THINKING LIKE AN EXPERT LAWYER: MEASURING SPECIALIST LEGAL EXPERTISE THROUGH THINK-ALOUD PROBLEM SOLVING AND VERBAL PROTOCOL ANALYSIS

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ABSTRACT

This empirical study identifies and measures ways in which legal specialists with different levels of expertise (but the same technical legal knowledge) think differently when assessing legal risk in information-limited and time-constrained contexts.

The 20 participants in this study are all specialists in competition law. They are a mixture of lawyers and economists from eight leading Australian law and economics firms, and from two regulatory bodies responsible for administering national competition laws. This sample of individuals, whose years of experience as competition law specialists range from five to 35 years, is assumed to include apprentices, journeymen, experts and masters according to the proficiency scale used in Middle Ages craft guilds and still used today in studies of expertise and expert performance.

Following an initial selection and ranking process, participants are categorised according to these four levels of proficiency. Their cognitive skills are then tested and compared to identify expertise-related differences. The principal data analysed are the think-aloud, concurrent verbalisations of study participants recorded as they seek to assess legal risk in test cases that require the use of competition law expertise. These data reveal a number of readily identifiable and measurable differences between how more and less expert participants assess legal risk in their common area of legal specialisation.

Master-level legal specialists are identified by their correct substantive analysis of legal issues, the ease and speed with which they identify key issues, and their heavy and effective reliance on intuition in assessing legal risk. Experts are identified by their refusals to provide concluded views when information and time are limited, their ability to identify key issues quickly, and their effective integration of intuition and analytical reasoning.

In terms of lower-level legal specialists, journeymen are identified by their reliance on superficial reasoning to assess legal risk, their laboured identification of issues, and their tendency to rely on guessing rather than intuition and to ‘blurt out’ their responses prematurely. Apprentices are identified by their laboured reasoning and extensive
searching for relevant issues and analogies, their heavy reliance on analytical reasoning, and the influence of self-doubt on their deliberations.

These and related findings, which are generalizable across other areas of legal specialisation, confirm the results of previous studies, raise questions about others, and offer new insights into the ways in which lawyers at different points along the legal-expertise continuum think differently from each other. These insights have the potential to improve the assessment methodologies used in lawyer accreditation schemes, change how users of legal services assess the expertise of legal specialists, increase the effectiveness of in-house training programs developed within law firms and by other legal service providers, and lead to new pedagogical approaches to the design and delivery of post-graduate, mid-career courses offered by law schools. They also provide a new foundation for scholarly research into the cognitive development of specialist legal expertise, which to date has not distinguished between the four levels of proficiency identified in this thesis.
DECLARATION

This thesis is submitted to Bond University in fulfilment of the requirements of the Degree of Doctor of Philosophy.

This thesis represents my own original work towards this research degree and contains no material which has been previously submitted for a degree or diploma at this University or any other institution, except where due acknowledgement is made.

Signature: ........................................ Date: 6 May 2015
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