would be expected when examining a particular transaction. Second, there is little room to deny the benefits of plain English in promoting comprehension. The residual criticism focuses more on the over-optimistic assertions of what plain English could achieve than on its inherent utility. Third, economic analysis assists in understanding what people actually do, why they do it, and how mechanisms may develop to reduce the problems of information overload. Fourth, the idea that economic analysis seeks to eliminate the role of collectivist intervention is mistaken. Finally, when courts consider issues of comprehension, the 'reasonable' level of comprehension should be that one would expect of a rational person as suggested above.

Ignorance of the law is no excuse, but neither is it a command to attempt the impossible — to be fully informed about all things. The implication that ignorance may be rational may at first glance seem confronting. However, this is not to suggest a preference for or promotion of ignorance. The point of the analysis is that it recognises the reality of human behaviour under the constraint of time. It also provides a model by which those wishing to promote comprehension can achieve their goal.

Decle references continued from p.171.

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23. In *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497 both the court at first instance and on appeal held that the cause of action accrued to Joy Williams not when she merely had a suspicion of the damage, but when she had a clear appreciation of the nature and extent of the damage.
24. In *Williams v Minister*, Joy Williams was granted an extension to the limitation period to allow to continue her claim in the courts because the Court of Appeal felt she had acted as promptly as could reasonably be expected in bringing the action.
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26. per Studdert J at 61,211.
27. Leger, L., above, p.177.