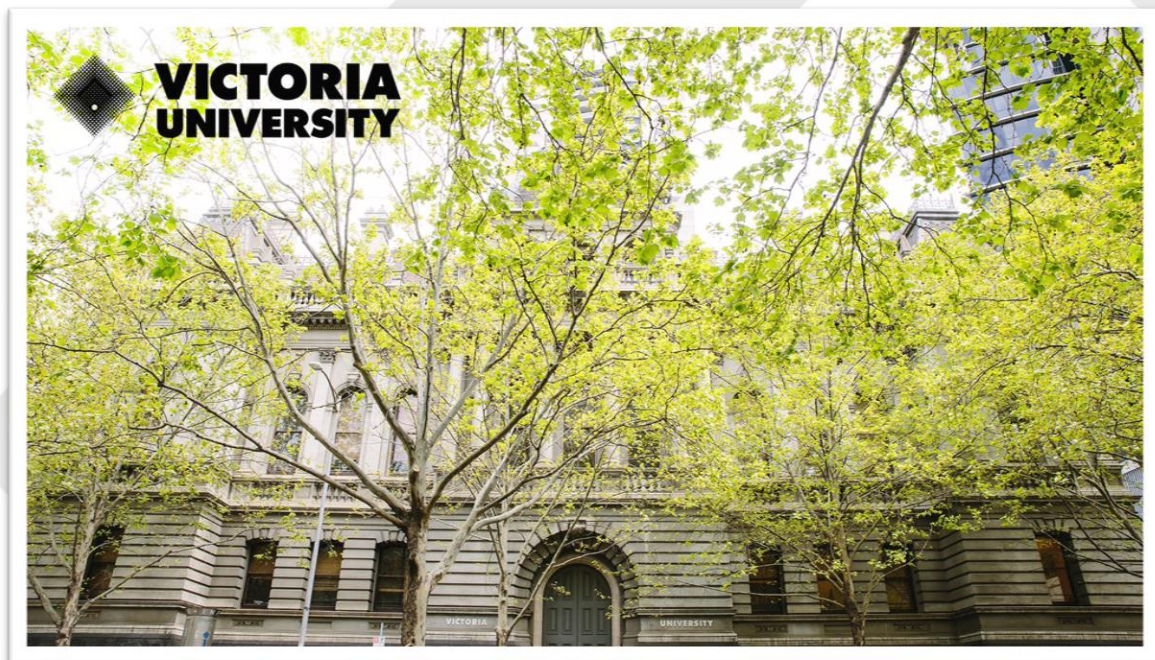
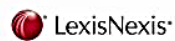

THE 9TH ANNUAL MICHAEL KIRBY CONTRACT LAW MOOT COMPETITION 23 – 26 AUGUST 2021

College of Law and Justice



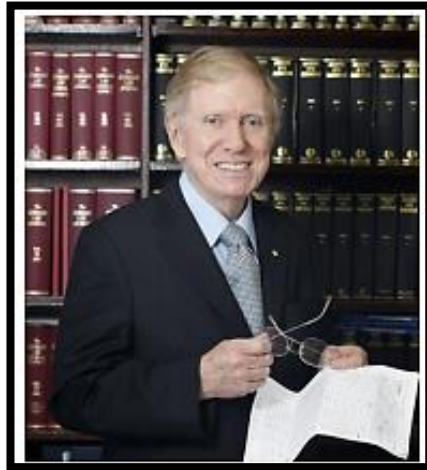
Thank you to our sponsors



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Welcome from the Hon. Michael D. Kirby AC CMG



VICTORIA UNIVERSITY COLLEGE OF LAW AND JUSTICE

MICHAEL KIRBY CONTRACT LAW MOOT

9th ANNUAL COMPETITION

23 – 26 August 2021

I send greetings to all the participants in this mooting competition. In such a short time, it has become one of the premier mooting contests in Australia. It goes from strength to strength. I have seen this with my own eyes at successive finals of the competition held in Melbourne.

I wish specially to welcome teams from Universities who are competing for the first time.

Contract law is rightly one of the core subjects in any law course. It underpins our economy and helps to sustain economic growth and business certainty.

I hope that this year's competition will be as hard fought and successful as in earlier years.

I express thanks to the Honourable Justice Timothy McEvoy, Michael D Wyles Q.C and David Thomson for judging the final. And to all the other moot judges, the organisers and participants.

This competition underlines the great importance of Melbourne and Victoria in law in Australia, and specifically as a centre of commercial dispute resolution, including in the courts.

A handwritten signature in black ink, which appears to read "Michael Kirby". The signature is fluid and cursive.

The Hon. Michael D. Kirby AC CMG

Welcome from Dean of the College of Law and Justice



I extend a warm welcome to all of you who have travelled here from Law Schools around Australia, to the 9th Annual Michael Kirby Contract Law Moot. We at the College of Law and Justice at Victoria University are pleased with the very strong response to this mooting competition from Australian law schools, and from the Victorian legal profession.

We are delighted that the moot continues to be accessible and relevant to Australia law schools, and that into the future, universities further afield in New Zealand and other parts of Australasia may consider supporting this competition.

We are grateful to the many members of the legal profession for their continued support of this moot. We are also very privileged to have his Hon. Michael D. Kirby AC CMG supporting the College of Law and Justice at Victoria University in the Michael Kirby Contract Law Moot each year.

Finally, I thank the moot partners, as well as all the student volunteers and all the members of the Organising Committee. Thank you especially to Ms Suzanna Pejic, our Kirby Moot coordinator for 2021.

I wish all those competing and participating in the Moot success, and trust that you will enjoy and greatly benefit from your experience at the University and the College of Law and Justice.

Best wishes,

A handwritten signature in cursive script that reads "Lidia Xynas". The signature is written in dark ink on a light-colored background.

Professor Lidia Xynas
Dean
College of Law and Justice
Victoria University

Welcome from Moot Coordinator



Welcome to the 9th Annual Michael Kirby Contract Law Moot.

We are so excited to be finally be running this main event in 2021 in these challenging times.

Due to the unforeseen circumstances of the current pandemic and the states borders being locked we have had no option but to run the Moot online via Zoom.

I am sure this year will not disappoint. To all the participating students, I hope you find the 2021 competition both challenging and rewarding. Your enthusiasm and willingness to extend yourself academically and personally, contributes to the success of this competition and for this I thank you.

Special thanks for the many members of the judiciary, the wider legal profession and academic staff who have agreed to participate as arbitrators and mentors.

To the Hon. Michael D. Kirby AC CMG, thank you sincerely for your continued support, participation and for joining us for the 2021 Grand Final.

Finally, special thanks to Professor Lidia Xynas, Dean, College Law & Justice at Victoria University for overseeing this special event.

Kind Regards

Sue Pejic

2021 Moot Coordinator

About the Moot

Since first established in 2011 by Victoria University, the Annual Michael Kirby Contract Law Moot has quickly become the premier, national mooting competition in contract law for universities around Australia. There are three main characteristics of this moot:

1. **Accessible:** Each University is allowed to submit up to two teams of four to compete in the moot. Consequently, the mooting opportunities are given to up to eight students per university;
2. **Allows for incremental development of skills:** Each team is allowed to moot four times in the General Rounds. Students are provided with formative feedback to help them reflect on their performance and incrementally develop the relevant advocacy skills and their overall delivery of arguments;
3. **Relevant:** The moot problem is designed to closely resemble a real-life dispute. Indeed, the choice of the arbitration setting reflects the growing importance of ADR in Australia and internationally. Further, a large proportion of the judges are practising members of the Victorian legal profession.

The Honourable Michael D. Kirby AC CMG

When he retired from the High Court of Australia on 2 February 2009, Michael Kirby was Australia's longest serving judge.

In 1975 he was appointed Deputy President of the Australian Conciliation & Arbitration Commission. Soon after, he was seconded as inaugural Chairman of the Australian Law Reform Commission (1975-84). Later, he was appointed a Judge of the Federal Court of Australia, President of the New South Wales Court of Appeal (1984-96) and, concurrently, President of the Court of Appeal of Solomon Islands (1995-6). His appointment to the High Court of Australia followed in 1996 and he served until 2009.

In addition to his judicial duties, Michael Kirby has served on three university governing bodies. He also served on many national and international bodies. Amongst the latter have been service as a member of the World Health Organisation's Global Commission on AIDS (1988-92); as President of the International Commission of Jurists, Geneva (1995-8); as UN Special Representative for Human Rights in Cambodia (1993-6); as a member of the UNESCO International Bioethics Committee (1995-2005); as a member of the High Commissioner for Human Rights' Judicial Reference Group (2007- 9) and as a member of the UNAIDS Reference Group on HIV and Human Rights (2004-).

In 2011-12 he served as a member of the Eminent Persons Group on the future of the Commonwealth of Nations. He was appointed to the Advisory Council of Transparency International, based in Berlin in 2012. In 2013- 2014, he was appointed Chair of the UN Commission of Inquiry on Human Rights Violations in North Korea. In 2015-16 he was a member of the UN Secretary General's High Level Panel on access to Essential Healthcare. He has been Patron of the Blood Born Diseases since 2011.

His main current international activity is as Co-Chair of the International Bar Association's Human Rights Institute (2018 -).

Michael D. Wyles Q.C.



For more than 31 years Michael D Wyles Q.C. has worked in the commercial courts (including the High Court), instructed by Australia's leading commercial solicitors. He is among the most experienced advocates at the Victorian and New South Wales Bars, both at trial and appellate level. His broad exposure to all manner of commercial enterprise has allowed him a mastery of those areas of the law fundamental to commerce; tax, contracts, trusts, equity, corporate law and trade practices. This mastery was recognised by his peers who have selected him for entry in "Best Lawyers Australia" since 2014.

Clients seek Mr Wyles out for opinions as to what a judge is likely to decide, relying on his extensive experience as counsel in assisting judges at trial and on appeal.

Mr Wyles has been involved in providing advice across a broad spectrum of areas, including more arcane matters of tax (such as the principle of mutuality), corporations law and trade practices. Mr Wyles was the architect of Cadbury's very successful cartel claim against Amcor for the loss caused to Cadbury by Amcor's participation in the packaging cartel with Visy.

In addition to his work as a senior silk, Mr Wyles took time to chair Barristers' Chambers Limited for 5 years from 2012 to 2017, growing BCL to a \$200m commercial enterprise with a turnover in excess of \$35m. Along the way Mr Wyles completed a Certificate of Workplace Leadership at the University of Melbourne.

The Honourable Justice McEvoy



The Honourable Justice Timothy McEvoy was appointed a Judge of the Family Court of Australia in March 2019. Prior to his appointment he had been a member of the Victorian Bar since 2002, taking Silk in 2016. He practised in the State Supreme Courts and the Federal Court at trial and appellate level in Australian and international commercial law, in public law, and in major torts, including defamation.

He appeared before boards of inquiry, disciplinary tribunals, the Coroners Court and State Supreme Courts in disciplinary matters, investigations, and criminal proceedings, as well as in financial matters in the Family Court of Australia. Immediately prior to his appointment he was senior counsel assisting the Aged Care Quality and Safety Royal Commission.

Since 2001 Justice McEvoy has been a visiting professor of law at the University of Virginia School of Law in the United States, teaching an annual course in the conflict of laws. In 2011-2012 he was a Fulbright Professional Scholar in Australia-US Alliance Studies and visiting scholar at the Georgetown University Law Center in Washington DC. From 1998-2002 he was a member of the Australian Delegation of Experts to the Special Commission of The Hague Conference on Private International Law (Jurisdiction and Judgments Convention).

His Honour is a member of the American Law Institute and a Judicial Deputy President of the Commonwealth Administrative Appeals Tribunal.

David S Thomson, OAM, FACE



David Thomson read Arts and Law at Monash University and the University of Cambridge, served as an officer in the Royal Australian Air Force during the Vietnam War and became a teacher, pioneering the teaching of Legal Studies in secondary schools. In his own words, he has had several decades of experience in telling people to stop talking.

David is Teacher-in-Residence at the Victoria Law Foundation and a Fellow of the Sir Zelman Cowen Centre at Victoria University.

Kirby Moot - Past Winners

2011

Winner: Melbourne University Team 1

Runner Up: University of Western Sydney

2012

Winner: Victoria Law School Team 2

Runner Up: University of Adelaide Team 1

2013

Winner: Queensland University of Technology

Runner-up: Bond University Team 2

2014

Winner: University of Western Australia

Runner-up: Bond University Team 2

2015

Winner: Griffith University Team 1

Runner-up: Queensland University of Technology Team 2

2016

Winner: Queensland University of Technology

Runner-up: Griffith University

2017

Winner: Bond University

Runner-up: Queensland University of Technology

2018

Winner: Melbourne Law School

Runner-up: Bond University

Awards and Mentions for MKM 2021

Awards and Mentions for MKM 2021

1. Award for the Winning Team in the Final Rounds (\$1,000) •
Sponsor: Leo Cussen & College of Law
2. Award for the Runner Up Team in the Final Rounds (\$800) •
Sponsor: Leo Cussen & College of Law
3. Award for the Best Individual Oralist in the General Rounds (\$250) •
Sponsor: Thomson-Reuter
4. Award for the Best Individual Oralist in the Final Rounds (\$250) •
Sponsor: Thomson-Reuter
5. Award for the Best Individual Oralist in the Grand Final (\$250) •
Sponsor: LexisNexis
6. Award for Best Written Memorandum for Claimant (\$250) •
Sponsor: Oxford University Press
7. Award for Best Written Memorandum for Respondent (\$250) •
Sponsor: VU College of Law & Justice

Honorable mentions will be made for:

1. The Highest Scoring Team in the General Rounds
2. The Highest Scoring Oralist in the General Rounds
3. The Highest Scoring Oralist in the Final Rounds
4. The Spirit of MK Contract Law Moot 2021

Schedule of Events 2021

Monday 23 August 2021	
9.30 am	Official Welcome Dean of College of Law and Justice Moot Coordinator - Housekeeping
11 am - 12.30 pm	
2 pm - 3.30 pm	General Zoom Rounds
5.30 pm - 7pm	

Tuesday 24 August 2021	
11.30 am - 1pm	
2 pm - 3.30 pm	General Zoom Rounds
5.30 pm - 7pm	
9.00pm	Announcement of Top 8 Teams via email

Wednesday 25 August 2021	
1.00 pm - 2.20 pm	Quarter Final
Around 5.00 pm	Announcement of Top 4 Teams

Thursday 26 August 2021	
9.30 am – 10.30 am	Semi-Final
Around 1.00 pm	Announcement of Grand Finalists
2.00 pm – 3.30 pm	Grand Final
5.00 pm	Awards Ceremony VU College of Law

General Rounds 2021 Schdule

Monday 23 August 2021		
11 - 12.30		
Round	Claimant	Respondant
1	UQ	ACU
2	UNSW	SWIN
3	BOND	NEWCASTLE
4	MU	ACU - SYD
2-3.30pm		
Round	Claimant	Respondant
5	MACQ	VU
6	ACU	MU
7	ACU-SYD	Newcastle
8	Monash	UQ
5.30 - 7pm		
Round	Claimant	Respondant
9	Newcastle	Monash
10	RMIT	BOND
11	VU	UNSW
12	SWIN	MACQ
Tuesday 24th August 2021		
11.30am-1pm		
Round	Claimant	Respondant
13	ACU	SWIN
14	RMIT	MU
15	VU	MONASH
16	UQ	UNSW
2-3.30pm		
Round	Claimant	Respondant
17	BOND	ACU-SYD
18	MACQ	RMIT
19	SWIN	VU
20	UNSW	ACU

5.30pm-7pm		
Round	Claimant	Respondant
21	MONASH	RMIT
22	MU	BOND
23	ACU-SYD	MACQ
24	NEWCASTLE	UQ

Quarter Final Wednesday 25th August 2021

1.00-2.20pm		
Quarter Final	Claimant	Respondant
QF1	x	x
QF2	x	x
QF3	x	x
QF4	x	x

Semi Final Thursday 26th August 2021

9.30am-10.30am		
Semi Final	Claimant	Respondant
SF1	x	x
SF2	x	x

GRAND Final Thursday 26th August 2021

2pm-3.30pm		
FINAL	Claimant	Respondant
	x	x

2021 Teams

No.	University
1	The University of Queensland
2	University New South Wales Law Society
3	Bond University
4	Melbourne University Law School Society
5	ACU
6	Swinburne
7	Macquarie University Law Society
8	ACU – North Sydney
9	Newcastle University
10	RMIT
11	VU
12	Monash

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to Practice**
The College of Law

Moot Problem with Clarifications

The 9th Annual

Hon. Michael Kirby Contract Law Moot

Melbourne, Australia
23 – 26 AUGUST 2021

MOOT PROBLEM

Organised by the College of Law and Justice,
Victoria University, Melbourne Australia



B E T W E E N:

ROCKHOUND PROMOTIONS PTY LTD (ACN 142 142 189)

Claimant

-and-

BRINKHOFF PTY LTD (ACN 001 441 929)

First Respondent

-and-

WILLIAM BRINKHOFF

Second Respondent

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AGREED SUMMARY OF FACTS

Parties

1. Rachel Rockhound is the Director and General Manager of Rockhound Promotions Pty Ltd (**Rockhound**). Rockhound is an event management company. It primarily stages promotional events for corporate clients.
2. William Brinkhoff is a Director and shareholder of Brinkhoff Pty Ltd (**Brinkhoff**), a popular manufacturer of confectionary. Brinkhoff is particularly well-known for its “Jelly Button” chocolates (**JB’s**). JB’s are multicoloured, button-shaped chocolates, which are similar in size to a 5-cent piece.

The Event

3. Symmetry Technologies Inc (**ST**) is a multinational corporation with a reputation for developing cutting edge consumer electronics.
4. In February 2021 ST engaged Rockhound’s services to assist with the launch of a new product to the Australian market: a holographic non-fungible token. The release of ST’s products are highly anticipated and details of the product launch event (the **Event**) were a tightly held secret.
5. The Event was scheduled for 26 June 2021 at the Melbourne Cricket Ground (the **MCG**). Aside from organising and managing the Event, Rockhound agreed to:
 - a. create 16,000 gift bags for attendees;
 - b. ensure that each gift bag contained a 125 gram packet of JB’s, among other things; and
 - c. ensure that the JB’s matched the ST company colours of red and green.

Agreement

6. The onset of Covid-19 and the Victorian Government’s lockdown measures had a devastating impact on Brinkhoff. In the most recent financial year, it’s sales decreased by more than 80% and Brinkhoff recorded a substantial loss. The Rag Newspaper ran an article in January 2021 entitled “Brinkhoff to cut 300 jobs after sales fall off cliff.”
7. Rachel exchanged several emails with William to determine whether Brinkhoff was able to supply two tonnes of JB’s in time for the Event. During a phone conversation:
 - a. Rachel asked whether Brinkhoff would be “around long enough” to fulfill the order;
 - b. William laughed and said “we’ve been in business for 30 years, we aren’t going anywhere;”
 - c. Rachel replied “will you guarantee that;”

- d. William said “sure thing. I’d bet my life on it.”
8. Rachel felt fairly confident that Brinkhoff was in a position to fulfill the proposed order and deliver the JB’s on time. She thought it likely that most local confectionary companies would be experiencing some level of financial stress. Rachel decided to order the JB’s for the gift bags. She said as much to William and he had a draft contract of sale emailed to Rockhound.
9. Rockhound reviewed the draft contract and proposed several changes, including the addition of a clause that read:
- “A director who signs this agreement for or on behalf of a party to this agreement guarantees its performance and is personally liable as if the signatory was the party.”*
10. Rockhound provided no explanation for the inclusion of this clause and it went unnoticed by Brinkhoff.
11. On 1 March 2021 Rockhound and Brinkhoff entered into an agreement, pursuant to which Brinkhoff agreed to supply and package 2 tonnes of JB’s in 125 gram packaging. The parties’ agreement was recorded in a written contract, which was duly executed in counterpart by Rachel and William (the **Contract**).

Delivery

12. On 11 June 2021 Brinkhoff notified Rockhound that it was experiencing supply difficulties and could not deliver until 24 June. The parties arranged to have the goods delivered directly to the MCG.
13. The goods were delivered to the MCG on the evening of 23 June 2021. The following morning, Rachel posted a tweet concerning the JB’s to Twitter. Rockhound paid the purchase price that afternoon.
14. On 25 June 2021 Rachel advised ST that the gift bags had been assembled. She also gave ST’s Event Manager, David, a sample gift bag. Upon opening the bag, David immediately complained that the ratio of red and green JB’s was not equal. “Why are there so many red ones? If the others are like this, I want them removed from the gift bags” he exclaimed.

The Dispute

15. Rockhound contacted Brinkhoff to complain about the ratio of the JB’s. Brinkhoff argued that a precise ratio could not be achieved unless individual chocolates were deposited in each packet by hand, which was impractical.
16. Rockhound sent the JB’s to be tested by Real Laboratory. It’s findings are disclosed in an expert report dated 26 June 2021 (the **Report**).
17. On 27 June 2021, Rockhound sent a letter rejecting the goods and terminating the Contract. Brinkhoff denies any breach and says that the termination was itself a repudiation of the Contract.

18. Rockhound claims damages against Brinkhoff for the delay in delivery and seeks to recover the purchase price.
19. Rachel is now concerned that Brinkhoff will not remain solvent. She hopes to avoid a situation where the tribunal renders a hollow award in Rockhound's favour. For this reason, Rockhound also claims damages against William on the grounds that he guaranteed and is personally liable for any breach of the Contract.
20. While the Contract does not contain an arbitration agreement, the parties have agreed to submit their dispute to arbitration on the following terms:
 - a. the arbitral seat is Melbourne;
 - b. the substantive law is that of Victoria;
 - c. the Kirby Moot Rules will determine the procedure of the arbitration.
21. The tribunal is properly constituted and there are no procedural or jurisdictional issues in dispute.
22. In August 2021 the tribunal handed down an interim award and determined that the Report is admissible as expert evidence.

EXHIBIT 1

Agreement

This Agreement is made between:

Brinkhoff Pty Ltd (ACN 001 441 929) of 21 Simons Parade, Balwyn VIC
("Brinkhoff")

-and-

Rockhound Promotions Pty Ltd (ACN 142 142 189) of 3 Waverly Street,
Melbourne VIC ("Rockhound")

(together, the **Parties**).

Recitals

- A Rockhound intends to stage an event for its client on 26 June 2021.
- B It requires chocolates to include in 16,000 event gift bags.
- C Brinkhoff is a manufacturer of chocolates known as Jelly Buttons.
- D Brinkhoff agrees to provide Jelly Button chocolates to Rockhound for inclusion in the gift bags.
- E The Jelly Button chocolates are to be packaged in an equal mix of red and green colours.

THE PARTIES AGREE AS FOLLOWS:

1. Interpretation

- 1.1 This agreement is governed by the law of Victoria, and the Parties submit to the non-exclusive jurisdiction of the courts of that state.
- 1.2 In the interpretation of this agreement:
 - 1.1.1 a reference to '\$' means Australian dollars;
 - 1.1.2 obligations under this agreement affecting more than one party bind them jointly and each of them severally;
 - 1.1.3 where a word or phrase is given a defined meaning, another part of speech or other grammatical form of that word or phrase has a corresponding meaning;
 - 1.1.4 the words 'include' or 'including' are not words of limitation;

- 1.1.5 a reference to the word 'owing' means actually or contingently owing, and 'owe' and 'owed' have an equivalent meaning;
- 1.1.6 a reference to a party or clause is a reference to a party or clause of or to this agreement;
- 1.1.7 a reference to any document or agreement is to that document or agreement as amended, novated, supplemented or replaced;
- 1.1.8 dates and times are fixed by reference to Australian Eastern Standard time; and
- 1.1.9 headings are for convenience and do not affect the interpretation of this agreement.

2. Definitions

- 2.1 In this agreement:
 - 2.1.1 *Agreement* means this contract and includes all enclosures and annexures.
 - 2.1.2 *Delivery Date* means 19 June 2021.
 - 2.1.3 *The Goods* means red and green button-shaped chocolates known as Jelly Buttons.
 - 2.1.4 *Packaging* means clear plastic packaging capable of holding 125 grams of Chocolates.
 - 2.1.5 *Purchase Price* means the sum of \$165,000.

3. Goods

- 3.1 Brinkhoff shall:
 - 3.1.1 package the Goods in the Packaging;
 - 3.1.2 deliver two tonnes of the Goods to Rockhound;
 - 3.1.3 ensure the Goods are an equal mix of red and green chocolates; and
 - 3.1.4 deliver the Goods to 3 Waverly Street, Melbourne on or before the Delivery Date.
- 3.2 Rockhound will pay to Brinkhoff the Purchase Price upon receipt of the Goods.

4. General

- 4.1 The Parties acknowledge that:
 - 4.1.1 no promise or representation has been made to induce the Parties to enterer into this agreement;
 - 4.1.2 they have read, understood and accepted the terms of this agreement;
 - 4.1.3 they have had a reasonable opportunity to receive independent legal advice about the terms and effect of this agreement; and

- 4.1.4 the terms of this agreement are, in all the circumstances, fair and reasonable.
- 4.2 This agreement may be executed in any number of counterparts, and this has the same effect as if the signatures on the counterparts were on a single copy of this agreement.
- 4.3 A director who signs this agreement for or on behalf of a party to this agreement guarantees its performance and is personally liable as if the signatory was the party.
- 4.4 This agreement contains the entire understanding between the Parties. No representation or information provided by either Party to the other constitutes a collateral agreement, warranty or understanding between the Parties.

5. Delay

- 5.1 In the event that Brinkhoff fails to deliver the Goods on or before the Delivery Date, Brinkhoff agrees to pay to Rockhound an amount equal to:
- (a) 2.5% of the Purchase Price for each day or part thereof that the Goods remain undelivered (the **Liquidated Damages**).
 - (a) Brinkhoff acknowledges that:
 - (i) the Liquidated Damages are a genuine pre-estimate of the damages likely to be suffered by Rockhound in the event that the Goods are not delivered on or before the Delivery Date;
 - (ii) Rockhound's rights under this clause do not derogate from or affect its right to seek, as an alternative to liquidated damages, any other remedy at common law or in equity; and
 - (iii) the rights and obligations of the parties under this clause survive after the agreement has ended.

6. Severance

If a clause or any part of a clause in this agreement is unenforceable or invalid, it is to be read down so as to be enforceable and valid. Where this is not possible, the clause or any part thereof is to be severed without affecting the enforceability or validity of the remaining clauses.

7. Waiver

A failure or a delay in exercising any right, power or remedy under this agreement does not operate as a waiver. A single or partial exercise or waiver of the exercise of any right, power or remedy does not preclude any other or further exercise of that or any other right, power or remedy.

8. Variation

Any variation to this agreement will only have effect where it is recorded in writing.

EXHIBIT 2

From: William Brinkhoff <william@brinkhoffconfectionary.com.au>
Sent: Friday, 26 February 2021 3:05 PM
To: Rachel Rockhound <rachel@rockhoundpromotions.com.au>
Subject: RE: Thanks for your enquiry

Hi Rachel,

Great chatting with you and thanks for your enquiry.

We are more than capable of fulfilling an order of 2 tonnes of our world-famous Jelly Button chocolates. I confirm that we are able to package the chocolates in 125-gram bags.

It won't be a problem getting the chocolates to you by 19 June and in the required colours.

I look forward to working with you.

Kind Regards,

Billy

William Brinkhoff | Director
Brinkhoff Confections
500 William Street, Melbourne, VIC 3000
T 0477 667 722 | E william@brinkhoffconfections.com.au

From: Rachel Rockhound <rachel@rockhoundpromotions.com.au>
Sent: Friday, 26 February 2021 3:15 PM
To: William Brinkhoff <william@brinkhoffconfectionary.com.au>
Subject: RE: Thanks for your enquiry

Dear Billy,

Excellent news. David will be very pleased. I understand that Jelly Buttons are his favourite chocolates!

Just to confirm, the packets will be half green and half red?

Also, are you free to discuss our order later in the week?

Kind Regards,

Rachel

Sent from my iPhone

From: William Brinkhoff <william@brinkhoffconfections.com.au>
Sent: Friday, 26 February 2021 4:05 PM

To: Rachel Rockhound <rachel@rockhoundpromotions.com.au>

Subject: RE: Thanks for your enquiry

Hi Rachel,

That's great! Yes, shouldn't be a problem 😊.

Kind Regards,

Billy

William Brinkhoff | Director

Brinkhoff Confections

500 William Street, Melbourne, VIC 3000

T 0477 667 722 | E william@brinkhoffconfections.com.au

EXHIBIT 3

From: Rachel Rockhound <rachel@rockhoundpromotions.com.au>
Sent: Friday, 26 February 2021 4:38 PM
To: David Smith <David@symmetry.com.au>
Subject: RE: Your favorite chocolates for the gift bags

Hi David,

Good news. I've spoken with Billy Brinkhoff. We can definitely get the custom Jelly Buttons for the gift bags. I'll get a sample to you once you've arrived in Melbourne.

Kind Regards,

Rachel

Sent from my iPhone

EXHIBIT 4

From: William Brinkhoff <william@brinkhoffconfections.com.au>

Sent: Friday, 11 June 2021 2:55 PM

To: Rachel Rockhound <rachel@rockhoundpromotions.com.au>

Subject: RE: Your order

Hi Rachel,

I'm really sorry to do this to you, but we've had a bit of an issue with suppliers at our end. It's looking like there may be a slight delay in getting the Jelly Buttons to you on time.

My Operations Manager has advised we will definitely be in a position to get the order to you by 24 June. Can we reach an agreement about extending the delivery date? I hope this doesn't cause any issues at your end.

Billy

Sent from my iPhone

From: Rachel Rockhound <rachel@rockhoundpromotions.com.au>

Sent: Friday, 11 June 2021 3:02 PM

To: William Brinkhoff <william@brinkhoffconfections.com.au>

Subject: RE: Your order

Hi Billy,

Yes, we can push the delivery date to 24 June. This is far from ideal though. The event is only a handful of days away. We really have no choice but to move ahead with the order.

I'm sure you can appreciate that a lot of time and effort goes into assembling thousands of gift bags. It would help if the chocolates can be delivered directly to the MCG. I've had a chat with their venue management. There is a warehouse on site where we can store the chocolates.

Rachel

Sent from my iPhone

From: William Brinkhoff <william@brinkhoffconfections.com.au>

Sent: Friday, 11 June 2021 4:31 PM

To: Rachel Rockhound <rachel@rockhoundpromotions.com.au>

Subject: RE: Your order

Hi Rachel,

Many thanks for your understanding. And I promise they'll be no further issues. No probs re delivery to the event venue. Happy to wear any extra freight costs in the circumstances.

Billy

EXHIBIT 5

SAS Logistics – item tracking

Your delivery

Instructions:

Please change delivery address to Warehouse B, MCG, Richmond VIC 3002.

Please charge the extra freight to my account. Billy.

Delivered

Most recent update

Delivered -
MCG, Richmond
57 Event Drive, Melbourne VIC 3777
23 Jun • 7.30 pm

EXHIBIT 6

Rachel Rockhound

[@rockhoundpromotions](#)

Just received our special-order red and green Jelly Buttons. And yes, I've tried them... Delicious! At the rate our team are "sampling" them, there may not be any left for the @Symmetry launch next Saturday!
#jellybutons #delicious #symmetry
#billybrinkhoffisagenius

EXHIBIT 7

From: Rachel Rockhound <rachel@rockhoundpromotions.com.au>
Sent: Friday, 25 June 2021 10:15 AM
To: William Brinkhoff <william@brinkhoffconfections.com.au>
Subject: RE: Not what I ordered

Billy,

I had a meeting with David this morning and provided him with a pack of the Jelly Buttons. He was very disappointed - to say the least - to find that there were far more green buttons than red buttons in the packs. This is unacceptable. The packs were required to be exactly 50 percent green and 50 percent red.

This is important to David! Everyone knows that Symmetry is all about perfection. I've got an expert checking each of the packets now. You'd better hope the rest don't turn out to be the same.

Rachel
Sent from my iPhone

From: William Brinkhoff <william@brinkhoffconfections.com.au>
Sent: Friday, 25 June 2021 10:20 AM
To: Rachel Rockhound <rachel@rockhoundpromotions.com.au>
Subject: RE: Not what I ordered

Rachel – that is nonsense!

You never specified they had to be exactly 50/50. Show me where it states that in the contract? That would be practically impossible in any event! Do you seriously expect us to pack 2 tonnes of chocolates by hand??

Billy

EXHIBIT 8

Excerpt from the Expert Report of Real Laboratory

.....

Brinkhoff made exactly 1 tonne of both red and green JB's.

.....

The chocolates deposited into a mixing device which is similar in appearance to a cement mixer. The chocolates were turned in the mixer for a period of 15 minutes. Once mixed, the chocolates were deposited into another machine which weighed and packaged the chocolates into 125 gram bags. In my experience, this process is fairly standard in the confectionary industry.

.....

I have inspected 2,000 of the 16,000 packets.

1900 packets contained between 43% to 46% red chocolates.

The remaining 100 packets contained between 38% to 43% red chocolates.

Clarification Questions and Answers

1. In Exhibit 7, Rachel stated that there were “far more green buttons than red buttons in the packs” and according to the Report done by Real Lab there are more green chocolates than red ones, which is inconsistent with paragraph 14 where David asked “Why are there so many red ones?” Is this an error or is it up to us to interpret this inconsistency? **This is for the Teams to determine.**
2. Are we allowed to reference the real COVID policies adopted in Victoria including the lockdown dates, public gatherings restrictions, work from home instructions and so on? **This is up to the Teams, but it is not a requirement. It may distract from the more relevant issues.**
3. After sending the letter rejecting the goods, did Rockhound return the JB’s back to Brinkhoff? **Teams can assume that they are still in Rockhound’s possession.**
4. ACN of both Rockhound and Brinkhoff are invalid according to the ASIC ACN validation method. Do we assume the ACN as valid for the purpose of the moot? **Yes.**
5. According to the business name of ST ‘Symmetry Technologies Inc’, is it an incorporated company under US State companies legislation? **Yes, the facts refer to it as an international corporation. Students can assume that it is incorporated under relevant US law.**
 - 5a. If so, does ST have a registered legal entity in Australia? **Yes.** Is this product launch event their debut launch in Australia, which means that most Australian consumers have no prior knowledge of ST’s products? **Correct.**
6. How and when were the proposed changes communicated to Brinkhoff by Rockhound (paragraph 9, page 4)? **Teams to assume via an updated contract document sent via email.**
 - 6a. Was there any negotiation about these proposed changes and how were these changes documented?
Teams can assume that there were no negotiations between the parties about the changes made, and that they were included in an updated contract document emailed from Rockhound to Brinkhoff.
 - 6b. How, and if, communication occurred in regards to the changes to the contract directly relate to the bases on which an equitable rectification might be sought/opposed.
This is for the Teams to consider.
7. Is the Tweet in Exhibit 6 published to the public or only followers? **Teams can assume that the Tweets are public by default; anyone can view and interact with these Tweets.**
 - 7a. Does William Brinkhoff have a twitter account. If so, does he follow the Rachel Rockhound? **Assume that he does. Assume that he has viewed the Tweet.**
 - 7b. Consideration if the tweet is available to the seller for them to have deemed it as acceptance of the goods.**This is for the Teams to consider.**
8. Whether the Recitals under Exhibit One are legally binding? **This is for the Teams to determine and to argue.**
9. What does the term ‘hollow award’ refer to in paragraph 19 mean? **An award for damages that cannot be met.**
10. Whether the claims by the parties are brought under contract law alone, or under both contract and statute? **This is for the Teams to consider.**
11. Whether we need to consider any causes of actions or rights applicable to ST? Explanation: It will determine whether a claim will be brought under the doctrine of privity and other relevant arguments. **This is for the Teams to consider. See point 17 below.**
12. Whether the termination of the contract on 27 June 2021 was based on rejection of the goods not were not of an equal amount or termination because they were delivered late? **This is for the Teams to consider.**

12a. Sub-question: Should the right to terminate issue be argued separate to the repudiation issue? Paragraph [17] alludes to both arguments simultaneously.

This is for the Teams to consider.

13. How many employees do Brinkhoff Pty Ltd and Rockhound Promotions Pty Ltd each have?
Assume that both companies employ less than 20 employees.
14. Is Brinkhoff Pty Ltd seeking damages against Rockhound Promotions Pty Ltd for wrongful termination of the Contract? Paragraph [17] of the Agreed Facts states that 'Brinkhoff denies any breach and says that the termination was itself a repudiation of the Contract'. It is unclear whether Brinkhoff is advancing a counterclaim for damages for wrongful termination. **This is for the Teams to consider.**
15. Is Rockhound Promotions Pty Ltd seeking damages against Brinkhoff Pty Ltd for (a) delay in delivery; and (b) unequal quantities of Jelly Buttons simultaneously, or as mutually exclusive alternatives? **This is for the Teams to consider.**
16. What is the amount of damages sought by Rockhound Promotions Pty Ltd for each breach? Paragraph [18] of the Agreed Facts states that 'Rockhound claims damages against Brinkhoff for the delay in delivery and seeks to recover the purchase price'. This could be read as meaning (a) Rockhound is claiming damages of \$165,000 (ie, the purchase price) only for the delay in delivery, or (b) Rockhound is simultaneously claiming damages for delay in delivery *in addition to* damages of \$165,000 for the unequal quantity of Jelly Buttons. **This can be read to include seeking damages for the delay in delivery, plus the recovery of the purchase price.**
17. What is the potential liability of Rockhound in monetary terms to Symmetry Technology (ST)? More details are required to determine what the nature of the obligations owed by Rockhound to Symmetry, this issue concerns the remoteness of loss; was the loss in contemplation of both parties (Symmetry – Rockhound – Brinkhoff)? **As per Paragraph [5] of the Moot question, Teams can assume that the obligations that Rockhound have to ST are to assist with the launch of a new product, which includes the provision of 16,000 gift bags. They were to ensure that each gift bag contained a 125 gram packet of JB's, among other things; and to ensure that the JB's matched the ST company colours of red and green. Teams can assume that any failure to meet any or all of these requirements by Rockhound to ST can have a potential liability monetary value of up to \$20,000.**
18. What was the mode of execution between William and Rachel? **Email.**
19. What was the declaration between the parties? Did William sign in his capacity as a director, agent, or consumer? **As director and authorised agent for Brinkhoff**
20. What are the logistical implications of packaging the JB's by hand? How long it would take Brinkhoff to individually package 16,000 bags goes to whether Rachel's interpretation of the 50/50 requirement is onerous/unfair. **Assuming that if packing by hand were to be undertaken, one person could pack 60 bags per hour. There are to be 16,000 bags. This would equate to the equivalent of 266 hours (or 33 days @ 8 hours per day).**
21. Was the tweet [Exhibit 6] published by Rockhound a true representation of what the employees were doing with the JB's? **Yes. Did Brinkhoff see this tweet? Yes.**
22. In the Expert Report [Exhibit 8], do the findings in regard to the percentages of red chocolates refer to the quantity or weight of red chocolates in each packet? This would provide clarification as to whether the bags were asymmetrical by quantity or by weight. This in turn affects what was required to satisfy Rachel's interpretation of the 50/50 requirement under the contract. **Assume asymmetrical by quantity.**
23. Prior to 25 June 2021, how—if at all—had Symmetry Technologies Inc expressed their strong preference for exact 50/50 proportions of red and green Jelly Buttons? **They did not express any preference.**

- a. Sub-Question: Does Rachel have any other basis than her interactions with Symmetry Technologies Inc to assert that 'everyone knows that Symmetry is all about perfection'? **No.**
24. Clear statements as to the importance of exact 50/50 proportions of red and green Jelly Buttons may inform the capacity of cl 3.1.3 of the agreement to be characterised as an essential term, as may a public reputation for exactness and expectations of precision in Symmetry Technologies Inc. **This is for Teams to determine**
25. When did CLAIMANT send the Jelly Buttons for testing? **Prior to rejecting the JB's.**
 - a. Sub-Question: Did they send all 16,000 packets away for testing or only 2,000? **2000**
26. The time at which CLAIMANT sent away the packets for testing and the volume of packets sent may inform the loss it has suffered as a result of RESPONDENT's purported breach. This in turn may inform CLAIMANT's right to terminate for breach as well as RESPONDENT's liability in damages. **This is for the Team to determine.**
27. Does CLAIMANT's agreement with Symmetry Technologies Inc expose it to any liability for failure to provide conforming Jelly Buttons or, in the event that all Jelly Buttons were sent for testing, for failing to provide any Jelly Buttons at all? **This is for the Team to argue. See other Q and As.**
28. Any liability in CLAIMANT that flows from RESPONDENT's purported breach may sound in RESPONDENT's liability to CLAIMANT if that breach is made out. **This is for the Team to determine. See other Q and As.**

PART C Guides for Arbitrators

Registration (On the day(s) of the Moot)

1. Ensure you have the correct Zoom link and click on least 10 minutes before your scheduled moot.
2. Brief instructions for the moot will be provided.
3. The facilitators will direct you during the Moot zoom session.

Before the Moot

1. Please verify the names of the teams and the respective team members.
2. Ask for appearances and the agreed division of speaking time.
3. Each mooter has 15 minutes of speaking time (a total of 30 minutes per team and 1 hour for the two teams) and they can reserve some of this time for rebuttal or sur-rebuttal.
 - This time is inclusive of time spent dealing with arbitral interventions and questions.
 - Time extensions may be allowed in some circumstances, especially if the arbitral panel has been actively intervening or asking questions. Any extension given to a team will be equally granted to the other team

During the Moot (Assessing and Intervening)

- Look for strong and convincing opening and closing submissions. Ask whether the mooter has clearly, coherently and systematically explained his/her client's case? Was a roadmap given at beginning?
- Does the mooter advocate for his/her client throughout the delivery? A good mooter should not simply approach the matter in an academic manner. The mooter should be able to put the best case for his/her client. "Passion, therefore, is something that you should be looking for. Not over-the-top histrionics, but firm, confident advocacy for their client."
- Look for signs of confidence and conviction. A mooter who has conquered their nerves should be scored higher than the mooter who has not. Similarly, a mooter who puts his/her submissions with confidence and deal with difficult questions in a similar manner should be scored higher.
- Does the mooter read from his/her notes extensively?
- Does the mooter exhibit any irritating habits such as waving hands excessively or constantly meddling with his/her pen or notes?
- Is the mooter appropriately respectful and courteous to all the moot participants, even when it is not his/her turn to speak?
- Does the mooter use correct pronunciation and grammar, speak clearly, employ timely emphasis and have an appropriate volume and inflection? Does the mooter also use phrases such as 'if it pleases the tribunal' or refer to the other mooters as 'learned friends or colleagues'?
- Each mooter's submissions must be clear and logical and they must not contradict any submissions of the other mooter in the same team.
- Intervention from the panel is important. If there is not enough of it, the moot will lack the authenticity of the real-life experience. However, too much intervention is also not encouraged. Therefore consider the following points when intervening:
 - a) Test the mooter's knowledge of the facts.
 - b) Test the mooter's knowledge of the relevant law.
 - c) At a deeper level, students should be able to discuss the wider principles underlying the case before panel and any public policy implications that may arise should the panel adopt the outcome that is put to them by the mooters
 - d) A good mooter should also be able to make concessions as long as they explain to the panel why that concession does not in any way harm their case.
 - e) A mooter should never attempt to deceive the panel by improperly construing the facts or by deliberately misusing authority. Mooters who do so should be penalised in their scores.
 - f) 'The capacity to move beyond a simple discussion of the law and really address the underlying issues presented by the case...is one of the things that separate an average mooter from an excellent one.'

g) Subject the mooters to approximately the same number of questions

h) Whilst mooters should be given every opportunity to respond to questions, if they are obviously floundering, encourage them to move to another point.

- Mooters should be allowed to deliver rebuttal and sur-rebuttal **only if they have reserved the time**. 'Rebuttal should be an opportunity for an advocate to land the most telling blows on their opponent.' The effectiveness of the rebuttal will therefore depend on whether better arguments are used to undermine the opponent's case.

After the Moot

1. Score the overall performance of each mooter using the following criteria:
 - a) Presentation style, demeanour, observance of etiquettes and professional standards
 - b) Knowledge of the subject matter
 - c) Knowledge of the law
 - d) Ability to present coherent, logical and clear arguments
 - e) Ability to be convincing and persuasive
 - f) Ability to answer questions directly, correctly and persuasively
 - g) Effective rebuttal and sur-rebuttal
 - h) Time management

Satisfactory: 30-34	Good: 35-39	Very Good: 40-44	Excellent: 45-50
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2. Please give each mooter an overall score out of 50 (Mooters are ultimately competing on an Individual as well as on Team basis);
3. The 8 highest scoring teams will progress to the Elimination Rounds. Therefore, the scores given to each speaker and ultimately each team will have to reflect your opinion on whether the team deserves to proceed to the next round, that is, the Elimination Round;
4. DO NOT DISCLOSE THE SCORES TO THE TEAMS
5. Please provide students with constructive feedback (either on an individual or team basis). Some students will appreciate feedback on contents although please remind the students that ultimately they should decide, in consultation with their coach, on the best strategy that their team would take in the next round. You can deliberate before or after you provide the feedback;
6. If you are judging the elimination rounds or any of the final rounds, please read the additional instructions:
 - 🚦 The Quarter Final round Wednesday 25th August 2021 at 1 pm ;
 - 🚦 The Semi Final Thursday 26th August 2021 at 9.30 am;
 - 🚦 The GRAND Final Thursday 26th August 2021 at 2 pm
 - a. When deliberating the scores, a decision on the moot has to be made, that is, the winning team has to be determined;
NOTE: Moot Rule 48: In the elimination rounds (and in all the subsequent final rounds), each arbitrator will continue to score each of the speakers on a scale of 30 to 50. The winner of each moot will be determined by a unanimous decision. Where this is not possible, it will be determined by a majority decision of the arbitral tribunal.

- b. “The winning mooters usually demonstrate the better all-round advocacy skills and the more comprehensive knowledge of the substantive legal issues. It is accordingly entirely possible- and, indeed, very common- for the winners of a moot to lose on the law.” ‘Advocacy in a moot competition should be judged as an art.’ (Joel Butler, Terry Gygar, Australasian Mooting Manual 2nd ed, (2012) LexisNexis Butterworths)
- c. The scores given to each speaker and ultimately each team will have to reflect your assessment on whether the team deserves to proceed to the next round

7. DO NOT ANNOUNCE THE WINNER AND THE SCORES.

8. The announcement will be made by the Moot Coordinator.

9. You can email the score sheets to suzanna.pejic@vu.edu.au

Moot Organisers

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Moot Co-ordinator 2021

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