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 SUBMISSIONS IN REPLY

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PART I: CERTIFICATION

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

PART II: SUBMISSIONS

Issues

2. Pharm-A-Care contends that the answer to the first four issues raised by the Comptroller-General do not affect the outcome of the appeal or do not arise: RS[1] [3]-[4]. This contention should be rejected.

3. The first two issues relate to the Full Court's view that a good must be a "food" or a "Section IV" food if it is to fall within Note 1(a). Pharm-A-Care says that these issues do not arise as regards the vitamin preparations because the Tribunal held that, whether or not they were "foods", the vitamin preparations were not "food supplements": RS [13]. There are two problems with this argument. *First*, to the extent that the Tribunal held that the vitamin preparations were not food supplements,[2] that holding was infected by its anterior finding that a food supplement must be a food. *Secondly*, the argument now advanced by Pharm-A-Care was not a basis relied on by the Full Court for dismissing the appeal and there is no Notice of Contention. The Comptroller-General argued before the Full Court that the Tribunal had misconstrued the phrase "food supplement": see CAB 61 [28](3). The Full Court did not expressly resolve that argument: it did not need to because it held that there was no error in the Tribunal's conclusion that a "food supplement" must be a "food". Were a Notice of Contention to be filed, the Comptroller-General would contend that the Tribunal misconstrued "food supplement" and asked the wrong question at CAB 22 [62].

4. The third issue relates to whether a good cannot be a "food preparation" if its essential character is cosmetic. At AS [8] and [85] of the Comptroller-General's submissions in chief, there was an erroneous reference to "food *supplement*" rather than "food *preparation*". The Comptroller-General's point was (and is) that the Full Court erred in holding that a good cannot be a "food preparation" if its essential character is cosmetic. So understood, the issue arises.

5. The fourth issue is whether the Tribunal erred in holding that a good cannot be a "food preparation" unless it is also a food. Pharm-A-Care says that this issue does not arise

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1 Respondent's Submissions dated 2 August 2019.

2 The high point of which appears to be CAB 22 [62] (first sentence).

because the Tribunal did not so hold: RS [6], [14]. That contention of Pharm-A-Care's depends on a reading of T [87] that is intricate and not fairly available.

Factual Background

6. The Court should receive the material in the Appellant's Book of Further Materials: cf RS[3] [10]-[12]. The material is adduced as evidence of "how a statute should be construed"[4] and, therefore, as evidence of legislative fact. There is no jurisdictional limitation on this Court receiving the material;[5] just as there is no limitation on the Court receiving, for example, explanatory memoranda which were not placed before the lower courts (as, indeed, the respondent seeks to do in this case: RS [49]). It is desirable that the
10 Court have before it a precise translation of the French text rather than simply the respondent's concession that certain words do not appear. The Comptroller-General does not rely on the footnotes at ABMF 16 (which simply explain the translator's reasoning).

The Full Court decision

7. The submission that the Full Court did not decide whether every instance of the things in the brackets in Note 1(a) was a food or beverage (at RS [16]) is unsustainable. The Full Court expressly held that "each item listed must ... be a food or beverage": CAB 61 [31].

Issue 1: can a good be a "food supplement" if it is not a "food"?

8. It is erroneous to assert that, even if this issue is resolved in the Comptroller-General's favour, the vitamin preparations "cannot fall within the Note on the unchallenged facts as
20 found by the Tribunal": RS [19]. There is no Notice of Contention defending the Full Court's orders on that basis. In any event, the Tribunal's conclusion at CAB 22 [62] was flawed in two ways. First, it necessarily proceeded from a misconstruction of "food supplement". Secondly, it involved the wrong question. The question was not whether a "vitamin preparation" was a "food supplement"; it was whether the *goods* in issue were "food supplements".

9. If it is suggested at RS [23] that there was some pre-existing "conflict" in the international authorities as to whether a "food supplement" must be a "food" or the words "Section IV" qualify the preceding words, then that submission is incorrect. None of the authorities addressed at T [32]ff adopted the construction ultimately adopted by the Full Court.

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3 Respondent's Submissions dated 2 August 2019.
4 *Aytugrul v R* (2012) 247 CLR 170 at [70] (Heydon J).
5 *Aytugrul* at [70]; *Gerhardy v Brown* (1985) 159 CLR 70 at 141-2 (Brennan J).

10. Pharm-A-Care does not deny that, if weight is to be given to the French language version of the Convention, the approach taken by the Full Court and the Tribunal cannot be correct. Instead, Pharm-A-Care suggests that the French language version should not be given weight: see RS [27]-[32]. Pharm-A-Care's reasons should be rejected. Even if it be assumed that the Act *only* implements the English-language version, one must still construe the English-language version *and* the English-language version must be construed having regard to the French-language version: cf RS [27]. The Comptroller-General does not read the words "foods or beverages" out of the Act (or English-language Convention): cf RS [27], [30]. He submits only that those words should not be given such prominence that they render superfluous the words in parentheses. The text of the *Customs Tariff Act 1982* (Cth) does not assist: cf RS [28], [37]. The 1982 Act did not implement the Convention, and it cannot properly be said that Note 1 to Ch 30 of the 1982 Act "became" Note 1(a) to Ch 30 of the 1987 Act (which did implement the Convention). The Comptroller-General's construction is not impractical: cf RS [31]-[32]. The Comptroller-General's construction gives meaning to all of the words in Note 1(a), whereas the Full Court's and Pharm-A-Care's approach would require a customs officer to realise that some of those words are redundant. In any event, given that a purpose of the Act was to "provide international uniformity in the classification of goods" (see AS [29]), it is difficult to see how it could be an error to give some weight to the French-language convention in the construction of the Act.

11. Pharm-A-Care's submissions on the phrase "such as" at RS [33]-[43] either do not assist it or should be rejected. Pharm-A-Care submits that "such as" means "for example": RS [35]. That supports the Comptroller-General's case: it indicates that if a good falls within one of the listed examples, it should be understood to fall within the Note. The Full Court's error was in holding that the good must "nonetheless ... be a food or beverage" even if might otherwise be considered to meet the description of the listed example: see CAB 61 [31] and contra RS [36]. Pharm-A-Care's submissions at RS [38]-[39] – which collate slightly different phrases throughout the Act – involve a parsing of language which is too fine for an Act like this: see AS [56]-[57]. Nor does Pharm-A-Care's "pasta" example assist. Some of the listed items – eg noodles and gnocchi – would not readily fall within the ordinary meaning of "pasta". On the approach of the Tribunal and the Full Court, one could look at noodles and conclude that they were not covered by heading 1902 because, although they were noodles, they were not also pasta.

Issue 2: the parenthetical words at the end of Note 1(a)

12. Pharm-A-Care offers only a muted defence of the Full Court's reasoning at FC [37]-[38] (CAB 62-63). And Pharm-A-Care correctly acknowledges that it did not seek to advance or defend that reasoning in the Full Court: RS [44]. The defence Pharm-A-Care offers should be rejected.

13. The decision in *Chief Executive Officer of Customs v ICB Medical* (2008) 73 ATR 306 can be put to one side (cf RS [48]): it is not binding on this Court and contains no persuasive reasoning on the present issue.

14. The Explanatory Memorandum to the Additional Note to Ch 30 does not assist: cf RS [49]. The Act which inserted the Additional Note – the *Customs Tariff Amendment (2012 Harmonized System Changes) Act 2011* (Cth) – also inserted heading 9619 which expressly included under sub-heading 9619.00.10 the very goods referred to in the Additional Note.[6] It was for that reason that the Explanatory Memorandum described the Additional Note as effecting a "transfer" of the goods referred to in the Additional Note to heading 9619.[7] In that context, the reference in the Explanatory Memorandum to the Additional note specifying that those goods are classified in heading 9619 is well explicable without it carrying any broader significance for similar parenthetical words throughout the tariff. Further, it is most unlikely that words in a 2012 Commonwealth Explanatory Memorandum could manifest some intention to change the meaning of words in a pre-existing Note based on the text of a multilateral convention.

15. The Full Court's approach is not required by the general principle that goods have only one classification: cf RS [50]. The rules in Schedule 2 are sufficient to achieve that outcome without the need to distort the construction of the tariff.

16. That the Full Court's approach rendered Note 1(a) narrower does not bring its construction "closer to the French version": cf RS [51]. That a construction is narrower does not mean it is closer in meaning to the different French text.

Issue 3: the "cosmetic" purpose of the garcinia preparations

17. To observe that the "essential character" of a good is a question of fact does not assist: cf RS [54]. The issue is whether it follows from the finding that the essential character of a

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6 That is, "(a) incontinence pads, whether or not had having an adhesive stripe; (b) pants or napkins for adults".

7 Explanatory Memorandum, *Customs Tariff Amendment (2012 Harmonized System Changes) Bill 2011* at 61.

good is cosmetic that it *cannot* be a food preparation. The Full Court's conclusion that one followed from the other bespeaks both a misconstruction of "food preparation" (because a good with a cosmetic purpose, like a Weight Watchers meal, can be a food preparation) and a misunderstanding of Schedule 2 (which permits a good to be classified to a heading *even though* its essential character would not warrant that classification).

Issue 4: the holding that a good cannot be a "food preparation" unless it is also a "food"

18. Pharm-A-Care submits that the Tribunal properly "found" that the garcinia preparations did not fall within the ordinary and common-sense understanding of the phrase "food preparations": RS [61]. The Tribunal did not in fact make that finding (and had it made it, one would have expected it to be expressed: see *Acts Interpretation Act 1901* (Cth) s 25D).

19. The Full Court's additional reasons at FC [69] (CAB 74) are unpersuasive: cf RS [62]. It would be irrelevant if other "miscellaneous items listed in Ch 21" would not cover the garcinia preparations (which appears to have been the Full Court's first point). Heading 2106 covers "food preparations not elsewhere specified or included" and, necessarily, one would expect it to cover goods not elsewhere mentioned. That garcinia preparations "confer significant health advantages" (if it be correct) does not furnish a purposive reason why they are not "food preparations". That involves the erroneous assumption that there is some contrariety between a health benefit and bearing the character of a "food preparation".

Issue 5: relief

20. Pharm-A-Care submits that any error on issue 1 did not materially affect the outcome of the appeal: RS [63]. As indicated, Pharm-A-Care has not filed the Notice of Contention which could found any submissions of this kind. Further, any unimpeachable finding that the vitamin preparations were not "food supplements" would not save the garcinia preparations and, in particular, the Tribunal's reasoning in the last sentence of T [87].

Dated: 23 August 2019

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ANNEXURE – LIST OF CONSTITUTIONAL PROVISIONS, STATUTES AND STATUTORY INSTRUMENTS REFERRED TO IN SUBMISSIONS

21. *Acts Interpretation Act 1901* (Cth) s 15AD (current compilation)

22. *Customs Tariff Act 1987* (Cth) (as enacted)

23. *Customs Tariff Amendment Act (No 5) 2001* (Cth) (as enacted)

24. *Customs Tariff Amendment (2012 Harmonized System Changes) Act 2011* (Cth) (as enacted)

25. *Customs Tariff Act 1995* (Cth) ss 6, 7, 15, 16, Sch 2, Sch 3 (compilation No. 68 dated 13 September 2017, in force as at 19 October 2017)

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