

MOOTING

Handbook

Presented By The UTS Law Students' Society

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Mooting

Mooting involves competing in teams of two in the context of a **mock submission**. The problem is generally modeled on an appeal from an earlier trial, so all the facts of the case have already been agreed upon; as such, there are no witnesses and involve an argument about what the law is and where it is contestable. It is different from a debate because the audience is a bench of judges who do not necessarily listen in silence but instead interrupt the mooters to ask questions to probe the strength of their arguments.

The Law Students Society offers junior and senior levels of mooting competitions, held in second and first semester respectively. Subject moots in Criminal Law, Australian Constitution Law and The Law of Torts are also offered.

Law students are particularly encouraged to enter mooting competitions, as it builds upon their knowledge of a particular area of law and is an excellent tool in building and acquiring great advocacy skills.

How does mooting fit with my law degree?

“Mooting is a discipline which teaches you to think like a lawyer rather than like a law student.”

Angus Macinnis. Senior Associate, Dibbs Barker & intra-varsity mooting coach.

What are graduate attributes?

Graduate attributes are the characteristics and qualities, skills and capabilities possessed by students by the time they complete their UTS:Law degree.

Why do we have them?

Because being a successful law graduate in today's world requires more than just knowing the law and how to apply it.

Graduates need to be able to think critically, to analyse information and its source, to behave professionally and to manage work and life priorities in an effective manner.

Graduates need to be ready to thrive and survive in a workplace that is more technologically dependent and rapidly changing than ever before.

As with all forms of education, there is no guarantee that you will leave university a ‘model graduate.’ What UTS seeks to do throughout your degree is to give you every opportunity – via your classroom exchanges, assessment, extracurricular activities such as these LSS competitions and other initiatives - to develop the intrinsic skills and values unique to a university experience and demanded by employers in a competitive job market.

How do Graduate Attributes fit with UTS LSS Competitions?

Competitions run by the UTS Law Students’ Society (“LSS”) provide an ideal opportunity to put your legal skills into practice and demonstrate the values you have been exposed to throughout the course of your law degree so far.

In mooting, the focus is on teamwork, quick-thinking, deep and creative analysis, thorough research and persuasive presentation – all to a tight deadline. In other words, you are developing:

1. Critical Thinking

2. **Analysis and Evaluation**
3. **Spoken and Written Communication**
4. **Legal Research and Technological Literacy**
5. **Disciplinary Knowledge**
8. **Self and Cooperative Work Management**

Below is a brief explanation of each attribute. For a more in-depth exploration, please refer to www.law.uts.edu.au/students/ga.html

Being a Critical Thinker

A person proficient in this attribute can identify and apply themselves to problems, and create new or imaginative perspectives or solutions.

A critical thinker evaluates information by breaking it down and examining its component parts, or takes dispersed, disconnected ideas and information and synthesises them, or creates something new from them.

To critically analyse something requires independent thinking and creativity. It involves making a judgement as to the position adopted or rejected, and backing it up with evidence from the synthesised material.

Being Analytical and Evaluative

An analytical person appraises and assesses the value and significance of legal issues and viewpoints. These may challenge their personal beliefs, and involve them taking a position they may not otherwise believe in (i.e 'playing the Devil's advocate.')

Being proficient in legal analysis and evaluation requires a higher tolerance of **intellectual uncertainty**, and promotes the confidence to reach a well-reasoned view that can form the basis for persuasion and decision-making.

Being an Advanced Communicator

Persuasive and well-structured communication is the benchmark of an outstanding mooter. Mooting and other legal skills competitions offer you the rare chance to develop these traits so often sidelined in a regular classroom setting.

So what makes an advanced communicator? Knowing who you are communicating to, the best medium to use and why you are doing it. In other words: audience, medium and message.

Advanced communicators understand the purpose of their communications, and **strategically select** the appropriate medium and message. They notice how their message is received and alter their strategy accordingly. They use communication to inform, analyse, report and persuade. They are ready to correct miscommunications rather than seek to apportion blame.

Being an effective researcher

Effective legal researchers recognise when information is needed and have the capacity to locate the information, evaluate and effectively use it. They follow a routine process to identify

and retrieve legal information, establish its authority and relevance, and use it to support legal decision making. They are capable of locating and using hard copy library resources and online databases.

Your ability to research effectively is central to succeeding as mooter. Outstanding research will provide the foundation for bold, original arguments grounded in law.

Being self-managed

A person with self and cooperative work management skills knows and understands their own strengths and weaknesses, potentials and limitations. They understand and manage emotions regarding themselves and others, are conscious of their own decisions and undertake goal planning for their personal and professional life.

They are able to determine what is most urgent and important to do at any point in time, and to choose the most effective and efficient use of time and resources in order to achieve their priorities.

They are able to collaborate effectively with others in order to achieve goals, including participation and contribution to group discussion, sharing information, dividing up work tasks, building consensus, and generating effective team outputs. This includes, for example, the ability to work effectively as part of a legal team preparing a case for trial or settlement negotiations.

Rules

Teams

- 1.1 Each team may consist of either 2 or 3 members.
- 1.2 In a team of three members there are two counsels and one solicitor. Team members may rotate positions between senior counsel, junior counsel and solicitor.
- 1.3 In a team of two members there are two counsels. Team members may rotate positions

between senior counsel and junior counsel.

- 1.4 The three nominated members of the mooting team shall remain the same for the duration of the competition.
- 1.5 All team members must be enrolled in a law degree at UTS at the time of the competition, and be current financial members of the UTS Law Students' Society.

Competition Structure

- 2.1 The competition shall consist of one friendly round, two preliminary rounds, a quarterfinal, a semi final and a grand final, where practicable.
- 2.2 The competition structure as outlined in 2.1 may be altered at the discretion of the Vice-President (Activities).
- 2.3 In the event that an even number of teams enter the championship, all teams compete in all the preliminary / friendly rounds.
- 2.4 In the event that an odd number of teams enter the championship, one bye per round is declared. The bye is allocated randomly. Any team with a bye is deemed to have scored in the round in which they have the bye the average mark scored by that team in the other rounds in which it competes.
- 2.5 Eight teams will progress to the quarterfinals. Those teams will be decided on the basis of their win-loss ratio from the preliminary rounds.
- 2.6 In the event of a tie, consideration will be given to the following factors:
 - 2.6.1 The average score of the tied teams from the preliminary rounds will be calculated, and the team with the highest average score will progress to the final.
 - 2.6.2 If teams remain tied, the team with the lowest score in a preliminary round will be eliminated.
 - 2.6.3 If teams remain tied, the team with the highest average of victory from the preliminary rounds will progress to the final.
 - 2.6.4 If teams remain tied, the team with the highest average margin of loss will be eliminated.
 - 2.6.5 If teams are still tied, the team with the lowest average margin of victory will be eliminated.
- 2.7 The Areas of law to be covered in the Senior competition are;
 - 2.7.1 Administrative Law
 - 2.7.2 Commercial Law
 - 2.7.3 Constitutional Law
 - 2.7.4 Contract Law
 - 2.7.5 Corporations Law
 - 2.7.6 Equity & Trusts

- 2.7.7 Real Property
- 2.7.8 Tort Law
- 2.8 The areas of law to be covered in the Junior rounds are;
 - 2.8.1 Criminal Law
 - 2.8.2 Tort Law
 - 2.8.3 Contract Law

Release of Questions

- 3.1 Each preliminary/friendly round uses the same question.
- 3.2 Questions for the preliminary rounds are released via email one week before the friendly round begins.
- 3.3 Problem questions shall be distributed via email only.
- 3.4 Competitors may only appeal if the opposing team received the question more than 6 hours before they received it.
- 3.5 in the opinion of the Vice President (Activities) the teams were given an adequate period of time in which to prepare, there will be no right of appeal, notwithstanding the question was distributed less than one week before the round.
- 3.6 Different question will be used for the quarter, semi and final rounds. These questions will not be the same as that used for the friendly/preliminary round.
- 3.7 The competitions officer will endeavor to release the questions for the quarter, semi and final rounds one week before the appropriate round begins.
- 3.8 All questions must be written by academic law faculty/school staff members, preferably by associate professors or professors, but not necessarily academics of the University of Technology, Sydney.

Preparation and Research

- 4.1 All research and preparation for the moots will be conducted solely by the team members.
- 4.2 The Vice President (Activities) may disqualify from the championship any team receiving outside assistance.
- 4.3 Unless otherwise stated, all moots will be heard as if before the Supreme Court of New South Wales. The jurisdiction to hear the case will be assumed.
- 4.6 Penalties apply if Counsel makes extensive reference to authorities other than those included in their submitted list of authorities.
- 4.7 Where issues of legislation are to be argued, this will be specifically referred to in the moot problem. Otherwise, argument is limited to the common law.

Judging

- 5.1 The preliminary/friendly rounds are heard by either one or three judges, depending on availability.

- 5.2 The quarter, semi and grand finals may be heard by one, three or five judges.
- 5.3 The grand final cannot be heard by less than three judges.
- 5.4 Judges shall be provided with the moot question, an information sheet and a marking guide. Teams are strongly advised to have regard to it in preparation of the moots.
- 5.5 No draws are possible.

Forfeiture

- 6.1 Any team which forfeits a moot will be deemed to have lost that moot. Counsel for the forfeiting team will be deemed to have a mark of zero for that moot.
- 6.2 Any team whose opponent forfeits a moot will be deemed to have won that moot. Counsel for the winning team will be deemed to have scored in that round the average mark scored by that team in the other two rounds in which it competes.
- 6.3 Any team which forfeits a moot is excluded from competing in the Quarter, Semi or Grand Finals.

Written Submissions

- 7.1 In each round each team must submit three copies of a Memorandum of Argument in hard copy.
- 7.2 The three hard copies must be submitted to the organiser of the competition or their appointee at least two hours prior to the commencement of each moot.
- 7.3 Penalties apply if insufficient Memorandums are submitted or if sufficient Memorandums are submitted late.
- 7.4 The Memorandum of Argument must contain:
 - 7.4.1. An outline of the structure of the team's submission.
 - 7.4.2. Major arguments to be raised.
 - 7.4.3. Allocations of speaking time.
 - 7.4.4. A list of the authorities on which Counsel rely.
- 7.5 Each team must format their Memorandums of Argument in accordance with the standard submission in these rules. During the moot, Counsel are advised to follow the structure of submissions as set out in their Memorandum of Argument.

The Moots

- 8.1 After a formal introduction to the bench each team will have 30 minutes to present their case.
- 8.2 The time may be divided between senior and junior counsel 15/15 or 20/10. The division of time must be specified in the written submissions.
- 8.3 Penalties apply if Counsel exceed their allocated or extended time.
- 8.4 Judges may grant an extension of time of up to five minutes per team.

8.5 There will be no right of reply.

8.7 Counsel will not robe.

Complaints, Appeals, Penalties & Interpretation

9.1 All complaints and appeals concerning scoring and assessment or the organisation, administration and conduct of the competition must, within twenty- four hours of the matter giving rise to the complaint or appeal, be submitted to the Competitions Officer for determination.

9.2 In respect of any alleged breach of these Rules, the Competitions Officer will:

9.2.1 Determine whether there has been a breach; and

9.2.2 Determine what penalty, if any, is to be imposed for the breach.

9.3 All questions concerning the interpretation of these Rules must be submitted to the Competitions Officer for determination.

9.4 The Competitions Officer may at any time determine such amendments or additions to these Rules or other measures as may be necessary or convenient for the efficient organisation, administration or conduct of the competition.

9.5 All determinations made by the Competitions Officer in accordance with these Rules will be final and conclusive and binding on all competitors.

Physical layout of the court

1.1 The Moot Court will be set up in the same layout as that of a courtroom. Judges sit at the front of the room, behind a table. Counsel sits facing the judges, the Appellants sitting on the right (facing the judges). Senior Counsel sit closer to the lectern than Junior Counsel.

Submissions

1.1 A written submission is meant to guide the judge while the competitor is talking. It should not contain a written argument, but merely an outline of the points to be made in the competitor's oral submission.

1.2 Under each point the competitor should list the cases, which will be used to back up the statement.

1.3 Under the Competition Rules, legislation must not be cited unless it has been provided with the question.

Finding cases/research for your submission

- 1.4 Begin by reading something about the broader area of law in a legal encyclopedia or textbook. This should draw your attention to relevant cases and articles on the topic. Then read the seminal cases dealing with the topic, and perhaps some articles, before conducting some research to see whether there have been any recent developments in the area.
- 1.5 If you want to impress the judge then use a case database such as CaseBase or Firstpoint to find more cases.
- 1.6 One of the advantages to mooting is that it gives you some experience in conducting research in the same way you would as an articulated clerk or law graduate. Often, moot topics will involve areas of law that you may know absolutely nothing about. The best way to approach these kind of topics is to work from the general to the more specific.
- 1.7 Some moot competitions, like the ALSA National Championships, are mock appeals from real cases. In these circumstances, the obvious thing to do is to read the case that is the basis for the appeal and any important cases and articles that it refers to. Although you may be limited in the time that you have to spend on more general research, textbooks and legal encyclopedias may also help to give you the “bigger picture” of that area of law.
- 1.8 For all the cases you have used, make sure you have a summary of the facts and know who the judges were.

Alternative arguments

- 1.9 Sometimes it is necessary to run several levels of argument that have their own merit. For example, if your first submission is that there is not a duty of care, your second submission could be that ‘even if’ the court finds a duty of care, it has not been breached.

Structure

- 1.10 For the structure of a submission, look at Appendix A to the Open Moot Rules. Marks will be lost if this structure is not adhered to.
- 1.11 There is no one “right” way of formulating arguments. Each person has to find her or his own style of argument. The obvious thing is to formulate your arguments in a clear, concise and logical way. Never write your submissions out in full. You need to be flexible in dealing with different arguments to the extent and in the order that the judges want to hear them. The best thing is to write down in bullet point form all the issues in the problem. These should be divided between the two speakers (if there are two) in a logical way. You should then write down all the arguments that you have for each issue.
- 1.12 You should have at least two (as it is dangerous to rely on one argument alone), but there may be more. State at the outset that you will be dealing with issue ‘A’ while your colleague will be dealing with issue ‘B’. You should then state that you will be making (for example) three submissions in support of issue ‘A’, and briefly state each one of them. You have then provided the judges with a short summary of how you will proceed, and should then deal with each of the arguments in turn. When you speak, it is usually a good idea to have your submissions in bullet point format in front of you.

- 1.13 You should have the main issue or argument written at the top of the page in bold format. Below that, in bullet point, write a short description of each of the main points of your argument. Having your arguments in bullet point will force you to formulate them in your own words rather than delivering a set speech, which can sound rehearsed and detract from your ability to create a dialogue with the judges.
- 1.14 Interspersed with these points, or at the bottom of the page, have a list of authorities, perhaps with a few key words to remind you of the salient facts. Be sure to include the full citations of cases, as you should give these unless the judges tell you that you may dispense with formal citations. One of the great skills in mooting is to be able to use authorities appropriately. Mooting should not be like an exam, where a proposition of law is simply stated and followed by an authority. Stating the legal proposition is a good idea, but that should then be immediately applied to the problem at hand. Use authorities to argue your case effectively by comparing the facts of cases to the facts of the problem. This demonstrates that you have an in-depth knowledge of the authorities and is a much more effective way of arguing your case.

Oral submissions

- 1.1 Generally, moots are run fairly formally and follow standard court protocol. Both teams (applicant/respondent or appellant/respondent) will assemble and set up prior to the competition. The entry of the judges will be announced, all present rise, and the judges enter the room. Judges will indicate that those present may be seated. There will then usually be a call for appearances. The senior counsel (first speaker) from the applicant will then rise, go to the podium and say something like, "Your Honours, my name is Jane Briggs and I appear with my learned co-counsel, Esmeralda Jones for the applicant".
- 1.2 The senior counsel for the respondent will then rise and do the same thing. It is also common in some competitions for senior counsel at this point to provide the judges with an estimate of the time that each competitor will speak for. Once appearances are given, the judges will call upon the first speaker for the applicant. S/he will present her or his arguments, followed by the second speaker for the applicant. Then each speaker for the respondent team will rise in turn and give their presentations. In some competitions, the applicant then has a short right of reply (rebuttal), and then the respondent may have a right of surrebuttal. Rebuttal should be concise and directed at a point raised by the respondent in its submissions. Surrebuttal must be confined to issues raised by the applicant in rebuttal.

Appearances

- 1.3 At the discretion of team members, Senior Counsel can make appearances for both and Junior counsel, e.g.: The Senior Appellant stands up and says 'Your honour my name is (SURNAME ONLY) and I appear with my learned colleague as Counsel for the Appellant, (PARTY YOU'RE REPRESENTING. The Senior Respondent will do the same. This is the only difference between Senior and Junior Counsel.
- 1.4 In the alternative, Senior and Junior Counsel can make their appearances separately.
 - 1.4.1 Senior Counsel for the Appellant will present his or her oral submissions.
 - 1.4.2 Junior Counsel for the Appellant will present his or her oral submissions.
 - 1.4.3 Senior Counsel for the Respondent will present his or her oral submissions.
 - 1.4.4 Junior Counsel for the Respondent will present his or her oral submissions.

- 1.4.5 The judge(s) will deliberate and comment on the competitors' performance.

Summary of the facts

- 1.5 Senior Counsel for the Appellant should ask the Judge whether they would like a brief summary of the facts of the case.
- 1.6 Other Counsel may choose to mention additional facts that support their case.

Introduction

- 1.7 Begin with an introduction which strongly summarises your case. Senior Counsel should also briefly outline what their Junior will be discussing, e.g.: 'Your honour my learned colleague will be addressing the issue of whether there was a breach of duty of care.' This way the judge will have a clear idea of who is discussing what and can decide which questions they wish to address to each Counsel.

Submissions

- 1.8 When concluding your introduction, try to link it to your submissions by saying something like 'Your Honour I would like to move on to along my first submission'
- 1.9 Then go through each point on your written submissions, making sure to apply the point to both the relevant facts of the case, supporting it with the relevant law
- 1.10 Ideally you would not use a speech while giving your submissions. For first time mooters, dot points should be used. As mooters gain experience, many end up speaking straight from their written submissions.
- 1.11 Remember the judge is marking you on your interaction and eye contact! You want to speak to the judge, not to your notes.

Questions

- 1.12 The judge(s) may ask you questions at any time during your moot so be prepared for at least a few minutes of questioning. Their questions may focus on your argument itself, or any cases that you (or even your opposition) have cited. It is a good idea to have a summary of each case that you are citing, including the facts, who the judges were, what the judges' final decisions were and why. If you did not hear a judge's question properly, simply ask them to repeat it: 'I'm sorry Your Honour, I did not quite hear your question, would you mind repeating it please?'
- 1.13 When a judge asks you a question, remember that it is not a personal attack, nor does it mean your submission was underdeveloped. Rather, it is the judge expressing a genuine interest in your law – treat it as the perfect opportunity to further explain your argument.

Citation of Authority

- 1.14 When you come to your first authority you should cite it in full, e.g. *Donoghue v Stevenson* [1932] AC 563 – Donoghue AND Stevenson in the 1932 volume of the Appeals Cases at page 563 OR *Civil Liability Act 1935* (SA).
- 1.15 After you have cited this first piece of authority in full, and finished the sentence pertaining to it, ask the judge(s)' permission to dispense with full citations. This means that you can then refer to the cases that are contained in your written submissions by just the parties' names, and the legislation by just its name (not year and jurisdiction).

1.16 Remember that in civil cases the 'v' is referred to as 'and' whereas in criminal cases the 'v' is referred to as 'against'.

1.16.1 e.g. Civil – Donoghue AND Stephenson

1.16.2 e.g. Criminal – The Queen (R) AGAINST Brown

Conclusion

1.17 Once you have finished your submissions you should strongly summarise your main argument, and ask the judges whether they have any further questions. E.g.: 'If the Court has no further questions, this concludes the submissions of Senior Counsel for the Appellant'

Timing

1.18 If the judge asks you a question just before your time is up, request an extension of time to properly answer their question, rather than just going over time. Say something like: 'If it pleases Your Honour, may I have a few extra minutes to complete my submissions/answer your question?'

1.19 Note: the judge(s) has full discretion about whether or not they extend your time limit. If you go over time, you will be penalised.

Tips & Techniques

Appropriate Language

1.1 Moots are formal, you are expected to dress in business attire.

1.2 Make sure you are as polite as possible.

1.3 Refer to a single judge as 'Your Honour', and multiple judges as 'Your Honours'.

1.4 Never say 'I think'. Use 'I submit'; 'the Appellant submits'; 'Counsel for the Appellant submits'; 'it is submitted'.

1.5 Refer to your partner as 'my learned colleague'

1.6 Refer to your opposition as Counsel for the Appellant/Respondent

1.7 Have in mind the weaknesses of your case and be prepared to concede to them or overcome them

1.8 Speak at a relatively slow pace, do not rush, otherwise the judge cannot understand

Things to avoid

1.9 Read your written submissions or your notes.

1.10 Wander from the lectern.

- 1.11 Interrupt other counsel.
- 1.12 Say 'I think'; 'I believe' or 'In my opinion'.
- 1.13 Forget to answer (or avoid answering) questions from the judge(s).
- 1.14 Attribute opinions or arguments to the Bench.
- 1.15 Use unnecessary humor.
- 1.16 Refer to a case you have not read thoroughly.
- 1.17 Try to be sarcastic.
- 1.18 Repeat an argument unnecessarily.
- 1.19 Argue with the Bench.
- 1.20 Be intimidated by the Bench.
- 1.21 Show any enmity or discourtesy to other counsel.
- 1.22 Interrupt the judge(s).
- 1.23 Play with a pen or your hair.
- 1.24 Shuffle your papers unnecessarily.

Developing advocacy skills

- 1.25 Try not to be too attached to your written submissions or to a set speech; it is much more important to be flexible and be able to maintain a conversational dialogue with the bench. Rarely will a speaker be free to follow her or his submissions as though giving a speech. Most judges will be proactive in asking questions and moving speakers from one point to the next. The ability to think quickly on one's feet and answer questions is a crucial skill for mooters.
- 1.26 It is always important to listen carefully to the question being asked, and to respond as clearly and concisely as possible. If the answer to a question is unknown, it is best to say, "I am sorry, I am unable to help Your Honour on that point". Lying, or trying to "bluff" an answer can be very dangerous, particularly if the judge knows the answer to the question already! There is nothing wrong with taking a moment to think about the answer before giving it. Try to formulate at least the structure of your answer before delivering it, as this will help to keep your answers concise and avoid unnecessary rambling.
- 1.27 Remember that the moot court is a mock court room and necessary formalities should be adhered to. Always address the bench appropriately, and never be upset or overly aggressive with the bench if they are asking questions.
- 1.28 Although often it will seem that judges are being difficult in asking so many questions, they are really just trying to judge your ability and your knowledge of the topic. Remaining calm and answering questions fluently and patiently demonstrates that you are in control of your submissions and have a good grasp of the legal concepts involved.
- 1.29 Above all, try to relax and have fun! Mooting can be difficult and challenging but it can also be very rewarding. It will help you to develop a range of skills as well as giving you

the opportunity to travel and meet lots of interesting people.

Sample Problem

**IN THE SUPREME COURT OF WESTERN AUSTRALIA
COURT OF APPEAL**

NO CIV 330 OF 2005

B E T W E E N:

ALANA RAMSAY Appellant

- and -

COFFEE GALORE PTY LTD Respondent

STATEMENT OF AGREED FACTS

1. Alana Ramsay decides to open a café in the Perth CBD. She negotiates to buy a cappuccino machine from Coffee Galore Pty Ltd (CG). Alana is particularly anxious to

ensure that the service she will provide to patrons of the café will be quick. She therefore tells Nico Rossi, the manager of CG that the machine must be able to produce a cappuccino in under three minutes.

2. CG imports and sells Italian cappuccino machines to the trade as well as to private customers. Nico tells Alana that “the only machine currently in stock which will probably work that fast is the CU 01”. Nico informs Alana that this model has been superseded and is no longer being manufactured, and it will be six weeks before any current models arrive in Australia. Nico shows Alana a brochure prepared by the manufacturer, Casa Umbria, which amongst other things describes the CU 01 as “the rocket”.
3. Alana decides to buy the CU01. It costs \$42,000. After using it for a month it becomes clear to Alana that the minimum time for a cappuccino to be ready using the machine is 6 minutes. She is disappointed but decides not to make any complaint to Nico as the business is doing well. A couple of days later, Alana is injured while making a cappuccino for a customer. She sustains facial burns when a sudden burst of steam issues from the machine. A metal label on the front of the machine contains the following words: “Warning! Operators need to be aware of occasional steam emissions”. It is not unusual for cappuccino machines of this sort to emit steam occasionally as part of their cooling mechanism. Manufacturers have no way of controlling this.
4. Alana is taken to hospital for treatment for her third degree burns. Her pain is compounded by the fact that, in her absence, she knows customers will inevitably be lost. She also remembers that the machine never worked as fast as she had stipulated and this makes her more upset. Two weeks later she decides to close the café as she doesn’t know when she will be able to return and her losses are mounting.
5. She is advised to consider her legal options. When Alana examines the contract of sale for the CU 01, she notices a clause, clause 8 which limits CG’s liability to replacement or supply of equivalent goods.
6. Alana commences proceedings in the WA District Court to recover damages in the sum of \$100,000 for losses and loss of profits, incurred by her business, from CG. She alleges that CG is in breach of the implied conditions that goods must be fit for their purpose and be of merchantable quality, under s71(1) and 71(2) of the Trade Practices Act. In addition, she alleges the product is defective, according to s 75AC of the TPA.
7. The trial judge, Weighbury DCJ, found for CG on both causes of action: “I turn first to the implied conditions in s71(1)& 71(2). Counsel for CG has argued that even if there were a breach of the implied conditions, liability is limited by clause 8. I agree. As the sale of the cappuccino machine was not a consumer transaction, the implied conditions in Division 2 of Part V of the Trade Practices Act 1974 (Cth) are inapplicable. Rather the implied conditions in s14(i) & (ii) of the Sale of Goods Act 1895 (WA) are relevant. According to this Act, liability for breach of the implied conditions can be modified or indeed excluded. Counsel for CG has also argued that the machine is not defective, within the meaning of s75AC of the Trade Practices Act, because of the warning on the label. I agree. Labels on products are affixed for a purpose and this label was clear and visible”
8. Alana appeals to the Western Australian Court of Appeal.
9. The grounds of her appeal are as follows:
 - a. The learned trial judge erred in finding that the contract of sale between Alana Ramsay and CG was not a consumer transaction; and

- b. The learned trial judge erred in failing to find the cappuccino machine defective.

Sample Submission

IN THE SUPREME COURT OF WESTERN AUSTRALIA

Moot No.5 of 2009

BETWEEN:

ALANA RAMSAY

Appellant

-and-

COFFEE GALORE PTY LTD

Respondent

Alana appeals against the trial judge's finding that the contract for sale between Alana and Coffee Galore was not a consumer transaction for the purposes of the *Trade Practices Act 1974 (Cth)*, and that the cappuccino machine was not a defective product.

Dated this Thirteenth day of May 2009.

(Insert Name)

Senior Counsel for Appellant

(Insert Name)

Junior Counsel for Appellant

APPELLANT'S LIST OF AUTHORITIES

1. *ACCC v Glendale Chemical Products Pty Ltd* [1998] FCA 180
2. *Atkinson v Hastings Deering (QLD) Pty Ltd* (1985) 6 FCR 331
3. *Baresic v Slingshot Holdings Pty Ltd* [2004] NSWCA 464
4. *Begbie v State Bank of NSW Ltd* (1994) ATPR 41-288
5. *Bunnings Group Ltd v Laminex Group Ltd* [2006] FCA 682
6. *Carey-Hazell v Getz Bros (Aust) Pty Ltd* [2004] FCA 853
7. *Carpet Call Pty Ltd v Chan* (1987) ATPR (Digest) 46-065
8. *Cavalier Marketing v Rasell* [1991] 2 Qd R 323
9. *Crago v Multiquip Pty Ltd & Dunogan Farm Tech Pty Limited* (1998) ATPR 41-620
10. *David Jones v Willis* (1934) 52 CLR 110
11. *E v Aus Red Cross Society* (1991) 27 FCR 310
12. *Jillawarra Grazing Co v John Shearer Ltd* (1984) ATPR 40-441
13. *Lambert v Lastoplex Chemicals Co Ltd* [1972] SCR 529
14. *Martin v Stratman* (1994) Aust Torts Reports 81-262

15. *Medtel Pty Ltd v Courtney* (2003) 130 FCR 182
16. *Minchillo v Ford Motor Co of Australia Ltd* [1995] 2 VR 594
17. *Nea Pty Ltd v Magenta Mining Pty Ltd* [2005] WASC 106
18. *Trade Practices Act 1974* (Cth)
19. *Vosten v Commonwealth* [1989] 1 Qd R 693
20. *Walker v Bletchley Flettons Ltd* [1937] 1 All ER 170
21. *Webb Distributors (Aust) Pty Ltd v Victoria* (1993) 179 CLR 15
22. *White v Malco* [1999] NSWSC 1055

APPELLANT'S SUMMARY OF FACTS

1. Alana Ramsay decides to open a café in the Perth CBD. She negotiates to buy a cappuccino machine from Coffee Galore Pty Ltd (CG). CG import and sell Italian cappuccino machines to the trade as well as to private customers.
2. Alana is particularly anxious to ensure that the service she will provide to patrons of the café will be quick. Alana therefore told Nico Rossi, the manager of CG, that the machine must be able to produce a cappuccino in under three minutes.
3. Nico tells Alana that *"the only machine currently in stock which will probably work that fast is the CU 01"*
4. Nico informs Alana that this model has been superseded and is no longer being manufactured, and it will be six weeks before any current models arrive in Australia. Nico shows Alana a brochure prepared by the manufacturer, Casa Umbria, which amongst other things describes the CU 01 as *"the rocket"*.
5. Alana decides to buy the CU 01. It costs \$42,000. After using it for a month it becomes clear to Alana that the minimum time for a cappuccino to be ready using the machine is 6 minutes. She is disappointed but decides not to make any complaint as business is doing well.
6. A few days later, Alana is injured while making a cappuccino for a customer. She sustains facial burns when a sudden burst of steam issues from the machine.
7. A metal label on the front of the machine contains the words *"Warning! Operators need to be aware of occasional steam emissions"*. It is not unusual for cappuccino machines of this sort to emit steam occasionally as part of their cooling mechanism. Manufacturers have no way of controlling this.
8. Alana is taken to hospital for treatment for her third degree burns. Her pain is compounded by the fact that, in her absence, she knows customers will inevitably be lost. She also remembers that the machine never worked as fast as she had stipulated. Two weeks later Alana closes the café as she doesn't know when she will be able to return and her losses are mounting.

APPELLANT'S SUBMISSIONS

1. The trial judge erred in finding that the appellant was not a consumer as defined by s 4B of the *Trade Practices Act 1974* (Cth).
2. As a consequence of this error, the appellant was wrongfully disallowed of a cause of action under s 71(2) of the *Trade Practices Act 1974* (Cth).
3. Further, and in the alternative, the appellant was wrongfully disallowed of a cause of action under s 71(1) of the *Trade Practices Act 1974* (Cth).
4. The trial judge erred in failing to find that the cappuccino machine was defective under s 75AC of the *Trade Practices Act 1974* (Cth). The machine was defective in its design and formulation. The risk created by the design and formulation of this product was unreasonable.
5. Further, and in the alternative, the cappuccino machine was defective under s 75AC of the *Trade Practices Act 1974* (Cth), as there was a defect in information. This defect occurred by reason of the failure to adequately warn of the risk.

The submissions are supported by the following:

Submission One

1. The trial judge erred in finding that the appellant was not a consumer as defined by s 4B of the *Trade Practices Act 1974* (Cth).
 - 1.1 Where the price of the goods exceeds the prescribed amount of \$40,000, a person shall be taken to have acquired particular goods as a consumer for the purposes of the Act, if the goods were:

“ of a kind ordinarily acquired for personal, domestic or household use or consumption...”

Trade Practices Act 1974 (Cth) s 4B(1)(a)(ii)

- 1.2 The statutory definition of 'consumer' should be construed broadly, so as to give the fullest effect to the remedial, protectionalist nature and object of the Act.

Webb Distributors (Aust) Pty Ltd v Victoria (1993) 179 CLR 15, 41 per McHugh J
Bunnings Group Ltd v Laminex Group Ltd [2006] FCA 682, 76

- 1.3 The term 'ordinarily' means 'commonly' or 'regularly', and not 'principally' or 'exclusively'.

Bunnings Group Ltd v Laminex Group Ltd [2006] FCA 682, 81

- 1.4 Goods may be 'of a kind ordinarily acquired for personal, domestic or household use', even if goods of the same kind are acquired for business use in the majority of cases.

Crago v Multiquip Pty Ltd (1998) ATPR 41-620

- 1.5 Where goods are characterised as 'of a kind ordinarily acquired for personal, domestic or household use', they do not lose that description merely by reason of a commercial rating or quality.

Carpet Call Pty Ltd v Chan (1987) ATPR (Digest) 46-065, 53,072 per Thomas J

- 1.5 As goods become more widely available on the market, those goods may become more readily acquired for 'personal, domestic or household' uses. Where there is nothing other than price that would make them unsuitable for such purposes, goods may still be considered to be 'of a kind' acquired for personal, domestic or household uses.

Bunnings Group Ltd v Laminex Group Ltd [2006] FCA 682, 111-112

- 1.7 Applying the law to the facts, the CU 01 cappuccino machine constituted a good 'of a kind ordinarily acquired for personal, domestic or household use', despite being purchased for a commercial purpose. The appellant satisfies the definition of a consumer within the meaning of the *Trade Practices Act 1974* (Cth) s 4B.

Carpet Call Pty Ltd v Chan (1987) ATPR (Digest) 46-065

Submission Two

2. As a consequence of this error, the appellant was wrongfully disallowed of a cause of action under s 71(2) of the *Trade Practices Act 1974* (Cth).

- 2.1 Where a corporation supplies goods to a consumer in the course of a business, and the consumer, expressly or by implication, makes known to the corporation or to the person by whom any antecedent negotiations are conducted, any particular purpose for which the goods are being acquired, there is an implied condition that the goods are reasonably fit for that purpose

Trade Practices Act 1974 (Cth) s 71(2)
Cavalier Marketing v Rasell [1991] 2 Qd R 323

- 2.2 There was sufficient disclosure by the appellant, who made it expressly known to the respondent that the cappuccino machine must be able to produce a cappuccino in under three minutes. The machine was not in fact fit for that purpose.

Carpet Call Pty Ltd v Chan (1987) ATPR (Digest) 46-065

- 2.3 The implied condition that goods are reasonably fit for that purpose applies, whether or not that is a purpose for which such goods are commonly supplied.

Trade Practices Act 1974 (Cth) s 71(2)

- 2.4 It was reasonable of the appellant to rely on the skill and judgement of Nico Rossi, in his capacity as the manager of a specialist importer of cappuccino machines.

David Jones v Willis (1934) 52 CLR 110

- 2.5 Had the appellant correctly been classified as a consumer, she would have been entitled to damages for breach of the implied condition of fitness for purpose

Submission Three

3. Further, and in the alternative, the appellant was wrongfully disallowed of a cause of action under s 71(1) of the *Trade Practices Act 1974 (Cth)*.

- 3.1 Where a corporation supplies goods to a consumer in the course of business, there is an implied condition that the goods are of merchantable quality.

Trade Practices Act 1974 (Cth) s 71(1)

- 3.2 Goods are of merchantable quality if they are as fit for the purpose or purposes for which goods of that kind are commonly bought, as is reasonable to expect having regard to any description applied to them, the price and all other relevant circumstances.

Trade Practices Act 1974 (Cth) s 66(2)

- 3.3 The CU 01 cappuccino machine was not of merchantable quality, by reason of unreasonable risk of injury. Although it is not unusual for cappuccino machines to emit steam occasionally as part of the cooling mechanism, the ordinary operation of the CU 01 is associated with an appreciably higher risk of injury, given its propensity to spontaneously discharge in the face of the operator.

Medtel Pty Ltd v Courtney (2003) 130 FCR 182

- 3.4 A good will not be reasonably fit if it contains some defect which would be a source of potential danger to someone using it. The cappuccino machine constituted a source of potential and unacceptable danger to anyone who may have used it.

White v Malco [1999] NSWSC 1055, 573 per James J

- 3.5 Had the appellant been correctly classified as a consumer, she would have been entitled to damages for breach of the implied condition of merchantability.

Submission Four

4. The trial judge erred in failing to find that the cappuccino machine was defective under s 75AC of the Trade Practices Act 1974 (Cth). The machine was defective in its design and formulation. The risk created by the design and formulation of this product was unreasonable.

- 4.1 For the purposes of Part VA of the *Trade Practices Act 1974* (Cth), the appellant does not need to be classified as a 'consumer' under s 4B of the act.

Trade Practices Act 1974 (Cth) s 75AA

- 4.2 The manufacturer is not represented in Australia. Therefore, as the importer, the respondent is liable as the manufacturer.

Trade Practices Act 1974 (Cth) s 75AB

- 4.3 Goods are defective if their safety is not such as persons are entitled to expect with regard to all the relevant circumstances. In this regard, the good supplied by the respondent was inherently defective.

Trade Practices Act 1974 (Cth) s 75AC(1) , (2)

ACCC v Glendale Chemical Products Pty Ltd [1998] FCA 180

Martin v Stratman (1994) Aust Torts Reports 81-262

- 4.4 A defect which is introduced advertently into a product as a consequence of an error in judgement at the stage of product conception, design or formation, which creates a risk of product-related loss or damage, for persons acting in a way in which they may reasonably be expected to act, in circumstances which may reasonably be expected to occur, constitutes a defect in design or formulation.

Vosten v Commonwealth [1989] 1 Qd R 693

Walker v Bletchley Flettons Ltd [1937] 1 All ER 170

- 4.5 This defect in design and formulation caused the appellant to suffer serious physical injury, which resulted in financial loss. The respondent is therefore liable for the loss suffered as a result of the appellant's injuries.

Trade Practices Act 1974 (Cth) s 75AD

Carey-Hazell v Getz Bros (Aust) Pty Ltd [2004] FCA 85

Submission Five

5. Further, and in the alternative, the cappuccino machine was defective under s 75AC of the Trade Practices Act 1974 (Cth), as there was a defect in information. This defect occurred by reason of the respondent's failure to adequately warn of the risk.

- 5.1 An error or omission in the information provided with a product, which prevents safe or effective use of the product is a defect in information. The respondent failed to adequately warn of the risk. This defect prevents an adequate level of safety which the community is entitled to expect.

Trade Practices Act 1974 (Cth) s 75AC(1), (2)

ACCC v Glendale Chemical Products Pty Ltd [1998] FCA 180

Baresic v Slingshot Holdings Pty Ltd [2004] NSWCA 464

- 5.2 The greater the inherent risks in using a product, the greater the duty to warn, particularly where the product is being marketed to ordinary members of the public.

Lambert v Lastoplex Chemicals Co Ltd [1972] SCR 529

- 5.3 This defect in information caused the appellant to suffer serious physical injury which resulted in financial loss. The respondent is therefore, liable for the loss suffered as a result of the appellant's injuries.

Trade Practices Act 1974 (Cth) s 75AD

- 5.4 In addition, information provided with a product will not necessarily operate to break the causal link, where it can be said that the design or formulation of the product is unreasonable

Martin v Stratman (1994) Aust Torts Reports 81-262

On the basis of the above submissions, Counsel for the appellant respectfully requests an Order from the Court, to reverse the decision of the trial judge, and an award for damages in the amount of \$100,000.

END OF APPELLANT'S SUBMISSIONS