



# AVOIDING AMBIGUITY IN DRAFTING COMPLEX LISTS

## Introduction

Ambiguity in legal writing has been called “the lawyer’s curse”.<sup>1</sup> It is difficult to spot because legal drafters “are too close to their writing to notice it”.<sup>2</sup> Ambiguity exists “where a word, phrase or sentence is equivocal, in the sense of having two or more possible meanings”.<sup>3</sup> For example, a “light truck” can refer to a truck that is “light in weight” or “light in colour”.<sup>4</sup>

Ambiguity can arise in various contexts, most notably from “the location of words or phrases within a sentence”.<sup>5</sup> For example, the requirement for “no unsatisfied judgment, order or writ of execution” raised doubts in an Australian case whether “unsatisfied” qualified only “judgment” or all the three listed items i.e. “judgment, order or writ of execution”.<sup>6</sup>

In practice, lawyers commonly encounter statutory provisions or contractual clauses setting out a list of activities, for instance:

- “...before he installs, repairs, alters or dismantles any mobile crane or tower crane”;<sup>7</sup>

- “Whoever...destroys, mutilates or falsifies, or is privy to the destruction, mutilation or falsification of a document...”;<sup>8</sup> and
- “The receiving party shall not copy, publish or disclose such information to others ...”.<sup>9</sup>

As the case study below illustrates, special attention must be paid to avoiding ambiguity when drafting complex lists containing numerous items.

## Case Study

Suppose your client is a delivery driver for a dairy company and the law states that your client is entitled to overtime pay for working more than 40 hours in a week. However, the law does not apply if your client’s job scope falls within a list of exempted activities. Your client only delivers dairy products (which are perishable foods), but does not pack them.

You are presented with two versions of a list of the exempted activities below. Can you spot the differences? Which version could allow your client to claim overtime pay?

### Version 1

The canning; processing; preserving; freezing; drying; marketing; storing; packing for shipment; or distributing of:

- (1) Agricultural produce;
- (2) Meat and fish products; and
- (3) Perishable foods.

### Version 2

The canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of:

- (1) Agricultural produce;
- (2) Meat and fish products; and
- (3) Perishable foods.

Version 1 would be the wrong answer as it expressly refers to distributing perishable foods, which is what your client does.

If you chose Version 2, you would probably have spotted that the phrase “packing for shipment or distribution” appears ambiguous as it may refer to a single activity of “packing” (whether for shipment or distribution) or two distinct activities of “packing” (for shipment only) and “distribution”. The former interpretation would favour your client’s claim as your client does not pack dairy products.

Version 2 was the subject of a dispute between a Maine dairy company and its delivery drivers in an actual US Court of Appeals case, *O’Connor v Oakhurst Dairy*,<sup>10</sup> decided in March 2017. The US Court of Appeals held that the text of Version 2 was ambiguous and ultimately resolved the ambiguity in favour of the delivery drivers in light of the remedial purpose of the statute. The case was eventually settled for US\$5m.<sup>11</sup>

A few months after the O’Connor decision, the Maine Legislature enacted Version 1 to clarify that two separate activities of “packing for shipment” and “distributing of” perishable goods were envisaged.<sup>12</sup>

### How to Avoid Ambiguity

The above case study offers some instructive pointers for lawyers to check for ambiguity when drafting or reviewing lists of activities found in statutory provisions or contractual clauses.

#### 1. Use appropriate punctuation to delineate the items if required

The US Court of Appeals in *O’Connor* observed that the absence of a serial (or Oxford) comma in Version 2’s list of exempted activities led to the dispute. In other words, if the phrase had read “packing for shipment, or distribution of”, it would have been clearer that the distribution of dairy products was a separate activity from packing these products for shipment.

However, the Maine Legislature’s drafting convention prohibited the use of a serial comma in drafting lists. The dairy company tried to use this practice to its advantage by arguing that the serial comma was missing in Version 2 for a good reason, but the argument was not dispositive. When the Maine Legislature enacted Version 1, it adhered to this convention and used semi-colons to delineate all the items in the list instead.

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## 2. Name distinct items in the list consistently

A key argument of the delivery drivers in O'Connor was based on what is called the "parallel usage convention", namely that each word in a parallel series must play the same grammatical role. The drivers contended that most of the activities such as "canning", "processing" and "packing" were framed as gerunds, while "shipment" and "distribution" were non-gerunds and only qualified the exempt activity of "packing".

The US Court of Appeals agreed with the drivers' interpretation. It rejected the dairy company's reading as being inconsistent with the parallel usage convention because "distribution" would not only play a different grammatical role from "shipment", but also be on par with the gerunds by being an exempt activity in its own right.

It is apparent that the Maine Legislature took into account this argument in enacting Version 1 as it replaced "distribution" with "distributing".

## 3. Watch out for any outlier item in the list

The delivery drivers' subsidiary argument in O'Connor was that "distribution" could not have been intended as a stand-alone exempt activity as it was different from most of the activities in the list which involved "transforming perishable products to less perishable forms", such as "preserving", "freezing" and "drying". The drivers' contention was based on the well-known *noscitur a sociis* rule, which required words grouped in a list to be given similar meaning.

However, the US Court of Appeals was not convinced by this argument because the list of activities also included the outlier term "marketing", which had nothing to do with transforming the perishability of the dairy products. In any case, "marketing" was potentially similar to "distribution" and therefore did not conclusively support the drivers' reading.

The Maine Legislature retained "marketing" in enacting Version 1. Given that "distributing" perishable foods is now a distinct exempt activity, "marketing" and "distributing" may not be synonymous.

## 4. Insert a conjunction before the last item in the list

The US Court of Appeals in O'Connor acknowledged that the dairy company's strongest argument was that if "packing for shipment or distribution" was indeed the final item on the list, it was strange that no conjunction was used to mark it off. Instead, the only conjunction used was "or", which preceded "distribution" within the final item in Version 2's list.

Although the drivers justified the omission based on an obscure rhetorical device known as "asyndeton", the US Court of Appeals held that the argument was "hardly fully satisfying", especially when the use of such a device was generally avoided in legislative drafting. The Maine Legislature retained the conjunction "or" before "distributing of" in Version 1. Together with the semi-colon preceding "or", distributing perishable foods is now the final item in the list.

## Conclusion

The above pointers can reduce the risk of drafting ambiguous lists, although punctuation, grammatical structures, interpretive canons and conjunctions are not necessarily decisive of how a court may ultimately interpret the provision or clause in question. These pointers also cannot be universally applied to every legal document as different drafting conventions and styles may apply. Legal drafters should nevertheless strive for consistency and clarity in drafting complex lists, in order to avoid difficult interpretational issues that can arise through the unintended interplay amongst various enumerated items.

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## Endnotes

1. Peter Butt, *Legal Usage: A Modern Style Guide* (Lexis Nexis Butterworths, 2018) at p 33 (“Legal Usage”).
2. Peter Butt, *Modern Legal Drafting: A Guide to Using Clearer Language* (Cambridge University Press, Third Edition, 2013) at [6.39] (“Modern Legal Drafting”).
3. Legal Usage, *supra* n 1.
4. Helen Xanthaki, *Drafting Legislation: Art and Technology of Rules for Regulation* (Hart Publishing, 2014) at p 90.
5. *Modern Legal Drafting*, *supra* n 2.
6. Legal Usage, *supra* n 1, at p 34; *Modern Legal Drafting*, *supra* n 2, at [6.40] (Example 3).
7. Reg 26(1)(a), Workplace Safety and Health (Operation of Cranes) Regulations 2011.
8. Section 8D(1), Companies Act (Cap 50).
9. Richard Christou, *Boilerplate: Practical Clauses* (Sweet & Maxwell, 7th ed., 2015) at [4-023].
10. 851 F.3d 69 (1st Cir. 2017).
11. See e.g. Daniel Victor, “Oxford Comma Dispute is Settled as Maine Drivers Get \$5 Million” *The New York Times* (9 February 2018) <<https://www.nytimes.com/2018/02/09/us/oxford-comma-maine.html>> (accessed 30 August 2018).
12. See <<http://legislature.maine.gov/statutes/26/title26sec664.html>> (accessed 30 August 2018).

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