



University of Newcastle Law Students' Association

Senior Mooting Competition

2022 COMPETITION HANDBOOK

2022 Senior Mooting Competition

Why Should You Enter?

The UNLSA holds mooting competitions to complement your legal education, increase your engagement with the Law School, and to find the best students to represent the University of Newcastle at a national level.

Contacts

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Appendix

1. Mooting Marking Guide; and
2. Sample Standard Form Memorandum of Argument and List of Authorities.

Competition Rules

1. Purpose of the Competition

- 1.1. The University of Newcastle Law Students' Association (**UNLSA**) has established a Competitions Portfolio to provide as many students as possible with the opportunity to gain valuable practical skills by competing in Educational Competitions and to further the UNLSA's interests. The UNLSA and the Director(s) of Competitions (Advocacy) will at all times endeavour to uphold this purpose by promoting involvement, sportsmanship and excellence in educational competitions.
- 1.2. It is the UNLSA's position that where the implementation of any rule or procedure would be inconsistent with the overarching purpose outlined in this Rule 1, that rule or procedure should not be implemented. An alternative course of action may be determined by the Director(s) of Competitions (Advocacy) in order to uphold the purpose of the Competition.
- 1.3. Please be aware that it is the responsibility of each competitor to be familiar with the rules of this competition.

2. Competition Structure

- 2.1. The structure of the Competition and the way in which it is conducted may be subject to change to accommodate the exigencies of public health circumstances. Participants will be notified via email if any such changes occur.
- 2.2. The Competition may consist of two preliminary rounds, one or more quarter-final rounds, one semi-final round and one grand-final.
- 2.3. The number of rounds held will be at the discretion of the Director(s) of Competitions (Advocacy) and will be dependent on competitor numbers.
- 2.4. Preliminary Round Procedures:
 - 2.4.1. If an odd number of teams enter the Competition, one of the following resolutions is to be adopted:

- 2.4.1.1. A bye will be declared for each round (the bye will be allocated randomly by the Director(s) of Competitions (Advocacy));
 - 2.4.1.2. One team to compete ex parte; or
 - 2.4.1.3. There will be a three-way moot.
- 2.4.2. The procedure to be adopted in 2.3.1. is at the discretion of the Directors of Competitions (Advocacy).
- 2.4.3. Opposing sides are randomly matched by the Director(s) of Competitions (Advocacy).
- 2.5. At the end of the preliminary rounds, each team's score is totalled and their win/loss ratio calculated. The eight teams with the highest win/loss ratios are the quarter-finalists.
 - 2.5.1. In the event that only two teams have tied win-loss ratios, and the two teams have faced each other in the preliminary rounds, then the winner of that round shall proceed to the semi-finals.
 - 2.5.2. In the event that two teams referred to in 2.4.1 have not faced each other, or there are more than two teams with tied win/loss ratios, the team or teams will progress on the basis of the highest average winning margins.
 - 2.5.3. If the teams referred to in 2.4.2 remained tied, the teams will progress based on a coin toss conducted by the Director(s) of Competitions (Advocacy).
- 2.6. Semi-Final Procedures:
 - 2.6.1. Teams will be allocated to sides randomly.
 - 2.6.2. The winner of each semi-final will progress to the grand final.

2.7. Notification of winners:

- 2.7.1. Teams progressing through the preliminary and semi-final rounds will be notified via email.
- 2.7.2. The winner of the grand final will be announced immediately after the grand final takes place.

3. Competitors

- 3.1. Subject to Clause 3.2, each team may consist of a maximum of three competitors.
 - 3.1.1. The team of three will consist of one Senior Counsel, one Junior Counsel and one Solicitor.
 - 3.1.2. Only two team members are required to be present at each Mooting round, but it is encouraged that all three members of the team be present for each round.
 - 3.1.3. Team members may swap roles amongst themselves from round to round, if they wish.
- 3.2. A team may consist of a single Competitor or two Competitors at the discretion of the Vice President (Competitions). The single Competitor will perform the roles of both Senior Counsel and Junior Counsel as a single Counsel.
- 3.3. Each team member must be a member of the UNLSA.
- 3.4. All competitors must be either a third year or higher undergraduate student, or a second year or higher Juris Doctor student of the University of Newcastle Law School.
- 3.5. Teams must register by the registration date as set by the Director(s) of Competitions (Advocacy). The Director(s) of Competitions (Advocacy) may apply penalties for late registration at their discretion.
- 3.6. Where one team member cannot compete in a particular round due to extenuating circumstances, the Director(s) of Competitions (Advocacy)

may at their discretion permit substitution. All decisions as to whether substitution will be permitted will be made with reference to section 1 of these rules. Substitution is not available for teams consisting of a single Competitor.

- 3.6.1. In deciding whether to permit substitution, the Director(s) of Competitions (Advocacy) may consult with the Competitions Appeals Board, or any or all members of the UNLSA Executive.
- 3.6.2. Any member of the UNLSA Executive who is also a competitor should not be consulted by the Director(s) of Competitions (Advocacy) during the decision-making process.
- 3.6.3. Where an entire team is unable to compete for a particular round, that team will no longer be permitted to continue with the competition.
- 3.6.4. It is at the discretion of the Director(s) of Competitions (Advocacy) to make any exceptions to rule 3.5.3.

4. Withdrawal and Forfeiture

- 4.1. Where a team is unable to compete for a particular round, that team must communicate this decision as soon as possible to the Director(s) of Competitions (Advocacy).
 - 4.1.1. If communication occurs earlier than 48 hours prior to the commencement of that round (unless exceptional circumstances exist and the team wishes to continue participating), that team will be taken to have withdrawn and will no longer be permitted to continue with the competition.

NOTE: “exceptional circumstances” will be examined on a case-by-case basis.
 - 4.1.2. Where one team member cannot compete in a particular round due to extenuating circumstances, the Director of Competitions (Advocacy) may, at their discretion, permit substitution. All

decisions as to whether substitution will be permitted will be made with reference to section 1 of these Rules. Substitution is not available for teams consisting of a single Competitor.

- 4.1.3. In deciding whether to permit substitution, the Director of Competitions (Advocacy) may consult with the Competitions Appeals Board, or any or all members of the UNLSA Executive.
- 4.1.4. Any member of the UNLSA Executive who is also a competitor should not be consulted by the Director of Competitions (Advocacy) during the decision- making process.
- 4.2. Any team which forfeits shall be excluded from progressing in the competition.
 - 4.2.1. A forfeit will be considered to have occurred where a team withdraws later than 48 hours prior to the commencement of that round of competition.
 - 4.2.2. The forfeiting team will be deemed to have a mark of zero for that round.
 - 4.2.3. Any team whose opponent forfeits a round will be deemed to have won that round. The team's margin will be the average of their margins from the other rounds.
 - 4.2.4. It is at the discretion of the Director(s) of Competitions (Advocacy) to make any exceptions to rule 4.2, including any rules therein.

5. Release of Questions

- 5.1. Mooting scenarios for the preliminary rounds will be released via email at least one week prior to the start of the Competition.
- 5.2. The same question will be used for all rounds.
- 5.3. The draw for the preliminary round(s) will be released at the same time, and teams will be informed at this time whether they will be appearing as counsel for the appellant or respondent.

- 5.4. Legal background material may also be provided to participants if considered by the Director(s) of Competitions (Advocacy) to be necessary.
- 5.5. There should be no communication between teams regarding the Mooting Competition after the information has been released.
 - 5.5.1. Any breach of Rule 4.5 may result in a penalty or disqualification at the discretion of the Director(s) of Competitions (Advocacy).

6. Preparation and Research

- 6.1. All research and preparation for the moots must be conducted solely by team members.
 - 6.1.1. Any team who receives outside assistance may be disqualified from the moot, at the discretion of the Director(s) of Competitions (Advocacy).
- 6.2. Unless otherwise stated, all moots will be heard as if before the Supreme Court of New South Wales.
- 6.3. The Jurisdiction to hear the case will be assumed.
- 6.4. Procedural submissions must not be made during the moot.
- 6.5. Lists of materials may be issued with any Preliminary Round question and are intended as a guide only. Moots may use additional cases at their discretion.
- 6.6. Where issues to be argued include legislation, this will be specifically referred to in the moot problem or list of materials. Otherwise, argument is limited to the common law.

7. Witness Submissions

- 7.1. Teams will be required to submit a Memoranda of Argument for each round of the competition.

- 7.2. Competitors must prepare the number of hard copies of their Memorandum of Argument specified by the Director(s) of Competitions (Advocacy) and must send an electronic copy to advocacy@unlsa.com (either .doc, .rtf or .pdf format), or their nominee, as well as any known opposing team(s).
 - 7.2.1. Copies must be submitted in accordance with Rule 6.2 twenty-four (24) hours prior to the commencement of each moot.
 - 7.2.2. Teams must supply three (3) copies of their Memorandum of Argument to the Director(s) of Competitions (Advocacy).
 - 7.2.3. At least one (1) copy must be provided to the opposing team with the remaining copies to be distributed among the judge(s) of that moot.
 - 7.2.4. The requirement to provide hard copies of Memoranda of Argument may be waived at the discretion of the Vice President (Competitions) where the Competition is held virtually.
 - 7.2.5. Penalties apply if Memoranda of Argument are submitted late (See Rule 10.1.2).
- 7.3. The Memoranda of Argument must contain an outline of the structure of the team's submissions, major arguments to be raised, allocations of speaking time and a list of authorities on which Counsel rely.
- 7.4. Each team must format their Memoranda of Argument in accordance with the standard submission in these rules (See Appendix 2 - Sample Standard Form Memorandum of Argument and List of Authorities).

8. The Moots

- 8.1. Counsel will not robe.
- 8.2. After formal appearances, each team will have thirty (30) minutes to present their case.

8.2.1. Presentation time may be divided between Senior and Junior Counsel in one of the following ways:

8.2.1.1. 20/10;

8.2.1.2. 15/15; or

8.2.1.3. 10/20.

8.2.2. The division of time outlined in 8.2.1 and any other reference to divisions of time between Senior and Junior Counsel in this document shall refer to the division of time between appeal points where a team consists of a single Competitor.

8.2.3. It is at the discretion of the Director(s) of Competitions (Advocacy) to allow any exceptions to rule 8.2.1.

8.2.4. The nominated division of time must be specified in the written submissions.

8.3. Judges may grant an extension of time of up to five (5) minutes per competitor. There will be no right of reply and penalties apply if Counsel exceeds their allocated or extended time.

8.3.1. A competitor must stop speaking when asked to do so by a judge.

8.4. Nothing may be handed up to the judge(s).

9. Judging

9.1. Each preliminary round will be observed and evaluated by a single judge.

9.2. Each semi-final or grand final will be evaluated by a single judge or a panel of three judges.

9.3. Judges will be legal practitioners, professionals, Newcastle Law School staff or senior students with mooting experience.

9.3.1. Where a senior student is serving as a judge, s/he may not judge a team from his/her year.

9.4. Judges are to have access to all simulation materials provided to participants.

9.5. The judge(s) will evaluate the performance of the participants according to the criteria provided.

9.5.1. Teams are strongly encouraged to have regards to the marking schedule when preparing for the moot.

9.6. Each judge will award every individual a mark out of one hundred (100). These marks will be allocated as follows:

Organisation of presentation	10 marks
Written submissions	10 marks
Development of argument	25 marks
Questions from the bench	30 marks
Speaking ability and delivery	25 marks
Total	100 marks

9.7. The judge(s) must award each competitor a different score; no draws are possible. Where there is more than one judge, judges will be asked to produce one (1) set of scores between them.

10. Penalties

10.1. The following penalties apply:

10.1.1	Continuation of oral submissions beyond the time limit without the judge's express permission	After twenty (20) seconds have elapsed, two (2) marks for every
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		minute or part thereof.
10.1.2	Late submission of written Memorandum of Argument	Two (2) marks for every ten (10) minutes late or part thereof.
10.1.3	If a competitor is more than five (5) minutes late for the commencement of their round of competition	Two (2) points per five (5) minutes or part thereof shall be deducted from their team's score for that round.
10.1.4	If a competitor cites authority or argument that is not outlined within their written submissions or within a mandatory case list without seeking leave to introduce this information from the Judge(s)	Two (2) marks per authority.
10.1.5	If a competitor or team observes or is briefed concerning a Round in which they are not competing	Disqualification.
10.1.6	If the allocation of speaking time is not included within written submissions	Two (2) marks per team.

10.2. Where a penalty is levied against a team, the penalty will be divided equally amongst counsel for that team.

10.2.1. Where a competitor is disqualified, their team will be able to continue in their competition provided that two (2) team members remain in the team.

10.3. Where possible, judges shall not be notified of the application of any of these penalties at any time.

- 10.3.1. If a Judge becomes aware that a penalty has been or will be applied, they will be instructed not to take this penalty into consideration when marking the competitors.
- 10.3.2. Judges do not have the discretion to dispense with these penalties.
- 10.4. The Director(s) of Competitions (Advocacy) has full discretion as to the application of these penalties.
- 10.5. The Director(s) of Competitions (Advocacy) also has discretion as to the deduction of marks or disqualification of a competitor or team for any serious breach of the Rules that is not covered elsewhere or within Rule 9.

11. Appeal Process

- 11.1. A two-stage appeals process exists for decisions made in relation to the Competition.
- 11.2. The first stage (Stage One) of appeal must be made to the Vice President (Competitions). Should a second stage (Stage Two) of appeal be commenced then the appeal will be reviewed by the Competition Appeals Board.
- 11.3. Appeals should only be made where the issue has first been raised with the Director(s) of Competitions (Advocacy).
- 11.4. Appeals may only be made where they relate to matters other than the decisions of competition judges on the basis of merit. Decisions of judges may not be appealed.
- 11.5. The Competition Appeals Board will consist of two academic members of Law School Staff and the UNLSA President, or his/her nominee. Where possible, the academic members of the Competition Appeals Board will be the coordinators of the Competitive Mooting directed course or have an academic interest in competitions.
- 11.6. Decisions made by the Competition Appeals Board are final and may not be appealed.

11.7. The Procedure of Appeals

- 11.7.1. When wishing to appeal, the competitor(s) will notify the Directors of Competitions (Advocacy) by email within six hours of the issue arising. The notification should contain the following:
 - 11.7.1.1. Identification of the competition (name, date, time, and parties);
 - 11.7.1.2. Grounds of appeal or grievance or complaint;
 - 11.7.1.3. Arguments supporting the need for review or resolution; and
 - 11.7.1.4. Suggested outcomes.
- 11.7.2. The Directors of Competitions (Advocacy) will then notify the Vice President (Competitions). The Vice President (Competitions) has the power to:
 - 11.7.2.1. Grant the appeal;
 - 11.7.2.2. Dismiss the appeal; or
 - 11.7.2.3. Direct the appeal to the Competitions Appeals Board.
- 11.7.3. The Vice President (Competitions) must inform the person or team appealing of the outcome of the appeal by email.
- 11.7.4. Following a decision being handed down by the Vice President (Competitions), the person or member of the appealing team who lodges the original appeal may further appeal to the Competition Appeals Board within 24 hours of the Vice President(Competitions)' decision being handed down.
- 11.7.5. They are to email their Stage Two appeal to the Vice President (Competitions) along with a notification written by that person containing the following:

- 11.7.5.1. Justification for a review of the decision on grounds other than merit; and
- 11.7.5.2. Suggested outcomes.
- 11.7.6. The appeal will then be forwarded to an academic staff member of the Competition Appeals Board who will determine its appropriateness for review by the full Competition Appeals Board.
- 11.7.7. In determining the appeal, the Competition Appeals Board will consult the Director(s) of Competitions (Advocacy). The Competition Appeals Board may also consult any or all members of the UNLSA Executive, or any other person(s) deemed necessary.
 - 11.7.7.1. Any member of the UNLSA Executive who is also a competitor should not be consulted by the Competitions Appeals Board during the appeals process.
- 11.7.8. The Competitions Appeals Board will notify the Director(s) of Competitions (Advocacy) of their decision, who will then notify the competitor(s).

12. Competitions Blacklist

- 12.1. The Competitions Blacklist (found in UNLSA By-Law 47) will be enforced throughout the competition. By-Law 47 has been reproduced below.

47. Competitions Blacklist

1. The Vice President (Competitions) is to create and maintain a Competitions Blacklist.
2. Any member added to the Competitions Blacklist will not be permitted to:
 - a. compete in any internal competition;
 - b. be selected for an external competition; and
 - c. receive a subsidy from the Association to attend an external competition.
3. The Competitions Blacklist must provide blacklisted member's:
 - a. name;
 - b. student number;

- c. date blacklisted;
 - d. period of blacklisting; and
 - e. reason(s) for blacklisting.
4. The Vice President (Competitions) may add a member to the Competitions Blacklist where that member:
 - a. withdraws from an internal competition outside of the dates prescribed by the relevant competition directors;
 - b. is disqualified from an internal competition; or
 - c. refuses or fails to attend preparations for an external competition that they have been selected for; and
 - d. fails to provide a reasonable excuse for doing so.
 5. If the Vice President (Competitions) adds a member to the Competitions Blacklist, they must provide that member with written notice within reasonable time of doing so, which details:
 - a. the effect of blacklisting;
 - b. the reasons for adding them to the Competitions Blacklist;
 - c. the duration that they have been blacklisted for;
 - d. the date that the blacklisting will expire; and
 - e. how they may appeal the decision.
 6. A member who is added to the Competitions Blacklist may appeal the decision within seven days of receipt of written notice of their suspension by sending written notice to the Vice President (Administration).
 - a. Such notice should detail the reasons why the member believes that the blacklisting or duration of the blacklisting is inappropriate.
 7. Within reasonable time following receipt of a written notice to appeal, the Vice President (Administration) is to notify the Executive of the appeal who may:
 - a. dismiss the appeal if it is vexatious or without merit; or
 - b. convene a Committee Meeting within the next 28 days where the Committee will decide the appeal.
 - i. If the Committee is to decide the appeal, the Vice President (Administration) is to provide the relevant member of written notice of that decision, and invite them to that Committee Meeting.
 8. At a Committee Meeting where a Competitions Blacklisting Appeal is to be decided:
 9. The Vice President (Competitions) is to provide a short explanation of the reasons for the Blacklisting;
 - a. The relevant Member is to provide a short explanation as to the reasons for their appeal; and
 - b. The Committee, after hearing those reasons, is to vote by show hands, either in favour of or against the appeal.

10. The Committee's decision in a Competitions Blacklisting Appeal is final.

13. Miscellaneous

13.1. In the event that an issue arises that is not covered by the rules of the Competition, the Directors of Competitions (Advocacy) may consult:

13.1.1. the UNLSA Executive;

13.1.2. the UNLSA Committee;

13.1.3. Newcastle Law School Staff;

13.1.4. ALSA rules and ALSA;

13.1.5. any other university competition director(s); or

13.1.6. any other person(s) they deem necessary.

University of Newcastle Law Students' Association
Mooting Competition
Marking Guide

FINAL SCORE /100

Competitor: _____ Judge: _____ Round: _____

Content	Overall score range: descriptive criteria (please tick as appropriate)			Comments and Score (additional space over page)
	50-60	61-70	71-85	
Organisation of Presentation	<input type="checkbox"/> insufficient overview of submissions or conclusion <input type="checkbox"/> organisation poor: lacks structure or direction; poor time management	<input type="checkbox"/> adequate overview of submissions and conclusion <input type="checkbox"/> argument may have been better structured; too lengthy or too brief in parts	<input type="checkbox"/> clear focus, concise overview and conclusion <input type="checkbox"/> arguments clearly and logically structured	<input type="checkbox"/> effective overview and conclusion, noting relative significance of arguments <input type="checkbox"/> flexible and engaging / 10
Development of argument	<input type="checkbox"/> understanding of legal issues inadequate <input type="checkbox"/> use of authorities inadequate or inappropriate <input type="checkbox"/> fails to address key legal or factual issues	<input type="checkbox"/> good approach but lacks clarity or directness <input type="checkbox"/> addresses all key issues; though some arguments given inappropriate weight <input type="checkbox"/> poor application of law to the facts	<input type="checkbox"/> good understanding of all legal issues; good use of authorities <input type="checkbox"/> effective application of law to the facts <input type="checkbox"/> generally logical and persuasive	<input type="checkbox"/> excellent understanding of legal issues and their interrelationship, policy arguments and authorities <input type="checkbox"/> addresses and rebuts opposing arguments <input type="checkbox"/> logical and persuasive / 25
Questions from the bench	<input type="checkbox"/> unprepared for questions reasonably to be expected <input type="checkbox"/> evades answering <input type="checkbox"/> poor composure <input type="checkbox"/> inflexible or concedes too readily	<input type="checkbox"/> fails to perceive the object of questioning <input type="checkbox"/> responses sometime too lengthy or too brief <input type="checkbox"/> responses lack clarity or directness	<input type="checkbox"/> accurately perceives the object of questioning <input type="checkbox"/> responds to questions directly and concisely <input type="checkbox"/> handles irrelevant questions well	<input type="checkbox"/> accurately perceives the object of questioning <input type="checkbox"/> clear responses; engages with the court's views <input type="checkbox"/> effectively integrates responses and argument / 30
Speaking ability and delivery	<input type="checkbox"/> lacks proper courtesy <input type="checkbox"/> lacks clarity of language and expression <input type="checkbox"/> fails to observe correct etiquette and terminology <input type="checkbox"/> over-reliance on notes	<input type="checkbox"/> courteous and clear <input type="checkbox"/> lacks variation of tone, pace and expression <input type="checkbox"/> poor eye-contact <input type="checkbox"/> good knowledge of court etiquette and terminology	<input type="checkbox"/> courteous and clear <input type="checkbox"/> good use of language, gesture and expression <input type="checkbox"/> comfortable with interventions <input type="checkbox"/> conveys confidence	<input type="checkbox"/> conveys ideas and deals with interventions with ease, skill and confidence <input type="checkbox"/> engages well with court <input type="checkbox"/> conveys impression of conviction and sincerity / 25
Written Submissions	<input type="checkbox"/> written submissions are inadequate or incomplete <input type="checkbox"/> written submissions contain spelling and grammatical errors	<input type="checkbox"/> written submissions lack clarity or directness <input type="checkbox"/> written submissions contain one or two spelling or grammatical errors.	<input type="checkbox"/> written submissions clear, concise and citations correct <input type="checkbox"/> logical reasoning <input type="checkbox"/> written submissions are free from errors.	<input type="checkbox"/> written submissions clear, concise; citations correct; logical reasoning <input type="checkbox"/> written submissions are free from errors. High standard of expression and flawless grammar. / 10

[Sample MULTIPLE PERSON TEAM] Standard Form Memorandum of Argument and List of Authorities

IN THE FULL COURT OF THE SUPREME COURT OF NEW SOUTH WALES MOOT 1 of 2017

BETWEEN

PKS DISTRIBUTORS (AUSTRALIA) PTY LTD

Appellant

and

LARCH ORIGINAL OCCUPATIONAL TECHNOLOGY LIMITED

Respondent

APPELLANT'S OUTLINE OF SUBMISSIONS

Speaking Time: Senior Counsel – 15 minutes, Junior Counsel – 15 minutes

A. SUMMARY OF THE FACTS

1. The Respondent manufactured a hand-held computerised diary called the Delphic organiser in the United States and the Appellant began negotiations to distribute the product in Australia and New Zealand.
2. In June 2000 the Respondent represented to the Appellant that “US Manufacture was the “bedrock” of the company’s success with the Delphic organiser” and that the Respondent “happily replaced any defective Delphic organiser returned to it”.
3. In August 2000, the parties concluded an agreement under which the Appellant undertook to distribute the Delphic organiser in Australia and New Zealand.
4. However, in early 2002 the Respondent contracted with a New Zealand company to manufacture the product under license and supply the Appellant a New Zealand made product.
5. The New Zealand product was significantly less reliable than the original product and the Appellant demanded that the Respondent supply only the US-manufactured product and give credit for the organisers returned within warranty.
6. The Respondent subsequently terminated the agreement under Clause 17.
7. The Appellant brought an action in the Supreme Court of Western Australia alleging terms should be implied into the contract, but the action was dismissed by Dunlop J and is now appealed to the Full Court.

APPELLANT'S SUBMISSIONS

1. Parol evidence of the June 2000 pre-contractual discussions is admissible for the purposes of illuminating the surrounding circumstances of the contract.
2. A term should be implied into the contract that the product supplied under the distribution agreement would be US-manufactured.
3. A term should be implied into the contract that the Appellant could return any product found to be defective within warranty to the Respondent for full credit.

THE ABOVE SUBMISSIONS ARE SUPPORTED AS FOLLOWS:

Submission One

1. Parol evidence of the June 2000 pre-contractual discussions is admissible for the purposes of illuminating the surrounding circumstances of the contract.

1.1. Extrinsic evidence of pre-contractual discussions is admissible for the purposes of illuminating the objective background or surrounding circumstances in which the contract came into existence.

Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337 at 352 per Mason J.

Spunwill Pty Ltd v BAB Pty Ltd (1994) 36 NSWLR 290 at 299.

1.2. Thus, evidence that the parties have contracted on the basis of a common assumption but have not included a provision to the same effect is admissible.

Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337 at 354 per Mason J.

1.3. In the instant case, evidence that the parties contracted on the basis of a common assumption that the product referred to in the agreement was the US- manufactured product is admissible.

1.4. Further, evidence that the parties contracted on the basis of a common assumption that the Respondent would replace defective products within warranty is also admissible.

Submission Two

2. A term should be implied into the contract that the product supplied under the distribution agreement would be the US-manufactured product.

2.1. The implication of terms ad hoc into a written agreement must meet the five requirements laid down in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266:

2.1.1. It must be reasonable and equitable.

2.1.2. It must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it.

2.1.3. It must be so obvious that it goes without saying.

2.1.4. It must be capable of clear expression.

2.1.5. It must not contradict any express term.

BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977) CLR 266 at 283 per Lord Simon of Glaisdale.

Codelfa Constructions Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337 at 347 per Mason J.

2.2. A term requiring that the product supplied under the distribution agreement be manufactured in the United States meets these requirements.

2.2.1. The term operates reasonably and equitably between the parties as they had entered the contract on the basis that the Appellant would distribute the US-manufactured product.

2.2.2. The term is necessary to make the agreement effective in a business sense and prevent the Respondent from acting to undermine the understanding of the parties by exploiting a gap in the contract.

Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234 at 257-258 per Priestly JA.

2.2.3. The term is so obvious it goes without saying. Had the “officious bystander” suggested the parties include such a term they would have dismissed it as obvious that the product referred to in the agreement was the US product since this was the only product in existence at that time.

2.2.4. The term is capable of clear expression.

2.2.5. The term does not contradict any express terms in the written agreement, and, in particular, is consistent with Clause 15.

2.3. A term should be implied into the contract that the product supplied under the distribution agreement would be manufactured in the United States.

Submission Three

3. A term should be implied into the contract that the Appellant could return any product found to be defective within warranty to the Respondent for full credit.

3.1. This term must also satisfy the *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977)* 180 CLR 266 test for the implication of terms ad hoc into a written agreement.

3.2. The purported term meets the five requirements enunciated in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977)* 180 CLR 266.

3.3.1. The term operates reasonably and equitably between the parties as they had entered the contract on the basis that the Respondent took full responsibility for the replacement of defective products.

3.3.2. The term is necessary to make the agreement effective in a business sense.

Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234 at 257-258 per Priestly JA.

3.3.3. The term is so obvious it goes without saying and it was simply assumed by the parties that the Respondent would replace defective products within warranty.

3.3.4. The term is capable of clear expression.

3.3.5. The term does not contradict any express terms in the written agreement as there is no term in the written agreement that purports to deal with the question.

3.3. Thus, a term should be implied into the contract that defective products found to be defective within warranty could be returned by the Appellant to the Respondent for a full credit.

On the basis of the above submissions, counsel for the Appellant respectfully requests an Order of the Court upholding the first ground of appeal and reversing the order of the trial judge.

DATED this 3rd day of March 2019

Name

Senior Counsel for the Appellant

Name

Junior Counsel for the Appellant

Name

Solicitor for the Appellant

[Sample SINGLE PERSON TEAM] Standard Form Memorandum of Argument and List of Authorities

IN THE FULL COURT OF THE SUPREME COURT OF NEW SOUTH WALES MOOT 1 of 2017

BETWEEN

PKS DISTRIBUTORS (AUSTRALIA) PTY LTD

Appellant

and

LARCH ORIGINAL OCCUPATIONAL TECHNOLOGY LIMITED

Respondent

APPELLANT'S OUTLINE OF SUBMISSIONS

Speaking Time: First appeal point – 15 minutes, Second appeal point – 15 minutes

A. SUMMARY OF THE FACTS

1. The Respondent manufactured a hand-held computerised diary called the Delphic organiser in the United States and the Appellant began negotiations to distribute the product in Australia and New Zealand.
2. In June 2000 the Respondent represented to the Appellant that “US Manufacture was the “bedrock” of the company’s success with the Delphic organiser” and that the Respondent “happily replaced any defective Delphic organiser returned to it”.
3. In August 2000, the parties concluded an agreement under which the Appellant undertook to distribute the Delphic organiser in Australia and New Zealand.
4. However, in early 2002 the Respondent contracted with a New Zealand company to manufacture the product under license and supply the Appellant a New Zealand made product.
5. The New Zealand product was significantly less reliable than the original product and the Appellant demanded that the Respondent supply only the US-manufactured product and give credit for the organisers returned within warranty.
6. The Respondent subsequently terminated the agreement under Clause 17.
7. The Appellant brought an action in the Supreme Court of Western Australia alleging terms should be implied into the contract, but the action was dismissed by Dunlop J and is now appealed to the Full Court.

APPELLANT'S SUBMISSIONS

1. Parol evidence of the June 2000 pre-contractual discussions is admissible for the purposes of illuminating the surrounding circumstances of the contract.
2. A term should be implied into the contract that the product supplied under the distribution agreement would be US-manufactured.
3. A term should be implied into the contract that the Appellant could return any product found to be defective within warranty to the Respondent for full credit.

THE ABOVE SUBMISSIONS ARE SUPPORTED AS FOLLOWS:

Submission One

1. Parol evidence of the June 2000 pre-contractual discussions is admissible for the purposes of illuminating the surrounding circumstances of the contract.

1.1. Extrinsic evidence of pre-contractual discussions is admissible for the purposes of illuminating the objective background or surrounding circumstances in which the contract came into existence.

Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337 at 352 per Mason J.

Spunwill Pty Ltd v BAB Pty Ltd (1994) 36 NSWLR 290 at 299.

1.2. Thus, evidence that the parties have contracted on the basis of a common assumption but have not included a provision to the same effect is admissible.

Codelfa Construction Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337 at 354 per Mason J.

1.3. In the instant case, evidence that the parties contracted on the basis of a common assumption that the product referred to in the agreement was the US- manufactured product is admissible.

1.4. Further, evidence that the parties contracted on the basis of a common assumption that the Respondent would replace defective products within warranty is also admissible.

Submission Two

2. A term should be implied into the contract that the product supplied under the distribution agreement would be the US-manufactured product.

2.1. The implication of terms ad hoc into a written agreement must meet the five requirements laid down in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 180 CLR 266:

2.1.1. It must be reasonable and equitable.

2.1.2. It must be necessary to give business efficacy to the contract so that no term will be implied if the contract is effective without it.

2.1.3. It must be so obvious that it goes without saying.

2.1.4. It must be capable of clear expression.

2.1.5. It must not contradict any express term.

BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977) CLR 266 at 283 per Lord Simon of Glaisdale.

Codelfa Constructions Pty Ltd v State Rail Authority of NSW (1982) 149 CLR 337 at 347 per Mason J.

2.2. A term requiring that the product supplied under the distribution agreement be manufactured in the United States meets these requirements.

2.2.1. The term operates reasonably and equitably between the parties as they had entered the contract on the basis that the Appellant would distribute the US-manufactured product.

2.2.2. The term is necessary to make the agreement effective in a business sense and prevent the Respondent from acting to undermine the understanding of the parties by exploiting a gap in the contract.

Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234 at 257-258 per Priestly JA.

2.2.3. The term is so obvious it goes without saying. Had the “officious bystander” suggested the parties include such a term they would have dismissed it as obvious that the product referred to in the agreement was the US product since this was the only product in existence at that time.

2.2.4. The term is capable of clear expression.

2.2.5. The term does not contradict any express terms in the written agreement, and, in particular, is consistent with Clause 15.

2.3. A term should be implied into the contract that the product supplied under the distribution agreement would be manufactured in the United States.

Submission Three

3. A term should be implied into the contract that the Appellant could return any product found to be defective within warranty to the Respondent for full credit.

3.1. This term must also satisfy the *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977)* 180 CLR 266 test for the implication of terms ad hoc into a written agreement.

3.2. The purported term meets the five requirements enunciated in *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council (1977)* 180 CLR 266.

3.3.1. The term operates reasonably and equitably between the parties as they had entered the contract on the basis that the Respondent took full responsibility for the replacement of defective products.

3.3.2. The term is necessary to make the agreement effective in a business sense.

Renard Constructions (ME) Pty Ltd v Minister for Public Works (1992) 26 NSWLR 234 at 257-258 per Priestly JA.

3.3.3. The term is so obvious it goes without saying and it was simply assumed by the parties that the Respondent would replace defective products within warranty.

3.3.4. The term is capable of clear expression.

3.3.5. The term does not contradict any express terms in the written agreement as there is no term in the written agreement that purports to deal with the question.

3.3. Thus, a term should be implied into the contract that defective products found to be defective within warranty could be returned by the Appellant to the Respondent for a full credit.

On the basis of the above submissions, counsel for the Appellant respectfully requests an Order of the Court upholding the first ground of appeal and reversing the order of the trial judge.

DATED this 3rd day of March 2019

Name

Counsel for the Appellant