

IDEAS FOR ORDERS WITH MORE CLARITY

Justice Graham Mullane

“What’s written without effort is in general read without pleasure.”

Samuel Johnson

NO “THATS”

No need to start every order with “that”. When you talk do you start sentences with “that”?

ONE TOPIC PER ORDER

Don’t try to do too much in the one order.

Example: some precedent orders for sale of real estate that separate the various issues:

1.1 REALTY - SALE BY AUCTION

- () On or before **(date)** the parties must do all acts and execute all documents necessary to sell the property known as **(address)** being the land in Certificate of Title Volume Folio Identifier No. by public auction.
- () The reserve price is **(\$amount/ such price as (specify who) advises)** or such lower price as the parties agree.
- () The reserve price is to be such amount as the parties agree 14 days before the auction and in default of agreement, such amount as is advised by **(name/a valuer nominated by (specify))**.
- () There is to be no reserve price at the auction.
- () Each party has the right to bid at the auction.

1.2 REALTY - SALE

- () On or before **(date)** the parties must do all acts and execute all documents necessary to sell at market value the property known as **(address)** being the land in Certificate of Title Volume Folio Identifier No. .

1.3 REALTY – SALE - AGENT AND SOLICITOR

- () The agent for the sale is to be **(name, firm and address)**, and the solicitor for the parties on the sale is to be **(name, firm and address)**;

OR

- () The **(husband/wife)** is to have the conduct of the sale on behalf of the parties and is to instruct agents and solicitors on their behalf.

1.4 REALTY - SALE – CONDUCT

- () The **(husband/wife)** is to have the conduct of the sale on behalf of the parties and instruct solicitors and agents to act on their behalf.

1.5 REALTY - SALE - OCCUPATION TILL SALE

- () Until completion of the sale the **(husband/wife)**:

- /1 has the right to occupy the property **(to the exclusion of the wife/husband)** subject to **(the husband/wife)** paying the following payments as they fall due:

Payments -

- i) Council and water rate instalments
- ii) Household building and contents insurances
- iii) Repayments in respect of any mortgage secured on the property
- iv) Other

- /2 must keep the property tidy, clean and in repair (having regard to its present condition);

- /3 must permit inspection by agents and prospective purchasers at all reasonable times.

1.6 REALTY – SALE - PAYMENT OF PROCEEDS

- () The parties must do all acts and execute all documents to cause the proceeds of sale of the property to be paid as follows:-

- () reasonable expenses of the sale including agent's commission and legal costs and disbursements;

- () discharge of the mortgages (secured on the property) to:
Name Mortgage No.

- () rate adjustments (other than those amounts otherwise payable by one of the parties pursuant to these orders);

- () **(\$amount)** to **(name)**;

- () **(\$amount/(number)% of the balance)** to the **(husband/wife)**; and

- () the remainder to the **(wife/husband)**.

ORDER PEOPLE TO DO/NOT DO -- DON'T MAKE ORDERS IN REM

Any order, other than a declaration or a notation, should require someone to do something (or to not do something). Otherwise it will be unenforceable.

Examples of orders that do not require anyone to do anything:

- 2.1 **“That the former matrimonial home be sold and the net sale proceeds be divided equally between the parties.”**

(Unenforceable - Can it be fixed if it's a final order, the other party is living in the house pending sale, won't sign a sale agreement and won't consent to orders varying the order? Appears Sec. 79A(c) might not be available. Can it be established that “a person has defaulted in carrying out an obligation imposed on him by the order...”?)

- 2.2 **“That the other party be notified within 2 hours if any of the children should be hospitalised or has a serious injury.”**

(Who is required to notify? If one of the children is hospitalised and no notice is given to the other party, no one has contravened the order.)

PLAIN ENGLISH

Don't use Latin legal jargon or “Olde English”. Use words that are simpler, clearer, easier understood.

Otherwise a simple bequest:

- 3.1 “I give my horse Hi Ho Tonto to my daughter Mildred”

can become:

- 3.2 “I give, devise and bequeath to my daughter Mildred Drinkwater, married woman and anaesthetist, of Unit 12, 46 Honeymoon Crescent, Argenton South, her heirs and executors all my right title and interest in my quarter horse called “Hi Ho Tonto” stabled at my property Lot 16 Hannell Street, Wickham anything hereinbefore, or hereinafter, or in any other instrument or conversation of whatsoever nature or kind soever, to the contrary in any wise, notwithstanding”.

Some lawyers can't resist words like “herewith”, “hereinafter”, “hereinbefore”, or “aforesaid”, “instant”, “proximo”, therein, herein, and “ultimo”. But those words are foreign to the English speaking world.

If you say “Enclosed herewith is a copy” what use is the word “herewith” other than to demonstrate you don't understand the word “enclosed”?

PREFER ACTIVE RATHER THAN PASSIVE

Sentences structured as Subject/Action/Object (active) are usually clearer than those with the elements in different order. Note the examples in the above discussion of unenforceable orders as both examples are passive and do not have a subject that is required to perform the action.

Some examples for comparison:

- 4.1 “There was sitting by the cat on the mat.” (action/subject/object)
- 4.2 “Sitting on the mat was the cat” (action/ object/subject)
- 4.3 “The mat was sat on by the cat.” (object/action/subject)
- 4.4 “The cat sat on the mat.” (subject/action/object)

5.1 “**Publication** of details of these proceedings **by the applicant** is prohibited”.
(action/object/subject)

5.2 “The **applicant must not publish** details of these proceedings.”
(subject/action/object)

6.1 “Service of a sealed copy of the application on the respondent **must be effected** by the applicant mailing it to him at his residential address.”
(object/action/subject)

6.2 “The applicant **must serve** the Respondent with a sealed copy of the application by mailing it to him at his residential address”.
(subject/action/object)

7.1 “**A review of the literature on the topic** must be conducted **by the single expert**.”
(object/action/subject)

7.2 “The **single expert must review the literature** on the topic.”
(subject/action/object)

PREFER “MUST” TO “SHALL” (OR “IS TO”) WHERE APPROPRIATE

It is generally accepted in legal drafting and in legislative drafting that “must” is the clearer word to use when it is intended to command, require, compel or oblige someone to do something.

Despite the biblical commands of “thou shalt” the meaning of shall is now generally more intended as “should” or the future tense (e.g. “I shall go”). Similarly “is to” is generally used for future tense rather than to express a command.

Examples:

- 8.1 “The applicant **shall deliver** Stanley to the father’s residence each Wednesday at 5pm.”
- 8.2 “The applicant **is to deliver** Stanley to the father’s ... etc.”
- 8.3 “The applicant **must deliver** Stanley to the father’s ... etc.”

EXPRESS CRUCIAL ACTIONS AS VERBS -- AVOID NOMINALISATIONS

(Another version of Active rather than Passive.)

If you express crucial actions as abstract nouns instead of verbs, you will usually have lots of words ending in “tion”, “ence”, “ness”, “ity” etc. Nominalisations can also occur where verbs are converted to adjectives. Nominalisations are typical of a turgid, overly complex style. They choke a sentence.

So if you mean to say “**In order to prove the Court is biased, you must prove refusal to accept the evidence of minority witnesses**”, you can convert that with nominalisations to:

“Proving the existence of bias on the part of the Court is dependant upon the production of proof of its refusal to accept the evidence of minority witnesses”.

Similarly you can make sentences less clear by nominalisations:

- 9.1 “The agency **modified the program.**” becomes,
- 9.2 “There **was a modification of the program** by the agency”.

And:

- 10.1 “The Court **decided to review** the matter.” becomes,
- 10.2 “The Court **made a decision to conduct a review** of the matter”.

Other examples avoiding nominalisations:

- 11.1 “**Notice** of the new return date **must be given** by the solicitor for the applicant to the Respondent.”
- 11.2 “The solicitor for the applicant **must notify** the respondent of the new return date.”

- 12.1 “**Compliance** with order 6 **is mandatory** for the 2nd Respondent.”
- 12.2 “The 2nd Respondent **must comply** with Order 6”.
- 13.1 “The **applicability** of the provision depends upon the **willingness** of the Court to behave with leniency.”
- 13.2 “If it **is willing** to be lenient, the Court **will apply** the provision.”

PRESENT TENSE IS CLEARER THAN FUTURE OR SUBJUNCTIVE

Examples:

- 14.1 “The respondent **do be and is hereby restrained** from leaving Australia”
- 14.2 “The respondent **do be restrained** from leaving Australia” (South Australian?)
- 14.3 “The respondent **be restrained** from leaving Australia”
- 14.4 “The respondent **is restrained** from leaving Australia.”

OR (better still):

- 14.5 “The respondent **must not leave** Australia”
(active rather than passive)
- 15.1 “The father **is to have** sole parental responsibility for Hector”
- 15.2 “The father **shall have** sole parental responsibility for Hector”,
- 15.3 “The father **has** sole parental responsibility for Hector”.

KEEP THE SUBJECT AND THE OBJECT CLOSE TO THE ACTION

This usually results in a time limit, such as “until further order”, or “on or before 25 September” or “by 4.00pm on 20 May”, being expressed at the start of a sentence.

It also involves avoiding splitting the action.

Examples:

- 16.1 “The **applicant must** within 28 days, or longer if the respondent agrees in writing, **pay** towards the respondent’s costs of today **to the respondent’s solicitor**, or such other person as the respondent directs in writing, **a sum of \$500.**”

- 16.2 “Within 28 days, or longer if the respondent agrees in writing, the **applicant must pay \$500 to the respondent’s solicitor**, or such other person as the respondent directs in writing, towards the respondent’s costs of today.”
- 17.1 “**The mother may provide** to any mental health service or mental health practitioner assessing or treating Cedric **a copy of the report of Dr Brown.**”
- 17.1 “**The mother may provide a copy of the report of Dr Brown** to any mental health service or mental health practitioner assessing or treating Cedric”.

Some may prefer “is permitted to” to “may”.

INCLUDE A FINDING IN AN ORDER ONLY IF REQUIRED TO BE MADE BY ORDER OR NECESSARY TO GIVE MEANING

An example is a superannuation splitting order under para 90MT(1)(a) of the Family Law Act.

The Family Law Act provides in that provision that the Court can make a splitting order for a superannuation interest that is not a percentage- only interest so that whenever a splittable payment becomes payable, “the non member spouse is entitled to be paid the amount (if any) calculated in accordance with the regulations”.

That calculation can only be done using the “base amount”. The court is required under subsection 90MT (4) to first “allocate” the base amount before making the splitting order. There is no requirement to make the finding as to the base amount by order.

But if the base amount is not in the order then the person who calculates the entitlement of the non member spouse would need the judgment or some other evidence to prove the base amount “allocated”. Thus to give meaning to the order the base amount should be included.

The order below includes the finding as to the base amount and the operative date.

18.1 SUPERANNUATION - SPLITTING ORDER – GROWTH PHASE -
Sec.90MT(1)(a)

- () Whenever a splittable payment is payable in respect of the superannuation interest of (*member’s name*) in the (*name of superannuation fund*):
- (i) (*name of non-member spouse*) is entitled to be paid an amount calculated in accordance with the Family Law (Superannuation) Regulations, 2001, using a base amount in the sum of (*amount in dollars*) at the operative time of (*date*); and

- (ii) there is a corresponding reduction in the entitlement of the person to whom the splittable payment would have been made but for this order.
- () The above order binds the trustee or trustees from time to time of the superannuation fund.

Another example is the duty to support a step child. Section 66D of the Family Law Act provides that a step parent, subject to Division 7 of Part VII, has the duty to maintain a child “if, and only if, a court, by order under Section 66M declares it is proper for the step parent to have the duty. Clearly what is needed is not just a determination that it is proper for the step parent to have a duty to support the child, but that the determination be by order.

18.2 CHILD – STEP-PARENT – DUTY TO MAINTAIN – SEC.66M

- () It is proper for **(name of step-parent)** the step-parent of **(name(s) and date(s) of birth of child/ren)** to have a duty to support the **(child/ren)**.
- () **(name of step parent)** must pay to **(name)** weekly maintenance for the following children as specified, first payment on or before **(date)**:

Name	Date of Birth	Amount
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REFER TO STATUTORY PROVISIONS IN ORDER ONLY IF REQUIRED BY LAW OR NECESSARY TO GIVE MEANING

Sometimes the legislation requires that the order state that a particular provision applies. Sometimes the validity of the order or its effect depends upon compliance. An example is an order for payment of a lump sum or transfer of property where a purpose is that all or part will be provision by way of spouse maintenance. Sec 77A requires that the court “express the order to be an order to which this section applies”. Hence the orders viz:

19.1 SPOUSE – LUMP SUM

- () (a) In respect of the period from **(date)** to **(date)** the **(liable party)** is to pay to the **(receiving party)** on or before **(date)** maintenance of \$ **(amount)**.
- (b) This is an order to which sec 77A of the Family Law Act applies and the whole of the amount payable is maintenance.

19.2 SPOUSE – PART OF LUMP SUM OR TRANSFER OF PROPERTY

- () (a) **(require payment/ transfer etc.)**

(b) This is an order to which Sec 77A of the Family Law Act applies and \$ **(amount)** of the **(money payable/value of the property transferable)** to the **(receiving party)** is maintenance **(where for limited period, specify period)**.

WHERE APPROPRIATE, USE THE WORDS OF THE STATUTE

Sometimes the legislation closely defines the order(s) the Court can make. Compare the wide terms of Sec 79(1)(a) of the Family Law Act -- order “altering the property interests of the parties” with the precise wording of Sec 90MT(1) as to the alternative orders that can be made splitting superannuation entitlements.

Consequently it is prudent to follow that precise wording in the paragraphs of the subsection giving the power such as:

20.1 SUPERANNUATION - SPLITTING ORDER – GROWTH PHASE - Sec.90MT(1)(a)

- () Whenever a splittable payment is payable in respect of the superannuation interest of **(member’s name)** in the **(name of superannuation fund)**:
 - (iii) **(name of non-member spouse)** is entitled to be paid an amount calculated in accordance with the Family Law (Superannuation) Regulations, 2001, using a base amount in the sum of **(amount in dollars)** at the operative time of **(date)**; and
 - (iv) there is a corresponding reduction in the entitlement of the person to whom the splittable payment would have been made but for this order.
- () The above order binds the trustee or trustees from time to time of the superannuation fund.

20.2 SUPERANNUATION - SPLITTING ORDER - PERCENTAGE ONLY INTEREST - S.90MT(c)

- () Whenever a splittable payment is payable in respect of the superannuation interest of **(name)** in the **(name of superannuation fund) /under the (Judges’ Pension Act, 1968 (Cth)/ Judges’ Pension Act, 1953,(NSW)/ specify other)**:
 - (i) **(name of non-member spouse)** is entitled to be paid the amount (if any) calculated in accordance with the Family Law (Superannuation) Regulations, 2001 by reference to a figure of **(number)** per cent; and
 - (ii) there is a corresponding reduction in the entitlement of the person to whom the splittable payment would have been made but for this order.
- () The above order binds (name of payer of superannuation).

20.3 SUPERANNUATION - SPLITTING ORDER – PAYMENT PHASE -
Sec.90MT(1)(b)

- () Whenever a splittable payment is payable in respect of the superannuation interest of *(member’s name)* in the *(name of superannuation fund)*:
 - (i) *(name of non-member spouse)* is entitled to be paid *(number)* per cent of that splittable payment; and
 - (ii) there is a corresponding reduction in the entitlement of the person to whom the splittable payment would have been made but for this order.
- () The above order binds the trustee or trustees from time to time of the **(name of superannuation fund)**.

Similarly, because of the precise terms of Sec 66D defining the condition for a step parent to have a duty to maintain a child, it is best to use the wording of the section, viz:

21.1 CHILD - STEP-PARENT – DUTY TO MAINTAIN – SEC.66M

- () It is proper for **(name of step-parent)** the step-parent of **(name(s) and date(s) of birth of child/ren)** to have a duty to support the **(child/ren)**.
- () **(name of step parent)** must pay to **(name)** weekly maintenance for the following children as specified, first payment on or before **(date)**:
(list name, date of birth and amount for each child)

SHORT SENTENCES OR SUBDIVIDE INTO POINTS

“All length is torture.....” William Shakespeare, Anthony and Cleopatra, 4.14

Short sentences or points are generally much easier to understand than long sentences.

Two examples of long sentences (Slides of Building Contract Clause and Easement for Batter)

Examples of subdividing into parts or lists is in the following Anton Pillar Orders:

22 ANTON PILLAR ORDERS

- () It is noted that **(applicant)** (“the applicant”) undertakes:-
- (a) to abide by any order the Court makes as to damages in case the Court finds that **(respondent)** (“the respondent”) has sustained any damages by reason of these orders which the applicant ought to pay;
 - (b) to provide **(name)**, a solicitor who is not a member of the firm of solicitors acting for the applicant, (“the supervising solicitor”) with a copy of these orders in ample time for the supervising solicitor to become familiar with these orders before attending any premises pursuant to these orders;
 - (c) to ensure the supervising solicitor is present when access to any premises is sought, obtained or continued pursuant to these orders;
 - (d) to arrange for the supervising solicitor to promptly serve these orders together with the application and affidavits supporting the application upon an apparently responsible person appearing to be in charge of the premises mentioned below being the respondent or a servant or agent of the respondent (“the said person”);
 - (e) not to use (or permit anyone to use) any documents or information obtained pursuant to these orders, other than with the written consent of the respondent or leave of the court, for any purpose except for this proceeding;
 - (f) not to disclose any document or information obtained pursuant to these orders to any person other than:
 - (i) counsel and solicitors retained on behalf of the applicant;
 - (ii) **(accountants)** retained on behalf of the applicant; and
 - (iii) **(valuers)** retained on behalf of the applicant;
 - (g) not to effect forcible entry into any premises in the execution of these orders;
 - (h) to retain all articles and documents obtained as a result of the execution of these orders in the safe custody of the applicant’s solicitors; and
 - (i) to make a list of all articles and documents obtained as a result of these orders prior to removal of any such articles or documents into their safe custody and provide the said person with a signed copy of such list prior to such removal;
 - (j) to pay the reasonable costs, charges and expenses of any person other than the respondent upon whom these orders are served, or to whom notice is given, incurred by him in complying with the terms of this order.
- () The respondent and **(his/her/their/its)** servants and agents must immediately permit not more than 4 persons comprising:
- (a) the supervising solicitor;
 - (b) **(name)**, who is a solicitor and member of the firm of solicitors acting for the applicant (“the nominated solicitor”);
 - (c) the applicant or a representative of the applicant; and,
 - (d) (if the applicant wishes) one other person nominated by the applicant;

to enter the premises at (**address**) and any other premises occupied by or under the control of the respondent at any time between the hours of (**time a.m.**) and (**time p.m.**) and to:

- (i) search for, inspect, photocopy, and make notes of any or all of the following documents or articles:

List of Documents and Articles:

[list what documents or articles can be searched for, inspected, copied, or noted]

and

- (ii) pending further order remove in the custody of the applicant's solicitors any of:

List of Documents/Articles for Removal

[list what documents or articles can be removed]

- () In order to implement these orders the said person where necessary shall cause to be displayed or printed out by computer(s) all documents and materials referred to in the preceding order or any portion or part of such documents and materials as are in computer readable form.
- () The said person after all due and proper enquiries, must disclose to the nominated solicitor for the applicant the whereabouts of all documents and articles in the above list whether they be on the same premises or another premises and whether they are being held on behalf of the respondent by any other person or company.
- () The said person must deliver to the applicant's solicitors within 24 hours of service of these orders all documents and articles in the above List of Documents/Articles for Removal that have not already been taken into custody of the applicant's solicitors.
- () The supervising solicitor must:
 - (a) promptly serve these orders together with the application and affidavits supporting the application upon the said person;
 - (b) introduce and identify the said person to those persons authorised by these orders to enter the respondent's premises.
 - (c) inform the said person that the respondent has a right to obtain legal advice prior to the execution of these orders if that advice is sought forthwith;
 - (d) inform the said person of the applicant's undertaking that except for purposes of this proceeding the applicant will not make use of any of the information obtained pursuant to the execution of this order;
 - (e) offer the said person to explain in every day language the meaning and effect of these orders;
 - (f) answer forthwith any query by the said person as to whether any particular document or article is within the scope of these orders; and
 - (g) prepare a written report about the execution of the order and provide copies of that report to the respondent and the Court as soon as practicable.

- () ***(If the orders direct the occupant of residential premises to permit a search)***
If the applicant is aware that at the time at which service of the order is affected the occupant of the premises is likely to be a woman and the supervising solicitor is not a woman, the supervising solicitor must be accompanied by a woman.
- () The nominated solicitor must:
 - (a) prior to removal of any such articles or documents from the premises, make a list of all such articles and documents obtained as a result of these orders, provide the said person with an opportunity to check the list and provide the said person with a signed copy of such list; and
 - (b) ensure that all articles and documents obtained as a result of the execution of this order are retained in the safe custody of the applicant's solicitors.
- () Until **(date – not more than 7 days)** the respondent must not inform anyone but his lawyer of these orders.
- () The costs of the application are reserved.
- () Further hearing of the application is adjourned to **(date)** at **(time)** and each party has leave to apply in the meantime to vary these orders on 24 hours notice to the other(s).

(OPTIONAL)

- () The respondent is entitled to dispose of up to **(\$amount)** per **(week/month)** for business operating expenses and dispose of property so far as necessary to pay any debts falling due in the ordinary course of business.
- () Otherwise until **(further order/(date))** the respondent is restrained from:
 - (a) removing, or authorising or permitting the removal, from Australia of any of **(his/ her /their/its)** property (which expression in this order and subsequent orders made today includes present property, property subsequently acquired, any present or subsequently acquired interest in property, real and personal property and any deposits or loans with or to any person, bank, building society, or lending or financial institution whether at call or not);
 - (b) disposing of within the jurisdiction any of the property or any interest in the property; and
 - (c) dealing with, pledging, charging, leasing, encumbering, or otherwise creating any interest in any of the property.
- () On or before **(date)** the Respondent must file and serve a financial statement making full and frank disclosure of **(his/her/ their/its)** financial circumstances and including:
 - (a) the matters specified in Rule 13.04 of the Family Law Rules; and
 - (b) all property acquired or disposed of since **(date)**.

CLARITY

“Clarity” is the 6 monthly journal of the International Association Promoting Plain Legal Language. The Association has a sizeable membership from Australia and New Zealand. The Association holds an annual conference. Membership costs \$35 per annum. If you are interested in joining, I can provide the address of the Australian representative.

Recommended Reading:

“Plain Language for Lawyers”, (3rd Edition) by Michelle M. Asprey, The Federation Press. Michelle is an Australian lawyer who is an expert on the topic and has participated in training some Family Court Judges.