Federal Court of Australia

Freedom Foods Pty Ltd v Blue Diamond Growers [2021] FCA 172

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| File number: | VID 644 of 2020 |
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| Judgment of: | **MOSHINSKY J** |
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| Date of judgment: | 5 March 2021 |
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| Catchwords: | **ARBITRATION** – international arbitration – arbitration agreement – application for stay of the proceeding pursuant to s 7(2) of the *International Arbitration Act 1974* (Cth) – where the contract between the parties contained an arbitration agreement requiring disputes to be arbitrated in California – where the respondent sought a stay of the proceeding pursuant to s 7(2) – where the applicants contended that the arbitration agreement was invalid or of no effect by virtue of cl 21 of the Franchising Code of Conduct  **CONSUMER LAW** – franchise – Franchising Code of Conduct – where the first applicant and the respondent entered into a License Agreement for the manufacture, distribution and sale of certain almond milk products in Australia – whether the License Agreement constituted a “franchise agreement” for the purposes of the Franchising Code of Conduct |
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| Legislation: | *Competition and Consumer Act 2010* (Cth), Sch 2, Australian Consumer Law, ss 18, 21, 134  *International Arbitration Act 1974* (Cth), ss 3, 7  *Competition and Consumer (Industry Codes—Franchising) Regulation 2014* (Cth), Sch 1 |
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| Cases cited: | *Bank Mellat v Helliniki Techniki SA* [1984] QB 291  *Bautista v Star Cruises* 396 F (3d) 1289 (11th Cir, 2005)  *Casaceli v Natuzzi SPA* (2012) 92 ALR 143  *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242  *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160  *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442  *Inghams Enterprises Pty Ltd v Hannigan* (2020) 379 ALR 196  *Lipman Pty Ltd v Emergency Services Superannuation Board* [2011] NSWCA 163  *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 473 US 614 (1985)  *Queensland Premier Mines Pty Ltd v French* (2007) 235 CLR 81  *Rafferty v Madgwicks* (2012) 203 FCR 1  *Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazoni v Lauro* 712 F(2d) 50 (3rd Cir, 1983)  *Rinehart v Hancock Prospecting Pty Ltd* (2019) 366 ALR 635  *Tanning Research Laboratories Inc v O’Brien* (1990) 169 CLR 332  *Transurban WGT Co Pty Ltd v CPB Contractors Pty Ltd* [2020] VSC 476  *Workplace Safety Australia Pty Ltd v Simple OHS Solutions Pty Ltd* (2015) 89 NSWLR 594 |
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| Division: |  |
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| Registry: |  |
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| National Practice Area: | Commercial and Corporations |
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| Sub-area: | Commercial Contracts, Banking, Finance and Insurance |
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| Number of paragraphs: | 145 |
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| Date of last submissions: | 19 February 2021 |
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| Date of hearing: | 4 and 17 February 2021 |
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| Counsel for the Applicants: | Mr PD Crutchfield QC with Dr AM Dinelli |
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| Solicitor for the Applicants: | Arnold Bloch Leibler |
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| Counsel for the Respondent: | Dr JP Moore QC, with Ms HA Tiplady and Mr T Farhall |
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| Solicitor for the Respondent: | Norton Rose Fulbright Australia |

ORDERS

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|  | | VID 644 of 2020 |
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| BETWEEN: | FREEDOM FOODS PTY LTD (ACN 068 972 181)  First Applicant  FREEDOM FOODS GROUP INGLEBURN PTY LTD (ACN 600 569 382)  Second Applicant  FREEDOM FOODS GROUP TRADING PTY LTD (ACN 614 863 286) (and another named in the Schedule)  Third Applicant | |
| AND: | BLUE DIAMOND GROWERS  Respondent | |

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| order made by: | MOSHINSKY J |
| DATE OF ORDER: | 5 MARCH 2021 |

**THE COURT NOTES THAT:** the respondent (**BDG**) by its counsel has provided the following undertakings:

* 1. BDG will consent to the second applicant (**FF Ingleburn**), the third applicant (**FF Trading**) and the fourth applicant (**Pactum**) joining the arbitration in California commenced by BDG against the first applicant (**FFPL**) on or about 25 September 2020 (the **Californian Arbitration**);
  2. in the Californian Arbitration, BDG will accept that:
     1. insofar as those provisions are applicable to the conduct of BDG alleged by the applicants, ss 18 and 21 of the Australian Consumer Law (being Sch 2 to the *Competition and Consumer Act 2010* (Cth)) are mandatory laws that the arbitrator must apply; and
     2. Australian law is to be applied by the arbitrator in determining the applicants’ claims under those provisions; and
  3. BDG will discontinue the proceeding against FFPL in the United States District Court, Eastern District of California (with a view to bringing the claims in the Californian Arbitration).

THE COURT ORDERS THAT:

1. Pursuant to s 7(2) of the *International Arbitration Act 1974* (Cth), the proceeding be stayed.
2. BDG’s interlocutory application dated 15 December 2020 otherwise be dismissed.
3. The applicants’ interlocutory application dated 20 November 2020 be dismissed.
4. Within 14 days, the parties file any agreed minute of order as to the costs of the interlocutory applications and of the proceeding.
5. If the parties cannot reach agreement:
   1. within 21 days, each party file a written submission (of no more than two pages) as to costs; and
   2. within 28 days, each party file a responding submission (of no more than two pages) as to costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MOSHINSKY J:

## Introduction

1. The applicants are members of the Freedom Foods group of companies (the **Freedom Foods group**), the ultimate holding company of which is Freedom Foods Group Ltd (**FFG**). The applicants, and FFG, are each incorporated in Australia. FFG is listed on the Australian Stock Exchange. The Freedom Foods group is involved in the manufacture and sale of food and beverage products in Australia and elsewhere. The four applicants are:
2. Freedom Foods Pty Ltd (**FFPL**);
3. Freedom Foods Group Ingleburn Pty Ltd (**FF Ingleburn**);
4. Freedom Foods Group Trading Pty Ltd (**FF Trading**); and
5. Pactum Australia Pty Ltd (**Pactum**).
6. The respondent, Blue Diamond Growers (**BDG**), is a company incorporated under the laws of California, United States of America, and a cooperative of nearly 3,000 independent Californian almond growers that produces and sells over US$1.5 billion in almond products each year worldwide.
7. Disputes have arisen between BDG and the applicants. The disputes relate to a License Agreement between BDG as licensor and FFPL as licensee (the **License Agreement**). The License Agreement was entered into in October 2011 and amended in August 2014. The initial term of the agreement was five years. Pursuant to the terms of the agreement, in October 2016 the agreement was automatically renewed for a further five years. Under the License Agreement, BDG licensed FFPL to manufacture and sell almond milk products under the “Almond Breeze” name and certain trademarks. In broad terms, the disputes that have arisen relate to the manufacture and sale, by the Freedom Foods group, of MILKLAB almond milk and ‘private label’ almond milk.
8. The License Agreement contains an express choice-of-law clause, which provides that the agreement is governed by the law of California, USA.
9. The License Agreement also contains an arbitration clause, which refers certain disputes between the parties to arbitration in California. The arbitration clause is part of the dispute resolution clause (cl 28). Paragraph (a) of the clause provides that any controversy between the parties “as to the meaning or operation of this Agreement (except one involving a claim for equitable relief, including but not limited to claims for restraining orders, injunction, or specific performance)” shall be resolved to the extent possible by informal meetings and discussions in good faith between the parties. Clause 28(b) is in the following terms:

Arbitration. In the event any controversy referenced in subsection 28(a) above cannot be resolved by good faith discussions, such controversy shall be submitted to arbitration by either party in Sacramento, California before a single arbitrator to be mutually agreed by the parties. If the parties are unable to agree, then the American Arbitration Association shall appoint the arbitrator. Proceedings shall be conducted in accordance with the Commercial Arbitration Rules of the American Arbitration Association or any successor organization. The decision of the arbitrator shall be binding on the parties and judgment on any award may be entered in any court having jurisdiction thereof. The costs of the arbitration shall be borne equally by the parties; however, unless otherwise provided herein, each party shall be responsible for its own attorney and expert fees. Notwithstanding the above, a party seeking specific performance or injunctive relief with respect to any obligation hereunder shall not be required to submit such claim to arbitration as set forth herein but may proceed to file such claim in any state or federal court having jurisdiction thereof.

1. On 25 September 2020, BDG lodged a demand for arbitration against FFPL with the American Arbitration Association’s International Centre for Dispute Resolution. By its statement of claims, BDG alleges that FFPL breached exclusivity provisions under the License Agreement by manufacturing, selling and distributing nut-based beverage products other than BDG’s products. The American Arbitration Association subsequently sent a letter to the parties stating that, consistent with the parties’ agreement, the arbitration would be heard by a single arbitrator in California. I will refer to the arbitration as the **Californian Arbitration**.
2. Also on 25 September 2020, BDG commenced a proceeding against FFPL in the United States District Court, Eastern District of California (the **US District Court Proceeding**). By its complaint, BDG alleges that at a meeting in June 2019, BDG and FFPL attempted to resolve their disputes by entering into an oral forbearance agreement.
3. On 29 September 2020, the applicants commenced the present proceeding in this Court by filing an originating application and a concise statement. By the originating application, the applicants seek an injunction restraining BDG from prosecuting or taking any step in the arbitration, a declaration that cl 28(b) of the License Agreement is of no effect, and a series of declarations, damages, interest and costs. The declarations sought by the applicants include declarations to the effect that:
4. none of the applicants has breached the License Agreement by manufacturing, packaging, selling and distributing MILKLAB almond milk products or private label almond milk products;
5. no agreement was entered into by FFPL and BDG at a meeting in June 2019 as alleged by BDG;
6. none of the applicants is required, under the License Agreement, to obtain ‘almond base’ exclusively from BDG for the manufacture of MILKLAB almond milk products or private label almond milk products;
7. BDG has engaged in misleading or deceptive conduct contrary to s 18 of the Australian Consumer Law (being Sch 2 to the *Competition and Consumer Act 2010* (Cth)) (the **Australian Consumer Law**) and is estopped from resiling from certain representations (referred to as the “MILKLAB Representation” and the “Private Label Representation”) and from withdrawing its consent to the sale of MILKLAB almond milk products and private label almond milk products;
8. a breach notice dated 31 July 2020 served by BDG is not a valid breach notice under the License Agreement;
9. the License Agreement is a “franchise agreement” under the Franchising Code of Conduct (being Sch 1 to the *Competition and Consumer (Industry Codes—Franchising) Regulation 2014* (Cth)) (the **Franchising Code**);
10. by issuing the breach notice dated 31 July 2020, BDG breached its obligation under cl 6(1) of the Franchising Code to act in good faith, and acted unconscionably, contrary to s 21 of the Australian Consumer Law; and
11. cl 10(b) of the License Agreement (which is headed “Licensee Non Competition”) is invalid as an unreasonable restraint of trade and of no effect.
12. On 15 October 2020, a Judge of this Court made an order granting the applicants leave to serve the originating application, the concise statement and certain other documents on BDG in the USA by sending the documents by post. The documents were delivered on 22 or 23 October 2020.
13. There are two interlocutory applications before the Court: an interlocutory application dated 20 November 2020 filed by the applicants; and an interlocutory application dated 15 December 2020 filed by BDG. It is common ground that it is logical to deal first with BDG’s interlocutory application. By its interlocutory application, BDG seeks orders that:
14. the order granting the applicants leave to serve the relevant documents on BDG in the USA be discharged;
15. further or alternatively, service of the relevant documents on BDG be set aside;
16. the proceeding, insofar as it has been commenced by FFPL, be stayed pursuant to s 7(2) of the *International Arbitration Act 1974* (Cth); and
17. in the alternative to paragraph (c), the proceeding be stayed as a matter of discretion on the basis that Australia is a clearly inappropriate forum for the determination of the proceeding.
18. At the hearing, senior counsel for BDG stated that BDG did not press the relief outlined in paragraphs (a) and (b) above. Further, although the relief set out in paragraph (c) above is expressed in terms of the proceeding *insofar* *as it has been commenced by FFPL*, in its written and oral submissions BDG submitted that the proceeding *insofar* *as it has been commenced by all applicants* should be stayed pursuant to s 7(2) of the *International Arbitration Act*.
19. By their interlocutory application, the applicants seek injunctions directed to the prosecution of the Californian Arbitration and the US District Court Proceeding. The applicants seek orders to the effect that:
20. BDG be restrained from prosecuting, continuing with, or taking any step in the Californian Arbitration;
21. BDG be restrained from prosecuting, continuing with, or taking any step in the US District Court Proceeding;
22. alternatively to paragraph (a), BDG be restrained from prosecuting, continuing with, or taking any step in the Californian Arbitration, pending the final determination of this proceeding; and
23. alternatively to paragraph (b), BDG be restrained from prosecuting, continuing with, or taking any step in the US District Court Proceeding, pending the final determination of this proceeding.
24. The applicants’ interlocutory application is premised on the applicants being successful in relation to BDG’s interlocutory application. In other words, it assumes that the Court declines to grant a stay of this proceeding as sought by BDG in its interlocutory application.
25. For the reasons that follow, I have concluded that, subject to BDG giving certain undertakings, the present proceeding should be stayed pursuant to s 7(2) of the *International Arbitration Act*. I have also concluded that the applicants’ interlocutory application should be dismissed.

## The hearing and evidence

1. The hearing of the two interlocutory applications took place over two hearing days, namely 4 February 2021 and 17 February 2021. The hearing was conducted by video using Microsoft Teams due to restrictions in place because of the COVID-19 pandemic.
2. The applicants rely on the following lay and expert evidence:
3. an affidavit of Justin Vaatstra, a partner of Arnold Bloch Leibler, the solicitors for the applicants, dated 20 November 2020;
4. an affidavit of Julie Stoner, the Regional Sales Director for Australia and New Zealand for FFG, dated 22 January 2021;
5. two affidavits of Scott Standen, the Company Secretary of FFG, dated 3 February 2021 and 12 February 2021;
6. an affidavit of Leon Zwier, a partner of Arnold Bloch Leibler, dated 14 October 2020; and
7. three expert reports relating to Californian law prepared by Susan Leader, a partner of Akin Gump Strauss Hauer & Feld LLP, dated 5 January 2021, 20 January 2021 and 25 January 2021.
8. In addition, the applicants rely on one documentary exhibit.
9. BDG relies on the following lay and expert evidence:
10. an affidavit of Dale Tipple, a Vice President and the Managing Director – International of BDG, dated 14 December 2020;
11. an affidavit of Brendan Binder, a consultant to BDG in the period 2007 to 2016, dated 14 December 2020;
12. an affidavit of Juan Moreno, the Finance Director of BDG, dated 14 December 2020; and
13. three expert reports relating to Californian law prepared by Craig Celniker of Morrison & Foerster (Singapore) LLP, prepared on or about 22 December 2020, 20 January 2021 and 28 January 2021.
14. In addition, BDG relies on one documentary exhibit.
15. An issue arose at the outset of the hearing concerning Mr Standen’s affidavit dated 3 February 2021. This was served the day before the hearing, which was well outside the time permitted in timetabling orders previously made by the Court. The affidavit related to an issue as to whether the Franchising Code was inapplicable by virtue of cl 3(2)(b) of the Franchising Code (set out later in these reasons) (the **20% Issue**). There was some evidence about this issue in Mr Moreno’s affidavit, but the applicants submitted they had not appreciated the point until service of BDG’s outline of submissions. I gave leave to the applicants to rely on Mr Standen’s affidavit dated 3 February 2021. I also gave leave to BDG to cross-examine Mr Standen, with this to occur on the second hearing day. I also made an order for the production by the applicants of certain documents relevant to the 20% Issue. In the period between the two hearing days, in addition to producing documents, the applicants served a second affidavit of Mr Standen. I gave the applicants leave to rely on that affidavit on the second hearing day.
16. On the first hearing day, the parties made oral submissions on BDG’s interlocutory application, save that the 20% Issue was deferred until the second hearing day. On the second hearing day, Mr Standen was cross-examined and the parties made submissions on the applicants’ interlocutory application and on the 20% Issue.
17. None of the witnesses apart from Mr Standen was cross-examined.

## Background facts

1. The background facts are set out in the lay affidavits filed by the parties. The following is a brief summary of that material.
2. On 18 October 2011, FFPL and BDG entered into an agreement headed “License Agreement”. The agreement was executed in Los Angeles, California by Rory Macleod on behalf of FFPL. It was executed in Sacramento, California, by Mark Jansen on behalf of BDG. The Recitals to the agreement state that BDG desired to engage FFPL (referred to as the “Licensee”) in the manufacture, sale and distribution of the nut beverage products listed in Schedule A (defined as the “Products”). Schedule A contained a list of products, all of which contained “Almond Breeze” in their name. The Recitals also stated that BDG desired to grant FFPL the right to use the Formulations/Specifications (as defined in the agreement) to manufacture the Products, and to use the Trademarks (which were listed in Schedule C to the agreement) in connection with the sale and distribution of the Products to wholesalers, distributors and retailers located and taking delivery of the Products within the territory listed in Schedule D (referred to as the “Territory”). The Territory comprised Australia, New Zealand and “Oceania Countries”, including Papua New Guinea, Solomon Islands, Fiji, Tonga, Cook Islands, Vanuatu and Samoa.
3. On 18 July 2014, the parties agreed to amend the agreement with effect from 1 August 2014. The amendments are contained in an agreement headed “First Amendment to License Agreement”.
4. In October 2016, the agreement (as amended) was automatically renewed for five years.
5. Clause 3 of the License Agreement is headed “Grant of Exclusive Rights in Territory”. By cl 3(a), BDG grants FFPL an exclusive license: (i) to use the Formulations/Specifications to manufacture the Products (or arrange for the manufacture of the Products by a co-packer approved by BDG) for sale and distribution to customers located and taking delivery within the Territory; and (ii) to use the Trademarks to package, sell and distribute the Products to customers located and taking delivery within the Territory. Clause 3(b) is headed “Territorial Restriction” and provides that FFPL will manufacture, sell and distribute the Products to customers solely in the Territory. It also provides that FFPL will have the right in its sole discretion to determine the prices at which the Products will be sold to its customers.
6. Clause 3(d) is headed “Marketing Plan”. I will return to this clause later in these reasons. In brief, it provides that BDG will be responsible for the development and implementation of annual marketing plans. Clause 3(e) is headed “Promotional Plan”. I will also return to this clause later in these reasons. In brief, it provides that FFPL will be responsible for the development and implementation of annual trade promotion and account-specific promotional plans. The balance of cl 3 deals with a range of matters, including the packaging of the Products, changes to the Formulations/Specifications and promotional materials.
7. Clause 4 of the License Agreement deals with the purchase of almond base by FFPL from BDG. The price at the commencement of the agreement was specified as US$10.40 per US pound delivered duties paid to Sydney. Commencing with the 2013 financial year, BDG could change the price once per financial year. Clause 4(b) deals with sales goals, and cl 4(c) deals with ranging and distribution goals.
8. Clause 5 of the License Agreement deals with reports, records and business reviews. Clause 6 deals with the Trademarks. Clause 7 deals with trade secrets. Clauses 8 and 9 contain representations, warranties and covenants.
9. Clause 10 is headed “Exclusivity”. This clause, which was amended by the amendment agreement of 18 July 2014, is central to the disputes between the parties. By cl 10(a), BDG agrees (in summary) that it will not, without the prior written consent of FFPL, directly or indirectly manufacture, package, sell or distribute, or license or otherwise authorise any third party to manufacture, package, sell or distribute, nut beverage products to customers in the Territory.
10. By cl 10(b) (as amended), FFPL agrees (in summary) that it will not, without the prior consent of BDG, directly or indirectly manufacture, package, distribute or sell any nut beverage products to customers outside the Territory. Further, FFPL agrees (in summary) that it will not “sell any non-organic nut beverage product other than the licensed Products inside the Territory”. However, there are several exceptions (or clarifications) as to what FFPL *is* permitted to do. These include the following exceptions or clarifications:
11. FFPL is not precluded from launching an Australian organic almond beverage product under its “Australia’s Own” organic beverage brand, as part of maintaining a competitive brand presence in the organic beverage segment and protecting its brand and intellectual property (subject to certain qualifications).
12. BDG acknowledges that Pactum is not precluded from providing contract packaging services of UHT-based beverages (including any nut-based beverages) to any third party.
13. The entry by FFPL and/or Pactum of a bid or bids for the manufacture, packaging, sale and distribution of non-organic private label almond milk to be packaged, marketed and sold under a brand name exclusive to a particular chain of retail groceries (referred to as “Private Label Products”) and the performance by FFPL or Pactum of a contract or contracts to manufacture, sell and distribute Private Label Products, will not be deemed to be a breach by FFPL of its covenant in cl 10(b), subject to a series of conditions or qualifications.
14. Clause 15 of the License Agreement is headed “Nature of Relationship”. It states that the agreement establishes a trademark licensing arrangement to manufacture or arrange for the manufacture and sale of the Products, and a requirements supply agreement for the purchase of the almond base. It also states that nothing herein shall be deemed or construed to create a partnership, joint venture, agency or distribution relationship between the parties.
15. Clause 17 states as follows:

Assignment. The rights and obligations of the parties under this Agreement may not be assigned, sublicensed or delegated without the prior written consent of the non-assigning party, non-sublicensing or non-delegating party in its sole discretion, except that this Agreement may be assigned, sublicensed or delegated by Blue Diamond and Licensee without the other party’s consent to a subsidiary or affiliate of Blue Diamond or Licensee, as the case may be, in connection with a merger, consolidation or other business reorganization plan. This Agreement shall be binding on, and inure to the benefit of and be enforceable by, the parties hereto and their respective successors, permitted assigns and legal representatives.

1. Clause 27 deals with governing law:

Governing Law. This Agreement and all acts and transactions pursuant hereto and the rights and obligations of the respective parties hereto shall be interpreted, construed and governed by the internal laws of the State of California, United States of America, without regard to conflicts of law principles, and specifically excluding the UN-Convention on Contracts for the International Sale of Goods and the application of any other uniform civil or conflict of law rules created by intergovernmental or inter-State Conventions or Treaties or multi-lateral pacts.

1. Clause 28, which deals with dispute resolution and includes an arbitration clause, has been set out in the Introduction to these reasons.
2. Mr Vaatstra gives evidence that:
3. in or about September 2015, the Freedom Foods group launched a range of milk and milk-substitute products, including almond milk, under the MILKLAB brand; and
4. FFPL has not manufactured, packaged, sold or distributed the MILKLAB almond milk products, Australia’s Own almond milk products or non-organic private label milk. Rather, those products have been manufactured and packaged by Pactum or, since 2016, FF Ingleburn and sold and distributed to customers by Pactum or, since 2016, FF Trading.
5. Mr Tipple gives evidence that since at least August 2016, all of BDG’s dealings regarding the Almond Breeze products, private label products, MILKLAB products and non-organic Australia’s Own products have been with FFG and its employees, rather than with any person who has identified themselves as an employee or representative of FFPL or of either FF Ingleburn or FF Trading.
6. Mr Tipple gives evidence that, according to the packaging of the Almond Breeze products, FFPL does not now manufacture or distribute any of them. An example of such packaging is depicted in his affidavit, which indicates that the products are manufactured and distributed by FF Trading.
7. Mr Tipple gives evidence that BDG has not at any time consented to the assignment, sub-licensing or delegation of the License Agreement to FF Trading or any other company.
8. On 26 November 2019, BDG commenced an arbitration against FFPL in California. In that arbitration, BDG alleged that it had not been paid some US$7,807,363 for almond base which had been delivered under the License Agreement. FFPL filed an answering statement in that arbitration. In the context of that arbitration, neither FFG nor FFPL alleged or suggested that the arbitration agreement in cl 28(b) of the License Agreement was void by reason of the Franchising Code or otherwise. On 5 January 2020, Freedom Foods Financing Pty Ltd, a subsidiary of FFG, paid BDG the amount of US$7,807,363 claimed in the arbitration.
9. In the period May to October 2020, FFG made certain market announcements, as detailed in paragraphs 35-46 of Mr Vaatstra’s affidavit.
10. On or about 31 July 2020, BDG issued a notice to FFPL stating that:
11. “we appreciate that you have considerable issues facing your organisation”;
12. at a meeting in California on 18 and 19 June 2019, “the parties agreed that Freedom would be permitted to manufacture and sell MilkLab almondmilk in the food service channel and private label products, **but only on the express condition that** Freedom exclusively use Blue Diamond beverage base to manufacture the products” (emphasis in original);
13. “Freedom has been using a locally-sourced beverage base to produce MilkLab and private label products in either pure or blended form. Use of any such third party base is in direct breach of the current License Agreement and contravention of the bargained for compromise reached in Los Angeles”; and
14. “Freedom may cure the current breach and avoid litigation by either removing MilkLab almond milk from the market or by using only Blue Diamond beverage base in its production of MilkLab and private label almond milks” and by paying to BDG the demand amount, being US$16 million. BDG gave FFPL 30 days to cure the breach or by no later than 31 August 2020.

## The Californian Arbitration

1. As noted above, on 25 September 2020, BDG lodged a demand for arbitration with the American Arbitration Association’s International Centre for Dispute Resolution. By its statement of claims, BDG alleges that FFPL breached the License Agreement’s exclusivity provisions by manufacturing, selling and distributing nut-based beverage products other than BDG’s products. The claims made by BDG in the Californian Arbitration are summarised in paragraph 66 of Mr Vaatstra’s affidavit. FFPL’s preliminary answer statement is summarised in paragraph 68 of Mr Vaatstra’s affidavit. I note that the arbitration has been brought against FFPL alone. FF Ingleburn, FF Trading and Pactum are not parties to the Californian Arbitration.
2. The status of the Californian Arbitration is outlined in paragraphs 69-79 of Mr Vaatstra’s affidavit and in paragraph 42 of Mr Tipple’s affidavit.

## The US District Court Proceeding

1. As noted above, on 25 September 2020, BDG commenced the US District Court Proceeding against FFPL. By its complaint, BDG alleges that at a meeting in June 2019, BDG and FFPL attempted to resolve their disputes by entering into an oral forbearance agreement. BDG’s claims in the US District Court Proceeding are summarised in paragraphs 82 and 83 of Mr Vaatstra’s affidavit. The US District Court Proceeding has been brought against FFPL alone.
2. The status of the US District Court Proceeding is outlined in paragraphs 86-91 of Mr Vaatstra’s affidavit and in paragraph 43 of Mr Tipple’s affidavit.

## The present proceeding

1. As noted above, on 29 September 2020, the applicants commenced the present proceeding. The relief sought by the applicants in their originating application has been set out in the Introduction to these reasons. The claims made by the applicants in support of that relief are outlined in their concise statement. Although this is not a formal pleading (such as a statement of claim) it nevertheless provides a useful outline for present purposes of the applicants’ claims and contentions. The applicants set out certain express terms of the License Agreement in paragraph 6 of the concise statement. In paragraph 7, the applicants state that the sale of the Products under the License Agreement has increased substantially, from about 7.1 million litres in the 2016 financial year (i.e. the year ended 30 June 2016) to about 18.1 million litres in the 2019 financial year. It is stated that, since April 2017, BDG has received payments totalling approximately $73.5 million for almond base supplied under the License Agreement. It is contended in paragraph 8 of the concise statement that, during the term of the License Agreement, the price of the almond base under the pricing clause has been unreasonably high having regard to the market price of almonds.
2. The concise statement, at paragraph 9 to 12, outlines contentions relating to MILKLAB almond milk. It is stated that, in or about September 2015, the Freedom Foods group (referred to as “Freedom Foods” in the concise statement) launched a range of milk and milk-substitute products, including almond milk, under the MILKLAB brand. It is alleged that, in or about June 2015, prior to that launch, the Freedom Foods group notified BDG of its intention to launch the MILKLAB products, including almond milk, and that BDG did not oppose the launch and ultimately supplied almond base for the manufacture of MILKLAB almond milk. It is alleged that, in doing so, BDG represented, in trade or commerce, that it did not oppose the sale of MILKLAB almond milk (referred to as the “MILKLAB Representation”).
3. At paragraphs 13 to 15 of the concise statement, the applicants outline contentions relating to private label almond milk. It is stated that, under the Country of Origin Food Labelling Information Standard 2016 (Cth) (made pursuant to s 134 of the Australian Consumer Law), food and beverage products sold at a retail level in Australia have, since 1 July 2018, been required to be labelled with additional information regarding the country of origin of their ingredients. It is stated that chains of retail grocery stores in Australia have required of the Freedom Foods group that private label almond milk be manufactured from almond base ingredients sourced from Australia. It is stated that BDG is unable to supply Australian-sourced almond base ingredients. It is alleged that, in 2018, BDG represented to the Freedom Foods group that that was so and that the Freedom Foods group was free to source such ingredients from other suppliers (referred to as the “Private Label Representation”).
4. At paragraph 18, the concise statement refers to a meeting between representatives of the Freedom Foods group and BDG on 18 and 19 June 2019 in California. It is stated that, at and subsequent to the June 2019 meeting, the representatives discussed potential amendments to the License Agreement. It is stated that, however, “the parties did not make the Alleged June 2019 Agreement (as alleged by BDG in the 31.07.20 Notice …), nor any other agreement to amend the License Agreement”.
5. The concise statement, at paragraphs 21 and 22, deals with the Franchising Code. It is alleged that the License Agreement is a “franchise agreement” for the purposes of the Franchising Code. It is alleged that, by reason of cl 21(2)(a)(ii) and (3) of the Franchising Code (set out later in these reasons), the arbitration clause in the License Agreement (cl 28(b)) is of no effect.
6. At paragraph 23 of the concise statement it is alleged that the MILKLAB almond milk products and the private label almond milk products have been manufactured and packaged by Pactum or, since 2016, FF Ingleburn, and sold and distributed to customers by Pactum or, since 2016, FF Trading.
7. At paragraph 24 it is alleged that, in manufacturing and supplying MILKLAB almond milk products and private label almond milk products made from Australian-sourced almond base, FF Ingleburn, FF Trading and Pactum relied on each of the MILKLAB Representation and the Private Label Representation.
8. It is alleged at paragraph 25 of the concise statement that at all relevant times each of FF Ingleburn, FF Trading and Pactum was not party to the License Agreement or bound by the restraint clause or the purported arbitration clause.
9. The concise statement, at paragraphs 26 to 29, outlines the breaches alleged to have been committed by BDG:

**BDG’s breaches**

26. In the premises, BDG’s conduct in making the MILKLAB Representation and the Private Label Representation and in issuing the Earlier Notices and the 31.07.20 Notice was:

(a) misleading or deceptive conduct contrary to s 18 of the [Australian Consumer Law];

(b) in breach of BDG’s obligation to act in good faith under cl 6(1) of the [Franchising] Code and s 51ACB of the [*Competition and Consumer Act*];

(c) further or alternatively, unconscionable conduct contrary to s 21 of the [Australian Consumer Law].

27. Further or alternatively, in the premises:

(a) if BDG is permitted to resile from the MILKLAB Representation and the Private Label Representation, FF lngleburn, FF Trading, FF Financing and Pactum would suffer detriment as a result of having acted in reliance on those representations; and

(b) therefore, BDG ought be estopped from resiling from those representations.

28. Alternatively, if the sale and manufacture of either MILKLAB almond milk, Australia’s Own almond milk and/or Private Label Almond Milk is in breach of the Restraint Clause (which is denied), then, in all the circumstances (including the Pricing Clause), the Restraint Clause is invalid as an unreasonable restraint of trade.

29. The Applicants (other than FFPL) will suffer loss and damage if they are:

(a) prevented from manufacturing or supplying MILKLAB almond milk products or Private Label Almond Milk products; or

(b) required to obtain all almond base ingredients for MILKLAB almond milk products or Private Label Almond Milk products from BDG.

**Particulars**

Loss of profits from the manufacture and the sale of MILKLAB almond milk products and Private Label Almond Milk products; loss of the investment made in developing and continuing the production and sale of those products; alternatively, the increased cost in almond base ingredients for the manufacture of those products.

1. It is alleged in paragraph 30 of the concise statement that any attempt by BDG to invoke the jurisdiction of an arbitral tribunal in California would be unlawful (on the basis of the Franchising Code). It is also contended, in paragraph 31, that an arbitral tribunal in California would have no jurisdiction to determine any disputes concerning the manufacture and sale of MILKLAB almond milk and private label almond milk, in circumstances where the manufacture and sale of those products has been undertaken by entities other than FFPL.
2. As noted above, on 15 October 2020, a Judge of this Court made an order granting the applicants leave to serve the originating application, the concise statement and certain other documents on BDG in the USA by sending the documents by post. The documents were subsequently delivered to BDG.

## BDG’s interlocutory application

1. Consistently with the way the hearing was conducted by the parties, I will deal first with BDG’s interlocutory application. I will then deal with the applicants’ interlocutory application.

### The parties’ contentions

1. BDG seeks a stay of the proceeding pursuant to s 7(2) of the *International Arbitration Act*. Alternatively, BDG seeks a stay on the basis that Australia is a clearly inappropriate forum.
2. Section 7 of the *International Arbitration Act* is in the following terms:

**7 Enforcement of foreign arbitration agreements**

(1) Where:

(a) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a Convention country;

(b) the procedure in relation to arbitration under an arbitration agreement is governed, whether by virtue of the express terms of the agreement or otherwise, by the law of a country not being Australia or a Convention country, and a party to the agreement is Australia or a State or a person who was, at the time when the agreement was made, domiciled or ordinarily resident in Australia;

(c) a party to an arbitration agreement is the Government of a Convention country or of part of a Convention country or the Government of a territory of a Convention country, being a territory to which the Convention extends; or

(d) a party to an arbitration agreement is a person who was, at the time when the agreement was made, domiciled or ordinarily resident in a country that is a Convention country;

this section applies to the agreement.

(2) 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.

(3) Where a court makes an order under subsection (2), it may, for the purpose of preserving the rights of the parties, make such interim or supplementary orders as it thinks fit in relation to any property that is the subject of the matter to which the first-mentioned order relates.

(4) For the purposes of subsections (2) and (3), a reference to a party includes a reference to a person claiming through or under a party.

(5) A court shall not make an order under subsection (2) if the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed.

1. The expression “arbitration agreement” is defined in s 3(1) of the *International Arbitration Act* as meaning an agreement in writing of the kind referred to in sub-article 1 of Article II of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted in 1958 by the United Nations Conference on International Commercial Arbitration (the **New York Convention**), a copy of which is set out in Sch 1 to the Act.
2. For s 7 to apply to an arbitration agreement, it is necessary for there to be an arbitration agreement (as defined) and for it to satisfy one of the paragraphs in s 7(1). BDG submits that cl 28(b) of the License Agreement is an “arbitration agreement” for the purposes of the *International Arbitration Act*; it constitutes an agreement in writing under which the parties have undertaken to submit to arbitration any or all of their differences which may arise between them in respect of their contractual relationship, concerning a subject-matter capable of settlement by arbitration. BDG submits that, at least, paragraph (a) of s 7(1) is satisfied here. Under that provision, s 7 will apply to an arbitration agreement where “the procedure in relation to arbitration under an arbitration agreement is governed … by the law of a Convention country”. BDG submits that: in the absence of any contractual provision to the contrary, the procedural law governing an arbitration is the law of the forum of the arbitration: *Bank Mellat v Helliniki Techniki SA* [1984] QB 291. Here, BDG submits, the forum of the arbitration is California in the USA, and the USA is a Convention country, being a Contracting State within the meaning of the New York Convention. It follows, BDG submits, that s 7 applies to the arbitration agreement constituted by cl 28(b) of the License Agreement.
3. BDG submits that s 7(2) mandates a stay of the present proceeding. In particular, BDG submits that the proceeding “involve[s] the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration”: s 7(2)(b). BDG submits that the first step is to identify the relevant “matter” or “matters”, that is, the subject-matter of controversy that falls for determination in the proceeding: *Tanning Research Laboratories Inc v O’Brien* (1990) 169 CLR 332 (***Tanning Research***) at 350; *Rinehart v Hancock Prospecting Pty Ltd* (2019) 366 ALR 635 (***Rinehart HC***) at [67]. In its outline of submissions, BDG identifies the claims made by the applicants in this proceeding. BDG submits that these matters are capable of settlement by arbitration pursuant to the arbitration agreement. Clause 28 of the License Agreement provides that any controversy “as to the meaning or operation” of the agreement is to be referred to arbitration. BDG submits that the question whether the parties’ dispute falls within the scope of the arbitration agreement is to be answered by reference to the proper law of the contract: *Casaceli v Natuzzi SPA* (2012) 92 ALR 143 (***Casaceli***) at [38]. Here, BDG submits, that is Californian law. BDG relies on Mr Celniker’s reports for the following propositions: the claims made by FFPL fall within the arbitration agreement, except perhaps any claims arising from the forbearance agreement alleged by BDG; the claims of the applicants would also be arbitrable and FF Ingleburn, FF Trading and Pactum could be joined to the Californian Arbitration; and cl 27 of the License Agreement (the choice-of-law clause) would not limit the ability of the applicants to assert claims or defences under Australian law in the Californian Arbitration. To the extent that Ms Leader expresses different views, BDG submits that the opinions of Mr Celniker are to be preferred.
4. BDG submits that: even if the question were determined by reference to Australian law, all of the applicants’ claims would still be within the scope of the arbitration agreement; and Australian courts have emphasised the need to construe arbitration agreements liberally and flexibly: see, eg, *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 (***Hancock FFC***) at [167]; *Francis Travel Marketing Pty Ltd v Virgin Atlantic Airways Ltd* (1996) 39 NSWLR 160 at 165; see also *Lipman Pty Ltd v Emergency Services Superannuation Board* [2011] NSWCA 163 at [6]-[8].
5. There is a dispute between the experts as to whether the applicants’ claims under Australian statutes could be brought in the Californian Arbitration. BDG concedes that, insofar as the *Competition and Consumer Act* prohibits certain conduct, that Act is a mandatory law that the arbitrator must apply (paragraph 58 of BDG’s outline of submissions). BDG submits that there is therefore no doubt that the arbitrator will apply Australian law in determining those claims. As clarified during oral submissions, I understand this concession to relate only to the applicants’ claims under the Australian Consumer Law, and not to the applicants’ claims based on the Franchising Code (were this Court to determine that the Franchising Code does not apply).
6. BDG submits that FF Ingleburn, FF Trading and Pactum, while not signatories to the License Agreement, are parties to that agreement. BDG submits that either: (a) they have become parties to the License Agreement; or (b) they are claiming “through or under” FFPL, with the consequence that they are to be treated as parties to the arbitration agreement: see s 7(4) of the *International Arbitration Act*; *Rinehart HC* at [67]-[69], [73]. Accordingly, BDG submits, s 7(2) requires that the proceeding in respect of *all* the applicants be stayed and the parties referred to arbitration. BDG states that, if it were necessary, BDG would consent to FF Ingleburn, FF Trading and Pactum joining the arbitration, and offers to give an undertaking to consent to this occurring (BDG’s outline of submissions, paragraph 70).
7. In the course of oral submissions, in the context of a suggestion by the applicants that BDG was adopting inconsistent positions, senior counsel for BDG said that, if the present proceeding were stayed, BDG intended to discontinue the US District Court Proceeding and to bring those claims in the Californian Arbitration (T28). An undertaking to this effect was offered.
8. In response, the applicants contend that the arbitration agreement in cl 28(b) of the License Agreement is invalid or of no effect. The applicants contend that there is a ‘mandatory law of the forum’, namely cl 21 of the Franchising Code, that renders the arbitration agreement invalid or of no effect. In oral submissions, senior counsel for the applicants submitted that, if this proposition is correct, “you don’t need to get to section 7(5), because the mandatory rule of the forum stops … there being an arbitration agreement”. Alternatively, the applicants submit that the arbitration agreement is “null and void” or “inoperative” within the meaning of s 7(5) of the *International Arbitration Act* and, accordingly, the proceeding should not be stayed.
9. It is convenient, at this point, to set out cl 21 of the Franchising Code. This provides:

**21 Jurisdiction for settling disputes**

(1) A franchise agreement may contain a clause that:

(a) if a party to the agreement wishes to bring an action or proceedings in relation to a dispute under the agreement, requires the party to bring the action or proceedings in a State or Territory in which the franchised business is based; or

(b) if a party to the agreement wishes to refer a dispute under the agreement to mediation, requires the mediation to be conducted in a State or Territory in which the franchised business is based.

(2) A franchise agreement must not contain a clause that:

(a) requires a party to the agreement to bring an action or proceedings in relation to a dispute under the agreement:

(i) in any State or Territory outside that in which the franchised business is based; or

(ii) in any jurisdiction outside Australia; or

(b) requires the mediation of a dispute under the agreement to be conducted:

(i) in any other State or Territory outside that in which the franchised business is based; or

(ii) in any jurisdiction outside Australia.

Note: See subclauses 3(4) and (5).

(3) If a franchise agreement contains a clause in contravention of subclause (2), the clause is of no effect.

1. The applicants contend that the License Agreement is a “franchise agreement” within the meaning of the Franchising Code and that cl 21(2)(a)(ii) and (3) render the arbitration agreement in cl 28(b) of the License Agreement of no effect.
2. The Franchising Code contains transitional provisions that affect cl 21. These are set out in cl 3(4) and (5) of the Franchising Code. The effect of the transitional provisions is (relevantly) that: cl 21(2) does not apply to a franchise agreement entered into on or after 1 March 2008 but before 1 January 2015 (cl 3(4)). However, cl 3(4) ceases to apply in relation to a franchise agreement entered into in that period if the agreement is varied or transferred on or after 1 January 2015 (cl 3(5)). In light of the transitional provisions, the applicants rely, not on the License Agreement as originally entered into in October 2011, but on the License Agreement as automatically renewed in October 2016. There is no real issue that, for the purposes of this argument, it is open to the applicants to rely on the License Agreement as renewed in October 2016.
3. It is convenient, next, to set out the definition of “franchise agreement” in the Franchising Code. Clause 5 of the Franchising Code provides as follows:

**5 Meaning of *franchise agreement***

(1) A ***franchise agreement*** is an agreement:

(a) that takes the form, in whole or part, of any of the following:

(i) a written agreement;

(ii) an oral agreement;

(iii) an implied agreement; and

(b) in which a person (the ***franchisor***) grants to another person (the ***franchisee***) the right to carry on the business of offering, supplying or distributing goods or services in Australia under a system or marketing plan substantially determined, controlled or suggested by the franchisor or an associate of the franchisor; and

(c) under which the operation of the business will be substantially or materially associated with a trade mark, advertising or a commercial symbol:

(i) owned, used or licensed by the franchisor or an associate of the franchisor; or

(ii) specified by the franchisor or an associate of the franchisor; and

(d) under which, before starting or continuing the business, the franchisee must pay or agree to pay to the franchisor or an associate of the franchisor an amount including, for example:

(i) an initial capital investment fee; or

(ii) a payment for goods or services; or

(iii) a fee based on a percentage of gross or net income whether or not called a royalty or franchise service fee; or

(iv) a training fee or training school fee;

but excluding:

(v) payment for goods and services supplied on a genuine wholesale basis; or

(vi) repayment by the franchisee of a loan from the franchisor or an associate of the franchisor; or

(vii) payment for goods taken on consignment and supplied on a genuine wholesale basis; or

(viii) payment of market value for purchase or lease of real property, fixtures, equipment or supplies needed to start business or to continue business under the franchise agreement.

(2) For subclause (1), each of the following is taken to be a franchise agreement:

(a) the transfer or renewal of a franchise agreement;

(b) the extension of the term or the scope of a franchise agreement;

(c) a motor vehicle dealership agreement.

(3) However, any of the following does not in itself constitute a franchise agreement:

(a) an employer and employee relationship;

(b) a partnership relationship;

(c) a landlord and tenant relationship;

(d) a mortgagor and mortgagee relationship;

(e) a lender and borrower relationship;

(f) the relationship between the members of a cooperative that is registered, incorporated or formed under any of the following laws:

(i) the *Corporations Act 2001*;

(ii) the *Co-operatives Act 1992* (NSW);

(iii) the *Co-operatives Act 1996* (Vic.);

(iv) the *Cooperatives Act 1997* (Qld);

(v) the *Co-operatives Act 2009* (WA);

(vi) the *Co-operatives Act 1997* (SA);

(vii) the *Cooperatives Act 1999* (Tas.);

(viii) the *Cooperatives Act 2002* (ACT);

(ix) the *Co-operatives Act 1997* (NT).

(Underlining added.)

As discussed below, there are issues between the parties as to whether the License Agreement satisfies paragraphs (b) and (d) of cl 5(1).

1. It is also relevant to set out cl 3 of the Franchising Code, which is an application provision. Clause 3 provides in part:

**3 Application**

(1) Subject to subclause (4), this code applies to conduct occurring on or after 1 January 2015 (other than to discharge an outstanding obligation that arose under the old code) in relation to a franchise agreement entered into on or after 1 October 1998.

(2) However, this code does not apply to a franchise agreement:

(a) to which another mandatory industry code, prescribed under section 51AE of the *Competition and Consumer Act 2010*, applies; or

(b) if:

(i) the franchise agreement is for goods or services that are substantially the same as those supplied by the franchisee before entering into the franchise agreement; and

(ii) the franchisee has supplied those goods or services for at least 2 years immediately before entering into the franchise agreement; and

(iii) sales under the franchise are likely to provide no more than 20% of the franchisee’s gross turnover for goods or services of that kind for the first year of the franchise.

(3) Paragraph (2)(b) ceases to apply to a franchise agreement if:

(a) sales under the franchise provide more than 20% of the franchisee’s gross turnover for the goods or services for 3 consecutive years; and

(b) the franchisee tells the franchisor that paragraph (a) of this subclause applies.

…

(Underlining added.)

As discussed below, there is an issue between the parties as to whether, if the License Agreement is a franchise agreement, the Franchising Code is inapplicable by virtue of cl 3(2)(b). This is referred to in these reasons as the “20% Issue”.

1. Having set out the key relevant provisions, it may be useful to repeat the applicants’ position. The applicants contend that the License Agreement constitutes a “franchise agreement” as defined in cl 5 of the Franchising Code and that the Franchising Code applies to the License Agreement. Accordingly, they contend, the arbitration agreement (in cl 28(b) of the License Agreement) is of no effect by virtue of cl 21 of the Franchising Code.
2. In response, BDG makes a series of submissions. BDG’s primary submission is that the Court should not decide the issue of whether the arbitration agreement is invalid or of no effect, but leave this to be determined by the arbitrator in accordance with the *kompetenz-kompetenz* principle: see *Hancock FFC* at [372]-[379], [390], [394]; *Transurban WGT Co Pty Ltd v CPB Contractors Pty Ltd* [2020] VSC 476 at [157]-[160].
3. In the alternative, BDG submits that, if the Court decides to determine the issue of the validity of the arbitration agreement, it should reject the applicants’ contention that the arbitration agreement is invalid for the following reasons:
4. BDG submits that the License Agreement is not a “franchise agreement” within the meaning of cl 5 of the Franchising Code. BDG submits that the License Agreement does not satisfy paragraphs (b) and (d) of cl 5(1). Further or alternatively, BDG submits that the Franchising Code has no application to the License Agreement, relying on cl 3(2)(b).
5. Alternatively, BDG submits that the issue of validity of the arbitration agreement is governed by Californian law (as the proper law of the arbitration agreement), or potentially another system of law that validates the referral to arbitration.
6. Alternatively, BDG submits that the Franchising Code does not apply to an agreement that is made outside of Australia and has a proper law other than Australian law.
7. Alternatively, BDG submits that the Franchising Code is invalid on the basis that it is inconsistent with s 7 of the *International Arbitration Act*.
8. BDG disputes the applicants’ contention that the Franchising Code is to be given overriding effect as a mandatory law of the forum. BDG submits that: the correct approach is to view the issue through s 7 of the *International Arbitration Act*; and the words “null and void” and “inoperative” in s 7(5) are limited to internationally-recognised vitiating factors such as duress, mistake, fraud or fundamental policies (see *Hancock FFC* at [381]).
9. In oral submissions, senior counsel for the applicants submitted that the Court *should* decide the issue of the validity of the arbitration agreement rather than referring the issue to the arbitrator. He submitted that the Franchising Code issue was a “crisp, short point” amenable to be determined now by the Court.
10. The alternative basis upon which BDG seeks a stay of the proceeding is the contention that Australia is a clearly inappropriate forum. It is not necessary to set out the parties’ submissions on this aspect of the application.

### Consideration

#### Sections 7(1) and 7(2) of the International Arbitration Act

1. There is no real issue between the parties that, putting to one side the applicants’ contentions relating to cl 21 of the Franchising Code, there is an arbitration agreement (namely, cl 28(b) of the License Agreement) and that paragraph (a) of s 7(1) of the *International Arbitration Act* (set out in [61] above) is satisfied on the basis outlined by BDG. Accordingly, subject to the applicants’ contention relating to cl 21 of the Franchising Code, s 7 of the *International Arbitration Act* applies to the arbitration agreement.
2. There is no issue that the requirement in s 7(2)(a) is satisfied. It is convenient to deal next with the question whether the requirement in s 7(2)(b) – namely, that the proceeding “involve[s] the determination of a matter that, in pursuance of the agreement, is capable of settlement by arbitration” – is satisfied. As BDG submits, with reference to *Tanning Research* at 350 and *Rinehart HC* at [67], the first step is to identify the relevant “matter” or “matters”, that is, the subject-matter of controversy that falls for determination in the proceeding. The relief sought by the applicants in the originating application is set out at [8] above. The applicants’ claims and contentions, as outlined in their concise statement, are summarised at [48]-[57] above. Those paragraphs of these reasons identify the subject-matters of controversy that fall for determination in the proceeding.
3. The next question is whether these matters are, pursuant to the arbitration agreement, capable of settlement by arbitration. Clause 28(b) of the License Agreement (set out at [5] above) refers to the controversies referenced in cl 28(a). Clause 28(a) refers to any controversy between the parties “as to the meaning or operation of this Agreement (except one involving a claim for equitable relief, including but not limited to claims for restraining orders, injunction, or specific performance)”. In my view, the applicants’ claims in this proceeding reflect or give rise to controversies “as to the meaning or operation” of the License Agreement, whether this is considered by reference to Californian law or Australian law. This is straightforward with many of the applicants’ claims, in particular: the claim that none of the applicants has breached the License Agreement by manufacturing and selling MILKLAB almond milk and private label almond milk; the claim that none of the applicants is required, under the License Agreement, to obtain almond base exclusively from BDG for the manufacture of MILKLAB almond milk or private label almond milk; the claim that the breach notice served by BDG was not a valid breach notice under the License Agreement; and the claim that cl 10(b) of the License Agreement is invalid as an unreasonable restraint of trade.
4. Insofar as the applicants claim that BDG engaged in misleading or deceptive conduct by making the MILKLAB Representation and the Private Label Representation, putting to one side whether the arbitrator can hear Australian statutory claims (considered below), this too reflects or gives rise to a controversy “as to the meaning or operation” of the License Agreement. The alleged representations were made in the context of the License Agreement. The alleged representation that BDG did not oppose the sale of MILKLAB almond milk by the Freedom Foods group, and the alleged representation that the Freedom Foods group was free to source Australian almond base ingredients from suppliers other than BDG, can only be understood as representations about how the License Agreement would operate. This is because, absent the License Agreement, there would seem to be no reason why this conduct would not be permissible. The same analysis applies to the claims relating to s 21 of the Australian Consumer Law and the Franchising Code.
5. Insofar as the applicants claim that no agreement was entered into at a meeting in June 2019 as alleged by BDG, while this aspect is not free from doubt, I also consider this to be a dispute “as to the … operation” of the License Agreement. The alleged agreement was a forbearance agreement in relation to alleged breaches of the License Agreement. The alleged forbearance agreement concerned the way in which the License Agreement would operate going forward.
6. For completeness, I note that the description of relevant controversies in cl 28(a) excludes a controversy “involving a claim for equitable relief, including but not limited to claims for restraining orders, injunction, or specific performance”. While the applicants do seek an injunction restraining BDG from prosecuting or taking any step in any arbitration pursuant to cl 28(b), this relief concerns the jurisdictional issue itself rather than the substantive disputes in the proceeding.
7. As noted above, there is a contest between the experts as to whether the applicants’ Australian statutory claims can be heard and determined by the arbitrator in the Californian Arbitration. Mr Celniker expresses the opinion that claims such as those under the *Competition and Consumer Act* can be heard and determined in a Californian arbitration and that Australian law would be applied in determining such claims: see Mr Celniker’s first report at paragraphs 5, 14 to 24; Mr Celniker’s second report at paragraphs 6, 12 to 40; Mr Celniker’s third report at paragraphs 10, 12, 37 to 48. In contrast, Ms Leader expresses the opinion that Australian statutory claims could not be pursued in a Californian arbitration, where the proper law of the contract is Californian law: see Ms Leader’s second report at page 2; Ms Leader’s third report at pages 1 to 3. On balance, I prefer the analysis of Mr Celniker on this issue. I consider his reasoning to be more persuasive and to be supported by the cases and other sources that he cites, in particular *Mitsubishi Motors Corp v Soler Chrysler-Plymouth Inc* 473 US 614 (1985) (***Mitsubishi***) and the *Restatement (Second) Conflict of Laws*. As noted in Mr Celniker’s second report in paragraph 13, in *Mitsubishi* the US Supreme Court held that competition claims under a US statute were capable of being settled by arbitration under an agreement providing for arbitration by the Japanese Commercial Arbitration Association seated in Japan where the choice of law of the contract was Swiss law. The Supreme Court held that the competition claims were arbitrable, and within the scope of the arbitration clause, and ordered them arbitrated: see Mr Celniker’s second report at paragraph 14. Accordingly, I find that the applicants’ claims under the Australian Consumer Law can be heard and determined in the Californian Arbitration and that Australian law would be applied in determining such claims. In any event, as noted at [66] above, BDG concedes that, insofar as the *Competition and Consumer Act* prohibits certain conduct, that Act is a mandatory law that the arbitrator must apply; BDG submits that there is therefore no doubt that the arbitrator will apply Australian law in determining those claims.
8. Insofar as claims are brought in this proceeding by FF Ingleburn, FF Trading and Pactum, I am satisfied that these companies are claiming “through or under” FFPL and thus are to be treated as parties to the arbitration agreement for the purposes of s 7(2) by virtue of s 7(4). The High Court in *Rinehart HC* considered the meaning of the expression “through or under” in comparable State legislation: see *Rinehart HC* at [66]-[68], [72]-[73] per Kiefel CJ, Gageler, Nettle and Gordon JJ; cf [88] per Edelman J. In the present case, the claims made by the applicants in the concise statement are expressed in substantially the same terms for all four applicants. Similarly, in the originating application, the same relief is sought by all four applicants. For example, all four applicants seek a declaration that “none of the Applicants has breached the License Agreement by manufacturing, packaging, selling and distributing MILKLAB almond milk products or Private Label Almond Milk products”. Further, all four applicants contend that BDG has engaged in misleading or deceptive conduct contrary to s 18 of the Australian Consumer Law by making the MILKLAB Representation and the Private Label Representation. The premise of those allegations is that FF Ingleburn, FF Trading and Pactum may otherwise be constrained by the License Agreement. Thus, FF Ingleburn, FF Trading and Pactum invoke, as an essential element of their claims, rights vested in or exercisable by the party to the arbitration agreement (see *Rinehart HC* at [66]). Further, the claims made by FF Ingleburn, FF Trading and Pactum put in issue rights or liabilities that are susceptible of settlement under the arbitration agreement (see *Rinehart HC* at [68]).
9. Further, I find that, as a matter of Californian law, FF Ingleburn, FF Trading and Pactum could bring their claims in the Californian Arbitration. I accept Mr Celniker’s evidence regarding the relevant principles of Californian law: see Mr Celniker’s first report at paragraphs 7, 38, 40, 41 (to the extent admitted into evidence) and 45; Mr Celniker’s third report at paragraphs 15 and 24. (Ms Leader’s evidence focuses on whether non-signatories can be *compelled* to arbitrate, rather than whether they are *able* to arbitrate claims: see, eg, Ms Leader’s second report at pp 1 and 2.) In any event, as noted at [67] above, BDG states that, if it were necessary, BDG would consent to FF Ingleburn, FF Trading and Pactum joining the arbitration, and offers to give an undertaking to consent to this occurring.
10. Accordingly, in my view, subject to the applicants’ contentions regarding cl 21 of the Franchising Code, the present proceeding “involve[s] the determination of a matter that, in pursuance of the [arbitration] agreement, is capable of settlement by arbitration”.
11. I note for completeness a submission by the applicants that, on BDG’s own case (as presented in the US District Court Proceeding), the arbitration agreement is spent. I do not accept that submission. Even if the alleged forbearance agreement was made, it does not necessarily follow that the whole License Agreement (including the arbitration agreement) is no longer on foot. Further and in any event, the forbearance agreement allegations may be seen as being in the alternative.

#### The validity issue

1. I turn now to consider the applicants’ contention that the arbitration agreement is invalid or of no effect by virtue of cl 21 of the Franchising Code (the **validity issue**). The first question that arises is whether the Court should determine the validity issue itself or refer this issue to the arbitrator for determination in accordance with the *kompetenz-kompetenz* principle (also referred to as the competence principle).
2. In *Hancock FFC*, the Full Court (Allsop CJ, Besanko and O’Callaghan JJ) discussed two important principles that are also relevant to the present case. The first was the separability principle (discussed by the Full Court at [341]-[360]). The second was the competence principle (discussed by the Full Court at [348] and [368]-[377]). I refer to and rely on the Full Court’s discussion of those principles. These aspects of the Full Court’s reasons are unaffected by the appeal to the High Court in *Rinehart HC*.
3. In the circumstances of the present case, I consider the more practical, efficient and just approach to be for this Court to itself determine the validity issue. The issue whether the License Agreement is a “franchise agreement” for the purposes of the Franchising Code, and the issue whether the Franchising Code does not apply to the License Agreement by reason of cl 3(2)(b), are relatively confined, both legally and factually. I consider that the Court is well placed to determine these issues now.
4. Having decided that the Court will itself determine the validity issue, I start with the issues relating to the Franchising Code. The first issue is whether the License Agreement constitutes a “franchise agreement” for the purposes of the Franchising Code. The definition of “franchise agreement” is set out in [73] above. The particular issues are whether the License Agreement satisfies paragraphs (b) and (d) of cl 5(1). Of these, the main focus of the argument was on paragraph (b), with relatively little time spent on paragraph (d).
5. The question raised by paragraph (b) is whether the License Agreement is an agreement “in which a person (the ***franchisor***) grants to another person (the ***franchisee***) the right to carry on the business of offering, supplying or distributing goods or services in Australia under a system or marketing plan substantially determined, controlled or suggested by the franchisor …”. The leading authority in this Court on the definition of “franchise agreement” is the judgment of the Full Court (Kenny, Stone and Logan JJ) in *Rafferty v Madgwicks* (2012) 203 FCR 1 (***Rafferty***). This judgment was largely followed by the NSW Court of Appeal in *Workplace Safety Australia Pty Ltd v Simple OHS Solutions Pty Ltd* (2015) 89 NSWLR 594 (***Workplace Safety***), in which the leading judgment was given by Bathurst CJ, with whom Basten JA agreed and Emmett JA relevantly agreed (at [183]).
6. In *Rafferty*, the Full Court was dealing with an earlier version of the Franchising Code. The definition of “franchise agreement” was set out in cl 4 of that version of the Code: see the Full Court’s judgment at [159]. Paragraph (b) of that definition was in the same terms as paragraph (b) of the current definition.
7. At [160] of *Rafferty*, the Full Court set out the gravamen of the contentions that the agreement in issue did not meet the criteria for a franchise agreement. The contentions focussed on the criterion in paragraph (b). The Full Court then stated at [161]:

… There are three distinct elements of cl 4(1)(b). That is, to satisfy cl 4(1)(b), there must be: (1) a person (the franchisor) who grants to another person (the franchisee) the right to carry on the business of offering, supplying or distributing goods or services in Australia; (2) under a system or marketing plan; (3) substantially determined, controlled or suggested by the franchisor (or an associate).

1. The Full Court considered the meaning of the expression “system or marketing plan” and identified several factors that may be indicative of a system or marketing plan:

171 We turn to the second and third elements of cl 4(1)(b) of the Code. The Code does not define the expression “system or marketing plan”. In ordinary English usage, the expression would signify a co-ordinated method or procedure, or scheme whereby goods or services are sold. This is apparently the sense in which the expression is used in the Code. Further guidance can be obtained from cases in the United States of America, where there is similar, although not identical, legislation: see *Capital Networks Pty Ltd v .au Domain Administration Ltd* [2004] ATPR (Digest) 46-254 (*Capital Networks*) at [101]-[119], where Bennett J set out the results of her research. See also *Kyloe* at [40] where Tracey J sets out a list of factors derived in part from *Capital Networks*. We are indebted to their Honours for their research and analysis, which forms the basis of the following discussion.

172 Broadly speaking, although much depends on the circumstances of the case, these cases indicate that the following factors may be indicative of a system or marketing plan: specific requirements for accounting and record keeping; reservation by the franchisor of a right to audit the books of account and other records; inability of the franchisee to supply goods or services to customers without the franchisor’s approval; reservation by the franchisor of the right to approve promotional and advertising material; provision by the franchisor of bonus structures or equivalent for those selling its goods or services; provision by the franchisor of training for staff selling its goods or services; stipulation of retail pricing structures, sales structures, sales quotas and the like; creation of marketing and sales territories; reservation by the franchisor of the right to approve sales staff; reporting systems in relation to profit or turnover; restriction on the franchisee selling competing products; controls on the use of brand and trading names; requirements for signage and merchandising; management structure; and badging requirements (mandatory use of trading name, uniforms, stationery, etcetera).

173 In the ordinary course, whether a system or marketing plan is “substantially determined, controlled or suggested by the franchisor” is closely related to whether there is a scheme or marketing plan at all. Matters relevant to determination, control or suggestion may include: the extent to which the franchisee’s business involves the sale of the franchisor’s goods and services; the degree to which the franchisor assumes responsibility for some centralised management and for uniform standards regarding quality; whether or not the franchisor places the franchisee under an obligation with respect to advertising and promotional campaigns; and the extent to which the franchisor controls the franchisee’s business, having regard to advertising and financial support, auditing of books, inspection of premises, hiring of staff, sales quotas, management training and the like.

1. The Full Court also stated, in [185], that it agreed with the trial judge that, in order to meet the requirement relating to system or marketing plan in cl 4(1)(b) of the Code, it is not necessary for the details of a system or marketing plan to be set out in the franchise agreement; it is enough that the agreement creates rights and obligations that would enable the franchisor substantially to determine, control or suggest that the business be conducted under a system or marketing plan.
2. *Workplace Safety* concerned the same version of the Franchising Code as in issue in *Rafferty*. At [80]-[83], Bathurst CJ described the three elements of cl 4(1)(b) in similar terms to the Full Court in *Rafferty*. Chief Justice Bathurst stated:

80 Clause 4(1)(b) of the definition contains three elements. The first is that it is an agreement containing a grant by the “franchisor” to the “franchisee” of the right to carry on the business of offering, supplying or distributing goods or services in Australia.

81 The second element is that the right to carry on the business must be a right to carry it on under a “system or marketing plan”.

82 The third element is that the system or marketing plan must be substantially determined, controlled or suggested by the franchisor.

83 The matters relevant in considering whether the second and third elements exist will often overlap, but it is important to remember that they are separate requirements. Thus, it would not be sufficient if the alleged franchisor was only able to control certain aspects of the supply or distribution of the goods or services. Rather, it is necessary that the power of the franchisor extends to substantially determining, controlling or suggesting the system or marketing plan under which the business is carried on.

1. In discussing the second element of cl 4(1)(b), Bathurst CJ stated:

90 I have set out above, at [32], the summary by the High Court in *Ketchell* of the legislative purpose of the Code. As one of the principal purposes of the Code is to protect franchisees, the court should reject any interpretation of its provisions which would allow this statutory purpose to be circumvented.

91 Notwithstanding, it remains necessary to determine whether the right granted was the right to carry on a business under a system or marketing plan. In my opinion, the word system, in that context, refers to a method of operation under which a business is to be conducted. In *Rafferty*, the compendious expression “system or marketing plan” was described by the full Federal Court as signifying “a co-ordinated method or procedure, or scheme whereby goods or services are sold.”

92 In *Rafferty*, the full court also stated that “it is not necessary for the details of a system or marketing plan [to] be set out in the franchise agreement. It is enough that the agreement creates rights and obligations that would enable the franchisor substantially to determine, control or suggest that the business be conducted under a system or marketing plan.” I respectfully agree that a system or marketing plan does not have to be spelt out in a franchise agreement. The contrary proposition would allow the statutory purpose of the Code to be readily circumvented.

93 However, it may not be sufficient, in order to satisfy the purpose of the section, that the agreement enables the franchisor to determine, control or suggest whether the business will be conducted under a system or marketing plan. Clause 4(1)(b) of the Code contemplates that the business *will* be carried out under a system or marketing plan. It is at least necessary that the agreement provides for that to occur, even if the terms of the plan are not settled or prescribed in the agreement.

(Footnotes omitted.)

1. In the context of discussing the third element of cl 4(1)(b), Bathurst CJ stated:

105 In determining whether the third element is satisfied, it is convenient to focus on the question of control. In its submissions, WSA emphasised that the obligation to prepare a business plan was imposed on Simple and Simple had the power to determine how to promote and market the business.

106 In the present case, the meaning of the word “control” must be determined by reference to the object and purpose of the legislation. That, as I have explained above, is the protection of a particular class of person: franchisees. To give effect to that purpose, the word “control” should be taken to mean the power to direct or restrain the content of the business plan on any substantial issue. The question is to be determined by practical and commercial considerations.

(Footnotes omitted.)

1. There is perhaps a small difference of opinion between the Full Court in *Rafferty* and the judgment of Bathurst CJ in *Workplace Safety*, insofar as Bathurst CJ stated the following at [110]:

In *Rafferty*, the full court stated that a relevant factor in determining whether a system or marketing plan is substantially determined, controlled or directed by the franchisor may be “the extent to which the franchisee’s business involves the sale of the franchisor’s goods and services”. In my opinion, the relevance of this factor is somewhat limited in circumstances where the Distribution Agreement relates to a discrete business activity to be carried on by the franchisor. The Code is concerned with the business the subject of the franchise agreement. So much is made clear by the definition in cl 4 and the differing disclosure requirements in cl 6 based on the turnover of the franchise business.

(Footnote omitted.)

However, if and to the extent that there is any difference, I do not consider it to affect the resolution of the present case.

1. The word “under” in paragraph (b) signifies that the business is to be carried on under the authority of, in accordance with, or pursuant to the system or marketing plan: cf *Chan v Cresdon Pty Ltd* (1989) 168 CLR 242 at 249; *Queensland Premier Mines Pty Ltd v French* (2007) 235 CLR 81 at [55]; *Inghams Enterprises Pty Ltd v Hannigan* (2020) 379 ALR 196 at [137]-[139].
2. Applying the principles set out above to the present case, it may be accepted that the first element of cl 5(1)(b) is satisfied, in that the License Agreement is an agreement in which a person (BDG) grants to another person (FFPL) the right to carry on the business of offering, supplying or distributing goods or services in Australia (namely the business of offering, supplying and distributing the “Products” as defined in the License Agreement). Although one would not normally describe this as a separate “business” in circumstances where FFPL sold other products, for the purposes of the Franchising Code it is appropriate to treat this as a separate business.
3. The second element of cl 5(1)(b) of the Franchising Code is that the right to carry on the business must be a right to carry it on “under a system or marketing plan”. It is convenient in the circumstances of this case to consider this together with the third element, which is that the system or marketing plan must be substantially determined, controlled or suggested by the putative franchisor. As set out above, in *Rafferty* the Full Court stated (at [171]) that the expression “system or marketing plan” signified “a co-ordinated method or procedure, or scheme whereby goods or services are sold”. In the present case, the parties in their submissions focussed in particular on clauses 3(d) and 3(e) of the License Agreement, although reference was also made to other clauses of the License Agreement.
4. Clause 3(d) of the License Agreement is in the following terms:

Marketing Plan. Blue Diamond shall be responsible for the development and implementation of all annual marketing plans for marketing the Products in the Territory (each a “Marketing Plan”), including the payment of all costs therefore. Each annual Marketing Plan developed shall be designed specifically to promote awareness and trial and usage of the Products in the Territory. All annual Marketing Plans developed by Blue Diamond shall be reviewed by Licensee before they are implemented. Each annual Marketing Plan shall provide, and Blue Diamond shall expend in each Australian Financial Year (1st July to 30th June) covered by the plan, marketing expenditures equal in the aggregate to no less than five percent (5%) of Licensee’s gross sales of the Products in the calendar year covered by the plan with the exception of the first two years of the agreement. The annual Marketing Plan for the first year of the Term will be invested on a specific dollar value based upon targeted sales volumes.

Year 1 minimum volume target will be set at not less than 150,000 cases (12 x 1 litre) based on a marketing investment of not less than US$650,000. In the event that this volume is exceeded in Year 1, Blue Diamond’s marketing investment may be increased at Blue Diamond’s sole discretion.

In the event that the volume target of 150,000 cases is not achieved in Year 1, Blue Diamond will have the right to terminate this Agreement.

In the event that the marketing investment of US$650,000 is not met in Year 1, Licensee will have the right to terminate the Agreement.

The right of termination for either Blue Diamond or Licensee referred to above will only be effective sixty (60) days following completion of Year 1 and in the event that the Parties have not otherwise agreed to continue the License Agreement.

Licensee recognizes the proposed financial year Marketing Plans and spending will be based on key assumptions regarding ranging decisions, timing of major retailers and sales volumes, and will be subject to change as required. In the event that Blue Diamond spends less than five percent (5%) of Licensee’s gross sales of the Products in any Financial year, Licensee shall have the right to terminate this Agreement by the provision of six (6) months advance written notice to Blue Diamond.

Within sixty (60) days of the Effective Date, Blue Diamond will provide Licensee with a proposed Marketing Plan for the first full calendar year of the Term. Licensee shall review the Marketing Plan and promptly provide Blue Diamond with any comments or suggestions on said plan. If necessary, the parties agree to meet to discuss the Marketing Plan and any changes Licensee believes are necessary. Blue Diamond shall consider the input provided by Licensee and, if necessary, develop a revised Marketing Plan for review by Licensee. Once the Marketing Plan has been mutually agreed by the parties, Blue Diamond shall proceed to implement the plan in accordance with a schedule also to be reviewed by the parties.

Each subsequent year of the Term, Blue Diamond shall prepare and deliver to Licensee a proposed annual Marketing Plan for marketing the Products in the Territory for the coming financial year. Blue Diamond shall deliver the annual Marketing Plan to Licensee with sufficient lead time such that the plan can be reviewed by 1st April of the then financial year. Licensee shall review and comment on the annual Marketing Plan, and the parties agree to meet to discuss the annual Marketing Plan should either party deem it necessary to do so. A final annual Marketing Plan shall thereafter be developed by Blue Diamond by the 30th May deadline. Thereafter, Blue Diamond shall implement the annual Marketing Plan.

1. While this clause refers in terms to a “marketing plan”, the difficulty for the applicants’ case is that it does not appear that the relevant business (namely, FFPL’s business of offering, supplying and distributing the Products) is to be carried on “under” the marketing plans contemplated by this clause. The marketing plans are to be implemented by *BDG* rather than FFPL. This is apparent from the first sentence, which states that BDG shall be responsible for the development “and implementation” of the annual marketing plans for marketing the Products in the Territory, including the payment of all costs thereunder. There are further references to BDG implementing the annual marketing plans in the penultimate and last paragraphs of the clause. The clause does not impose any obligations on *FFPL* as to the way in which it is to carry on the business of offering, supplying or distributing the Products. The clause does not, for example, require FFPL to take any particular steps, or to refrain from taking any particular steps, as set out in the marketing plans. Thus, there is no sufficient relationship between the marketing plans and the right to carry on the business.
2. Clause 3(e) of the License Agreement is in the following terms:

Promotional Plan. Licensee shall be responsible for the development and implementation of all annual trade promotion and account specific promotional plans (each a “Promotional Plan”) for the promotion of the Products in the Territory, including payment of all costs therefore. Each annual Promotional Plan developed by Licensee shall be reviewed by Blue Diamond before it is implemented. Each annual Promotional Plan shall provide, and Licensee shall expend in each calendar year covered by the plan, trade promotion expenditures equal in the aggregate to no less than five percent (5%) of Licensee’s gross sales of the Products in the calendar year covered by the plan. In the event that Licensee spends less than five percent (5%) of Licensee’s gross sales of the Products in any financial year, Blue Diamond shall have the right to terminate this Agreement by the provision of six (6) months advance written notice to Licensee.

Within sixty (60) days of the effective date of this Agreement, Licensee will provide Blue Diamond with proposed current financial year trade promotion and account-specific Promotional Plans, including distribution goals, frequency of temporary price reductions, trade performance goals, promotional price targets and projected costs for the current financial year of the Term. Blue Diamond recognize the proposed current financial year trade promotional program will be based on key assumptions regarding ranging decisions and timing of major retailers and will be subject to change as required. Blue Diamond shall review the trade Promotional Plan and promptly provide Licensee with any comments or suggestions on said plan. If necessary, the parties agree to meet and discuss the trade promotion and account-specific Promotional Plans and any changes Blue Diamond believes are necessary. Licensee shall consider the input provided by Blue Diamond and, if necessary, develop a revised trade promotion and account-specific Promotional Plans for review by Blue Diamond. Once the trade plans have been mutually agreed by the parties, Licensee shall proceed to implement the plans in accordance with a schedule also to be reviewed by the parties.

Each subsequent financial year of the Term, Licensee shall prepare and deliver to Blue Diamond a proposed trade promotion and account-specific Promotional Plans for promoting the Products in the Territory for the coming year. Licensee shall deliver the proposed trade plans to Blue Diamond with sufficient lead time such that the plan can be reviewed by 1st April of the then current financial year. Blue Diamond shall review and comment on the trade Promotional Plans, and the parties agree to meet to discuss the trade Promotional Plans should either party deem it necessary to do so. The final trade promotional program shall thereafter be developed by the Licensee by the 30th May deadline. Thereafter, Licensee shall implement the trade Promotional Plans.

1. In contrast with cl 3(d), the promotional plans referred to in cl 3(e) are to be implemented by *FFPL*. Thus, there is some scope to argue that the business is to be carried on “under” these promotional plans. The difficulty, however, for the applicants’ case, is the requirement that the system or marketing plan be “substantially determined, controlled or suggested” by the putative franchisor (BDG). Clause 3(e) provides that the *Licensee* (FFPL) is to be responsible for the development of the promotional plans. The second sentence of the first paragraph provides that each annual promotional plan developed by FFPL shall be “reviewed” by BDG before it is implemented, but I do not consider this to be enough to establish that the promotional plan is “substantially determined, controlled or suggested” by the putative franchisor (BDG). The second paragraph of cl 3(e) appears to provide for a higher level of involvement by BDG. However, that paragraph applied only to the first financial year of the License Agreement (that is, the License Agreement as originally entered into in October 2011). It does not apply to financial years during the term of the relevant agreement, being the License Agreement as renewed in October 2016. (As explained above, the applicants need to rely on the License Agreement *as renewed in October 2016* because of the transitional provisions in the Franchising Code.) The last paragraph of cl 3(e), which is relevant to subsequent financial years, does not contain comparable provisions to the penultimate paragraph. It merely provides that BDG shall “review and comment” on the promotional plans prepared by FFPL, and that the parties are to “meet to discuss” the plans should either party deem it necessary to do so. In light of these provisions, it is not established that the promotional plans described in cl 3(e) are “substantially determined, controlled or suggested” by the putative franchisor (BDG).
2. Having regard to the list of factors referred to by the Full Court in *Rafferty* at [172], it is relevant to note that the License Agreement requires FFPL to keep and maintain, and provide BDG with access to, certain books and records (see cl 5(a), (b), (c) and (d)) and gives BDG the right to audit certain books and records (cl 5(b)). The License Agreement contains restrictions on FFPL selling competing products (cl 10(b)) and contains requirements regarding branding, packaging and promotional materials (cl 3(a), (f), (g), and (h)). There is also a brief provision regarding performance review (cl 5(e)). I do not regard these provisions, whether taken individually or collectively, as constituting or establishing or making provision for a “system or marketing plan” under which the business is to be carried on. They do not deal in any detail with the way the business is to be conducted. Further, a number of the factors referred to in *Rafferty* at [172] are absent. In particular: there is no provision by the putative franchisor of bonus structures or equivalent for those selling the goods; there is no provision by the putative franchisor of training for staff selling the goods; there is no stipulation of retail pricing structures (indeed, under cl 3(b), FFPL has the right in its sole discretion to determine the prices at which the Products will be sold to its customers); and there is no provision for management structure.
3. For completeness, I note that I do not consider the evidence of Ms Stoner assists with this issue. The evidence is concerned with the practical implementation of the License Agreement, rather than the rights under the agreement, and relates to a period of time *after* October 2016, which is when the relevant agreement for present purposes was entered into.
4. For these reasons, I conclude that the License Agreement does not satisfy paragraph (b) of cl 5(1).
5. In light of the above conclusion, it is not necessary to consider paragraph (d) of cl 5(1). Nevertheless, I will consider it for completeness. Paragraph (d) requires the agreement to be one under which, before starting or continuing the business, the putative franchisee must pay or agree to pay to the putative franchisor (or an associate of the putative franchisor) an amount including, for example, a payment for goods, but excluding “(v) payment for goods and services supplied on a genuine wholesale basis”. There is no issue that the initial requirement of paragraph (d) is satisfied. Under the License Agreement, FFPL agreed to pay certain amounts to BDG, being payments for goods (almond base). The issue is whether the exclusion in sub-paragraph (v) of paragraph (d) applies. BDG submits that the exclusion applies; that is, it submits that the payments under the License Agreement were “for goods supplied on a genuine wholesale basis”. It follows, BDG submits, that paragraph (d) is not satisfied. The applicants dispute this, relying on evidence that the price in the License Agreement was above the market price for almond base, and on the ability of BDG to change the price.
6. Neither party referred to any case law or extrinsic materials that shed any light on the construction of paragraph (d) generally or the exception in sub-paragraph (v) in particular. Reading the exception as a whole and in context, it seems to be designed to exclude payments which are simply for the supply of goods on a wholesale basis, as distinct from payments for a mixture of purposes. In the present case, it may be accepted that the almond base is supplied on a “wholesale basis”, given that it is supplied in bulk by growers to a manufacturer. However, having regard to the License Agreement as a whole, I do not consider the payments to be made pursuant to cl 4(a) to be simply for the supply of the almond base. The License Agreement contains a number of different promises by the parties to each other. These include the grant, by BDG to FFPL, of an exclusive license during the term of the agreement to use the Formulations/Specifications to manufacture the Products, and to use the Trademarks to package, sell and distribute the Products (cl 3(a)). The payments to be made under the agreement are expressed to be for the almond base. However, in this context, the payments are in substance both for the almond base and for the other rights conferred by the agreement. This is consistent with the evidence that the price is above the market price. Accordingly, I do not consider the payments to fall in the exception in sub-paragraph (v) of paragraph (d). It follows that paragraph (d) is satisfied.
7. As set out above, I have concluded that the License Agreement does not satisfy paragraph (b) of cl 5(1) of the Franchising Code. It follows that the License Agreement is not a “franchise agreement” for the purposes of the Franchising Code. It further follows that cl 21, upon which the applicants’ argument depends, does not have any operation. Accordingly, I reject the applicants’ contention that the arbitration agreement is invalid or of no effect.
8. In light of the above conclusion, it is not necessary to consider the 20% Issue, namely whether the Franchising Code is inapplicable by virtue of cl 3(2)(b) of the Franchising Code. However, I consider it appropriate in the circumstances to make relevant findings and express a conclusion on this issue. I deal with this issue on the assumption that (contrary to the above conclusion) the License Agreement *is* a “franchise agreement”.
9. For ease of reference, I again set out cl 3(2) of the Franchising Code:

**3 Application**

…

(2) However, this code does not apply to a franchise agreement:

(a) to which another mandatory industry code, prescribed under section 51AE of the *Competition and Consumer Act 2010*, applies; or

(b) if:

(i) the franchise agreement is for goods or services that are substantially the same as those supplied by the franchisee before entering into the franchise agreement; and

(ii) the franchisee has supplied those goods or services for at least 2 years immediately before entering into the franchise agreement; and

(iii) sales under the franchise are likely to provide no more than 20% of the franchisee’s gross turnover for goods or services of that kind for the first year of the franchise.

1. As can be seen, cl 3(2)(b) of the Franchising Code provides that the Code does not apply to a franchise agreement if three requirements are satisfied, set out in sub-paragraphs (i), (ii) and (iii). There is no issue that sub-paragraphs (i) and (ii) are satisfied, given that the relevant agreement is the License Agreement as renewed in October 2016. The issue relates to sub-paragraph (iii). The question is whether “sales under the franchise are likely to provide no more than 20% of the franchisee’s gross turnover for goods or services of that kind for the first year of the franchise”. The applicants contend that the answer is “No”. In other words, they contend that sales under the franchise are likely to provide *more than 20%* of the franchisee’s gross turnover for goods of the relevant kind for the first year of the franchise (being October 2016 to September 2017). BDG disputes that proposition.
2. It is common ground that, for the purposes of this exercise, it is the gross turnover of the *Freedom Foods group*, rather than FFPL alone, that is relevant.
3. In relation to the expression “sales under the franchise”, BDG contends that this refers to sales of the “Products” under the License Agreement (that is, the Almond Breeze products). While the applicants initially agreed, subsequently senior counsel for the applicants submitted that the expression referred to all products manufactured using almond base supplied by BDG. I do not accept that contention. Assuming (contrary to my earlier conclusion) the License Agreement constitutes a “franchise agreement”, it could only be a franchise agreement in relation to the “Products” as defined in the License Agreement. This is because all or most of the clauses of the License Agreement upon which the “franchise agreement” contention is founded relate only to the “Products” as defined. I therefore proceed on the basis that “sales under the franchise” is a reference to sales of the “Products” under the License Agreement (that is, the Almond Breeze products).
4. In relation to the expression “goods … of that kind”, there is a dispute between the parties. The applicants contend that in the present case this refers to *plant-based beverages*. Mr Standen clarified in his oral evidence that this expression refers to plant-based beverages that are milk or milk-like beverages (such as almond milk, soy milk and oat milk). BDG contends that in the present case “goods … of that kind” refers to *all milk products*, that is, both dairy milk and what the applicants refer to as plant-based beverages. In my view, the applicants’ position on this issue is to be preferred. Having regard to the facts and circumstances as set out in the affidavit material, in my view, the reference in cl 3(2)(b)(iii) to “goods … of that kind” is appropriately identified as plant-based beverages, rather than all milk products. This seems to me to be the “kind” of product represented by the “Products” under the License Agreement. In this regard, I note that the “Licensee non-competition” clause in the License Agreement (cl 10(b)) provides that FFPL shall not during the term of the agreement sell any “non-organic nut beverage product” other than the licensed Products, suggesting, if anything, a *narrower* kind of product than that contended for by the applicants (namely, plant-based beverages). More generally, the evidence indicates that it is appropriate to identify plant-based beverages as the relevant “kind” of product for the purposes of the provision.
5. Clause 3(2)(b)(iii) of the Franchising Code refers to “likely” sales for the first year of the franchise. It is common ground that, as the relevant agreement for present purposes is the License Agreement as renewed in October 2016, the relevant year for the purposes of the provision is the year from October 2016 to September 2017. Further, it is common ground that the provision is concerned with the *likely*, as distinct from *actual*, sales for that year. This is to be assessed as at the commencement of that year, that is, as at October 2016.
6. In Mr Moreno’s affidavit, Mr Moreno (who is the Finance Director of BDG) carried out some analysis, for the purposes of cl 3(2)(b)(iii) of the Franchising Code, based on the financial information he had available to him. The financial information and Mr Moreno’s calculations are set out in paragraphs 5 to 26 of his affidavit. Given the nature of the information available to him, Mr Moreno’s calculations are for the financial year ended 30 June 2016. In relation to the “sales under the franchise” (that is, the Freedom Foods group’s sales of the Products), Mr Moreno estimates gross sales of $2,662,061 plus $3,767,007 (see his affidavit at paragraphs 21, 25), making a total of $6,429,068. In relation to the sales of “goods … of that kind”, Mr Moreno’s calculations treat this expression as meaning either *all products* or *all milk products* sold by the Freedom Foods group. Given my conclusion, above, that this expression refers in the present case to plant-based beverages, these calculations do not assist. However, the financial information reproduced by Mr Moreno also includes a figure for sales of plant-based beverages for the financial year ended 30 June 2016 (see his affidavit at paragraph 24). The figure appears in FFG’s annual report for the financial year ended 30 June 2017, in which the results for the financial year ended 30 June 2016 have been restated. The figure for sales of plant-based beverages for the year ended 30 June 2016 is $54,105,000. Applying these figures (namely, $6,429,068 for sales of the Products and $54,105,000 for sales of plant-based beverages), the percentage produced is 11.88%.
7. In Mr Standen’s first affidavit, he annexed spreadsheets with sales figures for the financial years ended 30 June 2016 and 30 June 2017. However, following the application by BDG for access to relevant documents, and the production of those documents by the applicants’ solicitors to BDG’s solicitors, Mr Standen prepared a further affidavit in which he substantially revised his evidence regarding the sales figures. In Mr Standen’s second affidavit, he stated at paragraph 5 that, since preparing his first affidavit, he had been informed (and now believed) that the sales data provided in his first affidavit:
8. included intercompany transactions within the Freedom Foods group during the financial years ended 30 June 2016 and 30 June 2017; and
9. included sales of vegan stock (that is, vegetable stocks used in soups and the like) in the “Plant Based” category (i.e. not solely sales of plant-based beverages).
10. In light of these statements, I do not consider that any weight can be placed on the figures provided in Mr Standen’s first affidavit.
11. Mr Standen’s second affidavit goes on to provide sales figures extracted from FFG’s accounting system for the periods October 2015 to September 2016, and October 2016 to September 2017. For present purposes, it is the figures for the period October 2015 to September 2016 (being the year leading up to October 2016) that are relevant. Mr Standen provides the following figures for that period:
12. gross sales of Almond Breeze products (i.e. the Products under the License Agreement) – $17,249,046; and
13. gross sales of all plant-based beverages manufactured during that period (excluding sales of liquid stocks) – $52,640,403.
14. On the basis of these figures, Mr Standen calculates that gross sales of Almond Breeze products were 32.77% of the total gross sales of plant-based beverages manufactured during that period (excluding sales of liquid stocks).
15. Mr Standen’s second affidavit also contains certain calculations based on *forecasts* for the financial year ended 30 June 2017. On the basis of the forecasts, Mr Standen provided (at paragraphs 13 and 15 of his second affidavit) the following calculations for the forecast sales for the financial year ended 30 June 2017:
16. total forecasted sales of Almond Breeze products – $20,280,933; and
17. total forecasted plant-based beverage sales – $62,032,310.
18. On the basis of these figures, Mr Standen calculated that sales of Almond Breeze products were forecasted to comprise 32.69% of total forecasted sales of plant-based beverage products.
19. Mr Standen was subjected to quite strenuous cross-examination. Much of this focussed on the financial information in his first affidavit. However, as set out above, this was explained and corrected in his second affidavit. In my view, Mr Standen gave evidence honestly, and sought to provide the best available information to the Court. I accept the evidence in his second affidavit. While there is a substantial difference between the calculations in Mr Moreno’s affidavit and those in Mr Standen’s second affidavit, this is explained by Mr Moreno having only limited information available to him. In contrast, Mr Standen’s figures have been extracted from FFG’s accounting system. This seems to me to be the most reliable available source of the relevant sales data, notwithstanding the criticisms made by BDG.
20. Accordingly, I find that, as at October 2016, sales under the franchise (that is, sales of the Products) were likely to provide *more than* *20%* of the franchisee’s gross turnover for goods of that kind (that is, plant-based beverages) for the first year of the franchise (that is, the year October 2016 to September 2017).
21. It follows that I accept the applicants’ contention that the exception in cl 3(2)(b) does *not* operate. It further follows that if (contrary to my conclusion above) the License Agreement constitutes a “franchise agreement”, the Franchising Code *does* apply.
22. In light of my conclusion that the License Agreement is not a “franchise agreement” it is not necessary to consider the other contentions raised by BDG as set out at [77](b), (c) and (d) above. Nevertheless, in deference to the detailed submissions presented by the parties on these points, I will make the following brief observations.
23. Insofar as BDG submits that the issue of validity of the arbitration agreement is to be governed (solely) by Californian law (as the proper law of the arbitration agreement) or potentially another system of law that validates the referral to arbitration, I do not accept that submission. While I accept that, in general, the validity of an arbitration agreement is to be determined by the putative proper law of the arbitration agreement (see *Dicey, Morris and Collins on the Conflict of Laws* (15th ed, Sweet & Maxwell, 2012), rule 64(1), [16-008], [16-013]-[16,016], [16-022]), this may be subject to overriding legislation of the forum that applies irrespective of the governing law (as recognised in fn 49 to [16-022] in *Dicey, Morris and Collins on the Conflict of Laws*).
24. In the circumstances of this case, the applicants contend that cl 21 of the Franchising Code is a mandatory law of the forum (which I take to refer to overriding legislation of the forum that applies irrespective of the governing law) or, alternatively, a provision that renders the arbitration agreement “null and void” or “inoperative” for the purposes of s 7(5) of the *International Arbitration Act*. In my view, in the circumstances of this case, it does not matter whether one approaches the issue under the rubric of ‘mandatory law of the forum’ or through s 7(5). Clause 21 of the Franchising Code forms part of the law of the forum and provides that a franchise agreement “must not” contain a clause that requires a party to the agreement to bring an action or proceedings in relation to a dispute under the agreement in any jurisdiction outside Australia; and that, if a franchise agreement does contain such a clause, “the clause is of no effect”. Having regard to the text, context and purpose of this provision, I incline to the view that, where cl 21 of the Franchising Code applies and operates in respect of an arbitration clause in a franchise agreement, it would be apt to describe the arbitration clause (or arbitration agreement) as “null and void” or “inoperative” for the purposes of s 7(5). I do not regard this as being inconsistent with the observations of the Full Court in *Hancock FFC* at [381]. The Full Court was not there considering an issue concerning whether domestic legislation could render an arbitration agreement “null and void” or “inoperative” for the purposes of s 7(5). Further, while the Full Court stated that the phrase “null and void” is to be limited as the Third and Eleventh Circuits said in *Rhone Mediterranee Compagnia Francese Di Assicurazioni E Riassicurazoni v Lauro* 712 F(2d) 50 (3rd Cir, 1983) and *Bautista v Star Cruises* 396 F (3d) 1289 (11th Cir, 2005) to “circumstances where it is commonly internationally recognised that the consequence of the vitiating consideration is to nullify or render void a contract, such as in the consequences of duress, mistake, fraud or fundamental policies”, the expression “fundamental policies” is apt to include a provision such as cl 21, which evinces a strong policy position in respect of a particular class of clauses in a particular class of agreements (franchise agreements), consistently with the purposes of the Franchising Code (as discussed in *Workplace Safety*).
25. Insofar as BDG submits that the Franchising Code does not apply to an agreement that is made outside of Australia and has a proper law other than Australian law, I am not inclined to accept this submission. It seems more likely that the intended field of operation, having regard to the purposes of the Code, is franchising businesses conducted or to be conducted in Australia. It would be surprising if the protective purposes of the Franchising Code were not intended to operate in connection with a franchise business in Australia simply because the agreement was entered into in another country or included a foreign choice-of-law clause (or both).
26. Insofar as BDG submits that the Franchising Code is invalid on the basis that the Code (as delegated legislation) is inconsistent with s 7 of the *International Arbitration Act*, I do not accept this submission. As discussed above, I incline to the view that if cl 21 of the Franchising Code applies and operates, the arbitration agreement would be “null and void” or “inoperative” for the purposes of s 7(5) of the *International Arbitration Act*. Hence, there is no inconsistency.
27. For the reasons set out above, I conclude that the License Agreement is not a “franchise agreement” for the purposes of the Franchising Code and that, accordingly, cl 21 of the Franchising Code has no operation. I therefore reject the applicants’ contention that the arbitration agreement is invalid or of no effect.

#### Conclusion on BDG’s interlocutory application

1. In the course of considering the issues relating to s 7(2) of the *International Arbitration Act*, I referred to and relied on a number of concessions made by BDG and the fact that it had offered to give certain undertakings. As I understand it, BDG has offered to give undertakings to reflect its concessions, namely undertakings to the effect that:
2. BDG will consent to FF Ingleburn, FF Trading and Pactum joining the Californian Arbitration;
3. in the Californian Arbitration, BDG will accept that:
   1. sections 18 and 21 of the Australian Consumer Law are mandatory laws that the arbitrator must apply; and
   2. Australian law is to be applied by the arbitrator in determining the applicants’ claims under those provisions; and
4. BDG will discontinue the proceeding against FFPL in the United States District Court, Eastern District of California (with a view to bringing the claims in the Californian Arbitration).
5. Subject to confirmation of these undertakings, it follows from my reasons and conclusions set out above that s 7(2) of the *International Arbitration Act* requires the present proceeding to be stayed.
6. It is not necessary to consider the alternative basis for BDG’s interlocutory application, namely that Australia is a clearly inappropriate forum.

## The applicants’ interlocutory application

1. The applicants’ interlocutory application is premised on the applicants succeeding in relation to BDG’s interlocutory application. In light of my conclusion in relation to BDG’s interlocutory application, the applicants’ interlocutory application must be dismissed.

## Conclusion

1. For the reasons set out above, subject to confirmation by BDG that it gives the undertakings set out in [141] above, I propose to make orders to the effect that:
2. Pursuant to s 7(2) of the *International Arbitration Act*, the proceeding be stayed.
3. BDG’s interlocutory application otherwise be dismissed.
4. The applicants’ interlocutory application be dismissed.
5. Within 14 days, the parties file any agreed minute of order as to the costs of the interlocutory applications and of the proceeding.
6. If the parties cannot reach agreement:
   1. within 21 days, each party file a written submission (of no more than two pages) as to costs; and
   2. within 28 days, each party file a responding submission (of no more than two pages) as to costs.

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| I certify that the preceding one hundred and forty-five (145) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Moshinsky. |

Associate:

Dated: 5 March 2021

SCHEDULE OF PARTIES

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|  |  |
| Applicants |  |
| Fourth Applicant: | PACTUM AUSTRALIA PTY LTD (ACN 112 913 336) |