126
EXPERT MARKETING EVIDENCE

by

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2018

AUTHOR INFORMATION

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He has provided expert marketing evidence in many cases, including designing surveys put into evidence in *BP plc v Woolworths Ltd* (2005) 212 ALR 79, *Opposition by La Chemise Lacoste to registration of trade mark application 1005106, 1017333 (classes 18, 25)*; *Optical 88 Ltd v Optical 88 Pty Ltd (No 2)* [2010] FCA 1380, Whiskas purple (see *Mars Australia Pty Ltd v Société des Produits Nestlé SA* [2010] FCA 639) and in applications for the registration of trade marks on the basis of colour in relation to Cadbury purple and *Yellow Pages*. He provided expert marketing evidence in Philips Electronics NV v Remington Products Australia Pty Limited [1998], NG 637 of 1997, where he gave an expert opinion on whether consumers would be confused by the appearance of a triple-headed shaver produced by Remington. He has also reviewed marketing evidence in many cases, including the application by Nestlé Australia Ltd pursuant to s 101a for review of the Australian Competition and Consumer Commission's notice under s 93(3) regarding Nestlé Australia Ltd's exclusive dealing notification N31488 (No 7 of 2006). This matter related to the importation and sale of Nescafé products in Aldi stores in Australia. He also produced an extensive analysis of two pieces of market research introduced in relation to proceedings instituted by Luxottica Retail Australia Ltd against Specsavers Pty Ltd [NSD 353/2010].

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The original author of the first edition of this chapter was Michael Beaton-Wells.

David Bednall would like to extend his profound thanks to Professor Hugh Selby for his help and extreme patience in encouraging his author to complete this revised work.

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Abbreviations

ACCC — Australian Competition and Consumer Commission

ACL — Australian Consumer Law, Schedule 2 of the *Competition and Consumer Act 2010* (Cth)

ARIMA — auto-regressive integrated moving average

FMCG — fast-moving consumer goods

IMC — integrated marketing communications

MAPE — mean absolute percentage error

POS — point-of-sale

RMSE — root mean square error

SKUs — stock-keeping units

SMEs — small-to-medium enterprises

STP — Segmentation, targeting and positioning

TARPS — target audience rating points

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Introduction

[126.10] Definition

Marketing has a wide scope, being involved in all manner of interactions between organisations and their stakeholders. As such it has wide application to legal matters, especially those involving commercial litigation. Marketers define it as *"… the activity, set of institutions, and processes for creating, communicating, delivering, and exchanging offerings that have value for customers, clients, partners, and society at large."* (AMA, 2017). The key concept here is *exchange*, which takes marketing back to its origins in a marketplace where sellers would exchange goods for money or other goods from buyers. However, *offerings* are now widely conceived. They could for example be physical goods in a supermarket, the Blood Service promoting donations, a broadband service or, for that matter, legal advice. There is now an emphasis on *value*, both tangible and intangible, not just on the monetary value. Similarly, the *price* paid by the customer may involve other costs besides money, including time, opportunity, inconvenience and annoyance. A range of activities leading up to the exchange – product design, advertising and the supply channel (retail, wholesale or other outlet) – and post-exchange – customer satisfaction, loyalty and after-sales service – are now encompassed by marketers. *Stakeholders* include not just customers (consumers and organisations), donors and clients, but also staff and supply chain intermediaries.

[126.20] Scope

Given its wide scope, most if not all activities of organisations have a marketing aspect to them. On this view, marketing evidence may be far more relevant to an issue in dispute than is obvious at first glance. Like all disciplines, marketing's boundaries are contestable, drawing as it does on approaches from psychology, economics, sociology, communication, analytics, statistics, econometrics, logistics, business ethics and anthropology. Importantly, it is a discipline that is concerned with the day-to-day phenomena and practical understanding of markets and the interplay between stakeholders. Modern marketing thus has much to offer lawyers and adjudicators in commercial disputes. It can help frame a problem, identify relevant evidence and provide specific answers to key issues in dispute. The challenge, however, is to understand what marketing can and cannot offer lawyers and to know how such evidence can be gathered and compiled in a way that will withstand cross-examination or expert review and ultimately prove of assistance to the court or tribunal.

This chapter sets out to provide the legal practitioner with guidance on these issues. It is structured under the following sections:

- *Overview of marketing*: definition, organisation and applications of marketing. In each major section, issues on which marketing evidence may be led are detailed: this provides a framework from a marketer's point of view, structured around specific marketing issues, independent of causes of action. This section and that on the applications of expert marketing evidence are cross-referenced to allow the reader to move between the legal and marketing perspectives;
- *Marketing expertise*: this explains the roles of practitioners, academics and experts and their qualifications and the relationships between marketing and other experts; and, the increased potential for conflict and perceived bias for experts who have extensive commercial experience in advising clients in industries involved in the dispute in question;
- *Sources of evidence on which marketing experts might rely*: this highlights the types of data available to marketers, including customer data, reliable surveys, and the use of predictive and forecasting tools. The use of marketing data from an evidentiary perspective is also considered. This is relevant in terms of the admissibility and weight likely to be attached to such evidence;

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- *Applications of expert marketing evidence*: this provides a framework from a lawyer's point of view, structured around causes of action and specific elements of each cause to which marketing evidence may be highly relevant; and
- *References*: The references cited throughout the chapter comprise both key recent and seminal writings.

A prefatory note: this chapter displays a marked emphasis on business-to-consumer markets (as distinct from other types of markets, such as business-to-business markets). This reflects the fact that business markets and other markets often have specialised, knowledgeable buyers and many niche markets and there appears to have been less litigation involving these markets.

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OVERVIEW OF MARKETING

[126.100] Development of the marketing concept

Marketing, as a formal discipline, is still relatively young, having emerged in the early 20th century. One of the first texts to use marketing in its title was the work by Butler, De Bower & Jones (1914). The first chair in marketing at a university was established in the early 1900s (and in an Australian university in the 1960s) and the first formal, peer-reviewed journals dedicated to the field emerged in the 1930s. The crucial shift came with the new emphasis on managerial marketing that McCarthy and Kotler led in the late 1960s as this replaced an institutional approach that had characterised the discipline for many years. Today, marketing is a well-established field of formal academic study, with multiple academic journals and formal chairs and courses offered at most major universities. Equally, marketing is an applied discipline. It has become a key part of corporate business structures, with positions such as director of marketing or chief marketing officer commonly having significant control over a firm's offer to its customers. A good overview of modern Australian marketing is provided by Kotler and his colleagues (Armstrong et al., 2018).

One simplistic formulation of marketing is the still commonly cited 4Ps approach. This reduces marketing to four functions: *product*, *promotion*, *price* and *place*. This formulation was

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begun in the 1950s (van Waterschoot & Van den Bulte, 1992) and still has currency in business circles and introductory marketing courses. Sometimes another "P", *packaging* is added. In services marketing, it has been extended to 7Ps by adding *physical facilities*, *processes* and *people* to take account of the fact that most services have intangible aspects of value and rely on co-production between the service provider and customer to create value. For example, education as a service creates an intangible good – learning – and relies on the co-production between student and teacher in a classroom or online to achieve this outcome. The 4Ps or 7Ps formulations are useful starting places to think about marketing issues and have their greatest application in implementing the marketing plan, using the so-called "marketing mix," see [126.240]. But they do not fully deal with the complexity of marketing, as shown in the introduction [126.10] and hence its relevance to legal practitioners.

So what is the scope of marketing as a discrete area of expertise? Marketing (and its management inside an organisation) has the prime responsibility for designing, coordinating and executing all those functions that *attain* and *retain* target customers or clients. This is done by *creating* and *capturing* customer value. Marketing seeks to influence and control a wide range of processes and management decisions within an organisation. These include:

- brand management, including defining core brand identities, protecting brand assets and coordinating multiple brands at once. Unlike other assets of a marketing organisation, a brand is unique. Marketing organisations therefore take great care to protect their brands, and resist the attempt of others to acquire their brand assets through passing off or other devices. The role played by a brand is also closely related to role played by a trade mark [126.850];
- advertising, which itself is part of a much larger subject of promotion management and a key element in competition between rival organisations. It includes a wide range of promotional channels, especially television and social media;
- identifying and understanding customer needs, trends and behaviour, and defining specific groups of prospective customers that best fit the organisation's offer and objectives;
- customer relationship management using databases, loyalty programs and predictive analytics;
- product management (conceptualising, developing and launching new products and managing existing products);
- distribution management, including designing the structure of the distribution channels through which products will be sold, choosing specific channel members and managing those members over time;
- pricing strategy, including setting pricing policies and levels;
- modelling the relationship between marketing activities, customer behaviour and financial success or loss;
- customer insights, including customer analytics, external market data, competitor intelligence and market research (commissioning, interpretation and application of the results);
- sales management, including sales forecasting, sales strategies and processes; and
- crisis management, including managing product recalls and public relations.

To do all of the above, marketing has had to become an integrative discipline, drawing on a range of other disciplines. For example, it draws on:

- financial and accounting concepts (e.g. to estimate payback periods on new product options, to forecast sales and to estimate a return from advertising);
- economics, to analyse competitor dynamics such as barriers to entry, order-of-entry effects, scale and scope efficiencies and behavioural economics to understand how customers frame value and risk;
- supply chain logistics, including ordering, delivery and after-sales service;
- management of customer-facing staff and design of the interfaces (physical or virtual) between supplier and buyer;
- social sciences, such as psychology and sociology, to understand human behaviour, including physiological and learned responses, memory and cognition, knowledge and confusion; and

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- creative design disciplines, as part of developing successful promotional campaigns.

With this overview in mind, the one thing that marketing always demonstrates is a constant focus on the customer, client or donor.

[126.110] Organisational role and impact of marketing

The "marketing concept" is described by Kotler (2000, p 19) as a business philosophy which "… holds that the key to achieving organizational goals consists of the company being more effective than its competitors in creating, delivering and communicating customer value to its chosen target markets." It should be observed that the emphasis here is on for-profit marketing. Value-based marketing thus examines the contribution of marketing strategies, planning, decisions and activities to shareholder value, primarily through the lens of their impact on the net present value of future cash flows or investments (a commonly used indicator of financial performance). While litigation involving marketing is mostly commercial in orientation, marketing is also used extensively in the non-profit sector (political parties, charities, sporting organisations, educational institutions). Some non-profit marketing organisations may also be subject to litigation, especially as many enter into sponsorship arrangements with for-profit companies (Dickinson and Barker, 2007). In addition, many non-profits are in themselves major trading organisations, such as the AFL or a university.

Marketing is not just interested in customers, but also in activities that occur within the organisation, sometimes known as internal marketing. During the 1980s, several authors worked to develop frameworks for implementing the marketing concept in organisations, and this approach came to be known as market orientation, defined by Jaworski and Kohli (1993, p 54), as the "… organization-wide *generation* of market intelligence pertaining to current and future customer needs … *dissemination* of the intelligence across departments … organization-wide *responsiveness* to it."

Market-led or marketing-led organisations are those in which key marketing principles and approaches are used to drive organisational strategies that are "based on offering value, that (the firm) is good at delivering, to a customer who wants it": Piercy (2002, p 5). Thus, a market oriented organisation is one where all actions are analysed in terms of their implications for the marketplace. For example, a streamlined internal communication system may allow a bank to offer more responsive services to customers.

Based on these definitions and organisational roles, the scope of marketing management thus credibly extends from fundamental organisational strategy and financial performance, through strategic and competitive decisions and policy issues such as customer relationship management and pricing to the execution of specific tactics such as brand naming, packaging design and advertising.

Legal applications

The definition of marketing, especially that used by a particular firm or firms involved in a proceeding, may well be a relevant area on which a marketing expert is asked to comment. For example:

- the market orientation of a firm, the way in which it gathers customer and market intelligence, the way in which it puts the customer as a central concern of the organisation;
- whether marketing activities undertaken by a licensee or distributor amount to "reasonable endeavours" (e.g. in a contractual dispute), see [126.900];
- whether the organisation had reasonable and appropriate mechanisms in place to monitor and disseminate market intelligence or to manage customer relationships (including measuring satisfaction and handling complaints, covered in further detail at [126.700]) (e.g. in relation to the issue of mitigation of losses following product failure or withdrawal), see [126.250];
- an assessment as to how realistic the organisation's expectations were and how it had organised itself (e.g. as part of an overall exercise in estimating loss of profits), see [126.910];
- whether marketing budgeting and resource allocation decisions were optimal, see [126.150].

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Kotler and other authorities also recognise that the scope of contemporary marketing – and hence of the activities of marketers and marketing management and the potential scope of marketing evidence – extends to entities well beyond traditional definitions of goods and services, and also includes experiences, events, persons, places, properties, organisations, information and ideas.

[126.120] Marketing strategy and tactics

Marketing strategy at its core is a set of objectives for an organisation as to who its main stakeholders should be, what fundamental value is to be offered to them and how this should be offered. This should be decided in the context of threats from competitors and other external influences, such as the financial system or laws and regulations.

Corporate strategy (e.g. relating to a portfolio of business units) and business strategy (e.g. relating to the asset, financial and human resources of a single business unit) are related to but not the same thing as marketing strategy. Whilst there is often overlap in practice, marketing strategy is usually subordinated to the former.

Contemporary marketing strategy can be seen to consist of:

- the strategy-formulation process;
- the content of the strategy; and
- the tactics used to implement the strategy.

The whole process involves analysis, planning and monitoring. Content typically pertains to one or more of the following:

- which markets to compete in, defined in terms of which geographic locations, which product or service types and at which levels of the production-distribution-retailing chain;
- which customers to compete for. Marketers call these "target markets", a term which reveals the marketers' preference for conceiving markets in terms of the customers contained within them rather than a supplier-oriented concept. Target markets are arrived at through a process called customer segmentation (explained below at [126.170]); and
- what offer to make which will create unique or competitive value for the target market and thereby confer competitive advantage on the firm over its rivals. This is also referred to as the "customer value proposition" and is primarily concerned with deciding which differentiating benefits will be offered at which price.

These strategies typically focus on:

- advertising and promotion (i.e. where, when and how to communicate with target customers);
- brand (i.e. positioning relative to other brands, brand equity development, brand associations and knowledge);
- sales (force) (i.e. size, incentives);
- pricing (i.e. relative price level, discount policy); and
- channel or distribution selection (i.e. where and how products will be distributed, such as retail, internet, franchise network, direct mail, sales force).

These aspects are often referred to in business planning documents as either "programs" or as sub strategies such as the "brand strategy", "sales strategy" or "integrated marketing communications strategy".

Marketing *tactics* are concerned with the detailed implementation of these marketing strategies.

Legal applications

Marketing strategy is not only indirectly relevant to the marketing expert's assessment of market events, but may also be directly relevant when asked to comment on the apparent strategic intent of a firm or individual as indicated by its actions. See e.g. *Cat Media Pty Ltd v Opti-Healthcare Pty Ltd* (2003) ATPR 41-933; [2003] FCA 133 and *Decor Corporation Pty Ltd v Australian Housewares Pty Ltd* [1998] FCA 1479.

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[126.130] Competitive forces and market structure

Integral to marketing strategy is an analysis of the level of competition within a given market/industry. Application of economics and industrial organisational principles to business strategy from the 1960s led to the seminal and influential work of Harvard Professor, Michael Porter, on competitive strategy: Porter (1985, 2008). This work is widely acknowledged by leading authorities, including marketing authorities. Industry analysis of the type embodied in Porter's "five forces" framework is a crucial early step in marketing planning: This framework is often used in the marketing discipline as a basic and systematic tool for analysing the competitive forces within an industry and their impact upon the long-term profit attractiveness of that industry (Besanko, Drove & Shanley, 2010). These "forces" are:

- rivalry among existing competitors – the jockeying for market share by firms;
- threat of new entrants – refers to the entry *and* exit barriers into and from an industry;
- the threat of substitute products or services– those that meet the same needs;
- bargaining power of suppliers – the ability of input suppliers, or intermediaries like retailers to negotiate prices that extract profits from their customers or suppliers; and
- bargaining power of buyers – the ability of individual customers, or buying groups, to negotiate purchase prices that extract profits from sellers.

It should be noted that rivalry between competitors lies in the centre of this model because it may be affected by each of the other forces. In the marketing arena, Porter's work has been supported by the resource advantage theory of competition (Hunt & Arnett, 2003). While agreeing on the market and economic advantages enjoyed by highly competitive organisations, the authors highlight the role that social institutions and internal culture play. They also note that organisations are part of complex networks in their industries, which offer further advantages. In this sense, their views coincide with a more recent emphasis on *relationship marketing* which focuses on the value derived from relationships and networks (Gummesson, 2004), on complexity and turbulence, and on competences and capabilities. The relevance of this turns on the shift away from transaction-based thinking/ models towards the much more complex issues arising from relationships and networks. At the same time, alliances or networks may produce anti-competitive outcomes for organisations outside the network. For example, a retailer which owns a supply chain may favour its own producers over competitors.

Legal applications

Porter's framework is similar to that which was used to analyse market structure in *Re Queensland Co-op Milling Association Ltd and Defiance Holdings Ltd* (1976) ATPR 40-012. Porter's five forces are essentially encapsulated in s 50(3) of the *Competition and Consumer Act 2010* (Cth), which provides a non-exclusive list of factors to take into account when assessing the effect on competition of a merger. This is illustrated in Table 1.

TABLE 1 Porter's five forces

The five forces	Competition and Consumer Act
Rivalry among existing market players	s 50(3)(c)
Threat of new entrants	s 50(3)(a)(b)
Substitutes	s 50(3)(f)
Supplier power	s 50(3)(i)
Buyer power	s 50(3)(d)

Expert economic evidence on market definition has been given relatively little weight by Australian judges in cases involving Pt IV of the *Competition and Consumer Act 2010*. The more important class of evidence has been industry evidence (Beaton-Wells, 2003). See [126.920].

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[126.140] Analysing competitors and predicting competitor response

Predicting competitor response is an important input into marketing planning and strategic decision-making. Often this involves combining specific areas of marketing expertise and practice with an understanding of microeconomics and the increasingly related subjects of the economics of strategy and "game theory".

Once a firm has identified its competitors, it must ascertain their objectives, strategies, strengths, weaknesses and patterns of reaction (Kotler, 2000, p 248). Systems for gathering competitive intelligence and methodologies for analysing such data are covered in numerous basic marketing textbooks, and are standard in many modern marketing departments. As described at [126.700] customer analytics can help marketers predict what offers customer will value, in addition to more conventional techniques used by market researchers to measure what customers value (Gale, 1994).

Competitor reactions can also be anticipated by applying lessons derived from general observations of industries over many years. Many business texts identify "generic" competitive strategies (e.g. lowest cost versus niche) (Porter, 1985) and typical roles in a market (e.g. leader versus imitator): Schnaars (1994, pp 1-4). The Miles and Snow (1978) typology of organisations' possible strategic orientations may also provide a useful framework to understand the marketing strategies. In particular, the more entrepreneurial "prospector" group are likely to pursue competition aggressively and be very active seekers of marketing intelligence (Valos & Bednall, 2010).

Legal applications

Examples where evidence on competitor response has been led include the following:

- The then *Trade Practices Act 1974* (Cth), Pt IV, s 46: in the predatory pricing case of *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (2003) 129 FCR 339; [2003] FCAFC 149, a marketing expert led evidence assessing the conduct of plant bakers, assessing whether price tiers in the market were established as between the major players, see [126.840].
- Whether competition will be substantially lessened, such as in a merger under s 50 TPA: *Re Application for Authorisation by Wattyl (Australia) Pty Ltd and Courtaulds (Australia) Pty Ltd* (1996) ATPR (Com) 50-232 where a marketing expert was asked to give evidence about the role of regional paint brands in response to the proposed merger, see [126.840].
- Identifying intent in relation to imitation conduct under cases involving passing off, s 52 of the then *Trade Practices Act 1974* (Cth) and trade marks, where that intent is interpreted as competitor response, see *Cat Media Pty Ltd v Opti-Healthcare Pty Ltd* (2003) ATPR 41-933; [2003] FCA 133 where the incumbent market leader was said to have been enticed to react to the successful market entry of Fat Blaster by adopting imitation strategies, see [126.820].
- In damages claims, assessing and predicting market reaction and competitor response where market forces impact on the claim, see e.g. *Seeley International Pty Ltd v Newtronics Pty Ltd* (2001) Aust Tort Reports 81-648; [2001] FCA 1862 where competing dealers "knocked" Seeley during a product recall, leading to long-term loss of dealer support. See also *Dowdell v Knispel Fruit Juices Pty Ltd* [2003] FCA 851 where Berri Ltd sought aggressively to increase market share in the "route trade" (i.e. independent convenience stores and milk bars) in the face of a salmonella outbreak affecting the leading South Australian brand, see [126.910].
- Competitive strategy is also relevant in damages claims, in that often a market pioneer as claimant will present its case around the legitimacy and advantage conferred by being pioneer and leader. In such cases (e.g. *Sydney Refractive Surgery Centre v Beaumont* [2004] NSWSC 164), a key question for expert evidence is whether the pioneer has a legitimate claim to advantage or whether this is illusory in the face of more flexible imitators, see [126.910].

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[126.150] Marketing planning

Marketing and/or brand planning is a major activity in most large firms based on their overall strategies. Organisations typically develop and publish marketing plans internally on a regular basis, with time horizons often looking forward several years. Marketing planning is a well-established discipline within both academic and managerial marketing, and there are numerous published works on the planning process. A "marketing plan" can be defined as a written document containing the guidelines for the business unit's marketing programs and resource allocations over the planning period. While many corporations have evolved their own approaches to the structure and content of marketing plans, typical components can be identified, as follows (after Lehmann and Winer, 2005, pp 9-10):

1. Update facts about the past – update and extrapolate.
2. Collect background data – conduct situation analysis.
3. Analyse historical and background data.
4. Development objectives, strategies and action programmes – in areas such as marketing mix, market share, observing legal constraints.
5. Develop financial statements – budgets, profit-and-loss.
6. Negotiate plan within the organisation.
7. Measure progress.
8. Audit outcomes against objectives and diagnose reasons for divergences.

Typical inputs to marketing plans include:

- corporate and business strategy objectives;
- market intelligence (activities and likely response of competitors);
- detailed sales figures, by segment, distribution channel, historical and current trends; and
- customer insights, usually informed by customer analytics and marketing research see [126.700] ff.

The implementation of the marketing plan and its underlying strategy is often referred to as the marketing tactics, commonly known as the marketing mix (Varadarajan, 2010) see [126.240].

Legal applications

Even when asked to comment on a relatively narrow question, such as a package or a single advertisement, marketing experts will frequently ask to view any marketing planning materials available. This is because marketers rarely undertake any single marketing tactic without reference to an overall plan, and because consumers respond to the total and cumulative effects of the activities of the marketer in question as well as the activities of competitors. Indeed, one of the key tasks for the marketing expert is to separate out the effects of one aspect of marketing, such as the effect of a claimed misleading advertisement or promotion on the market success of competitors. (See *Specsavers Pty Ltd v Luxottica Retail Australia Pty Ltd* [2013] FCA 648.)

The plan gives the expert:

- a view of the complete marketing strategy for the product in question;
- a sense of the expected competitive dynamic in the target market;
- the full range of marketing programs and marketing mix planned; and
- the relative budget allocations to each of these activities.

The actual design and implementation of the marketing plan may be less systematic and less successful (Simkin, 2002) than formal documentation might suggest. They may be based on what marketers assume to be the market dynamics, on an implicit belief in how markets operate, rather than being based on hard evidence or accumulated experience. For example, it is very difficult to establish the direct link between marketing activities and outcomes. Even where there is a link, many marketing outcomes show lagged effects where outcomes are not apparent until a later period. Elements of the marketing plan, like advertising spending, are therefore often based on what was done in last year's plan.

This may have legal implications in cases where claims are made that a competitor's advertising has unfairly affected the claimant's sales or otherwise damaged its reputation.

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Cross-examination of marketing personnel from an organisation, if sufficiently detailed, may reveal implementation practicalities that differ markedly from any stated plan. Or they may reveal the marketer's views of how the market operates, being based on their assumptions rather than from detailed experience or hard evidence.

Large organisations increasingly have the benefit of analytics data of the response from customers to its promotions based on its marketing planning. Direct marketing to individuals or the use of loyalty programs and single source data (see [126.650] and [126.700]ff) can directly tie customer response to promotions.

[126.160] Defining the market

The issue of defining the market for particular goods or services arises frequently in various types of commercial litigation (not just Pt 4 of the *Competition and Consumer Act 2010* (Cth)) and is a subject for marketing evidence, as marketers and marketing departments within organisations are responsible for day-to-day working definitions of their markets and customers.

Economic definitions of markets tend to be seller- and product-focused. But, in general, marketers tend to view the sellers as the "industry" and the buyers as the "market" for the goods or services in question (Kotler, 2000, p 13). Hence, marketers often define a market by asking "Which customers or potential customers are in it?", and such a practical approach can provide a robust and real-world answer to the issue of market definition. Normally the end-users comprise the markets, but disputes may also arise between suppliers and intermediaries, such as supermarket chains. A distinction also needs to be made between buyers and consumers. For example, women still tend to be the main buyers of grocery items in the household, but often other people are the consumers. If a claim is made that competitor advertising affects the marketplace, a decision is needed as to which group (or groups) define the market. Normally the buyers are the people of interest.

Legal applications

Defining a market is an important issue in many legal contexts. It is crucial in many competition law cases under Pt IV of the *Competition and Consumer Act 2010* (Cth). It is also important in cases involving consumer response to marketing stimuli, such as passing off, trade mark registration or product liability. Market definition sets the bounds of analysis for such cases, and in some instances can be either determinative of the outcome or at least play a major role in the final result. In addition to anti-trust cases, some examples include the following:

- Claims for lost sales are often based on loss of market share. Such claims, therefore, depend on market size and dynamics over time;
- Damage to a business needs to be assessed as a matter of causation. One of the key aspects to assessing this issue is determining whether normal competitive rivalry was to blame. In turn, this requires a clear definition of the market and the relevant competitive set. It also requires marketing evidence that clearly separates out the effect of alleged damaging behaviour from normal market forces. For example, if there is a misleading claim about a competitor in an advertisement, the effect of the claim needs to be separated from the effect of the other parts of the advertisement as well as the broader campaign of which the advertisement is part. In *Seven Network Ltd v News Ltd* [2007] FCA 1062, the definition of the market was a key point in claims relating to the Seven Network's ill-fated C7 pay television channels.
- Predicting or analysing customer response to marketing stimuli, such as advertising, packaging or pricing, is context-driven by reference to the relevant competitive set (or what for consumers is called the consideration set) as well as an analysis of which customer segment is being considered (see also segmentation at [126.170]).
- Assessment of discovered documents and drawing comparisons with other external documents concerning market dynamics requires a strong grasp of market definition, in order that like is compared with like.

See also [126.910].

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[126.170] Segmentation, targeting and positioning (STP)

STP is one of the basic strategic tools available to marketers. *Segmentation* refers to the dividing of the marketplace into distinct, non-overlapping groups. Ideally, segments should be homogeneous within and heterogeneous between. Marketers focus their attention on primary segments, on the ones where they will get the greatest return on their marketing effort. For example, Officeworks will focus on parents with school children in their "back-to-school" stationery promotions.

Reasons for segmentation include:

- identification of unmet needs and/or new product opportunities, or of consumers who would be receptive to branding;
- matching customer behavioural characteristics (e.g. loyalty) to the firm's capabilities;
- enhancing the focus, specificity and efficiency of marketing communications; and
- optimising distribution channels through which customers are served (e.g. customer preferences for personalised or online account management) and hence reducing costs.

Many different criteria and methodologies are used to segment markets. See Hassan and Craft (2012) and also Dowling (2004, Ch. 6):

- demographic: e.g. age, gender, size of family, income, ethnicity, education level;
- geodemographic: e.g. region, population density or climate. This can be quite detailed, down to the level of the individual household;
- psychographic: e.g. personality characteristics, beliefs, values, lifestyle, self-image; and
- behaviouristic: e.g. benefits sought, usage status (non-user, ex-user, regular user, etc), usage rate, purchase occasion, loyalty status, responsiveness to marketing factors (price, promotion, etc).

Segmentation is an area of continuing expert study and academic inquiry, as well as of statistical and/or proprietary techniques used by commercial market research providers. However, segmentation is sometimes also based on qualitative market research and/or "intuitive" managerial insights, with little empirical data. While scores of subgroups could theoretically be identified within any market, in order to be managerially useful, any segment must be substantial enough in size and value in order to warrant attention (Kotler, 2000). Technology has also enabled micro-marketing, based on customer analytics (customer purchase and contact data), as well as commercial services such as those provided by companies like Experian Australia which facilitate micro segmentation.

Targeting. The next step following segmentation is targeting, in which the segments of the greatest strategic value to the marketer – i.e. those for whom the marketer's offer is likely to have the greatest value and appeal – are identified. Appropriate promotional media must be available to communicate with the chosen segments and where possible to avoid wasting marketing expenditure on unresponsive segments.

Positioning refers to the image that a company, product or brand has in the minds of customers and potential customers both in its own right and particularly in relation to competitors. Luxury car brands seek to associate themselves with premium prices, quality and prestige and to dissociate themselves from everyday brands. Market research is often used to monitor the positioning of a brand relative to competitors. Branding and brand names are essential in positioning since almost every other feature or benefit of a product or service can be adopted by a competitor, within the limits of trade mark, copyright or patent law. See [126.850]ff.

Legal applications

Market segmentation is an issue that is frequently raised in a variety of legal proceedings relating as it does to the relevant class of consumers. It is an area on which marketing experts have been asked to comment. Examples include:

- In defending an action of passing off under the common law or an action under s 18 of the *Australian Consumer Law* (ACL) (Schedule 2 of the now *Competition and Consumer Act 2010* (Cth)), a party may claim that the product is targeted to a different, non-overlapping segment and hence no consumer would be confused, misled or deceived. A marketing

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expert can assist the court in interpreting market research or other data upon which the segmentation is said to be based, and may be asked to comment on the validity of the segmentation methodology used, and hence whether the parties' respective products or offers do or do not compete for the same customers, see [126.830], [126.840].

- Disputes about the rights of distributors or licensees within limited or exclusive customer segments, e.g. small-to-medium enterprises (SME) versus corporate accounts.
- Segments are not necessarily the same thing as submarkets, especially as that term has been used and interpreted in the context of Pt 4 of *Competition and Consumer Act 2010* (Cth). Submarkets might be a geographic region within a State or national market, a group of suppliers using one technology but competing with other suppliers using other technologies, and they might be a group of customers. Segments only refer, in marketing theory, to customer groups, and not to any other dimension of the market. Therefore, the two concepts overlap but are not interchangeable (Beaton-Wells, Beaton and Beaton-Wells, 1997). See [126.840].

[126.180] Product categorisation

Another approach to dividing up the marketplace is called product categorisation. The relationship between categories and markets is not a particularly clear one. Within an industry (e.g. the whitegoods industry), marketers commonly recognise and define categories, (e.g. washing machines, refrigerators or dishwashers) on the basis that consumers categorise goods and services around them as part of the process of comprehension and as an efficient way to organise information in memory. Consumers are said to begin to search for solutions to their needs at the level of the category, which is most likely to be defined by the consumer as the basic level of a product or service (Rossiter and Percy, 1997). Although categories are customer-oriented, they have often been heavily influenced by the marketer, or more often the retailer. By merchandising certain products together, for example soy-based drinks and dairy-based drinks, consumers over time come to consider two product types as related or within the same category, in this case, milk drinks comprising dairy milk and soy milk. In this example, soy drinks' fundamental image is heavily advantaged by being considered as a "milk", with all the associations and expectations that have been built up over the years via animal milk.

Consumer categorisation can have a very significant effect on the market because it will often define boundaries beyond which consumers will not consider substitution. It also often determines a consumer's basic expectation of the products on offer, by reducing all products in the category to having certain features in common (e.g. product attributes, places of distribution, price levels, types of promotion).

Legal applications

- How consumers make choices in a particular product category is often a relevant issue in passing off under common law and cases involving s 18 of the ACL. Concepts such as the extent of involvement (the degree of personal relevance), selective attention, information processing and recall, and the conditions under which consumers seek and recognise products and make purchase decisions, particularly arise in cases concerning fast-moving consumer goods (FMCG) categories. See e.g. *Red Bull Australia Pty Ltd v Sydneywide Distributors Pty Ltd* (2001) 53 IPR 481; [2001] FCA 1228. See [126.360].
- Pricing structure and dynamics vary considerably from category to category and have been the subject of expert marketing evidence and modelling. See e.g. *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (2003) 129 FCR 339; [2003] FCAFC 149 and see [126.280].
- With consumers having certain expectations of particular product categories, marketers and retailers will often employ generic or category cues to flag to the consumer that a product is of a certain type or category. This has been the subject of expert marketing evidence in relation to trade marks where the primary test focuses on distinctive versus generic descriptors. The whole topic of trade mark dilution exists against the backdrop of certain

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cues becoming more widely used to indicate product type rather than unique source. In reverse, claims of trade mark infringement (and passing off) may be defended successfully if a party can show that the signs in question were more in the nature of category cues than brand cues. More often than not, this will be a matter of judgment, taking multiple cues used in combination into account. See [126.850].

[126.200] Branding

The concept of the brand is central to much contemporary marketing thinking, research and management and explains why the scope of marketing extends so far beyond goods and services. The brand (and, often, brands and brand variants and extensions) has become a dominant focus for marketing strategy and marketing decision-making in many markets, especially consumer markets. A brand is a unique asset that cannot be legally replicated by competitors, while all other aspects of a product or service are potentially replicable by a functionally equivalent feature. A brand cannot be imitated lest the imitating company risk action for passing off. See [126.830].

Contemporary marketing and consumer behaviour disciplines define a brand as "a set of associations in the mind of the customer that influences perceptions, attitudes, expectations and behaviour". For example, a leading textbook describes a brand as "everything that one company's particular offering stands for in comparison to other brands in a category of competitive products" (Shimp, 2003, p. 31).

Modern marketers recognise that a brand is thus much more than a product or service – other dimensions are added to the core offering in order to differentiate it from other products or services designed to satisfy the same need. These differences may be rational and tangible or symbolic, emotional and intangible (Keller, 1998). In fact, brands are widely described in terms of their "personalities" and customers are said to form "relationships" with brands (Fournier, 1998).

The set of associations in the mind of the customer – referred to by leading authorities as "brand knowledge" (Keller, 1998) – creates value for both the firm and the customer by influencing customer feelings, beliefs and behaviour, especially recognition and identification of goods and services offered, evaluation of those offers and decision-making, that have economic implications for both parties. The concept of "brand equity" was developed through the 1980s to describe the marketing effects uniquely attributable to the brand (Aaker, 1991). According to Keller (1998), the key dimensions of a customer's brand knowledge are:

- awareness – the ability to call the brand spontaneously to mind when asked to name brands in the category (unaided recall) or to recognise the brand name when prompted (recognition); and
- associations – tangible and intangible things called to mind by various brand identifiers that help to define its meaning to customers. The *strength*, *favourability* and *uniqueness* of these associations in the mind of the customer are key determinants of overall brand strength.

Brand associations tend to be processed and stored by customers as an organised group, commonly referred to as a "gestalt" (Zaichkowsky, 1995, p 74; Isaac, 2000, p 25). Finally, brands have much in common with trade marks. Each uniquely identifies the source of a product or service. "A trademark is a word, phrase, symbol or design, or a combination thereof, that identifies and distinguishes the source of the goods of one party from those of others". (United States Patents and Trademark Office, 2011). However, trade mark elements such as a particular colour in Cadbury chocolate or Whiskas pet food are a component of branding, whereas a brand is a more wholistic concept.

Legal applications

The issue of gestalt was widely canvassed in *Red Bull Australia Pty Ltd v Sydneywide Distributors Pty Ltd* (2001) 53 IPR 481; [2001] FCA 1228 and in the appeal, *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* (2002) 55 IPR 354; [2002] FCAFC 157. In its judgment, the Full Court of the Federal Court, in affirming the trial judge's decision, noted that "his Honour (Conti J at first instance) firstly concluded that the concept of gestalt did not extend 'impermissibly beyond permissible limits of the traditional concept of get-up, as

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understood and referred to in the authorities'" (at [96]) and dismissed the appellant's contention that the trial judge erred in accepting the concept of gestalt. In *Unilever Aust Ltd v Karounos* [2001] FCA 1132 the concept of main and sub-brands and their relationship to trade marks is discussed.

An intriguing case of branding comes with the supermarket company Aldi Foods. The company mainly relies on its house brands. House brands, such as PROTANE in Aldi's case, are owned by the retailer and used exclusively in their stores. In evidence, a representative for Aldi Foods noted their practice of developing house brands which are similar to but not identical to main brands in the market. She mentioned her rule of thumb of having at least 10 points of difference between the Aldi and the main brand (see *Moroccanoil Israel Ltd v Aldi Foods Pty Ltd* [2017] FCA 823). There was a dispute about whether labels added to the PROTANE name, in this case "Moroccan Argan Oil", were sub-brands or labels as to ingredients as argued by Prof. Roberts, a marketing expert. "I am satisfied that at all material times Aldi has used the sign 'Moroccan Argan Oil' as a badge of origin" (Katzmann J, at [165]).

[126.210] Brand positioning

"Brand positioning is the act of designing the company's offering and image to occupy a distinctive place in the mind of the target market" (Kotler, 2000, p 308). As the word "distinctive" implies, brand positioning is a relative concept, in that it occupies a place in the mind of the target market relative to the positioning of other brands in the market. For example, a brand may be positioned as premium quality or as youthful or as radical or as innovative. Positioning requires the marketer to use all elements of the marketing mix (described below at [126.240]) in order to achieve this effect. Brand positioning is generally a broad amalgam of brand associations, rather than a singular dimension. Brand positioning is a key part of the STP approach.

Often, when a business is seeking to reinvigorate a mature brand, or to respond to falling market share, a marketer will try to reposition the brand. This involves setting a new course for the brand and may, in the extreme, almost appear to some consumers as the launch of a new brand. An example would be Skoda's "Simply Clever" campaign.

Legal application

In *Cat Media Pty Ltd v Opti-Healthcare Pty Ltd* (2003) ATPR 41-933; [2003] FCA 133, the established brand leader in weight loss supplements, Optislim, was repositioned in response to a new market entrant, Fat Blaster. Optislim was rebranded Fat Terminator (by Optislim). In this case, the repositioning effectively amounted to a rebranding exercise which the court held amounted to passing off because the new brand had effectively moved into the position already held by Fat Blaster, see [126.830], [126.840].

[126.220] Brand extension and brand architectures

When a firm uses an established brand name to enter a new market this is known as a "brand extension". Extensions can be classified into two general categories. A "line extension" is when a current brand name is used to enter a new market segment in the existing product class (e.g. Coke Zero or Coke Mother were extensions of Coca-Cola). A "category extension" is when the current brand name is used to enter a different product class (e.g. the Virgin mobile network is a category extension of Virgin Airlines).

A brand with a positive brand image allows the firm to introduce appropriate new products as brand extensions. An extension allows the firm to capitalise on consumer knowledge of the parent brand to raise awareness of and suggest possible favourable associations for the brand extension. Thus, extensions can potentially provide the following benefits to facilitate new product acceptance:

- reduce risk perceived by customers and distributors;
- decrease cost of gaining distribution and trial;
- increase efficiency of promotional expenditures;
- avoid cost (and risk) of developing new names;

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- allow for packaging and labelling efficiencies; and
- permit consumer variety seeking.

Apart from these benefits, there are also risks associated with brand extensions. These include:

- cannibalising sales of the parent brand;
- hurting the image of the parent brand if the extension fails (e.g. *Redheads laundry detergents*);
- hurting the image of the parent brand even if the extension is successful (e.g. via creating confusion or dilution of meaning); and
- forgoing the chance to develop a new brand name (opportunity cost).

Given these benefits and risks, it becomes apparent why firms that have invested in building their brand equity (a term defined at [126.230]) will want to protect their brand from misappropriation (whether intended or otherwise) by other firms.

"Brand architecture" is a term that has gained usage to describe the brand connections between a corporate owner's brand assets. There are divergent approaches to managing a portfolio of brands – some portfolios are explicitly linked together as a brand family (e.g. Nestlé) and others are kept quite separate (e.g. Unilever or L'Oreal). At its simplest, there are three levels at which brands exist:

- the product brand level for a single brand, which is usually the dominant level for the consumer and also referred to as the sub-brand (e.g. Tim Tams biscuits);
- the family brand level, which is a brand range with separate product brands (e.g. Arnott's which includes the Tim Tams product brand, i.e. Arnott's Tim Tams biscuits); and
- the corporate brand level (e.g. Campbell Soup Company, which owns the Arnott's Tim Tams biscuit brand). The term "parent brand" is somewhat misused at times to refer to what is here called "family brand" and at other times to refer to what is here called "corporate brand".

Legal applications

Brand extension is relevant in a number of different legal contexts:

- In determining whether or not there has been passing off or infringement of s 18 of the ACL, e.g., brand extension is often argued by the complaining party as a basis on which consumers may believe that a somewhat different-looking product may still be regarded as coming from the same source (i.e. in the guise of a brand extension). Ironically, this same argument is sometimes raised by the defending party, on the basis that a repositioned brand will still be seen by consumers as an extension of an existing brand rather than as a copycat of the complaining party's brand. For this reason, branding and issues such as brand extension require careful analysis and a considered position, see [126.830], [126.840].
- In trade mark proceedings, brand extension often plays a role in terms of assessing applications for registration in new classes or for defensive registrations. This is because the limits of extendibility of a particular brand tend to set a natural limit to the protection that may be afforded under the statute, especially when requirements of reputation and/or "connection" are concerned, see [126.220], [126.850]. A marketing expert's opinion about the significance of adding the word "bank" was accepted by the delegate of the Registrar of Trade marks as a reason for denying a trade mark. (See *Opposition by Bendigo and Adelaide Bank Limited to registration of trade mark applications 1541594 (36) and 1541620 (36) – COMMUNITY FIRST MUTUAL BANK and COMMUNITY FIRST BANK – both in the name of Community First Credit Union Limited* [2017] ATMO 73.)
- To determine the consequences of any such infringement, both qualitatively (e.g. actual damage or real prospect (likelihood) of damage), and in terms of quantum for the purposes of assessing damages (e.g. loss of existing trade, account of profits, loss of potential to exploit goodwill, loss of potential to expand business into other markets), evidence as to the current and future scope of the brand will be relevant, see [126.900]ff.
- Brand extension is also relevant where a co-branding or brand licensing agreement ends up in disputation. A key question is whether the complaining party had alternatives in terms of

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other brands that could be utilised to repair its position in the event of exit by the original brand. Such a question is essentially one of assessing brand extension and brand architecture, see [126.910].

[126.230] Defining and measuring brand equity

"Brand equity" can be defined as a set of brand assets and liabilities linked to a brand, its name and symbol that add to or subtract from the value provided by a product or service to a firm and/or to that firm's customers (Keller, 1998). There is some debate, however, as to the most appropriate definition and even more debate about how to measure brand equity.

Such equity can be thought of as based upon the following five factors:

- brand loyalty;
- brand awareness;
- perceived quality;
- brand associations; and
- other proprietary brand assets (e.g. patents, trade marks, channel relationships etc).

Brand equity, or more precisely the outcomes or benefits of brand equity, can be measured in a number of ways (Keller, 1998, pp 344–359; Reilly and Schweihs, 1999):

- cost approach;
- market approach; and
- income approach.

Legal applications

Some of the potential uses of expert marketing evidence in relation to brands and brand equity are set out below:

- Brand equity as an asset that owners seek to protect has been the subject of expert marketing evidence in a range of actions, especially in cases involving passing off, trade marks and s 18 of the ACL, see [126.830].
- Although they are intangible assets, brands have considerable commercial value. While there are disputes on how to value these assets, the company Interbrand (http://www.interbrand.com), which specialises in this area, estimated the world's top brand, Apple, to be worth $US178.1bn in 2016. Actions taken by competitors to appropriate brand elements or weaken brand equity are therefore likely to be met by vigorous legal action.
- A brand broadly defined is much wider than the concept of the legally defined trade mark. As such, there may not be protection available for all aspects of a brand that marketers may recognise in terms of brand equity. For example, some of the most powerful elements of brand equity are feelings and thoughts and the intangible nature of these make them incapable of simple legalistic treatment.
- A firm with a powerful brand may wield considerable influence within its sphere of operation. As such, there is potential for a firm to take advantage of such market power for proscribed purposes under Pt IV of the *Competition and Consumer Act 2010* (Cth). A marketing expert can assess the incidents of this power and analyse the context to infer the likely purpose of a firm's conduct, see [126.840].
- Brands are relevant to the assessment of damages in certain cases, both in terms of quantifying lost sales (via damage to the brand) and, in cases where it may be appropriate to assess a capital loss of intangible assets, to valuation of the diminished brand equity, see [126.910].

[126.240] Implementing the marketing plan: The "marketing mix"

The "marketing mix" which originally came to fame as the "four Ps" (McCarthy, 1960), illustrates marketing's concern with all of the ways in which supply is matched to demand in a market. Firms compete using the *product* (or service) itself; *pricing* of the product and associated services; *place*, that is, the "channels" through which the product is distributed and sold; and its *promotion*, including – but not limited to – advertising.

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To these four Ps, especially in respect of FMCG, is often added a "fifth P", namely *packaging*, in recognition of the ever-growing importance of packaging in stimulating consumer response in supermarkets and other self-service outlets for packaged goods. The controversy over plain packaging for cigarettes in 2012 illustrates the potential marketing power of packaging (Hoek et al., 2012). Other "Ps" have also been added to the marketing mix in certain contexts; especially with services such as telecommunications or insurance. *People* refers to the personnel the customer encounters to co-produce a service, such as a person in a call centre helping a customer resolve a billing inquiry. *Processes* encompass what the customer has to do in order to receive a service. For example, to make an insurance claim, a customer is required to provide details, make an application and perhaps provide a police report. *Physical evidence* refers to the tangible evidence of service quality, such as the reception area in a legal practice signalling the quality and professionalism of the firm.

A key element of any marketing plan will usually be detailed treatment of the marketing mix as the means by which the organisation intends to implement and influence the outcome of the desired marketing strategy.

Legal application

Before discussing individual components of the marketing mix, it is relevant to note that the mix itself and allocation of budgets to different marketing programs may well be an issue for expert marketing evidence.

- For example, in assessing mitigation consequent upon loss of sales, a question may often be whether the firm invested appropriately across the four Ps, see [126.910].
- It is often difficult to assess the effects of one marketing decision variable (e.g. packaging) in isolation to others. This is particularly the case in relation to consumer response, as a brand may be known to consumers not only by its name and other trade mark elements, but also – and sometimes more so – by its packaging, pricing relative to competitors, distribution outlets, advertising and other promotion (i.e. the gestalt referred to in *Red Bull Australia Pty Ltd v Sydneywide Distributors Pty Ltd* (2001) 53 IPR 481; [2001] FCA 1228). Whilst from a legal perspective, the intent of the marketer may be regarded as irrelevant (e.g. in an action for passing off), it may still be relevant to the marketing expert, e.g. in providing a contemporaneous view of the market at that time and the way a marketing strategy was likely to have been implemented, and hence to some extent perceived by consumers – whose response is most likely the subject of the marketing expert's brief. Survey evidence in the form of experiments which can test the effect of each element separately is possible, but expensive and highly contestable.

[126.250] Product management

The "product" in marketing is broader than commonly thought. It includes three elements:

- the physical product (such as energy drink and its physical properties, e.g. sweet flavour, fizziness, refreshment, caffeine-induced stimulation);
- the augmented product, e.g. finance arrangements, delivery arrangements, post-sale customer care services and other things that users value as part of their total consumption experience (Kotler, 2000); and
- product bundles (e.g. if combined with other products or sold in multi-packs at the point of sale) and product/service bundles (e.g. warranties, money-back guarantees etc.).

Although product management is one of the "four Ps" of the marketing mix, it is also an area of its own. How to manage products, from creation to demise, is a specialised skill. Three distinct subtopics within product management – new product development, product defects and product recalls – deserve special emphasis on the basis that issues in these areas are regularly brought before the courts. These are dealt with sequentially below.

Legal application

Product analysis is both relevant for defining the relevant class of goods and group of customers, but may also be relevant to issues such as what the relevant customer thought he or she was buying. This is particularly so in cases involving new products (described further below). See [126.900].

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[126.260] New product development

A classic study found that new products accounted for 28% of the surveyed companies' growth over a five-year period (Urban and Hauser, 1993). Contrastingly, they also reported that up to 33% to 35% of products introduced in the market over an 18-year period failed. The significant likelihood of a new product failing and the substantial costs of such failure mean that new product development is often at the heart of litigation.

Entities frequently seek to enter into contractual arrangements as a means of rapidly gaining access to capabilities needed to bring a new product to market faster than might otherwise be the case. Manufacturing facilities, technology, brands, franchising and distribution networks are examples of such capabilities. In these instances, the success of the new product development efforts often hinges on the ability of contracting parties to play their parts in developing the product effectively and to coordinate the development process. When this fails to happen, one party often feels that the other did not contribute adequately to the process and litigation frequently results. The marketing expert can perform a vital role in helping the courts to evaluate whether contracting parties adequately met their obligations.

The development of new products is a multidisciplinary process. In order to bring a new product to market, contracting entities not only need to design and manufacture a new product but also consider a plethora of marketing issues including the needs of the market and how the product will be distributed, promoted and priced. Urban and Hauser (1993) present a five-stage process that is useful in examining most product development processes. Gating practices remain common in new product development (Cooper and Edgett, 2012). This involves a planned sequence of reviews (such as product safety, a viable market) or "gates" through which a new product must pass before it is put on the market.

Legal applications

The following is a hypothetical case (based on actual experience) which illustrates the use of a marketing expert to provide evidence in a contractual dispute relating to product development.

BrandsCo, a consumer product manufacturer, entered into an agreement with LabCo, a research laboratory, agreeing to undertake "reasonable endeavours" to develop and market products containing a patented additive developed by LabCo. In return, LabCo was to be the sole supplier of this additive to BrandsCo. In due course, BrandsCo re-evaluated the feasibility of marketing these products and decided to discontinue their development. LabCo proceeded to take legal action against BrandsCo for lost sales and loss of business value, alleging that BrandsCo did not meet its contractual obligations to develop and promote the products. The original claim amounted to in excess of $10 million. A marketing expert was retained to assess whether BrandsCo undertook "reasonable endeavours" to research the potential market and to help quantify the likely loss of revenue to LabCo in the event that BrandsCo was held in breach. The case was settled on a confidential basis before it reached judgment.

In commenting upon the new product development process adopted by BrandsCo, the expert took the view that the process, although not perfect, constituted reasonable practice in terms of new product development by following an appropriate sequence of steps, exploring the right issues and allowing BrandsCo to halt product development at various points in the process on the grounds of lack of feasibility. The matter was settled in mediation. See [126.900].

[126.270] Product recalls

A product recall is the process whereby a product supplier, either voluntarily or involuntarily, requests consumers and other distribution channel participants to return or discard goods previously supplied. These are typically on the grounds that the goods pose a risk to consumer health and/or safety. In 2016, the ACCC Product Safety website https://www.productsafety.gov.au listed 39 product recalls. The website states:

> When suppliers become aware of defective or unsafe products, they can conduct a voluntary recall to remove the product from the marketplace. Under the Australian Consumer Law, a responsible Minister can also order a compulsory recall, if required. An example occurred in early-2018 when 2.5m potential faulty car airbags had to be replaced.

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The ACCC administers a national recalls system for recalls of specific and general consumer products and publishes all product recalls on this website.

Legal applications

Broadly speaking, marketing evidence is able to assist the courts in two ways when cases involving product recalls are brought before them: first, by providing an independent assessment of the adequacy and effectiveness of a product recall effort; and second, by quantifying the economic loss suffered by a product supplier in conducting a product recall.

The management of product recalls is a difficult task and courts often need to assess the product recall effort for a range of reasons including determining whether a product supplier took reasonable steps to minimise its loss. Did a product supplier adequately manage consumer and distributor perceptions during the product recall? Did it effectively facilitate the return and disposal of products by consumers and the distributors? What post-recall activities should the supplier have undertaken in order to mitigate its loss and re-establish its market position? Marketing experts are able to apply both knowledge of how product recalls should be conducted and an understanding of how markets behave, in helping the courts to answer such questions.

Suppliers who recall their products usually suffer substantial economic loss as a result of the recall and these often form the bases for litigation. Marketing evidence is crucial in assessing the losses suffered because these losses may originate from a variety of market phenomenon including altered consumer perceptions of the supplier brand, structural damage in a supplier's distribution channels and/or lost sales during the period of the recall, see [126.910].

In *Dowdell v Knispel Fruit Juices Pty Ltd* [2003] FCA 851, Knispel Fruit Juices Pty Ltd (Nippy's), a juice manufacturer, was forced to recall some of its juice products after a number of consumers suffered food poisoning. A class action was launched against Nippy's, which proceeded to file a cross-claim against its suppliers, alleging that the fruit it had been provided with was contaminated and that it had suffered loss as a result. A marketing expert was called to assess the loss from a marketing perspective. The expert found that trends of post-recall sales via the "route trade" (i.e. independent convenience stores and milk bars) differed significantly from those of post-recall sales through supermarkets. By demonstrating how distribution channels are different, the marketing expert was able to provide greater insight into the loss suffered by Nippy's.

[126.280] Pricing

Pricing is increasingly recognised as a specialised area of marketing investigation and practice. The understanding and practice of pricing integrates economic, financial and psychological principles with competitive strategy.

Price plays a critical role in communicating to the market the intended value positioning of a product or brand. It is also the element of the marketing mix that is most easily and flexibly able to be adjusted in the light of new market circumstances or changed strategic objectives. Thus, pricing can be the subject of a long-term strategy or a short-term tactic (Kotler, 2000).

Price is not only the base price, but includes any adjustments made in the sales and distribution process, such as discounts, rebates and allowances, trailing commissions, as well as any ongoing costs associated with using a product, such as replacement parts and service. Price is also not a singular fact but is usually made up of many prices at different locations and times in a market. Non-monetary costs are also a price customers may pay in terms of waiting time, difficulties getting remedies or opportunity costs.

Legal applications

- Expert marketing evidence can be led to analyse the rationale behind changes in a firm's pricing strategy or behaviour, particularly in relation to price cuts. An appropriately qualified marketing expert can critically analyse a firm's overall marketing strategy, its target markets, the competitive environment in which it operates, and the firm's capacities and capabilities in order to evaluate the likely purpose and effect of price cuts, see [126.240]ff.

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- In this regard, expert marketing evidence is valuable in assisting the determination of the subjective notion of "purpose" in s 46 cases where predatory pricing or limit pricing is alleged (s 46(1AA) of the ACL). It could be used to circumstantially infer either the existence of a prohibited purpose (s 46(1)(a) – (c)) or that there was a perfectly lawful, commercial reason. By the same token, marketing evidence can also be used to predict competitive response where the effects of price-cutting are disputed, see [126.840].
- Price is also often a factor argued by respondents in cases involving passing off or s 18 of the ACL as providing a clear distinction between the respective products the subject of the proceeding, see [126.830], [126.840].
- Price is a crucial feature of analysis in any claim of lost sales, as both consumer reaction and quantum is affected by it, see [126.910].

[126.290] Place (managing channels of distribution)

Managing channels of distribution (or "channel management") is also a specialised area of marketing theory, literature, education and practice. Channels are defined as external, contractual organisations that management operates to achieve its distribution objectives (Rosenbloom, 1999).

Management of distribution channels involves managing the following:

- product flow: physical movement of product;
- negotiation flow: interplay of buying and selling functions associated with transfer of title;
- ownership flow: movement of title to the product;
- information flow: information from channel participants; and
- promotion flow: flow of persuasive communication.

Empirical evidence has been established as to the appropriate structures for distribution channels and the rewards that are necessary to optimise incentives for the channel and profit for the manufacturer. Key concepts that are the subject of in-depth study and practice are channel conflict and the related topic of agency theory.

At the most basic level, optimal distribution is essential to successful marketing because no matter how well a product performs, how well it is promoted or how much value it offers in terms of its price, it will not be bought if the relevant customer cannot find it or is not encouraged to buy it at the point of sale.

A number of key decisions need to be made in channel strategy:

- Which types of outlets, if any, should the product be sold at? For example, supermarkets, corner stores, pharmacies, department stores, specialty stores, dedicated stores, direct mail and internet, direct sales force.
- How many outlets should carry the product? For example, compare restricting supply to just a few outlets (as is the case with exclusive fashion labels) to seeking ubiquitous distribution (as is the case with Coca Cola and its retailer/vending machine strategy).
- Whether to vertically integrate (more specifically to forward integrate) by owning the distribution chain by which the product is sold (e.g. the Body Shop has its own outlets). Krispy Kreme donuts are sold both in its own stores and in convenience stores. There are degrees of ownership and control, ranging from direct ownership, to exclusive franchises, to independent agents, or a combination of all three (hybrid model). The reference above to channel conflict arises when agents are appointed and especially where a hybrid model is implemented.

These choices are complex and have a two-way relationship with customers. Choices are made on the basis that the target market is most effectively accessed via a particular distribution channel (e.g. convenience stores). However, once that choice is made, implemented and reinforced over time, it helps shape a consumer's view of the product and its brand image. Certain expectations are created as to where one might expect to find a particular product. Distribution channels are generally long term, require a structure and are based on relationships and people. Competitors find it difficult to emulate channel strategy, thus providing a sustainable competitive advantage (unlike with other variables in the marketing mix which can often be emulated by competitors at relatively lower cost).

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Buyer behaviour and practice often vary from one channel to the next and from one channel participant to another. These often depend on the nature of contractual relationships between channel participants. In turn, contractual relationships often depend on the relative negotiating positions of channel participants (as determined by size, role in the channel, sales and management capability, reputation and market coverage).

Channel participants will often respond differently to changes in the marketing mix of upstream participants and the environment. For example, in *Dowdell v Knispel Fruit Juices Pty Ltd* [2003] FCA 851, it appears that supermarkets reacted differently (less negatively) to a product recall than corner stores (in what is also referred to as the "route trade").

Legal applications

Market power of major supermarket chains

- A distributor relationship may be the subject of dispute, in which case the whole issue of channel management may be in focus, including objective standards for channel management and what opportunity may have been lost as a result of less than optimal management.
- In a product recall situation, distributors may be the primary subject of loss, as customer backlash may be more directed at the frontline sales organisation than at the upstream manufacturer.
- Given the long-term nature of channel relationships, any event which causes damage to such relationships is often likely to have a longer-lasting impact than damage caused to consumers. Channel damage has the potential to create structural shifts in the market.
- Where competitive conduct is potentially impugned, e.g. in cases concerning:
  - suppliers being unable to compete for shelf space with vertically integrated house brands;
  - exclusive dealings: when a supplier requires its channel members to sell only its products or at least refrain from selling competing products, see [126.840];
  - full-line forcing and tying agreements: when a supplier requires a channel member to carry a broad range of its products if it wants to sell any particular product in the line, therefore forcing competing products out, see [126.840];
  - price discrimination: selling at different prices to the same class of channel members, to the extent that it reduces competition, see [126.840];
  - price maintenance: dictating the prices charged by channel members for products as a means of controlling distribution, see [126.840]; and
  - refusal to deal: refusing to deal with existing channel members that do not conform to seller policies, see [126.840].

[126.300] Promotion management (including advertising)

Numerous authorities on brands and marketing communications have recognised that brand equity is likely to be maximised when brand identity symbols, branding elements and brand associations are presented to consumers consistently across a range of media and reinforced through packaging, publicity and promotional appearances and events. This approach has been described as "integrated marketing communications" (IMC). See Keller (1998, pp 217–265) and Schultz, Tannenbaum and Lauterborn (1994).

There are many forms of promotion, of which the key ones are listed below:

- Advertising, also referred to as "above-the-line" (ABL) promotion. Advertising is split between the mass media (commercial television, mainstream radio and major metropolitan press) and specialised media (specialist media outlets for television, radio and print, as well as web and outdoor or out-of-home advertising).
- Other forms of promotion are generally referred to as "below-the-line" (BTL) promotion. Key examples of this type of promotion are as follows:
  - Advertorial is a key means of promotion, as the 1999 "Cash for Comments" inquiry into certain radio presenters in Australia stands testament. Entire segments of television programs, such as Good Morning Australia, on Channel Ten, and the TV Shopping Network provide paid segments for advertisers;

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- Product placement is where the advertiser's product is placed inside the scene of a drama or sports show. Examples include a character in a drama driving a particular brand of car or the owner of a sports betting company appearing as a panellist on a sports show;
- Social media carries straight advertising, but also may foster consumer groups who are friends of the "brand";
- Sponsorship of events, people and other media "properties". Although often expensive on a per person basis compared with mass media advertising, sponsors often regard it as highly effective because the degree of audience targeting is high and the "rub off" effect is often high compared with e.g. television advertisements – so much so that sponsorship has more recently been assessed in terms of co-branding and affinity marketing;
- Co-operative advertising is, especially for Fast Moving Consumer goods (FMCG), a significant form of promotion. In basic terms, the retailer gets the manufacturer to agree to co-fund advertising of the product specific to the retailer in the local media relevant to the retailer's catchment area;
- Promotion also includes what is called sales promotion. This typically involves promoting a discounted price for the product over a limited period of time. For example, the "Red Spot Specials" in supermarkets are sales promotions by agreement between the brand owner and the retailer; and
- Point-of-sale (POS) promotion is also very significant, especially in certain product categories and especially for time-poor segments of buyers who give minimal conscious consideration to advertising before they enter the store. POS promotion typically includes merchandising material such as shelf wobblers, decals and special display units (or fridges in the case of beverages).

Optimising the mix of the above promotion elements is a key marketing task. Selecting the promotion mix (also called the communication mix or in the case of advertising, the media mix) is a specialist field. It depends on knowledge of the underlying audience profiles for each promotion opportunity, an assessment of the competitive "noise" in each, and the likely consumer response. Promotional opportunities are never infinite (e.g. there are only so many television commercials available in prime-time spots) and therefore media planning is also a contingent exercise. It is time-bound in that audiences shift over the course of a year and decisions about when and how often to promote are also important. The complexity of choosing and placing promotional opportunities is sufficiently specialised that media-buying organisations exist to advise, not so much on marketing strategy, but rather on media selection and executing placement of advertising in that media. It may also be seasonal with particular types of goods and services prominently advertised at Easter, Christmas and Mothers' Day.

Within mainstream media, the most common unit of analysis of advertising is target audience rating points (TARPS) based on the Oztam television meter system (http://www.oztam.com.au). These points measure the reach (in audience size) and frequency with which the advertisers' target audience is likely to have been exposed to a particular advertisement. These ratings can provide fairly robust measures of audience size and profile. They are usually the key to assessing relative advertising weight in a market (called "share of voice"), where advertising of brand X is measured as the percentage of all advertising of competing products during a defined period. However, the fragmentation of audiences due to multiple digital channels plus competition from delayed replay internet services and the internet itself now make the task of designing integrated marketing communication [IMC] strategies much harder.

Also of relevance, marketing scholars and practitioners have been interested to know what effects certain types of advertising are likely to have on audiences, and in particular, over what period of time. Advertising carry-over effects have been estimated to vary depending on the circumstances, but three to six months is not out of the question. Specialist market research techniques have evolved to predict whether an advertisement is likely to be successful (called ad pre-testing) and then to track the impact of the campaign after it is launched (called advertising tracking or post-testing). Key questions posed in these studies typically include

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whether the ad was remembered at all; if so, were its key messages remembered; was the brand sponsor remembered; was the ad liked; was the brand favourably evaluated; and did the ad increase purchase intention scores?

While advertising is popularly believed to be very influential, advertising effects from particular campaigns or single advertising versions (executions as they are known) are notoriously difficult to demonstrate. This becomes understandable when considered from the perspective of the consumer. First, consumers are exposed to hundreds of advertising messages a day and only a few are likely to be studied closely. Second even in what is regarded as the most effective medium, television, advertising breaks in a program typically consist of station promotions, plus multiple advertisements. Within this clutter, it is difficult for messages to "cut through". Viewed on a program like the ABC's *Gruen*, advertisements are fascinating mini-productions. But when they are embedded within a television program or in a Facebook feed, they become an unwanted distraction and may be ignored, the viewer may temporarily leave the room, fast forward or scroll past.

Finally, many products are of little intrinsic interest to people, are often bought as a matter of routine and involve what is known as "low-involvement" decision making (Zaichkowsky, 1985). Advertising for these products needs to use devices such as humour even to get people to pay attention. Rossiter and Bellman (2005) detail the Rossiter-Percy-Bellman (RPB) Grid which looks at the intent of the product or service being sold (problem solving versus positive experiences) and combines it with levels of involvement to produce four very different advertising strategies. The response of consumers is likely to differ widely depending on the nature of the advertising. The marketing expert will be well placed to provide expert opinions about how the various types of advertising are likely to be processed.

Legal applications

- Section 18 of the ACL (Australian Consumer Law) (itself Schedule 2 of the *Australian Competition and Consumer Act 2010*) prohibits misleading or deceptive conduct (Previously s 52 of the *Trade Practices Act 1974*).
- A marketing expert may be asked to comment on the type of media chosen to promote a certain product the subject of infringement proceedings. This analysis may give rise to certain conclusions as to the marketer's intent, which customer groups were likely to have been reached and the likely effectiveness of such choice of media, see also [126.170].
- The marketing expert may also be asked to comment on the likely effect of the content of such a campaign, taking into account the relevant audience (itself a question on which the expert can comment), the style and messages conveyed in the promotion. This situation may also apply to the content of a broadcast or publication the subject of defamation proceedings – not in relation to liability but rather the issue of quantifying damages, see [126.830], [126.950].
- Promotion is, of course, relative – to both other sources of information about the product (e.g. word-of-mouth) and to other advertisements for competing products. Therefore, analysis in a legal context will almost always need to consider the impact of other contemporaneous promotion, see [126.300].
- Commentary in the social media about a competitor may be judged as "misleading and deceptive" and as making "false representations". See *Seafolly Pty Ltd v Madden* [2012] FCA 1346.
- Corrective advertising orders have been the subject of expert marketing evidence, both as to media selection, content and duration. Traditional orders for limited notices in metropolitan newspapers have more recently been argued to be inadequate in light of the objective of such orders. If the object is to correct the erroneous impressions (explicit and implicit) created by a particular advertising campaign, then the question of the nature and extent of activities necessary to achieve this can be assessed by a marketing expert. See [126.910]. In *Australian Competition & Consumer Commission v Danoz Direct Pty Ltd* [2003] FCA 881 the two marketing experts proposed diverging methods for corrective advertising needed to correct misleading advertising. Dowsett J did not accept that a newspaper notice was

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sufficient, as one expert proposed, nor the extent of television advertising proposed by the other. Both newspaper and television advertising were ordered, along with notification to purchasers.

- Marketing experts may be able to assist in the determination of the effect of advertising, or in the case of *Specsavers Pty Ltd v The Optical Superstore Pty Ltd (No 3)* [2012] FCA 504, where an injunction stopped advertising, the effect of a lost opportunity to advertise. Such estimations are extraordinarily difficult. While no one doubts that advertising has its effects, competitor activity, changes in society or the economy, seasonal factors and time lags between advertising and sales all complicate any estimation.

[126.310] Packaging

Marketing authorities and practitioners have long recognised that the packaging of goods can have powerful effects on consumer behaviour and, hence, that packaging is a vital part of the marketing mix for consumer products. Indeed, it has been said that "the package *is* the product": Meyers and Lubliner (1998). Beyond the practical, physical roles of packaging (i.e. as a means of containing, protecting, storing and dispensing the product), marketers also recognise three general classes of packaging communication effects:

- *Brand identification*: unique and memorable characteristics of packaging, such as brand name, logo, colour, shape, type-style and graphics, serve as cues to the consumer in brand identification and recognition and hence as a foundation for building a distinctive brand image through their effects in-store and in advertising and promotion;
- *Brand meaning*: a package may communicate meaning to a consumer, either explicitly by describing features, ingredients or attributes of the product, or implicitly by triggering associations such as product quality, performance characteristics and usage situations; and
- *Attention*: novelty and contrast may help a package to stand out visually from its physical surroundings and in comparison to alternative goods, and thus to draw the attention of consumers.

There are a multitude of elements that make up a single package, let alone those that are employed in different packages by different marketers. Elements of FMCG packaging that have been relevant for marketing analyses in a legal context – either individually, or as part of the package and brand gestalt – are listed below:

- product brand name;
- logo or logotype, including colour and font;
- graphic devices;
- warnings;
- guarantees;
- package shape, size and multiples;
- colour (e.g. single, predominant colour of packaging);
- other design schemas (e.g. colour scheme);
- description of product, including font;
- ingredients or ingredient platform;
- visible brand architecture, either parent/corporate brand or sub-brands, line extensions, flavours, etc;
- product benefit claims;
- tagline or slogan;
- brand personality or personification/presenter/character;
- third-party endorsement;
- photo or illustration of product;
- product as sold (e.g. if visible through part of the packaging);
- product source or ingredient(s);
- product in-use or "serving suggestion";
- depiction of intended user (real or aspirational);
- cues to usage situation (with or without user);

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- illustration;
- recipes and hints; and
- competition/coupon/other reinforcement.

Packaging is dealt with extensively in Parts 3-1, 3-3 and 3-4 of the *Australian Consumer Law*. Many of these issues are to do with proper labelling and safety. Further treatment of this topic is set out at [126.360].

Legal applications

Packaging often is at the heart of passing-off cases and in this context the term "get-up" is often used interchangeably with packaging, see [126.820].

The use of trade marked elements, such as colour or logos, is common on packaging, such as "yellowish-orange" in the case of Veuve Clicquot bottles or the "glass and a half symbol" on Cadbury Dairy Milk chocolate, see [126.850].

Packaging is also a key issue in cases where brand extension is relevant, because it is usually via the packaging that the fact and nature of the extension is conveyed to the consumer, see [126.220].

[126.320] Personnel

Personnel who represent an organisation in its dealings with customers are important to marketers in two domains. The first is in the selling process, where a salesperson promises or effectively warrants that a product or service will work in a particular way. Where they mislead consumers over costs, imply guarantees that do not exist, promise services that cannot be delivered, mislead consumers about the deficiencies of competing products or promote products that get them the best commission, legal action may result. Sales training is designed to produce people who are good at selling, but organisations with an interest in long-term relationships with customers want people who are ethical and who establish good rapport with customers.

The second is the actual delivery of a product or service. In the marketing of services especially, personnel are usually involved with buyers. The outcomes are said to be "co-produced". For example, a restaurant depends on various personnel (waiter, cook, cashier) working with the customer to produce a dining experience. If the customer does not arrive, does not order a dish they actually like, insults the staff or refuses to pay, the service experience will be absent or poor. At each stage of the process, personnel need to be involved. Ordering a new smartphone, moving house, changing a bank or completing an insurance claim will involve dealing with parties. Generally, these interactions occur at the point of ordering, delivering, installing, maintaining and disposing of services. Service "blueprinting" is one way of attempting to standardise services to minimise poor service.

Organisations have enough trouble training staff to deliver a consistent, high quality service. They have little control over customers and run the risk that customers may blame the organisation for service failures largely caused by their own action. For example, if an airline runs domestic flights out of its domestic terminal in Sydney most of the time, but runs some flights from the international terminal the rest of the time, who is to blame if the customer goes to the wrong terminal and misses the flight? Assume the airline correctly named the terminal on the electronic boarding pass but did not mention that the terminal was international and that flights close earlier when leaving from there. The customer is likely to blame the airline for missed flights and increased costs.

Legal applications

Class actions are possible where groups of consumers are concerned that the services they were promised were not delivered. Mobile phone networks which cannot deliver standard services in urban areas would be a case in point.

Misleading sales practices may also expose the organisation to prosecution.

[126.330] Processes

Service marketers attempt to simplify their own processes, especially those where the customer is involved. Customers are aware of the frustration of waiting on-hold at a call centre and

being passed from one person to another in trying to get an issue resolved. Customers who pay premium prices for a service expect better treatment, as part of the value equation.

Legal application

Misleading claims about customers receiving priority treatment for an increased fee may render an organisation liable to prosecution.

[126.340] Physical facilities

A characteristic of services is their high degree of intangibility compared with physical goods. Consumers have two ways of judging the quality and hence the value of a service. The first is to *experience it*. A restaurant may have a good reputation, but until it is experienced customers will not know for sure. However, with some services experience is not enough to judge quality. In these most intangible of services, the customer needs to have faith that what is being delivered is good value. These are known as credence services. Classic examples include investment advice or legal advice. It may not be for some years' time, as with investment advice, that the person knows they have received value. In these circumstances, the customer needs some cues as to quality. A professional office decor, qualifications showing, endorsements from well-known people and a professional and open demeanour are all signals of quality. All provide opportunities for deception at worst, or at best, to create a gap between what the customer is expecting and the ultimate value of the delivered service,

Finally, physical facilities are part of the value on offer. The world's best dentist would also be expected to have a clean, comfortable waiting room and the latest magazines to read.

Legal application

Unless the facilities are dangerous, the most likely application is that the physical facilities form part of the deception of the consumer. Marketing experts should be able to comment on the consumers' motivations, expectations and understanding of the value of offer.

[126.350] Conclusion

This section has elaborated the key concept of the marketing mix, and its sub-components of product, place, price, promotion, packaging, personnel, processes and physical facilities. This is one of the most fundamental frames of reference in marketing and one that provides a robust analysis of a marketer's activities, and by correspondence, competitors' activities. This section may be thought of as the marketers' stimuli. The next part deals with consumer response to such stimuli.

[126.360] Consumer response to marketing stimuli

As noted at [126.10], contemporary definitions of marketing centre on the creation of relationships with valued customers. Hence, analysing, understanding and anticipating consumer response to marketing programs and marketing stimuli, both individually and as an integrated marketing mix, is a central skill and function of marketers. As such, the discipline of consumer (or customer) behaviour including the ways in which consumers respond to marketing stimuli is, and has been for decades, a core area of academic inquiry, education and literature and of commercial practice, e.g. in marketing and communications research.

Logically, this is also an area in relation to which expert opinion and evidence is often sought. However – perhaps because each of us is also a consumer – it should be noted that the issue of whether expert evidence is actually necessary in assisting the court to form a view as to the effects of marketing stimuli on consumers is also frequently raised in proceedings. For example, in *Cat Media Pty Ltd v Opti-Healthcare Pty Ltd* (2003) ATPR 41-933; [2003] FCA 133 at [55], Branson J observed:

> It seems to me that evidence of opinions based on market research and expert appreciation of consumer behaviour will rarely be of assistance in litigation where the court's primary concern is with the behaviour to be expected of, and the judgments likely to be made by, ordinary (even if it might be thought, somewhat credulous) members of the community intent on making a relatively modest purchase in a conventional way.

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Thus, in many cases, expert marketing evidence is led in the interests of fully illuminating for the court the context in which consumers are exposed to the relevant stimulus or stimuli, and hence the full range of consumer behaviour considerations against which the effects of given stimuli should be interpreted. See also [126.510].

It is clearly beyond the scope of this chapter to give a complete exposition of consumer behaviour, especially as might be applied in detail to any given proceeding (see Schiffman et al., 2010). However, the following list gives general areas of consumer behaviour and consumer response to marketing stimuli on which expert marketing evidence has been sought:

- consumer perception;
- consumer motivation;
- consumer learning and experience;
- consumer involvement; and
- consumer decision-making process.

Marketing stimuli, such as advertising and packaging, can only evoke a response from the consumer if it is actually noticed by the consumer. In an environment where consumers are continuously bombarded with a plethora of stimuli, individuals will subconsciously exercise selectivity about which stimuli they will *perceive*. What consumers perceive will be influenced by both the nature of the stimulus itself and the consumers' *motivations* at the time of exposure. In general, consumers will have greater awareness of stimuli that meets their needs, and lower awareness of stimuli irrelevant to their needs.

How consumers respond to marketing stimulus after perceiving it will depend on a number of factors. First, the manner in which they process such stimuli will depend on their level of *involvement* with the product (or service) itself. Product purchases (including services) that have minimal personal importance are referred to as low-involvement purchases. Conversely, purchases that have a high degree of personal relevance for a consumer are known as high-involvement purchases, such as purchases of cars, homes or holidays. Consumers typically engage in more search for information, talk to friends or consult product review sites, weigh up alternatives and have a more considered decision-making process. When shopping for "low involvement" fast-moving consumer goods (FCMG) consumers tend to process brand information from the packaging get up, especially when re-buying (Zaichkowsky, 1985).

The level of involvement in turn affects whether consumers process stimuli centrally or peripherally. In central processing, the consumer attends to and scrutinises stimuli actively and thoughtfully, elaborating on the message to examine it and interpret it. In peripheral processing, the consumer attends to the message only cursorily and tends to make inferences about the content, looking more at the form of the communication (Sheth, Mittal and Newman, 1999) than they would with high involvement processing.

Marketing stimuli in the form of cues intrinsic or extrinsic to the product can also elicit consumer response by way of providing the basis for forming *perceptions* or judgments of its quality. Marketing stimuli that are intrinsic cues refer to the physical characteristics of the product itself, such as size, colour, flavour or aroma. Extrinsic cues are stimuli external to the product itself, such as price or the physical facilities of the store in which it is distributed (Dodds, Monroe and Grewal, 1991).

Marketing stimuli can also have an impact on the consumers' *decision-making process*. For example, consumers shopping for fast-moving consumer goods are faced with tens of thousands of different products and variants or "stock-keeping units" (SKUs). Shopping for grocery products is highly routine, and in-store decision-making, especially for repeat purchases, typically involves the evaluation of few alternatives, little external search, few evaluative criteria, and simple evaluation process models (Olshavsky and Grandbois, 1979). Characteristics of the shopper and of the specific shopping trip (major versus "top-up" trip, aisles visited, in-store displays, shopping party size) have all been shown to affect in-store decision-making (Inman and Winer, 1998). In this scenario, marketing stimuli such as packaging are crucial to facilitating the consumer's decision-making process. In fact, consumer response to packaging is a specialised area of marketing study and research and is the subject of notable works by marketing academics and practitioners (Garber, Burke and Jones, 2000; Bloch, 1995).

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More recent perspectives on consumer decision making have shown that our implicit models of the reasonable and rational consumer need to be revised. Behavioural economics (Kahneman, 2003) has shown that consumers make decisions somewhat differently. Typically, losses are more highly valued than gains, leading to a *framing effect*. For example, the entreaty, "buy now to beat the price rise" has the effect of enhancing the value of the current price, compared with just advertising the product at the current price. Behavioural economics has implications for a number of areas concerned with likely consumer response and legal issues such as consumer protection (Gans, 2005; Shafir, 2008). Consumer responses to losses and gains and to evaluating risk, while predictable, contradict the traditional view of a "reasonable consumer". Marketing expertise will be needed to explain how consumers are likely to respond to marketing stimuli.

Related research concerns the issue of "nudging" decision makers (Benartzi et al., 2017) using cues that people are not paying attention to which can nevertheless act to change what is decided. Similarly, people may have unconscious biases that affect their decisions.

These and many other facets of consumer behaviour have been the subject of controlled studies published in the marketing literature. They have their roots in psychology, but have evolved their own specialisation within the marketing field.

Legal applications

Understanding consumer response to marketing stimuli has been the subject of expert marketing evidence in the following areas of law:

- s 18 of the ACL – determining whether the impugned conduct (in the form of marketing stimuli) has misled or deceived or is likely to mislead or deceive, see [126.830]ff. In *Telstra Corporation Limited v Royal & Sun Alliance Insurance Australia Limited* [2003] FCA 786, qualitative market research and expert marketing opinion supported the view that Shannons' insurance advertising using the then well-known Goggomobil theme would be connected with the *Yellow Pages* which had used the Goggomobil theme and the same actor in earlier advertising;
- trade marks – (in infringement proceedings) whether the alleged infringing mark is deceptively similar, or (at registration) whether the mark in question is likely to deceive or cause confusion, see [126.850]; and
- damages quantification – whether events such as product recalls, television broadcasts or advertising campaigns are likely to have caused a downturn in sales for a business, see [126.910] and [126.950].

[126.370] Definition of marketing contexts

As noted in [126.10], marketing is in essence about structuring value exchanges between stakeholders, especially between customers and suppliers of goods and services. Given that it draws on research into psychology, economics, sociology, communication, statistics, business ethics and anthropology among others, as well as marketing research in its own right, definitions of marketing may be important in a number of legal contexts.

- They may help in defining the scope of issues on which a marketing expert may appropriately and usefully give evidence, and also in determining whether a proposed expert is appropriately qualified to give evidence in a particular matter. The Full Court of the Federal Court has acknowledged that marketing is a legitimate area in which an expert witness can assist the court, as it is an area of organised, expert study and specialised knowledge acquired through training and experience: *Sydneywide Distributors Pty Ltd v Red Bull Australia Pty Ltd* [2002] 55 IPR 354; [2002] FCAFC 157.
- The breadth of definition of marketing is directly relevant to the selection and qualifications of a marketing expert, see [126.530]ff, and to the issues on which he or she is instructed to comment. A broad contemporary view of marketing allows for the integrated consideration of a very wide range of issues. Some experts are retained based on their knowledge of a particular market or industry (e.g. the retail liquor industry) or of a relatively narrow marketing function such as advertising media buying, consumer behaviour, or market research design expertise rather than of marketing as a broad discipline. Such an expert may

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be able to assist the court in a narrow area but may be inadequately qualified to comment on broader issues of business behaviour, such as organisational structure and orientation, management decisions, resourcing of different functions, statistical modelling of lost sales and estimation of future sales.

- A broad definition of the issues with which marketing is concerned also has implications for the types of "marketing expenses" to be considered as part of damages quantification or marketing activities undertaken by a firm that should be considered in mitigation of losses.

[126.380] Persons as the subject of marketing

In *Versace v Monte* (2002) 119 FCR 349; [2002] FCA 190, evidence was adduced from a marketing expert as to the reputation of the Versace brand – including its links to the person and personality of its founder, the late fashion designer Gianni Versace – and the particular susceptibility of the Versace brand to damage as a consequence of defamatory representations and imputations regarding Mr Versace because of the identification of the Versace brand with the Versace family. Such damage might include adverse effects on public confidence and on the morale of the employees in the business. Tamberlin J noted that the marketing evidence "strongly support[ed] the applicants' case that they have suffered substantial damage to date and that more damage is anticipated". See also [126.930].

[126.390] Marketing events

Contemporary marketing management principles are applied to event management and sponsorship. *Ambush marketing* refers to non-sponsors of an event like the Olympics building an association with the event, without authorisation. For example, a company could sponsor individual competitors or place signs near Olympic venues. Ambush marketing may be hard to demonstrate because consumers may mistakenly assume that certain companies are sponsors when they are not. For example, the now defunct Ansett airline was the domestic sponsor of the 2000 Sydney Olympics, but the majority of consumers believed Qantas was the sponsor (Crow and Hoek, 2003). Marketers need to take care in how consumer confusion is measured here, as different approaches can produce different estimates, as Tripodi et al (2003) showed for the 2000 Olympics.

For the 2016 Summer Olympics in Rio, Telstra advertised the streaming of Channel Seven's Olympic Coverage through the Channel Seven App on its network in a series of television commercials and other promotions. Optus was the official Australian telecommunications sponsor. The Australian Olympic Committee sued, claiming that this was a breach of the *Olympic Insignia Protection Act 1987* and amounted to ambush marketing. The original judge rejected the claim and this was confirmed on appeal (*Australian Olympic Committee, Inc v Telstra Corporation Limited* [2017] FCAFC 165). No expert opinion was adduced in the original trial or on appeal.

[126.400] Corporate reputation and crisis management

The issue of corporate reputation is one for expert study within the marketing discipline See e.g. Dowling (2001) and its sister discipline, public relations. Marketing failures occur commonly in services marketing (Elliott, Harris and Baron, 2005) or in product failures that harm or even kill customers.

Legal applications

Public relations and legal responses to crises may be in conflict (Fitzpatrick and Rubin, 1995). Owning up to mistakes may protect corporate reputation, while opening the possibility of admitting liability. Commercial litigation is more likely in the case where commercial services to organisations are deemed to have failed or in class action taken by consumers against companies. Here the promises made by marketers in advertising or in other forms of promotion may make suppliers liable for legal action.

[126.410] Codes of Practice

Industry codes are dealt with under s 51ACA and s 51AE of the *Competition and Consumer Act 2010*. The ACCC regulates four mandatory industry codes that are prescribed (see

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especially s 22 of the ACL). The *Franchising Code* regulates the activities of franchising, one of the key merchandising channels for retailers like bakeries and small business services, such as mowing services. Marketing disputes are likely to be between the franchisor and franchisee (e.g. *DORRIAN & ANOR v RUSHLYN PTY LTD & ANOR* [2013] FMCA 101) rather than involving the end consumer. The *Unit Pricing Code* requires retailers with floor space above a minimum size, particularly those selling a defined range of grocery products to label the products in such a way that a unit price (e.g. $ per litre) is displayed with a view to informed consumer choice. Marketing evidence is likely in any litigation between the ACCC and parties it alleges have breached these codes.

The ACCC also provides advice to industries with voluntary Codes of Practice. Further Codes may be registered under other Acts. The Commercial Television Industry Code of Practice is covered by s 123 of the *Broadcasting Services Act 1992*. Among other issues, it covers aspects of television commercials. (Free TV Australia, 2013). Advertising of therapeutic goods is covered by *Therapeutic Goods Advertising Code 2007*.

Industry associations, such as the Association for Data-driven Marketing and Advertising (ADMA, 2017) and the Australian Market and Social Research Society (AMSRS, 2017b) have their own voluntary codes of practice. The Advertising Standards Bureau (ASB, 2017) administers self-regulatory Codes that inter alia cover the Advertising of Food & Beverages, Advertising & Marketing Communications to Children and Environmental Claims in Advertising and Marketing. There are many other codes relevant to marketing activities.

[126.420] Conclusion

This section has focused on issues of market definition, marketing events, persons of interest to marketers and crisis marketing.

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MARKETING EXPERTS

[126.500] The legitimacy of marketing experts' opinions

The Evidence Act 1995 (as amended 2008) makes certain opinion evidence ineligible for admission: "Evidence of an opinion is not admissible to prove the existence of a fact about the existence of which the opinion was expressed." However, s 79 contains the following which legitimises expert opinion, including that from marketing experts.

> Exception: opinions based on specialised knowledge
>
> (1) If a person has specialised knowledge based on the person's training, study or experience, the opinion rule does not apply to evidence of an opinion of that person that is wholly or substantially based on that knowledge.

It should be observed that the term "marketing expert" refers not just to people named in this way, but also to experts in consumer behaviour, market research and customer analytics.

Litigation in the first decades of the 2000s has had the effect of redefining the role of marketing experts in legal proceedings. There was extensive litigation between Cadbury Schweppes and Darrell Lea. In *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd* [2006] FCA 363, Heerey J ruled that evidence from a marketing expert, Dr Gibbs, was inadmissible. (Hodgekiss, 2006). His Honour observed at p 8:

> The present case is concerned with the brand names, colours and get-up of rival manufacturers of chocolate, and the likely effect of those features on retail purchasing decisions by consumers. Chocolate is an inexpensive, everyday product sold in hundreds of thousands of retail outlets throughout this country. Virtually the whole of the Australian population over the age of about eight years are purchasers or potential purchasers. In no way can consumers of chocolate be considered as a "special category of persons" within the meaning of the *Transport Publishing* rule. The questions thrown up by this case are quintessentially questions of fact within the experience and knowledge of a trier of fact.

A decision in the matter was then given (see *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 4)* [2006] FCA 446) in favour of the respondent. The evidence of the excluded marketing expert and two other marketing experts was not referred to in this judgment. Consequently, the applicant appealed the decision to exclude the marketing experts and sought a retrial. In *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd* [2007] FCAFC 70, the Full Court decided that the evidence was admissible. Their Honours observed at pp 20-21:

> His Honour accepted Dr Gibbs' expertise and, for that purpose, that his opinion was based upon his expertise. Thus, his Honour accepted that the field of expertise was a recognised field and it may be accepted that his Honour did not reject Dr Gibbs' evidence on the ground that he did not have relevant expertise or that his opinion was not based upon his specialised knowledge.
>
> The primary judge concluded, however, that it is a condition of the admissibility of opinion evidence that the opinion relates to an issue that is outside the knowledge or experience of

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> ordinary persons. In so far as that was the reason for concluding that the opinions of Dr Gibbs were inadmissible, his Honour erred. The fact that an opinion is expressed concerning the making of consumer decisions for the purchase of everyday items of commerce does not disqualify the opinion from being admissible, so long as s 79 is satisfied.

The matter did not go to a retrial, but Heerey J took the marketing evidence of Dr Gibbs and two other marketing experts into account in revising his judgment. See *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 8)* [2008] FCA 470. The application was dismissed in favour of the respondent. A commentary on these issues is in Gillies (2009).

The everyday behaviour of stakeholders, especially consumers, in their response to marketing activities, is somewhat, but not completely, within the experience of legal practitioners. There are many cases where the likely behaviour of consumers is referred to and the Court is in a position to come to judgment about these matters, despite there being no expert marketing evidence nor direct consumer research evidence adduced. For example, in *Samsung Electronics Australia Pty Ltd v LG Electronics Pty* Ltd [2011] FCA 664, Rares J observed at [32]:

> The ordinary reasonable viewer is a person who would not understand the advertisements to convey a strained, forced or utterly unreasonable interpretation. Such a viewer is a person of fair, average intelligence, who is not perverse, nor morbid nor suspicious of mind, nor avid for scandal nor similarly, likely to see the worst in things or the best in things. He or she does not live in an ivory tower but can and does read between the lines in light of that person's general knowledge and experience of worldly affairs. Likewise, the mode or manner of publication is material in determining whether a particular representation is capable of being conveyed by a transient, albeit repeated, publication, such as these. The context in which the advertisements are published is also relevant. A court must draw on its own experience of how ordinary reasonable people view television advertisements to determine what, ultimately, are the meanings they are likely to take away from that viewing.

In *Moroccanoil Israel Ltd v Aldi Foods Pty Ltd* [2017] FCA 823, Katzmann J observed at [169]:

> … the question of whether a mark is deceptive or likely to deceive is "a jury question". That is to say it is one for the tribunal of fact and not the expert: *Interlego AG v Croner Trading Pty Ltd* (1992) 39 FCR 348 at 387 (Gummow J, Black CJ and Lockhart J agreeing at 349) citing *General Electric Co (of USA) v General Electric Co Ltd* [1972] 1 WLR 729 at 738; [1972] 2 All ER 507 at 515 per Lord Diplock. As Diplock LJ explained in that case, in a passage cited by Gummow J in *Interlego* at 388 with evident approval, the judge is a potential buyer of the goods and the judge's approach should be the same as a jury's, albeit that the judge should be "alert to the danger of allowing [her or] his own idiosyncratic knowledge or temperament to influence [her or] his decision".

Similarly, in *Qantas Airways Limited v Edwards* [2016] FCA 729, Yates J observed at [83] that although the opinion evidence of a marketing expert about possible consumer confusion was admissible:

> The difficulty with opinion evidence of this kind is that, even if, at one level, it can be said to be an opinion substantially based on the witness' specialised knowledge, derived through training, study or experience, it is, nonetheless, an opinion which is, at its core, informed by, and arrived at on the basis of, the witness' personal evaluation and impression of the similarities and dissimilarities of the allegedly conflicting marks. The making of evaluative judgments of this kind is, quintessentially, the function of the tribunal of fact, not that of the witness. Nevertheless, evidence of an opinion is not inadmissible only because it is about a fact in issue or an ultimate issue, or a matter of common knowledge: s 80 of the *Evidence Act 1995* (Cth).

In *Stone & Wood Group Pty Ltd v Intellectual Property Development Corporation Pty Ltd* [2016] FCA 820 at [208], Moshinsky J rejected evidence of a marketing expert, "To the extent

that Stone & Wood relies on the evidence of Professor Lockshin … I do not think it is established, in the absence of tests in relation to the products in issue, that consumer purchasing behaviour in relation to the products in issue is likely to occur in the way described in his evidence". Such evidence would most likely have needed to be in the form of a consumer survey. Professor Lockshin, although acknowledged as a specialist wine marketing researcher, also had evidence rejected in a case involving possible confusion between wine brands, in *Samuel Smith & Son Pty Ltd v Pernod Ricard Winemakers Pty Ltd* [2016] FCA 1515. Charlesworth J observed at [113]:

> The opinion evidence of an expert on such questions, whilst admissible, is of lesser utility in the context of a market in which the general public participates: compare *Henschke* at [17]. I have ultimately determined that Professor Lockshin, on the question of the likelihood of confusion, has placed insufficient weight on the differences in the ideas and impressions conveyed by the marks under comparison. Professor Lockshin's conclusion was also founded on an unproven assumption that the word SIGNATURE would be "strongly associated [by consumers] with Barossa and Cabernet and Shiraz" by reason of Yalumba's own long standing use of its mark. If that assumption was in fact a further opinion formed by Professor Lockshin, I am not satisfied that there is an adequate basis for it.

In *Coca–Cola Company v PepsiCo Inc (No 2)* [2014] FCA 1287, a marketing expert Dr Gibbs was criticised as follows, "Dr Gibbs' opinion that the shape of the two bottles would be seen by consumers as very similar was no more than his personal opinion and was not based on any expertise which he has." (at [173]) and "… In this particular case, the absence of empirical evidence means that I have a real doubt as to whether many of Dr Gibbs' opinions have any scientific basis" (at [175]). Similarly, it was claimed that hybrid evidence from one marketing expert (personal circumstances and previous experience in litigation for the party adducing his evidence, as well as general marketing expertise) made the evidence unconvincing. (See *Specsavers Pty Ltd v Luxottica Retail Australia Pty Ltd* [2013] FCA 648.)

These judgements reinforce the need for marketing experts to be especially careful in establishing the evidentiary base for their conclusions, the basis of their relevant expertise and their carefully considered opinions. Even then, they may be given little or no weight.

[126.510] Developments in specialist marketing knowledge

Despite these limitations on the acceptance of expert marketing opinion, three developments suggest that the marketing expert may have an increased role in future litigation. First, more recent research in behavioural economics (see [126.360]) suggests that the view of a "reasonable" consumer is subject to challenge, as consumers often make decisions in surprising ways in response to perceived risk, the likelihood of losses or gains and the framing of marketing offers. Second, consumer decision making is often implicit, rather than fully conscious and may be influenced by cues that trigger emotional and other responses that are not obvious to consumers making the decision (Johnson et al., 2012). Third, it should also be observed that the analysis of marketing information is becoming increasingly sophisticated both because of the availability of more complex data sets and because of the increasing sophistication of the statistical analysis procedures in use. See [126.700]ff.

[126.520] Court guidelines for experts

Many of the legal matters involving marketing experts relate to proceedings in the Federal Court. The Court has issued and often revised a set of Practice Notes for two relevant areas. One relates to survey evidence [126.710], the other to the role of experts in general. In Practice Note "Expert Evidence Practice Note (GPN-EXPT)" (Federal Court, 2017a), the duties of an expert witness to the Court are expressed as:

> 4.1 The role of the expert witness is to provide relevant and impartial evidence in his or her area of expertise. An expert should never mislead the Court or become an advocate for the cause of the party that has retained the expert.

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4.2 It should be emphasised that there is nothing inherently wrong with experts disagreeing or failing to reach the same conclusion. The Court will, with the assistance of the evidence of the experts, reach its own conclusion.

4.3 However, experts should willingly be prepared to change their opinion or make concessions when it is necessary or appropriate to do so, even if doing so would be contrary to any previously held or expressed view of that expert.

The Practice Note specifies the requirements for the expert's report, especially its evidentiary base. It also allows for Court convened meetings of experts (Appendix B). This includes the so-called "hot tubbing" which can be either in court-ordered pre-trial meetings, or where two or more witnesses appear in court together (Yarnall, 2009; Edmond, 2009). An example is provided in *Specsavers Pty Ltd v The Optical Superstore Pty Ltd (No 3)* [2012] FCA 504. In a speech given by Rares J of the Federal Court (2013), his Honour observed the system has many advantages including a reduction in court time and the sharp identification of areas of agreement and disagreement between experts. Some potential disadvantages were also noted, but on balance the practice was strongly favoured.

Other Courts and Tribunals use similar Practice Notes, such as the VCAT PNVCAT2 in Victoria or follow the Federal Court practices, such as the Federal Circuit Court (see Rules 2001, Division 15.2).

It is clear that experts should not in any way act to usurp the decisions that a Court or Tribunal might make. Their role is to provide reliable evidence that is relevant to the proceedings.

[126.530] Academics vs. practitioners

Marketing experts as academics, normally come from within a business school (usually teaching on a Master of Business Administration program, a Master of Marketing or an undergraduate degree in business or commerce). While many marketing academics have business experience, predominantly they are now employed on the basis of publishing in academic journals. For many practitioners, these publication outputs are somewhat esoteric and impractical. However, this emphasis does mean that marketing academics are well versed in research methods and highly capable of identifying flaws or limitations in any marketing evidence tendered to a court. A sub-set of these academics are experts in marketing research methods specifically. Academics are required to publish their work – this is one of the key bases for their claimed expertise. However, one practical issue here is that the expert may have published research which contradicts the expert evidence the expert is about to give. Certainly, the context may be different and the expert may argue that subsequent research has led to changes in the expert's views. In any event, the expert's CV should include his or her publications and counsel should inquire what bearing, if any, the published research has on the current proceedings.

Marketers as practitioners come from somewhat different backgrounds. While many now have academic qualifications in business disciplines such as marketing, there is no formal barrier to becoming a marketing manager. Many come from financial, advertising or technical backgrounds, without necessarily having taken a marketing course. A Certified Practising Marketer (CPM) scheme has been developed by the Australian Marketing Institute (AMI, 2017) which stresses marketing experience and ongoing education. Similarly, the market research industry has established the Qualified Practising Market Researcher scheme (QPMR) (AMSRS, 2017a). Both CPMs and QPMRs have ongoing professional development schemes requiring some regular updating of skills. Ultimately it is expected that most marketing and market researcher experts will be CPM or QPMR qualified. However, currently there are no legal barriers to anyone calling themselves a marketer or market researcher. Some forensic marketing groups exist (e.g. QBrand). Beyond this there exist a number of experts who have been involved in numerous pieces of litigation whose reputation is well known to legal practitioners.

Marketing experts as practitioners tend to be of two types:

- consultants to industry who advise a wide range of firms in a wide range of sectors; and
- managers with marketing responsibility from within industry, such as a marketing director or brand manager.

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The latter type of expert may at one time have been regarded as a lay witness, but in more recent years has been more often presented as an expert.

There are clear advantages and disadvantages with both academics and industry experts. The academic may never have personally been responsible for managing a brand and never been in charge of an advertising campaign. They may never have been responsible for developing and implementing a marketing strategy. On the other hand, the academic's strength lies in having had broader exposure to a range of industries and situations through academic study. They should be familiar with the published research in the field that has been independently conducted and subjected to peer-reviewed publication processes. Therefore, while possibly lacking actual commercial experience, the academic may be able to apply highly cogent and credible learnings from the literature, including their own research. There is also style to consider. The academic tends, by nature, to be, and is perceived to be, independent and conservative.

By contrast, the marketing practitioner may have a great deal of "real world" experience and may be seen to be much more in touch with the ephemeral dimensions of a particular market, especially customer needs and behaviour. However, the marketing practitioner may often come across in style terms as less independent and less conservative. They may also not have such a wide purview of the field of marketing and may not be able to present a credible basis or framework for an opinion other than experience. One of the hallmarks of practising marketers is their ability to make effective business decisions on the basis of limited or imperfect information. In a legal setting, however, this ability may be seen as a rush to judgment and to providing opinions that are not soundly based.

Of course, ideally the expert will have a combination of academic and practical experience. Dowling suggests that the best type of marketing expert is one who subscribes to marketing as a combination of art *and* science as opposed to art *or* science. Many practitioners are more artful and many academics are more scientific (Dowling, 2004).

[126.540] Generalist vs. specialist

Marketing generalists are often one of: academics; management consultants offering what is often termed as marketing strategy advice; or, marketing practitioners at senior levels with extensive practical experience.

Marketing specialists, on the other hand, may come from very disparate corners of the profession. They may be academics who have specialised in sub disciplines such as advertising management, statistical analysis or marketing research. They may be marketing consultants who have done the same, such as those working in the market research arm of the profession or in advertising agencies, media planning agencies or design agencies. Marketing specialists may also come from firms within industry, such as the marketing research manager, the advertising manager or the market forecasting manager. Given the current importance of the internet in marketing, they may also have experience in its use.

This dimension also refers to whether the expert has any significant experience in the particular market or industry relevant to the proceeding in question. In general, it would appear that it is sufficient that the expert has some relevant experience and knowledge in relation to the market, industry, product class or customer group in question, whether that be direct or analogous experience. A priori, the more direct the experience the better, but this criterion would appear to be a secondary consideration when compared to criteria such as the expert's overall credentials, knowledge and experience relating to the particular issues in dispute and her or his ability to give credible, impartial evidence in the witness box. The latter criterion would appear to be mandatory in an expert, whereas the former seems to be an added bonus. This is not to say that there will not be cases where specialised knowledge of the relevant industry is required before a court attaches serious weight to such evidence.

Generally speaking, unless the marketing issues in dispute have been narrowed by agreement to very specific ones, a marketing generalist will be more appropriate than a marketing specialist. This is because the marketing arena is integrative and usually requires that a broad strategic overview be brought to bear before any opinion on specific issues can be reached. Engagement of a marketing expert should proceed to a marketing evaluation of the case as a

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whole. Without doing so, a narrow evaluation runs significant risks in leading to overly narrow conclusions, resting in turn on shaky foundations. There may be, as mentioned above, exceptions to this position. Additionally, it may be appropriate to lead evidence subsequently from a marketing specialist after a marketing generalist has enumerated the appropriate overall approach.

[126.550] Relationship with other experts and marketing manager's evidence

The independent marketing expert engaged to provide an expert opinion in litigation needs to be aware of the boundaries and potential for overlap with other types of experts, such as accountants, economists and even a lay marketing witness whose evidence may ultimately be put as expert evidence. Overlapping opinions on the latter issue are fraught with risk because they quickly show up inconsistencies in overall approach and opinion. If a marketing expert is engaged, that person needs very quickly to assess whether other commercial experts have already given an opinion and if so, what they have said as to market dynamics which may relate to issues on which the marketing expert will also give evidence.

Although there are many types of experts that may be led in a case, the three types that have been called most consistently alongside marketing experts, are those discussed below.

In a competition case, e.g., it makes sense for an economist to define the market first, and then any issues of market dynamics or market interpretation on which a marketing expert may give evidence would follow. The marketing expert will properly proceed from a definition of the market to assess other issues, and if that definition is not provided to her or him by way of assumption, then the marketing expert will most likely invent one. Such a step might call into question any future inconsistent definition arrived at by an economist, even though the latter is likely to be accorded more weight in the context of Pt IV of the *Competition and Consumer Act 2010* (Cth) on this particular issue. It may even be that the marketing expert is instructed to give an opinion on market definition, but from a marketing point of view. In this case, it is likely to focus more heavily on the customer dimension of the market (or markets as is the habit in the competition law jurisdiction).

To give an accounting example – in a product liability case, the establishment of the sales history of a given business is crucial for both the marketing and accounting evidence. The marketer will rely usually on the accountant to provide reliable sales data with which the marketer can work in interpreting events and, if necessary, forecasting sales into the future. It sounds a simple sequence, but in practice, the two experts may have to work closely together in working through issues such as the data source, data cleansing, disaggregation and re-aggregation of data. For example, deciding which products to analyse in a product liability case is difficult when the affected product brand (hypothetically, Jordan's drinking chocolate) is the same name as the corporate brand (Jordan). In such a case, potentially all of the company's products may be relevant if the overall brand was mentioned in media coverage of the events in question. But making this call is probably the marketer's decision, as it is an issue for expert opinion. Therefore, before the accountant prepares the sales data for use, there needs to be careful consideration of which data. The above example is just one of many that will typically need to be resolved before the data are finalised for use, by both the marketing and accounting experts.

Continuing in sequence, the accounting expert needs to be provided with an appropriate assumption about lost sales where this figure relies on any form of sales projection. This assumption will typically be provided by a marketing expert. In the absence of a reasonable basis for the assumption, the accountant cannot be confident that her or his entire assessment which flows from the sales assumptions will hold true.

There is also a complex area of overlap between marketing and accounting experts in the field of valuation and discount factors. Brand valuation, which includes valuation of intangibles, is an area in practice occupied both by accountants and marketing specialists. Therefore, there is some question about which type of expert to call. Brand valuation typically relies on making specialised judgments about the market in question, and absent an independent valuation of the brand already having been undertaken in recent times by the company in question, is a complex exercise in judgment. This same issue of overlap also applies to discount rates.

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Discounts are often employed in financial models to adjust for contingencies and the time value of money into the future. There are complex questions about what rate should be applied, and even whether it is for any expert to apply a discount, rather than leave this up to the court. Nor are discounts confined to the better-known situation of capitalising a future revenue stream (known as discounting to net present value). In assessing loss of opportunity cases, e.g., it may make sense to apply a discount to all revenue forecasts on the basis that it is well known that a certain percentage of new business start-ups fail within a short period of launch. It may also be appropriate to apply a discount to revenue forecasts for established businesses on the basis of specifically identified (but unquantifiable) negative factors likely to impact the business. See [126.940].

The third example of evidence from another type of witness to which the marketing expert will need to pay careful attention and to understand the respective roles is the industry marketing witness, such as the marketing director of the firm in question. More often than not, the latter's evidence is directed solely to establishing facts on which the marketing expert relies. Such facts would typically include a chronology of the firm in question and the evolution of the products or brands the subject of consideration. It would typically define and profile the marketing strategy and the activities that were undertaken to implement that strategy. It would also typically define and profile key competitors and consumers. In addition, it may need to deal with special facts that the marketing expert needs in order to prepare her or his opinion. In such a situation, it is often appropriate that the marketing expert be engaged before or during the preparation of the marketing director's affidavit or statement. The marketing director, however, may be put up as an expert, and may be asked to extend her or his opinion to the key issues in dispute (e.g. likelihood of confusion in a passing off case or market definition in a competition case). In such situations, questions of consistency with other experts, whether marketing, accounting or economic experts, need to be carefully borne in mind. It is important, if such a witness is asked to extend into these areas (assuming that the witness has the relevant expertise, qualifications and impartiality), that the witness be sufficiently briefed as to the issues underlying the questions and that the witness fully explain the basis of their opinion in reply.

[126.560] Conflict and independence: experts in advising clients

It is worth noting the special issue of conflict and independence, perceived or otherwise, that arises when engaging experts who are heavily engaged in working for industry. As marketing is both a theoretical and practical discipline, a marketing expert needs ideally to have expertise on both fronts. With extensive commercial experience comes extensive relationships. It would not be uncommon for a marketing expert with a long consulting career to have advised hundreds of clients in dozens of industries. This situation is no different to that faced by expert accountants, for instance.

If we accept that wide industry experience is a necessary ingredient for an independent marketing expert, then it is also likely that the issue of independence and conflict will arise more often than otherwise. A brief treatment of the issue follows:

- What if the expert has consulted to the firm whose solicitors are seeking to engage the expert? This is usually a clear case of actual or perceived conflict with the expert's primary obligation to assist the court, as the expert is seen to want to favour the existing client in the outcome of the case. By contrast, if the consultancy was many years ago, involved unrelated issues to those in dispute and involved only the most minor contact between the firm and the expert (e.g. a half-day seminar run in-house not involving actual advice), then there is no impediment to taking the litigation assignment.
- What if the expert has consulted to the opposing party in the proceeding? The expert's engagement may be objected to by the opposing party on the basis that the opinion would involve reliance on confidential information disclosed by it to the expert when acting as consultant. It may also be argued, if there were grounds, that the expert may bear some form of grudge against the other party in the event that consultancy had been discontinued or relations had not ended on a positive note in the past. Such an allegation could undermine an assertion of expert impartiality.

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- What if the expert, through his or her own private superannuation fund or family trust owns shares in one of the entities involved in the litigation? So long as the holding is disclosed and the ownership is limited, such conflicts should not be an issue.
- What if the expert was an interviewee in a survey conducted for the purpose of litigation which she or he was subsequently engaged to review? So long as disclosure occurs and the expert has conscientiously completed the survey honestly, then no problem should arise.

In general, the marketing community, academic and practitioner, in Australia is not vast. It is likely that many experts are in the same LinkedIn network and will have worked for many clients in a number of roles. Similarly, legal practitioners have their own group of experts with whom they are familiar and for whom they provide informal referrals. Murphy et al, (2010) have drawn attention to the distinction between the "clean" expert whose role it is to give independent evidence to assist a court or tribunal in its deliberations and the "dirty" expert who has been engaged to support the legal team for one of the parties. The focus of this chapter is on the clean, independent expert.

[126.570] Marketing expert mistakes

As early as 1992, Preston (1992) used a content analysis of many US deceptive advertising cases and identified several classes of mistakes made by marketing experts producing market (usually survey) evidence. It is likely that such mistakes have broader application than just advertising. The following error types were identified:

1. *Avoidable errors in testing whether claim was conveyed to the audience*. On the researchers' side, examples included biased questions, lack of control groups, no information on how survey responses were coded and too small sample sizes. On the lawyers' side, examples included researching advertising recall in a manner that went against practices previously accepted by the courts, asserting that consumer language recorded in a survey was of no use unless it exactly matched the legal wording of the deceptive claim and offering evidence of consumer response to ads similar to but not identical to the ad in question;
2. *Avoidable errors in materiality*. Examples included offering expert opinion that was contradicted by survey evidence and not testing the ads in question; and
3. *Avoidable errors about the truth or substantiation of conveyed claims*. On the researcher's side, examples included a lack of a double-blind trial, poor coding of survey responses that meant examples of consumers being misled were coded with other items making it impossible to discern the extent of deception, testing the advertiser's own employees, unrealistic tests of product usage, poor application of statistical tests. On the lawyers' side, examples included bad timing of the testing relative to showing the ad, selectively reporting only those parts of the research that supported the claim and rejecting an opponent's research method when their client had used and relied upon the same method in its decision making.

Essentially lawyers need to guide researchers on the basis of precedent as to the types of marketing evidence that will be accepted as relevant and useful. Researchers have a duty to put forward the best methods for obtaining marketing evidence, based on their academic and professional experience. While cross-examination and the response of opposing parties to marketing evidence adduced is a safeguard, Preston was able to show cases where faulty evidence had been adduced without challenge. In major cases, the lawyers for the parties may wish to engage a further expert to review the opinion being put forward by their experts, with a view to identifying possible errors and criticism that might be present. The Federal Court Practice notes covering expert evidence and survey evidence also provides safeguards. See [126.520].

[126.580] Conclusions

Given the wide scope of marketing, it is likely that marketing experts could be called in a wide number of cases involving commercial litigation. However, that is not always the case, as legal practitioners may have the view that many marketing issues are comprehensible from within their everyday experience. Nonetheless, as marketing is both an art and a science, both

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practitioners and academics have skills that are useful and go beyond the experience of triers of fact. The academic in particular is likely to have greater expertise in rigorous marketing research. Due to the limited pool of experts, it is likely that they have been involved as consultants to many parties, may hold shares directly or indirectly in one of the parties or may have published opinions or pieces of research relevant to the area. A careful monitoring of potential conflict of interest and a potential conflict in opinions between what is published and what position is taken in a particular piece of expert marketing advice, needs to be carefully monitored. Both lawyers and experts have made avoidable errors.

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SOURCES OF EVIDENCE ON WHICH MARKETING EXPERTS MAY RELY

[126.600] Overview of sources

A role as an independent marketing expert can be an unusual and tricky position to occupy. This is due to the breadth of the discipline, the complexity of issues on which such experts are asked to express their opinion and the mixture of sources on which they need to rely in reaching their opinion. Marketing is not an exact science (except in some specialised areas), and yet it offers fundamental frameworks developed in the literature that can provide significant assistance in understanding a situation. It perhaps has more on this count to offer lawyers and courts than is generally thought to be the case. There is a highly developed academic field in marketing, including a large quantity of published studies in the literature either directly or indirectly relevant to issues in commercial litigation.

[126.610] Practical knowledge

But marketing is also a highly practical or applied area of expertise. It is as much about practical knowledge, experience and judgment as it is about theory. Lawyers often want to know how to put a dollar figure on lost sales, e.g., and a marketer, with the right combination of practical experience and knowledge of principles, can usually provide an acceptable answer or estimate within a range. This section of the chapter discusses the specific resources (or sources) on which an expert will usually rely. By and large, and due to a natural scepticism about whether the types of issues on which such opinions focus are capable of precise opinions, the marketing expert should rely on as many of these resources as can be gathered.

Fundamentally, expert marketing opinion will rely on five types of information:

1. Information provided by instructing solicitors;
2. Information collected by one or more of the parties, especially customer data;
3. Published sources of information, including academic journals, industry reports and websites;
4. Expert's explicit and tacit marketing knowledge; and
5. Information collected specifically for the purpose of litigation, such as consumer surveys.

[126.620] Information provided by instructing solicitors

Instructing solicitors often provide a marketing expert with assumed facts, such as about the situation giving rise to the claim (e.g. "you will assume that the respondent's actions were negligent" or, in a case involving advertising that the court has found "misleading and

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deceptive" the expert might be asked to give an opinion on the deleterious effects of that advertising). The assumptions are usually sound in terms of foundation, as often they will have been determined by the court. Where they are not, then the opinion of marketing experts may be disregarded, as in *Qantas Airways Limited v Edwards* [2016] FCA 729, where Yates J observed at [87]:

> My own conclusions, however, will not be encumbered by the tendentious assumptions Mr Blanket was asked to make in expressing his opinions in this regard. I hasten to stress that these assumptions were not self-imposed by Mr Blanket. They are assumptions he was instructed to make. He cannot therefore be criticised for the form of the assumptions or for giving an opinion based on them. In any event, as I have noted … these assumptions were not proved by the appellant.

The expert may be instructed about the market position of the brand in question (e.g. "Brand X is the leading brand in the market"). The second type of instruction, however, is fraught with difficulty. It is usually an issue for an expert as to whether a brand is the leading brand, as it requires adumbration of leadership criteria as well as definition of the relevant market. It may be that the type of facts to be assumed are clearly capable of proof via lay evidence (e.g. "Brand X was launched in 2001 and has since been sold in 23 countries and currently has an annual marketing budget of $11.8 million in Australia"). Such an instruction would be sound, assuming it was subsequently proved via the lay witness such as a senior manager within the firm.

What is clear, however, is that such assumptions should only include those that are both necessary and appropriate for the expert to proceed, and that this will usually require involvement of the expert to decide such questions. Indeed, it requires the issues on which the expert is to be briefed to be determined, and this too will usually require involvement of the expert.

In general, it is common that key assumptions provided by way of the instructing solicitor to the marketing expert are often not helpful, as most of them need to be proved via other evidence before the expert expresses her or his opinion. The only category of instructed assumption that appears to be useful is as to contentious issues about liability to be determined at trial (e.g. "assume that the broadcast contained the following defamatory imputations").

The independent marketing expert should usually require as much as possible of the factual base about the firm – its brands, its customers, its competitors, its distribution channels, its promotion and its pricing – to be put by way of lay evidence, such as via the marketing manager and other industry witnesses, like sales agents and distributors. Such evidence may relate to very specific issues that the marketing expert has defined as being relevant (e.g. evidence about a firm's decision to launch a new product) and may need to be obtained from specialised third-party sources (e.g. media data in a corrective advertising case, see *Australian Competition and Consumer Commission v Danoz Direct Pty Ltd* [2003] FCA 881).

[126.630] Information collected by one or more of the parties

Any or all of the parties may hold information relevant to the litigation. The marketing expert may advise as to the likely availability of documents, such as previous marketing research reports. Similarly, marketing strategies, marketing plans and advertising schedules are all likely to be of some use.

In *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 3)* [2006] FCA 386, Heerey J rejected previous marketing research conducted by Cadbury, as the respondent had no chance to cross-examine the experts who prepared the reports. Survey evidence prepared for the purposes of the litigation was admitted and the experts cross-examined about it.

[126.640] Parties' discovered documents, including marketing research previously commissioned

Another source used by the marketing expert is the parties' discovered documents. The immediate question is "which documents"? Which types and what proportion of documents are relevant to the marketing expert? Depending on the issues to which the expert opinion is being

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directed, the marketing expert will need to have access to a wide range of discovered documents from the parties. In practice, the marketing expert is often involved in assisting solicitors with specifying draft orders for discovery and interrogatories. It will be obvious to the marketing expert if there is a class of document that has been omitted from discovery. It will also assist the solicitor to understand the precise relevance of certain documents if they have to argue on a motion for better and wider discovery.

Marketing issues are broad issues. As will be evident from reading this chapter so far, marketing issues touch on almost every aspect of a organisation's operations. Set out below is a generic list:

- corporate, business, marketing and brand plans;
- financial information including (a) detailed monthly sales data for each part of the relevant business going back as far in time as is available; (b) profit data for the same; and (c) any financial projections made at any relevant time;
- product information including detailed listing of products and services, how these are packaged to customers, how these products and services have changed over time and processes for new product evaluation and development;
- promotional information including promotional plans, details of the history of promotion activities, media schedules, details of expenditure on such activities and samples of all promotional materials available;
- sales channel information including details of arrangements for the sales channel, its structure and size, the basis of any contractual agreements and incentives with sales personnel or external organisations;
- pricing information including current and historical prices for all key products;
- competitor information including comparisons of products, how they are packaged, promoted, priced and distributed and their level of relative sales;
- marketing research reports (and underlying data) commissioned prior to the dispute which provides information on any of the above issues, but especially as to consumer trends, usage and attitudes and competitor comparisons;
- customer analytics data coming from the customer relationship management or sales management functions. Modern marketers have a wealth of information about their stakeholders (customers, clients and intermediaries) and many sophisticated tools to analyse these data;
- industry or market reports;
- information relating to any major event directly relevant to the dispute, such as a product recall; and
- information relating to customer service management, including after-sales service, warranty programs and refund policies.

[126.650] Organisational and subscription data sources

The marketing expert should also be able, in consultation with instructing solicitors, to identify and source any relevant industry or market information. There is a wide range of information providers about specific markets and industries, ranging from big providers such as the Australian Bureau of Statistics, Roy Morgan Research, Experian and AC Nielsen to smaller providers specialising in particular areas. Knowing how to identify such information is a particular role for marketing experts, who will be accustomed to accessing such data. Often identification will require detailed specification of the precise data required, and this requires the expert to be fully briefed.

The next issue is the interpretation of such information. If put forward on a contentious issue (e.g. market size and growth rates), such information will be the subject of critical examination and its source, method and findings will need to be very well understood, justified and carefully interpreted by the marketing expert. It is sometimes even necessary to call as a witness the author of such an industry report. This raises the possibility that the marketing expert is doing no more than assisting solicitors for one party in the identification and interpretation of relevant evidence. This is where the expert's broad and long experience in the

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field may be necessary to place an interpretation on the information above and beyond what is obvious on the face of the report or evidence given by the report's author.

[126.660] Extant academic literature on marketing

Courts are often influenced by the citing of academic studies on key points and see this as an appropriate role for the independent marketing witness to identify and explain (if necessary) such studies. These studies are usually drawn from quantitative (and to some degree qualitative) research on a particular issue and published in internationally recognised, peer-reviewed journals, such as the *Journal of Marketing*, the *Australasian Marketing Journal*, the *Journal of Marketing Research*, *Journal of Consumer Research* or the *Asia Pacific Journal of Marketing and Logistics*. Many of these journals are only available by subscription, most commonly in commercial electronic databases, though some authors also provide copies of articles to their university publications archives and these are often accessible through Google Scholar.

[126.670] Expert's explicit and tacit marketing knowledge

One of the more difficult sources to classify and define on which marketing experts often rely is knowledge of marketing practice. This knowledge may be in turn based on their own experience in implementing marketing practice or it may be based on knowledge of third parties' practices. To avoid dispute, such examples of practice should be evident in the public domain and as far as possible the proposition for which they are cited should also be evident on their face. For example, to say "the Virgin brand was extended beyond music retailing to airlines, mobile phones and credit cards as a means of leveraging and unlocking value in the brand" is probably uncontentious, even though the precise reason for such an evolution may simply have been that its owner, Sir Richard Branson, liked those other products and services.

Marketing experts are often called upon because of their knowledge and experience in an industry or their experience in a range of companies where they have developed marketing strategies and reviewed the outcome of marketing efforts. One of the strengths of such practitioners is their knowledge of the practical implications of marketing that goes beyond the normative prescriptions commonly found in marketing textbooks. However, one of the downsides of employing such experts is what has come to be recognised as tacit marketing knowledge which "… entails the acquisition of subtle forms of knowledge representation which are critical in exercising expertise, but which are difficult to articulate in words, i.e. they are 'tacit' (Hackley, 2009, p 729)". For example, an expert with many years of experience in advertising agencies working both with clients and with creative people in his or her agency is likely to subscribe to the view that advertising is necessary for the success of commercial companies and highly effective, when done properly. Such a person is likely to develop implicit theories about how advertising works and how it should be managed. If such an expert is asked to give an opinion about the effect of misleading advertising on consumers, he or she may exaggerate the effects and thus overestimate the damage done. In general, there are so many influences on buyer behaviour, that it is very difficult to tease out the effect of any one marketing factor from other possible forces, including but not limited to the activities of competitors, the state of the economy, the changing personal circumstances of the buyers and their degree of exposure to and comprehension of the marketing campaign.

Like any other expert, marketing experts should lay out the evidentiary basis on which they form their opinions. Unfortunately, where this is reduced to phrases such as "in my experience", tacit knowledge is likely to come into play and the basis for this is thus uncertain. When asked to produce evidence for such opinions, the expert may point to memorable examples in his or own history in order to support the points being made but whether these apply more generally cannot be determined. On the other hand, the expert may be highly useful in debunking other claims made, based on their impracticality. Thus, marketing experience is a double-edged sword. It gives legitimacy to the expert, but it also poses a danger to the extent that it relies on tacit knowledge whose evidentiary base cannot be simply tested.

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[126.700] Customer analytics

Customer analytics involve the systematic collection and analysis of data collected on stakeholders (Bijmolt and others, 2010). Organisations which have direct contact with customers, such as banks, insurance companies, airlines and telecommunications companies and charities, hold the most complete information. With the use of loyalty cards (such as Wesfarmers' FlyBuys, Woolworth's Everyday Rewards) and credit cards, organisations can build massive storehouses of information on customers. Potentially each interaction (such as a purchase, inquiry or complaint) is recorded, along with the action taken in response. Often these data are combined with geodemographic information (based on location and demographics) and single source market research (collected by companies like Roy Morgan Research) to build rich profiles of individuals and households. Much of these data are actual records of behaviour, not just reports of this behaviour. When allied with data on, say exposure to advertising, effects on behaviour can be directly modelled. Relevant data are likely to be available and growing in their completeness. Analytic techniques continue to grow in sophistication.

These systems of information describe actual stakeholder activities and incur no further cost in collection. However, the extraction and analysis of data may in itself be an expensive and time-consuming process. Possible applications include, for example, the study of changes in behaviour among people who have been exposed to advertising compared with those who have not. Where advertising is claimed to be misleading, this evidence could be used to judge its effects. Similarly, the entry of a competitor into a market could be modelled.

In one matter, customer analytics evidence was adduced, but the confidentiality of the information became an issue as the applicant did not want to provide the opponent with commercially relevant information (see *ALDI Stores v Coles Supermarkets Australia Pty Limited* [2010] FCA 563).

[126.710] Market research

Market research provides the second major source of customer information. Several types of market research are available. The most common is survey research. However, qualitative research and observation studies are also available. Data analysis techniques have continued to grow in sophistication for all types of research, including for qualitative data.

[126.720] Survey research

An important source of evidence, and perhaps the one that many lawyers see as synonymous with marketing evidence, is the commissioning of a survey of the relevant public on the issue(s) in dispute. The right marketing expert will be able to design, commission, report and interpret the results of such a survey. As in many jurisdictions, Australian courts initially had concerns that survey evidence was in effect hearsay and therefore inadmissible. As Gough (2008) has chronicled, changes in the *Evidence Act 1995* as well as in the practices of the courts, have led to the wide acceptance of survey evidence. The main issue now is the weight that should be given to the survey evidence, rather than its admissibility. Some cases may adduce evidence from research conducted by organisations in the course of their normal activities (secondary research), rather than research specifically conducted for the purposes of litigation (primary research). Surprisingly perhaps, some secondary market research not specifically designed for the litigation may carry greater weight; see e.g. *Twentieth Century Fox Film Corp v South Australian Brewing Co* (1996) 66 FCR 451; 34 IPR 225. Research specifically commissioned for commercial litigation may be regarded as partisan in the sense that, however well designed, it is commissioned by one party who expects it to show favourable outcomes. However, over time, primary research will be expected. In the US, it has been suggested that trade mark litigation will commonly involve survey evidence and be prone to fail if it does not (Evans and Gunn, 1989).

In one sense a survey is equivalent to calling a representative sample of consumers and asking them to appear as witnesses. This analogy fails, however, because once the survey has been conducted it is unlikely that participants will be asked to appear as witnesses. Instead, it is likely to be the expert who prepared the survey report who will be cross-examined.

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The Federal Court of Australia (2017b) has issued and revised Survey Evidence Practice Note (GPN-SURV) for the conduct of surveys. The revised version of the Practice Note appears to be more demanding and prescriptive than earlier versions, most likely because of problems encountered by the Court since survey evidence became admissible.

By way of a general overview of survey evidence, the Practice Note in Section 2 cautions:

> 2.1 Survey evidence can give rise to a number of problems which may result in it not being admitted into evidence or being given little or no weight. The party adducing the survey evidence is seldom in a position where it can remedy problems arising out of poor design or execution of a survey during the course of the trial. Even if a party is in a position to remedy such problems, allowing a party to do so at a late stage of the proceeding may be unfairly prejudicial to the other party and/or unduly disrupt the proceeding. It is therefore important that, at an early stage in the proceeding (and before any survey is conducted), a party proposing to adduce such evidence give close attention to the survey design and the steps that will be taken to ensure that the survey evidence is both relevant and reliable.
>
> 2.2 Experience shows that a great deal of time can be spent at the trial on evidence and submissions concerning the admissibility and/or reliability of survey evidence which, if the evidence is excluded, or given no weight, can result in a significant waste of time and costs. Any party seeking to adduce such evidence has a responsibility to take appropriate steps to ensure that the survey that is proposed to be conducted will be properly designed and executed and that the data obtained will be properly recorded and analysed. A party that fails to satisfy the Court that it has done these things may find not only that the survey evidence is excluded or given little or no weight but that it is also required to pay the other party's costs of responding to the survey evidence, even if it is otherwise successful in the proceeding.
>
> 2.3 One purpose of this practice note is to establish a procedure for the giving of notice of a party's intention to adduce survey evidence in order to ensure that the other party is given a meaningful opportunity to respond by raising any issues it may have in relation to the proposed survey design or methodology and/or the relevance of any results that may be obtained to matters in issue in the proceeding before the survey is conducted.
>
> 2.4 Another purpose of this practice note is to provide a party wishing to rely upon survey evidence with some guidance in relation to matters that may bear on the admissibility of such evidence or the weight that it might be given if admitted into evidence.
>
> 2.5 Needless to say, it will always be a matter for the judge hearing a matter either during or prior to the trial to rule upon the admissibility of survey evidence. Among other things, it may be open to a judge in a particular case to exclude survey evidence pursuant to s 135 of the Evidence Act. Further, a judge may either dispense with or modify the application of this practice note in any particular case as the judge considers fit including, without limitation, the requirements of this practice note with respect to the giving of written notices.

The initiating party intending to conduct a survey is required to raise the matter with the other, responding party. The notification needs to describe the issues the survey will address, particularly any fact or facts the survey aims to prove. It needs also to provide details of the survey design including the name and qualifications of the designer, the method for collecting data, the precise description of the population from which a sample will be drawn, the sample frame used to represent this population, the proposed questionnaire and the name and qualifications of the person organising the coding, processing and analysis of the data. The responding party then has 21 days to reply and the parties are then expected to discuss and consider their position with a view to minimising the differences. One safeguard that has been introduced is that "In an appropriate case, a judge may determine that a responding party may not be permitted to rely upon any submission or evidence that raises an issue relating to the

survey design not adequately identified or explained in the Responding Notice." (3.3). Previously it was open to the responding party to engage other experts at a later stage of proceedings and raise other objections.

The Practice Note then goes on to list problems with surveys that are best avoided:

(a) failure to adequately identify what it is that the survey is designed to measure;
(b) use of biased or leading questions, preambles and/or excessive use of probing;
(c) use of questions open to different interpretations and/or poorly defined or ambiguous terms or concepts;
(d) use of a survey instrument that is excessive in length and/or complexity;
(e) inadequate testing of the survey instrument;
(f) use of a sample frame not sufficiently representative of the target population;
(g) use of an inadequate sample size;
(h) inappropriate or poor quality recording and/or coding of responses;
(i) excessive non-response and/or non-completion rates;
(j) inappropriate or poor quality data analysis;
(k) use of researchers for interviewing and/or coding of responses with insufficient training or experience;
(l) lack of adequate quality controls (eg. failure to review data for evidence of problems with participants' understanding of questions and/or the reliability of recording/coding of responses).

These issues are discussed in detail below. The Practice Note discounts precedent in the sense that "what may be acceptable in one case may not be acceptable in another. For example, in some circumstances it may be preferable to use open-ended questions rather than closed questions. Similarly, probing for additional and/or more specific responses may be acceptable in one case but unacceptable in another." (4.3). Surveys should be tested before being conducted.

The Note goes on to limit the role of lawyers to the issue of relevant questions with relevant populations. Where practicable the lawyers should not be involved in data collection or analysis and those conducting interviews should be independent of the initiating party. Finally, the Practice Note describes the level of detail expected in a report on the survey:

(a) the purpose of the survey;
(b) a definition of the target population;
(c) a description of the sampled population;
(d) a description of the sample design;
(e) a copy of the survey instrument;
(f) calculations and estimates of sampling error;
(g) clearly labelled statistical tables;
(h) a copy of the interviewer instructions;
(i) coding and related instructions;
(j) quality control measures; and
(k) details of any unforeseen problems encountered in the course of the survey work that might reasonably be expected to have an impact upon the quality or reliability of the data or results.

The Practice Note has had some practical consequences for the use of survey evidence. First, parties wishing to adduce it run the risk that if it is deemed to be defective or given no weight then they will be responsible not only for the costs of the survey but also for the costs of the other party in dealing with it. Second, it strengthens the requirement that the responding party be advised that it is planned to conduct the survey and that party is given the opportunity to raise issues of concern. When these two requirements are read together, if objections are ignored and the Court later decides that the survey is flawed or carries no weight, based on these objections, then the risk is increased. Of course, the responding party also has the risk that if it fails to identify design flaws in the survey, it may be unable to raise these at a later

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stage in the proceedings. In the end though, the admissibility or weight the Court places on the survey will most likely be influenced by design or implementation flaws, at whatever time they are raised.

In practice, the initiating party is putting forward the proposed survey because it is of the opinion that if properly conducted, it will produce relevant and reliable information that will support its case. Given this, it is in the interests of the responding party to object to the survey and to raise idealised requirements (e.g. large random samples) that are not practical. Experience shows that it is far easier to critique a survey than it is to design and conduct one. Due to issues mentioned below, the perfect survey is difficult to achieve, given time, cost and access issues.

This source of evidence is not all that common, given the difficult experience that has been had by lawyers trying to adduce survey evidence in the Australian courts. It has become a highly specialised topic and one that the average marketing expert, let alone the average market researcher, is likely to find very trying. Indeed, some research firms decline to participate in such surveys because of the inevitable criticism that is likely to flow in open court.

For the initiating party, it may be more appropriate for the expert to design the survey and then for the solicitor to commission another expert to review the proposed survey, prior to notifying the responding party. For the responding party, a relevant issue is whether the initiating party has conducted any preliminary research (qualitative or pilot survey) prior to the design being finalised. If this is discoverable, this will highlight the role of the survey expert and the lawyers of the initiating party in developing the survey. In *Specsavers Pty Ltd v The Optical Superstore Pty Ltd (No 3)* [2012] FCA 504, Nicholas J expressed the view at [343] that, "… However, at least where the form of the questionnaire is a matter of dispute then it seems to me appropriate that … the party wishing to rely on the survey should produce any pilot study that was conducted for the purpose of designing or testing the questionnaire." Because no evidence was produced that the survey questions had been tested prior to use, his Honour gave the survey results no weight.

Failure to follow the then Practice Note may not make a survey inadmissible. However, as Heerey J observed in *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 5)* [2006] FCA 850 at [26]:

> The unexplained failure of Cadbury to comply with a practice note issued by the Chief Justice of this Court is not a matter to be brushed aside. Practice notes are issued for the guidance of practitioners so as to improve the fairness and efficiency of litigation. It is a matter of concern that practitioners have taken a conscious decision to ignore this practice note, presumably because it was thought forensic advantage would thereby be obtained. However, as Cadbury contended, non-compliance with a practice note does not affect the admissibility of evidence and is not like disobedience of a Court order. So I agree with Cadbury's submission that in itself non-compliance does not warrant indemnity costs, although there is perhaps irony in the fact that the unilateral preparation of the survey had the result that it turned out to have little, if any, usefulness.

In *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 2)* [2006] FCA 364, Heerey J had earlier dismissed Darrell Lea's application for this survey evidence to be excluded.

It is important to note that the survey expert needs to be guided by the party commissioning the survey as to the information that is relevant to collect because the survey expert does not have the legal expertise to decide this. See [126.620]. In *Optical 88 Limited v Optical 88 Pty Limited (No 2)* [2010] FCA 1380, survey evidence, though admitted, was deemed not to have addressed a key area of interest to the Court, among other criticisms made by his Honour[1].

1 The author of this chapter was the designer of the survey.

[126.730] Survey research design issues

Surveys may use a number of data collection methods, including web surveys, postal surveys, telephone surveys, face-to-face in-home interviews and mall-intercept interviews (at shopping

centres and other central locations). To the extent that a visual stimulus is required (e.g. reaction to advertising or packaging), usually telephone surveys will be inappropriate. Similarly, in litigation involving the trade marking of colour, the Web will be inappropriate as the researcher normally cannot control the colour displayed on screen.

Quantitative surveys have the aim of generating sufficient responses to provide statistically meaningful conclusions. Quantitative surveys have several forms. An *omnibus*, such as that conducted by Nielsen, refers to a study that is scheduled to be run on a periodic basis (usually weekly or monthly) with a pre-specified respondent base, sponsored by the research house. Subscribers pay to have their questions included on the omnibus, which contains a collection of questions from multiple clients. This is often a very fast and cheap way to gather survey results for just a few questions from a mainstream consumer audience. However, unless there is control over the questions that precede those of interest, there is a danger of bias. For example, if the previous set of questions asks about brands of spectacles that the consumer has heard about, later questions relevant to dispute between two brands of opticians may produce a misleading response. The sample available on an omnibus survey also needs to be carefully examined for representativeness.

Syndicated surveys are industry-specific and typically either sponsored by a research house (e.g. DBM Consultants) and sold publicly (for varying fees ranging, in some cases, to many thousands of dollars) or which are sponsored by a syndicate of firms in an industry and conducted by a research firm. The television ratings provide an example (http://www.oztam.com.au). The latter will sometimes be undertaken on a confidential basis for industry firms, with clear rules about what is disclosed between competitors.

Ad hoc surveys are customised from scratch, targeting a tailored respondent base and commissioned by one of the parties. This is an increasingly specialised and sophisticated area of market research. For example, in trade mark surveys relating to an attempt to register a mark such as a colour or symbol, at least two matched groups of interviewees are required. (Bednall et al., 2012). For example, if the "glass and a half" symbol on Cadbury chocolate is to act as a trade mark, many more people in one (experimental) group should identify Cadbury on the basis of seeing the symbol than would a comparable (control) group shown a neutral symbol in a similar get up (size, colour background). This should be done using a method known as a "double-blind" approach where neither the interviewer or interviewee is aware of the purpose of the test. This is analogous to a double blind medical trial where a medicine with the active ingredient (experimental group) is tested to see if it produces stronger effects than a placebo (control group) which does not contain that ingredient. Neither the person administering the drugs nor the person taking them, knows whether they have received the active ingredient. Similarly testing the Cadbury symbol on its own is not sufficient, as people may have guessed Cadbury as being a well-known brand. The control group with the neutral stimulus acts as the placebo.

The following survey issues are crucial to a proper design. However, the reader is cautioned that in designing a survey, these elements necessarily interact. So, the full picture is more complex than described here (Bednall et al., 2012). But what follows gives guidance on the key issues.

- Defining the population is a threshold issue. This is shown in *Australian Postal Corporation v Digital Post Australia Pty Ltd (No 2)* [2012] FCA 862 where "the class of survey respondents was not confined to potential users of the proposed digital mail service" (p 16), leading to the survey being given no weight. Survey samples cannot be constructed until the population of interest is defined. For example, if the litigation concerns claims that one drug company has misled General Practitioners, then this group defines the population. In other surveys this might be more contentious. If one company claims its over-the-counter medication is far more effective than that of a rival, then defining the population likely to be deceived (buyers, users, prescribers, carers, non-users or all?) is problematic. Once the population is defined, then a *sample frame* is needed. This is a list of people used to represent the population. For example, the *White Pages* was for many years used a sample frame for Australia because almost all homes had a fixed line and there were few silent numbers. Now fewer homes have fixed phones, especially homes with younger people.

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Self-selected samples may be rejected as unrepresentative, as opined by a marketing expert in *Sharples v Minister for Local Government* [2008] NSWLEC 308.

- Orthodoxy suggests that a random sample is what is required to select people from the sample frame. Sometimes these samples will have strata, for example capital city versus other areas. So long as these strata are mutually exclusive and jointly exhaustive they can follow the best random sampling principles. See *Opposition by Citigroup Inc to registration of trade mark applications 1339005(36) CITY ACCEPTANCE CORP (Words) and 1339006(36) - CITY ACCEPTANCE CORP (Device) - filed in the name of City Acceptance Corporation Pty Ltd 2013*. Occasionally, it is very straightforward to draw a random sample, for example, from a sample drawn from a customer list. However, completely random samples are very difficult to obtain in most circumstances. Partly this is caused by the difficulty in reaching people (e.g. younger people without a fixed phone) and partly by poor response rates. It is common in commercial research for less than one in ten people selected from a sample frame to be interviewed and usually many more people who are contacted refuse to take part than those who agree. To control for this, quotas will be specified for certain groups, such as age, gender and location. Quota samples, if carefully controlled, can approximate a random sample. In mall intercept interviews, for example, there is little other choice than to use quotas. In *Samsung Electronics Australia Pty Limited v LG Electronics Australia Pty Limited (No 2)* [2015] FCA 477, his Honour gave a telephone survey no weight because the in-household sampling procedure was criticised and this criticism was not challenged in cross-examination nor disputed (at [371]). This was perhaps surprising given the academic literature on the "last birthday" method commonly used in such surveys e.g. Binson et al. (2000). Doubts about sampling also led to two consumer surveys in *Australian Postal Corporation v Digital Post Australia* [2013] FCAFC 153 being given no weight.
- Similarly, many internet or smartphone surveys use panels of respondents. Even if these panels are quite large, they only involve a minority of the adult population and may not be recruited using random sampling principles. While panel companies attempt representativeness, some groups are less likely to be represented, such as older people and those without internet access. A quota sample is normally what is produced in these circumstances as well. Sampling is one area where any survey is vulnerable to criticism because the gap between an idealised random sample and what is practicable to achieve may be large. As well, inferential statistics, used to project the results from the sample to the population, assume random samples.
- Related to sampling is the question of how many people to survey. Assuming a random probability sample, we can calculate what is imprecisely known as "sampling error". This relates to our degree of confidence that if a sample produces a result of say 59%, we can be 95% confident that the true figure in the population is say within plus or minus 5% of that figure, i.e. we are 95% confident that the figure lies in the range 54% to 64%. Complete certainty can only be obtained by surveying the entire population, in other words, conducting a census. The confidence interval varies with sample size. To halve the confidence interval requires a sample four times as large – ultimately there will be a trade-off between accuracy and cost. In practice, the largest driver of sample size is usually the number of cells or subgroups in which separate data analysis and statistical reliability is sought. For example, if a separate answer is sought for each capital city, then it will be necessary to have perhaps five times the number of respondents. If separate answers are required for each age bracket in each city, then the sample size may be perhaps 30 times larger (e.g. five cities by six age groups). As a very rough rule of thumb, 200 respondents per cell may be sufficient to achieve adequate statistical reliability. In *Opposition by Michael Harvey to registration of trade mark application 1248610 (32) – EXTRA DRY – filed in the name of Lion-Beer, Spirits & Wine Pty Ltd 2013* the delegate of the Registrar questioned the sample size of the survey adduced by the applicant. "The survey consists of relevant responses from only 381 people which, if my understanding of the beer drinking habits of Australians is at all accurate, is a mere drop in the ocean." (p. 20). In fact, the size of the population is largely irrelevant to the size of the sample needed to represent it, so

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long as it is a random sample. What is needed is a sample sufficiently large to depict the results with the required accuracy or with enough power to detect differences between groups.

- There are two further issues. Sub-groups, such as residents in a particular area, will by definition have smaller sample sizes and thus larger confidence intervals, so if high accuracy is required in each sub-group much bigger samples will be needed. Second, figures for precision or accuracy are often quoted based just on these sampling considerations. This can be quite misleading in the sense that non-sampling errors resulting from poor question design or poor survey administration can produce far larger errors. Where quota sample are used, sampling error is likely to be larger than with a random sample.
- Perhaps the most difficult issue in survey design is to find a way to ask non-suggestive questions. Whilst it may be thought that suggestive questions are often asked deliberately in order to obtain a certain result, this is not the case. Suggestive questions, it seems, are more often asked either because the person designing the survey is unaware of the inherent bias in many questions or a sequence of questions, or is unable to find a way to ask a certain set of questions without being in some way being suggestive. For example, in a survey dealing with a trade mark application for a symbol, it would not seem prudent to specify a limited set of possible sources to the respondent. Rather, it would be better not to specify any and instead ask open-ended (i.e. free-response) questions. This is a position taken by Corbin and Gill (2008) in order to avoiding suggesting particular responses to interviewees or interviewers. To report, say, 1,000 answers to such a question would require many pages and much time for any person to read and interpret. Therefore, lawyers and researchers will often aggregate such answers into groups of similar responses (e.g. all those who said Brand X and all those who said Brand Y). Such aggregation is done using what is called a coding frame, in which categories of answers are defined by the researcher after reviewing the verbatim results. If coding occurs, it is essential that the court have access to the verbatim responses, together with the coding frame and a table showing into which group each of the responses is classified. This gives the courts direct access to what was said and allows others to interpret the evidence provided independently of the expert who wrote the survey report. Otherwise, the findings may be dismissed (see *Samsung Electronics Australia Pty Limited v LG Electronics Australia Pty Limited* [2015] FCA 227 at 349).
- Similarly, if you want to focus questions on a particular brand or trade mark, it is suggestive and highly artificial to open the interview by announcing the identity of the brand or mark. To get around this may require the brand to be hidden among a range of other unrelated brands, requiring perhaps five or 10 times as many questions in the survey as originally proposed in order to mask the identity of the sponsor and hence not lead the respondent. Practically, you may have to ask a certain question after which the identity of the sponsor will be obvious if you keep asking more questions. In such a case, it may be necessary to split the survey into separate response groups and ask particular questions of each group.
- In some situations, the most difficult thing is to find a way to ask the relevant question which will truly reveal the way consumers think. For example, establishing proof that consumers know a mark as a trade mark (that is, from a particular source and is being used to connote this) is one of the most difficult assignments, because consumers do not easily express such complex, and often legalistic, concepts in the course of a simple survey. For example, if a colour trade mark application specifies "orangish-yellow", this is probably a technical term that will confuse many consumers. Like the issue of leading questions, this is not about seeking a certain result, but rather trying to measure the real level of consumer belief about certain things. Of course, when it comes to colour, it is not the word descriptor that is important to a consumer's judgment, it is the colour itself, faithfully rendered. A similar logic applies to other marks which the research may wish to test. But, in some cases, market research may be technically incapable of providing lawyers with such assistance. For example, one of the criticisms made of surveys by judges is that they are essentially an artificial context in which to judge people's beliefs, motivations and attitudes. Finding ways to overcome or minimise this limitation is a challenge for those designing surveys.

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- In trade mark surveys designed to test whether a particular set of indicia (e.g. colour, logo or name) identify the source brand or company, an issue arises as to whether the survey results apply to the time of application, especially when conducted some years afterwards. In *Frucor Beverages Limited v The Coca-Cola Company* [2017] FCA 298, Yates J decided that two surveys that had this limitation were admissible.
- Finally, it can be noted that the special rules of evidence that apply to surveys mean that surveys done for the purposes of litigation bear little resemblance, in a process sense, to those commissioned in practice for business purposes. They generally seek answers to questions that are not often asked in commercial practice. They also will be subjected to the most particular scrutiny and as such will need to be designed to a standard that is simply not adhered to very often in commercial practice. Typically, this means the design of a survey of this nature will be far more involved than is obvious at first glance. All these things make survey evidence very expensive, usually much more expensive on a per respondent basis than ordinary market research, and litigants need to be aware of this.

Despite all these issues, surveys can provide systematic evidence about the relevant groups in the market and thus are capable of assisting any court or tribunal in its deliberations. A description of a complete trade mark survey showing the interaction between all the inter-dependent parts of the survey is found in Bednall et al. (2012).

[126.740] Qualitative research

Qualitative research aims to understand the motives, views, feelings and perceptions of key stakeholders, especially consumers. In commercial market research, group discussions (sometimes called focus groups) are the most common form. Typically, 8 to 10 people are invited to a convenient location and asked broad questions about the topic of interest. A payment for attendance is the norm. In terms of absolute numbers, geographical coverage and selectivity, they are unlikely to be representative of the population of interest. Second, normal activities for moderators are to follow up on comments ("probing") made until a response relevant to the topic arises and to raise topics which have not been spontaneously raised by interviewees. For example, if a moderator is exploring responses to advertising alleged to be misleading, she or he may keep probing until some potentially negative consequences are uncovered. The resulting research may therefore be seen as biased towards a particular outcome, or leading to undue attention on the negative consequences, over-estimating their importance. Given social pressures in a group, some people may also be led to agree with conclusions that they may not support privately. Despite these risks, group discussions may provide extensive marketing insights, if carefully conducted.

In-depth interviews are the other major form of qualitative data collection. They consist of one-on-one interviews with individuals. A range of broad questions will be asked and interviewer probing will occur. While group pressure is absent, the role of the interviewer is crucial. The more directive the questions and the more probing that is done, the more the validity of the information will be affected. Testing of survey questions is one legitimate use of in-depth interviews, as it aims to explore interviewees' understanding of the words used in survey questions and perhaps, the thinking process used in arriving at their answers (Willis, 2005). Where surveys are moving into new areas of inquiry, some pre-testing is likely. A literal reading of Practice Note 13 does not require the disclosure of pre-testing. Those parties facing market research evidence adduced by opponents would be well advised to seek discovery of any preliminary research or pre-testing. This can be revealing of the design decisions on which the final form of the research is based.

Transcripts and video recordings alleviate concerns about hidden bias in the consultant's report, but courts may require further information and this may be unavailable. Qualitative data needs to be organised ("coded") and summarised for the marketing expert to make sense of what occurred and to form the basis of their report. There is no objective procedure for this. Having others independently code the material is a possible, though expensive safeguard. Ultimately having the transcripts is a safeguard that allows an independent assessment of the outcomes.

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In *Telstra Corporation Limited v Royal & Sun Alliance Insurance Australia Limited* [2003] FCA 786 qualitative market research conducted by one of the parties for their own commercial purposes was adduced and considered by Merkel J in deciding that certain advertising contravened ss 52 and 53(d) of the then *Trade Practices Act 1974* (Cth).

[126.750] Observation research

Market researchers have available to them a range of techniques to observe the behaviour of consumers. The least controversial of these are observations of people in natural circumstances such as the use of a video camera in a shopping mall or counts of foot traffic into a store. Changes in this behaviour, for example in response to the closing of the main store in the mall, can be objectively assessed. Other companies are now active in harvesting activity and posts in the social media, such as Facebook or Twitter. While sampling is a real issue, the data may show how social media have acted, correctly or wrongly, with respect to brands, products and companies. Where companies have intervened in social media, such as paying agents to post messages about competitors, the outcomes of this activity could be monitored or revealed.

More interventionist techniques are possible. For example, it is possible to fit consumers with glasses that track their eye movements and area of focus. These can be worn as people travel through a supermarket or while driving past a roadside billboard. They could be used to judge response to advertising messages or features. Even more contentious are neuromarketing studies (Ariely and Berns, 2010). There is increasing information available about which areas of the brain are responsive to marketing stimuli and which parts are involved in decision making. Microelectronics have made it possible to fit consumers with relatively unobtrusive headsets to monitor these areas. In contrast, even more detailed information can be collected from intrusive imaging such as MRI scans. Legal applications of this research may be contentious. But if it could be shown that two brands are processed differently, claims about consumer confusion would be weakened.

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APPLICATIONS OF EXPERT MARKETING EVIDENCE

[126.800] Introduction

Having explained the general scope of marketing (see [126.20]), the type of marketing experts that may be relevant (see [126.510]ff) and the information on which they rely, this section provides a framework from a lawyer's point of view, structured around causes of action and specific elements of each cause to which marketing evidence may be highly relevant.

The section is structured under the following causes of action:

- intellectual property causes such as passing off, as well as the related causes of action arising under the *Competition and Consumer Act 2010* (Cth), in particular the Australian Consumer Law (ACL) as Schedule 2 to this Act and *The Trade Marks Act 1995* (Cth);
- product liability and other general commercial disputes;
- anti-competitive conduct under Pt IV of the *Competition and Consumer Act 2010* (Cth); and
- defamation.

For each cause of action, an outline of the legal issues to which marketing evidence may be relevant is given, cases and examples are cited and cross-references to the more detailed treatment of marketing issues at hand are provided.

[126.810] Other causes

There are other causes of action to which marketing evidence may be relevant (Sweeney, Bender and Courmadias, 2015) such as State Credit Acts, Business Names Acts, the *Copyright Act 1968* (Cth), the *Designs Act 2003* (Cth), *National Measurement Act 1960* (as amended 2013), the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* (Cth), State Dangerous Goods Acts, State Lotteries Acts and others in relation to representations made to customers and intermediaries.

There are many cases where it might have been expected that marketing experts would be called upon, but were not. An example would be *SC Johnson & Son Pty Limited v Reckitt Benckiser (Australia) Pty Limited* [2012] FCA 1266 where only the Marketing Director of the

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Applicant gave evidence. Despite this, the judgment contained 36 references to the "representative consumer" in a case involving the applicant's claim of conduct that was likely to mislead or deceive in contravention of s 18 of Schedule 2 of the *Competition and Consumer Act 2010* (Cth) (the Australian Consumer Law).

[126.820] Intellectual property

Intellectual property is an area in which marketing evidence is often led in support or defence of claims. This is because many of the causes depend on what consumers actually think or are likely to think or do. Hence, marketing evidence inferring or proving these facts has been common. In 2012, the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012* introduced a number of changes which affect the operation of the "Australian Patents Act 1990, Trade Marks Act 1995 and the Designs Act 2003" (IP Australia, 2013).

[126.830] Passing off

Marketing evidence has been led in passing off cases primarily in relation to three issues:

- to prove reputation;
- to prove actual or likely deception; and
- to assess appropriate remedies.

An applicant wishing to bring an action in passing off bears the onus of proving:

- the subsistence of some reputation or goodwill of the applicant;
- deceptive conduct on the part of the respondent; and
- the existence or threat of damage to the applicant as a result of that conduct.

Within each element, there are various issues on which marketing evidence may be led to assist in proof. Conversely, marketing evidence can also be employed by a respondent to refute allegations of passing off at each element.

It is also fair to observe that Courts may make judgements about likely deception or otherwise, in the absence of expert marketing evidence by determining how a hypothetical class of consumers might behave. In *Samsung Electronics Australia Pty Ltd v LG Electronics Australia Pty Ltd* [2011] FCA 664, Rares J was dealing with a case of one company seeking to restrain a rival company from using various television commercials for 3D televisions that it claimed were deceptive:

> It is necessary to identify a hypothetical person whose characteristics will provide the Court with the means to ascertain whether the conduct complained of will, or is likely to, mislead or deceive the members of the class or classes of potential consumers. This requires the Court to consider why any misconception complained of would arise, or would be likely to arise, in the mind of the ordinary or reasonable potential consumers [32]. (See also [126.530].)

Proving reputation

Evidentiary issues that arise in proving reputation include:

1. Whether the indicia in issue (e.g., name, get-up, image) are, in fact, indicia of commercial identity:
    (a) In *Telstra Corp Ltd v Royal & Sun Alliance Insurance Australia Ltd* (2003) ATPR 41-951; [2003] FCA 786, the issue arose in the Federal Court of Australia as to whether a character and motif used in advertising was a brand identity symbol capable of being an indicia of the applicant's commercial identity. Both parties led marketing experts to give evidence on the marketing status of the character and motif. Merkel J agreed with the evidence given by the applicant's marketing expert that the character and motif had become a form of "secondary branding" for the applicant. The court ultimately held that the respondent's use of the same character in a similar advertising motif was effectively misrepresenting that it was also an

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advertisement by the applicant or that the applicant was in some way associated or connected with that advertisement or with locating the services offered in it.

(b) In *Cadbury Schweppes Pty Ltd v Darrell Lea Chocolate Shops Pty Ltd (No 4)* [2006] FCA 446, Heerey J observed that Darrell Lea's and Cadbury's use of purple was accompanied by other branding indicia, particularly the brand name. He found that Darrell Lea's use of purple in seasonal Christmas promotion would not lead to consumers "thinking Darrell Lea's products are those of Cadbury or that Darrell Lea itself or its products have some kind of association with Cadbury." Survey evidence was accepted but given little weight after a marketing expert agreed that it did not research the combination of colour with other branding elements. In separate legal proceedings, various shades of Cadbury purple alone (without being accompanied by other indicia) were registered after Darrell Lea withdrew its opposition. (Registered Trade Marks 120614, 120615 and 120621).

2. Whether such indicia are distinctive of the applicant's offerings:

(a) In *Red Bull Australia Pty Ltd v Sydneywide Distributors Pty Ltd* (2001) 53 IPR 481; [2001] FCA 1228 (*Red Bull*) marketing experts were called by both the applicants and the respondents to provide evidence on the get-up of the respective products in issue. One issue in contention was whether the colour scheme used by the applicants in the packaging of their product was distinctive enough to act as a differentiating feature, or whether the colour scheme was generic to the product category and therefore not distinctive of the applicant's product. Conti J in the Federal Court of Australia accepted the evidence given by the marketing expert for the applicants, agreeing (at [61]) that "the nature of the colouring presentations and lay-outs on the Red Bull and LiveWire packaging, in terms of their respective combinations of blue, silver and red in hues, stand in telling contrast on first impression, as well as on close analysis, to any other product packaging in [the product category]". See [126.310].

(b) The marketing expert for the applicant also undertook an analysis of the applicant's marketing activities, and concluded that the "get-up" of the Red Bull can was central to the manner in which the brand had been presented to the market. Combined with consistent and concerted promotions and advertising, the expert was of the opinion that the get-up of the Red Bull can was distinctive in the minds of consumers and hence had a strong degree of brand equity (and therefore sufficient reputation in the get-up of its packaging). This was also accepted by the trial judge. See also ok ff, and [126.310].

(c) A much cited case is that of *Chocolaterie Guylian N.V. v Registrar of Trade Marks* [2009] FCA 891. Chocolaterie Guylian N.V. appealed a decision of the Registrar of Trade Marks not to register the seahorse shape of its chocolates. While consumer survey evidence showed some levels of association between the shape and the brand, Sundberg J [at 46] concluded "the survey results do not in my view confirm that consumers actually understand the shape as an indicator of the origin of the goods … [The marketing expert] said it was likely that many associations would have been based on recognition of the overall image and not simply its shape, for example colour and a perception of the texture of the object. I agree with the Registrar's submission that the marbled appearance on the surface of the shape is also likely to have contributed." The judgment rejected the appeal.

Proving deception

Evidentiary issues that arise in proving deception include:

1. Whether the respondent's conduct was calculated to deceive:

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(a) Whilst proof of fraudulent intent on behalf of the respondent is not necessary for the substantive issue of establishing deception, it is clear from the case law that proof of an intention to deceive will greatly assist the applicant in establishing actual or likelihood of deception on the part of the respondent. See e.g. *Twentieth Century Fox Film Corp v South Australian Brewing Co Ltd* (1996) 34 IPR 225 at 240. Proving intention is likely to be a necessary condition when seeking substantial damages (Stewart, Griffith and Bannister, 2010, p 512). See also [126.910]. A marketing expert can objectively analyse the marketing activities and strategies of a respondent, as well as its business records and other discovered or subpoenaed documentation, to infer the respondent's intent with respect to its impugned conduct. See [126.360].

(b) As for the test for determining the substantive issue of whether the respondent's conduct was calculated to deceive (that is showing that the respondent's impugned behaviour may foreseeably produce deception) a marketing expert can analyse the respondent's impugned conduct in light of the surrounding factual matrix to form an opinion as to whether it was foreseeable that consumers would be deceived or misled by the impugned conduct. Such analysis would focus on the marketing mix of the respondent, namely its pricing strategies, its product and packaging design, its channels of distribution and placement, and its promotional and communications campaigns, to determine how its offering is presented to the market. Having determined this, the marketing expert is then able to infer the likelihood of consumer confusion or deception based on the respondent's conduct and on accepted theories of consumer behaviour. See [126.510]ff and [126.360].

(c) In *Beecham Group PLC v Colgate-Palmolive Pty Ltd* [2004] FCA 1335, a key issue in the dispute between the parties was whether the marketing experts in the defendant company deliberately designed their new product to target a rival company's product by using a sub-brand name similar to a competitor's brand name. "The question of whether these experts, in adopting 'MAXCLEAN', chose it in the hope or expectation of deriving benefit from its resemblance to 'MACLEANS' in that the Colgate MAXCLEAN product might be confused with a MACLEANS product is relevant." (at [16]).

2. Which segment of the public was exposed to the respondent's impugned conduct:

(a) A marketing expert is able to conduct an analysis of the respondent's conduct, its promotional and advertising communications program and its distribution channel strategy, to determine which sections of the public would be *actually* exposed to the respondent's conduct. The expert would also interpret a respondent's marketing strategy to discern the *intended* target market. See [126.170] ff and [126.10].

3. Whether this segment was also aware of the applicant's reputation prior to the respondent's conduct:

(a) As with determining which segments were exposed to the respondent's conduct above, a marketing expert could also perform a similar analysis of the applicant's marketing activities and strategies to infer the intended and actual segments within the public that were aware of the applicant's indicia of commercial identity. This type of analysis is pertinent where reputation is localised, as courts have held that reputation is territorial in nature and therefore divisible. See e.g. *Targetts Pty Ltd v Target Australia Pty Ltd* (1993) 26 IPR 51; ATPR 41-231. Also see [126.290] and [126.10].

(b) In *Red Bull Australia Pty Ltd v Sydneywide Distributors Pty Ltd* (2001) 53 IPR 481; [2001] FCA 1228, evidence was given by marketing experts for both parties on the appropriate definition of the applicant's target market, based on an analysis of the applicant's promotional and distribution strategy. At issue was whether the applicant's target market, and hence those aware of

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the applicant's reputation, was a narrow group unlikely to overlap with those exposed to the respondent's conduct, or whether it was a wider group, far more likely, therefore, to be both aware of the applicant's reputation and subsequently exposed to the respondent's conduct.

4. Whether, having been exposed to the respondent's conduct, this segment was, or would likely be, deceived or confused:
    (a) Although this issue is ultimately a question for the court, marketing evidence may assist the court in understanding the way in which the respondent's conduct is received and reacted to by the relevant consumers. Marketing experts are able to examine the marketing stimuli that support both indicia in question, as well as their contextual environment. Experts can then assess these in light of known principles of consumer behaviour to determine the likely response of consumers to a party's conduct. See [126.360].
5. Whether the portion of this segment that was or would likely be deceived or confused constitutes a significant or substantial number:
    (a) Marketing experts can assist the court by providing marketplace context and segment characteristics against which the court may then be able to estimate the extent of deception or confusion amongst the affected segment. In *Tivo Inc v Vivo International Corporation Pty Ltd* [2012] FCA 252 the marketing expert contended that both the TiVo and Vivo products are high involvement purchases. See [126.360]. In these circumstances, consumers normally conduct careful searches for the products they wanted and engaged in thoughtful decision making because of the importance of the products to their lifestyle and because of their high cost. Because of the complexity of the audio-visual products involved assistance from sales staff was usually necessary. Dodds-Streeton J while observing that a degree of research and care in decision making might lower the likelihood of confusion, noted that there was other evidence that only a minority of consumers asked for a brand by name. As the "research" would often be in the form of verbal discussions with "sales people, family or friends" [at 36], the sounds of the marks "TiVo" and "Vivo" were important. It was here that confusion could occur. TiVo succeeded in its application for the registration of Vivo to be cancelled and the counter-claim against the registration of TiVo was dismissed.
    (b) As opposed to providing precise calculations on segment size, segmentation analysis can provide relevant characteristics on the consumers within the affected segment (such as demographics, psychographics, behavioural needs and so on). This can then be used judgmentally to estimate whether the number affected within the segment is significant or substantial. Alternatively, such characteristics could then be cross-referenced with external quantitative statistical data (such as Australian Bureau of Statistics Census and surveys) to provide additional context as to segment size.
6. The nature of the connection inferred by this segment between the respondent and the applicant:
    (a) Although it is not necessary to specify with precision the exact nature of the connection that may be inferred by deceived or confused consumers, such evidence may be of assistance when applicants are attempting to prove deception or misleading conduct. Marketing experts are able to draw on consumer behaviour theory, such as principles of inference-making and peripheral processing, to assess the likely connections consumers within the affected segment will make in light of their characteristics (e.g. experience, involvement). Such evidence may also be helpful in determining whether the impugned conduct caused more than mere wonderment or confusion as to whether a connection or association existed.
    (b) For example, in *Telstra Corp Ltd v Royal & Insurance Australia Ltd* (2003) ATPR 41-951; [2003] FCA 786, expert marketing evidence was led by the

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applicant on the respondent's advertisements, which had a similar theme, and used the same actor playing a similar role. In particular, the marketing expert opined as to likely connections or associations consumers may make between the respondent's advertisements and the applicant's. One such association found agreement with the court: "While there would be doubt as to the precise form of the association or connection a significant segment of the relevant public would also be likely to conclude that the first Shannons advertisement is another Yellow Pages 'Mr Goggomobil' advertisement", per Merkel J at [76].

(c) In *Opposition by Citigroup Inc to registration of trade mark applications 1339005(36) CITY ACCEPTANCE CORP (Words) and 1339006(36) - CITY ACCEPTANCE CORP (Device) - filed in the name of City Acceptance Corporation Pty Ltd* [2013] ATMO 12, (2013) 102 IPR 125 Telephone survey evidence showing consumer associations with the word "City" with Citibank was a factor in City Acceptance Corp being denied registration of its trade mark for a wide range of financial services.

Courts expect that marketing exaggeration ("puffery") would be a feature of advertising, where the advertiser talks up the merits of what is being promoted without being deceptive to the ordinary recipient of the advertising. In dealing with claims made by an advertiser, Gleeson J put it this way, "Whether a representation constitutes puffery or marketing exaggeration and, consequently, is not actionable turns on the particular facts considered in light of the ordinary incidents and character of commercial behaviour." [NSD 170 of 2015, at 46].

Proving damage/likelihood of damage

Evidentiary issues that arise in proving damage or likelihood of damage include:

1. Establishing actual damage or likelihood of damage for the purposes of injunctive relief:
   (a) Proving actual damage in the form of lost or diverted sales tends to be straightforward. However, damage can also take the form of diminution of brand equity, loss of potential for business expansion and loss of business opportunity in the form of licensing and royalty fees. Marketing experts can assist in elaborating these types of losses with reference to brand management concepts such as brand equity, brand valuation, brand architecture and brand leveraging. See [126.200]ff.
2. Whether the applicant's loss of sales was due to the respondent's conduct or factors independent of it (e.g. external market forces):
   (a) A marketing expert can assess the market dynamics of the industry in which the applicant operates as well as the applicant's own marketing strategy and business operations to form an expert opinion on whether, and if so in what proportion, the respondent's impugned conduct was responsible for losses experienced by the applicant, or whether the losses were due to factors independent of the respondent's conduct.
3. Inferring intent on the part of the respondent for the purposes of determining whether substantial damages ought to be awarded to the applicant
   (a) See above.
4. Quantifying compensable loss for the purposes of seeking damages:
   (a) Common claims for substantial damages under passing off include:
      - loss of sales;
      - loss of potential to exploit goodwill; and
      - loss of potential to expand business locations or field of activity.
   (b) Determination of these types of losses will invariably require reliance on marketing and business fundamentals. For example, the loss of potential to exploit goodwill can take the form of licensing and royalties fees foregone. The value of these fees will in turn be shaped by their expected returns,

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which will depend on many interconnected market variables. A marketing expert is able to undertake an analysis of these variables and model the market over the affected period and beyond. The principles, approaches and applications of marketing in the context of proving damages and quantifying losses are dealt with in further detail below at [126.950]ff.

Whilst the legal criteria for the determination of damages may differ from general law, the marketing principles and approaches applicable in proving damage under passing off and other analogous areas of general law are also relevant. In this regard, see above. For a discussion of the relevant marketing principles in quantifying damages, see [126.910].

[126.840] Australian Consumer Law (ACL)

Section 18 of the *Australian Consumer Law* (Schedule 2 of the *Competition and Consumer Act 2010*) (previously s 52 of the *Trade Practices Act 1974*) has many applications. One common use of the provision is in cases where misappropriation of business reputation is alleged. As a form of intellectual property, this aspect will be dealt with in this section. Other applications dealing with passing off are dealt with above. A Review of the ACL was reported in April 2017 (CAANZ, 2017). It contains many recommendations for legislative change, principally relating to consumer protection. In areas such as unconscionable conduct, unsolicited consumer agreements and purchasing online, resulting changes may involve litigation requiring marketing expertise.

In cases where misappropriation of business reputation is concerned, often both passing off and s 18 require that the same two evidentiary elements be addressed: whether the plaintiff/applicant has a distinctive reputation; and whether the relevant public have, or are likely to have, been deceived by the defendant's/respondent's conduct (Stewart, Griffith and Bannister, 2010, p. 542). With respect to advertising, three conditions are necessary to establish that it is misleading and deceptive (Sweeney, Bender and Courmadias, 2015):

1. A relevant audience has been identified;
2. A message or impression has been conveyed to a relevant reasonable and ordinary member of that audience; and
3. The message or impression is false.

Expert marketing evidence is applicable to establishing the first two requirements. Misleading product claims as to effectiveness (see *ACCC v Danoz Direct Pty Ltd* [2003] FCA 811), misleading comparisons with competitors (see *Luxottica Retail Australia Pty Ltd v Specsavers Pty Ltd* [2010] FCA 423) or claims about country of origin are covered by s 18.

Section 29 also covers false representations as the newness, quality, grade, composition, style or model of goods and services and prohibits false testimonials or false representations of sponsorship, affiliation or approval from another party. Misleading pricing information (e.g. *Ascot Four Pty Ltd v ACCC* [2009] FCAFC 61) misleading information about consumer rights (e,g. *ACCC v Skippy Australia* [2006] FCA 1343) are also prohibited under this section.

Section 33 covers deceptive practices in packaging, but more commonly marketing expertise is likely to be drawn on in cases involving passing off, where packaging is normally a key part of the claimed misleading or deceptive conduct.

As for remedies, see Part 3-1 of the ACL. Corrective advertising and compensation may be ordered.

[126.850] The Trade Marks Act (Cth) 1995

The Act was subject to changes from April 2013 under the *Intellectual Property Laws Amendment (Raising the Bar) Act 2012*. These changes relate mostly to the management of opposition to registration and non-use of trade marks (IP Australia, 2017).

A trade mark is defined in s 17 of the Act as "a sign used, or intended to be used, to distinguish goods or services dealt with or provided in the course of trade by a person from goods or services so dealt with or provided by any other person". "Sign" is broadly defined in s 6 to include "the following or any combination of the following": "any letter, word, name,

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signature, numeral, device, brand, heading, label, ticket, aspect of packaging, shape, colour, sound or scent" [*Moroccanoil Israel Ltd v Aldi Foods Pty Ltd* [2017] FCA 823].

A useful catalogue of possible actions regarding trade mark infringements is provided in Bortolin (2017), though in the US context. The classification is based on a combination of one or more of the following causes– misrepresentation, damage to signification and damage to income-goodwill.

There are a number of evidentiary elements in trade mark law and disputes that involve, in one way or another, marketing-related issues. These elements arise at various stages of a trade mark's existence: from seeking registration and opposing registration, to infringement and remedies.

Distinctiveness

(a) Where a trade mark's ability to distinguish is in issue, expert marketing evidence can be used to address the question of whether the mark has *acquired* distinctiveness based on its use in the marketplace. A marketing expert can assess the mark from a branding perspective, including the history of the marketing strategies that support the mark's branding (such as promotion and distribution strategies), and determine whether it has acquired distinctiveness amongst select target market segments. The expert can also draw on consumer behaviour knowledge to determine how consumers come into contact and respond to the mark in question as used in the marketplace. See [126.200]ff, [126.240]ff and [126.360].

(b) For example, in *Koninklijke Philips Electronics NV v Remington Products Australia Pty Ltd* (1999) 91 FCR 167; [1999] FCA 816, extensive expert marketing evidence (including expert opinion by the author of this chapter) was led by both sides on, inter alia, the issue of whether the arrangement of the triple-head shaver in an equilateral triangle shape was a mark distinctive of Philips.

(c) A marketing expert may also advise on survey designs appropriate for determining the substantial issue. For example, where a particular word is disputed on the grounds that it is descriptive rather than distinctive, a survey may show whether or not a sizeable and representative sample of relevant consumers understand the word in question to be descriptive or distinctive using a combination of implicit and explicit techniques. In addition to advising on survey design, a marketing expert might also be involved in the interpretation of the statistical and marketing significance of the survey results once the initial survey design has been carried out by an independent market research agency. Where registration of a trade mark is at issue, the date at which the application was made is relevant, requiring marketing experts to estimate whether the mark had acquired secondary meaning at the time of application. This requires evidence on the history of branding and if survey evidence is involved, projecting the results back to the filing date (Bednall et al., 2012).

(d) A similar approach can be used to determine whether a mark has become *generic* through usage in the marketplace. In *Opposition by Kraft Foods Australia Pty Ltd to registration of trade mark application 1275278(30) - FREE BARS - filed in the name of Mars Australia Pty Ltd 2012*, the Registrar upheld the objection to registration of the mark "Free Bars" after hearing expert evidence that the words were commonly used by the main providers of chocolate and confectionery bars in promoting their products.

1. Deceptive or confusing

    (a) In the process of registration, the issue may arise as to whether the mark in question is likely to deceive or cause confusion or just to cause the consumer "to wonder" if two marks are connected, particularly when compared with the mark of another trader (both registered or unregistered). In relation to this issue, expert marketing evidence may be led to:

        i. prove whether the mark of the other trader has reputation in the marketplace amongst the relevant consumer segments (note that this other mark can include a well-known mark, see below; and

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ii. prove whether the registration of the applicant's mark would create deception or confusion amongst the relevant consumer segments. In *Opposition by La Chemise Lacoste to registration of trade mark application 1005106, 1017333 (classes 18, 25) – words CROCODILE and CARTELO (WITH CROCODILE DEVICES) - filed in the name of Crocodile International Pte Ltd* [2008] ATMO 90, registration was refused. Although a marketing expert (the author of this chapter) provided a survey report which evidenced a degree of confusion, the Registrar's delegate decided on "first principles" that confusion was likely and denied registration. The survey evidence was regarded as supporting this decision, though little weight was given to it.

(b) As to how a marketing expert may approach these evidentiary issues, see [126.830]. Note that whilst the principles are similar in establishing deception or confusion in passing off cases, the threshold for establishing the level of deception for the purposes of trade mark proceedings is lower than that required for passing off. It is sufficient to show that there is a tangible danger of confusion amongst the target audience: (Stewart, Griffith and Bannister, 2010, p. 628).

(c) Moreover, a marketing expert would perform such analysis on the basis that it is not necessary to compare the marks side by side, but rather on the basis of whether the ordinary consumer would have the same general impression of the marks when seen at different times, allowing for imperfect recollection. Evidence from a marketing expert in *Opposition by Red Bull GmbH to registration of trade mark application 1338149(32) - BULZAI ENERGY DRINK and DEVICE - filed in the name of Kamal Khanbabaei General Trading Co LLC* [2012] ATMO 96 was that there was a high likelihood of confusion between the applicant's and the opponent's marks. The applicant was denied registration.

2. Substantial identity and deceptive similarity

(a) In establishing infringement, the registered proprietor must be able to show that the alleged infringing mark is substantially identical and/or deceptively similar. In terms of deceptive similarity, marketing evidence can be led in the same manner.

(b) Proving substantial identity, however, requires comparing the marks side by side, and assessing the similarities and differences having regard to the essential features of the marks. Marketing experts can assist in the analysis by providing evidence as to what, from a consumer's point of view and in the marketplace context, are considered essential features. See [126.310]ff and [126.360].

3. Well-known marks

(a) Whilst the legal test and standard for determining whether a mark is well known differs from proving reputation under an action for passing off, the approach and principles used by a marketing expert will be similar and can be tailored to accommodate any such differences in legal standards and tests. In this regard, see [126.830].

4. Defensive registration

(a) Essential to an application for defensive registration is proof that use of the applicant's trade mark in a category of goods or services other than that in which it is already registered would likely be taken as indicating a connection between those other goods and services and the registered proprietor: s 185(1) of the *Trade Mark Act 1995* (Cth).

(b) The requirement of "likely to be taken as indicating a connection" is similar in meaning to "likely to deceive or cause confusion" within s 43 of the *Trade*

Mark Act 1995 (Cth) (Stewart, Griffith and Bannister, 2010, p. 650). See also *Re Applications by Mobil Oil Corp* (1995) 32 IPR 535. Therefore, marketing evidence pertinent to the issue of deception and confusion is also applicable in this sense, see [126.830]ff.

(c) In addition to undertaking a marketing analysis, a marketing expert is also able to design, and interpret the results of, an appropriate survey that conforms to the stringent standards required for use in contentious proceedings. Such survey will necessarily be designed so as to address the key issue to be proven: whether the mark would cause confusion or deception if used on classes of goods or services other than those in which it is already registered. See [126.720]ff and also [126.550].

5. Similar or closely-related goods or services

(a) Where the issue of whether a mark conflicts with another registered for goods or services which are similar or closely related to the applicant's mark arises under s 44 of the *Trade Mark Act 1995* (Cth), factors to be taken into account in resolving this issue include (in relation to goods) consideration of the nature of the goods, their use, and the trade channels through which they are sold (Stewart, Griffith and Bannister, 2010, pp 632-633). See also *Southern Cross Refrigerating Co v Toowoomba Foundry Ltd* (1954) 91 CLR 592 at p 606.

(b) Marketing experts are able to provide a market-focused approach to assessing whether two goods are of the same description. By examining the needs of the intended target audience, as well as a distribution channel analysis, an expert is able to then provide an expert opinion that reflects pragmatic business sense rather than abstract reasoning. See [126.170] and [126.290].

6. Remedies (similar to passing off remedies)

(a) For a discussion of the relevant marketing principles in relation to injunctions and quantifying damages, see [126.950].

[126.860] Designs

Expert marketing evidence can be used to infer intent where imitation of a design is alleged. In a matter that eventually settled (see *Decor Corp Pty Ltd v Australian Housewares Pty Ltd* [1998] FCA 1479 for the facts), a marketing expert was retained for the applicant to provide an expert opinion on the marketing strategies of the respondent and whether from such strategies it was reasonable to infer that the respondent had imitated, and therefore infringed, the applicant's design. After a consideration of the respective products, their prices, distribution channel requirements, the branding within the category, and pre-launch marketing efforts (or lack thereof), the expert was able to infer that the respondent's marketing strategies were based on imitation of the incumbent's marketing strategy, including product design.

[126.870] Copyright

Use of expert marketing evidence in the determination of substantive issues (e.g. originality, infringement) in copyright proceedings is rare. Expert marketing evidence can, however, be used in quantifying the damages sought, given that such calculations are usually done with reference to commercial market factors, which in turn often requires some form or degree of market modelling, sales forecasting or royalty imputation. For a discussion of the relevant marketing principles in quantifying damages, see [126.910].

[126.880] Patents

As with copyright, the use of expert marketing evidence in the determination of substantive issues (e.g. novelty, inventive step, infringement) in patent proceedings is rare.

However, expert marketing evidence has been used in seeking an interlocutory injunction in a patent case. In *Aktiebolaget Hassle v Biochemie Australia Pty Ltd* (2003) 57 IPR 1; [2003] FCA 496, a marketing expert was called by the respondent to assess the nature of the

pharmaceutical market and determine the likely consequence of the imposition of an interlocutory injunction on the respondent's product launch and subsequent business opportunities. This evidence was referred to by the Federal Court of Australia in deciding that because an injunction would effectively retard any subsequent relaunch of the respondent's product and that it would render the loss of potential sales difficult to estimate thereafter, on balance it was more convenient to refuse the injunction rather than grant it.

Expert marketing evidence may also be led in relation to quantifying damages in patent infringement cases. For a discussion of the relevant marketing principles in quantifying damages, see [126.910] and [126.940].

[126.890] Product liability and other general commercial disputes

Product liability and general commercial disputes give rise to a variety of issues on which marketing evidence is relevant. Broadly speaking, these issues can be divided into two groups:

- issues relating to the determination of an objective standard by which liability is to be judged, such as determining what a reasonable consumer would have been entitled to expect, determining "fitness for purpose" in light of marketing claims, or defining reasonable endeavours under a marketing and distribution contract; and
- issues relating to remedies such as the quantification of damages or weighing the relative harm on an application for injunction. Marketing issues in these situations usually involve estimating lost sales (usually a complex task), wasted marketing expenditure, damage to reputation, loss of opportunity and assessing any mitigation strategies employed (or not) by the claimant.

[126.900] Substantive issues relating to liability

Reasonable or best endeavours

Contracts which define the rights and responsibilities between parties in a commercial arrangement commonly outline standards by which performance of certain responsibilities are to be carried out. Such contractual clauses may contain phrases such as "reasonable endeavours", "best endeavours" or variants. When contractual disputes arise due to an alleged failure on the part of either party to observe these standards, much hinges on defining what, in the circumstances, would objectively be required to satisfy such a standard.

Where such standards relate to business and marketing activities, a marketing expert is able to analyse the situation and provide evidence of what standards would be expected as a matter of industry practice with or without the benefit of hindsight. The expert would then be able to provide an assessment of the impugned act or omission as judged against industry practice to provide an expert opinion on whether such act or omission satisfied the contractual standard in question. The marketing expert may, depending on the circumstances of the case, make reference to knowledge on business and marketing strategy (see [126.130]), competitor analysis frameworks (see [126.130]), brand management (see [126.200]ff), marketing mix management (see [126.240]ff), and a range of other integrative marketing topics.

(See examples of product development in [126.260].)

Fitness for purpose / Merchantable quality

The concepts of "fitness for purpose" and "merchantable quality" that arise in the Sale of Goods statutes and in the *Competition and Consumer Act 2010* (Cth) are also areas in which expert marketing evidence may be relevant. Section 54 of the ACL defines "acceptable quality" as being "fit for all the purposes for which goods of that kind are commonly supplied." The two interrelated concepts that arise from this statutory definition from a marketing perspective are: (a) what consumers may expect (b) based on the manner in which the seller/manufacturer markets the product. A marketing expert can be called to provide an expert opinion on the manner of promotion, packaging, distribution and pricing of the product in question to ascertain what could be reasonably expected, see [126.240]. Such an analysis cannot be done in isolation, and consideration must be given as to how, and in what context,

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such stimuli are received by consumers. This requires reference to knowledge on consumer behaviour (see [126.360]), and may also require defining the relevant consumer segment, see [126.170].

Business judgment rule

Where a business judgment of a director or officer is the subject of a dispute under s 180 of the *Corporations Act 2001* (Cth), and such judgment relates to business or marketing strategy, a marketing expert may be able to articulate an objective standard by which to assess the rationality and reasonableness of the impugned conduct or omission. The standard can be applied to the elements in:

- s 180(2)(c) "inform themselves about the subject matter of the judgment to the extent they reasonably believe to be appropriate"; and
- s 180(2)(d) "rationally believe that the judgment is in the best interests of the corporation".

For a discussion of the ways in which expert marketing evidence can evaluate managerial decisions, see [126.120].

[126.910] Issues relating to remedies

Marketing evidence can and has been led where an *interlocutory injunction* is sought or when there is a need to *quantify damages*.

Interlocutory injunctions

Marketing evidence can assist the court in both determining whether there is a serious question to be tried, and in deciding whether the balance of convenience favours the granting of the injunction.

In determining whether the balance of convenience favours the granting or refusal of an interlocutory injunction, a marketing expert is able to simulate or model the likely commercial consequences of the granting or refusal of an interlocutory injunction on both parties. In doing so, such evidence can assist the court in deciding whether the grant or refusal would cause immeasurable or unquantifiable damage to the affected party, as well as ultimately where the balance of convenience lies.

For example, expert marketing evidence was used in an application for an interlocutory injunction in a patent case. In *Aktiebolaget Hassle v Biochemie Australia Pty Ltd* [2003] FCA 496, a marketing expert was called by the respondent to assess the nature of the pharmaceutical market and determine the likely consequence of the imposition of an interlocutory injunction on the respondent's product launch and subsequent business opportunities. This evidence was referred to by the Federal Court in deciding that because an injunction would effectively retard any subsequent relaunch of the respondent's product and that it would render the loss of potential sales difficult to estimate thereafter, on balance it was more convenient to refuse the injunction than to grant it, see [126.900] and below.

Other cases involving use of expert marketing evidence in interlocutory proceedings include *San Remo Macaroni Co Pty Ltd v San Remo Gourmet Coffee Pty Ltd* (2000) 50 IPR 321; [2000] FCA 1842; *Versace v Monte* (2002) 119 FCR 349; [2002] FCA 190 and *Simplot Australia Pty Ltd v McCain Foods (Aust) Pty Ltd* (2001) 52 IPR 539; [2001] FCA 518.

Damages quantification

Whilst the nature and underlying legal principles of the various classes of damages may differ, in essence the commercial aspects of quantifying damages in commercial and intellectual property disputes from a marketing perspective will generally require the application of a single, broad approach, tailored to the circumstances of each case. The approach requires a comprehensive analysis of the firm or brand in question – and the relevant market – before, during and after the event or circumstances alleged to have been responsible for the damage in question.

The first broad step in quantifying damages is to "set the scene" as it existed prior to the events that purportedly resulted in the damage. This often involves understanding relevant dimensions

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of business performance, management's intentions and the market context in which the business was operating. The picture thus developed of the state of the business prior to the events in question is later used by the marketing expert as a basis for comparison. Crucial to this step is the provision of correct assumptions and data, such as audited sales figures.

The next step of marketing analysis focuses on reviewing the events at the centre of the dispute, seeking to define them clearly – in terms of their timing, extent and participants – and understand what falls within their scope. Often, the marketing expert is also asked to consider actions taken – or not taken – by parties in response to the events as they transpired, including the suitability, feasibility and acceptability of that action or inaction, as the case may be.

The final step involves an analysis of the apparent consequences of the relevant events. The marketing expert can identify and quantify the marketing-related losses suffered, and also explain how these losses came about within the context of well-grounded marketing principles and frameworks. These considerations are undertaken in light of the reality that a business is not an isolated entity but rather operates in an environment in which contributing factors, ranging from consumer trends to macroeconomic trends, could have accentuated or mitigated the economic loss.

The marketing principles and knowledge that are applicable in quantifying damages will vary from case to case. In this regard, refer generally to [126.390]ff. By way of illustration, several cases in which expert marketing evidence has been used to quantify damages are elaborated.

Quantifying damages or losses is a very difficult task. This is well illustrated in *Specsavers Pty Ltd v The Optical Superstore Pty Ltd (No 3)* [2012] FCA 504, Specsavers obtained an interlocutory injunction against The Optical Superstore which prevented it showing a television commercial that was the subject of a dispute. The Court discharged the injunction and subsequently The Optical Superstore sought to obtain damages under the undertaking given by Specsavers at the time of seeking the injunction to pay damages to any party adversely affected by the operation of the interlocutory order. Katzmann J confronted the difficulty of quantifying this loss. Her Honour had to estimate, on probabilistic grounds, how long the commercial would have been run, were it not for the injunction, what were the lagged effects of advertising on sales, what lift in sales might have been expected had the commercial run and what costs were not incurred. Marketing experts retained by both parties appeared not to have offered great assistance to the Court in determining the loss as they both pointed to the complexity of the issues and the difficulty in disentangling the effects of any particular piece of advertising from a myriad of other possible influences.

In *Luxottica Retail Australia Pty Ltd v Specsavers Pty Ltd (No 3)* [2011] FCA 793, the court was being asked to determine the effect on OPSM (the retail store brand owned by Luxottica) of Specsavers advertising which Perram J had earlier found to be misleading and deceptive. This conclusion was based on two erroneous pricing claims in comparative advertising produced by Specsavers. The Court was being asked to rule on whether Specsavers could have access to market research information from qualitative and quantitative market research studies commissioned by the solicitors for Luxottica. They then intended to ask a marketing expert retained by Luxottica to use the results of this study, along with other sources, to estimate the extent of damage caused by the advertising. Luxottica maintained that damages should be determined as follows (at [5]-[6] in the judgment):

(a) the loss of sales and net profit from prescription glasses not sold as a result of the running of the Specsavers commercial;
(b) the future loss of sales and net profit from prescription glasses;
(c) the cost of rectifying the damage to the OPSM brand; and
(d) the enterprise value loss.

6 The last requires some explanation. OPSM says that Specsavers' commercial has inflicted permanent damage on the value of the OPSM business and that this is independently recoverable quite apart from the other three heads of loss.

The author of this chapter was retained to review the marketing evidence and the market research adduced. The matter was settled out of court; the fate of these wide claims is unknown.

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In *Seeley International Pty Ltd v Newtronics Pty Ltd* (2001) Aust Tort Reports 81-648; FCA 1862, the Federal Court of Australia awarded damages to the applicant, a manufacturer of air conditioners, against the supplier of a faulty part that led to house fires and a product recall. The marketing expert retained for the applicant concluded that the effect on consumers and retailers of the fires (see [126.360] and [126.290]), as well as associated publicity and product recall (see [126.270], [126.300], [126.200]ff), led to a significant decline in Seeley's market share, see [126.940].

The expert also concluded that the applicant had to incur above-normal advertising expenses to help protect its brand and that losses extended for a period of up to three years, see [126.300]. The trial judge, O'Loughlin J, broadly accepted this evidence as to the nature and degree of impact. Expert accounting evidence was then led to quantify lost profits flowing from the loss of market share, see [126.160].

In *Steiner Wilson & Webster Pty Ltd (t/as Abbey Bridal) v Amalgamated Television Services Pty Ltd* (1999) Aust Tort Reports 63,301; [1999] ACTSC 123, a marketing expert was relied upon by the plaintiffs to determine the amount of lost sales as a result of a defamatory television broadcast. Relying on historical monthly sales figures prior to the defamatory broadcast, the expert was able to forecast a range of conservative sales trends using statistical methods (see [126.950]) to show what sales figures the plaintiff would have expected to have generated but for the defamatory broadcast. In doing so, the expert took into account the possibility of internal and external factors that may have affected the trend line, such as seasonality and the plaintiff's own marketing activities, see [126.240]ff, [126.360]. This was then contrasted with the plaintiff's actual post-broadcast sales to show the magnitude of loss in sales suffered by the plaintiff. An accounting expert was then able to use these figures to determine net loss, see [126.550].

More detailed treatment of damages quantification is set out at [126.950].

[126.920] Trade practices/Competition law

Expert evidence in competition law cases under Pt IV of the *Competition and Consumer Act 2010* (Cth) and its predecessors the *Trade Practices Act 1974* has generally been the domain of economists. Part IV is recognised as an economic instrument of policy. That said, there have been several occasions when marketing evidence has been led on issues in dispute, especially as to assessment of market dynamics. For example, brand power, as an element of power in a market, may be an issue in dispute and marketing experts have been retained to provide an opinion on the nature of brands, and as a means of assessing their impact on a market, see [126.200].

It is also the case that industry evidence is highly influential in such cases (Beaton-Wells, 2003), and marketing evidence, whether by way of oral or documentary evidence, whether by lay or expert witness, is a fertile area for such evidence to be identified, compiled and interpreted.

Another key issue on which marketing evidence can be of relevance under Pt IV is inferring proscribed purpose. As marketing experts are in a good position to judge the likely basis of strategic actions of a firm in a market, they are well placed to give an opinion on this issue. This is especially so when it comes to price-related actions, where pricing decisions fall squarely within the remit of marketing management on a day-to-day basis. See [126.240]. Some examples of competition law cases in which marketing evidence was used are as follows.

- Telstra had sought to expand its foothold in the New Zealand telecommunications market by, among other things, pursuing large corporate accounts. In response, Telecom NZ decided to terminate carrier re-billing arrangements, under which Telstra was able to manage a bundle of services, including many provided by Telecom NZ. Telstra sued under New Zealand's competition law, the *Commerce Act 1986* (NZ), alleging misuse of market power. In *Telstra New Zealand Ltd v Telecom New Zealand Ltd* (High Court of New Zealand CL 16/99) marketing evidence was led on the appropriate market definition, and the likely purpose of Telecom NZ in terminating carrier re-billing arrangements. The

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marketing expert for Telecom NZ undertook extensive analysis of the characteristics and dynamics of the market for corporate telecommunications services in Australia and New Zealand. The expert concluded that, because of trends in business outsourcing and technology convergence, the market was expanding in terms of products, services and geography, leading to a broad definition of the relevant market in which Telecom NZ's power was being eroded by substitutes. The expert then assessed Telecom NZ's conduct against contemporary brand and customer relationship theory, concluding that such conduct was necessary to preserve service quality, optimise customer relationships and protect brand equity. The expert concluded that such conduct did not have an anti-competitive or other prohibited purpose, but rather was consistent with a desire to minimise risk in these areas of marketing, and could be expected from any firm acting rationally in a competitive market regardless of its market power. The case settled prior to trial.

- In *Australian Competition and Consumer Commission v Australian Safeway Stores Pty Ltd* (2003) 129 FCR 339; [2003] FCAFC 149 at issue was whether the operators of the Safeway chain had taken advantage of its power in the wholesale market for the acquisition of bread for the purpose of damaging competitors in the retail market or of preventing each of the bread manufacturers engaging in competitive conduct. The marketing issue in this case was whether bread manufacturers would agree to sell their premium-branded bread at a price matching that at which they sold their unbranded/generic brand breads. The Australian Competition and Consumer Commission (ACCC) argued that, if a request for such a deal had been made, such a request was taking advantage of market power and that Safeway knew bakers would not agree to such a request. The marketing expert called by the ACCC considered consumer behaviour in relation to bread products. The expert was of the view that price would be used as an indicator of quality and hence would be an integral part of the branding strategy of premium-brand breads and evident in the marketing investments made by bread manufacturers in these brands. Price tiers would exist in the bread market, and discounting would tend to be within, rather than between, price tiers. The expert conducted a detailed quantitative analysis of bread prices. Discounting a higher-tier bread brand to the price levels of the lower tier would lead to a perception of inferior quality compared to those in the higher tier, according to the expert, thereby damaging brand equity. The expert concluded that no baker, under normal business circumstances, would agree to such heavy discounting of premium bread brands. The ACCC was partially successful on appeal to the Full Federal Court.
- Dulux had been the leading paint brand in Australia for many years. In the mid-1990s, owners of the second-ranked brand, Wattyl, sought to acquire Taubmans, then the third-ranked brand. Combined, these brands would still have held significantly less market share than Dulux. In *Re Application for Authorisation by Wattyl (Australia) Pty Ltd in Relation to the Acquisition of Taubmans' Business by Wattyl (Australia) Pty Ltd* (NSW 1 of 1996) before the Australian Competition Tribunal appealing the ACCC's refusal to authorise the transaction, marketing evidence was led as to whether the proposed acquisition would give rise to an anti-competitive market structure. The marketing expert retained by Wattyl gave an opinion on the significance of brands in the paint market, the influence of retail channel distributors, and the role of regional paint manufacturers in the market. The expert's segmentation and competitor analysis showed that:
  - Wattyl, mainly an exterior paint brand, would only be able to compete effectively against Dulux in the larger interior paint segment if it acquired Taubmans, an established interior paint brand (i.e. complementarity).
  - The increasing influence of retailers, particularly national hardware chains, was leading to a power imbalance in the distribution channel that effectively constrained paint manufacturers' prices. The growing prominence of retailers' "house brand" paints also imposed greater competitive pressures on manufacturers' brands.
  - Given the need to maintain price and brand consistency across a highly regionalised paint market, a national brand like Wattyl would effectively be restricted in its ability to set and alter its prices.

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– Based on these factors, the marketing expert concluded that the proposed acquisition would be unlikely to result in an anti-competitive market structure, and with respect to the interior paint market, might even be pro-competitive.

In the end, the owners of Taubmans decided to sell to another purchaser prior to the application being heard.

[126.930] Defamation

Marketing evidence is common in defamation actions where the plaintiff is a business seeking redress for damage caused to its business as a result of a defamatory publication.

Such evidence is not usually led as to liability (i.e. as to the specific imputations pleaded) but rather as to the effects that such defamatory imputations may (or may not) have had on the relevant audience. Such evidence tends to be directed at proving a general downturn in business, rather than a specific claim for loss. In assessing such a claim, the expert marketing opinion is often directed toward analysis of audience profile, analysis of the performance of the business in question and assessment of the likely impact of the publication on customer behaviour. See discussion of *Steiner Wilson & Webster Pty Ltd (t/as Abbey Bridal) v Amalgamated Television Services Pty Ltd* [1999] Aust Tort Reports 63,301; ACTSC 123.

[126.940] Forecasting sales and other quantifiable market measures

At the most fundamental level, quantifying the economic loss suffered by an entity typically involves a comparison of its actual financial performance with an estimate of its financial performance had the events that purportedly caused the loss not transpired. An entity's actual financial performance is often easier to establish, given that it is founded on fact. The expected financial performance of the entity "but for" certain events is much more difficult to estimate and readily lends itself to the application of statistical forecasting approaches.

It is often contended that the entity's future financial performance is adversely affected. This adds an additional layer of complexity in that now the actual financial performance of the entity needs to be extrapolated into the future also. Statistical forecasting approaches are valuable means of doing so.

This section sets out an approach to estimating economic loss through the use of statistical forecasting approaches. As part of a Chapter on expert marketing evidence, it is not concerned with estimation of lost profits, as it is with estimation of lost sales, wasted marketing expenditures or further expenditures on marketing which are required to counter the loss of reputation caused by the actions of their opponent. This is because it is for an appropriately qualified forensic accountant to adopt the marketing expert's estimates as assumptions on which he or she will then attempt to assess the question of profits. Therefore, when economic loss is used in this section, it refers exclusively to loss of sales.

[126.950] A systematic approach to assessing economic loss using statistical forecasting techniques

The approach suggested in this chapter is by no means the only approach to applying statistical forecasting techniques in the estimation of economic loss. However, it has proved robust and credible in a range of cases and will demonstrate some of the key principles that should be considered in the process. This approach involves the following key steps:

- identify appropriate data for analysis;
- verify that the data are of sufficient quality;
- select an appropriate statistical forecasting technique;
- develop the statistical forecast; and
- verify the reasonableness of the forecast and adjust it accordingly.

It should be noted that this is not a linear process but involves some degree of iteration as the data and related marketing issues are explored.

[126.960] Identify appropriate data for analysis

The first step in developing a statistical forecast is to identify and obtain appropriate data to be used as the basis for forecasting. This chapter is primarily concerned with two categories of

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data: namely, data on the market variable that we are trying to forecast (also known as "dependent" variables) since it is a set of outcomes which are dependent on the marketing and other activities of the parties. Data on other variables that may explain these outcomes are known "independent" variables. The terminology is borrowed from psychology. For example, a typical dependent variable is sales revenue while common independent variables include advertising, price and distribution coverage from the marketing mix. See [126.240]. The time element in estimating economic loss means that the marketing expert is primarily interested in examining time-series data, that is, how these variables change over time.

Identification of appropriate data is often an exploratory process in that there are all manner of data potentially available to the marketing expert – particularly independent variable data. However, in the interest of efficacy, this search process should be informed and directed by an understanding of the issues in contention, the relevant markets and a firm grasp of marketing theory. The availability of data is often a very real constraint to the forecasting exercise, either because it does not exist or because it is only available from third-party information providers at great expense. An external starting point for such data is often the Australian Bureau of Statistics and private sector organisations such as AC Nielsen, Roy Morgan or Experian. Internally, customer analytics data from the Customer Relationship Management System (e.g. sales, complaints, and inquiries) may also be invaluable.

In identifying the relevant data, the marketing expert should take the following into consideration:

- possible partitions in the data; and
- frequency of observations in the data.

Possible partitions in the data

Market participants, whether they be consumers or distribution channel intermediaries such as distributors, are often differentially affected by sudden shocks in the market, e.g. product supply shortages. Even when this is not the case, market participants often react differently to the same market shocks. This translates into varying shifts in demand and hence, sales of a product.

With this in mind, the marketing expert should consider obtaining separate data along dimensions that possibly account for these differences such as geography or type of distribution channel. For example, the marketing expert may request separate data on sales via different distribution channels such as supermarkets and convenience stores based on an a priori hypothesis that supermarkets, as compared to convenience stores, on-sell the product to different types of consumers with different behaviours. In examining data along these dimensions, the dynamics in different parts of the market may become more apparent. This is part of the exploratory process and is one instance of how marketing theory and an understanding of the relevant commercial issues guide the statistical forecasting process.

Frequency of observations in the data

Generally speaking, the marketing expert should seek to obtain data with a large number of observations on the basis that statistical forecasting approaches become increasingly accurate as the data set increases in size. For example, in examining sales data from 2014 to 2017, the marketing expert is likely to produce more accurate forecasts by using 48 monthly sales figures versus four annual sales figures. Naturally, extending the time period in consideration is another way of increasing the size of the data set.

A consideration for the marketing expert in using larger, more granular data sets, e.g. monthly sales data versus annual sales data, is that these data sets have a greater tendency to exhibit seasonal (e.g. for sales of ice-cream) and cyclical effects that need to be accounted for when producing the statistical forecasts.

[126.970] Verify data are of sufficient quality

It is necessary for the marketing expert to verify that the data obtained are of good quality. In the first instance, the marketing expert should be broadly acquainted with the data collection process. Some methods of data collection may be less reliable than others, and different

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methods of data collection often do not measure the same thing. For example, sales could be recorded when electronic scanners are used to process product purchases from retailers, or simply estimated from purchases from wholesalers by retailers.

Additionally, data are often modified subsequent to collection in order to convert the data to more usable forms. For example, foreign exchange conversions and conversions from sales volume to value may have implicit underlying assumptions about product prices and foreign exchange rates. The marketing expert should be aware of such assumptions and how they may affect the forecasting process.

Finally, the marketing expert should be aware of how gaps or perceived errors in the data may have been corrected. Depending on their extent, these may affect the degree to which the data can be relied on for the purpose of providing expert marketing evidence.

[126.980] Select an appropriate statistical forecasting technique

The next step in the process is the selection of an appropriate statistical forecasting technique. First, it is often useful for the marketing expert to examine the data for obvious trends and patterns to inform this choice. This initial examination of the data may range from running some simple statistical diagnostics to simply viewing the data plotted visually as a graph.

Based on this examination and an application of marketing theory, the marketing expert may choose to model the dependent variable data, e.g. sales, as a function of certain independent data variables, e.g. consumer disposable income. Often, identification of appropriate independent data variables may prove to be too extensive a task and data may not be available. In these cases, many marketing experts opt for atheoretic methods that attempt to explain data based on previous values rather than based on any economic or marketing theory. Generally speaking, atheoretic methods identify patterns and trends in existing data for a single data variable with the aim of predicting future values of that variable.

There are myriad statistical techniques available to the expert, and each approach has its own assumptions inherently built in. Such assumptions are sometimes overlooked in the litigation process, but need to be understood if lawyers are to be able to accurately assess the veracity of the model prior to trial. Broadly speaking, these may be classified into seven broad approaches (De Gooijer and Hyndman, 2006):

1. Exponential smoothing methods;
2. ARIMA (Auto-Regressive Integrated Moving Average) models;
3. Seasonality models;
4. State space and structural models;
5. Non-linear models;
6. Long memory models;
7. ARCH/GARCH models; and
8. Count data models.

The details of these methods go beyond the scope of this chapter but suffice to say there exists a trade-off between the use of complex and simpler statistical techniques in analysing sales and other market measures. Complex techniques may not necessarily yield better forecasting accuracy than simpler ones. This would suggest the expert should try a variety of models and check for levels of agreement between the forecasts. At the same time, courts may find it difficult to understand and accept the application of these complex techniques within the broader context of the legal proceedings taking place. At the very least, the assumptions on which these models are developed need to be tested.

[126.990] Develop the forecast

Having selected an appropriate technique, the marketing expert proceeds to develop the statistical forecast. This is an iterative process. The expert progressively refines the forecasts while simultaneously ensuring that none of the underlying assumptions of the selected technique are violated. Although the specifics of this process are not addressed here, there are a couple of principles that should be noted.

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First, if possible, the expert should produce a range for their forecasts and not just point estimates for the dependent data variable. These ranges, commonly known as "Prediction Intervals", can be calculated for many of the common statistical forecasting techniques. For example, instead of saying that soft drink sales in January 2015 are expected to be three million litres, the expert should ideally indicate the range of expected sales for that month e.g. from 2.5 million to 3.5 million litres. This assists the courts in understanding the potential errors that are inherent in any forecasting exercise.

Second, the expert should provide measures of the extent to which their model adequately fits the data set used to produce the forecasts. The expert, using this model, produces forecasts over the period in which data are available and calculates how closely their forecasted values match the actual values. Examples of such measures include the RMSE (Root Mean Square Error) and the MAPE (Mean Absolute Percentage Error). Again, this helps the courts to grasp the likely accuracy of the forecasts produced by the expert. As a final observation, it is important to note two points: first, a model that better fits available historical data does not necessarily promise greater predictive accuracy and second, that these measures are themselves not without flaws.

[126.1000] Verify the reasonableness of the forecast and adjust it accordingly

At the end of the process, the expert should verify the reasonableness of the forecasts in light of other known facts including knowledge of the markets and the economy. For example, the expert may compare their forecasts against reference points such as published industry growth rates and come to a view of whether they are consistent. If there is a lack of apparent consistency, the expert has a choice of:

- reworking the forecasts;
- manually or "judgmentally" revising the forecasts; or
- providing some justification for the lack of consistency.

It may come to a surprise to the reader that there is substantial support for judgmental revision of forecasts, that is, adjusting forecasts for domain knowledge or exogenous factors that were not taken into account in the statistical forecasting process (Sanders and Ritzman, 2004). These factors may range from shifts in an entity's business strategy to structural changes in the market, such as increased competition.

Legal applications

Many of the issues in relation to statistical forecasting were raised in *Conagra Inc v McCain Foods (Aust) Pty Ltd* (unreported, Federal Court of Australia, Beazley J, 23 April 1996, NG 154/1991). Conagra had successfully applied for an interlocutory injunction against McCain preventing it from launching "Healthy Choice", a healthy-style frozen dinner product. Conagra had been marketing a similar product under the same name in the United States of America for some time. The injunction was lifted by the Full Federal Court several months later upon which McCain proceeded to apply for damages suffered from lost sales during and beyond the period of the injunction. Both sides introduced expert evidence quantifying the losses suffered by McCain.

The court preferred McCain's evidence over that led by Conagra and it is useful to consider a few of the key reasons. First, Conagra's expert had performed statistical analysis based on data with errors. It was also contended that Conagra's expert used an inappropriate data set altogether, in that he used ex-factory sales volumes instead of actual sales to consumers and therefore, introduced a timing difference in the data. This re-emphasises the point made earlier regarding the importance of identifying and verifying the data at the early stages of the forecasting exercise. That said, the data in this case had been identified as between the parties at an early stage and so the data errors were common to both experts' analysis.

Second, it was argued that Conagra's expert did not take into account how factors such as volume of advertising and distribution channel effects could affect sales to consumers. In fact, this was not the case, but rather was a difference of approach between an apparently simple method and an extremely complex one. More than anything else, this perhaps highlights the

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importance of making sure that the lawyers understand clearly and fully the assumptions inherent in the models being used and that they draw the court's attention to the full implications. See [126.310].

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