LEGISLATING IN LANGUAGE: INDIGENOUS LANGUAGES IN PARLIAMENTARY DEBATE, LEGISLATION AND STATUTORY INTERPRETATION

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There are signs that Australia is beginning a long-overdue process of incorporating Indigenous languages into its parliamentary debates and legislation. These are significant developments in Australian public law which, to date, have attracted insufficient scholarly attention. This article begins the process of teasing out the doctrinal implications of this phenomenon. The article is in four Parts, the first two of which describe and normatively defend the trend towards Indigenous language lawmaking in Australia. The third Part looks abroad to how other countries facilitate multilingual parliamentary debate and legislation. Finally, the article examines the interpretative questions that multilingual legislation poses for Australian courts. Potential answers to these questions are identified within existing Australian and comparative jurisprudence. However, the ultimate aim of this article is not to make prescriptions but to stimulate further discussion about multilingual legislation, which discussion ought to foreground Indigenous voices.

I INTRODUCTION

> Ngayulu kuwari kutju wangkanyi ngura nyangangka, munuṉa nguḻu nguwanpa ngaṟanyi. Ngayulu alatji watjaṉu aṉangu tjuṯa electionangka: ngayulu mukuringanyi tjukurpa katintjakitja aṉangu nguṟu kamanta kutu, kamanta nguṟu aṉangu kutu; ngayulu mukuringanyi nguṟurpa nguwanpa ngarantjakitja.[1]

In 1981, Neil Bell, newly elected member for MacDonnell (a largely Indigenous electoral division in the centre of Australia), addressed the Northern

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1 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 2 June 1981, 876 (Neil Bell). The *Hansard* translation reads: 'I am talking for the first time in this Assembly and I am a little nervous about it. I said this to the people during the election: I want to take your thoughts and ideas to the [P]arliament, and I want to take the [P]arliament's thoughts back to you. I want to be a go-between'.

Territory Legislative Assembly in Pitjantjatjara, an Indigenous language of the area. The subject of debate was pastoral land tenure, a topic of particular importance to Indigenous people given the historic tension between pastoral leases and Indigenous land rights. Bell chose to address the Assembly in Pitjantjatjara both because of his role as a non-Indigenous 'go-between' with the Aboriginal community and because of the symbolic imperative 'to represent the diverse views and aspirations of our multi-cultural Territory community'.[2] Bell's address appears to have been the first time an Indigenous language was used in parliamentary debate in Australia. Now, four decades later, there are signs of an increased momentum behind Indigenous language use in Australian parliamentary debates and, ultimately, legislation. In Victoria and Western Australia, statutes were recently enacted with Indigenous language headings and preambles. In the Northern Territory, an Indigenous language interpreter was used in the Legislative Assembly for the first time to allow substantive debate to occur in an Indigenous language. These are significant developments in Australian public law which, to date, have attracted insufficient scholarly attention. This article begins the process of teasing out the doctrinal implications of this phenomenon, in particular the interpretative questions that are thrown up by multilingual legislation.

The article is in four Parts, the first two of which describe and normatively defend the trend towards Indigenous language lawmaking in Australia. Part III looks abroad to how other countries facilitate multilingual[3] parliamentary debate and legislation, particularly Canada, Wales, South Africa and New Zealand. The experience of these countries will inform Part IV, which comprises a discussion of the interpretation of multilingual legislation. Three particular interpretative issues are discussed because, if left unaddressed, these issues present potentially fatal obstacles to the further expansion of multilingual lawmaking in Australia. These issues are: the interpretative authority of an English language court faced with non-English statutory text, the process for determining questions of irreconcilable inconsistency between multilingual statutory texts, and the weight to be given to Indigenous language statutory text.

Two caveats before proceeding. First, to the extent that this article makes suggestions, they are not intended to be prescriptive. The particular approach to multilingual lawmaking adopted in each Australian jurisdiction should be guided by local communities, particularly Indigenous communities. As is increasingly being recognised in Australia in the treaty and constitutional recognition debates, Indigenous self-determination is 'a vital step in a legal process of decolonising the relationship of Indigenous peoples and States'.[4] Practically, what this means is that Indigenous people should be involved in shaping the laws and policies that affect

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2 Ibid.

3 The term 'multilingual' is used throughout this article to encompass uses of two or more languages (ie no distinction is drawn between bilingualism and the use of more than two languages).

4 Tom Calma, 'Indigenous Peoples and the Right to Self-Determination' (Speech, International Law Association (Australian Division) and Human Rights and Equal Opportunity Commission Workshop, 10 November 2004).

them.[5] Accordingly, what follows are merely suggestions that might provide helpful starting points for further discussion between lawmakers, local Indigenous communities and the general public. The suggestions of this article are necessarily limited by the standpoint from which they are made,[6] that of a non-Indigenous lawyer, which is part of the reason they purport to do no more than offer a launching point for further discussion.

Secondly, the suggestions that are made in this article are, for the most part, consistent with the existing processes by which laws are made and interpreted in Australia. The advantage of framing a proposal within an existing framework is twofold. Such a proposal is more readily capable of being implemented. Less tangibly, but no less pragmatically, such a proposal is more likely to be attractive to an Australian legal community steeped in the common law tradition of incremental change rather than wholesale renovation. However, when the system within which a proposal is framed is a legacy system still bearing the fingerprints of its colonial past, there is an obvious trade-off. In such circumstances, a proposal framed within the orthodoxy risks reinscribing or reproducing the conditions of colonial relations. While this article has sought to avoid these risks, primarily by foregrounding the voices of Indigenous scholars and leaders, the reader will judge the extent to which this has been successful.

II THE DAWN OF MULTILINGUAL LAWMAKING IN AUSTRALIA

Since European arrival in Australia, the drafting and publication of statute law has been conducted in English despite the hundreds of other languages spoken on the continent. In more recent times, however, there are signs that the edifice of colonial legal monolingualism is finally starting to crack.

A The Trend towards Indigenous Language Lawmaking

The first[7] recorded usage of an Indigenous language in an Australian Parliament was in the Northern Territory in 1981 when Bell addressed the Legislative Assembly in Pitjantjatjara.[8] In the federal Senate, the first usage of an Indigenous language was when non-Indigenous Northern Territorian Senator Trish Crossin spoke in Gumatj in 1998.[9] The next year, Aden Ridgeway became the first Indigenous parliamentarian to use an Indigenous language in any Australian

5 It has been reported that 95% of Australians agree that 'it is important for Aboriginal and Torres Strait Islander people to have a say in matters that affect them': see Reconciliation Australia, *2018 Australian Reconciliation Barometer* (Summary Report, 2018) 7.

6 For a discussion of Indigenous standpoint theory, see Allan Ardill, 'Australian Sovereignty, Indigenous Standpoint Theory and Feminist Standpoint Theory' (2013) 22(2) *Griffith Law Review* 315.

7 The following resource provides a particularly helpful overview of Indigenous language use in Australian parliaments: Jacqueline Battin, 'Indigenous Languages in Australian Parliaments', *Australian Institute of Aboriginal and Torres Strait Islander Studies* (Blog Post, 21 May 2018) <https://aiatsis.gov.au/news-and-events/blog/indigenous-languages-australian-parliaments>.

8 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 2 June 1981, 876 (Neil Bell).

9 Commonwealth, *Parliamentary Debates*, Senate, 24 June 1998, 3979 (Trish Crossin).

Parliament when he introduced himself in his Gumbaynggirr language.[10] Since that time, it has been reasonably common for new Indigenous Members of Australian Parliaments to use an Indigenous language in their first address,[11] although this has sometimes required the suspension of Standing Orders.[12] Malcolm Turnbull became the first Prime Minister to speak an Indigenous language in a parliamentary speech during his 'Closing the Gap' address in the House of Representatives in 2016 (he spoke the Ngunawal language of the Indigenous people of present-day Canberra).[13]

Another way in which Indigenous languages make their way into Hansard is when Indigenous guests, usually Elders, are invited to address legislative chambers. This occurred in Victoria upon the introduction of historic legislation relating to the Yarra River (discussed further below) and the Advancing the Treaty Process with Aboriginal Victorians Bill 2018 (Vic). Passage of the treaty-related legislation was particularly significant, for it involved what might be the first Indigenous language song composed to advance legislative agenda. Mick Harding, Dhaagungwurrung man and chair of the Aboriginal Treaty Working Group, sang the following words to the Assembly:

> Worriwuk-ngal burt yelamungagi
> Worriwuk-ngal burt yelamungagi
>
> Yengi-ngal – gerrabinon yumaagu
> Yengi-ngal
> Yengi-ngal – gerrabinon yumaagu
> Yengi-ngal
>
> Singing to the legislation
> Cleansing it and inviting
> People to drink in the knowledge.[14]

There are also at least two other examples of Indigenous language songs being sung by guests in Australian Parliaments. In 2016, in the middle of her first speech to the House of Representatives, Linda Burney was 'sung' into the House by her

10 Commonwealth, *Parliamentary Debates*, Senate, 25 August 1999, 7771 (Aden Ridgeway).

11 See, eg, Northern Territory, *Parliamentary Debates*, Legislative Assembly, 29 June 2005, 17 (Alison Anderson); Northern Territory, *Parliamentary Debates*, Legislative Assembly, 11 September 2008, 163–4 (Alison Anderson); Northern Territory, *Parliamentary Debates*, Legislative Assembly, 23 October 2012, 34 (Bess Price); Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 April 2013, 112–5 (Josie Farrer); Commonwealth, *Parliamentary Debates*, House of Representatives, 31 August 2016, 163 (Linda Burney); Commonwealth, *Parliamentary Debates*, Senate, 1 September 2016, 448 (Patrick Dodson); Commonwealth, *Parliamentary Debates*, Senate, 14 September 2016, 944 (Malarndirri McCarthy); Northern Territory, *Parliamentary Debates*, Legislative Assembly, 18 October 2016, 26 (Yingiya Mark Guyula).

12 See, eg, Western Australia, *Parliamentary Debates*, Legislative Assembly, 17 April 2013, 112 (Michael Sutherland).

13 Commonwealth, *Parliamentary Debates*, House of Representatives, 10 February 2016, 1171 (Malcolm Turnbull).

14 Victoria, *Parliamentary Debates*, Legislative Assembly, 28 March 2018, 874 (Mick Harding).

Wiradjuri sister, who was positioned in the public gallery.[15] In 2017, Dr Ray Kelly of the Eora Nation sang a song in the Legislative Council of New South Wales to mark the passage of the *Aboriginal Languages Act 2017* (NSW).[16]

For a long time, the use of Indigenous languages by parliamentarians themselves – as opposed to guests – was limited to formalities, greetings or symbolic statements. However, in recent years in the Northern Territory, Indigenous politicians have been pressing to use Indigenous languages in substantive debate in the Legislative Assembly. This issue became particularly salient in 2016, when Indigenous parliamentarian Bess Nungarryi Price was told that she would be ruled disorderly by the Speaker if she continued to use language other than English in the Assembly.[17] Price responded: 'I feel that I cannot effectively represent my electorate without using my first language, Warlpiri. Over 75% of the population of my electorate is Aboriginal, most of who speak a traditional language'.[18]

Shortly after this incident, the Standing Orders of the Legislative Assembly were changed to permit the use of Indigenous languages, however the Orders required that the speech be prepared and interpreted in advance. The amended Order read:

> A Member may rise to speak in any language other than English so long as an oral translation is provided in the English language by the same Member immediately prior to the words spoken in the language other than English and a written translation is tabled immediately prior to the contribution by the Member speaking.[19]

In those terms, the Orders made it impossible for impromptu debate in Indigenous languages, an issue that concerned Indigenous politician Yingiya Mark Guyula.[20] Guyula proposed the following amendment to the Standing Orders of the Assembly:

> A member may be assisted on the floor of the Assembly by an interpreter to provide interpretation from the English language into the first language of the member and from the first language of the member into English. The interpreter will only be present for the purposes of interpreting and not for any other purposes and must vacate the floor when not undertaking those duties.[21]

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15 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 August 2016, 164 (Linda Burney).

16 New South Wales, *Parliamentary Debates*, Legislative Council, 11 October 2017, 11 (Ray Kelly).

17 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 3 December 2015, 7617 (Kezia Purick).

18 Letter from Bess Price to Kezia Purick, 12 February 2016, 2 <https://assets.documentcloud.org/documents/2714546/Bess-Price-and-Kezia-Purick-Letters.pdf>.

19 Legislative Assembly, Parliament of the Northern Territory, *Standing Orders* (SO 23A, 21 April 2016) <https://parliament.nt.gov.au/__data/assets/pdf_file/0005/377789/Standing-Orders-21-April-2016.pdf>.

20 Sara Everingham, 'NT Indigenous MLA Yingiya Mark Guyula Seeks to Speak Native Language in Parliament', *ABC News* (online, 30 November 2016) <https://www.abc.net.au/news/2016-11-30/nt-indigenous-mla-yingiya-mark-guyula-wants-speak-native-tongue/8077696>. See also Yingiya Mark Guyula, 'Indigenous Languages in the Legislative Assembly' (Speech, Language and the Law III at the Supreme Court of the Northern Territory, Alice Springs, 7 April 2019).

21 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 15 February 2017, 865 (Yingiya Mark Guyula).

Ben Grimes, a linguist and lawyer in the Northern Territory, fleshed out the proposal, writing:

> Each MLA could be given an allowance to use for interpreters in the languages and topics most relevant to their constituencies. Aboriginal-language speeches or questions in the assembly could also be sent to an interpreter service for translation into English and inclusion in the Hansard. Non-Aboriginal MLAs representing large Aboriginal electorates would also benefit from this provision in order to better connect with their constituencies.[22]

Guyula's advocacy bore fruit in March 2019 when the relevant Standing Order was removed and a new procedure was adopted in the following terms:

> …
>
> 4. [M]embers seeking leave to speak in languages other than English must provide the Speaker with adequate notice for the Speaker to make any arrangements to provide assistance so that the member may be understood and the Parliamentary Record may accurately report the contribution if leave of the Assembly to speak in the other language is granted
>
> 5. arrangements may include use of an interpreter, or relying upon the [M]ember providing their own translation orally or in writing; where a translation is provided only in writing, other members will be permitted an opportunity to respond to any concerns they have about content in written translations.[23]

Shortly thereafter, Guyula addressed the Legislative Assembly in Djambarrpuyngu on the issue of multilingual schools in remote Indigenous communities.[24] Guyula was assisted by a professional interpreter from the Aboriginal Interpreter Service, who provided an oral English translation of the address immediately thereafter.[25] This appears to be the first time in Australia's history that an Indigenous language interpreter has been used to facilitate substantive parliamentary debate (rather than formalities). Guyula has since used an interpreter on at least one other occasion, again to talk about issues of importance to remote Indigenous communities.[26] Elsewhere in Australia, Indigenous languages are also being used in parliamentary debate (although not with the use of an interpreter). An important instance was when Josie Farrer spoke in her Gidja language in the Western Australian Legislative Assembly against the forced closure of remote Indigenous communities.[27]

The above survey shows that Indigenous languages are increasingly being used in Australian legislative chambers. That trend is beginning to find expression in

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22 Ben Grimes, 'The English-Only NT Parliament is Undermining Healthy Democracy by Excluding Aboriginal Languages', *The Conversation* (online, 23 October 2018) <https://theconversation.com/the-english-only-nt-parliament-is-undermining-healthy-democracy-by-excluding-aboriginal-languages-105048>.

23 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 14 March 2019, 5682 (Natasha Fyles).

24 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 8 May 2019, 6081–2 (Yingiya Mark Guyula).

25 Ibid.

26 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 27 November 2019, 7592–4 (Yingiya Mark Guyula).

27 Western Australia, *Parliamentary Debates*, Legislative Assembly, 28 June 2017, 1930–2 (Josie Farrer).

legislation itself.[28] In 2016, Western Australia passed the first Australian statute with an Indigenous language title followed by an English translation – the *Noongar (Koorah*, *Nitja*, *Boordahwan) (Past*, *Present*, *Future) Recognition Act 2016* (WA).[29] That statute was designed to formally recognise the Noongar people as the traditional owners of 'Noongar boodja' (roughly translated as Noongar earth) in south-west Western Australia. Schedule 1 of the statute comprises a 'Noongar recognition statement', which commences with a paragraph of value statements in the Noongar language followed by an English translation. This appears to have been the first extensive Indigenous-language text to be enshrined in an Australian statute.

Victoria soon followed suit by incorporating Woi-wurrung language into the *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic). 'Wilip-gin Birrarung murron' means 'keep the Birrarung alive', and the purpose of the Act is to provide a statutory framework for the protection of the Yarra River.[30] Just as importantly as the multilingual title, a significant portion of the preamble is in the Woi-wurrung language. The Woi-wurrung text is followed by an English translation and an acknowledgement that '[t]he Woi-wurrung text does not exactly match the English words because it is a different language culture'.[31] Victoria has since introduced the Great Ocean Road and Environs Protection Bill 2019 (Vic) with a preamble containing text from both a Maar language and the Wadawurrung language.[32] If passed, this will be the first Australian statute to include three languages in its text. It is yet to be seen how the inclusion of Indigenous languages in the titles and preambles of legislation will be interpreted by Australian courts. While statutory preambles are primarily narrative, aspirational or symbolic,[33] they can be important interpretative aids (as can short titles).[34]

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28 In addition to the examples discussed in the text, it is worth referring to two less prominent examples. First, the *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217(III) (10 December 1948) has been translated into the central Australian Indigenous language Pintupi-Luritja. Secondly, there is at least one example of a fictional multilingual Indigenous language statute. See, respectively, *Universal Declaration of Human Rights* [Yara Tina Ngaatjanya Yananguku Tjukarurrulpayi Liipula Nyinanytjaku Mingarrtjuwiya], GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) [tr Lance Macdonald et al] <https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/piu.pdf>; Alison Whittaker, *Blakwork* (Magabala Books, 2018) 175.

29 Thanks to the Western Australia Parliamentary Counsel's Office for drawing this to my attention.

30 *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) preamble, s 1.

31 *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) n 4.

32 Thanks to the Victorian Office of the Chief Parliamentary Counsel for drawing this to my attention.

33 See Kent Roach, 'The Uses and Audiences of Preambles in Legislation' (2001) 47(1) *McGill Law Journal* 129, 141.

34 *Wacando v Commonwealth* (1981) 148 CLR 1, 23 (Mason J); *Re Boaler* [1915] 1 KB 21, 40 (Scrutton J); *Siu Yin Kwan v Eastern Insurance Co Ltd* [1994] 2 AC 199, 211 (Lord Lloyd of Berwick). Long ago, statutory preambles were described as 'a key to open the minds of the makers of the Act, and the mischiefs which they intended to redress': see *Stowel v Lord Zouch* (1569) 1 Plowd 353; 75 ER 536, 560. In New Zealand, Māori language statutory preambles have arisen for judicial consideration in a number of cases. See *Ngati Apa Ki Te Waipounamu Trust v A-G* [2003] 1 NZLR 779, 789 [60] (France J) (High Court of New Zealand); *Ngati Apa Ki Te Waipounamu Trust v The Queen* [2000] 2 NZLR 659, 666 [30], 668 [42]–[44] (Elias CJ), 690 [143]–[144] (Blanchard and Tipping JJ) (Court of Appeal); *McGuire v Hastings District Council* [2002] 2 NZLR 577, 588 [4] (Lord Cooke) (Privy Council).

Elsewhere in Australia, individual words of Indigenous languages – usually names of places or people – have long been dotted throughout the statute books. One example is the *Aṉangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA), which adopted the Indigenous language description of the cultural groups benefited by the statute.[35] A more unusual example is the statutory use of the Torres Strait Islander term 'Ailan Kastom', which is defined in the *Acts Interpretation Act 1954* (Qld) to mean: 'the body of customs, traditions, observances and beliefs of Torres Strait Islanders generally or of a particular community or group of Torres Strait Islanders'.[36] The term 'Ailan Kastom' is also used in a number of other Queensland statutes.[37] In the Northern Territory a bill was introduced, but never passed, to account for 'mirrirri' (brother/sister type relationships in the Yolngu language) in the *Coroners Act 1993* (NT).[38]

Another important development is the publication of explanatory and preparatory legislative materials in Indigenous languages. In the Northern Territory, where the population is almost one-third Indigenous,[39] public comment on draft legislation is sometimes solicited in Indigenous languages, particularly where the legislation is likely to have special significance to speakers of those languages. For example, the Burial and Cremation Bill 2019 (NT) was highly relevant to Indigenous people because of its potential to prohibit, and even criminalise, some traditional burial practices. During the consultation process for that Bill, the Government published audio information in 18 different Indigenous languages.[40] Ultimately the Bill was withdrawn after widespread and vocal opposition from the Indigenous community. At the federal level, the most recent Protocol on Indigenous language interpreting recommends using Indigenous language materials when designing and developing policy and programs.[41] It may be expected that the publication of legislation-related material in Indigenous languages will continue and grow.

B Symbolism and Substance

In light of the above, it might appear unnecessary to defend the use of Indigenous languages in parliamentary debate and legislation. Whatever one's

35 Thanks to the South Australian Office of Parliamentary Counsel for drawing this to my attention.

36 *Acts Interpretation Act 1954* (Qld) sch 1 (definition of 'Island custom'). Thanks to the Office of the Queensland Parliamentary Counsel for drawing this to my attention.

37 *Housing Act 2003* (Qld) s 6(g); *Human Rights Act 2019* (Qld) preamble, s 28; *Powers of Attorney Act 1998* (Qld) s 9(2); *Torres Strait Islander Cultural Heritage Act 2003* (Qld) s 9(a); *Torres Strait Islander Land Act 1991* (Qld) s 6.

38 Coroners Amendment Bill 2017 (NT) cl 4. Thanks to the Northern Territory Office of Parliamentary Counsel for drawing this to my attention.

39 'Aboriginal Population', *Northern Territory Economy* (Web Page) <https://nteconomy.nt.gov.au/population#aboriginal>.

40 'Draft Northern Territory Burial and Cremation Bill', *Northern Territory Government* (Web Page, 31 January 2020) <https://dlghcd.nt.gov.au/publications-and-policies/draft-northern-territory-burial-and-cremation-bill>.

41 Australian Government, Department of Prime Minister and Cabinet, 'Protocol on Indigenous Language Interpreting: For Commonwealth Government Agencies' (Protocol, Version 4, 17 November 2017) 5.

normative position, the process is well in train such that it seems inevitable Australia will continue its current trajectory of increasing use of Indigenous languages in parliamentary debate and legislation. Such a view, however, ignores how easily ground can be lost in this area. It was not so long ago – 2016 – that Price was told she would be ruled disorderly if she continued to use the Warlpiri language on the floor of the Northern Territory Legislative Assembly. Accordingly, it is useful to articulate the benefits of Indigenous language use in parliamentary debate and legislation.[42]

Symbolically, Indigenous language lawmaking is a powerful expression of political commitment to decolonisation, reconciliation and redress.[43] There is a limit to symbolism, yet the renovation and reinvigoration of lawmaking processes projects an important message about national commitments.[44] This symbolism was not lost on the Yolngu drafters of the Yirrkala Bark Petitions of 1963, who produced both documents in the English and Gumatj languages, and delivered them to the House of Representatives in Canberra.[45] Similarly, in her first address to the House of Representatives, Linda Burney (the first Indigenous woman to be elected to the House) spoke in Wiradjuri and then reminded listeners that '[s]ymbolism is important'.[46] Further, symbolism is a central means of shaping, and reshaping, a national political culture. Patrick Dodson explained in his first speech in the Australian Senate that language has a way of shaping thought: 'concepts from [language] … shape our ways of knowing and understanding'.[47] This sentiment was echoed in the Northern Territory where, after Guyula addressed the Legislative Assembly in Djambarrpuyngu, a non-Indigenous member responded:

> it is an honour to speak in response to what has just been presented to our [P]arliament. This is an [sic] historic moment. It is the beginning of a change in the Northern Territory. *It is not until we understand the voices of others that we can*

42 This section of the article seeks to defend the use of Indigenous languages in parliamentary debate and legislation on *normative*, rather than *legal*, grounds. A question for another day is whether international law might require certain state actions in this field. See *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, UN Doc A/810 (10 December 1948) arts 2, 19; *International Covenant on Civil and Political Rights*, opened for signature 19 December 1966, 999 UNTS 171 (entered into force 23 March 1976) art 27; *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN Doc A/RES/61/295 (2 October 2007, adopted 13 September 2007) art 13.

43 In the post-colonial African context, see Alamin M Mazrui, 'Globalism and Some Linguistic Dimensions of Human Rights in Africa' in Paul Tiyambe Zeleza and Philip J McConnaughay (eds), *Human Rights, the Rule of Law, and Development in Africa* (University of Pennsylvania Press, 2004) 52, 63–4.

44 Michel Bastarache et al, *The Law of Bilingual Interpretation* (LexisNexis, 2008) 30–1. The authors explain that multilingualism projects the message that minority linguistic communities 'are valued enough to have [their] government's rules … conveyed to them in their own language': at 31.

45 For reproductions of the petitions, see Errin Walker, 'Yirrkala Bark Petitions' (2013) 8(7) *Indigenous Law Bulletin* 33.

46 Commonwealth, *Parliamentary Debates*, House of Representatives, 31 August 2016, 163, 166 (Linda Burney).

47 Commonwealth, *Parliamentary Debates*, Senate, 1 September 2016, 449 (Patrick Dodson). Dodson's remarks echo the writings of Benjamin Whorf, who famously argued that the linguistic structures influence thought: see generally John B Carroll (ed), *Language, Thought, and Reality: Selected Writings of Benjamin Lee Whorf* (Technology Press of Massachusetts Institute of Technology, 1956).

> *respond adequately*. … This is, indeed, a great and significant day for the Northern Territory.[48]

Guyula himself said that this was an event that reminded everyone 'our language and our culture is strong'.[49] In Victoria, Indigenous Elders were invited to address the Legislative Assembly to introduce the Yarra River Protection (Wilip-gin Birrarung murron) Bill 2017 (Vic). Aunty Alice Kolasa told the Assembly:

> We would like to acknowledge the [S]tate for the inclusion of our language in the preamble to this [B]ill. This is a first in this [S]tate's history. It is also an important achievement for our community. As a direct consequence of European settlement, Woi-wurrung has been dormant for generations. This is recognition of language revival. These are clearly milestones to be proud of …[50]

To the extent that one believes, or hopes, that a political community can share certain values and ideas, lawmaking processes ought to express and embed those in an enduring way, including through the considered use of symbolism.

Moving from the symbolic to the practical, it is important to recognise that some Indigenous parliamentarians (or aspiring parliamentarians) are best able to express themselves in an Indigenous language and some constituents are best able to understand parliamentary speech in an Indigenous language. Guyula expressed this preference in 2016, saying: 'I feel stronger and powerful when I speak in Yolngu Matha first, that is my family language, that is my native language'.[51] He has also said: 'It helps me get the depth of my thinking out of my mind and into the world'.[52] Given the well-recognised right to an interpreter in other legal settings,[53] it is difficult to argue that a democratically elected representative should not also be afforded an interpreter in Parliament to best ensure they are able to advocate for their constituents. Similarly, with respect to Indigenous language legislation, familiar rule of law arguments[54] about a citizen's right to know the law weigh in favour of transmitting law in Indigenous languages, at least to persons who are only fluent in those languages. For people – whether parliamentarians or constituents – who use an Indigenous language as their primary means of communication, it can be argued that Indigenous language parliamentary debate is

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48 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 8 May 2019, 6082 (Terry Mills) (emphasis added).

49 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 28 November 2019, 7753 (Yingiya Mark Guyula).

50 Victoria, *Parliamentary Debates*, Legislative Assembly, 22 June 2017, 2018 (Aunty Alice Kolasa).

51 Everingham (n 20).

52 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 15 February 2017, 865 (Yingiya Mark Guyula).

53 It has been held to be an incident of the right to a fair trial that an accused be entitled to an interpreter if they are otherwise unable to adequately follow proceedings: see *Dietrich v The Queen* (1992) 177 CLR 292, 331 (Deane J); *Ebatarinja v Deland* (1998) 194 CLR 444, 454 [27]; *Frank v Police* (2007) 98 SASR 547, 558 [67]–[68].

54 See, eg, FA Hayek, *The Road to Serfdom*, ed Bruce Caldwell (Routledge, 2001) 75–6; Lon L Fuller, *The Morality of Law* (Yale University Press, rev ed, 1969) 39; Joseph Raz, *The Authority of Law: Essays on Law and Morality* (Clarendon Press, 1979) 213–14.

both an expression of identity and an aspect of the right to communication.[55] This argument has had considerable success in Australia in the sphere of Auslan interpretation, which has been used in parliamentary debate.[56] Admittedly this last argument may only be relevant to the small portion of the population who use an Indigenous language for everyday communication. However, some foreign jurisdictions publish multilingual laws for the benefit of only a small portion of the population. Belgium, for example, publishes laws in German even though only 1% of the population speak that language.[57]

Finally, the use of Indigenous languages in parliamentary debate will contribute to their preservation. These languages will be recorded in Hansard, they will be beamed around the country on television and radio, they will be quoted in news reports. Children will hear these languages. The case for the preservation of Indigenous languages is urgent and widely accepted,[58] it need not be rehearsed here.[59] It is sufficient to say that Indigenous language lawmaking would be a high profile and meaningful way to advance the language preservation project.

Of course, not everyone will agree with the case just made for Indigenous language lawmaking. In anticipation of such sceptics, it is necessary to debunk the two most likely arguments in opposition. First, there is the argument based on impracticality which suggests it is simply impossible, or at least highly impractical, to facilitate Indigenous language parliamentary debate or to publish legislation in Indigenous languages. Such an argument can be disproven from experience. As to parliamentary debate – Australia is already facilitating parliamentary debate in Indigenous languages, as shown by Guyula in the Northern Territory and Farrer in Western Australia. Similarly, as to legislation, recent experience suggests that Australian parliaments are capable of legislating in Indigenous languages. Victorian and Western Australian statutes incorporating significant amounts of Indigenous language text are the most relevant examples.[60] Also relevant are the

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55 Arguments from 'rights', like that advanced in the text, may have a different purchase and application depending on the particular context in which they are sought to be deployed. More specifically, 'rights' discourse may need to be accommodated within Indigenous systems of value and knowledge: see generally Sarah E Holcombe, *Remote Freedoms: Politics, Personhood and Human Rights in Aboriginal Central Australia* (Stanford University Press, 2018) ch 1. Thanks to a reviewer for alerting me to the nuances of this argument.

56 Gordon Taylor, 'Sign Language Interpreter in ACT Parliament Hailed as an Important First', *ABC News* (online, 24 October 2014) <https://www.abc.net.au/news/2014-10-24/sign-language-interpreter-in-act-assembly/5837604>. See also David Gibson, 'Breaking Down the Barriers: When Parliaments Display Leadership and the Executive Follows' (2012) 27(1) *Australasian Parliamentary Review* 208.

57 Janny Leung, 'Statutory Interpretation in Multilingual Jurisdictions: Typology and Trends' (2012) 33(5) *Journal of Multilingual and Multicultural Development* 481, 482–3 ('Statutory Interpretation in Multilingual Jurisdictions').

58 Doug Marmion, Kazuko Obata and Jakelin Troy, Australian Institute of Aboriginal and Torres Strait Islander Studies, *Community, Identity, Wellbeing: The Report of the Second National Indigenous Languages Survey* (Report, 2014) 16–17.

59 See generally House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Our Land, Our Languages: Language Learning in Indigenous Communities* (Report, September 2012) 7–33.

60 *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic); *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA). See also Great Ocean Road and Environs Protection Bill 2019 (Vic).

growing number of official government publications being published in Indigenous languages.[61] These publications suggest that Australian governments already have in place drafting structures capable of producing informative legal documents in Indigenous languages. This machinery should be capable of being adapted to produce Indigenous language legislation. Admittedly, there will be resource and logistical issues that need to be addressed, especially due to the shortage of accredited Indigenous language interpreters in some languages.[62] However, the process is neither impossible nor highly impractical, as recent experience illustrates.

Secondly, one can imagine an argument against Indigenous language parliamentary debate and legislation based on a fear of legal uncertainty. This argument cannot be dismissed as easily as that based on practical considerations. It is difficult to deny that statutory multilingualism creates more potential for legal uncertainty than monolingualism.[63] As the Welsh legal scholar and linguist Catrin Fflur Huws has written: 'no two languages map precisely on to each other with the result that the translation of a text reveals that what is perfectly clear and unambiguous in one language, may be more nebulous in another'.[64] Experiences in other jurisdictions show that concerns about legal uncertainty reduce to three questions:

> (a) How is a judge to ascertain the meaning of statutory text in a language they do not understand?
>
> (b) Where a statute is enacted in multiple languages, what happens in instances of (irreconcilable) inconsistency between the texts?
>
> (c) What interpretative weight will be attributed to the Indigenous language text of a statute?

If left unanswered, these questions present barriers to the advancement of multilingual lawmaking in Australia. Accordingly, each is addressed in detail in Part IV by drawing on the experience of other countries that have faced these same questions. Ultimately, it is suggested that Australia's legislative and interpretative practices are capable of accommodating statutory multilingualism without compromising the traditional institutional commitments of the legislature and the judiciary in the field of statute making and interpretation. In order to inform the

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61 See above nn 40–1 and accompanying text.

62 This same hurdle has been acknowledged in New Zealand: see Tai Ahu, 'Te Reo Māori as a Language of New Zealand Law: The Attainment of Civic Status' (LLM Dissertation, Victoria University of Wellington, 2012) 79 ('Te Reo Māori as a Language of New Zealand Law').

63 Legal linguist Deborah Cao has identified at least three types of inter-lingual uncertainty which, while not discussed here, persuasively establish that statutory multilingualism creates a greater potential for legal indeterminacy: Deborah Cao, 'Inter-lingual Uncertainty in Bilingual and Multilingual Law' (2007) 39(1) *Journal of Pragmatics* 69, 73–81. See also Catrin Fflur Huws, 'The Day the Supreme Court Was Unable to Interpret Statutes' (2013) 34(3) *Statute Law Review* 221, 224–8; Catrin Fflur Huws, 'Is Meaning Plain and Ordinary? Are You Sure About That?' (2012) 33(2) *Statute Law Review* 230, 245, 249–50 ('Is Meaning Plain and Ordinary?').

64 Huws, 'Is Meaning Plain and Ordinary?' (n 63) 245. See also Catrin Fflur Huws, 'The Law of England and Wales: Translation in Transition' (2015) 22(1) *Journal of Speech, Language and the Law* 1, 6 ('Translation in Transition').

discussion of these interpretative issues it is helpful to review practices of multilingual parliamentary debate and legislation in other jurisdictions.

III LOOKING ABROAD

Many jurisdictions around the world legislate multilingually. These include Finland,[65] Hong Kong,[66] Ireland,[67] Kenya,[68] Malaysia,[69] Rwanda,[70] Switzerland[71] and Tanzania[72] (historically parts of the United States also experimented with legislative multilingualism).[73] Legislative multilingualism, and the form it takes in a particular country, will depend on the historical, social and political forces at play, especially in countries with a colonial past.[74] For those reasons, there is a danger in simplistic comparisons of multilingual jurisdictions. There are also strong arguments against attempting to 'transplant' a particular model of legislative multilingualism into another context.[75] This article seeks to avoid both simplistic comparison and unthinking transplantation. Instead, various jurisdictions are studied for the purposes of catalysing and informing the Australian discussion of legislative multilingualism. With that aim in mind, this article considers multilingual lawmaking in Canada, Wales, South Africa and New Zealand.

The four foreign jurisdictions have been chosen, first, because of the similarities they share with Australia in their lawmaking processes (each being a common law country with a Westminster system of government).[76] Secondly, each

65 See Tarja Salmi-Tolonen, 'Legal Linguistic Knowledge and Creating and Interpreting Law in Multilingual Environments' (2004) 29(3) *Brooklyn Journal of International Law* 1167.

66 See Michael Thomas, 'The Development of a Bilingual Legal System in Hong Kong' (1988) 18 *Hong Kong Law Journal* 15; Spring Yuen-ching Fun, 'Interpreting the Bilingual Legislation of Hong Kong' (1997) 27 *Hong Kong Law Journal* 206; Clara Ho-yan Chan, 'Hong Kong Bilingual Legislation and Plain Language Drafting: A Communicative Approach' (2018) 37(6) *Multilingua: Journal of Cross-Cultural and Interlanguage Communication* 681.

67 See Dáithí Mac Cárthaigh, 'Interpretation and Construction of Bilingual Laws: A Canadian Lamp to Light the Way?' (2007) 7(2) *Judicial Studies Institute Journal* 211.

68 See Jill Cottrell Ghai, 'Pluralism, Language and the Constitution' (Research Paper, Katiba Institute, 15 September 2017) 20–3.

69 See Richard Powell, *Language Choice in Postcolonial Law: Lessons from Malaysia's Bilingual Legal System* (Springer, 2020) 70.

70 See Vastina Nzanze, 'Challenges of Drafting Laws in One Language and Translating Them: Rwanda's Experience' [2012] (1) *Loophole: Journal of the Commonwealth Association of Legislative Counsel* 42.

71 See Andreas Lötscher, 'Multilingual Law Drafting in Switzerland' in Günther Grewendorf and Monika Rathert (eds), *Formal Linguistics and Law* (Mouton de Gruyter, 2009) 371.

72 See Josephine Dzahene-Quarshie, 'Language Policy, Language Choice and Language Use in the Tanzanian Parliament' (2011) 22 *Legon Journal of the Humanities* 27.

73 See George A Bermann, 'Bilingualism and Translation in the US Legal System: A Study of the Louisiana Experience' (2006) 54 (Supplement) *American Journal of Comparative Law* 89; Roger K Ward, 'The French Language in Louisiana Law and Legal Education: A Requiem' (1997) 57(4) *Louisiana Law Review* 1283.

74 Leung, 'Statutory Interpretation in Multilingual Jurisdictions' (n 57) 481.

75 As to the general dangers of legislative transplants, see Helen Xanthaki, 'Legal Transplants in Legislation: Defusing the Trap' (2008) 57(3) *International and Comparative Law Quarterly* 659.

76 Strictly speaking, South Africa is a hybrid Westminster-Presidential system. As will be seen, however, none of South Africa's departures from the Westminster system significantly impact upon the way

country faces the same challenge that will confront Australia in maintaining a multilingual lawmaking practice in a place where English is the majority language (Canada, Wales and New Zealand) or the majority language among lawyers and parliamentarians (South Africa).[77] Finally, these four countries helpfully illustrate multilingual legislative systems at different stages of maturity: Canada and South Africa each have a long history of multilingual lawmaking, Wales initiated legislative multilingualism in the mid 2000s, and New Zealand passed its first multilingual statute in 2013.[78]

In what follows, a summary is provided of each country's experience of multilingual lawmaking. The discussion will canvas multilingual parliamentary debate, multilingual legislation and interpretation of multilingual statutes. The aim is by no means to provide an exhaustive description of each country's experience of legal multilingualism. Rather, only so much information is provided as is necessary to inform the discussion of the Australian possibilities in Part IV.

A Canada

Parliamentary debate in many parts of Canada has, for centuries,[79] been conducted multilingually, in French and English. When Canada first became a Confederation in 1867 it passed a constitutional clause explicitly allowing for parliamentary debate to be in both English and French.[80] This was confirmed in the Canadian Constitution of 1982.[81] French and English simultaneous interpretation has been offered in the House of Commons since 1959,[82] however such state-sponsored multilingualism did not initially extend to the use of Indigenous languages, at least not at the federal level. It was the Territories that pioneered the use of Indigenous languages in Canadian legislative deliberation. In the Legislative Assembly of the Northwest Territories, parliamentarians have had the right to use an Indigenous language in parliamentary debate since 1990, when nine Indigenous languages were recognised as 'official'.[83] In 2018, there were

multilingual legislation is drafted, enacted and interpreted, thus it remains a promising site of inquiry for this article.

77 Max Loubser, 'Linguistic Factors into the Mix: The South African Experience of Language and the Law' (2003) 78(1–2) *Tulane Law Review* 105, 143–4.

78 Note that New Zealand had a long history of multilingual parliamentary debate before 2013 when it passed its first multilingual statute. This history is discussed in detail in Part III(D).

79 For a short history of pre-Confederation multilingual parliamentary debate in Canada, see Serge Lortie and Robert C Bergeron, 'Legislative Drafting and Language in Canada' (2007) 28(2) *Statute Law Review* 83, 87–8.

80 *Constitution Act 1867* (Imp), 30 & 31 Vict, c 3, s 133: 'Either the English or the French language may be used by any person in the debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective records and journals of those Houses'.

81 *Canada Act 1982* (UK) c 11, sch B, ss 16(1), 17(1), 18(1).

82 Jean Delisle, 'Fifty Years of Parliamentary Interpretation' (2009) 32(2) *Canadian Parliamentary Review* 27.

83 House of Commons Standing Committee on Procedure and House Affairs, Parliament of Canada, *The Use of Indigenous Languages in Proceedings of the House of Commons and Committees* (Report No 66, June 2018) 11–12.

three members of the Assembly who regularly used Indigenous languages.[84] Similarly, in the Legislative Assembly of Nunavut – a Territory of Canada where 86% of the population speak Inuktitut as their first language – Inuktitut is extensively used during debate and Hansard is published in English and Inuktitut.[85] The final of Canada's three territories, Yukon, theoretically permits the use of eight Indigenous languages in parliamentary debate, and provides for the translation of Hansard and other records into those languages.[86] However, it does not appear that this yet happens in practice.[87]

At the federal level, a 2008 Senate report recommended that parliamentarians be permitted to use Inuktitut when debating and that simultaneous interpretation be provided.[88] Those recommendations were accepted, and there have now been a number of instances in which parliamentarians have addressed the Senate in Inuktitut with interpretation in English and French.[89] Leave may also be granted for Senators to debate in other languages.[90] In the federal House of Commons, progress in this area was precipitated when, in 2017, a Cree member of the House of Commons was unable to ensure the timely translation or interpretation of his address to the House in his Indigenous language.[91] The Member subsequently sought a ruling that his parliamentary privileges had been violated, arguing that Canadian parliamentarians have a constitutionally protected right to use Indigenous languages in Parliament.[92] While the requested ruling was denied,[93] the issue resulted in a parliamentary inquiry, which ultimately formalised the processes around Indigenous language use in the House of Commons.[94]

As to substantive enactments, it does not appear that Canada has yet enacted federal legislation in an Indigenous language. In Nunavut, an Inuktitut version of a Bill must be made available when the Bill is introduced to the Legislative Assembly; however, it appears that legislation is formally enacted only in English and French.[95] Canada legislates multilingually (in English and French) at a federal level, and also in a number of provinces.[96] It has done so since pre-Confederation.[97]

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84 Ibid 12.

85 Senate Standing Committee on Rules, Procedures and the Rights of Parliament, Parliament of Canada, *Amendments to the Rules* (Report No 5, 9 April 2008).

86 *The Use of Indigenous Languages in Proceedings of the House of Commons and Committees* (n 83) 15.

87 Ibid.

88 Senate Standing Committee on Rules, Procedures and the Rights of Parliament (n 85).

89 Senate of Canada, 'Senate Procedure in Practice' (Manual, June 2015) 83–4.

90 Ibid 84.

91 Canada, *Parliamentary Debates*, House of Commons, 4 May 2017, 10770 (Robert-Falcon Ouellette).

92 Canada, *Parliamentary Debates*, House of Commons, 8 June 2017, 12320–2 (Robert-Falcon Ouellette).

93 Canada, *Parliamentary Debates*, House of Commons, 20 June 2017, 12962 (Geoff Regan).

94 See Robert-Falcon Ouellette, 'Honouring Indigenous Languages Within Parliament' (2019) 42(2) *Canadian Parliamentary Review* 3; *The Use of Indigenous Languages in Proceedings of the House of Commons and Committees* (n 83) 3–5.

95 Note, however, Nunavut's Commissioner in Executive Council may order that any Act be published in an Inuit language. See *The Use of Indigenous Languages in Proceedings of the House of Commons and Committees* (n 83) 13.

96 André Labelle, 'What Ever Happened to Legislative Translation in Canada?' (2016) 37(2) *Statute Law Review* 133, 133.

97 As early as 1765, French Canadians petitioned the British King for laws to be passed in French, asking: 'how can we know them, if they are not delivered to us in our own tongue? … We entreat Your Majesty

This is a requirement of the *Constitution Act 1867* and the *Official Languages Act*.[98] While this contributes to the cost of passing laws, it is acknowledged to be essential to respecting the two biggest linguistic communities in Canada. Further, the creation of legislation in two languages has been found to improve the overall quality of legislation because increased attention to legislative language means that drafters identify and eliminate inconsistencies and ambiguities.[99]

Historically, the approach in Canada was first to draft legislation in English and then translate it into French.[100] This posed some problems. As renowned legislative translator André Labelle has explained:

> Legislation is most often prepared behind closed doors and the contents of a [B]ill are not revealed until tabled in Parliament. Before tabling, the draft [B]ill and related information are communicated very reluctantly, even to translators. Yet, translation requires a thorough analysis of the original text, and background information is often essential when the text lends itself to different translations. What is clear in the mind of the drafter is not necessarily so in the eye of the reader.[101]

The *sequential* approach to legislative translation was discarded at a federal level, and in some of the provinces, in the late 20th century in favour of a *simultaneous* approach to drafting multilingual legislation. The new approach is known as 'co-drafting': 'the simultaneous drafting of both versions (English and French) of a legislative text, without one being the translation of the other'.[102] That process is described by Labelle in the following terms:

> Under the new system, each of the two official language versions of federal [B]ills is prepared as an original text by a drafter under instructions from … officials of the Government Department responsible for the piece of legislation being drafted. Drafters meet and go over their drafts, in consultation with 'jurilinguists' [legal language experts who support drafters in the preparation of multilingual legislation], who advise them as to consistency of meaning and language quality. The drafts are then sent to Department officials, who are expected to comment on both versions. The [B]ill is then revised and changed until the clients are satisfied that it is ready for tabling in Parliament. The important point is that both drafters attend the same meetings and have access to the same information.[103]

Co-drafted legislation will often contain superficial dissimilarities between texts in order to achieve substantive harmony. Donald Revell has described this as the focus on 'vertical equality' ahead of 'horizontal equality':

… to grant that a Law may be published in our Language': Adam Shortt and Arthur G Doughty (ed), *Documents Relating to the Constitutional History of Canada 1759–1791: Part I* (J de L Taché, 1918) 227–9.

98 *Constitution Act 1867* (Imp), 30 & 31 Vict, c 3, s 133; *Official Languages Act*, RSC 1985 (4th Supp), c 31.

99 Michael JB Wood, 'Drafting Bilingual Legislation in Canada: Examples of Beneficial Cross-Pollination between the Two Language Versions' (1996) 17(1) *Statute Law Review* 66.

100 Labelle (n 96) 134. For a detailed description of the drafting/translation model, see Donald L Revell, 'Bilingual Legislation: The Ontario Experience' (1998) 19(1) *Statute Law Review* 32, 34–5.

101 Labelle (n 96) 135.

102 Ibid 133 n 1.

103 Ibid 136. See also Lionel A Levert, 'Bilingual and Bijural Legislative Drafting: To Be or Not to Be?' (2004) 25(2) *Statute Law Review* 151, 155–6.

> The object of co-drafted legislation, as with translated legislation, is to write laws which, when read as a whole, say the same thing in both versions. This may be referred to as vertical equality of the two versions. However, co-drafted legislation, when read clause by clause, may say the same things in different ways, for example, one version may have more clauses than the other, or they may say things in different places. When two texts say the same thing in the same place they are said to have horizontal equality.[104]

Quite aside from *drafting* multilingual legislation, Canada also has a long history *interpreting* such legislation. As early as 1866, the *Civil Code of Lower Canada* provided:

> If in any article of this code founded on the laws existing at the time of its promulgation, there be a difference between the English and French text, that version shall prevail which is most consistent with the provisions of the existing laws on which the article is founded …[105]

More recently, Canada has committed to the equal authenticity rule, which requires that all official texts of a law (including those in languages other than English) be given equal weight.[106] The rule derives from the Constitution[107] and is enforced by both common law[108] and statute.[109] (Importantly, the rule applies regardless of whether the two texts of the statute were co-drafted, or sequentially drafted (ie translated)).[110] The rule has been said to be of 'enormous symbolic significance'.[111] As Revell explains:

> It would have been possible to make one version prevail over the other. However, this would be unacceptable to the cultural group whose language was given inferior status. It would also not be true bilingualism as the version in the second language would exist only as a reference document rather than an official one.[112]

Canada's experience as a mature multilingual jurisdiction can be contrasted with that of Wales, which is only just embarking on the journey.

B Wales

During the Welsh devolution in the late 1990s and early 2000s, the National Assembly for Wales acquired the power to pass laws and Welsh Ministers the power to make subordinate legislation.[113] With limited exceptions, Bills may only be passed into law if they are in both English and Welsh.[114] Similarly, all accompanying documentation such as explanatory memoranda must be in both

104 Revell (n 100) 36.
105 *Civil Code of Lower Canada*, 29 Vic 1865, c 41, s 2615.
106 Pierre-André Côté, 'Bilingual Interpretation of Enactments in Canada: Principles v Practice' (2004) 29(3) *Brooklyn Journal of International Law* 1067, 1069.
107 *Canada Act 1982* (UK) c 11, sch B, s 18(1).
108 *R v Cie Imm BCN Ltée* [1979] 1 SCR 865.
109 *Official Languages Act*, RSC 1985 (4th Supp), c 31, s 13.
110 *Doré v Verdun (City of)* [1997] 2 SCR 862, 878–9 (Gonthier J).
111 Côté (n 106) 1069.
112 Revell (n 100) 39.
113 For a history of the development of multilingual legislation as a result of the Welsh devolution, see Thomas Glyn Watkin, 'Bilingual Legislation: Awareness, Ambiguity, and Attitudes' (2016) 37(2) *Statute Law Review* 116, 116–19.
114 *Government of Wales Act 2006* (UK) s 111(5).

languages.[115] Shortly after devolution, Wales began passing laws in English and Welsh; however, the Welsh texts were initially difficult for the public to access.[116] That shortcoming has now been remedied with all statutes being available online in their English and Welsh texts.[117] This has proved to be more than merely symbolic. A report from the Law Commission of England and Wales noted that 19% of people accessing legislation online did so using the Welsh text.[118]

While the final legislative product might be multilingual, Wales is not as advanced as Canada in its multilingual drafting process. At present, Bills are produced in one language (usually English) and then translated into the other.[119] In the longer term, most stakeholders hope that Welsh drafters will achieve a similar model of co-drafting to that practiced in Canada.[120] There have been recommendations that particular statutes be prioritised for this process.[121] In the meantime, early reports of legislative drafters have confirmed the Canadian experience that drafting a law in two languages can focus attention on deficits in the legislation that might not otherwise be detected.[122]

Given the requirement for multilingual legislation, it is unsurprising that parliamentary debate in Wales is also thoroughly multilingual. In 2011, Welsh and English were officially designated as joint languages of the National Assembly and the following requirements were spelled out:

> The official languages must, in the conduct of Assembly proceedings, be treated on a basis of equality …
>
> All persons have the right to use either official language when participating in Assembly proceedings …
>
> Reports of Assembly proceedings must … contain a record of what was said, in the official language in which it was said, and also a full translation into the other official language.[123]

One observer has described modern parliamentary debate in Wales as follows:

> contributions are routinely made to debates and discussions … in the language of the contributor's choice, with simultaneous translation being provided for members and others requiring it. It is commonplace for questions to be asked in one language and answered in the other, while bilingual contributors frequently respond to questions in whichever language they were posed.[124]

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115 Thomas Glyn Watkin and Daniel Greenberg, *Legislating for Wales* (University of Wales Press, 2018) 219–20 [8.45].

116 Dylan Hughes and Huw G Davies, 'Accessible Bilingual Legislation for Wales' (2012) 33(2) *Statute Law Review* 103, 114–15.

117 Law Commission of England and Wales, *Form and Accessibility of the Law Applicable in Wales* (Report No 366, 2016) 113 [10.3].

118 Ibid.

119 Ibid 130 [11.16].

120 Ibid 131 [11.20].

121 National Assembly for Wales, Constitutional and Legislative Affairs Committee, *Making Laws in Wales* (October 2015) 55 [Recommendation 16(ii)].

122 Huws, 'The Day the Supreme Court Was Unable to Interpret Statutes' (n 63) 229, 235; *Form and Accessibility of the Law Applicable in Wales* (n 117) 130 [11.18].

123 *National Assembly for Wales (Official Languages) Act 2012* (UK) s 1, amending *Government of Wales Act 2006* (UK) s 35.

124 Watkin (n 113) 119.

It should be acknowledged, however, that English remains the most commonly used language in parliamentary debate in Wales.[125]

Interpretatively, the Welsh largely follow the Canadians in that legislation passed in both English and Welsh is 'to be treated for all purposes as being of equal standing'.[126] Most Welsh commentators agree that this requires *both* texts of a law – English and Welsh – to be consulted to determine its meaning.[127] This presents a difficulty, however, as the vast majority of judges in Wales are not speakers of the Welsh language.[128] As a result, it has been recommended that linguistic experts be appointed to provide assistance to non-Welsh speaking judges.[129] This topic will be discussed further below in Part IV(A).

C South Africa

South Africa has been a multilingual jurisdiction since 1910, with English and Dutch (or, later, Afrikaans) being the official languages until the passage of the *Constitution of the Republic of South Africa Act 1993* (South Africa).[130] Now, there are 11 official languages in South Africa, with nine of them being Indigenous (all save English and Afrikaans).[131] Pursuant to the South African Constitution, national and provincial governments may use any official language for the purpose of government, taking into account, among other things, the practicality of such and the balance of the needs and preferences of the relevant population.[132] However, each government must use at least two official languages.[133] All official languages must 'enjoy parity of esteem and … be treated equitably'.[134]

A Bill in the South African Parliament must be submitted in English and at least one other official language (although the State Law Advisor need only certify the English text).[135] In the first decade under the current South African Constitution, 94 statutes were passed in an Indigenous African language as well as

125 Huws, 'The Day the Supreme Court Was Unable to Interpret Statutes' (n 63) 236.

126 See *Government of Wales Act 2006* (UK) s 156. See also *Government of Wales Act 1998* (UK) s 122(1), as repealed by *Government of Wales Act 2006* (UK) s 163, sch 12.

127 See, eg, Huws, 'The Day the Supreme Court Was Unable to Interpret Statutes' (n 63) 222; Watkin (n 113) 127.

128 *Form and Accessibility of the Law Applicable in Wales* (n 117) 149 [12.48].

129 Ibid 148 [12.44].

130 Indigenous African languages were also used in legislation and debates in the 'homelands' under apartheid: see Koos Malan, 'Observations and Suggestions on the Use of the Official Languages in National Legislation' (2008) 23(2) *South African Publiekreg* 59, 61.

131 *Constitution of the Republic of South Africa Act 1996* (South Africa) s 6(1). The official languages are: Afrikaans, English, isiNdebele, Sepedi, Sesotho, siSwati, Xitsonga, Setswana, Tshivenda, isiXhosa, and isiZulu. This article does not consider Afrikaans as an Indigenous language for the purposes of assessing multilingualism in legislation. This approach is consistent with the way the issue is treated by South African scholars working in this area, who generally do not include Afrikaans within the category of 'African languages': see, eg, Malan (n 130). It should be emphasised, however, that despite its relation to the language of the Dutch colonisers, Afrikaans has been adapted to its local context and might, in other contexts, be properly considered indigenous to South Africa.

132 *Constitution of the Republic of South Africa Act 1996* (South Africa) s 6(3)(a).

133 Ibid.

134 Ibid s 6(4).

135 Bernard Bekink and Christo Botha, 'Aspects of Legislative Drafting: Some South African Realities (or Plain Language is Not Always Plain Sailing)' (2007) 28(1) *Statute Law Review* 34, 55 n 94.

English;[136] many more statutes were passed in English and Afrikaans.[137] No statute was passed in more than two languages.[138] Confusingly, some amendments were passed in languages other than that of the original statute.[139] For instance, the *National Sports and Recreation Act 1998* (South Africa) was passed in English and Afrikaans but amended in English and isiZulu by the *National Sports and Recreation Act 2007* (South Africa).[140]

Once passed, legislation must be signed by the President.[141] Prior to the 1996 Constitution, it appears that legislation was signed alternately (and somewhat arbitrarily) in English or Afrikaans.[142] Now it appears that the President always signs the English text.[143] The signed text will not usually carry more weight than any other text unless there is an irreconcilable conflict, in which case some scholars suggest that the first signed text will prevail.[144] After signing, legislation will be published in the *Government Gazette*, usually in English and one other language.[145]

The above description has the tendency to mislead, however, insofar as it suggests a truly multilingual legislative process. In practice – and arguably contrary to the Constitution's requirement that all official languages 'enjoy parity of esteem and be treated equitably'[146] – English is used as an 'anchor language'.[147] The government publishes draft legislation only in English and conducts the legislative process on the basis of the English text.[148] Technically, parliamentary debate may take place in any official language;[149] however, the reality is described by one observer as decidedly English-centric:

> It is only once the entire parliamentary consideration process in respect of a Bill has been completed and the Bill has been passed by Parliament that the translation into another language is finalised … the translated version is very seldom available before the Bill has been passed by Parliament.[150]

In the field of interpretation, it is accepted in South Africa that one language text may be used to clarify the meaning of statutory text in another language.[151] Indeed the authoritative English text of the interim Constitution was interpreted in

136 Malan (n 130) 65.
137 Ibid 66.
138 Ibid 65–6.
139 Loubser (n 77) 126.
140 Malan (n 130) 66, 69.
141 *Constitution of the Republic of South Africa Act 1996* (South Africa) s 79(1).
142 George Devenish, 'Statutory Bilingualism as an Aid to Construction in South Africa' (1990) 107(3) *South African Law Journal* 441, 443.
143 Loubser (n 77); Malan (n 130) 71. But see Bekink and Botha (n 135) 55.
144 Bekink and Botha (n 135) 56. This is distinct from the case of the Constitution itself, whereby the English language text prevails to the extent of any inconsistency: see *Constitution of the Republic of South Africa Act 1996* (South Africa) s 240.
145 Loubser (n 77) 125.
146 *Constitution of the Republic of South Africa Act 1996* (South Africa) s 6(4).
147 Malan (n 130) 63–4.
148 Loubser (n 77) 125.
149 Ibid.
150 Malan (n 130) 66.
151 Bekink and Botha (n 135) 55.

light of the non-binding Afrikaans text in *Du Plessis v De Klerk*.[152] This has been suggested to 'provide the opportunity for comparison of various versions … to enhance an understanding of a statute'.[153] All efforts will be made to reconcile any apparent ambiguity between different language texts with reference to the context and purpose of the statute.[154] This interpretative process follows what has been called the 'common-denominator' rule[155] or the 'highest-common-factor' technique.[156] This rule requires a court to give effect to the semantic meaning that is common to all texts of a statute, and to ignore any meaning that is only expressed in one text. However, the highest common factor approach will be applied in service of, not to the detriment of, legislative intention.[157] Finally, if two different language texts of a statute are in tension, one may be preferred where it better advances the spirit, purpose and objects of the Bill of Rights.[158] This interpretative preference is required by section 39(2) of the Constitution.[159]

D New Zealand

The use of Māori as a civic language in New Zealand has a chequered history.[160] In the early days of European presence in New Zealand, a number of foundational documents were published in Māori and English. These documents included the *Treaty of Waitangi* ('*Treaty*'), the *Declaration of Independence of the United Tribes of New Zealand 1835* and almost all deeds of cession.[161] In 1865, for the first time, a statute was published in Māori and English (although only enacted in English).[162] However, by 1910, statutes were no longer published in Māori.[163] There followed a prolonged interregnum in Māori language legislative

152 [1996] ZACC 10, [44] (Kentridge AJ) (Constitutional Court).

153 Loubser (n 77) 128.

154 Bekink and Botha (n 135) 56.

155 Ibid.

156 Devenish (n 142) 446–8.

157 *Janse van Rensburg v Minister of Defence* [2000] ZASCA 21, [18] (Melunsky AJA) (Supreme Court of Appeal):

> A court fulfills its function by attempting to give effect to the intention of the lawgiver. If the highest common factor approach is applied mechanically it may result in a construction which is purely arbitrary and which could not have been intended … this approach should not be adopted as a rule of first resort. All other methods of interpretation should be considered with a view to arriving at the intention of the legislator.

158 Christo Botha, *Statutory Interpretation: An Introduction for Students* (Juta, 4th ed, 2005) 89, cited in Lourens Du Plessis, 'The Benefits of Multilingualism for Statutory and Constitutional Interpretation in South Africa' (2012) 1 *International Journal of Language and Law* 76, 81.

159 *Constitution of the Republic of South Africa Act 1996* (South Africa) s 39(2): 'When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights'.

160 See generally Māmari Stephens and Phoebe Monk, 'A Language for Buying Biscuits? Māori as a Civic Language in the Modern New Zealand Parliament' (2012) 16(2) *Australian Indigenous Law Review* 70; Julian R Murphy, 'Indigenous Languages in Parliament and Legislation: Comparing the Māori and Indigenous Australian Experience' [2020] (July) *Māori Law Review*.

161 Stephens and Monk (n 160) 70. See also RP Boast, 'Recognising Multi-Textualism: Rethinking New Zealand's Legal History' (2006) 37(4) *Victoria University of Wellington Law Review* 547, 554.

162 Phil Parkinson, '"Strangers in the House": The Maori Language in Government and the Maori Language in Parliament 1865–1900' (2001) 32(3) *Victoria University of Wellington Law Review Monograph* 1, 8.

163 Stephens and Monk (n 160) 71.

translations until the early 21st century, when a number of statutes began incorporating Māori text in a symbolic or performative way (rather than in operative provisions). For example, the *Ngati Awa Claims Settlement Act 2005* (NZ) uses Māori text for a lengthy historical preamble, as do a number of other 'claim settlement' statutes.[164] At least two statutes enacted in the 1990s and 2000s included substantive provisions in Māori,[165] however the watershed moment came in December 2013, when Parliament enacted the *Te Ture mō Mokomoko (Hei Whakahoki i te Ihi*, *te Mana*, *me te Rangatiratanga) 2013/Mokomoko (Restoration of Character*, *Mana*, *and Reputation) Act 2013* (NZ). Enacted in both Māori and English, this has been called New Zealand's first bilingual statute.[166] Since that time at least two other multilingual statutes have been enacted: *Te Ture mō Te Reo Māori 2016/Māori Language Act 2016* (NZ); *Te Ture kia Unuhia te Hara kai Runga i a Rua Kēnana 2019/Rua Kēnana Pardon Act 2019* (NZ).

Turning from statutes to parliamentary debate, an accurate historical account of the use of Māori in parliamentary debate is complicated by deficiencies in parliamentary recording of Māori contributions.[167] What *is* clear is that in the late 19th century, Māori was used in substantive parliamentary debate. This was a matter of necessity, because the Māori parliamentarians could not speak English.[168] Interpreters were regularly used from 1868 (when Māori were first granted seats in parliament) until the 1880s.[169] As Māori members became more fluent in English, the Māori language was used less frequently in the legislative chamber. By 1913, Māori interpreters would only be present when requested, and in 1920 the last full-time interpreter stopped work at the Parliament.[170] The painstaking scholarship of Māmari Stephens and Phoebe Monk has identified only 36 uses of Māori in Parliament in the years between 1907 and 1986.[171] When Māori was used during this time, it was primarily used 'as a [l]anguage of [r]itual, but [n]ot as a [l]anguage of [p]arliamentary [d]ebate'.[172]

This enforced desuetude changed in the mid-1980s. In that time, the Wellington Māori Language Board succeeded in their claim before the Waitangi Tribunal and the Māori language was acknowledged to have special status under the *Treaty of Waitangi* as a *taonga* (a 'valued possession').[173] At around this same time, Māori was recognised as an 'official language' by the *Māori Language Act*

164 See also *Ngati Ruanui Claim Settlement Act 2003* (NZ); *Ngāti Tuwharetoa (Bay of Plenty) Claims Settlement Act 2005* (NZ); *Te Roroa Claims Settlement Act 2008* (NZ); *Waitaha Claims Settlement Act 2013* (NZ).

165 *Te Ture Whenua Maori Act 1993/Maori Land Act 1993* (NZ); *Māori Television Service (Te Aratuku Whakaata Irirangi Māori) Act 2003* (NZ).

166 Tai Ahu, 'New Zealand's First Bilingual Statute: Does New Zealand Have an Appropriate Legal Framework?' [2014] (March) *Māori Law Review* 20 ('New Zealand's First Bilingual Statute').

167 Stephens and Monk (n 160) 72, 79 n 13.

168 Ibid 71.

169 Māmari Stephens, '"Tame Kākā" Still? Māori Members and the Use of Māori Language in the New Zealand Houses of Representatives' (2010) 14(1) *Law Text Culture* 220, 221.

170 Ibid 223.

171 Stephens and Monk (n 160) 73.

172 Ibid 72.

173 Waitangi Tribunal, *Te Reo Maori Claim Report* (Wai 11, 1986) 20.

1987 (NZ).[174] Most significantly for present purposes, the Standing Orders of Parliament were changed so that parliamentarians could speak in Māori or English.[175] Previous orders had required that a member obtain the services of an interpreter in advance.[176] Initially, after the Standing Orders were amended in the 1980s, there do not appear to have been government interpreting services provided to members who wished to address parliament in Māori. This began to change in the late 1990s and from December 2009 simultaneous translation services were made available.[177]

As has been explained above, New Zealand has a rich history of multilingual parliamentary debate, however the enactment of multilingual legislation is relatively recent. Accordingly, the judiciary's interpretative approach to multilingual legislation is still embryonic. As yet, there is no statutorily prescribed interpretative approach to multilingual interpretation, although individual laws contain their own interpretative provisions. For example, the *Treaty of Waitangi Act 1975* (NZ) provides that the Waitangi Tribunal has the authority 'to decide issues raised by the differences' between the Māori and English texts of the *Treaty*.[178] The Tribunal's jurisprudence establishes that both texts of the *Treaty* must be considered, but in the case of ambiguity, the Māori text will carry more weight 'since this is the version assented to by all but a few Maori'.[179]

Outside of the Waitangi Tribunal, courts have had to consider differences between the Māori and English texts of statutory preambles.[180] More recently, when New Zealand's first fully multilingual statute was passed, a parliamentary committee was of the view that the Māori and English texts of the statute would be considered equal, and that 'any inconsistencies between them would have to be resolved in a court of law'.[181] While such interpretative issues remain underdeveloped, New Zealand scholars have predicted that courts will ultimately resolve multilingual inconsistencies by adopting a purposive approach designed to

174 *Māori Language Act 1987* (NZ) s 3. More recently, see *Te Ture mō Te Reo Māori/Māori Language Act 2016* (NZ). See also Māmari Stephens, '*Te Ture mō Te Reo Māori 2016 Māori Language Act 2016*: New Directions, Old Problems' [2016] (July) *Māori Law Review* 1 ('New Directions, Old Problems').

175 House of Representatives, Parliament of New Zealand, *Standing Orders of the House of Representatives* (SO 151, 1985), cited in Ahu, 'Te Reo Māori as a Language of New Zealand Law' (n 62) 13. For the current position, see House of Representatives, Parliament of New Zealand, *Standing Orders of the House of Representatives* (SO 108, 23 August 2017).

176 New Zealand, *Parliamentary Debates*, House of Representatives, 1 August 1913, 163, 368 (Frederic Lang).

177 'Launch of Simultaneous Interpretation in the House', *New Zealand Parliament* (Web Page, 9 February 2010) <https://www.parliament.nz/en/visit-and-learn/how-parliament-works/office-of-the-speaker/speeches/launch-of-simultaneous-interpretation-in-the-house/>.

178 *Treaty of Waitangi Act 1975* (NZ) s 5(2).

179 Waitangi Tribunal, *Ngai Tahu Land Report* (Wai 27, 1991) vol 2 [4.4.4]. See also Waitangi Tribunal, *Motunui-Waitara Report* (Wai 6, 1983) 45–9 [10.1].

180 *Te Ture Whenua Maori Act 1993* (NZ) is one such statute. It includes its own interpretative direction that preferences, in s 2(3), the Māori text in the event of a conflict in meaning between the English and Māori preambles: see *John da Silva v Aotea Māori Committee* (1998) 25 Tai Tokerau MB 212, 237 (Spencer J).

181 Māori Affairs Committee, Commentary, Mokomoko (Restoration of Character, Mana, and Reputation) Bill 2011(28 June 2013) 3.

ascertain the 'true intent' of the provision.[182] This prediction is strengthened by the interpretative provisions of a recent multilingual statute, which provide:

> (1) Me whakahāngai te whakaputanga reo Māori me te whakaputanga reo Pākehā o tēnei Ture, e tino whakatairangahia ai te aronga o te Ture me ngā mātāpono e whakatakotoria ana i roto i te wehenga 8.
>
> (2) He ōrite te mana o te whakaputanga reo Māori ki te mana o te whakaputanga reo Pākehā o tēnei ture, engari kī te ara ake he tohe mō te rerekē o te tikanga o ngā kōrero, i roto i ngā whakaputanga e rua, nō te whakaputanga reo Māori o te ture te mana o runga ake.
>
> (1) The Māori and English versions of this Act are to be interpreted in a manner that best furthers the purpose of the Act and the principles set out in section 8.
>
> (2) The Māori and English versions of this Act are of equal authority, but in the event of a conflict in meaning between the 2 versions, the Māori version prevails.[183]

Māmari Stephens has suggested that these provisions will result in a purposive, but culturally contextualised, approach to statutory interpretation; an approach that Stephens considers to have been lacking from some earlier decisions interpreting multilingual statutes.[184]

IV INTERPRETATIVE ISSUES

In light of the above discussion of international practice, it is now possible to return to the three questions raised in Part II, repeated here for convenience:

> (a) How is a judge to ascertain the meaning of statutory text in a language they do not understand?
>
> (b) Where a statute is enacted in multiple languages, what happens in instances of (irreconcilable) inconsistency between the texts?
>
> (c) What interpretative weight will be attributed to the Indigenous language text of a statute?

If Australia is to continue to legislate multilingually it is inevitable that it will have to grapple with each of these questions.

A A Crisis of Interpretative Authority?

Australian judges called upon to interpret English and Indigenous language legislation in the near future are unlikely to be fluent in the relevant Indigenous language. A fundamental threshold question thus arises of how a judge can interpret a statute in a language they do not understand. In Wales, the recent move to legislate in both English and Welsh has posed a similar question.[185] There, only

182 Ahu, 'New Zealand's First Bilingual Statute' (n 166) 26–7.

183 *Te Ture mō Te Reo Māori 2016/Māori Language Act 2016* (NZ) s 12.

184 Stephens, 'New Directions, Old Problems' (n 174). Stephens critiques the decision of *Page v Page* (2001) 21 FRNZ 275 (High Court of New Zealand): at 5.

185 The issue has also arisen in New Zealand, where 'the effectiveness of co-drafting relies on judges having a high degree of proficiency in both languages. Currently, very few judges of the New Zealand courts can speak Māori fluently': see Ahu, 'Te Reo Māori as a Language of New Zealand Law' (n 62) 80.

a small fraction of judges are fluent in Welsh.[186] Thus, it is anticipated that English-speaking judges will have to authoritatively interpret laws drafted in English and Welsh.[187] Welsh scholars have suggested that one way through this dilemma would be for the court to appoint an expert translator to provide a report on the possible meanings of the Welsh text.[188] One objection to this proposal might be that it would lead 'to a usurpation of the courts' judicial role'.[189] Welsh critics see an expert translator's role as more like a judge than a scientific expert – 'unlike the scientific expert, the expert translator's role is to undertake a role previously reserved to the judiciary, namely statutory interpretation'.[190] 'The interpreter', it is said, 'assumes the role of the judge'.[191] The objection, however, is overstated, as is the characterisation of the translator as 'an adjudicator of law'.[192]

In Australia, one can imagine a role for an expert translator that would be consistent with existing adjudicative principles and practice and would allow courts to authoritatively interpret multilingual statutes. The expert translator's role would be very much like that of the scientific expert who offers transparently reasoned opinions as to contested questions of fact. However, the expert translator would offer opinions as to contested questions of linguistic meaning. This difference of roles maps neatly onto the distinction between 'adjudicative facts' and 'legislative facts'.[193] Just as the scientific expert offers opinions about (but does not decide) questions of adjudicative fact so too would the expert translator offer opinions about (but not decide) questions of legislative fact. More specifically, the expert translator could offer opinions as to the meaning of particular words or phrases in the Indigenous language text of a statute. It would then be for the court to assess that opinion and to weigh that with all of the other relevant indicators of legislative intention (including second reading speeches, explanatory memoranda, committee reports etc) and come to an authoritative conclusion as to the question of statutory interpretation at issue. When understood in this way, judicial consideration of an expert translator's opinion is little different to judicial reference to dictionaries,[194] a practice that is both common and largely unobjectionable.[195] A convenient summary of the approach is contained in Lord Wilberforce's judgment in the House of Lords decision in *Fothergill v Monarch Airlines Ltd* ('*Fothergill*'), which concerned the interpretation of a French word:

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186 *Form and Accessibility of the Law Applicable in Wales* (n 117) 149 [12.48].

187 Huws, 'The Day the Supreme Court Was Unable to Interpret Statutes' (n 63) 224.

188 Ibid 228.

189 Ibid. The objection is in fact twofold, at once a challenge to the court's epistemic competence and to the court's interpretative authority. See 'the court cannot assess the advice given, thus creating a danger that the courts will rely too heavily on the opinion of the expert': at ibid 229. See also ibid 238.

190 Ibid 232.

191 Huws, 'Translation in Transition' (n 64) 10.

192 Ibid 8.

193 See *Breen v Sneddon* (1961) 106 CLR 406, 411 (Dixon CJ). See also Stephen Gageler, 'Fact and Law' (2009) 11(1) *Newcastle Law Review* 1, 17–22.

194 As to the use of foreign language dictionaries to assist in ascertaining intention, see Jeffrey Goldsworthy, 'Moderate versus Strong Intentionalism: Knapp and Michaels Revisited' (2005) 42(2) *San Diego Law Review* 669, 681–2.

195 The practice is unobjectionable so long as the dictionary does not become a 'fortress': *Cabell v Markham*, 148 F 2d 737, 739 (2nd Cir, 1945) (Hand J).

> [T]he question of how the court ought to ascertain the meaning of a word or an expression in a foreign language … must vary according to the subject matter. If a judge has some knowledge of the relevant language, there is no reason why he should not use it … There is no reason why he should not consult a dictionary … In all cases he will have in mind that ours is an adversary system: it is for the parties to make good their contentions. So he will inform them of the process he is using, and, if they think fit, they can supplement his resources with other material – other dictionaries, other books of reference, [textbooks] and decided cases. They may call evidence of an interpreter, if the language is one unknown to the court, or of an expert if the word or expression is such as to require expert interpretation.[196]

Fothergill has been approvingly adopted in New Zealand in relation to questions of the statutory interpretation involving Māori words.[197] Courts there have shown a willingness to consult Māori dictionaries as well as 'to take notice of appropriate historical, sociological, anthropological and etymological evidence' on the question of a Māori word's meaning.[198]

As it turns out, courts in Australia are already engaging in multilingual interpretation without any apparent crisis of interpretative authority. The High Court was recently required to compare the equally authoritative French and English texts of an international convention.[199] In a unanimous judgment, the Court described divergences between the two texts and felt no compunction about authoritatively reconciling them. The Court had been provided with an expert translation of the French text on the basis that it was evidence of how the statute should be construed (ie evidence of legislative fact) and thus analogous to an explanatory memorandum.[200] It is a fair assumption that at least some of the Justices relied on the translation, as it seems unlikely that all of them are French speakers. It thus appears that Australian courts already have the conceptual framework in place to allow English-speaking judges to interpret Indigenous language texts without any crisis of interpretative authority.[201]

B Instances of (Irreconcilable) Inconsistency

When a statute is enacted multilingually, the potential arises for differences between the texts. Many of these differences will be able to be resolved by what might be called 'harmonious construction'.[202] When practicing harmonious construction, courts read apparently divergent statutory texts in such a way as to reconcile their meaning, even if those readings are not the most obvious or ordinary meanings suggested by the text. However, there will be occasions where the

196 [1981] AC 251, 273–4 ('*Fothergill*').

197 *Te Waka Hi Ika O Te Arawa v Treaty of Waitangi Fisheries Commission* [2000] 1 NZLR 285, 327 (Paterson J) (High Court of New Zealand).

198 Ibid 300 (Paterson J).

199 *Comptroller-General of Customs v Pharm-A-Care Laboratories Pty Ltd* (2020) 375 ALR 98, 107–8 [30]–[37] (the Court). See also *Maloney v The Queen* (2013) 252 CLR 168, 208–9 [92] (Hayne J).

200 Comptroller-General of Customs, 'Appellant's Submissions in Reply', Submission in *Comptroller-General of Customs v Pharm-A-Care Laboratories Pty Ltd*, S161/2019, 23 August 2019, 2 [6].

201 Similarly, in the United States, the Supreme Court has managed multilingual treaty interpretation for almost two centuries: see *United States v Percheman*, 32 US (7 Pet) 51 (1833).

202 Mark Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011) 46–50 [3.2].

statutory texts are simply too far apart, such that it would require the courts to impermissibly rewrite the provisions to bring them together. These might be called instances of irreconcilable inconsistency.[203] In such cases, a higher order rule is required to determine the outcome.

Australian courts are familiar with rules to determine the consequences of irreconcilable inconsistencies between federal and State or Territory laws.[204] Similarly, courts have developed rules to govern irreconcilable inconsistencies between laws emanating from the same source.[205] However, Australia has not yet had to decide upon a course to take in cases of irreconcilable inconsistency between multiple texts of a single law. Various approaches have been taken in other multilingual jurisdictions.

In Ireland, in the event of a conflict between the Irish and English constitutional or statutory texts, the Irish text takes priority.[206] In South Africa – where the Constitution is published in all 11 official languages – the English text prevails in the event of inconsistency.[207] There is a different rule, however, for multilingual South African legislation. Historically, inconsistency between different language texts of South African statutes was resolved by giving priority to that which was first signed by the President.[208] Kenya takes a similar position.[209] In Canada and Wales, different language texts of a law are said to be 'equally authoritative' or to have 'equal standing'.[210] However, as will be explained below, the experience of these jurisdictions shows that the equal authenticity principle does not adequately answer questions of irreconcilable inconsistency. The equal authenticity rule will sometimes result in a 'tie' between two conflicting meanings arising from the different language texts of a statute; in such a case a tie breaker rule is needed.[211] An example of such a tie breaker rule appears, in the sphere of international law, in the *Vienna Convention on the Law of Treaties*.[212] The rule provides that all multilingual treaty texts are equally authoritative; however, in cases of a persistent 'difference of meaning' between texts, the meaning prevails 'which best reconciles the texts, having regard to the object and purpose of the treaty'.[213] The position is similar to that within the European Union, where

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203 Others use the term 'irreconcilable conflict': see, eg, Bekink and Botha (n 135) 55.

204 *Australian Constitution* s 109. For recent cases considering s 109, see *Work Health Authority v Outback Ballooning Pty Ltd* (2019) 363 ALR 188; *Williams v Wreck Bay Aboriginal Community Council* (2019) 363 ALR 631.

205 See Leeming (n 202) ch 3.

206 *Constitution of Ireland 1937* (Ireland) arts 25.4.6, 25.5.4.

207 *Constitution of the Republic of South Africa Act 1996* (South Africa) s 240.

208 *Republic of South Africa Constitution Act 1961* (South Africa) s 65; *Republic of South Africa Constitution Act 1983* (South Africa) s 35; *Constitution of the Republic of South Africa Act 1993* (South Africa) s 65(2). The position does not appear yet to be settled under the new constitutional order: Loubser (n 77) 132–3.

209 *Constitution of Kenya 2010* (Kenya) art 120(2).

210 *Canada Act 1982* (UK) c 11, sch B s 18(1); *Government of Wales Act 1998* (UK) s 122(1), as repealed by *Government of Wales Act 2006* (UK) s 163, sch 12; *Government of Wales Act 2006* (UK) s 156.

211 On the concept and design of tie breaker rules, see Adam M Samaha, 'On Law's Tiebreakers' (2010) 77(4) *University of Chicago Law Review* 1661.

212 *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 January 1980).

213 Ibid arts 33(1), (4).

regulations have equal authenticity in all official languages, subject to an overriding requirement of 'teleological' interpretation to give effect to legislative intention.[214]

All of the above rules for determining irreconcilable inconsistencies are products of their national (or international) context. For example, the South African rule that the English text of the Constitution takes priority was presumably adopted because the majority of the Constitutional Assembly's drafting and deliberative process was conducted in English. The different rule historically applied to South African legislation – that the text first signed by the President had priority – was considered to be an 'arbitrary' but necessary means to 'cut the Gordian knot'.[215] In Ireland, the rule that the Irish language constitutional and statutory text takes priority over the English could hardly have been otherwise, given the War of Independence with Britain and the nationalistic sentiment animating the drafting of the Irish Constitution. In Canada, the Supreme Court has explained that, in effect, the rule of equal authenticity of French and English statutory text is 'not absolute'; a particular text may be preferred where it would better give effect to the intention of the legislature.[216] This approach can be understood as paying due respect to both the French and English linguistic communities but also to Canada's historic commitment to intentionalism in statutory interpretation. The international rule, which operates to promote 'the object and purpose of the treaty', rather than the intention of the parties, makes sense because the international legal order is designed to ensure the 'effectiveness' of the legal instruments themselves.[217] In the European Union, the equal authenticity rule (tempered by teleological interpretation) is required to afford equality and sovereignty to each of the members states,[218] without which it would likely be impossible to preserve sufficient harmony to keep the Union together.

Self-evidently, the Australian legal context is different to each of those described above. Accordingly, it is not appropriate to import a mechanism for determining irreconcilable inconsistencies simply because the mechanism works well in another jurisdiction. Rather, what is needed is a mechanism for determining questions of irreconcilable inconsistency that is most consistent with, or best 'fits' with, the other norms and practices of the Australian legal system.[219] In what

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214 Lawrence M Solan, 'The Interpretation of Multilingual Statutes by the European Court of Justice' (2009) 34(2) *Brooklyn Journal of International Law* 277, 277–82.

215 *New Union Goldfields Ltd v Commissioner for Inland Revenue* [1950] 3 SA 392, 406B (Van den Heever JA) (Appellate Division).

216 *Doré v Verdun (City of)* [1997] 2 SCR 862, 878–9 (Gonthier J).

217 Mark E Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties* (Martinus Nijhoff Publishers, 2009) 460. The rule has also been explained to be 'based on the principle of equality of states, thought to originate from the *Treaty of Westphalia 1648*': Janny HC Leung, *Shallow Equality and Symbolic Jurisprudence in Multilingual Legal Orders* (Oxford University Press, 2019) 187 ('*Shallow Equality and Symbolic Jurisprudence*').

218 Solan (n 214) 279.

219 On the idea that a rule should 'fit' within the legal landscape, see Ronald Dworkin, 'Hard Cases' (1975) 88(6) *Harvard Law Review* 1057, 1084, 1094. See also *Burns v Corbett* (2018) 353 ALR 386, 444 [210] (Edelman J).

follows, it will be suggested that, in Australia, the most fitting way to determine instances of irreconcilable inconsistency would be to prefer the text that best gives effect to the statute's purpose.

The reason why this article prefers statutory purpose as the orientating concept to determine cases of irreconcilable inconsistency between different language statutory texts is that Australian statutory interpretation is already deeply committed to interpreting statutory text in light of statutory purpose. This commitment is reflected both in common law interpretative rules and in the *Interpretation Acts* of each jurisdiction. At common law, the task of the court interpreting a statute is to construe the statutory text to give effect to the legislature's intention.[220] While there is disagreement about whether legislative intention is an authentic or fictional concept,[221] all agree that its pursuit requires the discovery or attribution of the statute's purpose (the 'mischief' to which the statute is directed).[222] Once this purpose (or 'mischief') has been discovered, it will inform the interpretation of the statutory text. This common law commitment to reading statutory text in light of statutory purpose can be explained with reference to a statutory provision that reads: 'guns are prohibited in, on or around banks'. The word 'banks' in this provision could plausibly refer to riverbanks or financial institutions. Once it is understood that the statute was passed in response to a spate of armed robberies of financial institutions, the latter meaning will be preferred because it obviously conforms to the *purpose* of the statute. Similarly, all Australian *Interpretation Acts* include provisions requiring purposive interpretation.[223] While the wording of these provisions varies, they essentially require courts to prefer an interpretation that would advance a statute's purpose to one that would not. The stronger version of these purposive interpretation provisions has been described as a 'tie breaker … [to] pick a purposive to a non-purposive interpretation' where all other things are equal between different interpretations of a statutory text.[224] This article suggests that reference to statutory purpose may not just serve as a tie breaker in cases of monolingual textual

220 *Tasmania v Commonwealth* (1904) 1 CLR 329, 358–9 (O'Connor J); *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 180 (Isaacs J); *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297, 320 (Mason and Wilson JJ). See also *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1, 13 (Mason J); *Wilson v Anderson* (2002) 213 CLR 401, 417–8 [7]–[8] (Gleeson CJ).

221 See Justice Stephen Gageler, 'Legislative Intention' (2015) 41(1) *Monash University Law Review* 1; Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36(1) *Sydney Law Review* 39.

222 It is a strange feature of the Australian debate about statutory interpretation that, while there is considerable disagreement about the object of statutory interpretation, this disagreement does not disrupt the consensus on the more workaday question of the correct principles and methods to be applied in the interpretation of statutes, which consensus is reflected in (or created by?) Dennis Pearce, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 9th ed, 2019).

223 *Acts Interpretation Act 1901* (Cth) s 15AA; *Legislation Act 2001* (ACT) s 139; *Interpretation Act 1987* (NSW) s 33; *Interpretation Act 1987* (NT) s 62A; *Acts Interpretation Act 1954* (Qld) s 14A; *Acts Interpretation Act 1915* (SA) s 22; *Acts Interpretation Act 1931* (Tas) s 8A; *Interpretation of Legislation Act 1984* (Vic) s 35(a); *Interpretation Act 1984* (WA) s 18.

224 Philip P Frickey, 'Structuring Purposive Statutory Interpretation: An American Perspective' in Tom Gotsis (ed), *Statutory Interpretation: Principles and Pragmatism for a New Age* (Judicial Commission of New South Wales, 2007) 159, 169.

ambiguity, but is also the most appropriate way to choose between multilingual texts that are irreconcilably inconsistent.

Having put forward a purposive tie breaker to determine Australian instances of multilingual irreconcilable inconsistencies, it falls now to consider how such a mechanism might operate in practice – that is, is the English language text or the Indigenous language text more likely to be preferred, or will the different texts be preferred on an equal number of occasions? Theoretically, the purposive tie breaker is linguistically neutral. However, as will be shown below, there are reasons why a purposive tie breaker may result in contemporary Australian courts more often preferring the English language statutory text to the Indigenous language statutory text when faced with irreconcilable inconsistencies between them. This short-term prediction largely accords with Janny Leung's global study of multilingual statutory interpretation. Leung explains that 'unequal authority of … [statutory] languages' is almost inevitable as transition occurs from 'legal dualism towards a fuller form of legal bilingualism'.[225] However, this tendency towards an English-language preference is neither inevitable nor, necessarily, enduring. As will be seen below, while the purposive tie breaker may presently favour English language statutory text this will not always be the case and, over time, Indigenous language texts may be more regularly preferred to English.

There are three reasons why, in the short-term, a purposive tie breaker will more often result in preference for the English statutory text. The first reason relates to the sources from which statutory purpose is ascertained. Outside of the statute itself, courts most commonly rely on second reading speeches, explanatory memoranda, parliamentary debates and committee reports to ascertain statutory purpose. In the current Australian context where parliamentary debates and extrinsic materials are almost exclusively conducted and published in English, it is likely that the English language text of a statute will be more closely aligned with the purpose derived from these materials.[226] This has been the experience in Canada where, despite the equal authenticity rule, linguistic preference often results from the fact that many of the interpretative aids and extrinsic materials are only available in one language.[227] Similarly, in South Africa it appears that there

225 Leung, 'Statutory Interpretation in Multilingual Jurisdictions' (n 57) 489.

226 A difficult question would be the approach to be taken to irreconcilable inconsistency in a multilingual statute that explicitly required the Indigenous language text to prevail: see, eg, *Te Ture mō Te Reo Māori 2016/Māori Language Act 2016* (NZ) s 12(2). If all the English language extrinsic materials tended toward one meaning, but the Indigenous language text expressed an inconsistent meaning, could Parliament *deem* its intention to be that of the Indigenous language text? Or would that involve the Parliament stepping too far into the courts' constitutional competency in statutory interpretation? At present there is little Australian case law or literature on the outer limits of Parliament's power to prescribe interpretative rules for the judiciary. By contrast, this issue has received considerable attention in the United States: see Nicholas Quinn Rosenkranz, 'Federal Rules of Statutory Interpretation' (2002) 115(8) *Harvard Law Review* 2085; Larry Alexander and Saikrishna Prakash, 'Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation' (2003) 20(1) *Constitutional Commentary* 97; William Baude and Stephen E Sachs, 'The Law of Interpretation' (2017) 130(4) *Harvard Law Review* 1079, 1139–40.

227 Côté (n 106) 1079–80:

is an interpretative bias towards English, because that is the language common to all Members of Parliament.[228]

There is a second reason why a purposive tie breaker is likely to result in an English language preference in cases of irreconcilable inconsistency, namely, the embeddedness of Australian legal concepts in the English language. This embeddedness means that, in most cases, the English language will be able to more accurately convey legal concepts than another (Indigenous) language to which such concepts are foreign. To acknowledge as much is not to endorse what, on one view, is a perverse and self-perpetuating legacy of colonial occupation. Rather, it is to recognise the reality of Australia's current legal landscape, and the way that it is shaped by its past. Consider the *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic), one function of which is to create the Birrarung Council, a statutory body to advocate for the protection and preservation of the Yarra River.[229] Imagine that the statute was wholly bilingual in Woi-wurrung and English and that a controversy arose about the scope of the Council's statutory powers. In the case of irreconcilable inconsistency between the Woi-wurrung and English text, it would be likely that the English text would more precisely describe the scope of the Council's powers. This would be so because English language statutes have a centuries-long tradition of using particular language to create, define, empower and constrain statutory bodies. By contrast, a degree of imprecision might be expected in an Indigenous language that does not have the same linguistic legacy to draw upon.[230] This need not be a permanent phenomenon. Indigenous languages can build up a legal terminology; however, this process takes time, effort and resources.[231] The influence of linguistic history is being felt in Canada, where 'the [A]nglo-Canadian tradition in criminal law is deeply rooted in the English language' such that interpretations of criminal legislation will usually prefer the English language text to the French.[232]

Finally, it is to be recalled that one, perhaps the primary, purpose of legislation is to guide conduct.[233] In the most simple case, legislation does this by putting the public on notice of conduct that is declared unlawful and the consequences (such as criminal penalties) of engaging in such conduct. Most of the Australian public, and the lawyers advising them, speak English. The most widely spoken Indigenous

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> Even when both versions have been drafted as originals, the simple fact that the ministerial instructions preceding the drafting process result from discussions that have taken place in one language only and are themselves drafted in that language will be detectable by interpreters, who will accordingly tend to attach more weight in their approach to the statute to the version drafted in the language of the ministerial instructions.

228 Malan (n 130) 66.

229 *Yarra River Protection (Wilip-gin Birrarung murron) Act 2017* (Vic) s 48(1)(b).

230 For an illustration of the difficulties of communicating 'Western' legal concepts into an Indigenous Australian language, see Holcombe (n 55) ch 1.

231 See Mariëtta Alberts, 'Legal Terminology in African Languages' (1997) 7 *Lexikos* 179; Parkinson (n 162) 41–3; Māmari Stephens, 'The Legal Maori Dictionary: Treading a Careful Path' [2012] (September) *Māori Law Review* 20.

232 Nicholas Kasirer, 'The Annotated Criminal Code en Version Québécoise: Signs of Territoriality in Canadian Criminal Law' (1990) 13(2) *Dalhousie Law Journal* 520, 553.

233 Raz (n 54) 213–14.

language is Djambarrpuyngu, spoken by just over 4,000 people.[234] It stands to reason, then, that in cases of irreconcilable inconsistency between multilingual texts of wide-reaching legislation, courts will be more likely to prefer the English language text because it has the greater capacity to guide public conduct. This argument can also be expressed as avoiding unfair surprise to the greatest number of people. Ruth Sullivan has made a similar argument in Canada, writing:

> When the English and French versions of bilingual legislation express clear but different rules, the [S]tate has made a mistake and all subjects are at risk of being taken by surprise. In deciding which rule to adopt, courts should strive as much as possible to minimize that surprise.[235]

Importantly, however, some statutes may not be directed at 'all subjects' but may instead be directed at a particular group of people,[236] whether that group is defined geographically, culturally, linguistically or simply by virtue of their participation in the area of conduct that is regulated.[237] In the case of such targeted legislation, the best way to advance statutory purpose may be to prefer the language text of a statute that is most widely understood amongst the targeted group.[238]

It remains to stress that the three considerations mentioned above do not *necessarily* mean that the English language statutory text will always be preferred in instances of irreconcilable inconsistency. In each case of an irreconcilable inconsistency, what is required is identification of the statute's purpose and consideration of whether the English or Indigenous statutory text better gives effect to that purpose. It is not so hard to imagine examples were this might require preference for the Indigenous language text. For example, a statute may be enacted for the purpose of protecting and preserving Torres Strait Islander culture. The statute may have been drafted after wide public consultation on the Torres Strait Islands, much of which consultation occurred, and was documented in Indigenous languages. Assume that part of the resulting statute provides copyright-type protections for 'Ailan Kastom', that is, the 'body of customs, traditions, observances and beliefs of Torres Strait Islanders'.[239] The statute may contain

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234 'Key Statistics from the 2016 Australian Census', *Identity Communications* (Web Page, 1 July 2017) <https://identitycomms.com.au/2017/07/key-statistics-2016-australian-census/>. Note that if Kriol or Yumplatok (Torres Strait Creole) are treated as a single language group, they are the most widely spoken Indigenous languages with about 7,000 and 6,000 speakers respectively. However, in light of the considerable diversity within the Kriol spoken in different locations, Djambarrpuyngu has been identified in the text as the most widely spoken Indigenous language.

235 Ruth Sullivan, 'Some Problems with the Shared Meaning Rule as Formulated in *R v Daoust* and *The Law of Bilingual Interpretation*' (2010) 42(1) *Ottawa Law Review* 71, 88.

236 Consider, for example, the *Dongara-Eneabba Railway Act 1974* (WA), which appears to be almost exclusively relevant to people living in or visiting the Dongara-Eneabba region of Western Australia, and those segments of the government and private sector involved in the construction and running of the railway.

237 For a discussion of the ways in which statutory drafting should be modified according to the 'legislative audience', see Reed Dickerson, 'Statutory Interpretation: The Uses and Anatomy of Context' (1972) 23(2) *Case Western Reserve Law Review* 353, 365–6.

238 Thanks to a reviewer for alerting me to considerations of legislative audience.

239 See above nn 36–7 and accompanying text.

definitions of Ailan Kastom in English and the three Indigenous languages of the Torres Strait Islands: Kalaw Lagaw Ya, Meriam Mir and Yumplatok (Torres Strait Creole). One can imagine an irreconcilable inconsistency arising between the English and Indigenous language texts as to whether a particular practice or activity fell within the meaning of 'Ailan Kastom'. Faced with such an irreconcilable inconsistency, it is likely courts would prefer the Indigenous language definitions of Ailan Kastom, as these would better give effect to the statutory purpose of protecting Torres Strait Islander culture.

Notwithstanding the lengthy analysis just conducted, it should be remembered, however, that cases of irreconcilable inconsistency will be rare. Much more commonly, the multilingual statutory texts will be interpreted in a way that gives weight to each of them. This will be discussed further in the next section.

C Interpretative Weight

While irreconcilable inconsistencies may be rare, it is more routine (although not common)[240] for courts to encounter instances of ambiguity within or between different language texts.[241] In such cases, how should the novel presence of an Indigenous language text influence the interpretative inquiry? The best answer is that, consistent with Australia's orthodox approach to statutory interpretation, the Indigenous language text should be considered by the court for the purpose of ascertaining the intention of Parliament. At a methodological level, there are two techniques by which courts could use Indigenous language statutory text to illuminate legislative intention. First, courts could apply the 'shared meaning' rule that has, to varying degrees, been adopted in other multilingual jurisdictions. Alternately, courts could consider the Indigenous language text simply as one among many indicators of legislative intention (what will be called the 'text-as-indicator-of-intention' approach). As will be seen, the latter approach is preferable because it is more consistent with the orthodox approach to statutory interpretation in Australia. In order to explain why that is so it is necessary to consider the shared meaning rule, before discussing the relative advantages of the text-as-indicator-of-intention approach.

The shared meaning rule requires that any ambiguity or difference of meaning in multilingual legislation is to be resolved, where possible, by settling on the meaning that is common to, or shared by, the different texts.[242] The rigidity and formalism of the shared meaning rule should not obscure the fact that it is 'a tool to determine legislative intent'.[243] Advocates of the shared meaning rule argue that, where differences between two statutory texts raise a doubt about legislative intention, that doubt is most safely resolved by settling upon the meaning that is

240 Leung, *Shallow Equality and Symbolic Jurisprudence* (n 217) 207: 'interlingual discrepancies are found in only a minority of cases'.

241 Leung calls these 'intralingual' or 'interlingual' indeterminacy: ibid 195.

242 *R v O'Donnell* [1979] 1 WWR 385, 389 (Bull JA) (British Columbia Court of Appeal).

243 Bastarache et al (n 44) 90. The authors note that 'a finding of shared meaning creates a presumption in favour of the shared meaning as the actual meaning of the provision – it is, after all, a tool to determine legislative intent': at 90.

clearly within the intention of all texts.[244] There are two common situations in which the shared meaning rule is engaged.[245] First, the shared meaning rule is applied where one text of a statute conveys a broad meaning and another text of the statute conveys a narrower meaning that falls wholly within the broader (ie a subset of the former). In such a case, the narrower meaning will be preferred.[246] Secondly, the shared meaning rule is applied where one text of a statute leaves open multiple possible meanings and the other text clearly supports only one of those meanings. In those circumstances, the clear meaning will be attributed to both texts.[247] Canada employs a version of the shared meaning rule,[248] as does South Africa.[249] There are, however, persuasive critiques of the rule which count against its adoption in Australia.

The most astute criticism of the shared meaning rule is that it prioritises superficial linguistic equality to the detriment of legislative intent. Critics in this camp argue that the shared meaning rule should be abandoned, or at least deprioritised, in favour of a less rigid, more nuanced, interpretative approach.[250] In New Zealand, it has been acknowledged that the shared meaning rule can produce 'unpredictable and unprincipled' results.[251] In particular, it has been said that the shared meaning rule may require a narrow reading where Parliament in fact intended the broader meaning.[252] Similarly, South Africa's version of the shared meaning rule has been tempered by courts seeking to avoid 'a construction which is purely arbitrary and which could not have been intended'.[253] The most obvious way to avoid doing violence to legislative intent is to adopt the text-as-indicator-of-intention approach outlined earlier. On this approach, different language texts of a statute will simply be inputs into the interpretative calculus, the importance of which must be assessed on a statute-by-statute basis depending on the extent to which the court considers the Indigenous language text to reliably indicate legislative intention. This approach has been proposed in Wales, where the Law Commission observed that:

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244 Ibid 15.

245 Ibid 64, 75. The authors explain the two situations as 'ambiguity shared meaning' and 'breadth shared meaning'.

246 *R v Daoust* [2004] 1 SCR 217, 231 (Bastarache J). See also Pierre-André Côté, Stéphane Beaulac and Mathieu Devinat, *The Interpretation of Legislation in Canada* (Carswell, 4th ed, 2011) 348; Michael Beaupré, *Interpreting Bilingual Legislation* (Carswell, 2nd ed, 1986) 5.

247 *R v Mac* [2002] 1 SCR 856, 858 [5]–[6] (Bastarache J). In that case, the Court applied the shared meaning rule to ascertain the meaning of an offence provision criminalising the possession of items 'adapted and intended to be used to commit forgery'. See also *R v O'Donnell* [1979] 1 WWR 385, 389 (British Columbia Court of Appeal) where Bull JA observed: 'if one version is clear and unambiguous and the other version has the same meaning as well as others, it follows that, when construing, the common meaning must be accepted'.

248 Côté, Beaulac and Devinat (n 246) 347–8.

249 Bekink and Botha (n 135) 56.

250 Paul Salembier, 'Rethinking the Interpretation of Bilingual Legislation: The Demise of the Shared Meaning Rule' (2003) 35(1) *Ottowa Law Review* 75, 99; Côté (n 106) 1070.

251 Ahu, 'Te Reo Māori as a Language of New Zealand Law' (n 62) 83.

252 Ibid.

253 *Janse van Rensburg v Minister of Defence* [2000] ZASCA 21, [18] (Melunsky AJA) (Supreme Court of Appeal).

> The aim of the interpretation exercise must of course be to determine the intention of the legislature as it objectively appears from the texts. Where it is not possible to reach an interpretation consistent with the literal meaning of both language versions, we tend to the view that the *legislative intention is better discerned by reference to the purpose or object of the legislation as they appear from the texts than by a search for a shared meaning*.[254]

It should be noted that shared meaning will remain relevant on the text-as-indicator-of-intention approach. This is because a shared meaning may be a sound, but not determinative, clue to legislative intention. Canadian scholars have explained '[w]hen a shared meaning can be found, it constitutes merely a supplemental factor in the search for the best meaning of the provision. It will, however, be ignored if it is felt that it does not correctly reflect the intention of Parliament'.[255]

For Australia to adopt a text-as-indicator-of-intention approach would not just be consistent with the traditional aim of Australian statutory interpretation to ascertain legislative intention, it would also be in line with what has been described as a 'strong converging trend among multilingual jurisdictions towards purposive interpretation'.[256]

V CONCLUSION

Indigenous languages are already being incorporated into Australian parliamentary debate and legislation, and there is every reason to believe that this trend will continue and accelerate. Given this phenomenon, it is inevitable that sooner rather than later, multilingual Australian statutes are going to require judicial interpretation. Rather than require or expect judges to chart their approach to multilingual interpretation alone, it would be preferable for the public and the academy to consider these questions in advance. This article has sought to commence such a process. As was acknowledged at the outset, the proposals put forward here are not intended to be prescriptive. Rather, it is hoped that the above discussion will catalyse further debate on this issue, which ought to foreground Indigenous voices.

254 *Form and Accessibility of the Law Applicable in Wales* (n 117) 147 [12.40] (emphasis added).
255 Côté (n 106) 1071. See also *Doré v Verdun (City of)* [1997] 2 SCR 862.
256 Leung, 'Statutory Interpretation in Multilingual Jurisdictions' (n 57) 491.