



## 2019 Study Question

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Jonathan P. OSHA, Reporter General  
Ari LAAKKONEN and Anne Marie VERSCHUUR, Deputy Reporters General  
Guillaume HENRY, Ralph NACK and Lena SHEN, Assistants to the Reporter General  
**Consumer survey evidence**

Responsible Reporter(s): Lena SHEN and Anne Marie VERSCHUUR

National/Regional Group	New Zealand
Contributors name(s)	Kathleen Henning and Michael Brown, AJ Park
e-Mail contact	michael.brown@ajpark.com

### I. Current law and practice

***Please answer the below questions with regard to your Group's current law and practice.***

**1.a** Is consumer survey evidence in principle admissible in trademark proceedings? Please answer YES or NO.

Yes

Please Explain

However, survey evidence is a topic of controversy and courts treat this evidence with varying degrees of criticism and acceptance (see *Levi Strauss & Co v Kimbyr Investments Ltd* [1994] 1 NZLR 332 and *Intercity Group v Nakedbus* [2014] NZHC 124).

Often, survey evidence does not form the basis of a Judge's final decision, but rather acts as a source of confirmation for conclusions reached on other grounds.

**1.b** Are there specific statutory provisions in your law governing consumer survey evidence?

If YES, what do they state and do they specifically concern trademark matters or do they have a more general nature?

No

Please Explain

No, there are no specific statutory provisions in New Zealand law governing consumer survey evidence.

***If you have answered NO to Q1)a), please skip Q2)-Q5) and proceed to Q6); If you have answered YES to Q1)a), please proceed to Q2).***

**2.a** Is consumer survey evidence admitted in all types of trademark proceedings (see also para. 13 in the full text of the Study Guidelines which can be found at the top of this webpage)?

**2.b** If consumer survey evidence is not admitted in all types of trademark proceedings, in which types is it admitted and in which types is it not (e.g. opposition proceedings, revocation, proceedings, infringement proceedings)?

**3.a** What can consumer survey evidence prove or help prove (e.g. confusion, acquired distinctiveness; see also para. 14 in the full text of the Study Guidelines which can be found at the top of this webpage)?

**3.b** What is consumer survey evidence most used for in practice to prove or help prove (e.g. confusion, acquired distinctiveness; see also para. 14 in the full text of the Study Guidelines which can be found at the top of this webpage)?

**4.a** Are there specific requirements for surveys, e.g. as to the way of conducting the survey (e.g. internet or email survey, telephone survey, shopping mall interrupt surveys), the number and selection of respondents, the appropriate form and order of survey questions and the use or nature of controls? If so, which?

**4.b** If your answer to Q4a) is NO, what characteristics do surveys generally have, e.g. as to the way of conducting the survey, the number and selection of respondents, the appropriate form and order of survey questions and the use or nature of controls?

**5.a** Are specific percentages of respondents answering certain questions required or sufficient to prove certain items? If so, which?

**5.b** What percentages of respondents answering certain questions are typically deemed insufficient?

**6** Is the court or IP office involved in the set-up of the survey, or can it be, and, if so, to what extent?

No

Please Explain

No, the New Zealand courts are not generally involved in the set-up of the survey.

**7** What weight or value is generally given by the court or IP office to consumer survey evidence, if such is admitted, and which factors are relevant in considering the extent of such weight or value?

In *Auckland Regional Authority v Mutual Rental Cars Ltd* [1987] 2 NZLR 647 (HC), Barker J summarised the criteria for survey evidence as follows:

- a. The interviewees must be selected so as to represent a relevant cross-div of the public;
  
- a. The size of the survey must be statistically significant;
  
- a. The survey must be conducted fairly;
  
- a. All the surveys carried out must be disclosed including the number carried out, how they were conducted, and the totality of persons involved;
  
- a. The totality of the answers given must be disclosed and made available to the defendant;
  
- a. The questions must not be leading nor should they lead the person answering into a field of speculation he would never have embarked upon had the question not been asked;
  
- a. The exact answers must be recorded;
  
- a. The instructions to the interviewers regarding how to carry out the survey must be disclosed;
  
- i. Where the answers are coded for computer input, the coding instructions must be disclosed.

In *Levi Strauss & Co v Kimbyr Investments Ltd* [1994] 1 NZLR 332 at 264, the court confirmed that the two essential requirements for survey evidence in New Zealand were that:

- a. Interviewees represent a cross-div of relevant consumers; and
  
- a. the instructions given to interviewers are fully disclosed.

In assessing the probative value of the evidence, the court will consider the “universe” from which survey respondents are drawn. However, in *Levi Strauss*, Williams J confirmed that a survey did not have to be “nationwide” and that a survey of 500 people undertaken in seven major New Zealand cities had sufficient probative value.

## II. Policy considerations and proposals for improvements of your Group's current law

**8** Could any of the following aspects of your Group's current law or practice relating to consumer survey evidence be improved? If YES, please explain.

**8.a** Types of trademark proceedings in which survey evidence is admissible;

**8.b** What survey evidence can prove or help prove;

**8.c** Requirements of surveys;

**8.d** The application, or lack thereof, of bench-mark percentages;

**8.e** The weight or value given to consumer survey evidence.

**9** Are there any other policy considerations and/or proposals for improvement to your Group's current law falling within the scope of this Study Question?

## III. Proposals for harmonisation

**Please consult with relevant in-house / industry members of your Group in responding to Part III.**

**10** Do you believe that there should be harmonisation in relation to consumer survey evidence?

**If YES, please respond to the following questions without regard to your Group's current law or practice.**

**Even if NO, please address the following questions to the extent your Group considers your Group's current law or practice could be improved.**

**11** Should consumer survey evidence in principle be admissible in trademark proceedings? Please answer YES or NO.

**2.a** Should consumer survey evidence be admitted in all types of trademark proceedings (see also para. 13 in the full text of the Study Guidelines which can be found at the top of this webpage)?

**2.b** If consumer survey evidence should not be admitted in all types of trademark proceedings, in which types should it be admitted and in which types should it not be admitted (e.g. opposition proceedings, revocation, proceedings, infringement proceedings)?

**13** What should consumer survey evidence be allowed to prove or help prove (e.g. confusion, acquired distinctiveness; see also para. 14 in the full text of the Study Guidelines which can be found at the top of this webpage)?

**14** Should there be specific requirements for surveys, e.g. as to the way of conducting the survey (e.g. internet or email survey, telephone survey, shopping mall interrupt surveys), the number and selection of respondents, the appropriate form and order of survey questions and the use or nature of controls? If so, which?

**5.a** Should specific percentages of respondents answering certain questions be required or deemed sufficient to prove certain items? If so, which?

**5.b** What percentages of respondents answering certain questions should be deemed insufficient?

**16** Should the court or IP office be involved in the set-up of the survey and, if so, to what extent?

**17** What weight or value should be given by the court or IP office to consumer survey evidence, if such is admitted, and which factors should be relevant in considering the extent of such weight or value?

**18** Please comment on any additional issues concerning any aspect of consumer survey evidence you consider relevant to this Study Question.

**19** Please indicate which industry sector views provided by in-house counsel are included in your Group's answers to Part III.