# Session 7 – LEGAL CITATION & WRITING

# 1. Citation

* Citation important for assessment tasks but also in legal research methods.
* Why is observing proper citation method important?
* Proper acknowledgement of sources essential for all academic writing – necessary to avoid plagiarism.
* Also essential for doctrine of precedent and separation of powers > judges must show an authoritative legal rule laid down either in a previous case or by Parliament through legislation. In answering any legal problem, you must do the same.
* Legal/academic community expects writing to comply with the conventions, in our case the ***Australian Guide to Legal Citation*** (4th ed, 2018) (**AGLC**).
* It also helps you to know where to find sources that are referenced in other legal materials that you read - accurately and quickly
* You need to spend time browsing the AGLC. Today we will cover only the ‘bare essentials’.
* In law we use footnotes (not endnotes), to reference our authorities/sources. AGLC Rule 1.1.2 explains where you should position the footnote number in your text. AGLC 1.1.3 also tells you how to separate multiple different sources within one footnote.
* In law you should always cite *primary sources* (ie cases or legislation) as authority for propositions of law. Casebooks and textbooks are ***not*** sources of law. They might be relevant to reference when engaging in critical analysis on a legal topic.

# (a) Cases

* See **AGLC Chap 2.** A complete case citation includes:
* name of the case, italicised
* year of the decision (or publication, where the report series is published in annual volumes)
* volume number of the report series (if there is one)
* abbreviated title of the report series: for comprehensive listings of these, see **Appendix A of AGLC** (in hard copy only), the Library research session notes posted under Session 6 – Legal Research, or various online sources linked at: <https://libguides.anu.edu.au/law/abbreviations>
* page in the report volume at which the case begins
* an indication of the specific page or paragraph (if any) being referred to within the case (called a ‘**pinpoint reference’**).
* Pinpoint ref should always be to relevant page(s) of the *case report* that the case is reported in, NEVER the page number of a textbook (and also never to pages that form part of the headnote to the case). See **AGLC 1.1.6, 1.1.7, 2.2.5** for rules about pinpoint references.
* If you have already included the full name of case in your text, do not repeat again in footnote – only the rest of the citation. See **AGLC 2.1.15.**
* If you have included a direct quotation from a case and it is not already indicated or obvious in the text which judge(s) you are quoting, it is worth doing this in brackets at the end of the citation (after the pinpoint reference). See **AGLC 2.4.1.**
* If the case has quite a long name or is commonly referred to by a short-hand name (*eg Mabo*, or *Tasmanian Dam Case)* you provide the full name on your first reference and then define it as the abbreviated name in brackets and single quote marks. See **AGLC 2.1.14.**
* If a case has been reported in more than one report series (eg authorised, unauthorised, generalist, specialist) then there is a ‘hierarchy’ you should follow for which citation to use. See **AGLC 2.2.2**. Cite only one report series if case reported in several places.
* *First*, authorised report (see **AGLC 2.2.3** listing of most common authorised reports)
* *Second*, if no authorised report, use an unauthorised report
* *Third*, if it is reported in multiple unauthorised reports, use the generalist unauthorised report series in preference to a specialist one
* *Fourth*, if it is only cited in one unauthorised report, use that unauthorised report series
* *Fifth*, if it is not reported in any report series, cite it as an unreported judgment. This normally means following ‘medium neutral citation’ if the court has used one. See **AGLC 2.3.1.** If no medium neutral citation, follow **AGLC 2.3.2.**

# (b) Legislation

* See **AGLC Chap 3.**
* Basic method is to:
* italicise the full name of the Act (including the year in which it is passed)
* in brackets (but not italics) give jurisdiction abbreviation (see list of jurisdiction abbreviations in **AGLC 3.1.3**)
* give the pinpoint reference using the relevant abbreviation (eg ‘s’ for section – see the list of abbreviations in **AGLC 3.1.4**). There is no comma before the pinpoint.
* Bills are cited in a similar way to Acts, but without the italics.
* Chapter 3 of AGLC also covers some ‘quasi-legislative’ materials like rules of certain authorities or courts and various other things.

# (c) Secondary sources

* Depending on what courses you go on to do, your assessment tasks may involve essays or research papers requiring you to utilise, and reference, secondary sources.
* In our course, you will only need to reference secondary sources in assessment task 4.
* Generally, the most common secondary sources you will use are: textbooks, legal journal articles (peer reviewed), parliamentary materials (eg debates – Hansard), government body / authority reports (eg Law Reform Commission, Royal Commission report, etc), speeches (eg by judges, speaking extra-judicially).
* General Rules for Secondary sources – see **AGLC Chap 4**
* Books – see **AGLC Chap 6**
* Journal articles – see **AGLC Chap 5**
* Royal Commission reports – **AGLC 7.1.3**
* Law Reform Commission Reports – **AGLC 7.1.4**
* Hansard – **AGLC 7.5.1**
* Speeches – **AGLC 7.3**

# (d) A few more general citation tips ...

* Rules on subsequent references - see **AGLC 1.4**
* *Ibid*: follow **AGLC 1.4.3**
* For the citation of earlier-mentioned (1) primary materials and (2) secondary sources follow **AGLC 1.4.1**
* Full stops on the end of each footnote!
* Take note of the *introductory signals*for citations explained at **AGLC 1.2.** Can use when citing a source that is, eg, an *example* of the proposition stated in text or in *contrast* to that proposition, etc.
* Take note of the rules around sources referring to other sources at **AGLC 1.3 -** if you haven’t gone back to that original case, you should indicate that you are actually citing (or directly quoting) a judgment within a judgment.
* **Leave plenty of time** for completing proper citations for any law assessment task (other than a sit-in exam where you don’t need to follow them). They can take longer than you’d expect.

# 2. Legal Writing

* Legal writing is an essential skill, as the law is a ‘document heavy’ discipline.
* Within this Session – if time permits - we will briefly cover:
* Plain language in law
* Writing a case analysis
* Academic integrity

# Plain language in law

# (a) What is it?

* No set ‘definition’ - just about writing in a clear and simple style.
* ‘Plain English’ is said to have first arisen as a ‘movement’ in the 1970s. Originally prompted by concerns that consumers were unable to understand their rights and obligations.
* Soon expanded into other areas and to legal drafting generally.
* Not universally supported.

# (b) What isn’t it?

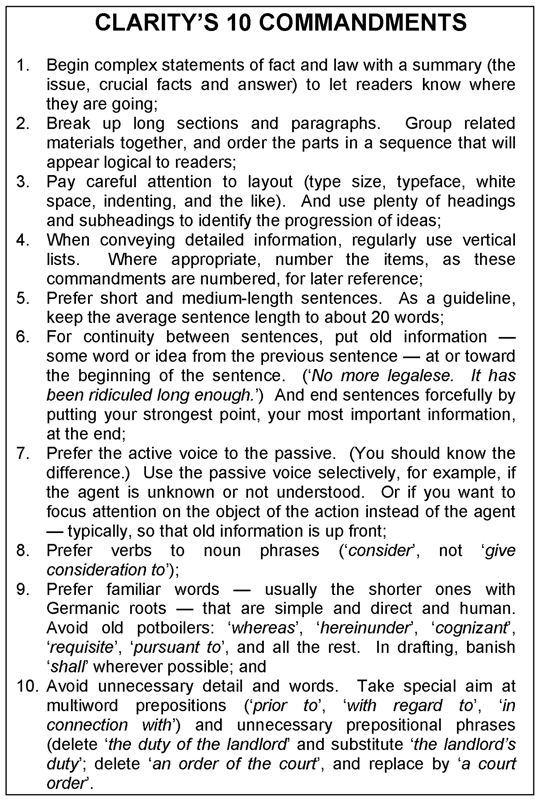
* Not about “dumbing down” legal language by getting rid of any technical language and discarding long words.
* Goal is clarity of expression, *not* reduction of expression or ideas.

# (c) Why do we need it?

* Access to justice issue.
* Look at some examples of excessively convoluted and unclear legal writing. See eg a clause from a legal contract from Plain English Campaign examples of long sentences, available at: <http://www.plainenglish.co.uk/examples/long-sentences.html>

# (d) Key principles

* See ‘Clarity’s 10 Commandments’ in the Kirby article set for essential reading (extracted below).
* But remember that plain language is *not* a set of inflexible rules to be followed at all costs. Point is always to make expression clearer – if application of one of these principles does not contribute to that objective in a given piece of writing then don’t use it.



***Rule 2 – break up long sentences and paragraphs***

* Generally speaking, plain language recommends that each paragraph should deal with only one topic, and each sentence should deal with only one idea.
* In the U.S., one of the plain English statutes says that the average number of words per paragraph in certain consumer contracts must be less than 75. This is equal to about 7 or 8 lines.
* Kirby recommends keeping sentences to about 20 words (Rule 5).
* The position of ‘qualifying phrases’ in a sentence can affect readability. Sometimes the qualification is placed in between the verb and the direct object, which can make it difficult to read. For example:

*Party B cannot, without providing valuable consideration, enforce the promise as a binding contract against Party A.*

It would be much easier to read this:

*Party B cannot enforce the promise as a binding contract against Party A without providing valuable consideration.*

***Rule 3 – pay careful attention to layout***

*Connecting words and phrases*

* Connecting words and phrases are important. They link sentences and paragraphs and help the reader to follow the line of argument. Don’t be tempted to discard them all because you think they are ‘unnecessary’ compared to the substantive points. They can actually make those substantive points clearer.
* Examples:

However

In addition

At the same time

On the other hand

As discussed in paragraph [x] above

Unlike the situation described above

*Logical order*

* Plain language is as much about structure and logical ordering of ideas as it is about words.
* It is hard to set out clear guidelines since it will depend on the specific context. However, Kirby’s tip of using *plenty of headings and subheadings to identify the progression of ideas* is an important one. Make sure that you use the same numbering / typeface for headings of the same level. Use indentation if that helps you to order the information.

***Rule 7 – prefer the active voice***

* Active voice requires the writer to identify the actor (ie party carrying out the act) and involves simpler grammar.
* For example, this is passive voice:

*It was resolved by the Board that management be kept informed of developments in the strategic planning process.*

* This is active voice:

*The Board resolved to keep management informed of developments in the strategic planning process.*

The actor is clearly identified and the grammatical structure is simpler.

* Lawyers often use the passive voice for a variety of reasons – eg, believing it conveys a more formal or authoritative tone, or when trying to deemphasise the actor’s responsibility.
* For example:

*The documents will be forwarded to you as soon as possible.*

Instead of:

*We will forward the documents to you as soon as possible.*

Or this:

*The file was mislaid during the office reorganisation.*

Instead of:

*We mislaid the file during the office reorganisation.*

* Sometimes as a lawyer it is appropriate to use the passive voice because it would be too confrontational to use the active voice. For example:

*Our latest invoice remains unpaid*

Instead of:

*You have not paid out latest invoice.*

***Rule 8 – prefer verbs to nouns (avoid nominalizations)***

* Keep to simple verb forms.
* Lawyers have a tendency to convert verbs to nouns. This makes expression longer but doesn’t really add anything to meaning.
* Examples:

*The purchaser shall make payment*

Instead of:

*The purchaser shall pay*

Or

*The parties reached agreement*

Instead of:

*The parties agreed*

***Rule 9 - prefer familiar words and avoid archaic language***

* You are probably unlikely to use these terms in your writing but need to understand them when you come across them in reading.

***Rule 10 - avoid unnecessary detail and words***

*Double negatives*

* A good example of this is the tendency of lawyers, and the English language, to use double negatives. This is due partly because of the slightly different emphasis they are thought to achieve and because they are a less direct method of communicating.
* For example:

*This view is not completely incorrect.*

Could be said as:

*This view is partly correct.*

* Another example:

*We cannot identify any legal reason why you should not accept this contract.*

Could be said as:

*There is no legal reason why you should not accept this contract.*

*Redundant words and phrases*

* Another tendency of lawyers has been to use redundant words and phrases, under the misperception that they will add something to the meaning. Some examples:

Clearly/obviously/apparently

Must necessarily

Duly signed

It is important to note that

It should be remembered that

In view of the fact that

Expressly agrees

* Don’t confuse these redundant words/phrases with connecting words/phrases which are important.

*Synonym strings*

* It is common in the law to see phrases of two or more words which mean the same thing.
* For example:

*Give, devise and bequeath* (meaning ‘give’)

*Goods and chattels* (meaning ‘goods’)

*Transfer and assign* (meaning ‘transfer’)

*Null, void and of no effect* (meaning ‘of no effect’)

*Right, title and interest* (meaning ‘interest’)

*Discharge and release* (meaning ‘release’)

* You are unlikely to use synonym strings in your writing, although you will come across it in your reading. However the point is that you should not use more words than are necessary and you should be wary of using words and phrases solely on the basis of convention.

# Writing a case note

* Recall that there were two forms of case analysis described in *Laying Down the Law* para 6.4 (which was included in the essential reading for Session 2) – a short form and a longer form.
* I have no quibble with the shorter form but I think the longer form – even with the accompanying explanation and illustration – is not clear enough to be followed by new law students. So, for the first time, I will this year prescribe the headings I want you to use in Part A of your Assignment 4.
* I will ask you to organise your material under these headings:

1. citation
2. brief statement of material facts
3. procedural history
4. grounds of appeal and/or issues to be decided
5. the reasoning of the judge(s)
6. the key principle(s) of law underpinning the decision (*ratio(nes) decidendi*)
7. decision and orders
8. wider context and commentary

* It is always a good idea to check the ***marking criteria*** for any assessment you are preparing for submission. These can be found in the Course Summary document for any course, and often also in the assignment question document. For Part A of your Assignment 4 task, the marking criteria (which are typical for this type of task) are as follows:

1. Analysis of the judgment

* summarises facts and procedural history
* identifies issues to be decided
* summarises court’s analysis of law and identifies principles of law to be applied
* summarises court’s application of law to the facts
* identifies court’s decision
* analyses the policy ramifications and/or social or cultural context of the case:
* using logical and well-organised discussion
* conducting critical analysis of the material
* drawing on a range of appropriate research sources
* reaching well-reasoned conclusions
* **In relation to the last point** - **analyses the policy ramifications and/or social or cultural context of the case -**  I am inviting you to adopt a critical perspective, have a look around for any commentary on the case specifically and/or the wider issues it raises, and provide some critical analysis. **You will need to research it and draw on secondary sources in order to do this meaningfully.** So, while the bulk of the case note is really just an exercise in extracting the most important points from the case itself, the final part asks you to go beyond the case and reflect upon its themes and outcomes in a critical way.