



Introduction to Mooting Workshop

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Attendance Form



<https://forms.gle/2LZJbwUJV7auYLvx6>

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Resources to Check Out!

Posted Online

- ✓ Competition Rules
- ✓ Competitions Withdrawal Policy

- ✓ **Mooting Handbook**
- ✓ Sample Written Submissions

- ✓ These slides (after today)
- ✓ Demonstration Mooting Video
- ✓ Mooting 'Cheat Sheets'
- ✓ Mooting Training Videos

<http://www.unswlawsoc.org/competitions/resources>

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Any questions?

Submit an anonymous question about mooting to the Training Directors via the form below:



<https://forms.gle/h9drH9Warwu5MVfH9>

You may submit questions at any time, even during Round 1 of Beginners!

mooting.training@unswlawsoc.org

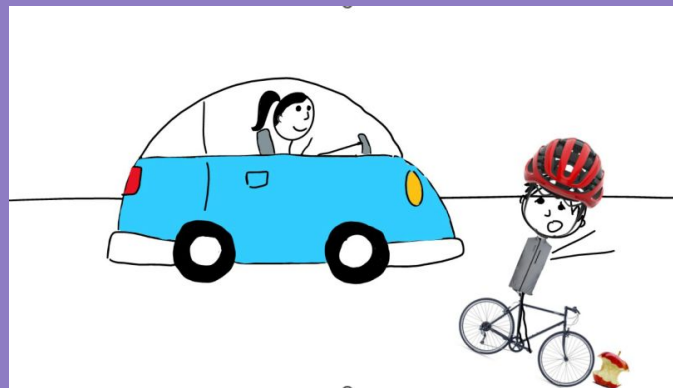
Today's Problem Question



<https://tinyurl.com/2s4d8ssk>

For the purposes of this workshop, we will be sharing the process of preparing for a moot with reference to the problem question *Molville vs Woods* (which may be familiar to anyone who watched the Demonstration Moot in O-Week!).

Feel free to scan the QR code to access the facts of the problem question.



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What is Mooting?

**IN THE NEW SOUTH WALES
COURT OF APPEAL**

NO. 80 of 2023

BETWEEN:

Molville
(Appellant)

-and-

Woods
(Respondent)

1. Lance Woods is an avid cyclist. For the past ten years, he has been regularly cycling almost every day for sport, and from time to time, he takes part in long distance races. Lance also cycles around the city due to Sydney's bad traffic.
2. As part of Lance's routine, every Monday and Wednesday he spends two hours from 6.30 am to 8.30 am cycling around Millennial Park to train for

What is Mooting?

9. Sarah Molville appeals to the New South Wales Court of Appeal on the following ground:
 - (a) The defence in s 5L of the *Civil Liability Act* protects the defendant from liability in this case because:
 - i. The plaintiff was engaged in a dangerous recreational activity at the time of injury; and
 - ii. The plaintiff was injured from the materialisation of an obvious risk. The trial judge erred in characterising the risk too narrowly.
10. The facts and the damages are not in dispute.
11. The facts and damages are not in dispute. Do not refer to the *Passenger Transport Act* or legislative provisions other than the *Civil Liability Act 2002* (NSW) provisions relating to s 5L.

What is Mooting?

A simulated court hearing at the appeal stage. It is a formal conversation in which you try to persuade a bench of judges of your case.

- In **teams of two**, competitors play the role of barristers in a fictitious dispute
- Prepare legal arguments: submit them first in **written form**, and then **present** them **orally**
- Each person speaks for **20 minutes**

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Why Moot?



- Learn advocacy, legal reasoning and legal research skills
- Engage with stimulating and contentious legal issues



- Get a head start on course content
- Make new friends
- Highly respected by employers



- Gateway to external competitions
- Chance to travel around Australia and the world representing UNSW!

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Agenda

1. Preparation for the moot
2. Written submissions
3. Oral submissions
4. The moot



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What am I being judged on?

1. Argument and Structure (-/20)

Knowledge of legal principles, application to the facts, correct and persuasive use of authorities, clear structure

2. Questions and Answers (-/10)

Direct and persuasive answers to questions, citation of law in response, ability to return seamlessly to submissions

3. Presentation and Speaking (-/10)

Clear, confident and engaging speech, measured pace, eye contact, time management

4. Written Submissions (-/10)

Clear, logically structured, concise, spelling and grammar, citation according to AGLC

Preparation

Preparation Period



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Preparation Period



Problem Question Release

You and your partner will receive an email with:

1. The problem question for your moot.
2. Whether you are representing the **appellant** or the **respondent**.
3. Time and location for your moot.

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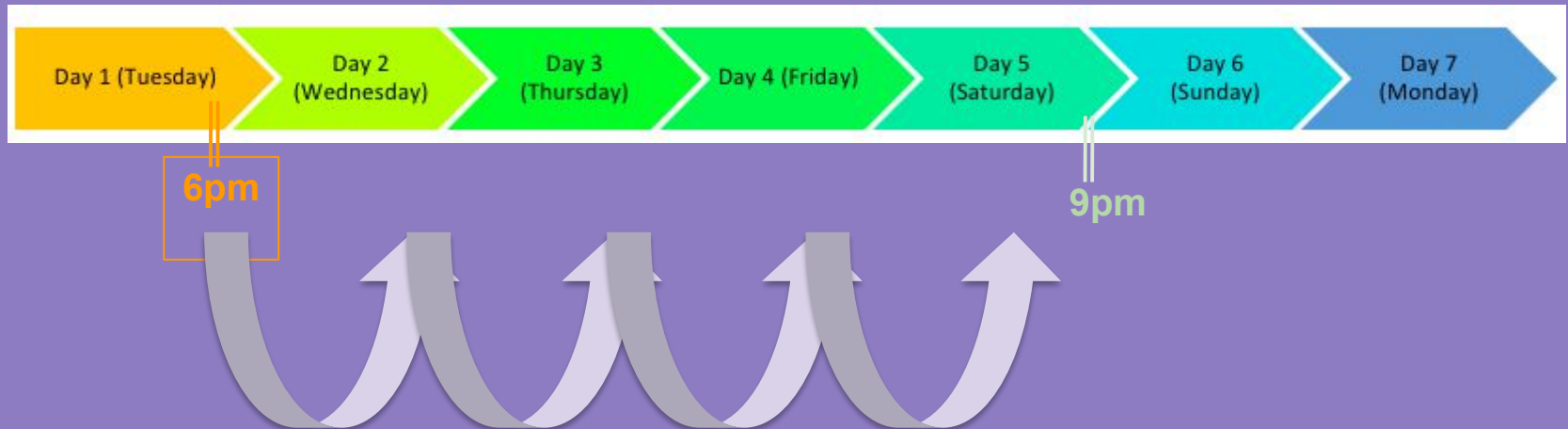
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Preparation Period



Preparation of Submissions

- After receiving the problem question, you and your partner will then have **four days** to research and prepare your written submissions.
- You will need to **email your written submissions** to the Beginners Mooting Directors, the judges, and of course, the other side by **9 pm** two days before your moot. Just click **‘reply all’** to the Problem Question email.
- You do not need to email an outline of your oral submissions to anybody.

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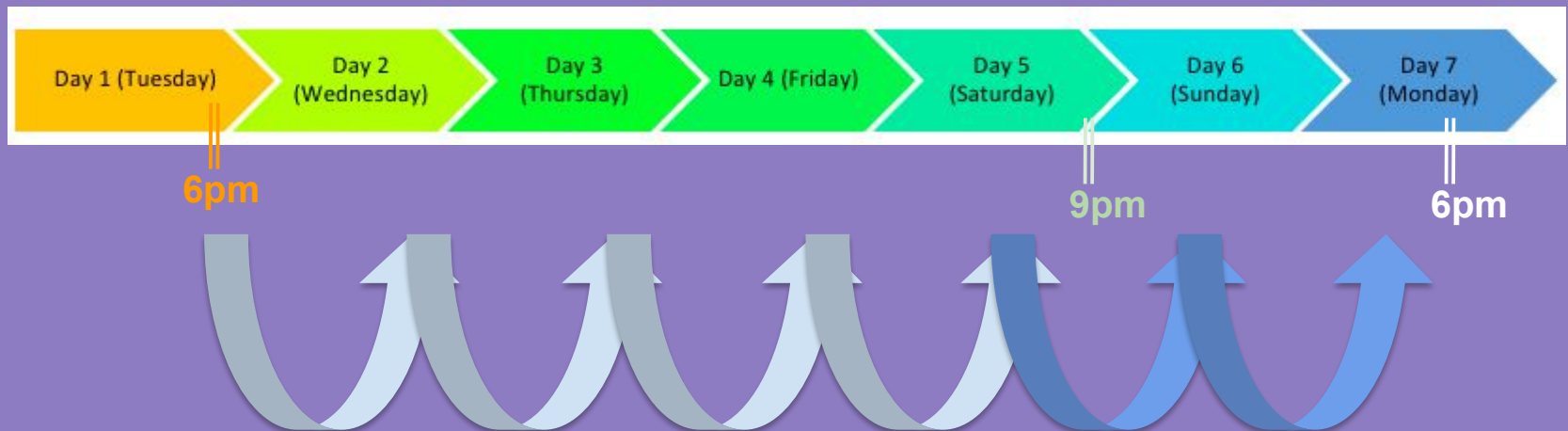
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Preparation Period



Final Preparation Time

- You will be mooting two days after you have emailed your written submissions.
- Use this time to **prepare/refine/practice your oral submissions!**
- **Read the written submissions** of the other side.

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Receiving the Problem Question

Step 1: Read through the problem. Then, read through it again. In fact, read it through once more for good measure.

Step 2: Now, look at the grounds of appeal. These will tell you which **legal issues** you will need to focus on. Divide up the grounds of appeal with your partner.

Step 3: After dividing the grounds of appeal, you will now have **two** legal issues to focus on out of four. You should commence your research by reading a **general overview** of the law.

Step 4: Your research should have given you a fairly good general understanding, but now you need to go a bit deeper. You now need to answer this question: **what do I need to prove (or disprove)?** Write a list! You should find **cases (authorities)** to support this list.

Step 5: Once you have your list of things which you need to prove (or disprove), **you will then need to go through the facts of the problem again** to figure out how to make an argument to prove (or disprove) them. For some things, this will be easy, but for others, it will be harder.

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Step 1: Read through the problem. Then, read through it again. In fact, read it through once more for good measure.

Dramatis Personae

LANCE WOODS	
Information	Page, Paragraph Reference
<ul style="list-style-type: none">● Avid cyclist<ul style="list-style-type: none">○ Has been cycling for past 10 years	1, [1]
<ul style="list-style-type: none">● Cycles around Millennial park every Monday and Wednesday<ul style="list-style-type: none">○ Training for upcoming competitions	1, [2]
<ul style="list-style-type: none">● Goes to university after cycling	1, [2]
<ul style="list-style-type: none">● Wears a helmet and reflective jacket while riding	1, [4]

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Chronology

Chronology		
Time	Information	Page, Paragraph Reference
Wednesday, 6:30 am	Lance cycling at Millennial Park with MAMILS	1, [5]
Wednesday, 8:45 am	Lance veered off to cycle to uni. 	1, [5]
	NB: Lance usually leaves at 8:30 not to get late.	1, [2]
Wednesday, 8:45 am	Sarah Molville chucked apple out of window	2, [6]

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9. Sarah Molville appeals to the New South Wales Court of Appeal on the following ground:

- (a) The defence in s 5L of the *Civil Liability Act* protects the defendant from liability in this case because:
 - i. The plaintiff was engaged in a dangerous recreational activity at the time of injury.
 - ii. The plaintiff was injured from the materialisation of an obvious risk. The trial judge erred in characterising the risk too narrowly.

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- (a) The defence in s 5L of the *Civil Liability Act* protects the defendant from liability in this case because:
- i. The plaintiff was engaged in a dangerous recreational activity at the time of injury; and
 - ii. The plaintiff was injured from the materialisation of an obvious risk. The trial judge erred in characterising the risk too narrowly.

Questions You Should Ask

- What is liability? What is “negligence”?
- What does my side want?
- How does successfully proving/disproving this appeal assist in gaining what my side wants?

Where Can I Research This?

- Academics/barristers/law firm articles
- Textbooks
- Legislation
- Commentaries

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Ground
#1

The plaintiff was engaged in a dangerous recreational activity at the time of injury.

Questions You Should Ask

- What does dangerous mean?
- What has been considered 'dangerous' in the past?
- What does 'recreational' mean?
- What has been considered 'recreational' in the past?
- What facts support this activity being considered dangerous/recreational

Where Can I Research This?

- Academics/barristers/law firm articles
- Textbooks
- Legislation
- Commentaries
- Judicial Benchbooks
- **Cases**

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Primary vs Secondary Sources

What we want to see:

REFERENCES

A Cases

Australian Safeway Stores v Zaluzna (1987) 162 CLR 479

Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty 'The Wagon Mound' (No 2)
(1966) 2 All ER 709

Wyong Shire Council v Shirt (1980) 146 CLR 40

B Legislation

Civil Liability Act 2002 (NSW)

NB: Legislation unlikely to be required for most rounds of the Beginners Competition.

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Primary vs Secondary Sources

What we don't want to see:

REFERENCES

- Lexis Nexis
- WestLaw Australia
- Halsbury's Laws of Australia
- ILJ Textbook
- Torts Textbook
- *Civil Liability Act*
- *Barton v Armstrong*
- *Rixon v Star City*
- *Zanker v Vartzokas*
- 'Man Suffers Trauma from Kitchen' *Sydney Morning Herald*

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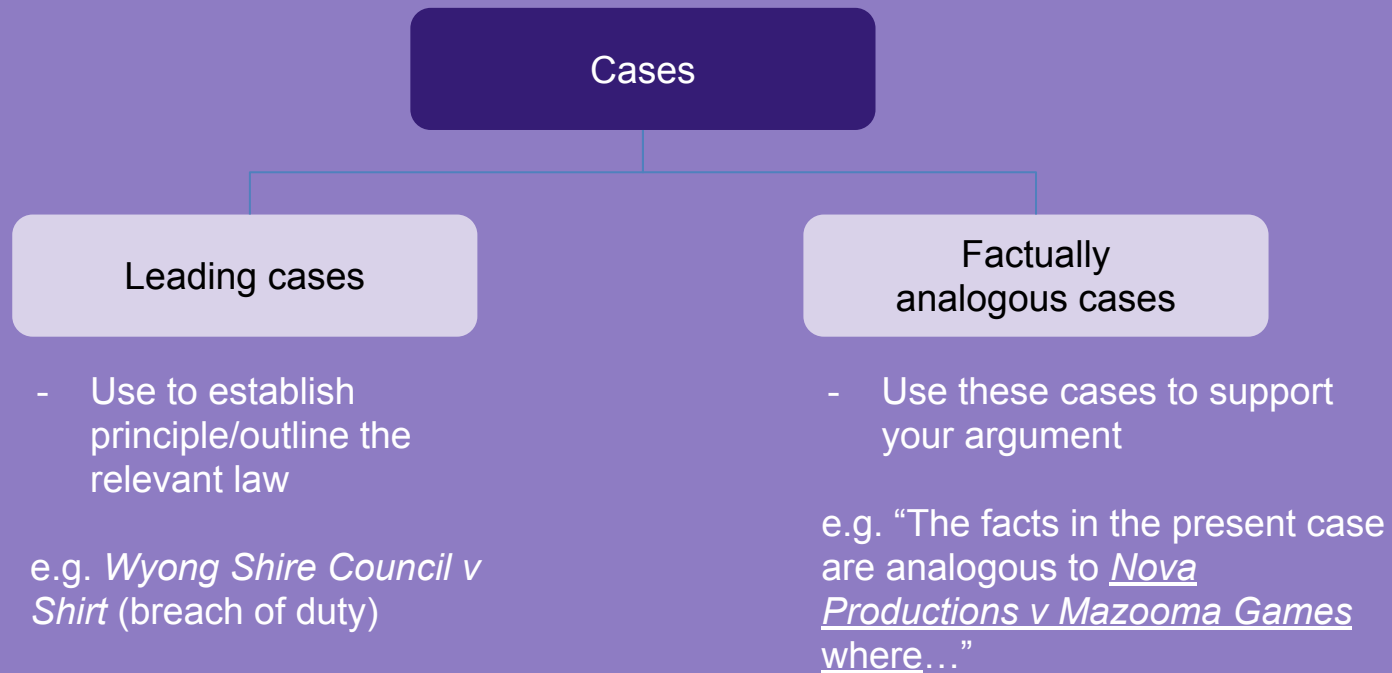
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What do you need cases for?



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How do I find cases?

Databases

- Westlaw (via UNSW Library)
- LexisNexus (via UNSW Library)
- Jade.io
- NSW Caselaw
- Austlii



Footnotes

- Textbooks
- Barrister Notes

Article - Casenotes

- Legislation
- Unreported cases
- NoteUp function

Other Cases

- Judges refer to cases in their cases (often the most important parts)
- Summaries

What are reported versions of cases, and how do I find them?

Online – which service depends on what report series you want

Westlaw AU

- CLRs (which report High Court cases)
- NSWLR (for the NSW Supreme Court)
- FLR (for the Federal Court)



Westlaw International & ICLR

- **Westlaw**: international cases including UK and Canadian cases
- **ICLR**: UK cases

Austlii

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You should now be ready to write your written submissions!

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Written Submissions

What are Written Submissions?

Written submissions are a skeletal explanation of your arguments.

Purpose

To notify your opponents and judges what you'll be arguing ahead of time.

Structure & Style

- Submissions should be set out systematically, as a series of arguments addressing appeal grounds.
- They should be as detailed as possible, while still being succinct.
- Remember to put all your arguments in your written submissions

Referencing

Citation must comply with the AGLC4:

https://law.unimelb.edu.au/_data/assets/pdf_file/0005/3181325/AGLC4-with-Bookmarks-1.pdf

Due Date

These are what you email at 9pm, two days before the moot.

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Structure of Writtens

IN THE FULL COURT OF THE FEDERAL COURT OF AUSTRALIA
No 47 of 2015

BETWEEN: BLUE FIN TUNA PROTECTION SOCIETY
Appellant

-and-

MINISTER FOR THE ENVIRONMENT
Respondent

WRITTEN SUBMISSIONS FOR THE APPELLANT
REPRESENTED BY [TEAM MEMBER 1] AND [TEAM MEMBER 2]

1

Title Page

- Names the matter, parties, court, counsel and dates etc.

ISSUES FOR DETERMINATION

- 1 Whether Blue Fin Tuna Protection Society ('the appellant') has standing to apply for an order for review of the decision of the Minister for the Environment ('the respondent') under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act').
- 2 If the appellant has standing, whether the respondent failed to take a relevant consideration into account in not reading the submission of the appellant before making the decision to not make a declaration.

SUBMISSIONS

- 1 **The appellant has standing to apply for an order for review of the decision of the respondent under the ADJR Act.**
 - A *Applying for an Order for Review*
- 3 This application arose under s 5 of the ADJR Act in the Federal Court of Australia.¹ A person may apply for an order of review of a decision under s 5 if the appellant is 'a person who is aggrieved by a decision to which this Act applies'.² A person applying for an order under s 5 must therefore show that there is a relevant 'decision to which this Act applies' ('the decision requirement') and that they were aggrieved by it ('the standing requirement').
 - B *Was the Decision Requirement Satisfied?*
- 4 The phrase 'decision to which this Act applies' is defined in s 3 of the ADJR Act as meaning 'a decision of an administrative character ... (whether in the exercise of a discretion or not)³ which is made 'under an enactment'.⁴ A reference to the making of a 'decision' includes a reference to 'making a declaration'.⁵ An 'enactment', relevantly, is 'an Act'.⁶
- 5 In this case, the relevant decision of the respondent was a decision to not make a declaration under s 35(1) of the *Marine Environment (Threatened Species) Conservation Act 2008* (Cth) ('Conservation Act'). This decision was administrative by reason of not being 'legislative' or 'judicial',⁷ and was made under an Act. Therefore, the decision requirement is satisfied.
 - C *Was the Standing Requirement Satisfied?*
- 6 A reference to a 'person⁸ who is aggrieved by a decision' includes a reference to 'a person whose interests are adversely affected by the decision'.⁹ This first requires identification of the interest claimed by the appellant, followed by a determination of whether the interest claimed by the

¹ The jurisdiction of the Federal Court to hear claims arising under the ADJR Act is conferred by s 8(1). The Full Court of the Federal Court has jurisdiction to hear appeals from decisions of the Federal Court.
² ADJR Act s 5(1).
³ Ibid s 3(1) (definition of 'decision to which this Act applies').
⁴ Ibid s 3(1) (definition of 'decision to which this Act applies' para (a)).
⁵ Ibid s 3(2)(e).
⁶ Ibid s 3(1) (definition of 'enactment' para (a)).
⁷ *Griffith University v Tang* (2005) 221 CLR 99, 123 (Gummow, Callinan and Heydon JJ).
⁸ A 'person' includes a body corporate: *Acts Interpretation Act 1901* (Cth) s 2C(1).
⁹ ADJR Act s 3(4)(a)(c).

2

Submission Points

- Go through each of the submissions in detail

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Structure of Writtens

ORDERS

27 The decision of the respondent under s 35(1) of the *Conservation Act* be quashed.⁶⁴

28 The respondent be directed to consider the appellant's submission in accordance with s 35(2)(b) of the *Conservation Act*.⁶⁵

LIST OF REFERENCES

A Cases

Animals' Angels et al v Secretary, Department of Agriculture [2014] FCAFC 173 (19 December 2014)

Argos Pty Ltd v Corbell (2014) 89 ALJR 189

Australian Conservation Foundation v Minister for Resources (1989) 19 ALD 70

Australian Conservation Foundation Inc v Commonwealth (1980) 146 CLR 493

Australian Institute of Marine and Power Engineers v Secretary, Department of Transport (1986) 13 FCR 124

D'Amore v Independent Commission Against Corruption (2013) 303 ALR 242

Griffith University v Tang (2005) 221 CLR 99

Minister for Aboriginal Affairs v Peko-Wallsend Ltd (1986) 162 CLR 24

Minister for Immigration and Citizenship v Khadgi (2010) 190 FCR 248

Omus v Alcoa of Australia Pty Ltd (1981) 149 CLR 27

Sean Investments Pty Ltd v MacKellar (1981) 38 ALR 363

Tobacco Institute of Australia Ltd v National Health and Medical Research Council (1996) 71 FCR 265

Ward v Williams (1955) 92 CLR 496

Williams v Minister for Justice and Customs (2007) 157 FCR 286

B Legislation

Acts Interpretation Act 1901 (Cth)

Administrative Decisions (Judicial Review) Act 1977 (Cth)

Marine Environment (Threatened Species) Conservation Act 2008 (Cth)

⁶⁴ ADJR Act s 16C)(e).

⁶⁵ ADJR Act s 16C)(d).

Orders Sought

- Name the orders you are seeking
e.g. that the appeal be denied

Reference List

- List the cases and legislation you rely on in alphabetical order

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Setting out a Submission Point

1 Proposition

- Riding a bicycle on a road is a dangerous activity.

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Setting out a Submission Point

1 Proposition

- Riding a bicycle on a road is a dangerous activity.

2 State the law with authority.

- An activity is dangerous if it involves a significant risk of physical harm: *Fallas v Mourlas* (2006) 65 NSWLR 418, 423 [24].

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Setting out a Submission Point

1 Proposition

- Riding a bicycle on a road is a dangerous activity.

2 State the law with authority.

- An activity is dangerous if it involves a significant risk of physical harm: *Fallas v Mourlas* (2006) 65 NSWLR 418, 423 [24].

3 Apply the facts to the law.

- First, the requirement to wear protective gear while cycling on a road indicates a significant risk of physical harm, or injury.
- Secondly, the strength and speed of motor vehicles are much greater than that of a bicycle. Having to cycle next to these vehicles, moving with high force, exposes a cyclist of significant physical harm upon collision.

Setting out a Submission Point

1 Proposition

- Riding a bicycle on a road is a dangerous activity.

2 State the law with authority.

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3 Apply the facts to the law.

- First, the requirement to wear protective gear while cycling on a road indicates a significant risk of physical harm, or injury.
- Secondly, the strength and speed of motor vehicles are much greater than that of a bicycle. Having to cycle next to these vehicles, moving with high force, exposes a cyclist of significant physical harm upon collision.

4 Conclusion

- Therefore, the dangerousness element of the s 5L defence is made out.



This is called 'IRAC'

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Example

I Mr Woods was engaged in a dangerous recreational activity at the time of injury.

A Mr Woods was engaged in a dangerous activity.

Riding a bicycle on a road is a dangerous activity. An activity is dangerous if it involves a significant risk of physical harm: *Fallas v Murlas* (2006) 65 NSWLR 418, 423 [24]. First, the requirement to wear protective gear while cycling on a road indicates a significant risk of physical harm, or injury. Secondly, the strength and speed of motor vehicles are much greater than that of a bicycle. Having to cycle next to these vehicles, moving with high force, exposes a cyclist of significant physical harm upon collision. Therefore, Mr Woods was engaged in a dangerous recreational activity.

B Mr Woods was engaged in a recreational activity.

Riding a bicycle on the road, was a recreational activity...

Sample written submissions will be emailed to all registered Beginners competitors.

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Key Tips

- 1) **Justify the margins**
- 2) **Proofread (aloud) to eliminate all grammatical and spelling errors**
- 3) **Write concisely**
 - a) **Active voice**
 - i) “Mr Woods’ bicycle was hit by the apple core that was chucked out by Ms Molville.”
 - ii) “Ms Molville chucked an apple core which hit Mr Woods’ bicycle.”
 - b) **No long sentences**
 - i) “Because Mr Woods had to wear protective gear (which indicates risk), and because he also had a friend die while cycling, the court can evince that cycling on a road is a dangerous activity.
 - ii) Cycling on the road is a dangerous activity. First, Mr Woods’ protective gear indicates that cycling is risky. Secondly, his friend’s death indicates its risk.
 - c) **NB: Paragraphs should be 3-4 sentences at a maximum. Submissions should be ideally around 2 pages.**
- 4) **Use microstructure**

Oral Submissions

What are Oral Submissions?

Written submissions



Oral submissions

This is your chance to persuade the judges of your arguments in person.

Allow the judges to ask any questions they have about your arguments.



- Prepare a set of 'oral submissions' to speak from in the moot – normally in dot point form.
- The main difference between writtens and orals is that your orals should **flesh out** your written submissions and **focus on the contentious points**.
- Do not read out your written submissions
- Each speaker will speak for 20 minutes.

You must stick to the arguments you made in your written submissions.

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Court Formalities

A moot is a mock court hearing and hence formal language is used.

It's a bit like 'speaking a different, legal language'.

Avoid colloquialisms such as 'yeah', 'like' and 'I dunno'.

Judges

*Refer to judges as
'Your Honour'*

Appellants

Junior

Senior

Lectern

Respondents

Senior

Junior

*Refer to your partner as
'my learned junior / senior'*

*Refer to your opponents as
your **'learned friends'**, or as
the appellant / respondent*

See the Mooting Handbook for more court formalities and useful phrases.

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Signposting

Signposting = giving an **indication of where your argument is headed** *before you make it*.

- Signposting is the use of numbers to list out your arguments
- It's important to signpost throughout the moot
 - E.g. "There is no breach of duty in this case **for two reasons...**"
- Use an introductory sentence whenever you are about to talk about something new, setting out the structure of your new point
 - E.g. Before you begin making your breach argument: "**I now turn to my first submission**, that the appellant breached his duty of care to the respondent..."

CLARITY

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What you need for oral submissions?

A *Mr Woods was engaged in a dangerous activity.*

...First, the requirement to wear protective gear while cycling on a road indicates a significant risk of physical harm, or injury...

The difference between written and oral submissions:

- More facts
- More law
- Example
 - First, *Carey v Lake Macquarie City Council* [2007] demonstrates that protective measures to mitigate risk, such as reflective tape, indicate risk of physical harm/danger.
 - At [4] of these facts, Mr Woods was wearing a helmet, and a reflective jacket.
 - Cyclists can also/do wear other gear
 - These measures demonstrate danger

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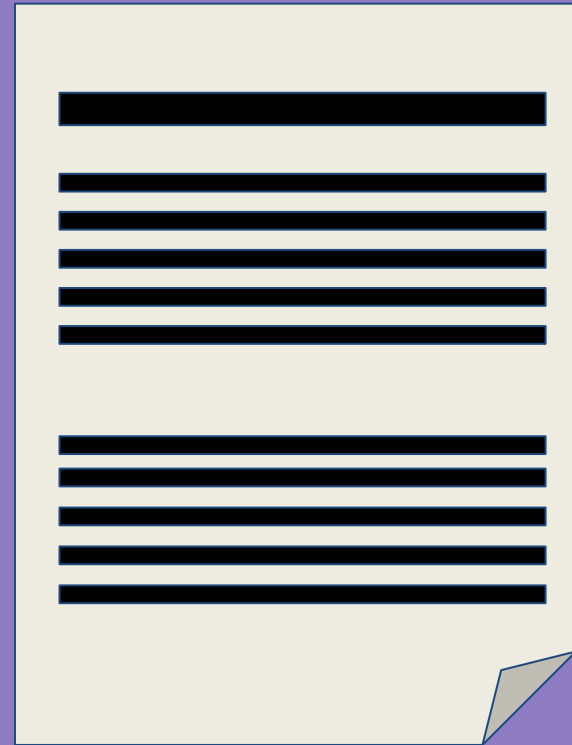
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How might you physically structure oral submissions?

- Say your submission
 - “It is our submission here that the activity was dangerous”
- Say the law
- Say your reasoning
- Restate your submission
 - “Therefore, the activity was dangerous”



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Chinese Walls

See Bureau Interprofessionnel des vins de Bourgogne (the Taltarni Wines case) [2002] FCA 588 and Newman v Phillips Fox (1999) 21 WAR 309 for examples of Chinese walls that did and did not succeed.

“In my opinion an effective Chinese Wall needs to be an established part of the organisational structure of the firm, not created *ad hoc* and dependent on the acceptance of evidence sworn for the purpose by members of staff engaged on the relevant work.” – Lord Millet, *Prince Jefri Bolkiah v KPMG*

Some elements of an effective wall Lord Millett notes include:

- physical separation of personnel involved;
- regular educational programme;
- strict procedures for dealing with any contact between personnel involved or any other crossing of the wall;
- monitoring by compliance officers;
- disciplinary sanctions.

We submit that equitable compensation for what Quartz paid is the appropriate remedy for the established equity.

Primary Submission: Equitable Compensation for Quartz's expenditure of \$46,000

- 1) Respondent claims a constructive trust for relief for proprietary estoppel
- 2) Jurisprudential reasoning behind awarding relief is because courts find it is unconscionable to allow the promisor to resile
- 3) However, Justice Deane said in the 1990 case *Commonwealth v Verwayan*, decided in this court:
 - a. If the relying party's detriment was relatively small and in readily-quantifiable amounts, is not unconscionable for the promisor to resile from their promise if they pay back those amounts.
- 4) We submit:
 - a. Quartz was relatively-small reliance - \$46,000 and she was rich
 - i. Unlike the life-changing reliances in *Sidhu v Van Dyke*, *Milling v Hardie*
 - b. Quartz easily quantified [10]

Courts aversion to the significant of imposing a constructive trust in general – let alone a full constructive trust

- a. *Giumelli*, 113-114 – *Chief Justice Gleeson, Justices McHugh*,

Alternative One: Full Constructive Trust

- No, because she did not rely on it. *Verwayan*.

Alternative: Half a constructive trust or Equitable Compensation for Value of Property

- 1) *Clean Break*
 - a. *DeLaforce v Simpson-Cook* (2010) 78 NSWLR 483, 493 [60] (Handley AJA)
 - b. *Stoklasa v Stoklasa 5* [2004] NSWSC 518, [42] (Gzell J)
 - o Equitable lien
 - o Breakdown of a relationship between plaintiff (father) and defendant (son) is not a reason to then let someone in the house

The language of s1032(3) encourages this Tribunal to continue proceedings.

- 1) The word “may” explicitly authorises that tribunals continue proceedings. The language is not, for example, that ‘tribunals choose to suspend proceedings while waiting for the courts’; the language is not ‘arbitral proceedings may be halted in the face potential unforceability’. Continuing proceedings is therefore more consistent with the intention of s1032's language.

Practical reasons

- 2) “Respondent argues at [16] that continuing with proceedings will be ‘unnecessarily wasting time and resources’
 - 1) However, if the court finds in favour of Claimant, then there are no resources waste. There is instead, already an actionable award that resolves both Parties’ obligations.
 - 2) Alternatively, even if the court finds in favour of Respondent, there are still benefits to ADR:
 - i. Parties will have ventilated their issues, and potentially clarified or reconsidered their positions;
 - ii. This arbitral Tribunal's reasoning can be considered
 1. Especially if a future arbitration takes place in, for example, the International Chamber of Commerce
 - iii. Claimant faces significant costs by delaying
 1. Staying proceedings disables the Parties from exiting their contractual obligations, and pursuing other business interests

Script

Introduction

May it please the court.

Your Honours, I will be dealing with the third ground of appeal, namely that the elements of *common law negligence* cannot be established **in this case** as the event and subsequent injuries suffered by the respondent were the result of an autonomous drone. **Your Honour, we note that despite the increasing replacement of human action with automation, a counter-intuitive focus on human responsibility continues to prevail. Although concerns about accountability and liability are valid, a desire for compensation must not conveniently gloss over the complexities of autonomous systems. Particularly, the role of an operator of a system like Thanksy must not subsume the liability arising from the agentive role of the designer of the software that directs the system. We must foster broader public trust in autonomous technologies and utilise their potential for achieving greater safety outcomes – however, this must not be achieved through lowering the standard of proof in complex factual situations in an effort to identify a human actor responsible.** We submit, that presently the Appellant cannot be held liable for negligence.

Submissions

Your Honours, I now turn to an analysis of the elements of negligence. First, we will submit that any *duty of care* owed by the Appellant is to be limited by their minimal degree of control and the capacity of the foreseeable plaintiffs to protect themselves. Secondly, we will submit that the duty of care was not *breached* through the performance of “Blood Money”, and in our assessment of the calculus of negligence we submit that to require the appellant to have taken more precautions would be too burdensome. Thirdly, we submit that even if a duty and breach were found, the complexities of factual causation and the evidentiary gaps in the present case preclude a finding that the damage suffered is causally related to any breach.

Turning now to the first element of common law negligence, we submit that if Thanksy owed a **duty of care**, it is to be limited appropriately by the salient factors of the case.

A *Duty of care limited by lack of control*

Although we do not dispute that Mr Thompson belonged to the reasonably foreseeable class of plaintiffs within the vicinity of the drone’s flight,¹ your Honours, the authorities on the duty of care are all one way, in that they

¹ *Donoghue v Stevenson* [1932] AC 562.

all state that mere foreseeability of the risk of injury arising from a negligent act or omission is insufficient to find legal liability. (*Sullivan v Moody* 2001 HCA)

As this is a novel case, pursuant to the 2009 judgement of President Allsop in *Caltex Refineries Pty Ltd v Stavar* in the NSW Court of Appeal, salient factors (normative considerations of judgement and policy) such as the degree and nature of control exercised by the appellant, and the vulnerability of the respondent must be assessed since they affect the appropriateness of finding a legal duty.²

Our learned friends seek to rely on the authority of *ACQ Pty Ltd v Cook* (2008, NSWCA) in paragraph [3.1] of their submissions to establish that analogously, a duty of care is owed presently. Although ultimately in *ACQ*, no duty of care towards the plaintiff to operate the aircraft with reasonable care was found, (Pilot of aircraft owes no duty of care, concerning manner in which he flies, to an electricity worker who is nowhere near the place where the flying occurs, but who is a type of person likely to come to the scene if negligent flying brought a power line down.) earlier in his judgement Justice of Appeal Campbell *equivocally* held that a pilot of an aircraft *may* owe a duty to people on the ground who might be injured if the plane or anything from it struck them.

99 I recognise that Mr Stubbs may well have owed duties of care to people other than Mr Cook concerning the operation of the aircraft. He may have owed a duty to people on the ground who might be injured if the plane or anything dropped from it struck them or caused them to injure themselves while taking evasive action. Particularly when he knew he was flying in close proximity to high voltage electricity cables, he may well have owed a duty to people on the ground who might be struck or come into the immediate vicinity of a wire as it fell, to inexperienced people who approached too close to the fallen wire, to people who might come near a fallen wire without realising it was there, or to property owners who it was reasonably foreseeable may suffer damage in consequence of the fall of the wire. But that A owes a duty of care to one person, or people who fit within a particular description, does not necessarily mean that A owes a duty of care to anyone else.

Respectfully, your Honours, we submit that the novelty of the present case and the significant technological difference between a manned aircraft and an autonomous drone requires the court to undertake normative considerations of judgement and policy, and not impute a duty merely on the basis of Justice of Appeal Campbell’s obiter. Thus, we submit an analysis of the salient factors of the case is integral to the finding and scope of a duty.

- RE: factor of control

Thanksy’s performance artwork “Blood Money” was performed almost exclusively through the autonomous function of the drone. In programming the drone to decide when to drop paint bombs, where to fly and when to

² *Caltex Refineries (Qld) Pty Ltd v Stavar* (2009) 75 NSWLR 649.

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B DAOs are incongruent with existing Australian corporate structures

1 DAOs are most readily interpreted as common law partnerships, syndicates or unincorporated associations, with personal and unlimited liability for all participants.¹ They lack separate legal identity from their members, and thus do not constitute a legal ‘person’.² Moreover, DAOs are incapable of being recognised as a corporate body under the *Corporations Act 2001* (Cth), as existing regulatory categories appear to be incongruent with a DAO’s intrinsic characteristics of pseudonymity, anonymity, and decentralised governance.³

Per section 119 of the Corporations Act, a company comes into existence as a “body corporate” at the beginning of the day on which it is registered. There is no evidence that LUCK DAO applied for registration under section 117 of the Act, let alone such an application succeeding. As such, factually there is no basis upon which it can be claimed that LUCK DAO is a body corporate, and satisfies the definition of “person” for patent grants.

s 119 makes it clear that they are corporations when it provides that “a company comes into existence as a body corporate at the beginning of the day on which it is registered”. But other statutes dealing with other bodies may be less clear.

For example, suppose parliament enacts that a particular unincorporated

Australia doesn’t recognise member-managed organisations as legal entities

Arnold v Queensland (1987) 73 ALR 607

It is provided by s 22(a) of the Acts Interpretation Act 1901 that the word “person” — where used in a Commonwealth Act and unless the contrary intention appears — includes a body politic or corporate as well as an individual. Neither that Act nor the Administrative Appeals Tribunal Act suggests that “person” includes an unincorporated association lacking separate legal identity. I know of no case in which such an organisation

¹ Senate Select Committee on Australia as a Technology and Financial Centre, Parliament of Australia, *Australia as a Technology and Financial Centre* (Report, October 2021) 75 [3.154], [3.158].

² *Arnold v Queensland* (1987) 73 ALR 607, 611. See also ‘2.6.1.1 Who May be Granted a Patent’, *IP Australia* (Web Page) <<https://manuals.ipaustralia.gov.au/patent/2.6.1.1-who-may-be-granted-a-patent->>>.

³ Simon Moore, ‘Towards a Functioning Legal Framework for Emerging DAO Technologies in Australia’ (2021) 2(2) *Australian National University Journal of Law and Technology* 109, 115.

has been recognised as a “person” and it seems correct in principle to restrict the application of the word “person” in s 30 to individuals and to bodies politic and corporate, all of whom have a recognised separate legal identity.

In *Australian Building and Construction Commissioner v Construction, Forestry, Mining and Energy Union* (2017) 254 FCR 68; 271 IR 321; [2017] FCAFC 113; BC201705939 (C9) the Full Court of the Federal Court rejected a contention that pecuniary penalties in regard to a number of contraventions under s 38 of the Building and Construction Industry Improvement Act 2005 should be considered on that basis that each was a contravention by each group of workers at each of the relevant construction sites. The court said, at [78] “[i]t does not follow, however, that it would be open to the Commissioner to commence proceedings against a group of persons seeking a pecuniary penalty for a single contravention of s 38 of the [Building and Construction Industry Improvement] Act. A person, for the purposes of s 38 ..., may be an individual, a body politic or a corporation: see s 2C of the Acts Interpretation Act. It cannot, however, be a group of individuals, even if that group was acting in a collective way. If it could, how would the Commissioner go about describing the group if it was to be named as a defendant or respondent in proceedings commenced under s 49 of the [Building and Construction Industry Improvement] Act?”

My argument re: “body corporate” definition

Section 15 of the *Patents Act* contemplates that only a person may be granted a patent. A person includes both natural and legal persons such as bodies politic and corporate.

In applying the *Acts Interpretation Act* definition of a person, courts have readily equated the term “body corporate” with a corporation, that is, an incorporated body that has a separate legal identity from its constituent members.

For example, in *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168; 39 ALR 417; the High Court in interpreting the definition of a “second person” in the *Racial Discrimination Act 1975*, imported the definition of “person” which includes “body corporate” from the then section 22(a) of the *Acts Interpretation Act*, and proceeded to equate “body corporate” with a “corporation”. [424 - 425]

Additionally, the Patent Manual of Practice and Procedure, published by the Australian Government through the IP Australia agency, outlines in section 2.6.1.1 that an example of a body corporate is a company incorporated under the laws of the State of Victoria.

CORPORATIONS ACT 2001 - SECT 9

Per s 112, only proprietary companies, public companies or corporate collective investment vehicles can be registered under the Corporations Act 2001.

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The Night of the Moot



Wear formal clothing



Print:



Get to the room 15 minutes early.

- Not compulsory - but it is **recommended**, as it's a courtroom after all

- The problem question
- Both sets of written submissions (yours and your opponents)

- Meet your opponents and chat to the judges

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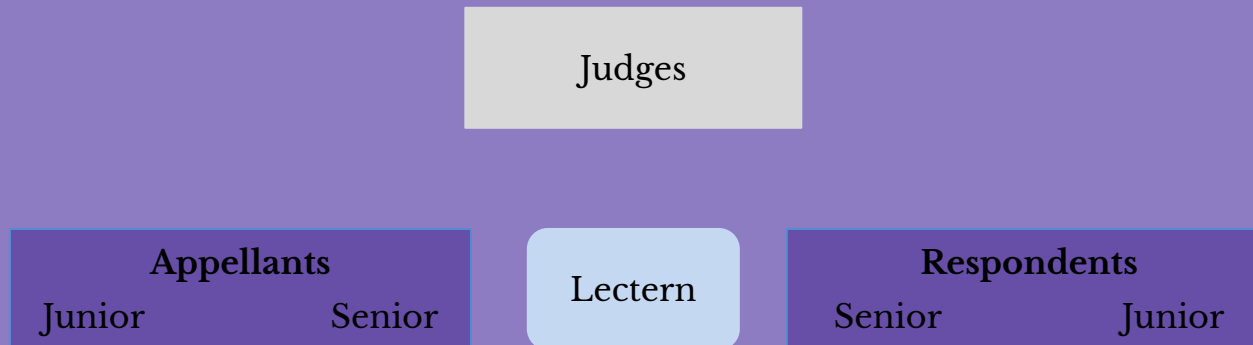
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Moot Structure – Overview



1. Judges' entrance
2. Appearances
3. **Senior counsel** for the **appellant** gives oral submissions
4. **Junior counsel** for the appellant gives oral submissions
5. **Senior counsel** for the **respondent** gives oral submissions
6. **Junior counsel** for the respondent gives oral submissions
7. Judges' decision and feedback

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Starting the Moot



- Rise when the judges enter the room. This begins the formal component of the moot.
- Bow to the bench of judges.
- Sit after they sit.
- Wait until the judges call you. They will start the hearing by saying: “In the matter of [name of case], the NSW Court of Appeal is now in session. We will now take appearances.”

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Appearances

Appearances are how counsel identifies themselves to the court.

It is an important chance to make a good first impression.

First: Appellant
Senior's
Appearances

Second: Respondent
Senior's
Appearances

Standard form of appearances:

“May it please the Court, my name is Jones Smith and I appear with my learned junior, James Flitwick, for the appellant, Elma Gantry, in this matter. I will address grounds 1 and 2, and my learned junior, grounds 3 and 4. We will both speak for 20 minutes.”

Refer to the Mooting Handbook

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Senior Counsel

1. Begins with *'May it please the Court'*
2. Gives a **brief** introduction of 2–3 sentences and states the pertinent facts of the case (45 seconds)
3. Lists both senior and junior counsel's submissions in a sentence per submission (45 seconds)
 - E.g. *'We will make four submissions. First, X. Second, Y. ... etc.'*
4. Oral submissions (18 minutes)
5. Concludes with *'May it please the Court, those are my submissions'*

Junior Counsel

1. Begins with *'May it please the Court'*
2. Lists own submissions in a sentence per submission (45 seconds)
3. Submissions (18 minutes)
4. At the end, states what orders his or her side is seeking (45 seconds)
 - Appellant typically requests that the appeal be allowed, and that damages be awarded
 - Respondent typically requests that the appeal be denied, and that no damages be awarded

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Important Tips

Timing

- You must stay within your 20 minute time limit! (This includes the time taken to answer questions.)

Time Extensions

- If you're running out of time, ask for a 1 minute extension: *'Your Honour, may I request a one minute extension?'*



Eye Contact

- You can glance down at your page sometimes, but avoid excessive reading.
- Try to maintain eye contact with your judges so you can 'read' the bench instead.

Pace & Tone

- Speak slowly and clearly
- Pause before you answer a question

Questions from the Bench: What are they?



- Judges can interrupt you at any time to ask questions, so watch for indications they want to speak.
- These questions are an opportunity to engage with any concerns the judge has about your argument and persuade them.
- The judges are trying to assist you in fleshing out your argument. They are not trying to dismantle it.

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Questions from the Bench:

How do I answer them?



Checklist

- Take your time and think your answer through before speaking.
- Be concise. Try to start with a “yes” or “no” if applicable.
- Always answer the question directly, referring to the Facts and any relevant case law.
- If you can't say anything more than you've already said: *'That's the highest I can put it'* (last resort).
- If you don't know the answer: *'I'm unable to assist the Court'* (last resort).

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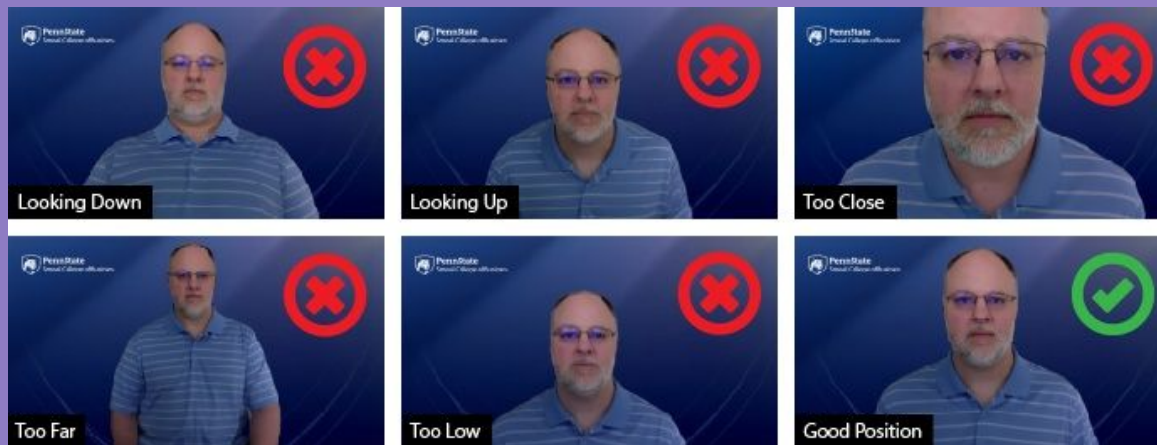
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Mooting Online

Checklist

- Mute your microphone when you are not speaking
- Split screen so you can look at the judges for visual cues
- Ensure you are positioned correctly in the frame
 - o Sit upright, place your camera at eye-level
- Look into the camera for 'eye contact'
- Ensure you have the meeting link beforehand (and check for any Zoom updates!)



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Want to see a moot in action?

Why not watch a ...

Demonstration Moot of *Molville v Woods!*

Online at <https://youtu.be/RqjtvyolC5k>

Mooting Final!

Online at

https://www.youtube.com/watch?v=NtVI2-6Ht_s

A more recent demonstration moot recording will also be sent with the Round 1 materials.

The Beginners Competition at UNSW

Round	Date	
Preliminary Round 1	Weeks 6 - 8	<i>Term 1</i>
Preliminary Round 2	Weeks 3 - 5	<i>Term 2</i>
Quarter Finals	Weeks 9	<i>Term 2</i>
Semi Finals	Week 2	<i>Term 3</i>
Grand Final	Week 5	<i>Term 3</i>

Note: The Beginners Competition is for students currently in their first year of law. We also have our Intermediate Competition (second year students) and our Senior Competition (third year students and above) for any older students trying mooting out for the first time! The dates for these other competitions will be slightly different to those above. All of this information can be found on the Law Society website.

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**Sign up to Round 1 of
Beginners Mooting!**



<https://tinyurl.com/2p8uyk9m>

**Sign up to Round 1 of
Intermediate Mooting!**



<https://tinyurl.com/ddmtstxu>