A review of Australian judges’ rulings on appeals on the grounds of incompetent interpreting

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Statement of originality

I hereby declare that this is my own work and has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

Alejandra Hayes
26 October 2009
Abstract

It has been argued by many that, in order to professionalise legal interpreting, the powerful participants need to be aware of the pivotal role of Aboriginal, foreign and signed language interpretation and the consequences of not employing competent interpreters at all levels of the judicial process. Empirical research has found that inadequate interpreting can have a significant impact on the outcomes of legal cases, including evaluations of witness testimonies and witness understanding of questions (Benmaman, 2000; Berk-Seligson, 1999, 2000, 2002, 2008; Cooke, forthcoming; Hale, 2004, 2007a and b, 2008, forthcoming; Mikkelson, 2008; Morris, 2008; and others). While most interpreting inaccuracies go unnoticed in bilingual cases, some (possibly the most salient ones) have led to appeals. This paper analyses the outcomes of fifty court and tribunal appeals on the grounds of incompetent interpreting from New South Wales, Northern Territory, Queensland, Victoria and Western Australia between 2006 and 2008. The findings reveal that even when the performance of interpreters during a trial or hearing is questioned on appeal, the higher courts are not convinced by the linguistic arguments presented regarding the impact of poor interpretation on the witness’ or applicant’s credibility or the outcome of the case, unless the interpreting errors are directly related to an issue of specific significance to the case and constitute jurisdictional error. As a result, this ground of appeal rarely succeeds. It is suggested that this approach unknowingly denies all the research in forensic linguistics (Loftus, 1979; O’Barr, 1982; Conley and O’Bar, 1990) and court interpreting (Berk-Seligson, 1990; Hale, 2004) which highlights the importance of pragmatically accurate interpreting. In doing so, this approach compromises the administration of justice.

Keywords: administration of justice, appeals, incompetent interpreting, rulings.
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CHAPTER 1

Background and context to the study

1.1 Introduction

No amount of swearing can guarantee high quality interpreting from an interpreter who does not have the necessary competency (Berk-Seligson, 2002, p. 204).

Government reports spanning twenty-one years have highlighted the need for specialist training for forensic interpreters in Australia (Australian Department of Immigration, 1973; Commission of Inquiry into Poverty, 1975; Committee on Overseas Professional Qualifications, 1977; Review of Post-Arrival Programs and Services for Migrants, 1978; Australian Institute of Multicultural Affairs, 1982; Senate Standing Committee on Education and the Arts, 1984; Commonwealth Attorney General’s Department (CAGD), 1991; Women’s Legal Resources Centre, 1994). Both academics and practitioners with an interest in the professionalisation of community interpreting have long been concerned about the avenues of entry into the profession, the national accreditation system, and the lack of compulsory specialist training for interpreters working in the legal system. They have been equally concerned about the lack of understanding of many judges, legal practitioners and police officers about the nature of language and interpreting, and the consequences of not employing competent interpreters at all levels of the judicial process (Cooke, forthcoming; Benmaman, 1999, 2000; Berk-Seligson, 1990, 2000; Framer, 2007; Hale, 2004, 2007a; Laver, 2007; Martinsen & Dubslaff, forthcoming; Morris 1993, 2001; and others). Despite these concerns and all the evidence supporting the need for improvement in legal interpreting standards, little has changed in the past thirty-five years.

1.2 Government reports on interpreting services

Sandra Hale’s The discourse of court interpreting (2004) presents a historical overview of court interpreting in Australia (pp. 15–30). Hale’s study is arguably the most comprehensive in the field and includes a review of eight government reports on

*Access to interpreters in the Australian legal system* (CAGD, 1991) presented a description of the interpreter services available across Australia at the time and it recommended that all states and territories be encouraged by the Commonwealth to enact uniform legislation regarding the right to an interpreter for people with insufficient language skills. The report also highlighted the fact that providing incompetent interpreters will not ensure a right to access and equity.

... it was recommended that legislation be enacted to ensure that people with insufficient English language skills should be entitled to an interpreter in the criminal investigation process and in court. If such legislation is not accompanied by measures which will ensure, as far as possible, the use of competent interpreters, then it would merely create the illusion of a right, without providing the means necessary to effectively exercise it (CAGD, 1991, p. 84).

Other main problems identified by the report reflected those of previous reports dating back to 1973, i.e. inadequate training for legal interpreters, the shortcomings of the NAATI examinations in measuring the competencies required of a legal interpreter and little incentive for interpreters to become better qualified (CAGD, 1991, p. 84). Five years later, the major recommendations made by the *Quarter way to equal implementation report* (Coory, 1996) were:

- that ‘the Charter of Victim’s rights be amended to include the right to an interpreter’,
- that a legal interpreter specialist training course be implemented for a selected group of Ethnic Affairs Commission interpreters, and
- that a course on the effective use of interpreters and on cross-cultural
issues be mandatory for lawyers, police and all other government organisations who deal with non-English speaking people (pp. 7–9).

Unfortunately, only one of these recommendations was implemented, and for just four years: thirty-five hours of specialist legal interpreting training was provided by the University of Western Sydney to all interpreters on the Community Relations Commission’s panel from 2000 to 2004. This initiative was commissioned by the Attorney General’s Department of New South Wales. Hale (2004) points out that none of the reports mentions the need for research ‘to inform the training courses’ curricula and NAATI examinations’ and that this lack of research tradition and of mandatory pre-service training are ‘the most serious deficiencies in the interpreting profession in Australia’ (pp. 27–28).

The reality today, thirty-five years after the first report was published, is that little has changed. Most people enter the interpreting profession by sitting a one-off generalist NAATI test, with no theoretical background or interpreting training required (NAATI, 2009). Therefore, it could be argued that there is little difference between a NAATI accredited interpreter and an educated bilingual. In ‘Themes and methodological issues in court interpreting research’ Hale (2006) summarises the results of research in the field (Berk-Seligson, 1990, 1999, 2002; Rigney, 1997, 1999; Hale, 1999, 2001, 2004), which clearly show interpreters’ lack of awareness of the significance of the strategic use of courtroom language and of maintaining its pragmatic force in their interpretation (Hale, 2006, p. 212). This leaves us wondering, on what court interpreters without specialised training base their professional decisions in the face of complex linguistic or ethical challenges; or how, without knowledge of forensic linguistics or interpreting theories, a practitioner can substantiate their choices. It is unlikely that untrained interpreters would be aware of the research into the language of the courtroom (e.g. Atkinson & Drew, 1979; Danet & Bogoch, 1980; O’Barr, 1982; Conley & O’Barr, 1990; Gibbons, 2003), the strategies used by lawyers to elicit the desired answers in the courtroom (Loftus, 1979; Danet & Bogoch, 1980; Woodbury, 1984; Walker, 1987; Maley & Fahey, 1991) or issues on the interpretation of different question types (Berk-Seligson, 1990, 1999, 2002; Rigney, 1997, 1999; Hale, 1999, 2001, 2004, 2007a, 2007b; Fraser & Freedgood, 1999), style and register in witness testimony (Berk-Seligson, 1990; Hale, 2004) and pragmatics in court interpreting research (Berk-Seligson, 1990, 2002; Brennan, 1999; Hale, 1996a, 2004; Jacobsen, 2002; Krouglov, 1999; Mason & Stewart, 2001; Rigney, 1999), for example.
1.3 NAATI interpreter tests

While the origins and initial raison d’être of NAATI may help explain the current situation, they do not justify it. NAATI was originally set up as a provisional body that would eventually allow a self-regulating professional organisation to take on the responsibility for accreditation. It was envisaged that, in time, all future interpreters would enter the profession upon completion of relevant degree courses (NAATI, 1978). However, these objectives were never met. ‘Although NAATI has supported the establishment of a professional association, NAATI’s articles of association do not contemplate any devolution of its regulatory role’ (Laster & Taylor, 1994, p. 35); the Australian Institute for Interpreters and Translators (AUSIT) was founded in 1987 as the national professional association, and yet ‘NAATI continued to exist unchallenged’ (Hale, 2004, p. 26). Significantly, Dueñas Gonzalez et al. (1991) compared the United States federal court interpreting specialist certification examination with NAATI’s generalist interpreter test and concluded that:

... the test should not be used to examine court interpreters for three reasons: (1) it does not reflect the rigorous demands of the three modes used in judicial interpreting: simultaneous (unseen or spontaneous), legal consecutive and sight translation; (2) it does not test for mastery of all the linguistic registers encountered in the legal context, ... and (3) it would not be a valid instrument to determine ability in judicial interpretation because its format, content, and assessment methods are not sufficiently refined to measure the unique elements of court interpreting (p. 91).

More recently, Roberts-Smith QC (forthcoming) indicated that ‘there are serious limitations to NAATI accreditation and none of the accreditation levels offered by this body involve specialist examination or legal interpreting accreditation’.

The very structure of the NAATI accreditation system is inadequate: both the old levels and the current nomenclature\(^1\) show a lack of understanding of the different types of interpreting. Rather than dividing accreditation examinations into different specialisation areas (e.g. generalist or administrative, conference, medical and legal) it created an arbitrary hierarchical system, with conference interpreting being at the top of the hierarchy.

\(^1\) The five-tier system was changed to ‘Paraprofessional Interpreter’ (old level II), ‘Interpreter’ (old level III), ‘Conference Interpreter’ (old level VI), ‘Senior Conference Interpreter (old level V) (NAATI, 1992).
The myth that conference interpreting requires higher language or interpreting skills is thus perpetuated by NAATI.

Conference Interpreter: This is the advanced professional level and represents the competence to handle complex, technical and sophisticated interpreting. Conference Interpreters practise both consecutive and simultaneous interpreting in diverse situations, including at conferences, high-level negotiations, and court proceedings. Conference Interpreters operate at levels compatible with recognised international standards, and may choose to specialise in certain areas. *(Accreditation Levels, n.d.)*

The above description epitomises the prevalent lack of understanding about the specialised nature of court interpreting, whose skills are different from—not subordinate to—conference interpreting, and therefore the two should not be mixed. Not only does legal interpreting require ‘faithfulness of both content and style’ (Hale, 2007a, p. 200) and competence in all registers and interpreting modes (consecutive, simultaneous, whispering and sight-translation), it does so in both language directions. Conference interpreting is mostly done in one language direction at a time, at a formal register, often from the comfort of a sound-proof booth, and ‘only the content of the original is what matters’ (Hale, 2007a, p. 200). Other factors that make legal interpreting arguably more complex than conference interpreting include the nature of the issues at hand coupled with the potential consequences of inadequate performance, and the thorough knowledge of both legal systems— the Australian legal system and the one of the country or culture where the other language is spoken— that is required. Indeed, ‘The respect given to law by Aboriginal elders is reflected in the expectation that the legal interpreter will be educated not only in two languages but in two laws’ (Cooke, forthcoming). These are the reasons why the notion that being a conference interpreter automatically qualifies someone to work in court proceedings is a fallacy. Lastly, there is a major contradiction embedded in NAATT’s system. According to their criteria, there would be hardly any qualified court interpreters in Australia, as they do not test in conference interpreting and the criteria for obtaining accreditation at that level are unclear.
1.4 Aim of the study

The aim of this study is to analyse the consequences of such a scenario over the years as reflected in the outcomes of fifty court and tribunal appeals on the grounds of incompetent interpreting in New South Wales, Northern Territory, Queensland, Victoria and Western Australia between 2006 and 2008. The study will attempt to answer the following questions: What are the grounds for incompetent interpreting stated in the appeals? What have been the outcomes of each of the appeals? How is competent interpreting defined in the rulings? And, what underlying perception of language and interpreting issues do the judges’ discourse practices represent?

1.5 Hypothesis

Note that this is a qualitative study and hypotheses are not an essential part of the methodology. The following hypothesis is presented as informed commentary of the current situations which led to the elaboration of the research questions (see Gibbs, 2002; Burns, 1994, for a discussion on qualitative methods).

Judges do not have the required knowledge of interpreting or the relevant Aboriginal, foreign or sign languages to ascertain whether an interpreter is competent or their interpretation adequate. While most judges might agree that competent interpreting in court is fundamental to justice, they do not regard forensic interpreting as a highly specialised profession. Hence, they allow untrained people to act as interpreters, often not realising that their work has the potential to impact negatively on the work of lawyers and barristers —ergo on the administration of justice. It is hypothesised that when the performance of interpreters during a trial or hearing is questioned on appeal, the higher courts are not convinced by the linguistic arguments presented regarding the impact of poor interpreting on the witness’ or applicant’s credibility or the outcome of the case, unless the interpreting errors are directly related to an issue of specific significance to the case and constitute jurisdictional error. As a result, this ground of appeal rarely succeeds.
1.6 Significance of the study

Much has been written about incompetent interpreting in the courtrooms. Yet, little seems to have been done to achieve systematic improvements that will lead to a better administration of justice. Multiple factors contribute to this impasse, but its underlying cause seems to be the general lack of recognition of the complex nature of court interpreting as a highly specialized activity (Hale, forthcoming).

The significance of the study lies in the fact that no-one has done this type of research in Australia and there is a large knowledge gap in this area. Some overseas studies have looked at the consequences of failure to appoint an interpreter or poor interpreting performance, whether by practicing, paid or *ad hoc* interpreters in the relevant languages or practitioners in the wrong language or dialect. Yet no study has specifically addressed the issue of appeals on the grounds of incompetent interpreting by practicing, paid interpreters in the relevant languages. This study will attempt to fill some of that gap by presenting evidence to the judiciary that will hopefully lead to greater awareness: it will analyse the appeals, quantify them and describe how they are dealt with. It will then comment on the implications of these results. The study will also comment on the practical and theoretical knowledge and skills required of a legal interpreter to be able to perform adequately in legal settings, and the potential consequences of not meeting those standards. The results may be used to carry out further research, and they can also be published in legal journals, sent to local members of parliament, the Refugee Review Tribunal, NAATI, and language department managers.

1.7 Structure of the thesis

The thesis is divided into five chapters. Chapter 1 describes the aim and significance of the study by reviewing the literature on underlying issues concerning court interpreting in Australia. Chapter 2 is a review of relevant legislation, competence and accountability matters and the paradox surrounding quality in forensic interpreting. Chapter 3 compares the interpreting issues faced in Australia with the current state of affairs in other Common Law countries. This chapter also explains the notion of accuracy from a linguistics perspective. Chapter 4 analyses the data and discusses the implications of the findings. Chapter 5 summarises the findings and concludes the thesis with some recommendations for further research.
CHAPTER 2

Legislation, access and accountability issues in bilingual legal settings

2.1 Legislation and forensic interpreting in Australia

It is surprising that in the multicultural Australia of today there is so little material available on the evidential and other issues relating to the use of interpreters and the law ... This lack of material is no doubt a reflection of the wider apparent lack of appreciation within the justice system and the legal profession of the importance of language and the nature and proper use of professional interpretation (Roberts-Smith, as cited in CAGD, 1991, p. 36).

Despite the recommendation put forward by the Access to interpreters in the Australian legal system report that uniform legislation be enacted across Australian jurisdictions (CAGD, 1991, p. 84), legislation remains patchy. Australian Common Law does not provide an automatic right to an interpreter for any party to a dispute, including a witness or the accused (Choolun, 2009, p. 22). However, in South Australia a statutory right to an interpreter exists for a witness who is ‘not reasonably fluent in English’ in any court proceeding or when being questioned by an investigating officer. Meanwhile, the right to

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3 Evidence Act 1929 (SA) s14 — Entitlement of a witness to be assisted by an interpreter.

(1) Where — (a) the native language of a witness who is to give oral evidence in any proceedings is not English; and (b) the witness is not reasonably fluent in English, the witness is entitled to give that evidence through an interpreter.

(1a) A person may only act as an interpreter — (a) if the person takes an oath or makes an affirmation to interpret accurately; and (b) in a case where a party to the proceeding disputes the person’s ability or impartiality as an interpreter, if the judge is satisfied as to the person’s ability and impartiality.

(2) An affidavit or other written deposition in a language other than English shall be received in evidence in the same circumstances as an affidavit or other written deposition in English if it has annexed to it — (a) a translation of its contents into English; and (b) an affidavit by the translator to the effect that the translation accurately reproduces in English the contents of the original.
an interpreter in Victorian and Commonwealth provisions is limited to specific circumstances. Beyond these circumstances, and in all other Australian jurisdictions where

4 Summary Offences Act 1953 (SA) s83A —Right to an interpreter
(1) Where — (a) a person whose native language is not English is suspected of having committed an offence; and (b) the person is not reasonably fluent in English, the person is entitled to be assisted by an interpreter during any questioning conducted by an investigating officer in the course of an investigation of the suspected offence.

(2) Where it appears that a person may be entitled to be assisted by an interpreter under subsection (1), an investigating officer must not proceed with any questioning, or further questioning, until the person has been informed of the right to an interpreter that exists under subsection (1).

(3) If a person who is entitled to be assisted by an interpreter under subsection (1) requests the assistance of an interpreter, an investigating officer must not proceed with any questioning, or further questioning, until an interpreter is present.

(4) In this section ‘investigating officer’ means — (a) a police officer; (b) a person authorised by or under an Act to investigate the suspected offence.

5 Victoria: Children and Young Persons Act 1989 (Vic) s22 (Version No. 079A incorporating amendments as at 1 July 2005) —Interpreter
If the Court is satisfied that a child, a parent of a child or any other party to a proceeding has a difficulty in communicating in the English language that is sufficient to prevent him or her from understanding, or participating in, the proceeding, it must not hear and determine the proceeding without an interpreter interpreting it.

Magistrates Court Act 1989 (Vic) s40 —Interpreter
If — (a) a defendant is charged with an offence punishable by imprisonment; and (b) the Court is satisfied that the defendant does not have a knowledge of the English language that is sufficient to enable the defendant to understand, or participate in, the proceedings— the Court must not hear and determine the proceeding without a competent interpreter interpreting it.

Commonwealth: Evidence Act 1995 (Cth) s30 (for witnesses in criminal trials) —Interpreters
A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact.

Migration Act 1958 (Cth) s427(7) —Powers of the Refugee Review Tribunal, etc.
If a person appearing before the Tribunal to give evidence is not proficient in English, the Tribunal may direct that communication with that person during his or her appearance proceed through an interpreter.

Defence Force Discipline Act 1982 (Cth) s101H(6) —Treatment of persons in custody
(6) Where an investigating officer has reasonable grounds for believing that a person in custody is unable, by reason of inadequate knowledge of the English language or any physical disability, to
Common Law prevails, the decision to use an interpreter is a matter within the discretion of the presiding judicial officer (Choolun, 2009, p. 23). Roberts-Smith (forthcoming) brings these issues to the fore, emphasising that ‘the provisions are not comprehensive, they are not consistent and they have other deficiencies’:

Some statutory provisions in Australia allow for an interpreter to be provided at the broad discretion of the court or decision-making body ‘if the court is satisfied the interests of justice so require’. Some statutes simply provide that a person ‘may’, or has a ‘right’ to, have an interpreter during proceedings. Some statutes qualify the right by reference to language proficiency. The communicate orally with reasonable fluency in the English language, the investigating officer shall not ask the person any questions in connection with the investigation of a service offence unless:

(a) a person competent to act as interpreter is present and acts as interpreter during the questioning;
(b) the investigating officer questions the person in a language in which both the investigating officer and the person are able to communicate with reasonable fluency, or by any other means by which the investigating officer and the person are able to communicate with reasonable proficiency; or
(c) the investigating officer has reasonable grounds for believing that it is necessary to question the person otherwise than in accordance with paragraph (a) or (b) without delay in order to avoid danger of the death of, or serious injury to, any person or serious damage to property.

7 Evidence Act 1977 (Qld), s 131 A(1); r 34(3)(g) Criminal Procedure Rules 2005 (WA) which provide that at a pre-trial hearing, the court may give directions for obtaining and using an interpreter at trial.
8 Victorian Civil and Administrative Tribunal Act 1998 (Vic), s 49; State Administrative Tribunal Act 2004 (WA), s 41 —unless the tribunal directs otherwise, a party may be assisted in a proceeding by an interpreter or other person necessary or desirable to make the proceedings intelligible to that party. Anti-discrimination Act 1991 (Qld), ss 162 and 284: a person has a right to use a professional or voluntary interpreter at a conciliation conference and tribunal proceeding.
9 A witness may give evidence about a fact through an interpreter unless the witness can understand and speak the English language sufficiently to enable the witness to understand, and to make an adequate reply to, questions that may be put about the fact: Evidence Act 2001 (Tas), s 30; Evidence Act 1995 (NSW), s 30; Evidence Act 1995 (Cth), s 30; Administrative Decisions Tribunal Act 1997 (NSW), s 71(6). The Magistrates’ Court Act 1989 (Vic), s 103(5) provides that if the court is satisfied that a party to an arbitration does not have a knowledge of the English language that is sufficient to
statutes which use the terms ‘may use’ or ‘right to’ an interpreter are typically silent on who assesses the language proficiency of the witness or party and on the question of who is responsible for the provision of the interpreter. It is implicit that it is for the court or tribunal to make the assessment of language proficiency (forthcoming).

In discussing the issue of judicial discretion being applied to assess a defendant’s knowledge of English and language abilities in the United States, Benmaman (2000) points out that how judges can accurately assess language skills has not been fully debated, which is ‘all the more curious given that foreign language educators are still grappling with developing an appropriate methodology for determining language proficiency’ (Failure to appoint an interpreter). And she raises another important question, how high must the language barrier be before someone has a right to a court interpreter? (Benmaman, 2000, Failure to appoint an interpreter). Choolun (2009) states that to avoid conferring an unfair advantage on people ‘with some knowledge of English’, courts have generally limited the use of interpreters to those persons with demonstrably inadequate proficiency’ (p. 24). However, this attitude demonstrates a deep lack of understanding of the nature of language, as noted by Kirby P in Adamopoulos v Olympic Airways SA:

The mere fact that a person can sufficiently speak the English language to perform mundane or serial tasks or even business obligations does not necessarily mean that (s)he is able to cope with the added stresses imposed by appearing as a witness in a court of law.

Coming back to the matter of statutory provisions, Roberts-Smith (forthcoming) takes issue with the vague language used in the available legislation. He explains that, given the lack of a recognised standard, leaving it up to the court to determine what a competent interpreter is clearly constitutes a problem:

enable the party to understand, or participate in, the arbitration, the court may allow a competent interpreter to interpret the arbitration.

10 See, e.g. Gradidge v Grace Bros (1988) 93 FLR 414, 426 (Samuels JA): ‘an accomplished linguist might have a field day hearing and understanding the questions asked in the language of cross-examination and having ample time to consider and then answer through an interpreter.’

11 See, e.g. Galea v Galea (1990) 19 NSWLR 263.

Some statutes express the obligation negatively as a prohibition.\textsuperscript{13} Some statutes make no reference to interpreter standards, for example defining ‘interpreter’ merely as a person who attends court to interpret the testimony of a witness.\textsuperscript{14} Others (more often in criminal proceedings) require a ‘competent’ interpreter\textsuperscript{15}, but in the absence of some recognised standard of competence, the problem in leaving that to the court to determine is obvious. Some recognised standard or qualification is necessary. The only measure presently available is accreditation by NAATI. Thus, some statutes define a qualified interpreter for the purposes of forensic interpreting, as one who is accredited by NAATI (Roberts-Smith, forthcoming).\textsuperscript{16}

\subsection*{2.2 Entitlement to interpreters in criminal and civil proceedings}

As Choolun (2009) notes, the English case of \textit{Kunnath v The State} continues a strong line of authority on the content of a fair trial (p. 23).\textsuperscript{17}

\begin{footnotes}
\item[13] (1) In a proceeding for a child, the Children’s Court must, as far as practicable, ensure the child’s parents and other parties to the proceeding (including the child if present) understand the nature, purpose and legal implications of the proceeding and of any other ruling made by the court.

(2) If the child, parent of a child or other party to a proceeding has a difficulty communicating in English or a disability that prevents him or her from understanding or taking part in the proceedings, the Children’s Court must not hear the proceeding without an interpreter to translate \textit{[sic]} things said in the proceeding or a person to facilitate his or her taking part in the proceeding: \textit{Child Protection Act 1999} (Qld), s 106.

\item[14] \textit{Uniform Civil Procedure (Fees) Regulations 1999} (Qld), reg 8; \textit{Criminal Code 2002} (ACT), s 700.

\item[15] \textit{Magistrates’ Court Act} (Vic), s 40. See footnote 6.

\item[16] An example of this, which recognises the practical situation where a NAATI accredited interpreter is not available, is reg 8 of the Law Enforcement (Powers and Responsibilities) Regulations 2005 (NSW) which deals with interviews by police officers:

\begin{itemize}
\item[(a)] a police officer should bear in mind that a person with some ability in conversational English may still require an interpreter in order to ensure that the person understands his or her legal rights.
\item[(b)] a qualified interpreter should be preferred over a person who speaks the detained person's language but is not a qualified interpreter. A qualified interpreter is one who is accredited to professional levels by the National Accreditation Authority of Translators and Interpreters in the language concerned.
\item[(c)] an interpreter should not be used as a support person.'
\end{itemize}

\end{footnotes}
It is an essential principle of the criminal law that a trial for an indictable offence should be conducted in the presence of the accused ... not simply that there should be corporeal presence but that the accused, by reason of his presence, should be able to understand the proceedings. An accused who has not understood the conduct of the proceedings against him cannot, in the absence of express consent, be said to have had a fair trial.\textsuperscript{18}

This precedent was supported by Lamer CJ in the Canadian case of \textit{R v Tran}, ‘the very legitimacy of the justice system in the eyes of those who are subject to it is dependent on their being able to comprehend and communicate in the language in which the proceedings are taking place.’\textsuperscript{19} In the words of Roberts-Smith, ‘the entitlement of an accused to an interpreter in a criminal trial is an aspect of the right of an accused to a fair trial.\textsuperscript{20} Denial of a fair trial constitutes a miscarriage of justice and a conviction which occurs in those circumstances will be quashed’ (Roberts-Smith, forthcoming). Choolun (2009) adds that ‘this consideration is paramount irrespective of whether the non-English speaker is the accused himself or a witness in the trial’ (p. 23).\textsuperscript{21} In theory, this should also apply to speakers of non-standard dialects, such as Aboriginal English varieties.

In civil proceedings access to interpreters is subject to various considerations, including the need for an interpreter to resolve the issues, the time at which the request for an interpreter is made, the possible prejudice to the interests of the other party caused by delays and costs of interpreting services and ulterior motives for the request (Choolun, 2009, p. 23). In other words, the presence of an interpreter as a matter of natural justice is measured against the supposed gains of the party. Choolun points out that, given the potential consequences of not doing so, Common Law discretion usually favours the use of an interpreter. However:

\begin{itemize}
  \item \textsuperscript{18} \textit{Kunnath v The State} (1993) 4 All ER 30.
  \item \textsuperscript{19} \textit{R v Tran} (1994) 2 SCR 951 975 (Lamer CJ); see also \textit{R v Suraya} (1993) 70 A Crim R 515, 516 (Badgery-Parker J); \textit{Ebatarinja v Deland} (1998) 194 CRL 444, 454 (Gaudron, McHugh, Gummow, Hayne and Callahan JJ); \textit{Gradidge v Grace Bros} (1988) 93 FLR 414, 422 (Kirby P) and 426 (Samuels JA); \textit{R v Scobie} (2003) 85 SASR 77, 109-110 (Gray J); \textit{R v Watt} (2007) QCA 28; \textit{Frank v Police} (2007) SASR 288, [22].
  \item \textsuperscript{20} Or as Deane J observed in \textit{Jago v The District Court of New South Wales} (1989) 168 CLR 23 at 56, the right not to be tried unfairly.
  \item \textsuperscript{21} \textit{R v Johnson} (1986) 25 ACR 433.
\end{itemize}
... certainty and uniformity call for a prima facie legislative right to an interpreter in all Australian states ... in accordance with the recommendations of the Australian Law Reform Commission (ALRC), this right should apply in criminal and civil matters, but be dispensable in the latter if considerations of the abovementioned character take priority (Choolun, 2009, p. 24).

In the United States, no federal constitutional provision guarantees the right to an interpreter. Benmaman (1999) explains that the rights of all individuals, including non-English speaking litigants, in the US system of justice are evoked by citing the Fifth, Sixth, and Fourteenth Amendments to the Constitution.

Although the United States Supreme Court has never directly addressed the existence of a constitutional right to an interpreter in criminal or civil cases, many lower courts have upheld that right in criminal cases. The landmark case in which this view was firmly established was heard in the Second Circuit Court of Appeals in 1970. In the United States ex rel. Negrón v New York, The Spanish-speaking defendant in a state homicide prosecution was entitled to services of a translator, and failure to provide a translator rendered the trial constitutionally infirm (Benmaman, 1999, p. 30).

Benmaman (2000) states that since the Negrón ruling, there has been a vast improvement over previous legislation and case law precedence concerning equal access to due process by linguistic minorities: the Federal Court Interpreters Act of 1978, legislation in several states mandating the presence of interpreters in cases involving individuals with minimal English skills and the required certification of practicing interpreters in twenty-two states (Appointment of an Interpreter). In the Brennan Center for Justice report on Language Access in State Courts, Abel (2009) notes that at least forty states have now joined the Consortium for State Court Interpreter Certification. This is an effort initiated by the National Center for State Courts which gives states access to exams assessing the

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23 434 F 2d 386 (2d Cir. 1970).
24 Id at 386.
25 28 U.S.C. 1827 (1978) Amended 1988. ‘The Act, which mandates the right to a court interpreter in federal criminal cases, requires the presiding judicial officer to utilize the services of the most available certified interpreter or of an otherwise competent interpreter when no certified interpreter is reasonably available. In any action initiated in the U.S. this service must be provided to any party or parties who have difficulty understanding the judicial proceedings because they primarily speak a language other than English’ (Benmaman, 1999, p.30).
competence of their interpreters. Unfortunately, however, the guarantee of a certified court interpreter is only available to speakers of a few languages (Benmaman, 1999). Benmaman laments that decisions regarding the need for interpreter services, and who may serve as interpreter are often arbitrary, despite the steps taken towards establishing minimal interpreter qualifications. Consequently, ‘there are wide inconsistencies in judicial practice, and even more significant, inconsistencies in decisions handed down by appellate court rulings’ (Benmaman, 1999, pp. 30–31).

2.3 Access to interpreting services by Aboriginal people

Ironically, despite the fact that ‘The need for effective communication between Europeans and Australian Aboriginal people was evident from the earliest days of European settlement at Sydney in 1788’ (Cooke, forthcoming), when it comes to receiving the services of a competent legal interpreter, Aboriginal Australians would be better-off if they were immigrants or refugees. The reasons for this are multifaceted and go beyond the scope of this paper, but one is that, unlike immigrants and refugees, Aborigines have always lived in Australia and supposedly understand English. Yet Aboriginal English varieties are pragmatically different to mainstream English. As Cooke (forthcoming) puts it, ‘Unfortunately, there is a long history of reliance on rudimentary English, forms of pidgin English or untrained ad hoc interpreters. This is responsible for a notorious record of Anglo/Aboriginal miscommunication often with tragic results’. This situation is unsettling, considering that Aboriginal Australians are twenty times more likely to come into contact with the criminal justice system than non-Aboriginal people (Findlay et al. 2005, p. 326). Moreover, although a few Aboriginal language centres set up in the 1970s and 1980s in the Northern Territory and Western Australia have been providing some limited interpreting services, ‘the use of interpreters in Aboriginal languages remained sporadic in Australia until the establishment of the Aboriginal Interpreter Service by the NT Government in 2000—a service restricted to the NT’ (Cooke, forthcoming).

2.4 Competence and accountability issues

Competent interpreting in court is fundamental to justice. The lack of competent interpreting in a criminal trial where an accused person does not speak any, or sufficient, English, may amount to denial of a fair trial and result in the quashing of a conviction. Where the inadequacy of the
interpretation is not recognised, the result may be wrongful conviction or acquittal (Roberts-Smith, forthcoming).

In his article ‘Forensic interpreting — trial and error’ Len Roberts-Smith (forthcoming), an ex supreme court justice, gives a historical overview of the issues arising in trials involving people with a language other than the court’s. He discusses the consequences of not employing suitably qualified interpreters, the inadequacy of NAATI accreditation tests, standards of competency and accountability issues. Finally, he considers two complex questions: What can courts do if there are no suitably qualified interpreters in the languages needed? And, how are courts or lawyers to know if an interpreter is competent? (Roberts-Smith, forthcoming). These concerns underlie any analysis of legal appeals on the grounds of incompetent interpreting and are found elsewhere in the court interpreting literature from Australia and overseas, as will be shown below.

Deviations from the norms, such as additions, omissions or register variations (e.g. Hale 1997, 2004, Jacobsen 2002), usually pass unnoticed by the primary participants involved because they cannot monitor the interpreters’ renderings of their own or other participants’ input. Other deviations which can be observed directly, also by monolingual participants, e.g. interpreters’ adoption of indirect speech or their engaging in short dialogues in the foreign language, seem to be tolerated by judges (cf. Jackobsen 2002 in the context of Danish district courts). In short, such deviations are commonplace and are not normally the subject of criticism (Martinsen & Dubslaff, forthcoming).

A recent case study of an interpreting event in a Danish courtroom accurately illustrates some of the recurrent issues in bilingual courtroom settings (Martinsen & Dubslaff, forthcoming). Three factors made this case study possible: firstly, the key witness happened to be a practising interpreter in the languages used in the trial; secondly, this interpreter-witness was present as a member of the audience when the official interpreter was interpreting; and lastly, the judge admitted comments from the audience (who had not been sworn in), including the interpreter-witness, regarding the official interpreter’s performance. It must be emphasised that the official interpreter was an authorised practitioner with several years of experience in her MA-level language, which was not French, i.e. the foreign language in the trial. This is an exceptional incident, and just as extraordinary is the fact that one of the researchers was in the courtroom as a participant observer when it happened: the performance of the official interpreter was disapproved of
by the French speaking members of the audience, so the interpreter-witness in the audience acted as a spokesperson and addressed the judge. Interestingly, the judge was only prepared to accept the criticism after another French speaking member of the audience, who was not a trained interpreter, offered his support.

This study is remarkable in that, although based on a single event, it brings out several points of concern which are commonplace and yet hard to substantiate. The reason why these issues are hard to prove is that only a skilled experienced interpreter would be able to notice that there is a problem. Since many courts do not keep a record of utterances in the original language, there is not normally ‘any material basis on which to evaluate incompetent interpretation’ (Morris, 1993, p. 19). Therefore, a second interpreter would need to be in the courtroom to be able to monitor the appointed interpreter’s performance. This is something Morris (2001) touches on when discussing the Demjanjuk trial:

The defendant was not the only person ... to suffer from the problem of inadequate interpretation which may subsequently, as an integral part of the trial record, be quoted against them ... Nevertheless ... the only extant record of what these witnesses were purported to have said was the English-language version as given by the interpreter and subsequently transcribed as the official record (pp. 9–10).

Similarly, Jacobsen (2002) explains that within the Danish legal system, ‘utterances in a foreign language are not considered evidence and are therefore not entered into the court records in their original form. Incidentally, the records are not verbatim either. As a result, an interpreter’s performance is not documented’ (p. 51). In Australia, reporting services vary from state to state, and some states tender these services out to private contractors. In New South Wales, most Supreme Court proceedings are not sound recorded, but all Local Court and most District Court proceedings are, although some district courts still use court reporters. Normally there is only one interpreter present in a trial, i.e. the one hired to do

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26 Most Supreme Court courtrooms are not currently equipped with sound recording facilities. In courtrooms which do include sound recording capability, recordings are not always of good quality and the interpreter may be difficult to hear. Where simultaneous interpreting is taking place, depending on the number of channels used, the two voices —English and the interpretation— may be coming over the same channel and be difficult to decipher. Another issue that hinders the accurate recording of proceedings by transcript typists is the poor English pronunciation of some legal
the interpreting. When there are two interpreters, usually in major trials, it is unlikely that an interpreter would comment on the poor quality of a colleague’s work during the course of an assignment. This is only likely to occur if there is a complaint about the official interpreter’s performance, in which case, a second interpreter would then be engaged to listen to the court or tribunal tapes, if they are available, and make an assessment.

It is unfortunate that Australian court interpreters do not work in teams, as is the case at international conferences or in the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague. As a rule, when two interpreters are engaged for a trial in this country, one of them is to interpret for the defence, the other for the prosecution. This is an unwise use of resources for two main reasons. Firstly, interpreters are bound by their professional code of ethics, with impartiality being one of their guiding principles, their renditions should be the same irrespective of the side for which they are interpreting, i.e. interpreters do not have a client in the sense that lawyers do (Foley, 2006), they are not advocates for either the defence or the prosecution. It could be said that the interpreter’s client is the interlingual communication process in the interest of justice. Secondly, teamwork would allow court interpreters to take turns every twenty or thirty minutes, as conference and ICTY interpreters do. Teamwork would thus help avoid fatigue and give interpreters ‘the benefit of co-operation, information sharing and professional solidarity’ (Stern, 2001, p. 268); this in turn would improve consistency of the terminology used and interpreting quality in general.

In any case, even if an interpreter did comment on the poor quality of a colleague’s performance, it would be impossible for the other participants to ascertain who is right. A survey of Australian practising lawyers (Hale, 2007a) showed that ‘many evaluate the interpreter’s competence on the coherence of the interpreter’s answers. Interpreters feel the pressure to improve on the style of the original, fearing that if they maintain the convoluted structure, hesitancy and incoherence, they will be judged as incompetent’ (p. 200). And yet, unlike in conference interpreting —where interpreters are expected to improve on the original whenever possible—, in legal interpreting it is essential to reproduce the style, i.e. register and tone, of the original utterances, including features such as intonation, interpreters (Personal communication with Tanya O’Dea from the Reporting Services Branch of the Attorney General’s Department of New South Wales, August 5 and October 21, 2009).
hesitation markers, fillers and hedges (Hale, 2007a). In the case of witnesses, for instance, the reason for this is so that they can be judged on their own style, rather than the interpreter’s. Research in forensic linguistics has repeatedly found that subtle discoursal features in courtroom questions can impact on witnesses’ answers (Loftus, 1979); meanwhile, speech style in witnesses’ answers can impact on jurors’ evaluations of credibility, competence and trustworthiness (O’Barr, 1982), as can the witnesses’ orientations in their narratives (Conley and O’Barr, 1990). Correspondingly, research into court interpreting has found that interpreter changes of what they regard to be superfluous, such as discourse markers or politeness markers, can have an impact on the understanding of those utterances by the target language listeners (Berk-Seligson, 1990; Hale, 2004). Chapter 4 expands on this topic when discussing the notion of accuracy in legal contexts.

Interestingly enough, the Danish judge in the cited study had originally believed that she could assess the interpreters’ competence based only on the coherence and fluency in the Danish rendition. The judge answered two different case-based questionnaires about the competence of the interpreter, both regarding criminal cases conducted three months apart in the same District Court. There was a notable difference in the way the judge handled the assessment task about her perception of the two interpreters’ performance and her rating of interpreting competence before and after the incident described.

The unusual incident ... had a clear effect on the judge’s perception of her monitoring ability. She had become aware of the fact that the common practice of relying exclusively on the interpreter’s renditions into Danish did not enable her to form an adequate impression of the interpreter’s competence. It follows from her restricted monitoring ability that the transparency of the proceedings, for which she is responsible, is severely restricted too (Martinsen & Dubslaff, forthcoming).

The degree of ignorance of the pivotal role of language interpreting at different phases of the judicial process is such that interpreters themselves often do not realise their skills are not adequate for legal interpreting work, as the Danish case study confirms. The authors of the study state that, in line with the interpreter’s lack of awareness of her inadequate bilingual competence, ‘it must be assumed that she was not aware of her responsibility for her unreliable performance either’ (p. 26). This was an authorised interpreter, therefore, she would have been familiar with the code of ethics. Significantly, her unethical behaviour confirms that ‘mere acquaintance with a code of ethics does not
guarantee that interpreters can apply the code to practice (e.g. Hale, 2008, Mikkelsen, 2008)’ (Martinsen & Dubslaff, forthcoming). Another point backed up by the study is that courts are not prioritising appropriately qualified and specialised interpreters, for ‘there is no shortage of authorised interpreters of French in Denmark’ (p. 25). This lack of knowledge by the different parties involved, especially by the powerful participants — since they are the decision makers—, is damaging to the interpreting profession, the legal system and ultimately, to the administration of justice. At best, the general view is that a person requiring interpreting services might be disadvantaged if their interpreter is not sufficiently competent. Yet this view fails to acknowledge the fact that in such cases it is the administration of justice, the legal system itself, that suffers (Abel, 2009; Hale, forthcoming).

2.5 The paradox surrounding quality in forensic interpreting

Judge Hill ... also found that ‘management ignored or abandoned’ the seriousness of the issue, minimized the complaints that were coming in about the interpreters, and viewed what was a key ‘access to justice’ matter as a labour-relations problem (Blatchford, 2005).

When the Australian legal system had to deal with a large number of Ukrainian witnesses brought from overseas during the War Crimes Prosecution between 1986 and 1993, it found itself confronted with unexpected linguistic and cross-cultural problems, despite its long term experience with court interpreting (Stern, 2001). This became particularly damaging during the court hearings and revealed the national courts’ inability to work effectively with non-English speaking witnesses. In discussing the practices adopted by the ICTY when investigating and hearing cases of war crimes committed in the former Yugoslavia, Ludmila Stern (2001) argues that the ICTY’s setting and approach helped them preempt and overcome linguistic and cross-cultural issues similar to those experienced during the Australian war crimes investigations and trials. One crucial factor contributing to the ICTY’s interpreting success is that ICTY interpreters are given ample opportunity to prepare for cases; this ‘contrasts strikingly with the Australian practice, which, by denying interpreters access to case-related information, denies them the opportunity to adequately prepare for their assignment’ (Stern, 2001, p. 267).

Berk-Seligson (2008), Christensen (2008), Hale (forthcoming) and Morris (2008) concur that there is a major contradiction between the courts’ high expectations and the limited
support for establishing the necessary prerequisites to meet those standards, such as rigorous pre-service university training, adequate working conditions and professional rates that are commensurate with their responsibility and the difficulty of the task. Why courts and governments are not addressing the issue is hard to fathom. While the most obvious reason is that they do not consider the problem important enough to take any action, it is also possible that they are failing to see the connection (Hale, forthcoming). Hertog et al (2007) believe that, as was the case for older established professions, an ‘unholy trinity of, often unnecessary, fear has hindered and still hinders progress’ (p. 164), since governments may be concerned about having to pay professional fees to qualified practitioners, unqualified interpreters may worry about their livelihoods, and educational institutions may be anxious about not drawing enough candidates with the high level of bilingual competence required.

Clearly, the problem surrounding inadequate interpreting is systemic, and the academic view (Choolun, 2009; Eades, 2008; Lee, 2009; Stern, 2001; and others) is that it is the system’s responsibility to take the necessary measures to meet the high standards required for the proper administration of justice. This includes the provision of high-calibre interpreting for non-English speakers, sign language users and speakers of Aboriginal English varieties, and adequate working conditions and appropriate remuneration for interpreters. A fine example of the system’s failure is its lack of sensitivity to the specific needs of the interpreting profession’s Aboriginal constituency. This can be seen from Cooke’s (forthcoming) observations that, while in 1986 the Standing Committee of Attorneys-General set guidelines governing the use of interpreters in the Australian legal system it did so ‘without input from Aboriginal languages interpreters or particular consideration of their situation’. Amongst other things, the guidelines required that interpreters ‘be independent of litigants’ (CAGD, 1991, 2.1.2):

Yet this is generally an impossible situation for Aboriginal interpreters who would personally know most, and be related to all, members of their speech community—with consequent rights and obligations under customary law according to the kinship category. It is obviously unsatisfactory that the situation of Aboriginal interpreting was neither recognised nor addressed in this determination (Cooke, forthcoming).
In short, there are various subtle ways in which interpreting services can be inadequate in different legal contexts, and it is essential to be aware of them. Amongst other things, inadequacy may be the result of inertia from the police or court — either failing to appoint an interpreter or not appointing the right interpreter —, shortage of qualified practitioners, and tensions between interpreting ethics and Aboriginal customary law (Cooke, forthcoming). I will comment on some of these issues in Chapters 3 and 4, with a focus on the consequences of incompetent interpreting.
CHAPTER 3

A worldwide problem through an Australian looking glass

3.1 The importance of professionalising legal interpreting

In Australia, where legal interpreting remains an ad hoc unregulated activity, there is a lack of commitment on the part of many interpreters, who use their background and knowledge of a second language to work as ‘interpreters’ to complement the household income or while completing unrelated studies (Ozolins, 1998). There is also a lack of professional identity, with interpreters working as independent practitioners rather than as part of a collegial group (Hale, 2004). Therefore, it is hard for legal practitioners working with interpreters to perceive them as professionals. This situation is frustrating for the adequately skilled and qualified legal interpreters, who generally do not feel recognised or respected in the career path they have chosen and who have to bear the burden of their colleagues’ lack of professionalism. Hale (forthcoming) finds it striking that despite the current conditions ‘there are still many interpreters in the market who are highly trained, competent and professional, who mostly go unnoticed’.

Advocating for the professionalisation of legal interpreting is advocating for a fairer and more trustworthy legal system, where police, barristers, judges, jury and tribunal members are not impaired in the performance of their duties every time an appellant, suspect, witness or defendant relies on the services of an interpreter. Berk-Seligson’s (2000) analysis of forty-nine US appellate cases from 1965 to 1999 showed that ‘when police make use of unqualified interpreters during their investigative interviews or interrogations, frequently the Miranda rights of detainees are jeopardized and issues of hearsay also arise’ (p. 212). Furthermore, regardless of whether the interpreter who interprets during the interrogation of a detainee in a police station is qualified and experienced or a ‘bilingual’ officer or relative, the transcript that is produced can be used as evidence at trial (Berk-Seligson, 2000). Whether lawyers and judges realise that a chain of interpreters and translators may have been responsible for the transcripts they are reading would depend on
individual cases. But if they are aware, ‘do they stop and question whether or not all of the links in the chain were professionals in the field?’ (Berk-Seligson, 2000, p. 232).

My own anecdotal experience in New South Wales courts is that lawyers often do not differentiate between a standard transcript from a monolingual police record of interview and a transcript which records the suspect’s utterances or signs as rendered by an interpreter. Lawyers will often dwell on a particular turn of phrase or inconsistency without a hint of suspicion that in fact that might be an interpreting issue and certainly without inquiring into the qualifications of the interpreter engaged at that early phase of the process. As Berk-Seligson (2000) puts it, while the role of legal interpreters has become relatively formalised ‘at the tail end of the process’, i.e. in the courtroom, no such guarantee exists for those in need of interpreting services ‘at the front end of the judicial process, where the crime scene and police station hold centre stage’ (Berk-Seligson, 2000, p. 212).

If we consider the logical argument that, ‘Engaging unskilled people to provide interpreting services means building a weak link into the legal process’ (Colin and Morris, 1996, p. 23), we realise how often the administration of justice is compromised whenever Aboriginal, foreign or sign languages are part of a legal process in our country. When poorly qualified interpreters are used at the interview stage, what suspects say may be rendered into the official language inaccurately, and when this happens, ‘statements attributed to them through faulty interpreting may come back to haunt them at subsequent stages of the judicial process’ (Berk-Seligson, 2000, p. 233). A review of Australian judges’ rulings on appeals will provide some insight into judges’ understanding of the nature of language, interlingual interpreting issues and the role of forensic interpreters at different phases of the legal process. This is important because for change to take place it has to come from the powerful participants. If the powerful stakeholders are not aware of what the core issues are then nothing will ever improve.

3.2 Inadequate interpreting standards

It seems apposite to begin this section with Hale’s (2007a) articulate description of the vicious circle surrounding incompetent interpreting in the Australian legal system:
Pre-service formal training is not a requirement for interpreters in Australia and therefore they are given no preference or monetary incentive based on their qualifications ... If those members of the legal system who work with interpreters do not demand high standards and support adequate training and remuneration, little will ever change. Poor interpreting will inevitably impact on the work of lawyers and judicial officers and ultimately on the service of justice (pp. 200–201).

On that note, the director of the National Association of Judiciary Interpreters and Translators in the United States, Isabel Framer (cited in Laver, 2007), describes the implications of inadequate interpreting services throughout the judicial process. She stresses that not only is it crucial for interpreters to obtain training and certification, but the judiciary ought to become familiar with the role of the interpreter and how unregulated interpreter services can have an adverse impact on judicial proceedings (p. 21). Eades’ (2008) research in the context of second dialect speakers elaborates on this argument.

Linguistic work which examines speakers of traditional indigenous languages shows the need for well-trained interpreters, as well as a legal system that understands not only how to work with interpreters, but also the significance of considerable cultural differences in the effective use of interpreting (Eades, 2008, p. 185).

Benmaman’s (2000) paper ‘Interpreter issues on appeals’ focuses on the most important US interpreter-related cases of the past twenty years with particular emphasis on those of the past decade. She explains that failure to appoint an interpreter, something which still occurs today, was the most common grounds for appeals during the 1970s and early 1980s. The author then provides a list of decisions where the judgments of convictions were reversed and the cases remanded with specific instructions (Failure to appoint an interpreter). The Alejandro Ramírez case in 2000 is an example of the quashing of a conviction due to incompetent police interpreting in the United States. The Ohio Court of Appeals ruled that the defendant could not possibly have understood the proceedings, e.g. ‘you have the right to the advice of an attorney’ was interpreted into Spanish as ‘you have a right-hand turn to give a visa to a lawyer’ (Laver, 2007, p. 20). A few years later, across the Atlantic, the editor of the Irish Translators’ and Interpreters’ Association’s Bulletin, Elizabeth Hayes, remarked, ‘These are difficult times for qualified, competent interpreters in Ireland ... Incompetent, unqualified bilingual people ... are being employed to do work that should be reserved for professionals. The reputation of all our interpreters is at stake.
here’ (Hayes, 2007, p. 2). Meanwhile, a Scottish case was deserted *pro loco et tempore* on the second day when the unqualified Polish interpreter admitted her inexperience in court (Bynorth, 2008). The defence lawyer noted that this was the third trial in which he had been involved that had been deserted due to incompetent interpreters. Apropos of this situation, the Grotius programme of the European Union Justice and Home Affairs Directorate funded a project in 2001 ‘to establish equivalent standards for legal interpreting and translation ... The participant countries were Belgium, Denmark, Spain and the United Kingdom and funding has just been awarded to implement its recommendations’ (Laver, 2007, pp. 21–22).

### 3.3 Shortage of qualified interpreters

The shortage of qualified court interpreters (Framer, 2007; Laver, 2007; Choolun, 2009; Cooke, forthcoming), especially in rare languages, is a worldwide reality. There seems to be enough evidence, both anecdotal and scientific (Anker, 1992; Benmaman, 2000; Berk-Seligson, 1990, 2002; Cooke, forthcoming; Hale, 2007a, forthcoming; Roberts-Smith, forthcoming; Wennerstrom, 2008), suggesting that serious mistakes are being made that could lead to miscarriages of justice in Common Law countries. Cooke (forthcoming) observes that, while several educational institutions and language centres in Western Australia, South Australia and the Northern Territory offer formal training for Aboriginal language interpreters at the paraprofessional level, ‘there are only three Aboriginal language interpreters accredited at the professional level. Interestingly, no judge has forced the issue by stopping a trial because a professionally accredited Aboriginal language interpreter was not available’.

In the United States the qualifications of interpreters used to translate rare languages vary widely. In most cases, they are not trained in interpretation. For thirteen state-certified languages in California, the state administers a stringent test that nine out of ten people fail, but for rare languages they have to resort to finding someone with the highest education level possible (Kim, 2009). Framer (2007) emphasises that the shortage of qualified court interpreters affects every government agency in their ability to carry out their job. The problem was widely reported in the media in 2007 and several senators highlighted their concern in legislative hearings (Romero, 2008). In Los Angeles, arguably the most popular centre for judicial interpreters, court officials sometimes struggle to find
speakers of Chuukese, Marshallese, Mexican Sign Language or Q’anjob’al, a Mayan variant. Officials recently had to resort to unusual remedies when they were unable to find anyone in the country who could interpret for an indigenous migrant from Mexico (Kim, 2009). This case illustrates the magnitude of the problem while, on a different level, it also highlights challenging cultural issues reminiscent of those found in Aboriginal language interpreting (Cooke, 1995, 1996, 1998). The situation in the United Kingdom is not dissimilar: the National Register of Public Service Interpreters (NRPSI) only has about 1000 interpreters registered, as there is no obligatory state registration system (Laver, 2007). ‘The leading trade union, Amicus, has recently warned that the failure to use qualified interpreters is resulting in justice failures and causing serious malpractice by police and court authorities’ (Laver, 2007, p. 21).

3.4 Conflict between quality and expense

The view that there should be a balance between a defendant’s constitutional rights and public concern with economic administration of criminal law is a recurrent one. This is clearly expressed in the following quote from a US appellate review27:

Use of courtroom interpreters generally involves a balancing of the accused’s constitutional rights to witness confrontation and due process against the public’s interest in the economical administration of the criminal law. If the government cannot afford to provide due process to those it prosecutes, it must forgo prosecution (Cited in Benmaman, 1999, p. 33).

Greg Drapac, who headed the Los Angeles court’s interpreter assignment operation from 1997 to 2005, and Michele Oken, who heads the Superior Court’s interpreter division, state they have never had a case dismissed because an interpreter could not be found. However judges have dismissed cases when the expense of providing an interpreter was considered exorbitant given the offence (Kim, 2009). On the other hand, in the Florida case of a Tigrinya speaking defendant from Eritrea on murder charges an interpreter was flown from New Jersey. Money from the state court’s revenue trust fund paid for the interpreter’s $600 daily fee, airfare, meals and accommodation (Alanez, 2009).

27 US v Quesada Mosquera (1993, ED NY) 816 F Sup.
Some options to approach the shortage of qualified interpreters would be to implement non-language specific courses in legal interpreting for rarer languages, video linked interpreting or flying top interpreters from other areas, as in the case cited above. While the latter option would be costly, it would be worth it for major trials. Expense is not an issue when it comes to expert witnesses, for example. If we are to move forward, any approach to this dilemma must begin by recognising the need for improvement in legal interpreting standards, the importance of prioritising the most qualified interpreter available every time and appropriate remuneration for qualified interpreters. If this last point is not implemented, good qualified interpreters will simply not be available (Phelan, 2007, p. 4).

In jurisdictions such as South Africa, where there are eleven official languages, the problem is compounded, as manifested in ‘a threat to strike by Western Cape translators [sic] that would have brought many trials to a standstill’ (Laver, 2007, p. 20). A further consideration to be taken into account by governments is that ‘the use of untrained and unqualified interpreters may lead to ... thousands of dollars wasted on misleading investigations and retrials’ (Framer, as cited in Laver, 2007, p. 22).

3.5 International interpreter issues on appeal

Benmaman’s study of US interpreter issues on appeal (2000) revealed that appellate issues have mainly focused on procedural errors, ‘matters for which both the trial court and counsel are ultimately responsible ... even when the actual performance of the interpreter in court is questioned on appeal, the higher courts have not been overly impressed with the arguments presented’ (Introduction). The author points out that only occasionally have the two major standards of review, abuse of discretion and demonstration of plain error28,

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28 ‘Plain Error Doctrine: If an error is not objected to at trial, an appeal may be sought under the plain error doctrine. This standard requires a showing that the error was egregious, that it affected substantial rights, represented a miscarriage of justice, or resulted in an unfair trial. This standard requires greater substantiation than the standard applied to objections made during trial. In general, reversals based on plain error are seldom granted.

Abuse of Discretion: The defence must make a timely and specific objection during the proceedings which is noted on the record. Proof must be presented to the trial court that a problem has occurred with an interpreter-related issue which is prejudicial to the defendant’s case. This may be a procedural error related to the need and presence of the interpreter, or to the interpreter’s actual performance. Once proof is presented, the trial court must rule accordingly. A presiding judge can take corrective
warranted a judgment of reversible error (Benmaman, 1999, p. 32), and that the ‘critical
determination depends on whether discrepancies affect material matters and issues central
to the case’ (Benmaman, 2000, Accuracy of interpretation).

The above was confirmed by most of the appeals sifted through during the data collection
phase and selection process of my study. In Saraya\textsuperscript{29}, however, the New South Wales
Court of Criminal Appeal held that the interpretation of the appellant’s evidence had been
so inadequate as to amount to denial of a fair trial:

Where an accused person is unable adequately to give evidence in the English language, the right
to the use of an interpreter for the purpose of his giving evidence must ... be regarded as an
essential incident of a fair trial; and the trial will be unfair if an interpreter is not provided: \textit{Dietrich
v The Queen} (1992) 177 CLR 292. Equally, it would be unfair if the interpreter lacks the skill and
ability to translate \textit{sic} accurately the questions asked by counsel and the answers given by the
accused person (Roberts-Smith, forthcoming)\textsuperscript{30}.

The 2002 \textit{Pagoada} appeal in Kentucky illustrates the difference that competent
interpreting can make. Santos Adonay Pagoada had been sentenced to forty years on a
murder conviction (Framer, 2001). After a successful appeal ‘for ineffective assistance of
counsel that went hand in hand with the use of untrained and unqualified interpreters’
(Framer, n.d.), Mr Pagoada won a new trial, in which he was provided with two federally
certified interpreters. He was found guilty of reckless homicide and was released from
prison for time served.

Similarly in Canada, a trial was declared a mistrial due to the court-appointed interpreter’s
incompetence. While hearing the appeal of conviction in 2005, Justice Casey Hill of
Ontario Superior Court heard evidence that from 2001 through early 2005 unaccredited
interpreters had worked thousands of hours interpreting at trials and contesting ‘bail
hearings and consent releases and guilty pleas and sentencings’ at both the Ontario Court
and Superior Court levels (Blatchford, 2005). Considering that Ontario Court is one of the

\textsuperscript{29} \textit{Saraya} (1993) 70 A Crim R 515.
\textsuperscript{30} \textit{Saraya, Ibid} (per Badgery-Parker J with whom Kirby ACJ and Loveday AJ agreed) at 516.
busiest and most multicultural, the judge concluded that, ‘it is statistically inevitable that there exists as yet undiscovered miscarriages of justice ... While gross mistakes in translation can be easily identified, subtle deficiencies, words and inaccurate interpretations, even few in number passing under the radar screen, risk wrongful conviction’ (Blatchford, 2005). In April 2008, a class action was instituted in the Ontario Superior Court of Justice against the Ministry of the Attorney General of the Province of Ontario (Class action, 2008). The action arose out of the province’s failure to provide competent interpreters in court proceedings and was on behalf of all individuals who have suffered because of incompetent interpreters (Class action, 2008).

It is essential to bear in mind that only the most obvious cases make it to the appeal stage; these are the ones that have been cited in the literature from around the world and the ones which I have found for my analyses. However, most cases with an inadequate standard of interpreting simply go unnoticed, with unknown consequences. As Salaets & Van Gucht (2008) note, ‘the other parties ... are dependent on the interpreter for translation purposes, hence they will probably only be aware of the most blatant misconduct’ (p. 283). This is another reminder of the ‘vital need to keep an accurate record of all utterances made in a trial in the original language’ (Morris, 2001, p. 9).

Apart from the issue of judicial review and appeals procedures, the record of proceedings may be cited in later cases and become part of the record thereof. There is therefore a danger that undetected and uncorrected errors may be perpetuated, potentially calling evidence into doubt (Morris, 2001, p. 9).

In light of the above comments, a short description of the subtle linguistic issues that can lead to inaccurate interpreting, which mostly go undetected, follows.

3.6 The notion of accuracy in legal interpreting contexts

Benmaman (2000) explains that, since there is ‘no precise criterion for an “accurate translation”, appellate review must focus on how the error affected the ability to present a defense’ (Accuracy of Interpretation). She goes on to say that interpreting errors are subject to review ‘if the record shows that a witness’s answers are unresponsive or confusing and if objections to the interpretation are placed on the record’ (Accuracy of
Interpretation). However, it may well be that an incoherent and poorly structured answer in the language of the courtroom is a perfectly accurate rendition by the interpreter, who may have maintained both the content and the style of the original utterances. It cannot be stressed enough that it is not the interpreter’s responsibility to rephrase long, convoluted, ambiguous or otherwise unclear questions and answers, just as it is not their role to raise or lower the register or level of formality of the original utterances. It is up to the interested parties, e.g. the barrister or witness, to rephrase poorly structured questions or ask for clarification (Hale, 2007a).

In addition to research conducted by Duke University\(^{31}\) (Conley & O’Bar, 1990) which looked at how witnesses with different speech styles were assessed by jurors, more recent experimental research in court interpreting (Hale, 2004) confirmed that mock jurors rated witnesses differently depending on their speech style, particularly in assessing credibility. The results showed that when both the content and style of the original utterances were maintained in the interpretation, a very similar rating as the original was achieved. Unfortunately, however, this research also found that interpreters tended to use their own style in their renditions rather than the witnesses’. Style here refers to register and tone, including features such as intonation, hesitation markers, fillers and hedges. The implication of this unawareness on the part of interpreters who change the original style arbitrarily is that witnesses will be judged on the interpreter’s style rather than their own. This can sometimes work in favour of, sometimes against the witness. Either case is undesirable, as the decision makers’ reaction is not based on the style of the original testimony. A further example of subtle linguistic changes in interpreters’ renditions is the omission or addition of politeness markers and discourse markers. As mentioned earlier, while the interpreters’ delivery in the target language may appear seamless to legal practitioners, these omissions can have pragmatic significance on the message and impact on the understanding of those utterances by target language listeners (Hale, 2004; Berk-Seligson, 1990).

\(^{31}\) Research conducted by Duke University showed that witnesses with different speech styles were assessed differently by jurors on issues of credibility, competence, trustworthiness and intelligence. They called the speech style that was predominantly used by unprofessional witnesses from lower socio-economic backgrounds, ‘powerless’, and the style predominantly used by professionals, ‘powerful’. They found that those with the powerful style were consistently rated as more competent, more trustworthy and more credible than their counterparts (Conley & O’Bar, 1990).
To fully understand the notion of interpreting accuracy in legal contexts, it helps to view language in terms of an inverted pyramid with three different levels, as in Figure 1 below: the word level at the bottom, the sentence level in the middle and the discourse level at the top. There are three corresponding approaches to interpreting: literal (word for word), semantic (sentence by sentence) and pragmatic (discourse). The reason why a word-for-word or sentence-by-sentence translation/interpretation is usually inaccurate is that both literal and semantic meaning is context free, whereas pragmatics refers to ‘the meaning of words in context, the appropriate use of language according to tongue, culture and situation ... the intended meaning behind the surface, the semantic meaning’ (Hale, 2004, p. 5). If they are to interpret accurately, interpreters must first understand the message at the discourse level, including the speaker’s intention (e.g. a barrister’s intention behind his or her questions in cross examination is often to confuse, trick or discredit the witness, rather than obtaining information), and then work their way down to the word level to chose the best equivalent in the target language. This is known as the top down approach (see Hale, 2007b, pp. 22–23, for a discussion on the different approaches). Doing the opposite, i.e. interpreting word for word without listening to or understanding the overall meaning and intention first, will rarely work. It is virtually impossible to find the right equivalent for a term in another language out of context. If this were possible, a thorough knowledge of two languages would suffice to be an interpreter.

**Figure 1.** Top down approach to language and interpreting (Hale, 2003)
Alarmingly, several studies (Berk-Seligson, 1990; Hale, 1996a, 1996b, 2001; Rigney, 1999) have found that interpreters often interpret the semantic, ‘fixed context-free meaning’ (Cook, 1989, p.29) only, and misunderstand or do not convey the pragmatic meaning. Hale (2004) gives the example of swearwords, for which a semantic translation may not have the equivalent intended meaning (that of insulting) and force (how insulting the swearword is) to the original. So to interpret this accurately, a pragmatic equivalent must be used, which may be entirely different semantically to the term in the original language. The nonsense produced by translation tools is another example that interpreting word for word or sentence by sentence does not work. This is also why having access to background materials is crucial for interpreters. Significantly, the judges’ and barristers’ unawareness of these basic principles is reflected in their persistent requests that the interpreter ‘translate (sic) verbatim’. For a detailed description of how Speech Act Theory (put forward by Austin in 1962 and later developed by Searle) applies to legal interpreting in a very practical way, see Hale (2004, pp. 5–14).

3.7 Concluding remarks

As stated in the introduction, my study will look at appeals on the grounds of incompetent performance on the part of practicing, paid interpreters in the relevant languages. It is these less obvious cases that are likely to pass under the radar. The study will analyse the appeals, quantify them and describe how they are dealt with. It will then comment on the implications of these results. One of the key elements of the analysis will be looking at the discursive practices found in judges’ rulings and how competent interpreting is defined in the rulings. Such an analysis will give us some indication of the judges’ understanding of interpreting issues and notions of accuracy. It will also shed light on the practical and theoretical knowledge and skills required of professional interpreters to be able to perform adequately in legal settings. This, in turn, will contribute to show why there is a need for improvement in legal interpreting standards and the avenues of entry into the profession in Australia.
CHAPTER 4

Interpreting quality issues on appeal

4.1 Methodology

A LexisNexis nationwide search was conducted to find appellate cases in which the standard of interpreting was cited as one of the grounds for appeal. The initial search was done in March 2009 and went from December 2008 back to 1991, year in which the Access to Interpreters in the Australian Legal System Report (CAGD) was published. The cases were searched by using the key word ‘interpreter’. LexisNexis is the same database used by Berk-Seligson (2000) in her analysis of forty-nine US appellate cases from 1965 to 1999, the results of which were published in her article, ‘Interpreting for the police: Issues in pre-trial phases of the judicial process’. The Australia-wide search revealed a total of 279 cases. Added to these were eight cases found through the Australasian Legal Information Institute (AustLII) website that had not come up in the LexisNexis search. Of a total of 287 appeals that emerged through the combination of both search procedures, 119 proved to be relevant. This is because the criteria applied was restricted to appeals in which the official interpreter’s standard of interpreting at the hearing or trial was in question and did not include cases in which one of the following points was the basis for a ground of appeal:

• no interpreter was booked for the hearing, trial or interrogation when the person involved needed one
• an interpreter in the wrong language or dialect was booked
• the record of interview was conducted through bilingual police officers, family members or other ad hoc interpreters.

The data used for my analysis is made up of criminal appeals and appeals against the Refugee Review Tribunal. While the grounds for incompetent interpreting stated in these two types of appeals are not necessarily different, two representative examples are provided below, for illustration purposes.
Example of grounds stated in criminal appeals:

• the trial miscarried as a result of poor quality of the interpreting service provided to the applicant by the court appointed interpreter
• the deficiencies in interpretation were such that the applicant was unable to give an effective account of facts vital to his defence.

Example of grounds stated in appeals against Refugee Review Tribunal decisions:

• the standard of interpretation at the Tribunal hearing was so inadequate that the applicant was effectively prevented from giving evidence at the hearing
• whether errors made by the interpreter at the Tribunal hearing were material to the conclusions of the Tribunal adverse to the applicant.

Before analysing my data, I will outline a brief summary of the Australian judicial system, by way of background. The workings of the Refugee Review Tribunal, as well as some information concerning the role of interpreters in these hearing, are also described below. Appendix 1 includes a flowchart with more detailed information on the Australian judicial system.

4.2 Overview of the Australian judicial system

The hierarchy of Australian courts involves the federal level and the state or territory level. Within each state the courts are divided into three levels: lower courts, intermediate courts and the Supreme Court. Likewise, the two federal territories also have their own courts, similar to the state courts, but without the intermediate level. Decisions made at one level can be appealed against at a higher level. The two main federal courts are the Federal Court and the Family Court, and there are various specialised federal tribunals, such as the Industrial Relations Commission. Sitting over all the courts is the High Court of Australia.

The names of the lower courts vary according to the state and possibly the function being performed, e.g. if a child is being charged, the normal Magistrates’ Court will sit as the Children’s Court. These cases are usually presided over by a magistrate — i.e. there is no jury —, who hears minor civil and family law cases, traffic and local council breaches, minor criminal cases and committal proceedings. Lower courts are limited in the size of
the penalty they can impose in criminal cases or the amount of money they can award in civil cases. The names of the intermediate courts also vary between states. They deal with more serious criminal offences and with more complex or expensive civil disputes. Criminal and civil cases are heard by a judge and jury. Supreme Courts deal with major civil cases. In criminal law, to some extent the Supreme Court’s powers overlap with those of the intermediate courts, so a serious criminal offence could be heard either in the Supreme Court or a local intermediate court, depending on various factors. A major function of the Supreme Court is to handle appeals from other courts. Often appeals are heard first by a single judge. A ‘Full Court’ or ‘Court of Appeal’ (civil matters) or ‘Court of Criminal Appeal’ (criminal matters) usually consists of three judges sitting together.

The Federal Court deals with federal law, such as the Trade Practices Act and bankruptcy. It also hears appeals from the specialised federal tribunals and the two territories. The Family Court of Australia deals directly with family law matters. The High Court of Australia sits on constitutional disputes and can also hear appeals from all other courts. A High Court decision is final (The Australian judicial system, n.d.).

### 4.3 Refugee Review Tribunal hearings and interpreters

In Australia, the Refugee Review Tribunal (RRT) reviews decisions about protection visas within the Immigration and Citizenship portfolio. The jurisdiction, powers and procedures of the RRT are set out in the Migration Act 1958 and in the Migration Regulations 1994. Appeals against RRT decisions can be made to the Federal Magistrates Court. Judgments of the Federal Magistrates Court dismissing an application for review of a decision of the RRT (second respondent) affirming a decision of a delegate of the Minister for Immigration (first respondent) to refuse the appellant a protection visa can be appealed against at the Federal Court. The last court of appeal is the High Court of Australia.

In 2007–08, interpreters were requested in 89% of RRT hearings (MRT & RRT, 2008, The Tribunals at a glance); in 2006–07, they were requested in 92% of hearings (MRT & RRT, 2007, The Tribunals at a glance); and in 2005–06, in 90% of hearings (MRT & RRT, 2006, The Tribunals at a glance). Given these statistics, and the fact that Tribunal hearings are

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32 See footnote 5 for Migration Act 1958 (Cth) s427(7) regarding interpreters.
sound recorded and the tapes readily available to applicants, it is little wonder that the majority of appeals on the grounds of poor interpreting came from the RRT. It should be noted, however, that the Migration Review Tribunal (MRT) and the RRT are required to publish decisions considered to be of ‘particular interest’ by the Tribunal’s Principal Member and the decisions made available to the public, i.e. the ones used in this study, only represent up to 40% of decisions made (Decisions, n.d.). This cross section of decisions is published on the AustLII website, which states that ‘before 1 June 1999, all Tribunal decisions were published ... A separate Tribunal database is not available’ (Refugee Review Tribunal of Australia, n.d.).

A refugee is defined by the 1951 United Nations Convention relating to the Status of Refugees, as amended by the 1967 Protocol, as a person who:

... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence, is unable or, owing to such fear, is unwilling to return to it (MRT & RRT, 2007, p. 23).

The Tribunal Member’s task is to determine whether an appellant is a Convention refugee and whether they have a ‘well-founded fear of being persecuted’ on the basis of the appellants’ account of their life story. The system is not adversarial and applicants are allowed to present their evidence more freely than in court. However, presentational style is of paramount importance in the evaluation of credibility, and therefore interpreters’ renditions must reflect both the content and the style of the original utterances, just as in the courtroom (Hale, 2007b, p. 85). In other words, interpreters working in the Refugee Review Tribunal are expected to perform the same role, and are bound by the same code of ethics, as court interpreters (MRT & RRT, 2007, p. 8).

After conducting a study of 193 Immigration Court hearings, Deborah Anker (1992) described the detrimental effects of poor interpretation on asylum cases in the United States:

[F]oreign language interpretation regularly suffered from inaccuracy, and other problems which affected the applicant’s ability to convey subjective fear, or to recount the basic facts of her case in
an intelligible form. In many cases interpretation errors had a clear and substantial effect on a judge’s decision to deny asylum’ (p. 509).

Speaking about interpreting in convention refugee hearings in New Zealand, Fenton (2004) stresses that an interpreter’s inaccurate rendition of an appellants’ account of their life story ‘may bear heavily on a positive or negative outcome for the refugee’ (p. 263). Unlike in criminal cases, in Tribunal hearings the onus of proof lies with the appellant, ‘The success of applications depends largely on the success of the verbal communication process in which the claimants have to convince the authority that the definition of the Convention applies to them’ (Fenton, n.d., Introduction). Similarly, in her analysis of how asylum seekers’ persecution stories are represented in US court opinions Wennerstrom (2008) states that ‘miscommunications ... may take on extreme proportions because they can distort an applicant’s story and raise doubt in a judge’s mind about credibility’ (p. 26). And she adds that, ‘One source of miscommunication is faulty foreign language interpretation’ (p. 26).

4.4 Analysis

Given the time limitations of this small-scale study, the data had to be further reduced. Of the 119 appeals from 1991 to 2008, the most recent fifty, from 2008 to 2006, were selected for study. It should be mentioned that not all 2006 appeals were included, as I arbitrarily stopped counting when I had reached fifty. Table 1 shows the number of appeals allowed and dismissed in this period. We can see that appeals on the basis of incompetent interpreting increased by 27.7% between 2007 and 2008.

<table>
<thead>
<tr>
<th>Date</th>
<th>Total appeals</th>
<th>Allowed</th>
<th>Dismissed</th>
</tr>
</thead>
<tbody>
<tr>
<td>2008</td>
<td>23</td>
<td>4</td>
<td>19</td>
</tr>
<tr>
<td>2007</td>
<td>18</td>
<td>3</td>
<td>15</td>
</tr>
<tr>
<td>2006</td>
<td>9</td>
<td>1</td>
<td>8</td>
</tr>
</tbody>
</table>

The fifty appeals selected came from New South Wales, Northern Territory, Queensland, Victoria and Western Australia. Table 2 shows the number of appeals allowed and dismissed by state.
Table 2. Appeals allowed and dismissed by state

<table>
<thead>
<tr>
<th>Place</th>
<th>Total appeals</th>
<th>Allowed</th>
<th>Dismissed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Brisbane</td>
<td>2</td>
<td>1</td>
<td>1</td>
</tr>
<tr>
<td>Darwin</td>
<td>1</td>
<td>-</td>
<td>1</td>
</tr>
<tr>
<td>Melbourne</td>
<td>7</td>
<td>3</td>
<td>4</td>
</tr>
<tr>
<td>Sydney</td>
<td>38</td>
<td>3</td>
<td>35</td>
</tr>
<tr>
<td>Perth</td>
<td>2</td>
<td>1</td>
<td>1</td>
</tr>
</tbody>
</table>

What is evident from this table is that an overwhelming majority (76%) of appeals on the grounds of incompetent interpreting were heard in New South Wales courts and tribunals. It would have been interesting to see if there are any trends in appeals allowed versus dismissed according to state or jurisdiction and the interpreters’ language and accreditation level. Unfortunately, however, this was not possible in my study due to the fact that much of the essential information — such as language and accreditation details — is often not stated in the rulings, as Tables 3 and 4 show. ‘Unspecified’ means that the ruling did not mention whether the interpreter was accredited or not. ‘Level unknown’ means that while the ruling stated that the interpreter in question was accredited, the level of accreditation was not recorded. ‘Recognition/None’ indicates that the interpreter was not accredited or only had NAATI recognition.

Table 3. Appeals dismissed

<table>
<thead>
<tr>
<th>Language</th>
<th>NAATI accreditation</th>
<th>State</th>
</tr>
</thead>
<tbody>
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<td>NSW</td>
</tr>
<tr>
<td>Not stated</td>
<td>unspecified</td>
<td>NSW</td>
</tr>
<tr>
<td>Not stated</td>
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<td>NSW</td>
</tr>
<tr>
<td>Not stated</td>
<td>unspecified</td>
<td>NSW</td>
</tr>
<tr>
<td>Not stated</td>
<td>unspecified</td>
<td>NSW</td>
</tr>
<tr>
<td>Ewe</td>
<td>unspecified</td>
<td>NSW</td>
</tr>
<tr>
<td>Not stated</td>
<td>unspecified</td>
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</tr>
<tr>
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<td>NT</td>
</tr>
<tr>
<td>Pushto (Pakistani)</td>
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</tr>
<tr>
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<td>unspecified</td>
<td>NSW</td>
</tr>
<tr>
<td>Mandarin</td>
<td>Level unknown</td>
<td>NSW</td>
</tr>
<tr>
<td>Not stated</td>
<td>Level 3</td>
<td>NSW</td>
</tr>
<tr>
<td>Mandarin</td>
<td>Level 3</td>
<td>NSW</td>
</tr>
<tr>
<td>Language</td>
<td>Level</td>
<td>State</td>
</tr>
<tr>
<td>-------------------</td>
<td>----------------------</td>
<td>--------</td>
</tr>
<tr>
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</tr>
<tr>
<td>Mandarin</td>
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</tr>
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<td>Cantonese</td>
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<td>NSW</td>
</tr>
<tr>
<td>Not stated</td>
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</tr>
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<td>Pushto (Pakistani)</td>
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<tr>
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<td>NSW</td>
</tr>
<tr>
<td>Arabic</td>
<td>Level unknown</td>
<td>NSW</td>
</tr>
<tr>
<td>Hindi</td>
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<td>NSW</td>
</tr>
<tr>
<td>Mandarin</td>
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<tr>
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<td>NSW</td>
</tr>
<tr>
<td>Not stated</td>
<td>Unspecified</td>
<td>VIC</td>
</tr>
<tr>
<td>Vietnamese</td>
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<td>VIC</td>
</tr>
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<tr>
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<td>VIC</td>
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<tr>
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<tr>
<td>Not stated</td>
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<td>NSW</td>
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<tr>
<td>Bengali</td>
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<tr>
<td>Not stated</td>
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<tr>
<td>Mandarin</td>
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<td>NSW</td>
</tr>
<tr>
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<td>NSW</td>
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<tr>
<td>Arabic</td>
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<tr>
<td>Mandarin</td>
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<td>NSW</td>
</tr>
<tr>
<td>Arabic</td>
<td>Unspecified</td>
<td>NSW</td>
</tr>
<tr>
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<td>NSW</td>
</tr>
<tr>
<td>Spanish</td>
<td>Unspecified</td>
<td>WA</td>
</tr>
</tbody>
</table>

* Heard in Sydney by video link.
### Table 4. Appeals allowed

<table>
<thead>
<tr>
<th>Language</th>
<th>NAATI accreditation</th>
<th>State</th>
</tr>
</thead>
<tbody>
<tr>
<td>Arabic (Lebanese)</td>
<td>Level 2</td>
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</tr>
<tr>
<td>Amharic</td>
<td>Level 2</td>
<td>VIC</td>
</tr>
<tr>
<td>Mandarin</td>
<td>Level 3</td>
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<tr>
<td>Arabic</td>
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</tr>
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<td>Mandarin</td>
<td>Level 3</td>
<td>NSW</td>
</tr>
<tr>
<td>Wik-Mungkan</td>
<td>Unspecified</td>
<td>QLD</td>
</tr>
<tr>
<td>Sinhalese</td>
<td>Recognition/None</td>
<td>VIC</td>
</tr>
<tr>
<td>Georgian</td>
<td>Recognition/None</td>
<td>VIC</td>
</tr>
</tbody>
</table>

Chart 1 displays the accreditation status of the interpreters in the appeals analysed. As in Tables 3 and 4, ‘Unspecified’ means that the ruling did not mention the interpreter’s accreditation. ‘Level unknown’ means that while the ruling stated that the interpreter in question was accredited, the level of accreditation was not recorded. ‘Recognition/None’ indicates that the interpreter was not accredited or only had NAATI recognition.

**Chart 1.** NAATI accreditation status of the interpreters in the appeals analysed

If we consider that most people enter the profession by sitting a one-hour generalist NAATI test which is ‘not sufficiently refined to measure the unique elements of court

* Heard in Sydney by video link.
interpreting’ (Dueñas Gonzalez et al., 1991, p. 91) and that ‘none of the levels offered by this body involve specialist examination or legal interpreting accreditation’ (Roberts-Smith, forthcoming), it follows that of the 14% of practitioners accredited at professional level (L3), only a very small percentage may have relevant tertiary studies and the specialised knowledge in forensic linguistics and legal interpreting which is needed to meet a safe standard. Furthermore, it is possible that up to 82% (66% unspecified + 12% level unknown + 4% level 2) of the interpreters used in these cases were only accredited at paraprofessional level (L2). This was impossible to corroborate in the study, because the interpreters’ names and qualifications are not stated in the published rulings as a matter of course. Such a practice seems to reflect the courts’ lack of interest in interpreters’ qualifications. The following quote from Lamer CJ in the Canadian case of *R v Tran* illustrates the illogical nature of the current situation in most Common Law countries:

> While there are, as of yet, no universally acceptable standards for assessing competency ... an interpreter must at least be sworn by taking the interpreter’s oath before beginning to interpret the proceedings ... Where there is legitimate reason to doubt the competency of a particular interpreter, a court will be well advised to conduct an inquiry into the interpreter’s qualifications.33

An interpreter may affirm or take an oath that they will interpret to the best of their ability; however, irrespective of their good will and intentions, if they do not have the required knowledge and skills, ‘the best of their ability’ cannot guarantee that they will perform competently to a safe standard. Interpreters should always be required to state both relevant qualifications and accreditation details for the record before the proceedings commence, not when a problem arises.

Chart 2 displays the appellants’ languages in the study: Amharic (1), Arabic (6), Bengali (1), Cantonese (2), Ewe (1), Georgian (1), Gujarati (1), Hindi (2), Mandarin (13), Pushto (Pakistani) (2), Sinhalese (1), Spanish (1), Vietnamese (1) and Wik-Mungkan (1). The languages involved in the remaining sixteen appeals were not stated in the rulings. Of the languages stated in the rulings, five of them are not available for NAATI accreditation at any level (Bengali, Ewe, Georgian, Gujarati and Wik-Mungkan), and only six are currently available for NAATI accreditation at professional level: Amharic, Arabic, Cantonese, Hindi, Mandarin and Spanish (NAATI, 2009, p. 2). Hence, it is quite possible that, of the

33 *R v Tran* (1994) 2 SCR 951 975 (Lamer CJ).
66% of interpreters whose accreditation status was not specified (Chart 1), several may not be accredited at all. This situation is concerning, because these are practicing interpreters who are registered with language services agencies or government departments and, one would assume, regularly work in court and other legal settings.

**Chart 2.** Languages in the appeals analysed

![Languages in the appeals analyse](chart.png)

Table 5 shows that most of the appeals analysed were heard at the Federal Magistrates Court of Australia, followed by the Federal Court of Australia. As previously mentioned, appeals against RRT decisions, where interpreters were used in an average of 90% of hearings between 2006 and 2008, are made to the Federal Magistrates Court in the first instance and to the Federal Court in the second instance. Moreover, RRT hearings are sound recorded and the tapes are readily available to appellants.

**Table 5.** Appeals allowed and dismissed by court

<table>
<thead>
<tr>
<th>Appellate court</th>
<th>Total appeals</th>
<th>Allowed</th>
<th>Dismissed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Federal Court of Australia</td>
<td>22</td>
<td>3</td>
<td>19</td>
</tr>
<tr>
<td>Federal Magistrates Court of Australia</td>
<td>26</td>
<td>4</td>
<td>22</td>
</tr>
<tr>
<td>Supreme Court of Queensland</td>
<td>1</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>Supreme Court of Western Australia</td>
<td>1</td>
<td>-</td>
<td>1</td>
</tr>
</tbody>
</table>
Chart 3 presents an overview of the appeals outcome. A ratio of 5.25 appeals dismissed to every appeal allowed confirms Benmaman’s findings (1999) in US appellate cases:

Perusal of several hundred decisions has revealed that courts of appeal historically grant broad discretion to the trial court in determining the need for the appointment of an interpreter, selection in that appointment, and all matters pertaining to interpreter performance. The predominant pattern has been for appellate judges to uphold the rulings of lower courts, and reject the defendant claims that their trials have been unfairly conducted, as long as an abuse of discretion has not been substantiated by credible evidence (Benmaman, 1999, p. 31).

**Chart 3. Appeals outcome**

![Chart showing appeals outcome with 84% dismissed and 16% allowed]

Finally, and to introduce the subject of rulings, Table 6 classifies the appeals outcomes according to the reasons given in the judges’ rulings regarding the standard of interpretation at trial. For the purpose of this analysis, the reasons were divided into five main categories, as follows:

1. Inadequate standard of interpretation. This category includes rulings stating at least one of the following reasons:
   - the standard of interpretation was so inadequate that the applicant was effectively prevented from giving evidence
   - the standard of interpretation was so inadequate that the applicant was deprived of a fair hearing
   - denial of procedural fairness regarding quality of interpretation
   - jurisdictional error.
2. Adequate standard of interpretation. This category includes rulings stating at least one of the reasons below:
   • the applicant was not prevented from giving his or her evidence
   • the applicant was not deprived of a fair hearing
   • no denial of procedural fairness regarding the quality of interpretation.
   • no jurisdictional error.

3. Material errors. This category includes rulings which state either one or both of the following:
   • there were errors in interpretation which were so material as to cause the decision making process to miscarry
   • errors made by the interpreter were material to conclusions adverse to the applicant.

4. No material errors. This category includes rulings stating that, although there were interpreting errors, these were not material to the outcome.

5. Unsubstantiated assertion. This category includes rulings stating that, in the absence of the transcript the claim cannot be made out. No evidence.

Table 6. Appeals outcomes according to judges’ reasons in their rulings

<table>
<thead>
<tr>
<th>Reasons for Judgment</th>
<th>Appeals allowed</th>
<th>Appeals dismissed</th>
</tr>
</thead>
<tbody>
<tr>
<td>Inadequate standard of interpretation</td>
<td>8</td>
<td>-</td>
</tr>
<tr>
<td>Adequate standard of interpretation</td>
<td>-</td>
<td>16</td>
</tr>
<tr>
<td>Material errors</td>
<td>5</td>
<td>-</td>
</tr>
<tr>
<td>No material errors</td>
<td>-</td>
<td>12</td>
</tr>
<tr>
<td>Unsubstantiated assertion</td>
<td>-</td>
<td>21</td>
</tr>
</tbody>
</table>

As can be seen from this table, the most quoted reasons for dismissed appeals fall under the ‘unsubstantiated assertion’ category followed by the ‘adequate standard of interpretation’ category. These findings will be best appreciated with examples from the rulings, which are provided in the following section.
4.5 Discussion

What follows is a critique of the current methods used by judges and tribunal members to assess competency. Appendix 2 provides a more detailed description of the three rulings quoted in this section. The full texts are available on the AustLII website.

In the majority of the fifty appeals analysed in this study, competent interpreting is defined by reference to *Perera v Minister for Immigration and Multicultural Affairs*\(^{34}\), where the appropriate standard of interpretation in court proceedings was the subject of a substantial judgment by Kenny J. Other cases have considered whether errors made by the interpreter at the Tribunal hearings were material to the conclusions of the Tribunal adverse to the applicant.\(^{35}\) In *Perera*, her Honour said:

... there is rarely an exact lexical correspondence but, even so, some interpretations are better than others. Whilst the interpretation at a Tribunal hearing need not be at the very highest standard of a first-flight interpreter, the interpretation must, nonetheless, express in one language, as accurately as that language and the circumstances permit, the idea or concept as it has been expressed in the other language.

While her Honour’s judgment is fairly detailed, from a linguist’s or legal interpreting expert’s perspective, it is inaccurate. Her reasons fail to convey the importance of a top down approach to language, as explained in section 3.6, and the consequences of not reproducing the original speaker’s intention and style, as well as the content (idea or concept). Her comments also support the apparently widespread view that language interpretation at courts and tribunals need not be of ‘the very highest standard’. In a similar way, a remark about ‘cultural facilitators’ made by the trial judge and quoted by one of the appellate judges in *R v Watt*\(^{36}\) reveals their underlying perception of interpreting:

\(^{34}\) *Perera* *v* Minister for Immigration & Multicultural Affairs (1999) FCA 507 (28 April 1999).
... and I think that’s partly what [the interpreter] is doing for us here; is not just the simple language translation and interpreting but also facilitating between our culture and the Wik culture, and that’s important, to get the real meaning of what’s being said across ... So perhaps we should be regarding [the interpreter] something of both.

In essence, ‘to get the real meaning of what’s being said across’ describes what pragmatic interpreting is all about, ‘the meaning of words in context, the appropriate use of language according to tongue, culture and situation ... the intended meaning behind the surface’ (Hale, 2004, p. 5). The loaded statement, ‘not just the simple language translation and interpreting’ encapsulates a prevailing misconception among both judges and legal practitioners, namely, that interpreting is about relaying utterances word for word, without taking into account the context or the speaker’s style and intention. It also attests to the judge’s belief that translation and interpreting are just simple tasks. Unfortunately, the current rates of remuneration for forensic interpreters reflect this fallacy very accurately.

In SZLDY & ORS v Minister for Immigration & ANOR37, an appeal heard at the Federal Magistrates Court of Australia in Sydney, the interpreting errors were easily identifiable. The judge’s insight as to the effect of interpreting errors on the applicant’s understanding is evident. She described the Kafkaesque communication event as follows:

The interpreter continued to interpret the word “persecution” as “prosecution” throughout the hearing ... The effect on the applicant of such mistranslation is apparent from his response. Perhaps unsurprisingly, the applicant responded ... “Why would I be prosecuted by the Lebanese? My name is clean I don’t have problems with the legal Lebanese government, the government of Saniora.” However the interpreter then mistranslated “prosecution” as “persecution”. The applicant’s response was translated into English as “According to the Lebanese government I have no fear of persecution I have a clean name I have no problems with them at all.” The mistranslation could be said to have made it appear that the applicant was providing a non-responsive or vague response. It was submitted that it hindered the Tribunal’s comprehension of the difficulties the applicant was experiencing with what he understood were questions about prosecution rather than persecution.

This appeal was allowed, and it is interesting to see that it confirms some of Wennerstrom’s (2008) findings in her analysis of how asylum seekers’ persecution stories

are represented in US court opinions ‘to discover differences in the linguistic structure in winning versus losing cases to reveal how the judges crafted the texts to justify their supposedly neutral opinions’ (p. 30). In the example below, the appellate judge uses a significant number of direct quotations with the corresponding mistranslations and makes a clear effort to justify the reasons why the applicant may have appeared unresponsive.

The applicant then ... started to explain the cause of the conflict with Hezbollah. He claimed he was “confronting them politically”. This was mistranslated as “I was the person that would negotiate between them”. He referred to threats from Hezbollah and its members in the village (translated as “supporters”) and political conflict. The Tribunal reminded the applicant ... “[Applicant], I will again remind you that I need to hear about any personal fear of persecution not about the political situation in your village”. This was translated as “She is reminding you again that she wants to hear from you about your own fear of any sentence against you, being prosecuted in your country she doesn’t want to hear about any politics and ...” The applicant responded “Any sentence against me? Hezbollah will give me the death sentence” but this was translated as “Hezbollah is going to persecute me by giving me the death sentence”, another answer that might well seem unresponsive to the question that was actually asked by the Tribunal.

The interpreting issues in the following criminal case of rape and deprivation of liberty were not so clear cut. The Aboriginal interpreter in this Queensland case had a Master’s degree in Linguistics, in which she had studied applied linguistics, language development, child language and issues in language and culture. Significantly, however, she did not have any qualifications in legal interpreting or forensic linguistics. This is a good example of the importance of relevant, specialist training.

38 ‘A close analysis of the language of published court opinions reveals that the judges’ linguistic choices vary systematically, even in the supposedly objective description of the basic facts of an asylum applicant’s persecution. Although the stories have a similar overall structure, the applicant’s voice emerges differently in grants versus denials of asylum. In winning cases, this voice is more likely to be a human one, described in favorable terms as having experienced painful persecution. There are more direct quotations and positive evaluations included in a judge’s description of events. Losers’ stories are related with a more skeptical stance, minimizing the human drama. These results are consistent with views expressed by Solan (1993), Kennedy (1986), and others, that judicial opinions are justifications for decisions. What is meant to be a neutral rendition of the applicant’s experience displays the underlying stance of the judge toward the facts of the case’ (Wennerstrom 2008, p. 45).
The transcript of the proceedings in this trial suggests that ... the complainant may not have been
given a full opportunity to give her version of events in the trial. Whether or not that is so, the
jury’s inconsistent verdicts and the unsatisfactory state of the complainant’s evidence as interpreted
mean that the appellant must be acquitted because the prosecution did not establish his guilt
beyond reasonable doubt.\textsuperscript{39}

For better or worse, the interpreter’s poor overall performance in this trial had a direct
bearing on the outcome of the case, as all three appellate judges agreed. A different
approach is taken in \textit{De La Espriella Velasco v The Queen}\textsuperscript{40}, a criminal appeal heard at
the Supreme Court of Western Australia, where one of the judges stated the following
about interpreting errors:

They all fall to be considered in the context of two questions. The first is whether there was a
failure of accurate interpretation in respect of any issue of specific significance to the case; the
second is whether the combined effect of the deficiencies had potential to weigh adversely against
the jury’s assessment of the appellant as a credible witness, or the content of the case he was
seeking to advance.

The issue here is twofold. Firstly, his Honour’s proposition assumes a bottom up approach
to language, which, as has been shown, is the opposite of how linguists view language and
discourse. A pragmatically inaccurate interpretation may not be apparent by looking at the
word or sentence level or ‘issues of specific significance to the case’. One needs to look at
the discourse level and assess whether the content and style of the original utterances,
including the speaker’s intention, were rendered accurately in the target language.
Secondly, it is virtually impossible to prove what the combined effect of the interpreter’s
deficiencies might have been, because one would need to run two identical parallel trials to
find out: one with a competent interpreter, one with an incompetent one. Nevertheless,
sections 2.4 and 3.6 have illustrated the potential consequences of employing poorly
qualified interpreters based on both anecdotal evidence and research findings. In a nutshell,
research shows that ‘style matters in the evaluation of character’ (Hale 2007a, p. 200) and,
therefore, having a competent interpreter who maintains both the content and style of the
original utterances is likely to produce very similar results to the ones that would have

\textsuperscript{39} \textit{R v Watt} (2007) QCA 286 (7 September 2007).

\textsuperscript{40} \textit{De La Espriella Velasco v The Queen} (2006) WASCA 31 (10 March 2006).
been obtained if the witness spoke English. Disappointingly, the following excerpt from the same case highlights a common misconception among judges.

Although Ms Crespo was not prepared to accept it, it seems to me that it was important that the jury had the opportunity to watch the appellant give evidence and to note the fluency with which he answered, in Spanish, the questions which were put to him. Ms Crespo expressed the opinion that in these circumstances, because the jury did not understand the Spanish language and it did not sound familiar or understandable, “the mind blocks out, so, in the end, what is received is what’s coming in English because the other stuff doesn’t make any sense so your mind will block. It’s like cacophony, you know. A noise that bothers you all the time, you block”. This is an opinion to be respected, but the trial process must involve the jury in making an assessment of the witness as he speaks the foreign language. Evasiveness, argumentativeness and inability to answer questions would all be noticed if that occurred. If, on the one hand the appellant was able to answer all questions fluently in Spanish, that, no doubt, would be a factor that the jury would note.41

When discussing cross-cultural communications in Kathiresan v Minister for Immigration and Multicultural Affairs42, Gray J warned about the dangers of paying too much attention to the ‘subtle influence of demeanour’, for ‘judging the demeanour of the witness from the witness’s own answers in a foreign language would require a high degree of familiarity with that language and the cultural background of its speakers’. It is noteworthy that the appeal judge in this case was not prepared to accept the second interpreter’s opinion (Ms Crespo was employed by the appellant to prepare a report of the original interpreter’s errors during his cocaine importation trial). It should also be highlighted that in most of the appeals analysed that have recorded this information, the only qualification stated for interpreters employed as ‘experts’ to listen to the tapes or go through the transcripts of the trial or hearing is NAATI accreditation. This seems to be the only criterion taken into account nationally. And yet, as has been argued, NAATI accreditation at any level does not provide the specialist knowledge required of a competent legal interpreter. Accordingly, a protocol on expert witnesses for interpreting performance is needed.

41 Idem.
In this regard, while some providers of court interpreting services, such as the Community Relations Commission in New South Wales, have formalised procedures for following up on complaints about interpreters, there are no standardised national protocols for the use of interpreters in legal proceedings. Insofar as it can be ascertained, the mechanisms currently in place to assure interpreting quality in Australian courts and tribunals are as ad hoc as the practice of legal interpreting itself. For example, in the abovementioned case, the trial judge allowed the appellant’s wife to sit with him and the court-appointed interpreter, and interpret for the appellant during the entire trial other than when he was giving his own evidence. She was neither sworn nor affirmed as an interpreter and had been involved to some extent in the activities out of which the charge arose.

To conclude on a positive note, an ‘Interpreter protocols in Australian courts and tribunals research project’ has recently been approved by the University of Western Sydney Human Research Ethics Committee. The study is jointly funded by The Australasian Institute of Judicial Administration and the University of Western Sydney’s Interpreting and Translation Research Group. The results of this study will be used to recommend a national protocol on the use of interpreting services in national courts and tribunals.
CHAPTER 5

Conclusions

5.1 Summary

This study addressed the issue of appeals on the grounds of incompetent interpreting by practicing, paid interpreters in the relevant languages. Fifty court and tribunal appeals from 2006 to 2008 were analysed, quantified and described. The appeals came from New South Wales, Northern Territory, Queensland, Victoria and Western Australia. The study also commented on the practical and theoretical knowledge and skills required of a legal interpreter to be able to perform adequately in legal settings, and the potential consequences of not meeting those standards. The judges’ understanding and perception of interpreting was discussed through a brief discourse analysis of their rulings. It was argued that the approach taken by most appeal judges towards interpreting issues unknowingly denies all the findings in forensic linguistics and court interpreting research about the importance of pragmatically accurate interpreting.

5.2 Conclusion

Forensic interpreting is a highly complex activity requiring practical and theoretical knowledge and skills, for which specialist training is essential. Being ‘bilingual’ or highly proficient in two languages is merely a prerequisite to be able to train as an interpreter. Language skills in themselves, however remarkable, are not enough to guarantee competent and safe interpreting performance in legal settings, e.g. unlike popular belief, it is perfectly feasible for an accomplished conference interpreter to perform poorly in court. Similarly, a one-off generalist interpreter test is not sufficient; specialised legal interpreting university training and accreditation should be the norm. Even more complex is the task of assessing adequate interpretation, given the intricacies of language and the fact that forensic interpreting deals with two different languages, legal systems and cultures, i.e. two different ways of viewing the world. This is a specialist job that should only be performed
by experienced and adequately qualified professionals in the relevant languages, trained in interpreting and forensic linguistics.

The results of this research suggest that most judges are unaware of many important interpreting issues, such as what constitutes competent interpreting, the meaning of accuracy, the importance of interpreting at the pragmatic level and the potential impact of poor interpreting on the outcome of a case. They seem equally unaware of the knowledge and skills required of a legal interpreter; therefore, they are not demanding higher standards. In other words, the prevailing misconceptions and lack of interest or understanding among the powerful stakeholders has hindered and continues to hinder progress within the legal interpreting profession in Australia. As a corollary, the administration of justice is compromised.

5.3 Limitations and recommendations

Nothing could be more logical than to investigate the places where language and justice converge. From a sociolinguistic perspective, the question is whether language variation has social consequences in legal settings. The sociolegal version of this question asks whether we can discover in language the precise mechanisms—Foucault’s microphysics—through which injustice happens (Conley and O’Barr 1998, p. 14).

This was a small-scale study and did not elaborate on the discourse of judges. Further research on the discourse of appellate judges in their rulings may help elucidate whether there are specific patterns associated with winning and losing cases (Wennerstrom, 2008) that relied on interpreting services. Nonetheless, the findings in this study did cast light on a number of systemic issues that ought to be addressed. These can be summarised as follows:

1. The recognition by government and the legal system that forensic interpreting is a highly complex activity requiring university training and commensurate remuneration.

2. The recognition by the legal system of the complexity inherent in assessing interpreting quality. This would entail compulsory use of adequately qualified expert witnesses to assess interpreting quality.
3. Training for lawyers and the judiciary on how to work with interpreters effectively and other basic principles, such as the meaning of accuracy and the role of the interpreter in legal contexts.

4. The importance of having all proceedings sound recorded, so as to keep a record of utterances in the original language. Relying on the English transcripts is insufficient to assess interpreting quality.

5. The need for judges to record more details in published rulings, including interpreters’ qualifications, accreditation level and language(s).

6. The need for improvement of interpreters’ working conditions:
   - providing interpreters with background material to prepare for each assignment in advance
   - setting up an interpreters’ preparation room in all courthouses
   - implementing team work for major cases or long trials, as is the case in the ICTY and all international conferences.

7. The recognition by government language services departments, the national professional association (AUSIT) and the accreditation authority (NAATI) of the importance of relevant university training. This could be shown by adding a qualifications box to their directories, rather than displaying the practitioners’ accreditation details as their sole credential.

8. The need for specialised legal interpreting university training and accreditation.
References


Coory, L. (1996). *Quarter way to equal implementation report*. Report of the Attorney General’s Committee monitoring the implementation of the recommendations of the *Quarter way to equal* report on barriers to access to legal services for migrant women.


Women’s Legal Resources Centre. (1994). *Quarter way to equal: A report on barriers to access to legal services for migrant women*. Sydney: Women’s Legal Resources Centre.

THE AUSTRALIAN JUDICIAL SYSTEM

The hierarchy of Australian courts involves the Federal level, and the State/Territory level.

1. Federal Courts

The Australian Constitution establishes the High Court of Australia, and also empowers the Australian Parliament to create other federal courts and to invest State/Territory courts with power to decide some federal matters.

The High Court of Australia

The High Court of Australia (the High Court) is the final court of appeal in Australia, and also exercises some original jurisdiction. Appeals from the High Court to the Privy Council in England were possible prior to 1975, but were effectively ended by the Privy Council (Appeals from the High Court) Act 1975.

The High Court’s appellate jurisdiction comprises the jurisdiction to hear appeals from:

- the original jurisdiction of the High Court;
- the Federal Court;
- other courts exercising federal jurisdiction;
- State Supreme Courts.

Appeals to the High Court are not automatic and require the leave of the Court (“special leave”). In deciding whether to grant special leave to appeal, the High Court must have regard to whether the application involves a question of law that is of public importance, or upon which there are differences of opinion among different courts, or that should be considered in the interests of the administration of justice.

The High Court’s original jurisdiction, conferred by section 75 of the Australian Constitution, involves:

- matters arising under any treaty;
- matters affecting consuls or other representatives of other countries;
- matters in which the Commonwealth of Australia, or a person suing or being sued on behalf of the Commonwealth of Australia, is a party;
- matters between States, or between residents of different States, or between a State and a resident of another State; and
- matters in which a writ of mandamus or prohibition, or an injunction is sought.

The Federal Court of Australia

The Federal Court of Australia has jurisdiction to hear most civil matters, and some summary criminal matters, that are governed by federal law. The subject-matter of cases coming before the Court usually involves one of the following subjects:

- trade practices,
- bankruptcy,
- corporations,
- industrial law,
- customs duties,
- administrative law, and
- native title.

Cases at first instance are heard by a single Judge. The appeals division of the Court, known as the Full Federal Court, is comprised of three judges.

The Federal Court exercises appellate jurisdiction from the Federal Magistrates Court, except in

The Family Court of Australia

The Family Court of Australia is a specialist court dealing with family and child support issues. It exercises original and appellate jurisdiction throughout Australia, with the exception of the State of Western Australia where a State Court called the Family Court of Western Australia decides family and child support issues. Appeals from the first instance decisions of the Family Court of Australia may be made to the Full Court of the Family Court.

The Family Court of Australia exercises appellate jurisdiction from the Federal Magistrates Court in relation to family law matters.

Appeals lie to the High Court of Australia, subject to special leave.
relation to family law matters (for which the Family Court of Australia exercises appellate jurisdiction), in appeals from the Supreme Court of the Australian Capital Territory and the Supreme Court of Norfolk Island in criminal and civil matters, and in appeals from State Supreme Courts in some federal matters. Appeals lie to the High Court of Australia, subject to special leave.

**Administrative Appeal Tribunal**

The Administrative Appeal Tribunal was established in 1975 to review administrative decisions of Australian Government departments and agencies. Although it is not a court, appeals from its decisions dealing with questions of law may be taken, subject to leave being granted, to the Federal Court of Australia.

**The Federal Magistrates Court**

The Federal Magistrates Court was established in 1999. Its jurisdiction includes:
- family and child support issues,
- administrative law,
- bankruptcy law,
- discrimination,
- trade practices,
- workplace relations and
- consumer protection.

Its jurisdiction is shared with the Federal Court of Australia and the Family Court of Australia, with the Federal Magistrates Court in general dealing with less complex cases.

Appeals lie to the Federal Court except in relation to family law matters for which the Family Court of Australia exercises appellate jurisdiction.

2. **State/Territory Courts**

The Courts of the Australian States and Territories deal with cases brought under State or Territory laws. They may also decide cases brought under federal laws where jurisdiction to do so is conferred on them by Federal laws (most Federal criminal matters are dealt with in State/Territory courts on this basis).

Each State and Territory has its own court hierarchy, generally comprised of (in descending order of seniority), in the case of the States:
- a Supreme Court,
- a District Court, and a
- Magistrates Court;

and in the case of the Territories:
- a Supreme Court and a
- Magistrates Court.

In general, Supreme Courts deal with the most important civil litigation and the most serious criminal issues. They also hear appeals from decisions made by lower courts and, sitting as the “Full Court” or “Court of Appeal” (civil matters) or “Court of Criminal Appeal” (criminal matters), from decisions of single judges of the Supreme Court.

Appeals lie from the Supreme Courts to either the High Court or the Federal Court, subject to the leave to appeal requirements of those courts.

Source: [http://www.unidroit.info/mm/TheAustralianJudicialSystem.pdf](http://www.unidroit.info/mm/TheAustralianJudicialSystem.pdf)
### Appendices

#### Rulings Quoted in Section 4.5

<table>
<thead>
<tr>
<th>Appeal citation</th>
<th>Outcome</th>
<th>Grounds of appeal</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. <strong>SZLDY, SZLDZ, SZLEA, SZLEB, SZLEC v Minister for Immigration &amp; Citizenship</strong> (first respondent) and <strong>RRT</strong> (second respondent) Federal Magistrates Court of Australia</td>
<td>Allowed</td>
<td>The first ground in the amended application is that the Tribunal failed to comply with s.425 of the Migration Act in that the standard of interpreting at the hearing held on 12 June 2007 was “so inadequate that the First Applicant was denied a proper opportunity to put his claims to the Tribunal.”</td>
</tr>
</tbody>
</table>
| 2. **R v Watt** Supreme Court of Queensland                                           | Allowed | * The jury verdict is unsafe and unsatisfactory in all the circumstances.  
* The appellant has suffered a miscarriage of justice as a result of the learned judge’s misstatement of the appellant’s evidence relating to the evidence [sic] on count 3. |
| 3. **De La Espriella Velasco v The Queen** Supreme Court of Western Australia          | Dismissed | Ground 7 asserts that: “The trial miscarried as a result of poor quality of the translation [sic interpreting] service provided to the Applicant by the court appointed interpreter.  
Particulars  
a) The interpreter lacked the skill and ability to translate [sic interpret] accurately the questions put by counsel and the answers given by the Applicant.  
b) The deficiencies in interpretation were such that the Applicant was unable to give an effective account of facts vital to his defence.  
c) The trial miscarried notwithstanding the fact that the Applicant’s counsel did not maintain her objection to the interpreter continuing to provide translation [sic interpreting] services to the Applicant.” |
47. The interpreter continued to interpret the word “persecution” as “prosecution” throughout the hearing. For example on page 10 of the transcript at line 5, after discussion of events in Lebanon the Tribunal stated “[Applicant] I need to know about your fear of persecution or what happened to you personally not what is happening in your village unless it has some impact on what’s happening to you”. This was translated as “What she wants to know from you is if you fear going back to your country and being prosecuted. She doesn’t want to know what happened in the village she wants to know what…”

48. This was not only a mistranslation but it also omitted the Tribunal’s significant qualification about the need to hear about the village events having an impact on what was happening to the applicant.

49. The effect on the applicant of such mistranslation is apparent from his response. Perhaps unsurprisingly, the applicant responded (line 9 page 10) “Why would I be prosecuted by the Lebanese? My name is clean I don’t have problems with the legal Lebanese government, the government of Saniora.” However the interpreter then mistranslated “prosecution” as “persecution”. The applicant’s response was translated into English as “According to the Lebanese government I have no fear of prosecution I have a clean name I have no problems with them at all.” The mistranslation could be said to have made it appear that the applicant was providing a non-responsive or vague response. It was submitted that it hindered the Tribunal’s comprehension of the difficulties the applicant was experiencing with what he understood were questions about prosecution rather than persecution.

50. The applicant then (page 10) started to explain the cause of the conflict with Hezbollah. He claimed he was “confronting them politically”. This was mistranslated as “I was the person that would negotiate between them”. He referred to threats from Hezbollah and its members in the village (translated as “supporters”) and political conflict. The Tribunal reminded the applicant (page 10 line 27) “[Applicant], I will again remind you that I need to hear about any personal fear of persecution not about the political situation in your village”. This was translated as “She is reminding you again that she wants to hear from you about your own fear of any sentence against you, being prosecuted in your country she doesn’t want to hear about any politics and…” The applicant responded “Any sentence against me? Hezbollah will give me the death sentence” but this was translated as “Hezbollah is going to persecute me by giving me the death sentence”, another answer that might well seem unresponsive to the question that was actually asked by the Tribunal.

51. As the applicant submitted, one can understand that the Tribunal might see the applicant’s translated response as non-responsive or vague, whereas in fact he was addressing the translated question about what the interpreter described as “prosecution” and a “sentence”.

77. It is convenient to consider first the respondent’s contentions about the context in which the acknowledged mistranslations and omissions in interpretation occurred at the hearing on 12 June 2007. Counsel for the first respondent pointed out that prior to the first hearing the applicant was apparently provided with a copy of the definition of refugee in the Refugees Convention in Arabic and an opportunity to read that definition. While this appears to have been the case, the interpreter’s mistranslations, in particular of the word “persecution”, did not occur only in the context of explaining the meaning of refugee in the Refugees Convention but also in questions addressing the Tribunal concerns about aspects of the applicant’s claims and in the applicant’s responses. The mistranslation of “persecution” and “prosecution” had a clear impact on the conduct of the hearing. It limited the applicant’s ability to give evidence effectively and the Tribunal’s understanding of what was being conveyed (and why) in response to mistranslated questions. It can be inferred that at least some of the exchanges in which such mistranslation occurred were material to the Tribunal’s assessment of the applicant’s evidence as non-responsive, generalised and vague and hence to its adverse credibility finding.

94. The first respondent contended that the applicant had not pointed to any findings to which the interpretation issues were material, other than the Tribunal’s general conclusion about credibility, non-responsiveness and vagueness. However this was a critical part of the Tribunal’s decision,
relevant not only to the assessment of the nature of the applicant's credibility but also to its assessment of specific claims which it did not accept or rejected as implausible.

108. The Tribunal's finding that the applicant was not a credible witness was material to its conclusions on his factual claims as well as its finding that it preferred the independent country information to his evidence, particularly in relation to his claim that there was no forced appropriation by Hezbollah in his area. Had the applicant been found to be credible the Tribunal may have taken a different approach to this and other issues. I am satisfied that the reasons the applicant was found not to be credible arose at least in part because of the difficulties with translation in the hearing on 12 June 2007. The applicant and the Tribunal were at cross-purposes for much of the time. It appears that each of them did not know what the other was talking about on occasion. In those circumstances it is hardly surprising that the Tribunal member would think that the applicant was obfuscating and being non-responsive so that what occurred in the first hearing as a result of the mistranslations and omissions by the interpreter affected the Tribunal's conclusions.

Whether interpretation errors give rise to jurisdictional error

110. The test whether interpretation errors gives rise to jurisdictional error has been expressed on the basis that the applicant must establish that the standard of interpretation at the Tribunal hearings was so inadequate that the applicant was effectively prevented from giving evidence at the hearing (see for example Perera at [38] – [42]; Mazhar v Minister for Immigration and Multicultural Affairs [2000] FCA 1759; (2001) 183 ALR 188 at [33] and Singh v Minister for Immigration and Multicultural Affairs [2001] FCA 1376; (2001) 115 FCR 1 at [27]). Other cases have considered whether errors made by the interpreter at the Tribunal hearings were material to the conclusions of the Tribunal adverse to the applicant (see for example Ismail v Minister for Immigration and Multicultural Affairs [1999] FCA 1555; (1999) 59 ALD 773 at [25]; Soltanyzand v Minister for Immigration & Multicultural Affairs [2001] FCA 1168 at [18]; NAUV v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCA 1319 at [42] and WACO v Minister for Immigration and Multicultural and Indigenous Affairs [2003] FCAFC 171; (2003) 131 FCR 511 at [63ff]). On either basis I am satisfied that the applicant has established jurisdictional error.

111. I note that there can be a breach of s.425 if an applicant is deprived of the opportunity to “give evidence and present arguments relating to the issues arising in relation to the decision under review” even if the Tribunal is unconscious of the reason for that occurring (see SZJQN v Minister for Immigration & Anor [2008] FMCA 1550 at [19] and cases cited therein). The transcripts of the Tribunal hearing on 12 June 2007 and 15 June 2007 and Mr Nes Selim’s report on the interpretation are such as to show that the interpretation on 12 June 2007 was so incompetent that the applicant was effectively prevented from given his evidence at that part of the hearing in the sense considered by Kenny J in Perera at [39]. When one takes into account the hearing as a whole (on both 12 June 2007 and 15 June 2007) it cannot be said that the applicant received a fair hearing given the possible impact on the conduct of the second hearing of the Tribunal’s views about the applicant’s evidence at the first hearing (see VWFY v Minister for Immigration and Multicultural and Indigenous Affairs [2005] FCA 1723 at [27]).

112. The mistranslations and omissions by the interpreter were of “significance, or at least of potential significance, to the outcome of the case” (M175 of 2002 v Minister for Immigration and Citizenship [2007] FCA 1212 per Gray J at [51]) given their direct relevance to the critical credibility finding. I am satisfied, reading the Tribunal decision as a whole, that the errors made by the interpreter had a material influence on the reasoning of the Tribunal in relation to the applicant’s credibility. Hence there has been a jurisdictional error consisting of a failure to comply with s.425.
APPEAL 2: Allowed (September 2007). Supreme Court of Queensland

APPEAL JUDGE A:

3. Justice B in her reasons has thoughtfully highlighted some concerning aspects of this trial flowing from the use of the interpreter of the Australian Aboriginal language, Wik-Mungkan, in the taking of the Indigenous complainant's evidence. I entirely endorse her Honour's observations. [...] 

The application of the rule of law in Queensland depends not only on the right of an accused person to a fair trial according to law but also on victims of alleged crimes having a genuine opportunity to make a complaint and to give evidence about it. Our community has an obligation to do everything practicable to ensure that even complainants who do not speak English or who have other disabilities have this basic access to the criminal justice system. This obligation is certainly not lessened in respect of Indigenous complainants. The transcript of the proceedings in this trial suggests that, despite the learned trial judge's best endeavours, the complainant may not have been given a full opportunity to give her version of events in the trial. Whether or not that is so, the jury's inconsistent verdicts and the unsatisfactory state of the complainant's evidence as interpreted mean that the appellant must be acquitted because the prosecution did not establish his guilt beyond reasonable doubt.

APPEAL JUDGE B

35. Needless to say, in such circumstances it is essential to the proper conduct of a criminal trial that the interpreter accurately relate the questions to the complainant and accurately relate the complainant's responses to the Court. The responsibility cast on the interpreter is particularly onerous: this is reflected in the interpreter's oath – [...] 

37. Regrettably there are no Wik Mungkan language interpreters accredited by NAATI to that level – a matter which, according to the trial judge, the District Court has raised with the Government for the last 6 years. The unavailability of a person with that level of interpreting skill made the conduct of the trial problematic, and called for some flexibility on the part of all concerned. But ultimately, as counsel for the appellant submitted, trial procedures could not be relaxed to the point where the appellant was prejudiced.

38. The interpreter employed in this case holds a Master’s degree in Linguistics, having studied applied linguistics language development, child language, and issues in language and culture at the Master’s degree level. According to the appellant's trial counsel, one of the difficulties she had as interpreter was that the younger generation in the indigenous community do not speak the rich Wik Mungkan language she knows – they borrow English which they use with Wik Mungkan. During the trial the appellant raised issues about the quality of the interpreting with his solicitor.

39. [...] There was discussion of the interpreter’s qualifications and experience, of the unavailability of a NAATI accredited interpreter, and of the Government’s setting up a program for training “cultural facilitators”. The trial judge observed –

“... and I think that’s partly what [the interpreter] is doing for us here; is not just the simple language translation and interpreting but also facilitating between our culture and the Wik culture, and that's important, to get the real meaning of what's being said across ... So perhaps we should be regarding [the interpreter] something of both. Would you agree with that ...” [...] “We'll let you go and have a chat to [the complainant] outside and see how you go and see if we can proceed from there.”

43. Clearly there is still much to be done systemically by those involved at all levels of the criminal trial process (the Courts themselves, the prosecution and the defence) to ensure that the defendant in a case such as this receives a fair trial and that the complainant has a proper and meaningful opportunity to give her evidence. And implementation of any new procedures which may be devised will require proper resourcing.

44. The prosecution case depended on the jury's accepting the complainant's evidence. Whether because of language difficulties or for other reasons or for a combination of language difficulties
and other reasons, that evidence was so vague and so riddled with inconsistencies that the verdicts on counts 3 and 4 are unsafe and unsatisfactory.

APPEAL 3: Dismissed (March 2006). Supreme Court of Western Australia

APPEAL JUDGE A

15. In this case the Court file shows that Mr C was engaged by the Court, through the Telephone Interpreter Service (“TIS”) of the Department of Immigration, Multicultural and Indigenous Affairs (“DIMIA”). The file does not reveal his level of NAATI accreditation.

73. As to competence, whilst there are no universally acceptable standards for assessing competency, an interpreter must at least be sworn by taking the interpreter's oath before beginning to interpret the proceedings (Lamer CJ, ibid 988). That was done here.

74. His Honour observed that where there is a legitimate reason to doubt the competency of a particular interpreter, a court would be well-advised to conduct an inquiry into the interpreter's qualifications. For myself, I would add that it will ordinarily be prudent for an interpreter to be required to state their qualifications for the record before being sworn or affirmed. The present case is a good illustration of the desirability of that being done. It also recognises the principle at common law that it is the responsibility of the trial Judge to ensure that adequate interpretation is afforded the accused or witness.

75. I respectfully endorse the approach taken by Kenny J in Perera (at [29]) that the interpreter must express, in the target language, as accurately as that language and the circumstances permit, the idea or concept as it has been expressed in the source language. The individual aspects of this expression of what is required, are important. The reference to the "idea or concept" being expressed acknowledges that the process of interpretation is not merely the substitution of a word in one language for an equivalent word in the other and that there is often a lack of semantic equivalence. That, and social or cultural differences may mean that even the "idea or concept" itself has no equivalent in both societies. [...] The requirement that the idea or concept be interpreted as it has been expressed in the source language, includes the notion of appropriate register, or conservation of meaning. That is to say, the form and level of expression of what the interpreter says in the target language should reflect the form and expression used by the witness in the source language.

77. Insofar as they concern the involvement of the interpreter, the proceedings at trial did not get off to the most auspicious start. Although the interpreter was sworn, there is nothing on the transcript about his level of accreditation (if any) or qualifications. The trial Judge extended a considerable indulgence to the appellant in allowing Ms Baroud to sit with him and the court interpreter, and interpret for the appellant during the entire course of the trial other than when he was giving his own evidence. She was not sworn nor affirmed as an interpreter for the proceedings, and indeed, on no view would it have been appropriate for her to have been nor to have acted as the official court interpreter. Not only was she by then his wife, but she had been involved to some extent in his activities out of which the charge arose. She was in no sense an independent and impartial person.

91. That there was a lack of continuity of interpretation must be accepted. That was self-evidently so. But I cannot accept the appellant's trial was thereby rendered unfair. Whilst the appropriate course would have been for his Honour to deal with the problem by addressing the appellant directly, through the interpreter, and explaining how the process was to be undertaken, in the end the substance of what his Honour intended was made known to the appellant. Furthermore, he was represented by counsel and both he and counsel had the assistance of Ms Baroud (although I acknowledge she was not in a position to assist the appellant in the course of these exchanges, but only subsequently). His Honour was made aware that the appellant had a concern about being stopped in the course of his answers, but insisted it would be done in a way he had instructed, because that was the appropriate way of doing it. So it was, and it was his Honour's responsibility to determine how the proceedings would be conducted. The lack of continuity here did not result in an unfair trial.
93. While the appellant acknowledged there is no Australian authority which "sets the necessary standard of interpretation in criminal trials", the submission is that, on the basis of Ms Crespo's report, the number and quality of errors of interpretation made throughout the trial were so serious that the interpretation could not have complied "with any conceivable standard". It is further submitted that the interpreter's interpretation took what was overall a forthright and clear explanation of a series of events by the appellant and made them convoluted and hesitant and that the overall impression gained of the appellant simply by reading the interpreted answers, is someone of poor comprehension and perhaps even with a lack of candour. The submission is that it is apparent when reading the revised transcript, that much of this can be attributed to the interpreter's difficulty in grappling with questions and answers. Ms Crespo identified what she described as 588 errors and 539 omissions. The categories into which these errors or omissions fell included literal translations (because interpreting involves units of meanings, not words), lack of language proficiency, grammatical errors, lexical errors, distortions, omissions, additions, hedging, fillers, embellishing answers and the loss of the paralinguistic elements. In her opinion the interpretation was neither accurate nor true to register; the interpreter accommodated things to his own level of language and proficiency, which was "substandard in both languages".

94. According to Ms Crespo the interpreter frequently misinterpreted numbers, dates and amounts. [...] 

107. With respect to the cumulative effect of interpreting deficiencies, a very large number of the errors or omissions noted by Ms Crespo were of little or no consequence when considered in context. Many were minor. Taken alone, although characterisable as errors, others apparently did not lead to any difficulty or misunderstanding. For instance, although the interpreter interpreted "loss of face" literally into Spanish, the appellant's answers indicated he in fact understood the meaning of the expression, notwithstanding it has no Spanish equivalent. His answers were responsive and appropriate.

113. Of course by no means all of the points taken by Ms Crespo are so innocuous in context. There are instances in which the interpretation given by the interpreter was in fact the opposite of what had been said. So, for example, he interpreted "that man will not betray us" as "... that that man is going to betray us", or earlier, the question "did that relieve your stress" was interpreted as "is that what stressed you out". Once again, the effect of these and all the other errors or omissions identified by Ms Crespo must be evaluated in their context and the issues in the trial. Having done that, and notwithstanding the interpretation was far from perfect, I am not satisfied that it was so deficient as to mean that the appellant was effectively not present at his trial or any part of it, or denied him the opportunity to adequately respond to the prosecution case and to advance his account for the consideration of the Court.

117. [...] I do not in any way diminish the professional correctness of her comments. I accept that although very many of her criticisms were minor or could even be described as pedantic, many pointed to substantial errors or omissions of interpretation. But I am not persuaded that in the end they resulted in any real unfairness to the appellant, much less one constituting a miscarriage of justice.

118. I am reinforced in this conclusion by the facts that the appellant's chosen interpreter (Ms Baroud) sat with and was able to interpret for him through the trial save for when he was giving his own evidence; that she listened to his testimony and was seated next to his counsel for the express purpose of bringing any difficulties in interpretation to attention; and that she was available to the appellant and his counsel during breaks. If there was any real concern during the trial that the appellant was being disadvantaged by the quality of interpretation, he and his counsel had every opportunity to raise it. The trial Judge had early on flagged how such a matter could be dealt with, if raised. Despite some aspects of the interpretation being ventilated, there was no application to change interpreters, nor even to challenge in any significant way, any particular aspect of the interpretation - and indeed, the appellant advisedly informed the Judge he wished to continue with the court appointed interpreter. These circumstances all suggest the correctness of a conclusion that if there were interpreting deficiencies, they did not result in any relevant unfairness to the appellant.

119. Finally, as Justice C points out, Ms Crespo's observations and opinions were new evidence, not fresh evidence, and her testimony neither shows the appellant to be innocent nor raises such
a doubt about his guilt that the verdict should not be allowed to stand (Ratten v The Queen (1974) 131 CLR 510, per Barwick CJ at 529). Nor was the quality of interpretation so deficient as to mean the appellant was effectively denied his right to be present at his trial or part thereof, contrary to (then) s 635(3) of the Criminal Code or (now) s 88(3) of the Criminal Procedure Act 2004 (WA). (Thomas v The Queen (No 2) [1960] WAR 129; Smith v The Queen (1985) 159 CLR 532).

120. I would dismiss the appeal against conviction on this ground and otherwise for the reasons given by Justice C. [...] 

APPEAL JUDGE B

162. During the trial the appellant was legally represented. He had available to him the services of Ms Baroud, a person he trusted and who had acted as his interpreter during the hearing up until he came to give evidence. During the course of the hearing the Court adjourned to consider whether or not any point would be taken about the interpretation of the appellant's evidence by Mr C. After considering the issue, a deliberate decision was made by the appellant not to complain about the interpretation. The Judge himself raised the possibility of evidence being led about the accuracy of the interpretation. The appellant, after taking legal advice, decided not to raise any complaint. The appellant's trusted interpreter remained in court at all times and was therefore able to inform the appellant and the appellant's counsel about the quality of the interpretation by Mr C. The circumstances are set out in full in Justice C's reasons. The appellant therefore made a carefully considered decision not to challenge the quality of the interpretation by Mr C.

163. The evidence of Ms Crespo criticising Mr C's interpreting is not "fresh" evidence. It is "new" evidence. If there were problems with the interpretation during the trial, the appellant well knew about those problems and had the opportunity to deal with the issue then. This is not a case of an under-resourced accused presented with a court interpreter and who was oblivious to errors in the interpretation until after the trial, in which case the evidence would almost certainly be fresh evidence.

164. In any event, for the reasons given by Justice C, there were no significant errors in the interpretation by Mr C. I agree also with the reasons of Justice A in relation to this ground. The errors which did arise did not give rise to any miscarriage of justice and ground 7 should therefore be dismissed. [...] 

APPEAL JUDGE C

345. Ms Crespo was undoubtedly well qualified in the work of an interpreter. She has university qualifications from the University of Louisville, Kentucky and she is a certified US court interpreter familiar with interpretation and the taking of depositions in United States courts. Translation services with respect to the Spanish language (in which she specialises) are required daily because there is a 50 per cent Spanish speaking population in the community in which she lives, in the State of Florida. It is unnecessary to trace Ms Crespo's curriculum vitae which is a preface to her report. On any view of it, she is highly qualified and experienced in the field of interpretation in courts.

346. The art of forensic interpreting, especially in court proceedings, is a complex and sophisticated process. Ms Crespo indicated this in the following exchange in evidence that she gave before this Court: [...] 

348. The report of Ms Crespo (dated 23 February 2005 and received as exhibit A on the appeal) expresses the view that the testimony of the appellant was "negatively impacted by the failure to provide adequate interpretation services". A review of the record revealed 588 errors and 539 omissions and Ms Crespo expressed the opinion that Mr C was not a trained experienced interpreter. She considered that his performance was severely impeded by fatigue or inexperience and his ability to understand process and convey linguistically precise statements when interpreting to and from the pertinent languages was less than satisfactory.

349. It would be impossible to detail the very many exchanges between the appellant and the interpreter which Ms Crespo criticised. Many were of no significance in terms of the appellant's defence. [...]

Appendix 2
It is apparent that procedures followed in the United States may be very different from those followed in Australia. The luxury of an interpreter being able to have the court adjourned in order that he or she might conduct research for the Court's assistance on the answer which accorded best with the nuance of language is something that would not appear to be feasible here. In any event, I have reservations as to whether it is appropriate for an interpreter to form a view by speaking "to an attorney that deals with maritime law" to form an opinion. The literal interpretation is often that which a Judge will ask the interpreter to give.

Counsel for the respondent submitted that Ms Crespo had applied a standard which was clearly more exacting that that required by the appellant or his counsel at the trial. The submission was that a demonstrated failure to attain the standard applied by Ms Crespo by the trial interpreter does not make out a case of miscarriage of justice. It was conceded that the interpretation by the trial interpreter may not have been "100 per cent accurate" but it was submitted that the meaning of the appellant's answers was made quite clear. Many of Ms Crespo's challenges to the process of interpretation were submitted to be pedantic. With this I must agree. [...]

The question is whether the learned trial Judge sufficiently ensured that the appellant understood the proceedings and was able to make himself understood with the use of a competent interpreter. It must be remembered that this was not a case where the appellant was appearing unaided by counsel or a check interpreter. [...] 

The appropriate standard of interpretation in court proceedings has been the subject of a substantial judgment in *Perera v Minister for Immigration and Multicultural Affairs* (1999) 92 FCR 6. At [18] Kenny J put the following general proposition:

"In criminal trials, there is a rule that an accused must be physically present in court. The rule, it is said, is intended to ensure that the accused is able to hear the case against him and to have an opportunity to answer it. The same rationale is said to inform the approach taken in the criminal courts with respect to the use of interpreters. In the case of an accused who is not sufficiently proficient in English to understand the proceedings or to make himself understood, the trial judge must, as part of his/her duty to ensure a fair trial, see to it that the accused receives the assistance of a competent interpreter: *Dietrich v The Queen* (1992) 177 CLR 292 at 331 per Deane J; *R v Saraya* (1993) 70 A Crim R 515 at 516 Badgery-Parker J (with whom Kirby ACJ and Loveday AJ agreed); *R v Johnson* (1987) 25 A Crim R 433 at 435 per Shepperton J and 442 - 444 per Derrington J; *R v Lee Kun* [1916] 1 KB 337 at 341 - 343 per Lord Reading CJ; *Kunnath v State* [1993] 1 WLR 1315 at 1319 - 1321; [1993] 4 All ER 30 at 35 -36; *R v Begum* (1991) 93 Cr App R 96 at 100 - 101; *R v Tran* [1994] 2 SCR 951 at 963 and *United States ex rel Negron v New York* (2nd Cir 1970) 434 F 2d 386."

There are other passages in the judgment of Kenny J relied upon by counsel for the appellant and they are as follows.

At [20] her Honour said:

"If not proficient in English, the applicant is effectively unable to exercise his right to give evidence unless an interpreter assists him. The Tribunal is unable to give the applicant an effective opportunity to appear before it to give evidence unless it provides an interpreter to assist."

At [31] her Honour said:

"An interpretation is competent if it is adequate or satisfactory when judged against the relevant standard. An interpreter is competent if he or she can provide a competent interpretation. To speak of the competence of an interpretation invites reference back to some of the criteria that have already been mentioned, such as accuracy, as well as to other criteria, some of which are mentioned below. To speak of the competence of the interpreter invites reference to the competence of the interpretation that that interpreter may be reasonably expected to provide. In assessing whether an interpreter is likely to be competent, courts and tribunals ordinarily have regard to various factors, including the interpreter's qualifications, accreditation or experience. It remains possible, however, that an interpreter, who satisfies a court or tribunal that, by reason of
qualifications and experience, he or she would be likely to provide a competent interpretation, may nonetheless provide an incompetent one."

364. There was extensive reference by counsel for the appellant to other authorities, many of which are collected in Kenny J’s judgment in *Perera v Minister for Immigration and Multicultural Affairs* (*supra*). Counsel stressed the need for continuity and the need for precision and competence. Both can be accepted and it is unnecessary to make reference to the authorities upon which reliance was placed. The question is whether in this case there was a miscarriage of justice occasioned to the appellant by reason of the process of interpretation by Mr C. In my view there was not. Notwithstanding the comprehensive criticism of the standard of interpretation voiced by Ms Crespo and fully documented in her ample report, only one piece of evidence has been pointed to as a critical error in interpretation and the view I have already expressed is that it was not critical to the appellant’s defence.

365. Although Ms Crespo was not prepared to accept it, it seems to me that it was important that the jury had the opportunity to watch the appellant give evidence and to note the fluency with which he answered, in Spanish, the questions which were put to him. Ms Crespo expressed the opinion that in these circumstances, because the jury did not understand the Spanish language and it did not sound familiar or understandable, "the mind blocks out, so, in the end, what is received is what's coming in English because the other stuff doesn't make any sense so your mind will block. It's like cacophony, you know. A noise that bothers you all the time, you block".

366. This is an opinion to be respected, but the trial process must involve the jury in making an assessment of the witness as he speaks the foreign language. Evasiveness, argumentativeness and inability to answer questions would all be noticed if that occurred. If, on the one hand the appellant was able to answer all questions fluently in Spanish, that, no doubt, would be a factor that the jury would note. The indications are that the appellant was able to do exactly that. [...]  

375. I agree with Justice B that the evidence should be admitted under s 40 of the *Criminal Appeals Act*, but that the evidence reveals no miscarriage of justice. Even if the evidence is not to be regarded as new evidence, but merely a reassessment of the accuracy of the interpretation process at trial, for the reasons that I have mentioned, it cannot be said that the appellant did not receive a fair trial and that there was a miscarriage of justice. The contention by the appellant that the compounding effect of multiple minor errors in the interpreting process denied the appellant a fair trial and thereby caused a miscarriage of justice is unpersuasive. The numerical number of word errors or omissions cannot, of itself, point to a denial of a fair trial and miscarriage of justice. It is all a question of how significant the errors were in enabling the appellant to properly put before the jury his defence to the prosecution case. In this respect, as I have pointed out, there could have been no misunderstanding or misinterpretation of what the appellant was saying about the role that he played in the enterprise.

376. Ms Crespo said in her evidence that the process of interpretation was such that the interpreter did not portray before the jury, the true level of intelligence of the appellant. [...]  

377. During the course of Ms Crespo's evidence I put it to her that the jury would have had the opportunity of listening to the appellant speak in Spanish and by observing him and listening to what he said in that language they would have understood his fluency and the level of intelligence that he demonstrated. Ms Crespo was not prepared to agree. She said:

"When you have a jury that does not understand the language and is being given information in another language, what doesn't sound familiar and is not understandable, the mind blocks out so, in the end, what is received is what's coming in English because the other stuff doesn't make any sense so your mind will block. It's like cacophony, you know. A noise that bothers you all the time, you block. It's like somebody who has the railroad tracks behind the house, hears them on the first two nights and the third night it's not there any more. It's the same thing with any other thing that's not familiar and it doesn't make any sense to you. Language will do that as well."

378. I find it difficult to agree with Ms Crespo's opinion in this respect. The members of the jury were seated opposite the appellant as he testified from the witness box. They had the opportunity of observing his demeanour and listening carefully to how he spoke in Spanish. Further, it is clear from the submissions of defence counsel at the trial when addressing the jury that it was put to...
the jury that the appellant had demonstrated assertiveness, pride and cleverness in the course of his evidence. [...]  

380. The ultimate question was whether the jury was satisfied beyond reasonable doubt that the prosecution had proven that the appellant was knowingly concerned in the importation of a prohibited drug in the sense that he played a vital role on shore to co-ordinate the landing point of the "White Dove" and with the intent thereafter to assist in the transportation of the one tonne of cocaine. The defence that he raised and which had to be negatived beyond reasonable doubt was that he was merely a master of ports, or, if one prefers Ms Crespo's version, a crew host (the distinction does not seem to me to be important), whose responsibility was to arrange on land accommodation and transport for crew members of the "White Dove" when they landed in Western Australia. The central thrust of this defence was clearly put before the members of the jury and it was for them to determine whether or not they were left with any reasonable doubt on the issue.  

381. I would dismiss this ground of appeal.  

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