Introduction

Expertise and the Common Law Tradition

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Law is itself a field of expertise, one of the elements of which is deployment of the expertise of non-lawyers. However much it depends on coherence in its expression, and consistency in its application, law is not a closed system of thought. It both draws upon and influences ideas beyond itself. It is liable to change as the society it serves may change.

For many Australian lawyers, the classic analysis of the admissibility and weight of expert testimony in a court of law is found in the judgment of Heydon J (then on the NSW Court of Appeal) in *Makita (Australia) Pty Limited v Sprowles*.[1] Writing extra-judicially, his Honour has acknowledged lingering controversy attaching to that judgment,[2] but the prevalent view of the Bar favours his insistence on an application of rigorous logic to identified assumptions and verifiable facts. A judge must ideally be able to test everything advanced for or against a case. Judicial decision-making cannot by stealth be delegated to expert witnesses. That approach manifests a strong commitment to the common law tradition, as does his Honour's critique of the strengths and weaknesses of specialist statutory tribunals, viz-a-viz ordinary courts, in *Kirk v Industrial Court of NSW*.[3]

The common law tradition is not a "value-free zone". Its methodology reflects and informs its aspirations, sometimes more effectively than abstract notions of justice. Each case must be decided by an application of principles, generally known or knowable, to facts fairly established by evidence. The High Court of Australia has rejected "top down reasoning" characteristic of European, civilian systems of law. In Australia's common law system,[4] based on case law,

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1 (2001) 52 NSWLR 705.

2 JD Heydon, *Cross on Evidence* (LexisNexis, Sydney, 8th Aust ed, 2010) at para [29200], notes 408-412.

3 (2010) 239 CLR 531 at 589-590 [122].

4 Australia's long-cherished independence was fully translated in the law with the passage of the *Australia Acts* by the UK and Australian Parliaments in 1986. In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562-563 the High Court confirmed that, under Australia's federal system of government, there is but one common law in Australia, which is declared by that court as the final court of appeal.