

## Forensic Marketing and Consumer Behaviour: Admissibility of Evidence

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### Abstract

**Purpose-** *The purpose of this paper is to explore the underlying aspects of Forensic Marketing and develop models that can be used in the forensic marketing analysis process. Thus providing support for the admissibility of marketing evidence in a court of law.*

**Design/methodology/approach-** *A two stage approach used in this paper. The first stage involves a literature review identifying theories and the various constructs and variables leading to the formulation of two models firstly, for conducting forensic marketing analysis and secondly, to clarify the relationship of marketing issues to profitability of a product. The second stage involves examining court rulings in regards to the admissibility of marketing evidence.*

**Contribution / implications-***The contribution of this paper is towards the clarification and justification of the underlying constructs and variables in the forensic marketing analysis as evidence in determining economic loss.*

**Key words:** Forensic marketing; consumer behaviour; brand recognition; economic loss.

JEL Classification: M31; K41

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## Introduction

Litigation between firms where it is necessary to measure economic loss or damages has given rise to the fields of forensic analysis in the disciplines of economics, concerned with providing evidence of an economic nature, and forensic accounting, concerned with providing evidence of an accounting nature. Indeed, forensic accounting has taken on a mantle of professionalism with a number of professional bodies existing in the USA, the Institute of Certified Forensic Accountants, and the Association of Certified Fraud Examiners. In Australia the Chartered Accountants of Australia and New Zealand have a special designation of forensic accountant for CA's that may undertake investigative services or litigation services that may lead to providing courtroom testimony. The legal system has accepted economists and accountants as experts in evaluating and reporting on methods of measuring the financial value of damages or economic loss for the consideration by the courts as evidence. However, there are cases where the financial or economic loss is more closely aligned with copyright or brand infringement and in such circumstances a greater knowledge and expertise in concepts of marketing and particularly consumer behaviour is required. To address these situations forensic marketing is emerging as a complimentary field that provides the objective empirical observation to support the measurement of loss.

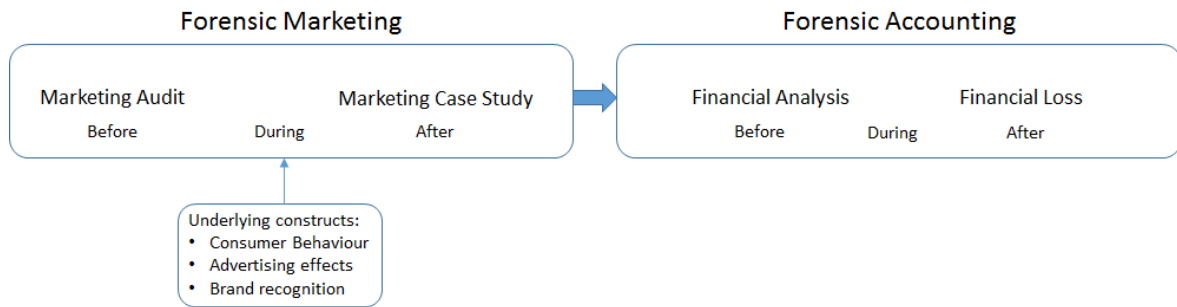
Forensic marketing has been instrumental in providing the required expert evidence in conjunction with accounting evidence to establish and quantify economic loss in a number of legal cases in Australia. Loss of market share leading to loss of profit was considered in *Seeley International Pty Ltd v Newtronics Pty Ltd* [2001] FCA 1862, with economic loss from a negative impact on a brand name being the focus in *Versace v Monte* [2002] FCA 190 and *Versace v Monte* [2003] FCA 126. In *Cat Media Pty Ltd v Opti-Healthcare Pty Ltd* [2003] FCA 133 the focus was also on the importance of brand recognition and advertising in market share and subsequent economic loss.

An approach to conducting forensic marketing was proposed by Anderson, Volker and Phillips (2008). They focused only on a methodology for gathering data and then undertaking analysis that could be ascribed as providing evidence. They recommended the use of a case study approach, without providing any discussion of the consumer behaviour that underpins the very nature of the forensic marketing analysis. Consumer behaviour is by its very nature closely aligned with the field of cognitive psychology in that it explores the basis for decision making by individuals. The method proposed by Anderson, Volker and Phillips (2008) did not address the underlying construct of consumer behaviour and the importance of this in validating the forensic marketing evidence. The concept of determining economic loss where a firm infringes on the copyright or brand of another has received little attention in the literature and no attempt has been made to incorporate a discussion of consumer behaviour in the analysis process. This paper seeks to build on the proposed forensic marketing method by providing a model which incorporates an explanation of the role of consumer behaviour as a construct in the validation of variables in forensic marketing. The intention is to provide a road map of the underlying principles for understanding consumer behaviour when a conflict arises between brand recognition either as a deliberate or an unintended act that is the subject of a court case requiring forensic marketing assessment.

## Literature Review

The approach to investigating and reporting on marketing facts and laws proposed by Anderson, Volker and Phillips (2008) is a two staged model. Starting with a forensic marketing audit to gather information and then forensic marketing case study. The model was intended to apply to the evaluation of various types of marketing related matters that do not necessarily require consideration of consumer behaviour issues. It also focused on the marketing aspects and provided little attention to the calculation of financial amounts that would constitute economic loss in a court of law. Subsequently, the model has been extended in this paper to address the additional consideration of deriving financial values and providing insights into the theoretical basis of consumer behaviour.

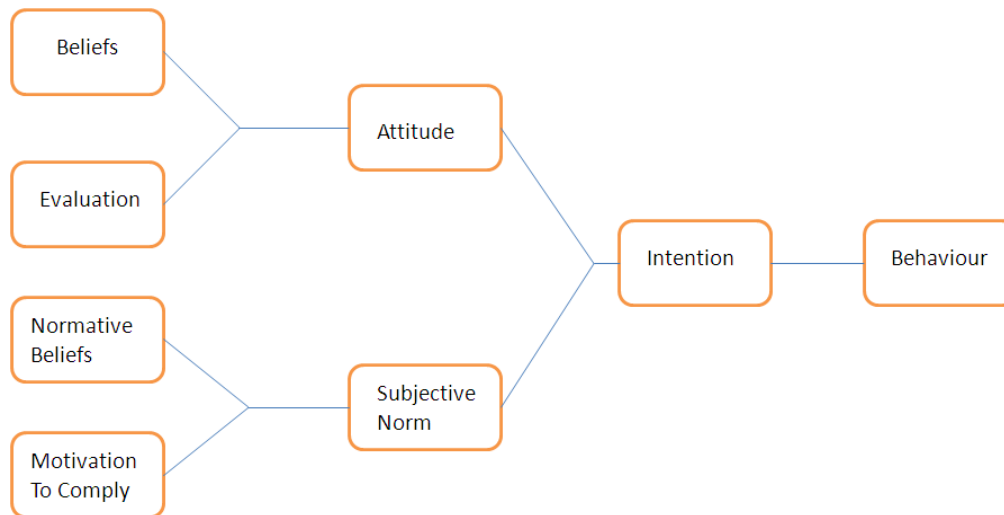
**Figure 1:**  
*Forensic Marketing and Forensic Accounting Joint Model*



**Consumer Behaviour**

Consumer behaviour is the corner stone of forensic marketing analysis especially when the concern is on evaluating purchasing decisions pertaining to brand recognition. In this regards the nature of consumer behaviour is a seemingly complex area of human behaviour however the theory of reasoned action (Fishbein, 1967; Ajzen & Fishbein, 1969, 1980) has support in the social psychology literature (Ryan, 1982; Sheppard, Hartwick & Warshaw, 1988) as a model to explain consumer decisions (see Figure 2). The model has been the subject of research attempting to predict behavioural intention and actual behaviour resulting in more complex variations such as the normative and attitudinal constructs (Liska, 1984; Oliver & Bearden, 1985) as well as attitudinal and normative belief constructs (Burnkrant & Page, 1988; Davis, Bagozzi & Warshaw, 1989).

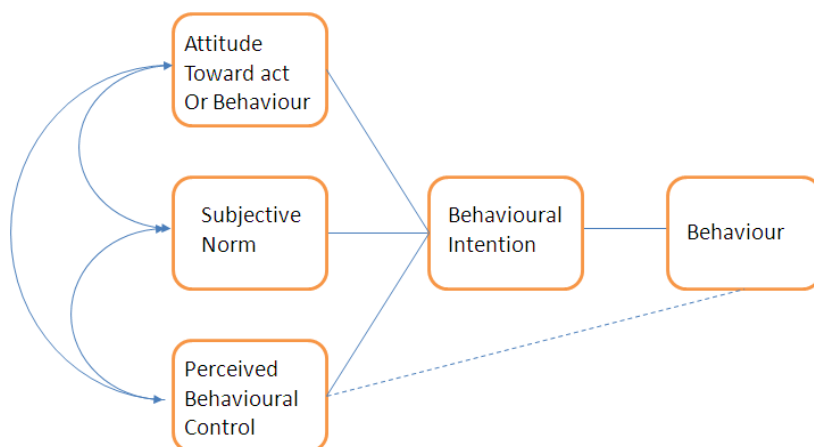
**Figure 2:**  
*Theory of Reasoned Action*



Source: Ajzen & Fishbein, 1969, 1980

To address the perceived shortcomings of the theory of reasoned action Ajzen (1991) developed an alternative model known as the theory of planned behaviour. This model (see Figure 3) addresses conditions of variable volitional control and includes a new construct, perceived behavioural control. The theory has also found support in the social psychology literature (Sparks, Hedderly & Shepherd, 1992; Madden, Ellen & Ajzen, 1992). Consistent with the theory of reasoned action the model asserts that behaviour is the result of behavioural intention which is influenced by attitude and subjective norm. The new construct of perceived behavioural control is included to accommodate situations where complete control over behaviour is limited.

**Figure 3:**  
*Theory of Planned Behaviour*



Source: Ajzen, 1991

A meta-analysis by Armitage and Conner (2001) and selective annotated bibliography by Southey (2011) highlight the effective use of the models in a diverse variety of contexts. However, behavioural intentions do not always translate into buying behaviour (Foxall, 1997, 2005) and given the complexity in this construct the ability of the models to predict actual buying behaviour has been questioned. To address this aspect Anderson and Mittal (2000) proposed the satisfaction-profit chain approach as a better predictor of consumer behaviour in a customer-firm relationship context. This approach consists of a chain of variables that influence each other and commences with product/service satisfaction, overall/relationship satisfaction, combined with the influences of commitment and trust, followed by purchasing/loyalty intentions and consequently behaviour (Reichheld, 1996).

### *Advertising Effects*

Advertising effects has relied on multiattribute models which assume that advertising influences brand attitudes by modifying consumer beliefs about the particular attributes of a product (Mitchell & Olson, 1981). There is support in the literature that product beliefs affect brand attitudes (Holbrook, 1978; Lutz, 1975; Mitchell & Olson, 1981; Wilkie & Pessemier, 1973), however, there is evidence that product beliefs are not the only mediator of advertising effects on brand attitudes. Research has found that both product beliefs and advertising reactions act as independent mediators of brand attitude (MacKenzie & Lutz, 1982; Mitchell & Olson, 1981). The role of advertising is to enhance brand awareness and beliefs by announcing the existence of the particular brand and raising awareness of the various attributes that it possesses (Deighton, Henderson & Neslin, 1994).

### *Brand Recognition*

Brands have been described as a visible, psychological symbol that differentiate one product from another (Bogart & Lehman, 1973). Where products are of a similar nature the brand identity, based on name, packaging and advertising provides the perception of difference for consumers.

### *Consumer Profiling*

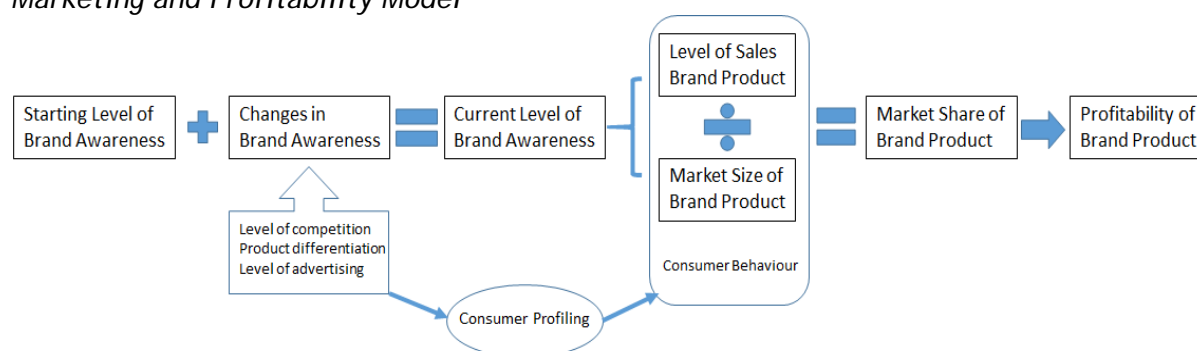
In order to successfully market a product or service, it is important to target the segment of the population that is most likely to buy the product or service. Targeting the market

segment simply requires identification of the characteristics that define the potential customer. In effect this involves creating a profile of the potential customer taking into consideration the demographic; geographic; psychographic; and behavioural characteristics (Sin & Tse, 2002). Demographic characteristics generally encompasses age, religion, gender, income, education. Geographic characteristics takes into consideration the location of the target customers be that local, state, regional, national or international. Psychographic characteristics refers to factors that are likely to influence a customers purchasing decision such as attitudes, beliefs and emotions. Behavioural characteristics the buying habits and patterns of customers which may be influenced by brand recognition, brand loyalty, or cost.

### Marketing and Profitability

The relationship between the underlying constructs of consumer behaviour, advertising effects and brand recognition can be linked to provide insight into the market share of a product and effect that this has on profitability. To better understand the relationship of the variables and constructs a model (see Figure 4) is proposed that starts with the existing level of brand awareness and is subsequently changed (increased or decreased) due to the level of competition, product differentiation and extent of advertising resulting in the current level of brand awareness. From this point the relevance of brand awareness is considered to be reflected in the level of sales which when divided by the market size results in the market share of the product. The market share in effect is linked to the profitability of the product since the greater the number of sales the higher the revenue income stream to produce profit.

**Figure 4:**  
*Marketing and Profitability Model*



## Cases

### Case 1: Traderight (NSW) Pty Ltd & Ors v Bank of Queensland Limited (No10) [2012] NSWSC 1181

The question of admissibility of evidence from the perspective of forensic marketing pertaining to marketing issues was addressed in the Supreme Court of New South Wales in *Traderight (NSW) Pty Ltd & Ors v Bank of Queensland Limited (No10) [2012] NSWSC 1181*. The issue revolved around the claim that there was reasonable grounds to believe that there was a substantial potential market of retail and business customers in New South Wales prepared to change banks - and in effect the marketing plan was based around this belief.

Summary of the conclusion from the first report by the Forensic Marketing Expert:  
(at para 43)

*"(a) At the time that the Bank was planning its entry into the NSW financial services market (the NSW Market), and over the time covered by the documents and materials provided to me, the NSW Market was difficult to enter, due to the presence of established, strong competitors and smaller banks already competing on the basis of the Banks asserted superior service quality.*

*(b) At the time of planning and prior to its entry into the NSW Market, this level of competition meant that any new entrant to this market had a high risk of not obtaining any*

significant market share by causing switching of consumer allegiance from an incumbent to the entrant.

(c) At the time of planning and prior to its entry into the NSW Market, the Bank knew that another Queensland based financial service company, Suncorp, had tried entry into that market and had failed.

(d) At the time of planning and prior to its entry into the NSW Market, the Bank should have known that its success in Queensland might not be replicated in NSW because the market conditions in Queensland were not the same as in NSW.

(e) The information available to the Bank as to consumer behaviour in NSW:

(i) did not show a substantial inclination of consumers to switch suppliers of financial services;

(ii) did not show that perception of personal relationship or service was valued highly by consumers or as a basis for change of supplier;

(iii) showed scepticism by consumers about claimed service levels or benefits in fact being available when promised;

(iv) did show demand for appreciable price advantage as a basis for possible change; and

(v) did show low level of actual change of suppliers of financial services.

(f) At the time of planning and prior to its entry into the NSW Market the consumer behaviour identified increased the risk of a new entrant, such as the Bank not obtaining significant market share, unless it could demonstrate to consumers a meaningful difference in price of financial products or services.

(g) At the time of planning and prior to its entry into the NSW Market, there was evidence in the documents and material provided to me that Bank products to be offered in the NSW market were not competitive and/or were not considered competitive.

(h) At the time of planning and prior to its entry into the NSW Market, the Bank appears to have ignored information contained in its research and internal reports which should have increased concerns about the planned entry method (being a franchise of the Bank of Queensland name and business); in particular evidence of consumer concern about a "Queensland" brand, about the use of a franchised bank, and also internal reports that the Bank's products were not considered competitive.

(i) At the time of planning and prior to its entry into the NSW Market, the Bank should have known that the NSW Market was risky, in the sense described above and application of proper marketing practice would have provided further evidence of this risk. Despite this, the Bank decided to enter the NSW Market in a manner, which while it decreased the cost and risk for itself, did not decrease the risk of not obtaining any significant market share, the risk of which would fall on the franchisees.

(j) The manner of the Bank's entry (i.e. using a franchise model, and with no mass media support) significantly increased the risk of failure to obtain significant market share. The decision not to use mass media appears to have been driven by the Bank's unwillingness to invest in the NSW Market, without apparent consideration of the increase in risk of failing to achieve market share which would result from the lack of mass media support which was needed to inform consumers of any competitive product and improve confidence in the new entrant.

(k) Given the strong competition in the NSW Market, the consumer behaviour to be expected, the Bank's inability to differentiate its products from competitors by its features or by advertising of them, and the launch method planned, being franchisee initiative, in my opinion, the failure of a large number of franchisees to secure significant banking business was inevitable.

l) Had the Bank applied proper marketing practice, in my opinion, it should have anticipated or predicted these failures, and then would either have varied its planned entry strategy, or would have decided not to extend into the NSW market."

The supplementary report from the Forensic marketing expert criticised the conclusions reached by the bank's marketing advisors: (at para 44)

*"In my view, a reasonable or prudent marketer could not reasonably recommend to the Bank that it should enter the NSW market (or the southern markets) on the basis of the evidence contained in these Presentations without substantial additional investigation into the viability [sic] of the Bank's proposed offerings in the southern markets."*

A possible oversight on the part of the marketing expert is the failure to draw on research to support the assertion. Research specifically relevant to the issues under investigation were available and should have been easily identifiable through a database search. Trubik and Smith (2000) examined the activities of a regional bank in Australia and developed a model to

study customer defection in the Australian Banking industry. Panther and Farquhar (2004) examined customer dissatisfaction with financial service providers in the UK and provided further insights into issues relevant to the circumstances of the court investigation. Had reference been made to the research it may well have provided support for the criticism levelled at the marketing presentations of the bank.

However, (at para 51) Ball JA did question whether the reports prepared by the Forensic Marketing expert, or parts of them, fail to satisfy the requirements set out by Heydon JA in *Makita (Australia) Pty Limited v Sprowles* [2001] NSWCA 305; (2001) 52 NSWLR 705 at [85]-[86]. Those requirements were stated by Heydon JA in these terms:

In short, if evidence tendered as expert opinion evidence is to be admissible, it must be agreed or demonstrated that there is a field of "specialised knowledge"; there must be an identified aspect of that field in which the witness demonstrates that by reason of specified training, study or experience, the witness has become an expert; the opinion proffered must be "wholly or substantially based on the witness's expert knowledge"; so far as the opinion is based on facts "observed" by the expert, they must be identified and admissibly proved by the expert, and so far as the opinion is based on "assumed" or "accepted" facts, they must be identified and proved in some other way; it must be established that the facts on which the opinion is based form a proper foundation for it; and the opinion of an expert requires demonstration or examination of the scientific or other intellectual basis of the conclusions reached: that is, the expert's evidence must explain how the field of "specialised knowledge" in which the witness is expert by reason of "training, study or experience", and on which the opinion is "wholly or substantially based", applies to the facts assumed or observed so as to produce the opinion propounded.

Thus in this case a Forensic Marketing expert was used to assess the marketing plan and provide reports for the court on the marketing issues. As a consequence the reports were also subject to assessment as to the admissibility of various opinions and conclusions and this provides useful guidance for the provision of future Forensic Marketing reports.

#### Case 2:

#### *Cat Media Pty Limited v Opti-Healthcare Pty Limited* [2003] FCA 133

The second case, *Cat Media Pty Limited v Opti-Healthcare Pty Limited* [2003] FCA 133 (4 March 2003), is concerned with two specific aspects of law. Firstly, tort of passing-off one product as another. Here the issue revolved around whether the product Fat Terminator was being passed-off as the product Fat Blaster or could in any way be associated with that product. The key facts were: packaging of identical size; substantially similar colour schemes; use of similar models; substantially similar layout of package face; product names with similar connotations; and evidence of copying.

The second part came under section 52 of the Trade Practices Act 1974 (Cth) specifically the existence of misleading and deceptive conduct. Here the issue revolved around whether consumers were likely to be misled or deceived as to whether the product Fat Terminator was the same as Fat Blaster or in any way associated with that product. The key facts were also: packaging of identical size; substantially similar colour schemes; use of similar models; substantially similar layout of package face; product names with similar connotations; and evidence of copying.

The introduction of the case provides a summary of the basic points accepted by the court and these are also important from the marketing perspective:

1. *"The market in Australia for products claimed to assist weight loss is apparently both large and competitive. Each of the applicant and the respondent sells to the public and to retail outlets a product in tablet form which is asserted to assist weight loss. The products are sold 'over-the-counter' and not by prescription. The applicant's product is called 'Fat Blaster' and the respondent's product is called 'Fat Terminator'."*
2. *"Fat Blaster has been available to the public in Australia since November 2000. It has proved to be a very successful product. Fat Blaster has become the largest*

*selling 'weight loss supplement' sold in Australia. Fat Terminator has only been available to the public in Australia since August 2002. This proceeding was instituted on 13 September 2002."*

For the most the conclusions reached by the court are consistent with the facts and there are no surprises to the eventual ruling.

"Paragraph 50 In this case unchallenged evidence was placed before the Court of consumers and pharmacy representatives acting on the apparent assumption that Fat Terminator is a product distributed by the applicant. I reject the submission of the respondent that this evidence is of little probative value because it says little, if anything, about the effect of the Fat Terminator get-up on the mind of the person who made the apparent assumption. I am satisfied that the evidence, taken as a whole, establishes instances of actual deception and is of importance to the judgment or estimation which I am required to make of the effect likely to be produced in the wholesale and retail marketplace for weight loss products of the Fat Terminator packaging. I stress, however, that I would have reached the conclusion which I have identified above in the absence of the 'confusion evidence'."

"Paragraph 51 As is mentioned above, I am satisfied that the significant similarities between the Fat Blaster box and the Fat Terminator box, the dissimilarity between the Fat Terminator box and the packaging of other rival products, and the absence from the Fat Terminator box of a significant feature capable of unambiguously distinguishing it from the Fat Blaster product, means that there is a reasonable probability of ordinary or reasonable members of the class of prospective purchasers of over-the-counter weight loss products being deceived by the Fat Terminator packaging. The respondent submitted that a prospective purchaser of Fat Blaster would, by reason of the way in which Fat Blaster has been advertised, and because of the likely subjective importance to him or her of the proposed purchase, have a heightened awareness of the brand name Fat Blaster such that they would not be deceived by the Fat Terminator packaging. I reject this submission. First, in my view, it attributes unrealistic significance to the precise brand name and insufficient significance to the general impression of the product and its packaging created by the Fat Blaster advertisements. Secondly, in my view, the submission pays insufficient regard to the likelihood of prospective purchasers acting on word-of-mouth endorsements of Fat Blaster which might not be given in a way, or might not be recalled in a way, which is dependent on the precise name Fat Blaster."

"Paragraph 52 In my view, by its adoption of the Fat Terminator packaging the respondent has made a representation to the public which is likely to lead a significant proportion of prospective purchasers of over-the-counter weight loss products to believe that Fat Terminator is Fat Blaster or alternatively that Fat Terminator is a product which comes from the same source as Fat Blaster."

"Paragraph 53 As to the third element of the tort, I am satisfied that the applicant is likely to suffer damage by reason of the erroneous belief engendered by the respondent's misrepresentations. That damage will flow from lost sales of Fat Blaster or Fat Blaster Max. "

"Paragraph 54 The applicant has established its claim of passing off. Further, the applicant's claim that the respondent has contravened s 52 of the TPA is made out."

However, the most telling and certainly interesting comments made are contained in paragraph 55, and basically go to the heart of the forensic marketing evidence which had been presented by both parties.

"I conclude these reasons for judgment with the following observations. Each of the parties placed before the Court expert evidence in the form of a report of a marketing consultant touching on the issues, including the ultimate issue, which the Court is required to determine in this proceeding. The evidence was received in each case without objection. I make no criticism of the parties' conduct in this regard. However, I consider it appropriate to record that in the particular circumstances of this case, which is concerned with the packaging of a product intended to appeal to a wide segment of the general public, I have found the expert evidence of no real assistance. This is not only because there is, as is common in cases of this kind, conflict between the evidence of the two experts. 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. I endorse the comment of Beaumont J in *Pacific Publications Pty Ltd v IPC Media Pty Ltd* [2003] FCA 104 at [92] that where a claim is essentially a matter for the Court's impression, expert views which are merely 'impressionistic' can be given no more than nominal weight. These observations are not intended in any way to belittle the importance of market research and expert appreciation of consumer behaviour in other types of cases and for other purposes."

## Summary

The two cases presented provide compelling insights into the need to approach the provision of forensic marketing evidence in a clear and concise manner with a conceptual model to justify opinions and conclusions if it is to be admissible in a court of law. As a consequence the brief yet focused presentation of the constructs and variables provides a point from which to better understand the importance for a conceptual model for forensic marketing evidence.

In hindsight had the marketing experts provided a conceptual framework and further supported the representations to the court with research into the issues there might have been a more favourable consideration given. Further benefits might come from research into the application of the framework in future court responses to admissibility of marketing evidence.

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