

Chapter 10

Words to use with Special Care (and Other Drafting Problems)

10.1 Introduction

As has been noted (see Chapter 2), the drafting of legislation requires very precise language. Unfortunately some of the commonest words in the English language are capable of being used loosely, leading to potential ambiguity or lack of clarity of expression. Other related matters: singular and plural, elliptical writing, indeterminate terms, gender-neutral drafting and expressions relating to time, will be examined in turn in this chapter.

10.2 'And' and 'Or'

In theory, these conjunctions should present no difficulty; the first indicates a joining together (it is said to be 'conjunctive'), while the second indicates a pushing apart ('disjunctive') or at least the presence of one or more alternatives. It is convenient to refer to these words in their obviously different meanings as 'strong' conjunctions.

An applicant must lodge the completed application form and the prescribed fee...

A passenger must pay the appropriate fare or show the appropriate season ticket for the journey.

10.2.1 Careless use of 'and' and 'or'

In spite of this, careless use of the conjunctions is often made in practice, and this can easily produce a meaning that is not intended:

A director of a company found guilty of an offence under this Act does not personally commit that offence if the director proves that he or she:

- (a) did not know of its commission; and
- (b) took all reasonable steps to prevent its commission.

Common sense suggests that these defences are meant to be alternative rather than cumulative (see further Chapter 14.3.1, on 'parties to offences') and that 'or' should be written at the end of paragraph (a). In a further example of careless use:

The Corporation commits an offence if it neglects to cause a street opened or broken up by works to be fenced, guarded or lighted by night.

The duties imposed are almost certainly intended to be “fenced or guarded, and lighted by night”.

10.2.2 Weakened conjunctions

There are, however, instances in which each of the conjunctions is significantly weakened to the point where one becomes virtually substitutable for the other. One of the most common of these situations is when it is used with permissive words:

- The Minister may make regulations prescribing:
- (a) forms and fees required under this Act;
 - (b) the procedure to be followed on application for a licence;
 - (c) the kinds of security required under section 32;
 - (d) other matters necessary to carry out the purposes of this Act.

The reality in this context is that if either ‘and’ or ‘or’ were to be inserted after paragraph (c) they would mean virtually the same thing.

Actually what this provision is doing is merely setting out a list, in this case of delegated powers. In these circumstances it is best to omit the conjunction altogether. In addition, use can be made, in the introductory words, of the expression ‘any of the following’:

- The Minister may make regulations prescribing any of the following:
- (a) forms and fees required under this Act;
 - (b) ...;
 - (c) ...;
 - (d) ...

The problem of weakened conjunctions can also arise where mandatory words are used:

- Where an auditor considers that this section applies, he or she must report the matter:
- (a) in the case of a member company, to the stock exchange, the Commission and the Registrar; or
 - (b) in any other case, to the Commission and the Registrar.

- The Central Bank must not discriminate between commercial banks when directing:
- (a) the policy to be followed in granting advances or allowing credit facilities; and
 - (b) the rates of interest payable to or by them.

In both these examples the conjunctions are actually interchangeable, and the same comments apply as above to the omission of either of the conjunctions and consideration of the use of ‘any of the following’.

The form ‘and/or’ should not be used, as it potentially gives rise to a query about which is actually intended.

10.2.3 Unacceptable combinations of conjunctions

In a paragraphing sequence, either 'and' or 'or' should be used but never a combination of both:

A person who is:
 (a) resident in Utopia and
 (b) married; or
 (c) over the age of 60; and
 (d) in receipt of a pension; or
 (e) physically handicapped,
 is entitled to the allowance.

A tabulation of this sort is ambiguous as well as being extremely difficult to understand. It could be restructured as either of the following:

A person who is:
 (a) resident in Utopia and married;
 (b) over the age of 60 and in receipt of a pension; or
 (c) physically handicapped,
 is entitled to the allowance.

or

A person who is resident in Utopia and:
 (a) married or over the age of 60; and
 (b) in receipt of a pension or physically handicapped,
 is entitled to the allowance.

In exactly the same way, different conjunctions in the same untabulated proposition cause problems:

The returning officer must notify the candidate or the candidate's election agent and the candidate's political party.

This can be interpreted as either:

The returning officer must notify:
 the candidate; or
 the candidate's election agent and the candidate's political party.

or

The returning officer must notify:
 the candidate or the candidate's election agent; and
 the candidate's political party.

Note however that so long as the paragraphs in the same sequence (e.g. (a), (b), and (c)) are linked by the same conjunction, the rule need not apply to subparagraphs within any of those paragraphs:

A dealer must maintain a register in which is recorded:
 (a) the prescribed particulars of goods acquired either:
 (i) from a trade source, including a public auction; or
 (ii) directly from a member of the public;
 (b) the name, address and business of the person from whom the goods are acquired; and
 (c) the date and time of acquisition.

10.3 'Which' and 'that'

Care needs to be exercised here too, as these words can be used in different senses.

'Which' can be used in the ways previously examined when looking at the use of commas (Chapter 8) to introduce:

- a defining modifying clause:

A police officer may seize any goods suspected to be stolen which he or she finds in premises named in the warrant.

- a commenting (or expanding) modifying clause:

A police officer may search for stolen goods in premises named in the warrant, which he or she may then seize.

In the first, but not the second of these examples, 'that' could be substituted for 'which' (technically this is because in the former use 'which' is an adjective, whereas in the second it is a conjunction). There is in fact a danger of inconsistently using the word 'which' in its slightly different meanings in the same sentence:

A police officer may search anything which he or she reasonably believes may contain stolen goods, which goods the officer may then seize.

Modern style tends to favour 'that' where it can be used instead of 'which', and grammar/style features of word-processing programmes endorse this.

But 'that' can also be similarly used in yet a different sense, i.e., attaching to a verb ('think that', 'consider that' or 'appear that'):

Where it appears to the Accountant General that a local authority has funds that have not been applied during the relevant year and that it is unwilling to invest in Government stocks...

could mean:

Where it appears to the Accountant General that:

- (a) a local authority has funds that have not been applied during the relevant year; and
- (b) it is unwilling to invest in Government stocks...

or:

Where it appears to the Accountant General that a local authority has funds that:

- (a) have not been applied during the relevant year; and
- (b) it is unwilling to invest in Government stocks...

In the first version, because the third 'that' is read as attaching to the verb 'appears', the unwillingness relates to **investing in Government stocks as a**

general principle. In the second, 'that' is read as attaching to the noun 'funds' (and thus does not have to be repeated if paragraphed in the way indicated), and consequently the unwillingness relates only to **investing the unapplied funds in that way**. It would be better to substitute the second 'that' with 'which' in each of the above examples.

10.4 'All', 'any', 'each' and 'every'

'A' or 'an' should be used unless there is reason to emphasise or draw a distinction:

A shareholder who holds at least 100 shares may nominate a person for election to the Board, but any shareholder may vote on a subsequent resolution to elect that person.

A special resolution is passed if assented to by a two-thirds majority of all the shareholders entitled to vote, whether present or not.

or unless grammar dictates otherwise:

In the application of these rules to a farm building, any farm equipment, an animal used for transporting goods or any cattle, the following modifications apply...

In this last example, 'equipment' and 'cattle' are so-called non-countable nouns that cannot grammatically take 'a' or 'an' (other examples are machinery, meat, money, sand).

'Any' may also be used where the sense is 'any that there may be':

An appointed officer may require a licensee to supply any document in the licensee's possession relating to the offence.

10.5 'Such'

There are many different uses of this word. It can be an **adjective** meaning 'of a kind already mentioned' or equally 'of a kind about to be mentioned':

At least two days' notice of such intended visit must be given...

The registrar must notify such persons as apply for the grant of a licence...

or to mean 'of so great a kind':

The procedure where a load is of such volume and weight as to exceed the normal operating capacity of a weighbridge may be provided for in regulations under...

'Such' can also be used as a **pronoun**:

A local authority need not provide waste disposal facilities as such, but must...

There is thus clearly a danger that the word may be used in different senses in the same sentence:

If such is not the case [i.e. *where there is no provision for written representations*], the Board must hear such oral representations as may be made by such of the members present at such meeting.

Most of the uses of 'such' are tiresome or archaic, or both. The word can usually (although, it needs to be stressed, not always) more conveniently be replaced by 'a', 'any', 'the', 'that', etc., or by simply omitting it:

If that is not the case, the Board must hear any oral representations made by the members present at the meeting.

10.6 Singular and plural

Generally, drafting should be in the **singular**, unless there is reason to refer to habitual usage. Compare:

A person who sells motor cars.

(the emphasis is on a course of behaviour, namely by a dealer) with

A person who sells a motor car.

(the emphasis is on an isolated action, namely by somebody in possession of the car).

Use of the plural can lead to ambiguity:

The Law Society is to issue certificates to students who have passed the required number of subjects in its intermediate examinations.

Here the question is left open as to whether one certificate in total is required, or one certificate for each subject passed.

10.7 Elliptical writing (omission of words which are to be implied)

This arises in two situations:

By operation of law:

A person who contravenes this section commits an offence and is liable [on conviction of that offence][by a court of competent jurisdiction] to imprisonment for [a term not exceeding] 6 months, or a fine [not exceeding the maximum] at level 5 on the standard scale, or to both [such imprisonment and fine].

Here the bracketed words will be understood by the application of background rules in the Constitution, and criminal procedure and interpretation legislation. They do not need to be constantly and tiresomely repeated. In fact by the

application of enabling rules in many Interpretation Acts the text can be shortened to:

... to imprisonment for 6 months and a fine [of] [at level 5 on the standard scale].

See further Chapter 14.

By implication from the words used:

A person in charge of a dog must not permit it to enter a restaurant.

The licensing authority must keep a register of licences in the prescribed form.

The first implies a **duty to remove** a dog which has entered, and the second the **duty to keep the register up to date**, without having to so state in terms.

10.8 Indeterminate terms

It is important to bear in mind the need for clarity and certainty in legislative rules (see Chapter 2), and this involves rejecting words that are unnecessarily vague or relative, particularly when applied to such things as time, speed and size:

often/sometimes; fast/slow; large/small.

But note that some of these words could be used if they are precisely defined:

"often occurring" means occurring more than three times in a year;

"slow train" means a train that stops at every station on a particular route;

"large investment" means an investment in money or money's worth to the value of \$1 million or more.

On the other hand, because of the infinite scope of variation in human behaviour, it is often necessary to use modifiers that are deliberately vague, and that in the absence of consensus would need to be construed by a court:

fair/just/equitable; fit/suitable; fraudulent; reckless; satisfied; as soon as possible; un/necessary; un/reasonable.

Many nouns in necessarily common use in legislation have an inherent degree of imprecision, and they will therefore probably need defining:

child/parent/family/relatives; land/building; [motor] vehicle/vessel/aircraft; possession.

Finally, there are words and expressions whose meanings may vary in time, and in different places:

cruel; fit for human habitation; indecent; malicious; poverty.

This phenomenon gives rise to the *noscitur a sociis* rule (words to be construed according to the context in which they are written):

No person shall behave in a riotous, violent or indecent manner in a place of religious worship.

In this 19th century example, the underlined word has its then contemporary meaning ‘disrespectful’, rather than the modern one ‘obscene’.

10.9 Gender-Neutral Drafting

Interpretation provisions, usually contained in the Interpretation Act or equivalent, state that use of the masculine gender in legislation includes the feminine. However, the point is taken in many jurisdictions that it is undesirable to draft in a way that seems to address only males, and although it is not necessary from a strictly legal point of view to draft in a gender-neutral style, increasingly it is becoming the practice to do so. There are various devices for doing this.

- **Use of Gender-Neutral Words, for example:**

legislative counsel or counsel:	not draftsman
head teacher or head:	not headmaster
supervisor or charge-hand:	not foreman
police officer or police:	not policeman/men
chairperson or chair:	not chairman
fire-fighter:	not fireman

- **Repetition of the noun to avoid a gender-specific pronoun:**

The Minister may delegate, by notice signed by or on behalf of the Minister [rather than “him”] to another person the performance of any functions vested in the Minister by this Act.

- **Use of ‘he or she’, or ‘it’:** in the previous example, this double pronoun could have been used in either or both places where the noun is repeated. Note that ‘he or she’ is unsuitable where the person referred to is likely to be a corporation or other impersonal body, and the rolled up ‘he, she or it’ is generally thought to be too cumbersome.
- **Omission of the possessive pronoun:**

The Registrar must enter in the register, in relation to every dentist:
 (a) the date of registration [rather than “his registration”]; and
 (b) particulars of the qualification in respect of which registration was granted.

- **Substitution of a definite or indefinite article for the possessive pronoun:** in the example above, ‘the registration’ might be better in paragraph (b).

- **Use of the passive form:**

Instead of, for example:

Where a lessor has prepared a statement of the grounds of complaint, he must send it to the lessee within 7 days.

state in the legal action part of the sentence:

...it must be sent to the lessee...

- **Restructuring the sentence:** this would be a routine matter for those habitually drafting gender neutrally. Rather than:

The Minister must consider the report and after ... he must lay it before Parliament

state:

After considering the report and ... the Minister must lay it before Parliament.

Style will probably dictate that a combination of these devices should be used, as overuse of any one leads to tedious repetition:

A person aggrieved by the failure of the Board to grant him or her a licence, or to renew his or her licence, may appeal in writing to the Tribunal; and if his or her business to which the licence relates employs more than 5 persons, he or she may appear before the tribunal at the appeal or be represented there by his or her legal representative.

This can be better expressed:

A person aggrieved by the failure of the Board to grant him or her a licence, or to renew a licence, may appeal in writing to the Tribunal; and, if the business to which the licence relates employs more than 5 persons, the appellant may appear before the tribunal at the hearing or be represented there by a legal representative.

10.10 Expressing time

10.10.1 Expressing time generally

Often there is no time expressed within which something in legislation is required to be, or may be, done. Basic provisions are typically made in an Interpretation Act by a rule which states that, in the absence of a fixed time requirement, it must or may be done with reasonable speed and as often as the occasion arises. The courts will, if necessary, construe what constitutes 'reasonable speed' from the context of the particular rule.

Often the fixing of a precise time limit would be impractical. However, a sense of urgency can be written into rules by using deliberately elastic expressions,

such as ‘without delay’, ‘as soon as possible’ or ‘with all reasonable speed’, expressions which likewise have to be construed according to the context:

A police officer, after arresting a person, must admit that person to bail or take the person before a magistrate [as soon as possible] [with all reasonable speed].

10.10.2 Expressing dates and time

Again, the Interpretation Act will dictate how time is, in general, to be calculated (usually, by international agreement, by reference to Greenwich Mean Time or its more modern equivalent Universal Time Coordinated). In expressing dates and time, practice varies but the following are recommended:

10 June 2016

rather than:

10th June 2016, 10.6. 2016,

or the archaic form:

the tenth day of June 2016

9 am, 10.30 pm, 12 noon, 12 midnight

rather than:

9 o’clock in the morning, 0900hrs, 22.30hrs.

In the case of a period of months or a year, reckoning must normally be made from the starting date to the corresponding date less one. Thus, the period of six months beginning on 6 March ends at the end of 5 September. The period of one year beginning on 1 March ends on 28 (or 29) February of the following year.

10.10.3 Fixing a beginning or an ending

Most Interpretation Acts contain provisions to the effect that periods of time expressed to begin or end on a particular day include the stated days, and some are more comprehensive still, but it is nevertheless important to bear in mind the following:

- When fixing a beginning, it is best not to state ‘from 1 January’, as this may still give rise to the question of whether 1 January is included or excluded. Rather state:

Beginning on 1 January; on or after 1 January; not earlier than 1 January

depending on the emphasis desired to be given.

- Likewise, when fixing an ending, it is best not to state 'before 31 January' or 'by 5 April', as these may give rise to the question of whether the date mentioned is included or excluded. Rather state:

Ending on 31 January; on or before 5 April; not later than 5 April

depending on the emphasis desired to be given.

- If both dates are to be set, the preferred expression would be:

The period beginning on 1 November and ending on 31 December...

A drafter should be careful not to write 'between 1 November and 31 December', as it will be unclear whether the two end dates are included, although with times in a day, or the happening of specific events, this may safely be done, as there can then be no ambiguity:

...between 8am and 6pm daily;

...between the despatch of a notice and its receipt

10.10.4 Periods fixed by reference to a specific date or event

When referring to a period, it is sometimes necessary to add the word 'immediately' before the words 'before', 'after' or 'following' to make it clear that the period must be calculated by direct reference to a date or event:

A person resident in Utopia for 3 months immediately before his or her death.

This might otherwise be thought to refer to any period, or even an aggregate period, before death.

In the 3 days immediately following the happening of the accident

This would save any argument about whether weekend days were or were not to be counted.

10.11 Expressing numbers

The practice in expressing numbers varies in different jurisdictions. A broad rule in some is to express numbers up to and including ten in words and those greater than ten in figures. However, it is convenient to write penalties using figures:

...is liable to imprisonment for 6 months and a fine of \$5,000.

Whatever the general rule, words rather than figures tend to be used in the following instances:

- where the number is technical modifier:

a third-party, a document written in the second person, a one-off permit

- where two separate numerical references appear together at the start of a section or subsection, or paragraph in a Schedule:

2. Twelve members constitute a quorum if...

- where confusion might otherwise result:

5 two-wheeled vehicles (or five 2-wheeled vehicles)

- where fractions are expressed:

one half; one quarter; one third

but note the conventional use of a hyphen in a multiple fraction:

three-quarters; two-thirds; five-sixteenths