

AUSTRALIA / JUDGMENT

Taggle Systems Pty Ltd v Elster Metering Pty Ltd

[2026] NSWSC 1176

COURT

Supreme Court

DECIDED

29 September 2026

BEFORE

Rees J

CASE / FILE NUMBER

2026/72235

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Medium Neutral Citation: Taggle Systems Pty Ltd v Elster Metering Pty Ltd [2026] NSWSC 1176

Hearing dates: 18 June 2026

Date of orders: 29 September 2026

Decision date: 29 September 2026

Jurisdiction: Equity - Commercial List

Before: Rees J

Decision: Partial stay of proceedings in favour of arbitration in Singapore, on condition that reference to arbitration not proceed until after the final determination of these proceedings.

Catchwords: COMMERCIAL ARBITRATION — stay of proceedings — s 7(2), International Arbitration Act 1974 (Cth) — first defendant manufactures water meters on-sold by plaintiff to local councils — plaintiff seeks indemnity in respect of \$10 million sought by council in related proceedings — contracts for sale of goods between plaintiff and first defendant do not include arbitration clause — plaintiff later enters into Distributor Agreement with second defendant — defendants seek stay on basis of arbitration clause in Distributor Agreement — whether first defendant a party to Distributor Agreement — whether arbitration clause incorporated into contracts for sale of goods — whether defendants entitled to stay proceedings on the basis of arbitration clause in separate contract between plaintiff and defendants' related entity.

COMMERCIAL ARBITRATION — kompetenz-kompetenz — whether Court should consider contractual arrangements or leave it to arbitral tribunal — principles at [9]-[15] — contractual arrangements a “hot mess” — absent some investigation as to existence and scope of arbitration agreement, application would be dismissed for

failure to discharge onus.

COMMERCIAL ARBITRATION — whether first defendant a party to the Distributor Agreement — Distributor Agreement entered into by second defendant “acting by and through” a business unit — whether inconsistency between arbitration clause in Distributor Agreement and choice of law clause in contracts for sale of goods in favour of New South Wales — construction of arbitration agreements, principles at [50]-[51] — no inconsistency — first defendant not party to an arbitration agreement — whether arbitration agreement applies to events that pre-date the agreement, at [54]-[55].

COMMERCIAL ARBITRATION — s 7(4), International Arbitration Act 1974 (Cth) — whether defendants claiming “through or under” party to arbitration agreement — principles at [70]-[73] — plaintiff signed Strategic Alliance Agreement with defendants’ related entity — defendants propose to rely on features of this contractual arrangement as informing plaintiff’s duty to take reasonable care and contributory negligence — defendants not taking stand on a ground available to related entity.

COMMERCIAL ARBITRATION — whether condition should be applied to stay of proceedings — principles at [81]-[83] — no arbitration agreement with first defendant — possibility that small portion of proceedings falls within arbitration agreement with second defendant — arbitration not to proceed until these proceedings are determined.

Legislation Cited:

International Arbitration Act 1974 (Cth), ss 7(2), 7(4), 16(1), Sch 2
UNCITRAL Model Law on International Commercial Arbitration, Art 16(1)

Cases Cited:

ACD Tridon Inc v Tridon Australia Pty Ltd [2002] NSWSC 896
Australian Health and Nutrition Association Ltd v Hive Marketing Group Pty Ltd (2019) 99 NSWLR 419; [2019] NSWCA 61
Blackbird First Mortgage Corp Pty Ltd v Jacobs [2025] FCAFC 136
Clough Products Australia Pty Ltd v Elecnor Australia Pty Ltd [2026] NSWCA 111
CPB Contractors Pty Ltd v DEAL S.R.L. [2021] NSWSC 820
DFD Rhodes Pty Ltd v Hancock Prospecting Pty Ltd (2022) 59 WAR 316; [2022] WASCA 97
Dialogue Consulting Pty Ltd v Instagram, Inc [2020] FCA 1846
Edwards v Australian Securities and Investments Commission [2009] NSWCA 424
Elecnor Australia Pty Ltd v Clough Projects Australia Pty Ltd [2025] NSWSC 610
Global Partners Fund Ltd v Babcock & Brown Ltd (in liq) [2010] NSWCA 196
Hancock Prospecting Pty Ltd v Rinehart (2017) 257 FCR 442; [2017] FCAFC 170
Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc (1998) 90 FCR 1
Inghams Enterprises Pty Ltd v Hannigan [2020] NSWCA 82
Karadag v Samkara Holdings Pty Ltd [2022] NSWSC 380
King River Digital Assets Opportunities SPC v Salerno [2023] NSWSC 510
Recyclers of Australia Pty Ltd v Hettinga Equipment Inc (2000) 100 FCR 420; [2000] FCA 547
Re Ikon Group Limited (No 2) [2015] NSWSC 891
Rinehart v Hancock Prospecting Pty Ltd (2019) 267 CLR 514; [2019] HCA 13
Rinehart v Welker (2012) 95 NSWLR 221; [2012] NSWCA 95
Roussel-Uclaf v GD Searle & Co Ltd [1978] 1 Lloyd’s Rep 225
Tanning Research Laboratories Inc v O’Brien (1990) 169 CLR 332; [1990] HCA 8
The Owners – Strata Plan No 66375 v King [2018] NSWCA 170
Tomolugen Holdings Ltd v Silica Investors Ltd [2015] SGCA 57; [2016] 1 SLR 373
Trollope & Colls Ltd v Atomic Power Constructions Ltd (1962) 3 All ER 1035

WesTrac Pty Ltd v Eastcoast OTR Tyres Pty Ltd [2008] NSWSC 894

Texts Cited:	P Herzfeld and D Prince, Interpretation (3ed, 2024, Lawbook Co) K Lewison and D Hughes, The Interpretation of Contracts in Australia (2ed, 2025, Lawbook Co)
Category:	Procedural rulings
Parties:	Taggle Systems Pty Ltd (Plaintiff/Respondent) Elster Metering Pty Ltd (First Defendant/Applicant) Honeywell International Inc (Second Defendant/Applicant)
Representation:	
Counsel:	HJA Neal (Plaintiff/Respondent) D Hume SC (Defendants/Applicants)
Solicitors:	GC Legal (Plaintiff/Respondent) Minter Ellison (Defendants/Applicants)
File Number(s):	2026/72235

JUDGMENT

HER HONOUR: This is an application under s 7(2) of the International Arbitration Act 1974 (Cth), to stay these proceedings in favour of arbitration in Singapore. Section 7(2) provides:

Subject to this Part, where:

- (a) proceedings instituted by a party to an arbitration agreement to which this section applies against another party to the agreement are pending in a court; and
- (b) the proceedings involve the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration;

on the application of a party to the agreement, the court shall, by order, upon such conditions (if any) as it thinks fit, stay the proceedings or so much of the proceedings as involves the determination of that matter, as the case may be, and refer the parties to arbitration in respect of that matter. (Emphasis added.)

Section 7(4) provides that, for the purposes of s 7(2), “a reference to a party includes a reference to a person claiming through or under a party”. The onus of establishing the requirements of s 7(2) rests on the party seeking the stay: *Tanning Research Laboratories Inc v O’Brien* (1990) 169 CLR 332 at 353 (Deane and Gaudron JJ); [1990] HCA 8. Where the requirements are satisfied, “the court shall” stay the proceedings. A stay is mandatory and there is no discretion: *Tanning Research* at 350; *WesTrac Pty Ltd v Eastcoast OTR Tyres Pty Ltd* [2008] NSWSC 894 at [7] (Barrett J).

The underlying dispute concerns the supply of ‘smart’ water meters by the plaintiff, Taggle Systems Pty Ltd, to Dubbo Regional Council. ‘Smart’ water meters include integrated radio communications technology that allows water usage to be monitored remotely. Some of the water meters ceased to register water usage or incorrectly registered one litre of occasional usage. The council seeks some \$10 million in losses from Taggle in related proceedings. It will be an issue in those proceedings whether the problem is the water meters or the local water. There is no arbitration agreement between Taggle and Dubbo Regional Council; the related proceedings will proceed in this Court as usual.

The water meters were manufactured by the first defendant, Elster Metering Pty Ltd (Elster Australia), and on-sold by Taggle to the council. (I will refer to the individual contracts for sale of goods between Elster Australia and Taggle as “supply contracts”.) The terms and conditions of sale did not include an arbitration clause either. But, after 90% of the water meters had been supplied to the council, Taggle entered into a Distributor Agreement with the second defendant, US company, Honeywell International Inc. That agreement provided the terms and conditions of sale for the last 10% of the water meters supplied to the council.

In these proceedings, Taggle seeks to be indemnified by Elster Australia and Honeywell in the event that it is liable to the council. Taggle proposes to seek an order that these proceedings be heard together with the proceedings brought by the council. Elster Australia and Honeywell seek to stay these proceedings on the basis of an arbitration clause in the Distributor Agreement. But Elster Australia is not a named party to the Distributor Agreement.

Alternatively, Elster Australia and Honeywell seek to stay these proceedings on the basis of a Strategic Alliance Agreement between Taggle and UK company, Elster Water Metering Holdings Ltd (Elster UK), under which the water meter supplied to the council was developed. But Elster UK is not a party to these proceedings.

The defendants’ senior counsel accepted that the contracts are “a hot mess”. The issues are:

the extent to which the Court should consider these contractual arrangements or leave it to the arbitral tribunal (that is, whether the “kompetenz-kompetenz” doctrine applies);

whether Elster Australia was a party to the Distributor Agreement and, if not, whether the arbitration clause in that agreement was incorporated into the supply contracts between Elster Australia and Taggle;

if not, whether the defendants are claiming “through or under a party to the arbitration agreement” and thus entitled to rely on the arbitration clause in the Strategic Alliance Agreement, under s 7(4) of the Act; and

if not all of the disputes between the parties fall within the scope of an arbitration agreement, should any condition be applied to the stay under s 7(2), such that the arbitration not proceed until final determination of the matters not referred to arbitration.

It is convenient to deal with the first issue at the outset.

“kompetenz-kompetenz”

As I noted in *CPB Contractors Pty Ltd v DEAL S.R.L.* [2021] NSWSC 820, an arbitrator has jurisdiction to determine whether a dispute falls within the scope of an arbitration clause and whether the arbitration agreement is operative, known as the kompetenz-kompetenz principle: at [48]. This Court can determine such questions but, generally speaking, should leave these matters to the arbitrator unless the context in which these questions arise make it preferable for the Court to determine such matters: at [60]. This principle is enshrined in Art 16(1) of the UNCITRAL Model Law on International Commercial Arbitration, being Sch 2 to the Act. As a consequence of s 16(1) of the Act, the Model Law has the force of law in Australia.

What the context dictates was examined in *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442; [2017] FCAFC 170, where the Full Federal Court (Allsop CJ, Besanko and O’Callaghan JJ) considered the two approaches generally taken, as categorised by Menon CJ of the Singapore Court of Appeal in *Tomolugen Holdings Ltd v Silica Investors Ltd* [2015] SGCA 57; [2016] 1 SLR 373. The first approach was the “prima facie approach”, described in *Hancock* at [141]:

“[This] approach ... is to give significant weight to the authority of the arbitrator and to the principle of Kompetenz-Kompetenz Under this approach, the Court does not reach a final view on the balance of probabilities in respect of the matters in s [7], including the scope of the arbitration agreement. If there appears to be a valid arbitration agreement which prima facie covers the matters in dispute, the matter should be referred to the arbitrator to deal with questions of jurisdiction, including the scope of the arbitration agreement.”

The second approach was the “full merits approach”, where the Court hears evidence and argument and finally determines the existence and scope of the arbitration agreement and whether the disputes fall within it: at [142]. In *Hancock*, the Court commended the “prima facie” approach, although not necessarily in all cases, explaining at [145]-[146]:

“145 We think that any rigid taxonomy of approach is unhelpful, as are the labels “prima facie” and “merits” approach. How a judge deals with an application under [s 7] will depend significantly upon the issues and the context. Broadly speaking, however, and with some qualification, aspects of the prima facie approach have much to commend them as an approach that gives support to the jurisdiction of the arbitrator and his or her competence, as recognised by the common law and by [Article 16], whilst preserving the role of the Court as the ultimate arbiter on questions of jurisdiction ... However, it is difficult to see how the Court can exercise its power under s [7] without forming a view as to the meaning of the arbitration agreement. Further, it may be that if there is a question of law otherwise affecting the answer to the question of jurisdiction, especially one that is confined, which might be dispositive, it might be less than useful for the Court not to deal with it. ...

146 ... The Court [may be] required to construe the [arbitration] clause, at least to the point of being satisfied that the disputes forming the matter are the subject of the agreement, or not, as the case may be. ...” (Emphasis added.)

The Court further observed, “Of course, if there is no sustainable argument that a matter or dispute can be characterised as falling within the agreement, it should not be referred to arbitration”: at [149]. But the enquiry should not travel into the merits of the case beyond determining whether the argument is sufficiently weak not to be sustainable; “That would be to usurp the role of the arbitrator. The Court’s role in [s 7] is not to act as a court of summary disposal filtering the matters that are suitable for arbitration”: at [149]. The Court should take a broad view, characterising the dispute to assess whether it is the subject of the arbitration agreement, rather than engage substantially in the merits of the case: at [151]. Further, at [377]:

“The real issue in any case is whether the Court should hear the separate attack or permit the arbitral tribunal to hear it, by staying its own proceeding. The proper answer to this question will depend on the nature of the attack and all the circumstances.”

The Court described this as a practical question: at [390].

Applying the same principles in *Dialogue Consulting Pty Ltd v Instagram, Inc* [2020] FCA 1846, Beach J accepted that the kompetenz-kompetenz principle applied, however, His Honour stated at [196]-[198]:

“196 In summary, I accept the respondents’ argument that the competence-competence principle applies But the fact that I could apply the principle does not entail that I should. There are no hard and fast rules. Context is everything. I do not propose to apply the principle for the following reasons shortly put.

197 First, there are tricky choice of law questions. What law should be applied to determine the existence of the arbitration agreement? I am best placed to answer this. Further, whatever choice is made I now have all bases covered in terms of being fully informed on Australian law, and by Judge Ware on US law, in order to determine (under whichever law applies) whether there is an arbitration agreement.

198 Second, I now have all the evidence in to make a final assessment on the merits as to the existence of the arbitration agreement. To leave any decision at the lower threshold of the prima facie stage would be a limp effort.” (Emphasis added.)

Beach J considered that he was better placed than the Californian arbitrator to deal with a cross-application concerning unfair contract terms and the question of Australian statutory unconscionability and, further, was better placed to deal with the choice of law on a question of waiver: at [200]-[201]. In the result, Beach J decided to determine on a final basis whether an arbitration agreement existed: at [12].

The defendants submitted that the nub of case law on applications such as this is that, unless the argument that there is a “matter” covered by the arbitration agreement is so weak as not to be sustainable, the appropriate forum for resolving the question of whether the matter is covered by the arbitration agreement is the arbitral tribunal. It was said to be inappropriate for the Court to take a granular and pedantic approach in scrutinising the provenance of the issues in this proceeding and their relationship to the Distributor Agreement, or to draw a tight, inflexible

boundary around which disputes fall within, and which disputes fall outside, the scope of the arbitration agreement.

Taggle submitted that, where Elster Australia was not a party to the Distributor Agreement, neither Elster Australia nor Honeywell were parties to the Strategic Alliance Agreement, Honeywell and Elster UK were not parties to the contracts to supply meters to Taggle for on-sale to the council and Taggle did not sue Elster UK, there was no sustainable argument that the matters the subject of the disputes were covered by an arbitral agreement. The Court should consider and construe the terms of the Distributor Agreement given the obvious prejudice to Taggle if it was forced to defend the council's claims in this Court but prosecute its claims against defendants in Singapore: *Hancock* at [145]; *CPB Contractors* at [60], [65]. There were no relevant factual disputes to be determined. The issues of construction were straightforward, of limited scope, and dispositive.

The question is what the context dictates in this case. The contractual arrangements in this case are very unclear. On the face of it, Taggle, Elster Australia and Honeywell are not all parties to the same arbitration agreement, and some may not be a party to any arbitration agreement. Where the implications of staying these proceedings in favour of arbitration will have significant ramifications for these and related proceedings in this Court, and where the documents on which this issue turns are in evidence and of short compass, I consider that the context dictates that I examine these contractual questions, at least to the point of being satisfied that there is an arbitration agreement and that the matters in these proceedings, on the face of it, fall within the scope of that agreement.

I do not accept that this approach is inappropriate, granular or pedantic. As matters presently stand, I have no idea whether the Court has power to stay these proceedings under s 7 of the Act. Absent some further investigation, I would be obliged to dismiss the application on the basis that the defendants have failed to discharge their onus. Nor is any arbitral tribunal bound by my consideration of these issues on this interlocutory application.

Supplying water meters

Turning to the parties said to have agreed to arbitrate, Elster Australia manufactures and distributes water meters to local councils or third-party distributors, such as Taggle. Honeywell has been Elster Australia's ultimate holding company since 2015.

Taggle is an Australian wireless communications company. It began corporate life doing wireless tagging of cattle, from whence its name is derived. In 2010, Taggle started to apply its technology to water meters. According to the pleadings, Taggle has been a distributor for Elster Australia since 2011. In August 2016, Taggle was approved by Local Government Procurement Pty Ltd to go on a panel of suppliers of water meters to local councils.

Strategic Alliance Agreement

Elster UK makes water meters too, in particular, a smart water meter for distribution in Europe called “V200H”. In 2016, Elster UK approached Taggle to develop a smart meter using the V200H model but replacing the European radio communications with a Taggle equivalent, for sale in Australia. The new model would be called “V200HT”, with the “T” being a reference to “Taggle”.

In about November 2016, Taggle and Elster UK signed a Strategic Alliance Agreement. (I say “about”, as the agreement is undated and helpfully marked “Draft”.) The agreement has naught to do with Taggle supplying products to local councils. The recitals note that Elster UK made water meters while Taggle made devices for reading water meters. The parties proposed to integrate their respective products and jointly market the final product. Three aspects of the agreement bear mention.

First, cl 5 concerned “Stage 1 – Development of Final Product and testing stage”. Schedule 2 to the agreement detailed a Functionality Test. Schedule 3 comprised Specifications which the Final Product was required to meet: cll 1.1, 5.1. Taggle would develop, manufacture and, after performing testing and validation, deliver Prototypes to Elster UK for the performance of a Functionality Test: cll 5.3(e), 5.5. On successful completion of the Functionality Test, Elster UK would manufacture Pre-Production Units: cl 5.3(f). Both would test and validate the Pre-Production Units: cll 5.3(h), 5.5.

Taggle’s engineering director, Richard Keaney, said that Functionality Test performed by Taggle under this agreement was limited to the development of the electronic part of the new product. It did not involve testing the brass chamber at the bottom of the meter, which measured waterflow using mechanical parts. The chamber remained the same as for model V200H.

Second, cl 6 concerned “Stage 2 – Manufacture of Final Product and marketing stage”. Elster UK was responsible for manufacture: cl 6.1(b). Elster UK would sell the Final Products directly or through its representatives, which may include other companies in the Honeywell Group or third-party distributors: cl 6.3. The Final Product would be marketed under Elster UK and Honeywell branding: cl 6.4(a). Taggle and Elster UK agreed to work on a marketing strategy, identifying potential customer sale opportunities, responding to those opportunities, preparing proposals and marketing the Final Product and Taggle Services: cll 6.4(d)-(e).

Third, cl 13 of the Strategic Alliance Agreement was a dispute resolution clause. The scope of the clause was set by cl 13.1, which provided:

“If any dispute arises between the Parties [Taggle and Elster UK] arising out of, or in connection with, this Agreement, including its construction, effect, the rights and obligations of the Parties, the performance, breach, rescission or termination of this Agreement, the entitlement of any Party to damages or compensation (whether for breach of contract, tort or any other cause of action) or the amount of that entitlement (Dispute), the Party claiming that a Dispute has arisen must deliver to the other Party a notice containing particulars of the Dispute (Dispute Notice).”

After a period of negotiation in an attempt to resolve the Dispute, cl 13.3 provided that, “either Party may submit the Dispute to arbitration for resolution, as administered by the Singapore International Arbitration Center in Singapore (SIAC), in accordance with the Arbitration Rules of SIAC in force from time to time”: cl 13.3(a). The arbitral tribunal was to comprise one arbitrator appointed by the Parties or, failing agreement, by the President of SIAC: cl 13.3(b).

The arbitration clause did not state that the only course for resolution of a Dispute after an unsuccessful negotiation was arbitration, as opposed to litigation. Consistently with this, cl 13.4 provides, “either Party shall be entitled to the granting of equitable relief (including without limitation injunctive relief) by any court of competent jurisdiction concerning any threatened or actual breach of the provisions of this Agreement”: cl 13.4. Where the Parties gave each other access to their confidential information and intellectual property for the purposes of developing the new product, the parties obviously contemplated that the arbitral tribunal may not be the only place the parties may need to go to ensure that the agreement was adhered to.

According to Taggle’s chief financial officer, Hugh Ealey, the V200HT smart water meter was completed and released to the market in about mid-2018. Certainly, by August 2018, Taggle and Honeywell were discussing a price list, with Taggle’s managing director, John Quinn, noting “we don’t have a supply agreement for Honeywell in Australia”. In December 2018, Honeywell provided a distributor agreement for consideration. But it took more than two years until this agreement was signed. There is no evidence, on this application, as to why it took so long, such as evidence of protracted negotiations on the terms of the agreement.

Water meters for Dubbo

Meanwhile, in late 2019, Dubbo Regional Council issued a request for tender for the supply of a smart water metering system in the local area. Taggle submitted a tender, which was accepted in December 2019. A series of purchase orders and invoices followed between Taggle and Elster Australia. According to the business records tendered in respect of these supply contracts, the procedure was:

Taggle would issue a purchase order to “Elster Metering NSW (Honeywell)” for delivery to Taggle, “Note: Delivery Address to be advised later”, and, later, for delivery to Dubbo Regional Council. I venture to suggest that “Elster Metering NSW (Honeywell)” arose from Honeywell branding on Elster Australia’s documents, together with the fact that Elster Australia had sales offices in a number of states, including New South Wales, and the purchase order was in respect of a sale in that state.

Elster Australia would deliver the water meters directly from its warehouse to the council and provide Taggle with the shipping details. Taggle would then issue a dispatch notice to the council with this information.

Elster Australia would issue a tax invoice to Taggle, noting shipment to (initially) Taggle and (later) to Dubbo Regional Council.

None of these business records refer to terms or conditions of sale. But Elster Australia had a standard practice for processing requests from customers, including Taggle, at the time. Elster Australia's sales team would prepare a quotation, which included standard terms and conditions and a standard product warranty. To accept the quotation, the customer was required to issue a purchase order. Elster Australia would then process the purchase order by supplying the products requested. The defendants have found two quotations from this period. First, in June 2019, Elster Australia issued a quote to Taggle for the supply of water meters to Moree Plains, the fine print of which noted "HPS Standard Terms and Condition of Sale apply with a copy attached." The same fine print was included in a quotation prepared by Elster Australia to Taggle in July 2019 for additional meters to be provided to Lithgow.

Taggle said there may be a dispute as to whether Honeywell's Terms and Conditions and Standard Product Warranty formed part of the supply contracts between Taggle and Elster Australia. Accepting this, I note that Elster Australia's Standard Product Warranty at the time did not contain an arbitration clause. Rather, the "Honeywell Process Solutions Sales Terms and Conditions (Australia – English)" in use at the time provided, in cl 15.7:

"The Agreement is governed by the laws of the state of New South Wales, Australia, without regard to conflicts of law principles. ... The Parties ... submit to the non-exclusive jurisdiction of the courts of New South Wales and the courts which hear appeals from those courts for resolution of disputes; however, Honeywell may seek an injunction or enforce a judgment against Buyer in any jurisdiction. ..."

From 29 January 2020 until 21 July 2020, the council purchased 17,250 V200HT water meters from Taggle. This comprised 88% of a total 19,533 water meters purchased by the council. Seven months later, the Distributor Agreement was signed.

Distributor Agreement

On 8 February 2021, Taggle entered into a Distributor Agreement with Honeywell "acting by and through its Honeywell Process Solutions Business Unit" in Texas. The Distributor Agreement is of the 'boilerplate' variety, to which is attached Rider A (with modifications to agreement terms), Rider B ("Honeywell Terms and Conditions of Sale") and Rider C ("Software License"). The modifications in Rider A concern both the Distributor Agreement and Rider B.

The Distributor Agreement "states the terms and conditions under which Honeywell may provide Products to Distributor and Distributor may obtain Products from Honeywell for distribution within the Territory". The clauses progressively address the appointment of Taggle as Distributor, its territory, responsibilities and sales growth. Clause 5 concerns purchase orders and provides:

"5. Purchase Orders

5.1 Distributor will obtain Products from Honeywell by placing a purchase order with either Honeywell or, at Honeywell's option and direction, a Honeywell affiliate identified by Honeywell for fulfillment of the purchase order. The Honeywell entity receiving the purchase order (whether Honeywell or a Honeywell affiliate) is hereafter referred to as "Seller". All purchase orders are subject to acceptance by Seller. "Order" means a Distributor purchase order accepted by Seller. ...

5.2 All Orders are subject to the Honeywell terms and conditions of sale attached to this Agreement as Rider B. ... In the event of conflict between the applicable terms and conditions of sale in Rider B and the terms of this Agreement, the terms of this Agreement shall take precedence." (Emphasis in original.)

The Distributor Agreement proceeds to then address delivery, price, payment, warranties, assistance to be provided by Honeywell to Distributor, intellectual property, changes to products and commercial terms, ethical business conduct, termination, the parties' relationship, trademarks and domain names, confidential information, disclaimers and limitations of liability, assignment, changes in ownership and management and succession. Clause 21 is a dispute resolution and governing clause. In particular, cl 21.2 and 21.3 provide:

"21.2 Any dispute, claim, controversy, action, or cause of action, arising out of or relating to this Agreement, including the breach, termination or validity thereof, will be finally resolved by a panel of three arbitrators in accordance with the Rules for Arbitration of the Singapore International Arbitration Center. ... The place of arbitration will be Singapore. ... If any dispute, or response to any dispute, includes an allegation that potentially concerns whether any Intellectual Property right owned, controlled, or licensable by either Party is invalid, unenforceable or infringed or misappropriated, or is otherwise limited in scope or application, then either Party may, in its sole discretion, elect to have that dispute adjudicated before a court of competent jurisdiction and this section will not be binding on either Party with respect to that dispute in its entirety or any related dispute, including any portions of a dispute that do not concern Intellectual Property rights. ...

21.3 This Agreement and any arbitral tribunal constituted under this Agreement will be governed by the laws of Singapore, without regard to conflicts of law principles."

The final clause, cl 22, "Miscellaneous", includes cl 22.10, which sets out an order of precedence, if there is any conflict between the documents applicable to the agreement, being (in descending order): the Distributor Agreement, Rider A, Rider B and Orders issued under the Distributor Agreement (but only for information authorised by the agreement, for example, shipping terms and order quantity). Further, "If Rider A expressly lists modifications to any terms of this Agreement, such modifications shall take precedence over such terms."

Rider B, as amended by Rider A, sets out Honeywell Terms and Conditions of Sale. It begins with general definitions, including (cl 1):

"1. GENERAL DEFINITIONS

1.1. “Agreement” means the written agreement, including these Sales Terms and Conditions and any addendum to them (“Addendum”) together with relevant Orders, made between Buyer and Honeywell for the Deliverables.

1.2. “Buyer” means the entity issuing the Order.

...

1.4. “Honeywell” means Honeywell Limited and its affiliates, subsidiaries, shareholders, officers, directors, and employees.

1.5. “Order” means a Buyer purchase order accepted by Honeywell.

1.6. “Party” means Honeywell or Buyer and “Parties” means both. ...”

The Honeywell Terms and Conditions of Sale progress through delivery, payment, tax, delay, warranties, limitations on liability, an indemnity in respect of patents and copyright suits, changes to orders, default and termination, intellectual property rights, confidential information and retention of title. The last clause, cl 14, “Miscellaneous”, includes cll 14.5 and 14.6:

“14.5. The Agreement is governed by the laws of the state of New South Wales, Australia, without regard to conflicts of law principles. ... The Parties ... submit to the non-exclusive jurisdiction of the courts of New South Wales and the courts which hear appeals from those courts for resolution of disputes; however, Honeywell may seek an injunction or enforce a judgment against Buyer in any jurisdiction. ...

14.6. The Agreement contains the entire agreement between the Parties ... If there is any conflict in terms, the order of precedence is the [Software] License [in Rider C], any Addendum, the acceptance, the Agreement (excluding the Order), and then the Order.”

Three issues arise in respect of the Distributor Agreement, which are necessary to consider in order to form a view as to whether these proceedings should be stayed under s 7(2) of the Act. First, is Elster Australia a party to the Distributor Agreement? Second, is the arbitration agreement in cl 21.2 incorporated by reference into the supply contracts between Taggle and Elster Australia in respect of the water meters distributed by Taggle to Dubbo Regional Council? Third, does the arbitration agreement have retrospective effect?

Is Elster Australia a party?

The defendants submitted that there was a sustainable argument that Elster Australia was always a party to the Distributor Agreement, including because that agreement says that Honeywell is a party “acting by and through its Honeywell Process Solutions Business Unit”, where there was evidence that Elster Australia was part of that business unit. The defendants also relied on the definition of Honeywell in Rider B (cl 1.1) and cl 5 in the Distributor Agreement in respect of purchase orders. Rider B, as applied to a purchase order by cl 5.2, must be subordinated to any conflicting term in the Distributor Agreement, which takes precedence and includes cl 21.2. Further, the Distributor Agreement provided for Honeywell to sell the meters to Taggle and what

seemed to have ended up happening was that purchase orders were issued by Taggle to either Honeywell or Elster Australia, as both were mentioned on the purchase orders. (Presumably, this is a reference to the fact that Taggle's purchase orders were addressed to "Elster Metering NSW (Honeywell)", albeit that was the case before and after the Distributor Agreement was executed.) The invoices were issued by Elster Australia to Taggle, and Taggle paid Elster Australia. All of these matters were said to involve interesting factual and legal issues which would need to be determined in due course.

Taggle submitted that Elster Australia was obviously not a party to the Distributor Agreement. "Honeywell" was defined as Honeywell "acting by and through its Honeywell Process Solutions Business Unit". Obviously, the Honeywell Process Solutions Business Unit was not a legal entity capable of entering into contracts. The fact that supply contracts after 8 February 2021 included the terms of Rider B, as amended by Rider A, did not make it so. Even if Elster Australia was regarded as part of the Honeywell Process Solutions Business Unit, that would not make it a party to the agreement. The Distributor Agreement provided that separate contracts would be entered into between Taggle and Honeywell or its affiliates in relation to sale of Products: cll 5.1, 5.2; Rider B. Clause 14.5 provided that the supply contracts were governed by the laws of NSW.

The defendants' first argument turns on the description of Honeywell as a party to the Distributor Agreement, being "Honeywell International Inc., acting by and through its Honeywell Process Solutions Business Unit" in Texas. According to Honeywell's legal counsel, Mahi Arun, the Honeywell Process Solutions Business Unit is a division of Honeywell's 'business' as opposed to a particular structure of holding companies within the wider Honeywell group. That is certainly what the name suggests. Of course, the business unit is not a party to the Distributor Agreement, rather, Honeywell "act[s] by and through" the business unit.

Honeywell's contact on the Distributor Agreement is Elster Australia's NSW sales manager, Jason Lindsay. According to Mr Lindsay, Elster Australia was a part of the Honeywell Process Solutions Business Unit at the time. I do not accept that a corporation is part of a business unit, even if Elster Australia's NSW sales manager thinks so. I expect that Honeywell's legal counsel is better informed as to the correct position. But even if Elster Australia was part of the business unit, that does not make Elster Australia a party to the Distributor Agreement, but an entity through which Honeywell "act[s] by and through".

The defendants' second argument relies on the broader definition of "Honeywell" in the Honeywell Terms and Conditions of Sale, to which any Order placed by Taggle and accepted by a Seller are subject. But that definition applies to supply contracts. The definition does not percolate up to, or amend, the Distributor Agreement. This argument seeks to reverse the order of precedence in cll 5.2 and 22.10, giving the description of Honeywell in Rider B precedence over the definition of Honeywell in the Distributor Agreement. Essentially for the reasons advanced by Taggle, Elster Australia is not a party to the Distributor Agreement.

Is arbitration agreement incorporated into supply contracts?

The defendants submitted that the arbitration agreement in cl 21.2 of the Distributor Agreement was incorporated by reference into the supply contracts between Taggle and Elster Australia. Although cl 14.5 of Rider B separately provided that the parties "submit to the non-exclusive jurisdiction of the courts of New South Wales ... for resolution of disputes", that could be put to one side given the order of precedence specified in cl 5.2 of the Distributor Agreement. Taggle was said to have implicitly accepted in its pleading that the arbitration agreement also bound Taggle and Elster Australia. (I disagree.) On a proper construction of cl 21.2 of the Distributor Agreement, which pays regard to the broad terms in which that arbitration agreement is expressed, cl 21.2 conflicted with cl 14.5 because it required disputes arising from the trading relationship between the parties, which relationship was established and maintained through the purchase orders placed pursuant to cl 5.2 of the Distributor Agreement, to be submitted to arbitration in Singapore. In the event of such conflict, pursuant to cll 5.2 and 22.10 of the Distributor Agreement, cl 21.2 of the Distributor Agreement must take precedence.

Taggle submitted that there was no conflict between the Distributor Agreement and Rider B for the purposes of cll 5.2 and 22.10. Disputes 'arising out of or relating to' the Distributor Agreement are to be arbitrated in Singapore. Disputes relating to purchasing of products are to be heard by the courts of NSW. Conflicts may arise in respect of other subjects dealt with by both documents, such as limitation of liability, intellectual property and confidential information, in which event the Distributor Agreement prevailed. To proceed otherwise would give rise to the inconveniences described by the defendants' solicitor.

The arbitration clause in the Distributor Agreement requires Taggle and Honeywell to arbitrate in Singapore. The Honeywell Terms and Conditions of Sale – to which any Order placed by Taggle and accepted by a Seller are subject – requires the Parties (including Honeywell and its affiliate, and Taggle) to submit to the non-exclusive jurisdiction of the courts of New South Wales. Is there an inconsistency or, to use the terms of cl 5.2, a "conflict between the applicable terms and conditions of sale in Rider B and the terms of" the Distributor Agreement, such that the arbitration clause prevails? This turns on the proper construction of the Distributor Agreement and its Riders.

The approach to the construction of commercial contracts and arbitration clauses is the same: *Rinehart v Welker* (2012) 95 NSWLR 221; [2012] NSWCA 95 at [115] (Bathurst CJ); *Inghams Enterprises Pty Ltd v Hannigan* [2020] NSWCA 82 at [54] (Bell P, as the Chief Justice then was); *Rinehart v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514; [2019] HCA 13 at [18] (Kiefel CJ, Gageler, Nettle and Gordon JJ). Both are to be construed in accordance with the parties' intention, objectively ascertained by reference to the language used by the parties, the circumstances known to them and the commercial purpose of the contract: *Inghams* at [53]-[67].

Provisions of an agreement are inconsistent "when one provision contradicts another or is in conflict with it such that effect cannot fairly be given to both": P Herzfeld and D Prince, *Interpretation* (3ed, 2024, Lawbook Co) at p 534 [22.80]. Courts are "reluctant to hold that parts of a contract are inconsistent with each other, and will give effect to any reasonable construction which harmonises such clauses": K Lewison and D Hughes, *The Interpretation of Contracts* in

Australia (2ed, 2025, Lawbook Co) at p 599 [9.13]. As White JA observed in *The Owners – Strata Plan No 66375 v King* [2018] NSWCA 170, “Generally, inconsistencies in a contract can be resolved by ascertaining the parties’ intentions from the language they have used, considering the document as a whole, and endeavouring to harmonise the conflicting parts so as to give effect to each of them. If the later clause can be read as qualifying rather than destroying the effect of the earlier clause, the two will be read together”: at [407].

Is there an inconsistency or conflict here? I think the answer is possibly, but should such an inconsistency or conflict arise, it is resolved by the contractual regime as follows:

The arbitration clause governs disputes between Taggle and Honeywell under the Distributor Agreement, other than from disputes concerning intellectual property. Given the subject matter of the Distributor Agreement, these disputes may involve ‘high-level’ problems concerning their ongoing commercial arrangement.

For supply contracts, between Taggle (as Buyer) and Honeywell or its affiliate (as Seller), cl 14.5 of Rider B applies to any disputes in respect of that supply contract. Disputes arising under individual supply contracts between the Buyer and Seller concern individual transactions.

It may well be that a particular supply contract is between Taggle and Honeywell (rather than a Honeywell affiliate) and raises issues under the Distributor Agreement as well. In such a situation, the order of precedence in cll 5.2 and 22.10 will resolve that particular inconsistency. I conclude that the arbitration agreement was not incorporated into supply contracts but might, in a given situation, apply if the order of precedence in cll 5.2 and 22.10 are called into action. It remains to consider whether the supply contracts here are such a case, to which I will shortly return.

Does the arbitration agreement have retrospective effect?

As to the defendants’ submission that, by entering into an arbitration agreement in the Distributor Agreement, Taggle brought within the scope of that agreement disputes about things that had already occurred, I accept that it is open to contracting parties to agree that their contract will have retrospective effect. This is often seen in building contracts. Early works begin while the finishing touches are being put on the paperwork. The building contract will commonly include a clause that the contract applies to works already done. In *Trollope & Colls Ltd v Atomic Power Constructions Ltd* (1962) 3 All ER 1035, Megaw J observed at 1039:

“Frequently, in large transactions a written contract is expressed to have retrospective effect ... and this in cases where the negotiations on some of the terms have continued up till almost, if not quite, the date of the signature of the contract. The parties had meanwhile been conducting their transactions with one another, it may be for many months, on the assumption that a contract will ultimately be agreed on lines known to both the parties, though with the final form of various constituent terms of the proposed contract still under discussion. The parties have assumed that when the contract is made — when all the terms have been agreed in their final form — the contract will apply retrospectively to the preceding transactions. Often, as I say, the ultimate contract expressly so provides. I can see no reason why, if the parties so intend and agree, such a stipulation should be denied legal effect.”

See likewise *Edwards v Australian Securities and Investments Commission* [2009] NSWCA 424 at [79] (Macfarlan JA, Spigelman CJ and Campbell JA agreeing); *Blackbird First Mortgage Corp Pty Ltd v Jacobs* [2025] FCAFC 136 at [78] (Feutrill and Longbottom JJ).

There was no evidence on this application that this was such a case. Rather, Taggle and Elster Australia appear to have been trading for a decade before the Distributor Agreement. Nor does the language of the dispute resolution clause readily cover disputes arising out of supply contracts entered into seven to 12 months before the Distributor Agreement, these being unlikely to “aris[e] out of or relat[e] to this Agreement”. I am not satisfied on this score, where the defendants bear the onus.

Further orders

As to whether the arbitration agreement applied to supply contracts entered into after the Distributor Agreement, a year after the agreement was signed, Dubbo Regional Council placed further orders with Taggle for water meters. The council purchased another 2,283 V200HT water meters, comprising 12% of total water meters purchased by the council from Taggle.

The business records in respect of these purchases are the same as earlier described. On the face of it, there is nothing in the supply contracts entered into after the Distributor Agreement that suggests that those contracts were with Honeywell as opposed to Elster Australia.

I accept that further evidence may be called in due course to indicate that these supply contracts were, in fact, with Honeywell and that the supply contracts gave rise to a dispute under the Distributor Agreement, as opposed to in respect of the supply contract, such that the arbitration clause in cl 21.2 of the Distributor Agreement takes precedence over cl 14.5 of Rider B. If realised, that possibility relates to a small portion of the supply contracts.

Problems

According to contentions now made by Dubbo Regional Council in this Court, from around May 2023, the water meters supplied by Taggle began progressively to fail in that they ceased to register any water usage or incorrectly registered a small amount of occasional usage. In November 2024, the council sent a letter of demand to Taggle, citing an increased rate of failure of the water meters and a significant loss of revenue to the council. Some \$10 million was sought in loss and damage.

In December 2025, the council commenced proceedings against Taggle for breach of contract, breach of warranty and damages under s 236 of the Australian Consumer Law. Put shortly, the council contends that Taggle represented that the water meters would be fit for its requirements but are not.

In its Commercial List Response, Taggle says that any representation was in respect of a future matter and for which it had reasonable grounds. Taggle’s supplier was Elster Australia, which had itself represented that the meters were suitable and fit for purpose for use in Australia, including

regional areas such as Dubbo and its surrounds. Taggle admitted that some of the water meters ceased to register any water usage or incorrectly registered one litre of occasional usage but denied that all of the meters were defective. Taggle noted that it will be an issue whether the water meters had been adversely affected by the water quality in the council area.

These proceedings

In February 2026, Taggle commenced these proceedings against Elster Australia and Honeywell. Taggle noted in its Commercial List Statement that it proposed to seek an order that these proceedings be heard together with the proceedings brought by the council. Against Elster Australia, Taggle sought damages for breach of contract or under s 236 of the Australian Consumer Law and an indemnity under s 274(1) of the Australian Consumer Law. Against Honeywell, Taggle sought damages under s 236 of the Australian Consumer Law.

In its Commercial List Statement, Taggle described its history of dealing with Elster Australia and Honeywell in the course of selling water meters to regional councils. Specifically, Taggle had been selling water meters for Elster Australia since 2011. Taggle pointed to Elster Australia and Honeywell brochures, promotional material and PowerPoint presentations made to potential customers in 2016. Before selling any water meters to Dubbo Regional Council, Elster Australia is said to have known that Taggle on-sold V200HT water meters to councils in rural areas such as Gunnedah, Moree and Mid-West Council.

Taggle contends that, between about 29 January 2020 and 6 March 2024, Taggle entered into 29 contracts to buy V200HT water meters from Elster Australia, which it then supplied and on-sold to Dubbo Regional Council. The Distributor Agreement is pleaded, apparently for the purpose of delineating the terms of supply contracts before and after that agreement. Before the Distributor Agreement was entered into, Taggle contends that the terms of the supply contracts between Taggle and Elster Australia comprised Taggle's purchase order. After the Distributor Agreement was entered into, the terms of the supply contracts comprised Taggle's purchase order and Rider B to the Distributor Agreement, as amended by Rider A.

Noting the proceedings brought by Dubbo Regional Council, Taggle denies that the water meters were defective or that it is liable to the council but brings these proceedings "without admissions, against the possibility, which is denied, that the Council's allegations against Taggle are made good". In that event, Taggle contends that the water meters supplied by Elster Australia – before the Distributor Agreement – were not reasonably fit for purpose or of merchantable quality such that Elster Australia breached ss 19(1) and (2) of the Sale of Goods Act 1923 (NSW), by reason of which Taggle has suffered loss in the form of any liability that it has to the Council, including its costs of defending the Council proceedings. For water meters supplied after the Distributor Agreement was entered into, Taggle relies on the warranty in Rider B (as amended by Rider A).

Further, Taggle contends that Elster Australia and Honeywell earlier represented (in 2016) through brochures, promotional material and PowerPoint presentations made with Taggle for potential customers that the water meters were suitable for use in all parts of Australia, including

regional areas. These representations are said to contravene s 18 of the Australian Consumer Law. Clause 7 of Rider B is said to be unenforceable to the extent that it purports to exclude the statutory scheme. As manufacturer, Elster Australia is said to be liable to indemnify Taggle in the event that the council succeeds in its claim for breach of the consumer guarantees in ss 54 and 55 of the Australian Consumer Law. Clause 7 of Rider B is said to be void to the extent that it purports to modify the operation of the statute.

The defendants have yet to file an appearance in these proceedings pending determination of the stay application. But the defendants' solicitor considers that Elster Australia and Honeywell may raise at least arguable defences in due course that the meters were not defective but any failure was caused by contaminants in the council's water supply. The representation asserted by Taggle – that V200HT meters were suitable for use in all parts of Australia, including regional areas – is said to be unsustainable given cl 6.2 of the Standard Terms and Conditions or the Standard Product Warranty or the Distributor Agreement. Given this, Taggle could not have relied on the representation, if made, and where Taggle undertook to promote and market the meters under the Strategic Alliance Agreement. Further, Taggle's claims may be limited by the Distributor Agreement and Strategic Alliance Agreement.

“through or under”

So far, Elster Australia is not a party to the Distributor Agreement and the arbitration clause in that agreement is not incorporated by reference into the supply contracts. As such, Elster Australia is not a party to an arbitration agreement. It remains possible that Taggle's claim against Honeywell in these proceedings is covered by the arbitration clause in the Distributor Agreement for the small portion of supply contracts entered into after the date of that agreement: see [59]. This takes us to the defendants' alternative case. The defendants relied on the arbitration clause in the Strategic Alliance Agreement, where Elster Australia and Honeywell were said to be “a person claiming through or under a party”: s 7(4).

An application for a stay must be made by “a party to an arbitration agreement”: s 7(2)(a). A reference to a party includes a reference to a person claiming through or under a party: s 7(4). This somewhat abstract concept was considered by the High Court in *Tanning Research*, where Brennan and Dawson JJ considered that a person claiming “through or under” may be a person seeking to enforce a right of a party to the arbitration agreement, or to resist enforcement of that right, such that the subject of the claim may be either a cause of action or a ground of defence: at 342. Their Honours continued, at 342:

“In other words, an essential element of the cause of action or defence must be or must have been vested in or exercisable by the party before the person claiming through or under the party can rely on the cause of action or ground of defence.” (Emphasis added.)

Put another way, the question is whether the person is taking their stand on a ground which is available to the party and thus stands in the same position vis a vis the counterparty as does the party: at 342. That will not be the case if the person seeks to rely on a ground which is different to, or not available to, the party: at 343. Likewise, Deane and Gaudron JJ considered that, where

the person “stands precisely in the position in which [the party] would have stood ... the [person] claims the benefit of the defences and answers which would otherwise have been available to [the party] and thus claims through or under” the party: at 353.

More recently in *Rinehart v Hancock Prospecting*, where the person’s defence turned on claims and defences exercisable by the arbitral parties, the majority of the High Court followed *Tanning Research*, at [73]:

“... the [person] takes its stand upon a ground which is available to the [party] and stands in the same position vis-a-vis the [counterparty] as the [party]. Accordingly, since the [parties] are bound by an arbitration agreement applicable to the claim ... there is no good reason why this claim should not be determined as between the [person] and the [counterparty] in the same way as it will be determined between the [party] and the [counterparty].”

Rinehart v Hancock Prospecting was applied in *DFD Rhodes Pty Ltd v Hancock Prospecting Pty Ltd* (2022) 59 WAR 316; [2022] WASCA 97, where Quinlan CJ and Beech JA (Vaughan JA agreeing) noted, “The focus is on the nature and source of the claims and defences of the person said to be claiming through or under a signatory to the arbitration agreement, not on the relationship between the two parties”: at [111].

The defendants’ solicitor said that Elster Australia and Elster UK are both owned by Elster Metering Holdings Ltd and, ultimately, by Honeywell. The defendants’ solicitor considers that the defendants may raise an arguable defence in answer to Taggle’s claim based on cl 5.5 and 6.4 of the Strategic Alliance Agreement. If it is found that the defendants are liable, they may advance a defence based on Taggle’s failure to take reasonable care and contributory negligence, under s 137B of the Competition and Consumer Act 2010 (Cth) with respect to claims under the Australian Consumer Law and s 5S of the Civil Liability Act 2005 (NSW) with respect to the remaining claims. The obligations imposed on Taggle under these clauses would be particulars to such defences. In relying on these provisions of the Strategic Alliance Agreement, the defendants would raise matters arising out of that agreement, including its effect and the rights and obligations of Taggle under that agreement. Accordingly, the defendants’ solicitor considers that each of the defendants would be persons who would seek to claim under or through the arbitration agreement in cl 13.3 of that agreement.

The defendants submitted that they intend to defend the claim on the basis of Taggle’s failure to take reasonable care and contributory negligence, given its obligations under the Strategic Alliance Agreement to conduct testing and validation of the Prototype which became the V200HT water meter (cl 5.5) and to jointly market the water meter to customers (cl 6.4). The standard to which Taggle performed those obligations, and the consequences for Taggle’s right to recover from the defendants, were said to be within the scope of the arbitration agreement in cl 13.3. The right to raise those matters vested in Elster UK. By raising those matters in defence to Taggle’s claims, the defendants were said to be claiming through or under Elster UK, as a party to the arbitration agreement, within the meaning of s 7(4). As the defence was contemplated in response to each claim made by Taggle against the defendants, Taggle’s claims must be stayed

under s 7(2): *Roussel-Uclaf v GD Searle & Co Ltd* [1978] 1 Lloyd's Rep 225. The Court should err in favour of a stay of proceedings and referral to the arbitral tribunal, which is competent to consider and rule on its own jurisdiction.

Taggle submitted that “an essential element of the cause of action or defence must be or must have been vested in or exercisable by the party [that is, Elster UK] before the person [Elster Australia] claiming through or under the party can rely on the cause of action or ground of defence”: *Rinehart v Hancock Prospecting* at [62], citing *Tanning Research* at 342. Taggle made no claim against Elster UK for breach of the Strategic Alliance Agreement or at all. The concept of Elster UK having defences to non-existent claims, and Elster Australia claiming “through or under” Elster UK, was absurd. Elster Australia's defence was available to it alone, in which case the position was different: see *Elecnor Australia Pty Ltd v Clough Projects Australia Pty Ltd* [2025] NSWSC 610 at [122] (Stevenson J). The authorities cited by the defendants involved circumstances where a plaintiff had claims against a defendant party to the arbitration agreement and sued that party. The circumstances in *Roussel-Uclaf* were said to be very different. Nor did the Strategic Alliance Agreement say anything about the terms of supply of water meters to Taggle.

That Elster Australia and Elster UK are related companies is not relevant. Where Elster Australia and Honeywell are not parties to the Strategic Alliance Agreement, the question is whether they fall within the extended definition of “party” as claiming “though or under” Elster UK.

I endeavoured to summarise the complex examples in the case law in *King River Digital Assets Opportunities SPC v Salerno* [2023] NSWSC 510. In reprise, a liquidator who rejects a proof of debt on the basis of a ground that was available to the insolvent company falls within this description, but not if the liquidator relies on a ground available to him or her as liquidator: *Tanning Research* at 342-3. In *Rinehart v Hancock Prospecting*, the claimants sued third party assignees of mining tenements in a *Barnes v Addy* claim. The assignees fell within this description as they contended that they took good title as there was no breach of trust: *Rinehart v Hancock Prospecting* at [73]. In *King River*, a director was said to be ‘knowingly concerned’ in misleading and deceptive conduct engaged in by his company, where the latter was party to an arbitration agreement. The director was claiming through or under the company where his position was that he could have no accessorial liability as the company did not engage in misleading or deceptive conduct; his defence would necessarily be decided in the same way as it would be decided if it were being put by his company: at [32].

Here, the defendants intend to rely on Taggle's contractual obligations to Elster UK under the Strategic Alliance Agreement as informing the content of Taggle's duty of care owed to them, or Taggle's failure to take reasonable care, such that any damages recoverable from the defendants should be reduced. More is required to be a person claiming “through or under” a party to an arbitration agreement. The defendants must be taking their stand on a ground which is available to Elster UK, for example, suing Taggle for breach of the Strategic Alliance Agreement, or defending Taggle's claims on the basis of a defence available under to Elster UK under that contract. That is not this case. Further, where the contract appears to have been discharged by performance in 2018, even Elster UK may have problems bringing such a claim now. Nor, for that

matter, is the arbitration agreement in the Strategic Alliance Agreement mandatory or comprehensive: see [29].

Conditions on stay

At this point, Elster Australia is not a party to an arbitration agreement with Taggle. It remains possible that Taggle's claims against Honeywell, in so far as those claims concern supply contracts post-dating the Distributor Agreement, may be subject to the arbitration agreement. It remains to consider whether the Court should impose any conditions on a stay of that part of the proceedings under s 7(2).

The Court's power to impose a condition on a stay was recently considered by the Chief Justice (Ward P and Free JA agreeing) in *Clough Products Australia Pty Ltd v Elecnor Australia Pty Ltd* [2026] NSWCA 111. Where, as here, not all claims fell within the scope of an arbitration agreement and not all parties to the proceedings were parties to the arbitration agreement, *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc* (1998) 90 FCR 1 was reviewed favourably as an example of how such a situation may be addressed.

In *Hi-Fert*, the Court stayed that part of the proceedings which fell within the arbitral clause, with the balance of the proceedings continuing in the Federal Court, but imposed a condition on the stay "as it was entitled to under section 7(2)", that the arbitration not proceed until the determination of the matters not referred to arbitration: *Clough* at [62]. Bell CJ concluded, at [69]-[70]:

"[69] ... the operation of an arbitration agreement in combination with s 7 of the Act may result in a circumstance where the resolution of the entirety of the parties' dispute[s] in a single forum, whether curial or arbitral may not be possible absent supervening agreement. In this context, s 7(2) of the Act permits a stay and referral to arbitration to be made "on such condition (if any) as it sees fit". In some cases where there is a fracturing of the dispute resolution process, the power to impose conditions on a stay of proceedings has been used for what may be described as case management purposes: see Hi-Fert discussed at [62] above.

[70] ... The imposition or non-imposition of conditions is really a question of case management, and is quintessentially a matter for the judge hearing the stay application. Unlike the decision to grant a stay under s 7(2) (which is mandatory when the necessary probanda are established), any decision to impose conditions upon that stay is a discretionary one. This distinction has implications for appellate review of the latter kind of decision (*House v R* (1936) 55 CLR 499; [1936] HCA 40) ..."

Relevant considerations in the exercise of this discretion were described by Bell P (Bathurst CJ and Leeming JA agreeing), as the Chief Justice then was, in *Australian Health and Nutrition Association Ltd v Hive Marketing Group Pty Ltd* (2019) 99 NSWLR 419; [2019] NSWCA 61 at [92], albeit in the context of an exclusive jurisdiction clause (where arbitration and exclusive jurisdiction clauses “have frequently been treated as legally cognate”: *Global Partners Fund Ltd v Babcock & Brown Ltd (in liq)* [2010] NSWCA 196 at [60]):

“The discretion is ultimately to be exercised by reference to the facts of the particular case and a careful consideration, in light of those facts, of the nature and complexity of the matters in issue, the degree of risk of inconsistent decisions and the weight to be attributed to that possibility as against the weight to be attributed to the consequences of one party losing the real benefit of an exclusive jurisdiction clause for which it bargained and secured as part of the overall commercial arrangement between the parties.”

The defendants’ solicitor considers that resolution of the issues in the proceedings will likely turn on questions of fact, in particular, the extent to which the water quality in the council area is responsible for the problems experienced by the meters, rather than any defect in the meters. This may involve contemporaneous records and evidence regarding the quality of the water and investigation of the meters returned by the council and Taggle, together with expert evidence as to the quality of the meters and the effect of the water on their operation (being mechanical and hydraulic engineering evidence and hydraulic and water quality evidence).

If any part of these proceedings is stayed in favour of arbitration, and the balance continues to be prosecuted in this Court, then the defendants’ solicitor expects that Elster Australia and Honeywell will be required to duplicate evidence in both the arbitration and this Court. This will cause increased costs, including in conducting separate arbitral and court proceedings. There is also a risk of conflicting findings by the arbitral tribunal and this Court. The defendants’ solicitor estimated that, if the whole of the proceedings were heard in one forum, then the defendants would incur some \$120,000 in conducting discovery and at least \$500,000 in connection with a final hearing, estimated at this early stage to take eight days. Where the claim against Taggle is some \$10 million, and Taggle seeks that loss from the defendants, the solicitor estimates that the arbitration could be resolved within 18 to 24 months of reference having regard to the significant breadth of evidence and discovery required.

The defendants submitted that the matters which arise in these proceedings fall within the scope of the arbitration agreement: whether the water meters are defective, whether the defendants made the alleged representations and whether Taggle relied on the same, and defences under cll 19.1 and 19.2 of the Distributor Agreement, cl 14.5 of Rider B and cl 6.4(q)(ii) of the Strategic Alliance Agreement. The arbitration agreement was broadly expressed, sufficient to encompass matters going to the trading relationship between the parties constituted by the Distributor Agreement. The “matter” need not cover the whole controversy between the parties: *Elecnor* at [94]. If there was any doubt about it, then that doubt should be resolved in favour of a complete stay and referral given the broad terms of which the arbitration agreement.

The defendants submitted that, although the trading relationship existed before the Distributor Agreement, the gravamen of that relationship was said to be at the core of the Distributor Agreement. The Court should encourage the use of arbitration and facilitate the use of arbitration agreements consistently with the objects of the Act, rather than make fine distinctions based on technicalities, or taking a narrow view of the arbitrability of the matters raised in a proceeding. The supply of water meters before and after the Distributor Agreement involved the same factual issues. The claim against Elster Australia and Honeywell drew no real distinction between the conduct and circumstances in either period. (Nor would such a distinction be necessary for the purpose of pleading Taggle's claim against the defendants, but the distinction may be important for this application.) Doing otherwise gave rise to multiple proceedings, and duplicated costs and the spectre of inconsistent findings. The exercise of the Court's discretion to stay the non-arbitral portion of these proceedings did not depend on the blunt exercise of counting the number of arbitrable versus non-arbitrable claims or their quantum. Taggle cannot invoke its own convenience to evade the operation of an arbitration agreement to which it agreed. (I agree with the last submission, save for the suggestion of "evasion".) For completeness, I reject the defendants' submission that, if the arbitral tribunal in Singapore determines the "matters" in respect of the supply of water meters after the Distributor Agreement, that the arbitral award will bind this Court in respect of the supply of water meters before that agreement.

Taggle submitted that the fact that Elster Australia was not a party to the Distributor Agreement was a decisive consideration against a stay and referral to arbitration: *Karadag v Samkara Holdings Pty Ltd* [2022] NSWSC 380 at [146] (Ward CJ in Eq, as the President then was); *Re Ikon Group Limited (No 2)* [2015] NSWSC 891 at [24] (Brereton J, as his Honour then was). Nor did the Distributor Agreement govern the supply of water meters before it was entered into. If the matters the subject of dispute in relation to supply after the Distributor Agreement could be stayed in favour of arbitration, then as a matter of discretion that the Court would not stay the non-arbitrable matters pending the arbitration. Further, the reference to arbitration of the arbitrable matters should not proceed until the final determination of the non-arbitrable matters by this Court. The number of water meters the subject of non-arbitrable claims far exceeded the number of water meters the subject of arbitrable claims. Any arbitrable claims are "ancillary to, and flow from" the non-arbitrable claims: *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 100 FCR 420; [2000] FCA 547 at [64]. The non-arbitrable claims are the "primary and substantial claims", non-arbitrable claims are "the ancillary and less significant claims" and unlikely to be "determinative": *Recyclers* at [69]. If Taggle succeeded on the non-arbitrable claims in these proceedings, there may be no need for it to pursue the arbitrable claims in Singapore: see likewise *Hi-Fert*; cf *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896.

Taggle submitted that it would be unfair to force it to defend the council's claim without the defendants' involvement in those proceedings, where it is the defendants who are knowledgeable about the suitability of its product and whether the defects were caused by water quality. Nor can Taggle pass on any liability to the defendants where they would not be bound by the findings of this Court. There was said to be no corresponding prejudice to the defendants. Nor was there any

suggestion that arbitration in Singapore will be any quicker than litigation in this Court. This Court should proceed as per *Hi-Fert* and determine the non-arbitrable claims first. The reference to arbitration in Singapore in respect of the claims involving the 2,283 water meters sold after entry into the Distributor Agreement should not proceed until the final determination of these proceedings: s 7(2), the Court's power to stay "upon such conditions (if any) as it thinks fit".

I consider that it is appropriate to impose a condition for four reasons. First, it is possible that these proceedings involve the determination of a "matter" that is capable of settlement by arbitration and falls within the arbitration clause between Taggle and Honeywell in the Distributor Agreement. But it is only a possibility, where the "matter" with which these proceedings are concerned is, by and large, representations said to have been made by Honeywell (and Elster Australia) in 2016, and where the Distributor Agreement was executed in 2021.

Second, the supply contracts which potentially fall into this category account for some 10% of the water meters supplied to Dubbo Regional Council. I do not accept that having regard to the arbitral and non-arbitral portions of these proceedings is a "blunt exercise" that should be eschewed. To ignore these proportions would be to let the 'tail wag the dog' just because there is an arbitral dispute somewhere.

Third, staying these proceedings in favour of arbitration has significant ramifications for these proceedings and related proceedings in this Court. It will delay the resolution of both proceedings, contrary to the just, quick and cheap manner which the plaintiffs in both proceedings are entitled to expect.

Fourth, if the defendants successfully defend these proceedings, there may be no need for Honeywell to participate in an arbitration with Taggle in respect of the sub-set of "matters" that may fall within the arbitral clause.

Orders

For these reasons I make the following orders:

Subject to Order 2, stay these proceedings against the second defendant pursuant to s 7(2) of the International Arbitration Act 1974 (Cth) insofar as the proceedings concern "the Elster Supply Contracts", as that term is defined in the Commercial List Statement, which post-date 8 February 2021.

A condition on the stay is that the reference to arbitration not proceed until after the final determination of these proceedings.

Otherwise dismiss the defendants' motion filed on 9 April 2026.

List the matter for directions in the Commercial List on 23 October 2026.

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