IN THE HIGH COURT OF AUSTRALIA **NO. S161 OF 2019**

SYDNEY REGISTRY

BETWEEN **COMPTROLLER-GENERAL OF CUSTOMS**

APPELLANT

10 AND

PHARM-A-CARE LABORATORIES PTY LTD

(ACN 003 468 219)

RESPONDENT

APPELLANT'S AMENDED SUBMISSIONS

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PART I: CERTIFICATION

1. These submissions are in a form suitable for publication on the internet.

PART II: STATEMENT OF ISSUES

2. The *Customs Tariff Act 1995* (Cth) (***Customs Tariff Act 1995***) imposes customs duty on goods imported into Australia: s 15. The duty in respect of goods is generally worked out by reference to a rate set out in Schedule 3 (**the Tariff**) of the *Customs Tariff Act 1995*: see s 16(1)(a). In enacting Schedule 3, the Commonwealth was giving effect to its obligations under the International Convention on the Harmonized Commodity Description and Coding System done at Brussels on 14 June 1983 (**the Convention**). Schedule 3 enacts the wording of the annex to the Convention which is known as the "Harmonized Commodity Description and Coding System" or **Harmonized System**. The Tariff (and the Harmonized System) contain Sections (Sections I through XXI) and Chapters (Chapters 1 through 97), with each Chapter having many headings and sub-headings. The intention is that each kind of good has a single, correct classification under the Tariff (and the Harmonized System). This reflects the purpose of the Harmonized System: it is designed to bring a degree of international uniformity to the task of classifying goods traded in international commerce. Each good has a correct sub-heading into which it falls.

3. This case concerns the proper classification of two kinds of goods: (i) certain ***vitamin preparations***, being edible pastilles containing vitamins, and (ii) certain ***garcinia preparations***, being edible gummies containing hydroxycitric acid, known as "garcinia cambogia". The position of the Respondent (**Pharm-A-Care**) is that the goods are classified under heading 3004 in Chapter 30 of the Tariff, which relates to "medicaments ... for therapeutic or prophylactic uses". The position of the Appellant (**the Comptroller-General**) is that the goods are excluded from Chapter 30 due to Note 1(a) to that Chapter, and should be classified as "food preparations" (heading 2106) or "sugar confectionary" (heading 1704).

4. Both the Tribunal and the Full Court agreed with Pharm-A-Care. A critical part of the reasoning was that Note 1(a) of Chapter 30 of the Tariff was inapplicable. That note states:

> 1. This Chapter does not cover:
>
> (a) Foods or beverages (such as dietetic, diabetic or fortified foods, food supplements, tonic beverages and mineral waters), other than nutritional preparations for intravenous administration (Section IV) ...

5. If the vitamin preparations or garcinia preparations were covered by Note 1(a), then they could not fall within heading 3004 of Chapter 30, as contended for by Pharm-A-Care (and found by the Tribunal).[1]

6. The Tribunal held that a good could not be a "food supplement" for the purposes of Note 1(a) of Chapter 30 unless it was also a "food": T [51]. The Full Court agreed with that holding: FC [31]. The Comptroller-General's position (which the Tribunal and the Full Court rejected) was that the meaning of the general words "Foods or beverages" must accommodate the specific words in the first set of parentheses. The Full Court also held that, by reason of the parenthetical words at the end of Note 1(a), that a good was covered by Note 1(a) if and only if it fell within "Section IV" of the Tariff (which relates to prepared foodstuffs; beverages, spirits and vinegar; tobacco and manufactured tobacco substitutes): see FC [37]-[38]. The Full Court also held that a good cannot be a "food preparation" (for the purposes of heading 2106) of heading if its "essential character[r]" is "cosmetic": FC [68]. It followed, for the Full Court, that the garcinia preparations could not fall within heading 2106. The Tribunal also appeared to hold that a good could not be a "food preparation" (for the purposes of heading 2106) unless it was a "food": T [87].

7. In this context, the appeal raises five issues.

8. ***First***, did the Tribunal and the Full Court err in holding that a good could only be a "food supplement" if it was also a "food"? The Comptroller-General submits that they did. ***Secondly***, did the Full Court err in holding that a good was covered by Note 1(a) if, and only if, it fell within Section IV of the Tariff? The Comptroller-General submits that it did. ***Thirdly***, did the Full Court err in holding that a good cannot be a "food preparation ~~supplement~~" if its essential character is "cosmetic"? The Comptroller-General submits that it did. ***Fourthly***, did the Tribunal err in holding that a good cannot be a "food preparation" unless it was also a "food"? The Comptroller-General submits that it did.

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[1] See also Sch 2, cl 1 ("classification shall be determined according to ... any relative ... Chapter Notes") and *Liebert Corporation v Collector of Customs* (1993) 23 AAR 287 at 289-290.

Finally, if the Tribunal erred, what relief should issue? The Comptroller-General submits that the matter should be remitted to the Tribunal.

PART III: SECTION 78B

9. The appellant does not consider that any notice under s 78B of the *Judiciary Act 1903* (Cth) is required.

PART IV: DECISIONS BELOW

10. *Comptroller-General of Customs v Pharm-A-Care Laboratories Pty Ltd* [2018] FCAFC 237 (**FC**)

11. *Pharm-A-Care Laboratories Pty Ltd v Comptroller-General of Customs* [2017] AATA 1816 (**AAT**).

PART V: FACTUAL BACKGROUND

Factual Background

12. The factual background was essentially undisputed in the Full Court. The key points were summarised at FC [15]. The following points can be noted.

13. The **vitamin preparations** were imported by Pharm-A-Care from Germany: T [1]. They are described as "pastilles containing vitamins": T [1]. They are marketed in Australia under the trademark "VitaGummies": T [1]. They are chewable and contain 70%-80% sucrose and gelatin together with flavours: T [60]. Seven categories of the products are marketed to adults; six categories are marketed for consumption for children: T [1].

14. The **garcinia preparations** were also imported by Pharm-A-Care from Germany: T [2]. The preparations are "gummies", which do not contain vitamins but do contain garcinia cambogia: T [2]. The packaging of one of the garcinia preparations described them as "formulated supplementary sports food": T [79].

15. Each of the vitamin preparations and garcinia preparations "contain[s] sucrose, glucose syrup, gelatin, flavours and other substances": T [5]. The terms "vitamin preparations" and "garcinia preparations" were not themselves inherent characteristics of the goods.

They were labels ultimately used by the Tribunal to describe the two general kinds of goods in issue: see T [1], [2].

16. The Comptroller-General decided that each of the vitamin preparations and the garcinia preparations should be classified under heading 1704 as sugar confectionery. Pharm-A-Care appealed that decision to the Tribunal.

Tribunal Decision

17. The Tribunal set aside the Comptroller-General's decisions and remitted the matter to the Comptroller-General with a direction that (i) the vitamin preparations were classifiable under subheading 3004.50.00, and (ii) the garcinia preparations were classifiable under sub-heading 3004.90.00.

18. The Tribunal addressed the classification of the vitamin preparations at T [13]-[78]. Important elements of the Tribunal's reasoning were as follows. *First*, on the proper construction of Note 1(a), "in order to conclude that goods are a food supplement within the meaning of Note 1(a), one would also need to conclude that the goods are food, or a beverage": T [51]. *Secondly*, the words in the first parentheses "(such as diatetic...foods, food supplements...)" could not be read as extending beyond the ordinary meaning of "Food and beverages": T [55]. *Thirdly*, it was not permissible to have resort to the French text of the Convention in order to raise a doubt as to the meaning of the English text of the Convention: T [55]. *Fourthly*, the word "food" is not apt to describe a "vitamin preparation": T [57], [62]. *Fifthly*, the essential character or purpose of the goods was to deliver vitamins, despite their sugar content: T [60]. *Sixthly*, the vitamin preparations had "prophylactic and therapeutic properties" and were "medicaments": T [73]. *Seventhly*, the correct classification of the goods was heading 3004 and, in particular, subheading 3004.50.00: T [77]-[78].

19. The Tribunal addressed the classification of the garcinia preparations at T [79]-[89]. Important elements of the Tribunal's reasoning were as follows. *First*, the products were designed to enable weight loss: T [79]. *Secondly*, it was doubtful that the products were "for a therapeutic or prophylactic purpose" and it was doubtful "that the product[s] [were] properly described as a medicament" (ie within the terms of heading 3004): T [85]. *Thirdly*, the "main purpose of the garcinia preparations" appeared to be "cosmetic": T [85]. *Fourthly*, heading 1704 was inappropriate because the goods "would be regarded as

weight-loss products rather than confectionery": T [87]. *Fifthly*, heading 2106 was inappropriate "for reasons ... already mentioned in rejecting a submission that Note 1(a) to Chapter 30 applies": T [87]. This must be a reference back to the reasoning in T [51] referred to in paragraph 18 above. *Sixthly*, it was appropriate to apply rule 4 of Schedule 2 (described below), which calls for a determination of the heading to which the goods are most akin. The goods were most akin to heading 3004 rather than heading 1704 "because there is often a significant health advantage to weight loss, and a good example of that is with type 2 diabetes" and "the excipients in the product seem wholly incidental to the main purpose of the goods": T [88]. *Seventhly*, therefore, subheading 3004.90.00 was appropriate.

Full Court decision

20. The Comptroller-General appealed to the Federal Court, and the matter was allocated to the Full Court. The Full Court upheld the Tribunal's decision but, in part, adopted a different construction of the Tariff to that adopted by the Tribunal.

21. The Full Court set out a number of general legal principles at FC [24], including that the "proper construction" of the relevant words in the Tariff (including Note 1(a)) was a question of law: FC [24(1)].

22. As regards the vitamin preparations, the Full Court reached the following conclusions. *First*, the Tribunal's conclusion at T [51] was correct: FC [31]. In order for a good to be a "food supplement" for the purposes of Note 1(a), it must also be a "food": FC [41]. *Secondly*, the Tribunal did not err at T [57], [60] and [62] in holding that a vitamin preparation is not a "food" and the excipients of the vitamin preparation (ie the sugar and glucose) were incidental to the vitamins: FC [32]. *Thirdly*, the reference to "food or beverages" in Note 1(a) of Chapter 30 is "not a reference to *any* food or beverage, but only to those foods or beverages which are addressed in 'Section IV' of the Tariff": FC [37]. "The question *thus* for consideration is not whether the vitamin preparations comprise 'food' or 'food supplements', but rather whether they fall within a heading or subheading within Section IV": FC [38] (emphasis in original); see also FC [60]. This conclusion did not form part of the Tribunal's reasoning and was not raised in argument in the Full Court. *Fourthly*, the Tribunal did not err in holding that the vitamin preparations were not "sugar confectionary" in circumstances where the Tribunal was lawfully of the

view that sugar was incidental to the essential purpose of the goods: FC [39]. *Fifthly*, the Tribunal did not err in holding that the vitamin preparations were not "food preparations" in circumstances where the Tribunal was lawfully of the view that the preparations were "not food but vitamins with prophylactic and therapeutic properties": FC [41].

23. As regards the garcinia preparations, the Full Court made the following findings. *First*, the Tribunal held that "the main purpose of the garcinia preparations appeared to be cosmetic": FC [68]. *Secondly*, a "product whose essential character is 'cosmetic' cannot also bear the essential character of being a 'food preparation": FC [68].

PART VI: ARGUMENT

10 **Summary of argument**

24. Both the Tribunal and the Court erred in construing the words in the first parentheses "such as...food supplements..." as restricted to goods falling within the ordinary meaning of "[f]oods or beverages". Note 1(a) was enacted to give effect to Australia's obligation to bring its domestic law into "conformity" with the Harmonized System,. That is clear from the legislative history (described below). Note 1(a) should be given a meaning which reflects its meaning in the Harmonized System. The Harmonized System has equally-authentic English and French language versions. The proper reading of the English text of Note 1(a) is that the introductory words are to be read as subject to the specific words that follow, not (as the Tribunal and Court did) the other way round. The
20 complete absence of the introductory words "foods or beverages" in the French language version of the Harmonized System was a powerful indicator that the approach adopted by the Tribunal was erroneous.

25. The Full Court also erred in concluding that the words in the second parentheses, "(Section IV)", indicated that Note 1(a) only applied to goods that are correctly classified within Section IV. Other parts of the Tariff, to which attention would have been drawn if the issue had been raised, are quite inconsistent with the Full Court's approach.

26. The Tribunal's misunderstanding of Note 1(a) infected its conclusions in respect of both the vitamin preparations and the garcinia preparations. Had Note 1(a) applied, neither kind of good could have been classified under Chapter 30.

Background to the *Customs Tariff Act 1995* and the Tariff

27. The *Customs Tariff Act 1995* imposes customs duty. Duty of that kind "has significance beyond the raising of revenue and is often a tool of government policy": *Air International Pty Ltd v Chief Executive Officer of Customs* (2002) 121 FCR 149 at [31].[2] So far as the Tariff is used to achieve *national* policies, it achieves that purpose through the *rate* of tariff, not through the manner in which goods are classified per se.[3] The manner in which goods are classified is largely dictated by a supranational agreement, the Convention.

28. The *Customs Tariff Act 1995* is the current successor to the *Customs Tariff 1902* (Cth), which was enacted by the first Commonwealth Parliament.[4] Since 1902, there have been substantial changes to the customs laws on various occasions: see, eg, *Customs Tariff Act 1966* (Cth), *Customs Tariff Act 1982* (Cth), *Customs Tariff Act 1987* (Cth) (**the 1987 Act**).

29. The immediate predecessor to the *Customs Tariff Act 1995* was the 1987 Act. The 1987 Act was the first Commonwealth tariff law implementing the Convention. The Explanatory Memorandum to the *Customs Tariff Bill 1987* (Cth) stated (at 1):

> This Bill proposes the introduction of a new Customs Tariff based on a modernised nomenclature for the classification of goods in international trade, known as the Harmonized Commodity Description and Coding System (HS).
>
> The System has been developed by the Customs Co-operation Council (CCC) to replace its existing nomenclature which is the basis for the current Customs Tariff (*Customs Tariff Act 1982*). A new International convention for the HS is programmed to come into operation on 1 January 1988 with all major trading nations participating.
>
> The main objectives of the HS Convention are to —
>
> - provide international uniformity in the classification of goods in Customs tariffs; make it easier to collect, analyse and compare world trade statistics (both import and export statistics);

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2 See also *Nott Bros & Co Ltd v Barkley* (1925) 36 CLR 20 at 27 ("The ordinary customs tariff is framed, as everyone knows, to carry out the decision of Parliament with respect to customs duties from the aspect of revenue and from that of the development of national industry").

3 With the exception of some limited additions and variations the Commonwealth has chosen to make. For example, Chapter 22 contains some "Additional Notes". The structure for alcoholic beverages is also partly different.

4 The *Customs Tariff 1902* (Cth) was enacted after the *Customs Act 1901* (Cth), but a draft of the *Customs Tariff 1902* (Cth) was laid before Parliament at the time the *Customs Act 1901* (Cth) was enacted: see *Cowan & Sons Pty Ltd v Lockyer* (1904) 1 CLR 460 at 464.

- provide a common international system for coding, describing and classifying goods for commercial purposes, (for example, freight tariffs, transport requirements);

- to update the CCC Nomenclature to take account of technological development and changes in international trade.

30. The *Customs Tariff Act 1995* was enacted after the signatory countries to the Convention agreed to several changes to the previously-agreed nomenclature in the Harmonized System.

31. The Explanatory Memorandum to the *Customs Tariff Bill 1995* (Cth) stated (at 3):

> This Bill proposes the introduction of a new Customs Tariff based on the Harmonized Commodity Description and Coding System (HCDCS) which is the international tariff system sponsored by the World Customs Organization (WCO) in Brussels. Australia has been a signatory to the HCDCS since 1987. The Customs Tariff Act 1987, which is repealed by this Bill, was also based on the HCDCS.
>
> ...
>
> The main amendments are the incorporation of approximately 350 classification changes agreed by signatory countries to the HCDCS. ...

32. The *Customs Tariff Act 1995* (and its predecessor) were enacted to give effect to Australia's obligation as a party to the Convention. Article 3(1) of the Convention states (relevantly):

> Subject to the exceptions enumerated in Article 4:
>
> (a) Each Contracting Party undertakes, except as provided in subparagraph (c) of this paragraph that from the date on which this Convention enters into force in respect of it, its Customs tariff and statistical nomenclatures shall be in conformity with the Harmonized System. ...

33. The "Harmonized System" is the "Harmonized Commodity Description and Coding System" which was annexed to the Convention (see Article 1(a)) and is an "integral part" of it (see Article 2).

34. Save for some additions, the *Customs Tariff Act 1995* enacted the text of the Harmonized System word-for-word. The effect is to bring Australia's domestic law into conformity with the Harmonized System.

35. The Convention permits amendments to be made to the Convention (and the Harmonized System) from time to time: see Article 16. The *Customs Tariff Act 1995* enacted the

Amendments to the Harmonized System effective from 1 January 1996. There have since been further amendments in 2002, 2007, 2012 and 2017 (each of which has led to iterative changes to the *Customs Tariff Act 1995*, but not its repeal and re-enactment).

36. In circumstances where the Tariff implements the Harmonized System, terms in the Tariff should be given the meaning which they bear in the Harmonized System: *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 230-231 (Brennan J), 239-240 (Dawson J), 251-2 (McHugh J), 272 (Gummow J), 292 (Kirby J); see also, in the context of the Tariff, *Air International Pty Ltd v Chief Executive Officer of Customs* (2002) 121 FCR 149 at [25] (Hill J).

10 37. This conventional presumption has added weight in a case like the present: in the context of a *uniform* international scheme for the classification of goods, it is most unlikely that Parliament would have intended domestic law to bear a meaning which varies from the meaning of the multilateral documents constituting the scheme.

38. Related to this, the Harmonized System is a multilateral, international document and should be construed as such. In interpreting such a document a court should seek to ascertain the documents meaning "untrammeled by notions of its national legal culture": see *R v Secretary of State for the Home Department; ex parte Adan* [2001] 2 AC 477 at 517 (Lord Steyn) (speaking of a treaty), adopted in *In the matter of K* [2014] 1 AC 1401 at [52] (Hale JSC) (Kerr, Clarke and Hughes JJSC).

20 **Relevant provisions of the *Customs Tariff Act 1995* and the Tariff**

39. Section 15(a) of the *Customs Tariff Act 1995* states:

> Duties of Customs are imposed by this Act on:
>
> (a) goods imported into Australia on or after 1 July 1996 ...

40. Section 16(1)(a) identifies how duty is to be calculated in respect of goods originating from most countries (including, relevantly, Germany). Where s 16(1)(a) applies, duty "must be worked out ... by reference to the general rate set out in the third column of the tariff classification under which the goods are classified".

41. Section 6 states:

A reference in this Act to the tariff classification under which particular goods are classified is a reference to the heading or subheading:

(a) in whose third column a rate of duty is set out; and

(b) under which goods are classified.

42. The Tariff – being Schedule 3 – identifies the headings and subheadings under which goods are to be classified.

43. Section 7(1) has the effect that the "Interpretation Rules" in Schedule 2 "must be used for working out the tariff classification under which goods are classified".

44. The Interpretation Rules in Schedule 2 include the following.

1. The titles of Sections, Chapters and sub-Chapters are provided for ease of reference only; for legal purposes, classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes and, provided such headings or Notes do not otherwise require, according to the following provisions.

...

4. Goods which cannot be classified in accordance with the above Rules shall be classified under the heading appropriate to the goods to which they are most akin.

...

6. For legal purposes, the classification of goods in the subheadings of a heading shall be determined according to the terms of those subheadings and any related Subheading Notes and, mutatis mutandis, to the above Rules, on the understanding that only subheadings at the same level are comparable. For the purposes of this Rule the relative Section and Chapter Notes also apply, unless the context otherwise requires.

The Tariff

45. The Tariff commences with some preliminary notes, which relevantly state:

Note 2: The text in this Schedule is based on the wording in the Harmonized Commodity Description and Coding System that is referred to in the International Convention on the Harmonized Commodity Description and Coding system done at Brussels on 14 June 1983.

Note 3: The text of the Convention is set out at Australian Treaty Series 1988 No. 30.

...

46. The terms of Note 1(a) of Chapter 30 are central to the present issues. They are set out in paragraph 4 above.

47. The *Customs Tariff Act 1995*, as initially enacted, expressed Note 1(a) of Chapter 30 as follows:

> Foods or beverages (such as dietetic, diabetic or fortified foods, food supplements, tonic beverages and mineral waters) (Section IV) ...

48. This word-for-word reflected the language in the English language version of the Convention.

49. Note 1(a) was repealed and replaced by cl 134 of Sch 1 of the *Customs Tariff Amendment Act (No 5) 2001* (Cth). Following the 2001 amendment, Note 1(a) read:

> Foods or beverages (such as dietetic, diabetic or fortified foods, food supplements, tonic beverages and mineral waters), other than nutritional preparations for intravenous administration (Section IV) ...

50. The Explanatory Memorandum to the *Customs Tariff Amendment Bill (No 5) 2001* (Cth) indicated that the purpose of the Bill was to "implement changes resulting from the second review of the Harmonized Commodity Description and Coding System": at 2.[5]

51. The Tribunal ultimately found that the vitamin preparations and garcinia preparations were classified under 3004.50.00 and 3004.90.00 respectively. Those portions of the Tariff read:

> 3004 MEDICAMENTS (EXCLUDING GOODS OF 3002, 3005 or 3006) CONSISTING OF MIXED OR UNMIXED PRODUCTS FOR THERAPEUTIC OR PROPHYLACTIC USES, PUT UP IN MEASURED DOSES (INCLUDING THOSE IN THE FORM OF TRANSDERMAL ADMINISTRATION SYSTEMS) OR IN FORMS OR PACKINGS FOR RETAIL SALE:
>
> ...
>
> 3003.50.00 -Other, containing vitamins or other products of 2936 Free
>
> ...
>
> 3003.90.00 -Other Free

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[5] The relevant change was recorded in the Amendments to the Harmonized System Nomenclature effective from 1 January 2001 (based on a recommendation dated 25 June 1999). The document recording the amendments said this of the amendment to Note 1(a): "The underlined text has been inserted for clarification".

52. In this case, the capitalised text is a "heading" and the text accompanying the other two categories is a sub-heading.

53. The Comptroller-General's case was that the goods fell within 1704.90.00 or 2106.90.90.

54. Heading 1704 and the relevant subheading stated:

> 1704 SUGAR CONFECTIONERY (INCLUDING WHITE CHOCOLATE), NOT CONTAINING COCOA:
>
> ...
>
> 1704.90.00: -Other 5%

55. Heading 2106 and the relevant subheading stated:

> 2106 FOOD PREPARATIONS NOT ELSEWHERE SPECIFIED OR INCLUDED:
>
> ...
>
> 2106.90.90 --- Other 4%

56. In interpreting the *Customs Tariff 1902* (Cth), O'Connor J made an observation which is equally applicable to the current Tariff.

> In interpreting any item of the tariff it must be remembered that it is, as other tariffs are, a Schedule in the form of a list or catalogue. The form of expression throughout is elliptical, and it is frequently necessary to transpose or add words if one would express in ordinary English the full meaning of the phrases used.
>
> *Chandler & Co Pty Ltd v Collector of Customs* (1907) 4 CLR 1719 at 1733 (***Chandler***)

57. Implicit in that statement of principle from *Chandler* is that it is an error to construe the Tariff in a narrowly legalistic way. That is a fortiori in circumstances where the current Tariff is based on a multilateral, international document: see, eg, *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1 at 261 (Deane J) ("International agreements are commonly 'not expressed with the precision of formal documents as in English law'").

58. With this background, it is convenient to turn to the primary issues in the appeal.

Issue 1: the Full Court and the Tribunal erred in holding that a good could only be a "food supplement" if it was also a "food"

59. Both the Full Court and the Tribunal found that the words "(such as dietetic, diabetic or fortified foods, food supplements, tonic beverages and mineral waters)" in Note 1(a) did not expand the content of the Note. At T [51], the Tribunal held:

> [I]n order to conclude that goods are a food supplement within the meaning of Note 1(a), one would also need to conclude that the goods are food, or a beverage.

This reasoning affected both the Tribunal's holding in respect of the vitamin preparations (T [51]) and its holding in respect of the garcinia preparations (T [87]).

60. The Full Court reached the same conclusion at FC [31], holding that something which might be considered to be a food supplement was not covered by Note 1(a) if it is "not otherwise 'foods or beverages'".

61. At the outset it can be noted that the Full Court's reasoning at FC [31] (as well as the Tribunal's reasoning at T [51]) does not sit well with the Full Court's reasoning at FC [38]. As set out above, according to the Full Court at FC [38], the question is *not* whether a good constitutes a food or beverage, it is whether the good falls within Section IV of the Tariff.

62. In any event, even standing on its own terms, the reasoning at FC [31] and T [51] was erroneous.

63. Note 1(a) used text from the Convention, namely, the text of the Harmonized System. It did so in order to give effect to Australia's obligations under the Convention. Note 1(a) should be given a meaning which accords with the meaning of the Convention. Here, the Convention had equally-authentic English and French language versions.[6] The French language version of the Convention is admissible to construe the English language version.[7] Both versions (and, relevantly, the English language version) must be construed in accordance with Section 3 of the Vienna Convention on the Law of Treaties done at Vienna on 23 May 1969 (**Vienna Convention**). Article 31(1) of the Vienna Convention requires the Convention to be interpreted in accordance with the ordinary meaning of the terms of the treaty in their context and in light of the Convention's object and purpose. Further, Article 33(3) provides that the terms of the Convention are presumed to have the same meaning in each authentic language version.

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6 See Article 20 of the Convention.

7 See *Maloney v R* (2013) 252 CLR 168 at [92] (Hayne J).

64. Also, so far as there is a difference in meaning between the text of the French and English language versions which cannot be reconciled through other interpretive principles, the applicable rule is that stated in Article 33(4) of the Vienna Convention, namely:

> when a comparison of the authentic texts discloses a difference of meaning which the application of articles 31 and 32 does not remove, the meaning which best reconciles the text, having regard to the object and purpose of the treaty, shall be adopted.

65. In this case, there was a finding of fact in the Tribunal that, in its French text version, the Convention "does not begin with the French equivalent of the words 'Foods or beverages', but rather lists the enumeration contained within brackets in the English text without commencing words": T [55].[8] The translations of the French language version of the convention at page 16 of the Appellant's Book of Further Materials confirm this. In that context, it is most difficult to construe the Convention as giving the words enumerated in the brackets no work to do – because that would give the French language equivalent of Note 1(a) no work to do and could not be said to involve a good faith interpretation of the French version. It is also most difficult to construe the Convention as giving the introductory words "foods or beverages" the degree of dominance given to them by the Tribunal or the Full Court – because those words do not appear at all in the French language version. And if Note 1(a) of the Convention does not (or cannot) bear a particular meaning, Note 1(a) of the Tariff should not be given that meaning: see paragraph 36.

66. This conclusion is consistent with orthodox domestic law constructional principles. Note 1(a) uses the common statutory formulation of using a general phrase followed by a non-exclusive list of inclusions. The effect of a formulation of that kind is that the provision *both* covers the examples and extends to the ordinary meaning of the general term: note, eg, *Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher* (2015) 254 CLR 489 at [18]. The purpose of a formulation of that kind is to ensure that otherwise doubtful cases are included within the provision: eg *Henderson v State of Queensland* (2014) 255 CLR 1 at [79]-[82]; *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 at [95]-[96].

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[8] For completeness, the Comptroller notes that his submission recorded in the penultimate sentence of T [55], which was based on the version of the French text that the Tribunal had called the parties' attention to, is erroneous. The French text has, since 2002, included the words "autres que les preparations nutritives administrees par voie intraveineuse": see Amendments to the Harmonized System Nomenclature effective from 1 January 2001. Those words are the equivalent of the words in the English text "other than nutritional preparations for intravenous administration".

67. Further, even if the listed examples are not standalone inclusions, the list is relevant to the construction of the term "foods or beverages". The included examples are a substantive part of the Note and cannot be overlooked in the construction of the preceding phrase "foods or beverages". If a good meets one of the descriptions in the list of inclusions, but is not thought to fall within the term "foods or beverages", then that is a strong indication that one is applying an incorrect approach to the construction and application of "foods or beverages". Further, s 15AD(1) of the *Acts Interpretation Act 1901* (Cth) provides that an example "may extend the operation of the provision", and that is the relevant effect here.

68. The approach below effectively reads the first set of parenthetical words in Note 1(a) out of the Act. This is contrary to the fundamental rule of construction that "no clause, sentence or word shall prove superfluous, void or insignificant, if by any other construction they may all be made useful and pertinent": *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at [71] (***Project Blue Sky***). The error appears on the face of the Full Court's decision: the Full Court contemplated that a good might meet the statutory description (ie be a food supplement) but nevertheless not be covered by the provision.

Issue 2: the Full Court erred in its conclusions at FC [37] and [38]

69. At FC [37] and [38], the Full Court made the following findings in respect of Note 1(a) to Chapter 30 of the Tariff.

> [37] ... [T]he reference to 'foods or beverages' [in Note 1(a)] is not a reference to *any* food or beverage, but only to those foods or beverages which are addressed in "Section IV" of the Tariff. If Parliament had intended otherwise, it might have not referred to Section IV at all. Alternatively, if it had intended Note 1(a) to cover more food than that classified by Section IV it might have referred also to Section I of the Tariff ("Live animals; animal products") which covers foods such as meat, fish, milk, cheese or honey, or Section II of the Tariff ("Vegetable products"), which covers food such as fruit. Instead, Parliament, by referencing only "Section IV", intended Note 1(a) to exclude only those items of food and beverages which fall within the scope and ambit of Section IV. ...
>
> [38] The question *thus* for consideration is not whether the vitamin preparations comprise "food" or "food supplements", but rather whether they fall within a heading or subheading within Section IV. ...

70. There are two available readings of these paragraphs. The Full Court may have meant what it said in [37] ie the exclusion *only* covers foods or beverages referred to in Section

IV. Alternatively, the Full Court may have meant what it said in [38] ie the *only* question for consideration is whether the good falls within Section IV. In either case, the Full Court erred.

71. At a general level, the analysis adopted by the Full Court involves the kind of fine and legalistic points which are inapt when construing a statute implementing a multilateral document: see paragraphs 38 and 57 above.

72. The reasoning in FC [37] assumes that the Commonwealth Parliament objectively made a careful decision about the manner in which it expressed the Note. That assumption is unrealistic in circumstances where Parliament was no doing no more than implementing its obligations under the Convention and adopting text from an annexure of it.

73. Further, the approach in [37] and [38] violates the principle that the Tariff should be construed as a whole. The drafter has said so expressly in the Tariff when an exclusion was intended to apply to all goods mentioned in a Section or Chapter. For example, Note 2(a) and (e) to Ch 40 states:

> This Chapter does not cover:
>
> (a) Goods of Section XI (textiles and textile articles)
>
> ...
>
> (e) Articles of Chapter 90, 92, 94 or 96; or
>
> ...

74. There are similar examples throughout the Tariff: see, eg, Note 1 of Ch 6; Note 3 of Ch 12; Note 1(c) of Ch 17; Note 1(c) of Ch 19; Note 2(c) of Ch 25; Note 1(b) and (d) of Ch 35.

75. If the Full Court meant what it said in [38], it erred for the following further reasons.

76. ***First***, on that construction, the brief and non-grammatical words at the end of Note 1(a) – "(Section IV)" – had the effect of rendering all of the preceding words in the Note redundant. Rather than asking whether the goods were "foods or beverages" or were (for example) "food supplements", one instead asked *only* whether the goods were referred to in Section IV of the Tariff.

77. ***Secondly***, that approach violates the principle articulated in *Project Blue Sky* at [71]. If FC [38] is correct, all the words in Note 1(a) were redundant, except the parenthetical words at the end.

78. ***Thirdly***, the approach in [38] also violates the basic principle that statutory construction begins and ends with statutory text. The error appears on the face of the Full Court's reasons. The Full Court expressly said that the question is *not* whether the vitamin preparations comprise "food" or "food supplements": FC [38]. For the Full Court, most of the statutory text is simply irrelevant.

79. ***Fourthly***, the approach in FC [38] was also internally inconsistent. When it came to the parenthetical list of examples in Note 1(a), the Full Court effectively held that they were for an abundance of caution. But, if FC [38] is correct, when it came to the parenthetical words at the end of the Note, the Full Court effectively held that they ousted everything that came before.

80. The correct position is that the parenthetical words at the end of Note 1(a) are no more than a guide to the reader. They merely indicate where the goods described in the preceding words in the Note, which are excluded from Ch 30, might otherwise have been classified. The Note does not give those words definitional or operative force in any way, in contrast for example to the terms of Note 2(a) and (e) to Ch 40 referred to above. They are no more than a cross-reference, in a lengthy and complex document, to the Section within which most foods and beverages fall.

Issue 3: the Full Court erred in holding that a good cannot be a "food <u>preparation</u> ~~supplement~~" if its essential character is cosmetic

81. In respect of the garcinia preparations, the Tribunal held (at T [85]):

> We doubt that a weight-loss product, as such, is for a therapeutic or prophylactic purpose, and we doubt that the product is properly described as a medicament. It would be different if it treated or prevented obesity or some related disease or ailment. **The main purpose of the garcinia preparations appear to us to be cosmetic.** (emphasis added)

82. The Tribunal's reasons do not clearly indicate what significance the Tribunal gave to the emphasised text.

83. The Full Court upheld this part of the Tribunal's reasons against challenge. The nub of the Full Court's reasons is at FC [68], where the Full Court said:

> [The Tribunal] made a finding of fact that the main purpose of the garcinia preparations appeared to be cosmetic (at [85]). That was a finding, in our view, concerning the essential character of the garcinia preparations. It was not challenged on appeal. Having so characterised these products, it follows that they were not "food preparations". In other words, in the context of Section IV and Ch 21, a product whose essential character is "cosmetic" cannot also bear the essential characteristic of being a "food preparation".

84. This reasoning does not sit well with the Tribunal's decision. The Full Court essentially held that the good *could not* be a "food preparation" because its main purpose was cosmetic. However, as is apparent from the first sentence of T [85], it was a key part of the Tribunal's argument that a good *could* be a medicament even though its main purpose *was not* for it to be a medicament. The error in the Full Court's reasoning was in failing to recognise that a good can be classified under a heading even if its main purpose (or essential character) does not warrant its classification under that heading. That outcome follows from cl 4 of Sch 2, which provides for a fallback position where goods cannot otherwise be classified and, in that case, requires the goods to be classified under the heading to which "they are most akin".

85. More fundamentally, the Full Court's reasoning introduces into the analysis a concept – "cosmetic" – which has no textual foothold in the Tariff. The Tariff does not refer to "food preparations ~~supplements~~, other than food preparations ~~supplements~~ which are used for cosmetic purposes". There is no inherent reason why a food preparation ~~supplement~~ cannot have a dominant "cosmetic" purpose. For example, protein powder added to food and drinks to aid muscle creation may be said to have a cosmetic purpose, but is also readily describable as a food preparation ~~supplement~~. Similarly, chia seeds are commonly added to food for perceived cosmetic health benefits in helping to lose weight, but also are readily describable as food preparations ~~supplements~~.

Issue 4: the Tribunal erred in holding that a good cannot be a "food preparation" unless it was also a "food

86. The Tribunal's approach to heading 2106 was also erroneous. At T [87], the Tribunal said:

Heading 2106 food preparations seems inappropriate for reasons we have already mentioned in rejecting a submission that Note 1(a) to Chapter 30 applies.

87. The point seems to have been that the garcinia preparations could not be a "food preparation" because (in the Tribunal's opinion) they were not a "food". The error was in equating the phrase "food preparations" (in subheading 2106) with the distinct term "foods" (in Note 1(a)). The two terms are not coextensive. Not everything that is a "food" is a "food preparation" and vice versa.

88. It is clear from the subheadings to 2106 that a good may be a "food preparation" even though it is not readily describable as a food. The sub-headings to 2106 include "protein concentrates", "compound alcoholic preparations of a kind used for the manufacture of beverages", "food preparations of flour or meal", "hydrolised protein" and "[p]reparations for oral consumption, such as tablets and chewing gum containing nicotine, intended to assist smokers to stop smoking". Many of the goods falling within those sub-headings are not readily describable as "foods". However, a good falling within those sub-headings is classifiable as a "food preparation".

89. Heading 2106 is a residual heading: it applies to "food preparations *not elsewhere specified or included*" (emphasis added). The evident purpose of the heading is to be a residual catch-all. In that context, it should not be given a narrow construction.

Issue 5: relief

90. For the reasons set out above, the Tribunal erred in its construction of Note 1(a) and "food preparation". Had the Tribunal not erred in its construction of Note 1(a), it might reasonably have decided that the goods in issue were "food supplements". That would then have led the Tribunal to consider whether the goods should properly be classified under heading 1704 to classification 1704.90.00 or heading 2106 to classification 2106.90.90. Further, had the Tribunal not erred in its construction of "food preparation", it might reasonably have found that the garcinia preparations fell within 2106.90.90. The proper course is for the matter to be remitted for determination in accordance with the reasons of this Court.

PART VII: ORDERS SOUGHT

The Comptroller-General seeks the following orders.[9]

1. Appeal allowed.

2. That part of the orders of the Full Court of the Federal Court of Australia dated 21 December 2018 in which it ordered that the appeal be dismissed be set aside and, in its place, it be ordered that:

   (a) the decision of the Tribunal dated 19 October 2017 be set aside;

   (b) the matter be remitted to the Tribunal to be determined in accordance with law.

3. The appellant is to pay the respondent's costs of the appeal to this Court.

PART VIII: ESTIMATE OF TIME FOR ORAL ARGUMENT

10 91. The Comptroller-General estimates that he will require approximately 1.5 hours to present his argument.

Dated: 5 July 2019

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9 The intent of order 2 is that the costs order in favour of Pharm-A-Care in the Full Court of the Federal Court not be disturbed. The Full Court made a single order both dismissing the appeal and awarding costs to Pharm-A-Care.