Drafting Readable Statutes

Christopher Enright

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Once a King Always a King

On 11 December 1936 King Edward VIII gave royal assent to the statute entitled *His Majesty's Declaration of Abdication Act 1936* (1 Edw. 8 & 1 Geo. 6 c3). The effects of this Act on the commencement of the Act were as follows. Edward ceased to be King. His brother Albert, Duke of York became King, and took the title George VI (he had been baptised Albert Frederick Arthur George). Succession to the throne passed to the heirs of George VI.

Section 4 of *Interpretation Act 1889* contained a provision about assent: once the Crown had given assent the Act commenced at the beginning of the day on which it received assent (that is, regardless of the time when the Crown gave assent). This raised problems for the abdication. Assume for the purposes of illustration that the King signed the Bill at 11.30 am. The abdication then took effect from midnight the night before and meant that come 11.30 am the King had abdicated and had no power to sign the bill.

This is a new twist to the old saying: 'Once a king always a king''

This account is taken from an article: Geoffrey Bowman (2005) 'Why is there a Parliamentary Counsel Office' 26 Statute LR 69, pp 71-72.

Illuminating Quotations
Our limited function is not to say what the legislature meant, but to ascertain what the legislature has said that it meant.
Rothschild & Sons v Commissioners of Inland Revenue (1894), L R 2 Q B D [1894], p 145, per Mathen J
However we might wish to provide for every hardship that may occur, we are bound to put that construction on the Act that the legislature intended.
Farmer v Legg (1797) 7 T B 193, Orose J
Notwithstanding all the care and anxiety of the persons who frame Acts of Parliament to guard against every event, it frequently turns out that certain cases were not foreseen.
Farmer v Legg (1797) 7 T R 190, Lord Kenyon CJ
There is nothing so common in the framing of instruments as that whilst the framer of them is studious to avoid one inconvenience, he incurs another, which does not present itself to his view. This is often to be seen in Acts of Parliament.
Lord Nelson v Tucker (1802) 3 Bos & Pull 275, Booke J
The language of statutes is peculiar, and not always that which a rigid grammarian would use; we must do what we can to construe them.
Lyons v Tucker (1881) L R 6 QBD 664, Grove J
A statute cannot alter by reason of time, but the common law may.
Anon (1649), Style's Rep 190, Ask J
The statute is like a tyrant; where he comes he makes all void; but the common law is like a nursing father, makes only void that part where the fault is, and preserves the rest.
Sir Henry Hobart, 1st Baronet, CJ, quoted by Sir Thomas Twisden 1st Baronet CJ in *Maleverer v Redshaw* (1670) 1 Mod Rep 36, and by Wilmot LCJ in *Collins v Blantern* (1767) 2 Wils 351
A very ingenious attempt to drive a coach-and-four through this Act of Parliament.
Queen v Registrar of Joint Stock Companies (1891) 61 LJ Rep Q B 6, Nathaniel Lindley, Baron Lindley LJ

Preface

Vast numbers of statutes rule our lives. Many of them are not easy to read. Parts of some are almost impossible to read. This book sets out some ways of drafting statutes that makes them easier to read. The basis of the technique is to structure a statute at two levels – the macro and the micro.

Macro Level

The macro level is the big picture. The important goal here is to divide the statute into its major parts and their various levels of subparts in a manner the helps a reader to make sense of the purpose of the part or subpart and its role in helping the statute to achieve its purpose and object.

Micro Level

The micro level contains the specific legal rules that constitute the statute. The vast majority of legal rules possess a structure that has a standard form consisting of a conditional statement that embraces and connects the elements of the rule and the consequences of the rule. The way to make a statute clear at this level is to ensure that the text makes clear to the reader the elements and consequences of each rule.

Purpose

The aim of organising statutes in this way is to simplify and systematise the process of drafting a statute that will be readable. The process is obviously a guide to performing the task. The immediate aim was to create a guide that was as close as possible to an algorithm. The ultimate goal was to enable law schools to train lawyers so that they could understand these tasks and, when required, perform them effectively and efficiently.

My hope is that drafters of statutes will adopt the techniques set out in this book. In my judgment this will help make statutes more readable.

Christopher Enright
Newcastle
26 January 2015

Contents

Legal Skills Series

This book is part of a series of textbooks that explain legal skills and that Sinch publishes. The table below sets out the books in the series.

Authors	Title
Christopher Enright	Legal Reasoning
Christopher Enright	Legal Method
Christopher Enright	Legal Writing
Christopher Enright	Proof of Facts
Christopher Enright	A Method for Interpreting Statutes
Christopher Enright	Drafting Readable Statutes
Christopher Enright & Clare Cappa	Fundamentals of Legal Research

Table of Legislation and Cases

Legislation

Commonwealth

New South Wales

United Kingdom

Cases

Table of Abbreviations	
FACS	Family and Community Services

1. 1 Edw. 8 & 1 Geo. 6 c 3

Table of Diagrams

Labels

Introduction

Discussion in this publication refers to items such as a statute or a meaning of an ambiguous provision. Often these are part of a collection, list, range or set of items. Frequently the text puts them in a diagram where they represent a model or a step on the way to explaining a model. The purpose here is to explain the labelling system used to refer to these items.

Describing Items

Labelling Items

There are several aspects to labelling the items in a set, range, list or collection. These are name, number, letter and designating a set of items.

Name

The name of an item commences with a capital letter. Some examples are Element, Statute and Meaning.

Number

Items in a set, range, list or collection are generally numbered. For example, the elements of a legal rule are labelled Element 1, Element 2, Element 3 and so on. These numbers are ways of identifying elements and distinguishing one from another. They are generally not intended to create any list according to preferences or values.

Letter

Items in a set, range, list or collection can be lettered. For example a list of statutes can be Statute A, Statute B and so on.

Designating a Set of Items

It is useful to designate a set of items with a single and simple tag. Here is an outline. The basic proposition is that a simple and obvious tag has two aspects:
1. Description. Use a written label on the items as a tag or description. Put it in plural form. Thus a tag for a set of statutes would be ‘Elements’.

2. Numbers. After the tag add a space then a compound numerical tag consisting of three items:
   2.1 The number of the first item in the set.
   2.2 A hyphen.
   2.3 The number of the last item in the set.

Here are two illustrations:
1. A set of six elements would be Elements 1-6.
2. A set of elements where the number can vary from situation to situation is written as Elements 1-n.

1. Naming the Items

The item has a name, which is usually obvious. For example each statute in a set of statutes would bear the name 'Statute', and each elements in a set of elements would be 'Element'.

2. Numbering the Items

There are two possibilities for the numbering of a set, list or range of items:
1. There can be a fixed number in the set.
2. There can be a variable number in the set.

2.1 Fixed Number in the Set

In a particular instance there may be a specific number of items in a set. For example a particular legal rule might be composed of five elements. In this case the first and last numbers designate the number of items in the set or range. In this example of a set of five elements, one would designate the set as 'Elements 1-5'.

2.2 Variable Number in the Set

Sometimes the text refers to a set or a list in general terms in cases where the number of items in the set can vary from situation to situation. In this event, the way to go is to number the last item with the symbol 'n'. To refresh readers, 'n' stands for however many there are on a particular occasion. An example would be a general discussion about elements of a legal rule. In this case the possibilities vary from legal rule to legal rule. Thus the designation of this set of items is Elements 1-n.

Null Option

There is a special case with options where one of the options is to do nothing and leave things as they are. This occurs, for example, with the proposed making of a statute where one option is just not to enact a statute. In a case such

as this the option is labelled with the symbol for nought, namely '0'. Thus the option not to enact a statute is designated as Statute 0. Statute 0 represents the null option – it is the option for a legislature not to enact a statute on a topic whereas Statutes 1, 2 3 and so on are options for different versions of a statute on a topic (on the basis that there is no form of a statute that can better present conditions). Given this the full set or range of possible statutes for a legislature to enact consists of Statutes 0-n.

Corresponding Items

Sometimes there are sets with corresponding items. This can occur for a number of reasons. Here are two examples:

1. For making and interpreting law, items correspond because of causation. Each version of a statute on a subject and each meaning of an ambiguous provision will cause an effect if a legislature enacts the statute or if a court declares the meaning to be legally correct.
2. In the model for litigation, elements and facts correspond because each element delineates a category of facts so that in a particular case the element is satisfied by a fact that falls within that category. Similarly, facts and evidence correspond because each fact is proved or potentially provable by some evidence.

Single Relationships

Corresponding items are labelled with the same number or letter. Here are some illustrations:

1. Statutes, Meanings and their Predicted Effects. Statute 0 is predicted to cause Effect 0, Statute 1 is predicted to cause Effect 1, Statute 2 is predicted to cause Effect 2 and so on. Meaning 1 is predicted to causes Effect 1, Meaning 2 is predicted to cause Effect 2 and so on. Similarly, Statute X (or Meaning X) is predicted to cause Effect X while Statute Y (or Meaning Y) is predicted to cause Effect Y.
2. Facts Satisfying Elements. Fact 1 is the label given to a fact that fits within or satisfies Element 1, Fact 2 is the label given to a fact that fits within or satisfies Element 2 and so on.
3. Evidence Proving Facts. Evidence 1 is the label given to evidence that might prove or has proved Fact 1, Evidence 2 is the label given to evidence that might prove or has proved Fact 2, and so on.

Collective Relationships

It is possible to use labels of correspondence to make collective statements. Here are some examples: Statutes 0-n are predicted to cause Effects 0-n, while

Evidence 1-n is capable of proving Facts 1-n. To construe these collective statements properly it is necessary to apply the maxim *reddendo singula singulis*. Literally this says that each is rendered on their own. In plainer language, the items are to be taken singularly so the each item in the first list is paired with the corresponding item in the second list. The adverb 'respectively' captures this notion.

Two or More Version of an Item

There may be two or more versions of an item. Additional letters or numbers can distinguish the different versions. For example:

1. If Element 2 is ambiguous because it has two meanings, the versions of Element 2 can be designated Element 2A and Element 2B.
2. There can be two versions of a fact. There are two major possibilities:

2.1 In a case there may be two versions of Fact 2 because the plaintiff propounds one and the defendant propounds the other. These can be designated 'P' and 'D' to signify the plaintiff and defendant's version. Thus the two versions are Fact 2P and Fact 2D.

2.2 After investigating the facts of a case the defendant may find that there is evidence to support two versions of one of the facts in their case. These are facts that the defendant could use to rebut the plaintiff's satisfying Element 3. The defendant or the court could designate these as Fact 3D.1 and Fact 3D.2.

Subdivisions of Items

It is possible to designate subdivisions of an item with a numbering system that invokes the form but not the meaning of decimal points. Thus if Element 2 has three sub-elements, one can designate them as Element 2.1, Element 2.2, and Element 2.3. If Element 2.2 has three sub-elements we can designate these as Element 2.2.1, Element 2.2.2 and Element 2.2.3. Obviously this form of numbering adapts to any number of levels of subdivision.

Possibilities: 'X', 'Y', Etc

Sometimes the text needs to refer to any option, that is, to an option in general terms. Conveniently this is labelled with a capital letter. Commonly, this is the letter X, so that a general option for a legislature wishing to pass a statute is Statute X. Naturally, if there is a need to refer to more than one option additional letters may be used. For example, there could be reference to Statute X and Statute Y; in this case Statute X is one possible statute and Statute Y is another possible statute.

Signifying Relationships

Sometimes it is necessary to signify a relationship between two items. This can be done using standard symbols. This table sets out the major possibilities:

Symbol	Relationship	Illustration
<	Less than	X<Y. X is less than Y.
>	Greater than	X>Y. X is greater than Y.
=	Equals	X=Y. X equals Y,
≠	Not Equals	X≠Y. X does not equal Y.
≈	Approximately Equals	X≈Y. X is approximately equal to Y.
≡	Congruence Relationship	X≡Y. X is congruent with Y.
≅	Isomorphic	X≅Y. X is structurally identical to Y
Labels Diagram 1. Symbols for Relationships		

Listing Items

Where there is a list, for example a list of the meanings of an ambiguous provision, we can set these out in the text as a series – Meaning 1, Meaning 2 ... Meaning n. In the text, as we have noted, the range can be efficiently represented as Meanings 1-n. In a table they are set out as a list in the following way:

Meanings
Meaning 1
Meaning 2
Meaning n
Labels Diagram 2. List of Meanings

In this presentation it is not strictly necessary to include Meaning 2. Indeed, it is actually redundant, when n=2. However, it usefully emphasises the sense of a list that sets out the range of options or possibilities.

Diagrams

Lists in a table can be connected to become a diagram or figure. This can involve corresponding items. A useful illustration consists of a diagram that has two major columns that match corresponding items. One column sets out the meanings of an ambiguous provision in a statute in Statute X and the other sets out the effect for the whole statute that each meaning is predicted to cause.

Here is the illustration:

1	2	3	
Meanings	→	**Effects**	**1**
Meaning 1		Effect 1	**2**
Meaning 2		Effect 2	**3**
Meaning n		Effect n	**4**
Labels Diagram 3. Meanings and Effects			

This diagram functions in the following way:
* Column 1 shows the meanings of the ambiguous provision, being Meanings 1-n.
* Column 3 shows the effect of the statue that each meaning is predicted to cause if a court chooses them as the legally correct meaning of the ambiguous provision. Let us flesh this out. Every statute that is enacted causes a number of outcomes. The author refers to the full collection of outcomes that a statute is predicted to cause as an effect. When a court interprets a statute it is faced with the basic options in terms of the range of meanings of the ambiguous provision that gives rise to the need to interpret the statute. The diagram labels these meanings as Meanings 1-n. If a court decides that Meaning 1 is the legally correct meaning of the ambiguous provision that decision is likely to have an impact on the effect that the whole statute will cause. Column 3, as stated, sets out this effect, the effect of the whole statute, for Meaning 1. In a similar way it sets out the effect for each other meaning of the ambiguous provision. This method of identifying the effects of each meaning caters for the constitutional rule in each Australian jurisdiction that requires a court to interpret a statute in the way that will 'best achieve' the purpose and object for which the legislature enacted the statute. Now the purpose or object of a statute is to cause some effect or outcome. Hence the term 'Effect' aligns directly with purpose and object (which of course is why the table includes it).
* Column 2 contains an arrow pointing from the Column 1 to Column 3, thereby indicating that each meaning in Column 1 is predicted to cause the statute to have the corresponding effect in Column 3.
* Columns 1-3 indicate meanings and their predicted effects. Assume for the purposes of the explanation that a court is interpreting an ambiguous provision in Statute X that has Meanings 1-3:

1. If a court chooses Meaning 1 as the legally correct meaning the prediction is that Statute X will cause Effect 1.
2. If a court chooses Meaning 2 as the legally correct meaning the prediction is that Statute X will cause Effect 2.
3. If a court chooses Meaning 3 as the legally correct meaning the prediction is that Statute X will cause Effect 3.

Probability

A number of symbols are used for probability. This diagram shows the common symbols and their meanings:

Symbol	Meaning
P(A)	probability that event A occurs
P(B)	probability that event B occurs
P(A ∪ B)	probability that event A or event B occurs (A union B)
P(A ∩ B)	probability that event A and event B both occur (A intersection B)
P(A')	probability that event A does not occur
P(A | B)	probability that event A occurs given that event B has occurred already (conditional probability)
P(B | A)	probability that event B occurs given that event A has occurred already (conditional probability)
P(B | A')	probability that event B occurs given that event A has not occurred already (conditional probability)
ϕ	the empty set = an impossible event
S	the sample space = an event that is certain to occur

Labels Diagram 4. Symbols Used for Probability

Summary

Statutes are plentiful, often long and frequently complex. This imposes burdens on users in relation to both finding the relevant statutory provisions and then reading and understanding them. The text presents two sets of remedies, one for findability and one for readability.

Findability

There are three means to enhance findability:
1. Title. Confer a title on a statute that properly reflects its content and will be recognised by users as such.
2. Location of Law. Locate provisions in the statute only if they deal with the subject matter designated by the title.
3. Format. Format the statute to make it easier for readers to find information.

Readability – Structure

One of the simple devices for making a statute readable is to structure it. It is necessary to structure a statute at both the bottom level and at higher levels.

Bottom Level

At the bottom level most legal rules have a common structure. This comprises two components, elements and consequences, which are joined by a conditional statement. Drafters can make a statute clearer by ensuring that the reader can easily identify these components.

Higher Levels

At the higher levels structuring the statute for readability involves dividing the provisions into major categories. Then one divides these major categories into as many levels of sub-categories that the nature of the provisions allows.

Provisions may go into the same category because they have either of two relationships:
1. Functional Relationship. The provisions are functionally related.
2. Formal Relationship. The provisions have a formal relationship in that the consequences of one provision constitute an element of another provision.

Chapter 1
Introduction

Regulation by complex and lengthy statutes is a modern burden – taxation, superannuation and securities regulation is of a linguistic complexity far beyond the age-old concepts involved (contract, property, debt, income, capital, duties and rights). At times, the impenetrability of the language in these statutes makes one ask oneself whether the Act in question is truly a law of the Parliament.[1]

Long to Reign Over Us

A statute 'is the attempt by one person through the medium of language to convey to another ideas that have legal consequences'.[2]

This book proposes a means of drafting statutes to make them readable. There is good reason to do this since statutes have a vast influence on our lives. Statutes rule us all in many areas of human endeavour. They are the superior source of law backed by a supreme parliament with plenary powers over large tracts of human activity. Once enacted statutes last until parliament repeals them. With their expanded scope and superior force statutes have taken command of the regulatory highway and relegated common law to a side street. Moreover, statutes have procreative powers. They spawn more legislation because many statutes authorise some official to make a second tier of legislation called delegated legislation.

Obviously this book is making suggestions for how legislators and drafters should frame and write statutes (and for the most party the advice would also apply to delegated legislation). Essentially it does this by developing structures that will make a statute clearer. Writing a statute, however, is the converse of reading a statute. Hence implicitly the book is giving some advice on how to

1 . Allsop (2009) par [22] and see pars [23]-[28]
2. Kirby (2003) pp 96-97

read a statute by describing the structure that links the provisions. Of course the thrust of the suggestion here for drafting a statute is to make this structure abundantly clear; but where the structure is not abundantly clear the book prompts a reader to discern or uncover the structure as a way to enhance their efforts in reading the statute.

Growth and Complexity

One of the hardest things is to convey a meaning accurately from one mind to another.[3]

While statutes are both potent and plentiful they are also treble trouble since they present three connected problems. First, they are becoming more numerous. In Australia, 'during the 110 years that have passed since the Federation came into existence, there has been a steady and latterly, it seems, exponential growth in the number of statutes and regulations, rules, by-laws and other forms of instrument made under statutes'.[4] Consequently, 'in Australia today we go about our lives under a mountain range of statutory words which impose obligations and restrictions, create rights and liabilities, and confer powers on a large and varied array of regulatory bodies, public authorities and officials.'[5] The reign of statutes down on us is torrential. Second, statutes are also becoming more complex and thus harder to read and to understand.[6] Third, some statutes are of inordinate length.[7]

The first of these problems is largely a political problem and thus beyond the immediate domain of black letter lawyers, even if it is crying out for attention. The third of these problems is also beyond our reach since it is a political matter. However, the second problem – that statutes are difficult to read – is a problem that falls squarely into the jurisdiction of legal scholarship. Since this problem will occupy our attention throughout this book let us lay a foundation by going

3. Lewis Carroll, letter, cited in Bowman (2005) p 74
4. French (2011) p 9
5. French (2011) p 9
6. French (2011) p 9. In *Secretary, Department of Family and Community Services v Geeves* (2004) 136 FCR 134, Justice Mark Weinberg observed that it had taken senior counsel for the Department the best part of a morning simply to explain the statutory regime in the *Social Security Act 1991* (Cth) under which the respondent had sought entitlement to a particular benefit.
7. In *Blunn v Cleaver* (1993) 47 FCR 111 in which the Full Court of the Federal Court noted that the *Social Security Act 1991* (Cth), with its more than 1367 sections in its then form occupied more than 1471 pages of the Commonwealth statutes. Weinberg (2008) par [5] comments: 'Curiously, the Minister in his second-reading speech declared that the Act had been drafted in 'clear English' to 'overcome the problem of readability'.'

back to first principles and consider the requirements for a good system of statute law.

Requirements for Readable Statutes

Regrettably, I believe that legislation will continue to be drafted in a manner that almost defies comprehension. Statutes will be longer and ever more prescriptive. Attempts at simplification, including drafting in 'plain English', will achieve little.[8]

Statutes create rules that govern how we behave towards other citizens and governments and how they must behave towards us. Ideally statutes will possess four major characteristics. One of them is that they are readable, which is the subject of this book but it will put readability into perspective by listing all four of these major attributes, which are now set out in the following table:

1.	Being effective	3.	Being accessible
2.	Being findable	4.	Being readable
Diagram 1.1 Requirements for Good Statutes			

Being Effective

To make a statute effective legislators should write the statute in a way that achieves, as far as is humanly possible, their aims in enacting the statute. For this reason drafting of a statute is an important step in the process of passing the statute,[9] as is, in consequence, the recruitment and training of parliamentary counsel.[10] In drafting legislation, language is power,[11] and much of the power resides with the legislative drafters.[12] In this regard there is a tradition of free expression in drafting statutes[13] because statutes, according to judicial authority,[14] 'need not be drafted using any particular form of words.'[15] But that said, a statute needs to hit the target because '[a]ccuracy is not [merely] a virtue, it is a duty.'[16] The aim, of course, it to put into the statute what needs to be there ('including the right material') and leave out what does not need to be there

8. Weinberg (2008) par [89]
9. See Abernathy (1983), Crabbe (1998), Danet (1980), Fairclough (1989), Finemore (1988), Hackett-Jones (1988), Kelly (1988B), McGill and Macdonald (1997), Mellinkoff (1963), Johnson (1978)
10. Ewens (1983)
11. Fairclough (1989), Turnbull (1983)
12. Hackett-Jones (1988)
13. Jamieson (1980-81), Jamieson (1995)
14. *Lord Pitsligo's Case* (1750) Fost 79, 83, *Longmead's Case* (1795) 2 Leach 694, 696
15. Jamieson (1980-81)
16. Bowman (2005A) p 78

('excluding the wrong material').[17] The calibre of the drafter in hitting the right target and missing the wrong target is captured in the concept of legislative marksmanship. This has three aspects:
1. Does the legislation miss items that it wishes to regulate so that it is affected by under inclusiveness? This is a matter of drafting.
2. Does the legislation regulate items that it wishes to miss so that it is affected by over inclusiveness? This is a matter of drafting.
3. Does the regulation that the legislation imposes bring about the outcome that the government wanted? This raises the question of causation. Honest and rational legislators believe that the statutes they enact will cause the outcome that the government wants. Yet the chain of causation from the statute to the desired outcome can be long and can take a path that is contrary to common understanding because causation can be complex and unpredictable.[18]

Being Findable

Introduction

Citizens should be able to determine clearly and easily which statutes governs them.[19] Specifically they need to be able to find a statute that deals with a particular subject. Within that statute they need to find the sections that deal with the aspect of that subject that concerns them. Performing these tasks successfully depends on the quality of findability.[20]

As statute law increases in size and complexity the task of finding whether there is a statutory provision that applies to a set of facts potentially becomes more difficult. To make statute law more findable there are three basic requirements:
1. Choice of Name: Give a statute a name that properly reflects its content.
2. Choice of Location: Insert a provision into a statute only when the statute deals with the subject matter of the provision. If the legislature observes the choice of name requirement the name of the statute will properly reflects that it contains this provision.
3. Format. Format the statute appropriately so readers can find provisions.

Findability Requirement 1: Choice of Name

Findability Requirement 1 urges legislators to give a statute a name that properly reflects its content. The idea is that the name of a statute should help lawyers who do not know of the statute's existence to find the statute. To explain this it is necessary to start at the beginning.

17. Bowman (2005A) p 77
18. Enright (2011) Chapters 13-16
19. Duperron (2005) p 65
20. See Enright and Cappa *Fundamentals of Legal Research* Maitland Press (2015)

Think of a lawyer taking instructions from a client. The facts of the case are such that the lawyer has not handled similar cases before and also does not know the name of any relevant statutes. Therefore they have to do legal research to see if there are any statutes that might cover the facts of their client's case. In this research the gateway though which the lawyer passes to use research tools is facts to law.[21] So, when a lawyer proceeds through this gateway they start with the facts. They then seek to find any statute that might regulate these facts.

There are three methods for ascertaining the name of a statute that covers or might cover a topic, namely the subject method, the title method and the case method.[22] Giving statutes an appropriate name assists a search for the statute based on the title method. The title method for finding a statute involves scanning a comprehensive list of statutes in the jurisdiction looking for any statute with a short title that suggests it might cover the facts of the case. Then the lawyer scans or reads this statute or these statutes to see whether they do in fact cover the facts of the case.

To emphasise our approach, in this case the gateway of facts to law involves looking for a match between the facts of the case and the types of facts that the statute regulates. In this task the first indicator of the kind of facts that the statute regulates is its short title.

Since it is vital that law is accessible it is important that the short title of the statute adequately reflects the situations it covers (or the facts over which it rules) to the extent that a handful of words will permit. In part this involves plain reason and common sense. It is also possible to obtain guidance from some simple pieces of advice:
1. Traditional Name. If a statute is performing some well-known function and there is a traditional name for statutes performing that function then use that name.
2. Name of Predecessor. If a statute is replacing an earlier statute on the subject then it makes good sense to give the statute that name. In this case the earlier and later statutes are distinguished by their year. For example if the legislature decides in 2012 to replace the *Property Act 1995* with a new statute then it should call the new statute *Property Act 2012*. On the other hand on 1 January 2011 the Commonwealth parliament renamed the *Trade Practices Act 1974* and called it the *Competition and Consumer Act 2010*.[23] This new name is an

21. A forthcoming text, Christopher Enright and Clare Cappa *Fundamentals of Legal Research* Maitland Press, explains the gateways needed to research law.
22. A forthcoming text, Christopher Enright and Clare Cappa (2015) *Fundamentals of Legal Research* Maitland Press, explains these three methods.
23. *Trade Practices Amendment (Australian Consumer Law) Act (No 2) 2010*

accurate description of the purpose of the statute in contrast to the old designation of *Trade Practices Act* which was somewhat non-descript. (After all the description 'Trade Practices' could be the title of a treatise on some aspect of economic anthropology.)

Findability Requirement 2: Choice of Location

This requirement involves deciding where to locate a provision that needs to be in a statute. The general rule is to locate a provision in a statute whose name properly reflects its content. If necessary, create a new statute with a proper name in preference to putting the provision in a location that will create difficulties in finding it.

Here are two examples where a legislature made a poor choice of location. First, New South Wales had a provision that a copy of each statute that the legislature enacted should be placed in the office of the Registrar General. It inserted this provision in s9 of the *Registration of Deeds Act 1843* (NSW). Obviously the title to this statute does not indicate that it might cover registration of statutes.

Second, the government of the Commonwealth of Australia has enacted two provisions requiring a decision maker to give reasons for decisions. One set of provisions is found in s13 of the *Administrative Decisions (Judicial Review) Act 1977*. This provides for reasons for decisions that are subject to judicial review under this Act. The other is found in s29 of the *Administrative Appeals Tribunal Act 1975* which provides for reasons for decisions that are subject to administrative appeal under this Act, although it is possible to appeal without obtaining reasons and to obtain reasons without instituting an appeal.

It would make a lot more sense to remove these provisions from their current respective locations and place them in a new statute entitled *Reasons for Decisions Act.* An appropriate note in the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and the *Administrative Appeals Tribunal Act 1975* (Cth) could indicate that reasons are available to applicants for review and appeal under the *Reasons for Decisions Act*. I have adopted this approach to illustrate the drafting techniques that I propose. To do this I have redrafted the provisions for reasons that are now in the *Administrative Decisions (Judicial Review) Act 1977* and inserted them in an as yet hypothetical statute entitled *Reasons for Decisions Act 2012*. I did not include the provisions for reasons that are now in the *Administrative Appeals Tribunal Act 1975* (Cth) purely because I wanted to keep the illustration simple.

Findability Requirement 3: Formatting

Formatting is used to make the rules clearer. It helps a lawyer in writing the rules and a reader in reading them. Formatting should be whatever is necessary or helpful

One innovator with regard to formatting was Henry Thring, the 1st Baron Thring (1818–1907). Henry Thring was a British lawyer and civil servant. Thring was appointed First Parliamentary Counsel when that office was established in 1869. He held the position until 1901**.** An example of Thring's innovation is the *Merchant Shipping Act 1854*. There he introduced the use of subsections, Arabic numerals and parts with separate headings.

Here are two suggestions for formatting (which some jurisdictions have already implemented):
1. Consider putting a heading on subsections of statutes as well as sections.
2. Have a dictionary at the back of the statute that includes all words and phrases defined even if definition operates narrowly for one section of just part of the statute – if the definition is located in that section (which is commonly the case) refer to the section by number.

Being Accessible

Citizens should be able to access copies of statutes.[24] Access was a problem when governments relied on printing to provide access to statutes because printing original statutes then bringing them up to date with reprints was tedious and expensive, especially for the statutes that were frequently amended. Nowadays the Internet has solved the problem. Governments now publish and update statutes of a jurisdiction on electronic databases, where updating statutes is easy and low cost. These databases frequently allow access to the public without restriction or fee.

Being Readable

As the Renton Committee noted, certainty is often attained at the cost of intelligibility. The immediate response to such all-encompassing legislation is bewilderment, not comprehension. The contorted complexities of the common law style with its interlocking clauses and cross referencing produces laws which, it is argued, are beyond the grasp of the citizens whose conduct they are meant to facilitate and control.[25]

24. Duperron (2005) p 65
25. Campbell (1996) par [13]

It is important that statutes are clear so that they are readable.[26] This is our concern here. Legislators should draft statutes so that people can read and understand them.[27] Statutes 'impose rights and obligations [so] the public is entitled to expect those rights and obligations to be stated precisely' and to be stated in language that they can understand.[28]

Unfortunately in the real world of legislation there is the problem of readability. As Justice Mark Weinberg put it: '[T]he last time any Parliament passed an Act that was well drafted was in 1893 when the United Kingdom Parliament enacted the *Sale of Goods Act*. Perhaps that is an exaggeration. At the same time, I would dearly love to see those responsible for having inflicted upon the courts, the legal profession, and the public such excrescences as the *Social Security Act 1991* (Cth), with its more than 1367 sections, punished by forcing them to read, and attempt to make sense of, their own handiwork.'[29]

How can legislators draft a statute that people can read? The way to do this, as will be explained, is to structure the statute in a logical and coherent way.

Need for Structure

The ideal is that the 'legislative drafter' gets 'the idea across in a way that is as clear, simple and direct as circumstances allow'.[30] The problem is that there has, however, long been complaint that statutes are unnecessarily complex and impenetrable. Thus Francis Bennion remarks how strange it is that 'free societies should thus arrive at a situation where their members are governed from cradle to grave by texts they cannot comprehend'.[31] Recognition of this has led to many proposals for simpler method of drafting statutes and setting out statutes.[32] Logically this focuses attention on methods of drafting[33] with some advocating simplicity[34] and the use of plain English.[35] But despite all the effort

26. Tanner (2002) explains a number of initiatives that have made legislation of the Commonwealth parliament easier to read.
27. Duperron (2005) p 65
28. Bates (1999)
29. Weinberg (2008) par [5]
30. Bowman (2005) p
31. Bennion (1983), p 8
32. See Jamieson (1995), Jamieson (1976), Thornton (1987), Turnbull (1990), Turnbull (1997); Turnbull (1983), Watson-Brown (1997), Kelly (1988). Note, though, that there has been a tradition of free expression in Australia – see Jamieson (1980-81).
33. Crabbe (1998), Thornton (1987), Bowers (1989), Bennion (1979), Casen and Steiner (1986), Eagleson (1988), Jamieson (1976), Jamieson (1995), McGill and McDonald (1997)
34. Berry (1987), Turnbull (1990)
35. Kelly (1986), Kelly (1988A), Eagleson (1988), Turnbull (1997)

there is little agreement on what is best. As Watson-Brown describes it: 'For every author there has been at least one critic. For every opinion there has been at least one view to the contrary.'[36]

In this book I explain some methods of drafting that will help to draft statutes so that they are clearer and more readable than is presently the case. In doing this I fly in the face of two pieces of traditional wisdom by proposing that plain English is not the complete answer to lack of clarity and that drafting statutes includes some science.[37]

Limitations of Plain English

Plain English proponents have done some good work and at times some great work in making documents, including legal documents, easier to read. The idea is to use plain and simple language to make the text clear and to avoid language that is cumbersome, artificial, verbose and repetitious. This book proposes ways of writing statutes that endorse and are consistent with the canons of plain English. At the same time this book seeks to overcome the major inadequacy of plain English principles, at least in their pure form, which is a substantial neglect of how vital is it is to structure written texts in order to ensure that they are readable.

Science in Drafting

Bowman argues that 'legislative drafting is more an art than a science'.[38] I argue that there are natural structures in law that are based on logic or reason and these provide a scientific way of composing statutes. The idea is to organise the statute by creating a rational and coherent structure that is as simple as the nature of things will allow.

Illustration: Redrafted Statute

Contrary to popular belief, expressing ideas unambiguously does not equate with using elaborate language or sentence structure.[39]

To furnish an illustration of ways to make a statute more findable and more readable the author has redrafted part of a statute of the parliament of the Commonwealth of Australia, namely the *Administrative Decisions (Judicial Review Act) 1977* (called the *Judicial Review Act* for short). In its original form the Act provided two rights, namely a right to reasons for administrative

36. Watson-Brown (1997) p 32. In that article he summarises some of the main methods proposed for organising statutes.
37. Brian Hunt queries whether plain English is the answer – see Hunt (2002)
38. Bowman (2005B) p 76
39. Bowman (2005A)

decisions and a right to review administrative decisions. For the sake of simplicity the redrafted statute covers only the right to reasons, which the author puts in a separate hypothetical statute entitled Reasons for Decisions Act 2012. Those who wish to compare the two versions of the statute can obtain the operational version of the *Administrative Decisions (Judicial Review Act) 1977* from the AustLII or Comlaw websites.