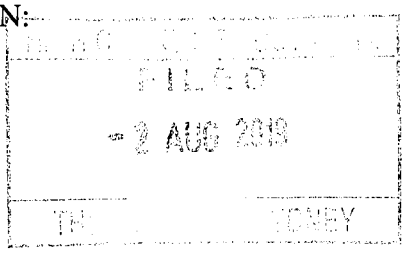
IN THE HIGH COURT OF AUSTRALIA

SYDNEY REGISTRY No. S161 of 2019

BETWEEN: COMPTROLLER-GENERAL OF CUSTOMS

Appellant



and

PHARM-A-CARE LABORATORIES PTY LTD (ACN 003 468 219)

Respondent

RESPONDENT'S SUBMISSIONS

Part I: Certification

1. The respondent certifies that this submission is in a form suitable for publication on the internet.

Part II: Issues

2. The respondent has modified the issues formulated by the appellant because some of the appellant's issues do not, in the respondent's submission, arise in the way asserted, given the findings of the Full Court of the Federal Court of Australia (**FC**) or Administrative Appeals Tribunal (**Tribunal** or **T**).

3. First, did the FC err in holding (at [31]) that a good could only fall within the scope of Note 1(a) to ch 30 of sch 3 of the ***Customs Tariff Act*** *1995* (Cth) if it is a food or beverage? The respondent submits that the FC did not err, and further submits that, in any event, the answer to this question cannot affect the outcome of this appeal.

4. Secondly, did the FC err in holding that, in order to fall within the scope of Note 1(a) to ch 30 of sch 3 of the *Customs Tariff Act*, a good must fall within the scope of Section IV of sch 3 of the *Customs Tariff Act*? The respondent submits that the FC did not err, and

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further submits that, in any event, the answer to this question cannot affect the outcome of this appeal.

5. Thirdly, did the FC find that a good cannot be a "food supplement" if its essential character is cosmetic? If so, did the FC err? The respondent submits that the FC did not so find and, therefore, did not so err. To the extent that the FC held that a good cannot be a "food preparation" if its essential character is cosmetic, the FC did not err.

6. Fourthly, did the Tribunal find that a good cannot be a "food preparation" unless it is also a food? If so, did the Tribunal err? The respondent submits that the Tribunal did not so find, and in any event that any such error is of no consequence in light of the separate reasoning and conclusions of the FC.

7. Fifthly, if, contrary to the respondent's contentions, the FC erred in failing to find that the Tribunal erred or otherwise, what relief should issue? The respondent submits that, even if the FC erred with respect to Issues 1 and/or 2 above (which is denied), this Court should not remit that part of the proceeding relating to the vitamin preparations.

Part III: Notice under s 78B of the *Judiciary Act 1903*

8. The respondent considers that no notice is required to be given under s 78B of the *Judiciary Act 1903* (Cth).

Part IV: Facts

9. The respondent accepts the appellant's chronology, except to note that one of the applications to the Tribunal was made on 17 August 2016 (not 2017). The respondent also notes, with respect to the chronology and to AS [16], that the appellant saw fit to classify at least one of the vitamin preparations to heading 3004.50.00 from 2011 until 2015, when it was classified to heading 2106.90.90.[1] On 26 May 2016, after an internal review, the appellant classified the relevant vitamin preparations to heading 1704.90.00.[2] The respondent largely agrees with the appellant's narrative of facts, save for the second sentence

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1 See Tariff Advice Application Number 20299300 dated 2 December 2011 and Tariff Advice Application Number 21346600 dated 18 June 2015.

2 See Internal Review of Tariff Advice Number 21346600 dated 26 May 2016 and Tariff Advice Number 21597500.

of AS [15]. The Tribunal found that a vitamin preparation would generally be described in Australia "as a vitamin preparation or by some similar words embodying the word "vitamin" or "vitamins" or multivitamins" (T [57]). The Tribunal found that the garcinia preparations would ordinarily be described as a "weight-loss preparation" (T [79]). The respondent further notes for completeness that the material and non-contentious background determined by the Tribunal and accepted on appeal before the FC are set out at FC [15] (material findings) and [18] (additional relevant findings). In particular, in addition to those facts summarised by the appellant in its submissions (**AS**) at [13]-[19], the appellant notes the following factual findings made by the Tribunal and accepted by the FC:

a) The vitamin preparations are all listed on the Australian Register of Therapeutic Goods as complementary medicines and are regulated by regulations made pursuant to the *Therapeutic Goods Act 1989* (Cth). The garcinia preparations are not complementary medicines and are not so regulated (T [6], FC [15]).

b) Vitamin preparations would not naturally or normally be described as food supplements in Australia (T [62], FC [18]).

c) The essential feature of the vitamin preparations, and that which should be used to characterise them, is the vitamins that they contain and not the excipients (T [60], FC [18]).

d) With respect the garcinia preparations, a weight-loss preparation would not ordinarily be described as a food or a food supplement (T [79], FC [18]).

10. There are no contested material facts, save to the extent introduced by the affidavit of John William Patrick Benson affirmed 1 July 2019 and its exhibits (see Appellant's Book of Further Materials). The appellant is impermissibly attempting to adduce fresh evidence that was not before the Tribunal or the Full Court.[3] The respondent submits that this Court should not receive that evidence.

11. The respondent accepts that the French text version does not begin with the French equivalent of the words "foods or beverages', but rather lists the enumeration

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3 See *Eastman v The Queen* (2000) 203 CLR 1 at [9], [16] (Gleeson CJ), [69], [76] (Gaudron J), [163] (McHugh J) and [190] (Gummow J); *Van Beelen v The Queen* (2017) 262 CLR 565 at [77] (Bell, Gageler, Keane, Nettle and Edelman JJ).

contained within brackets in the English text without commencing words (T [55], AS [65]). It also accepts that the current French text version contains the equivalent of "other than nutritional preparations for intravenous administration". There is therefore no need for this Court to receive the further evidence.

12. In particular, this Court should not receive the objectionable opinion evidence contained in the footnotes in Exhibit D (p.12 of the Appellant's Book of Further Materials). This evidence is controversial and, if adduced before the Tribunal, would likely have been the subject of cross-examination and contested evidence. It attempts to give evidence of the meaning (in English) of certain words and phrases used in ch 30 of sch 3, including by apparent reference to trade usage. Neither party in this proceeding, however, chose to adduce evidence before the Tribunal to suggest that any of the expressions used in Note 1(a) had a special trade meaning (T [25], cf e.g. *Herbert Adams Pty Ltd v Federal Commissioner of Taxation* (1932) 47 CLR 222). It is also not apparent that Mr Benson has the requisite expertise to opine on matters relating to the meaning of the English text in different geographical locations. Any attempt to challenge the Tribunal's factual finding that the vitamin preparations would not naturally or normally be regarded as food or food supplements (T [62], accepted by the FC at [18(d)]) is no longer available.

Tribunal decision

13. Subject to what follows, the respondent accepts that the findings identified by the appellant at [18] were made, but does not accept that those findings provide a fair or complete summary of the Tribunal's reasons as a whole (as important matters have been omitted). In particular, the respondent notes that the appellant's summary deals only with what the Tribunal identified as one possible view of Note 1(a). The other view was also considered and discussed by the Tribunal; namely, that goods could fall within the scope of Note 1(a) if they were "food supplements", **even if** they were **not** also a food or a beverage (T [53]). Accordingly, "for completeness", the Tribunal considered the question of whether the goods were a "food supplement" (T [53]). It concluded that vitamin preparations would not "naturally or normally be described as food supplements in this country" (at [62]). That is a significant finding in the context of this appeal. The Tribunal also (properly) rejected the reference to uses of the expression "food supplement" in the European Union, where "food supplements" are regulated as foods (T [63]).

14. The respondent disagrees with the fifth element in the appellant's summary of the Tribunal's reasoning with respect to the classification of the garcinia preparations (AS [19]). The "reasons... already mentioned in rejecting a submission that Note 1(a) to Chapter 30 applies" (T [87]) do not necessarily refer back to the reasoning in T [51], and instead should be understood to refer to the Tribunal's earlier reasoning with respect to the construction of sch 3; that is, the process of having regard to the ordinary meaning of the text (e.g. T [25], [56]). When considering the Tribunal's decision as a whole, it is clear from T [40] that the Tribunal appreciated that there was a distinction between "food" and "food preparations". The Court should reject the appellant's invitation to construe the Tribunal's reasons minutely and finely with an eye keenly attuned to the perception of error.[4]

Full Court decision

15. The appellant's summary of the Full Court's conclusions concerning vitamin preparations does not give sufficient emphasis to the alternative or merely supporting role played by the third element in the appellant's summary (AS [22]). After first agreeing with the reasons of the Tribunal at [51] (see FC [31]), and finding that the Tribunal did not err in holding that a vitamin preparation is not a "food" and the excipients of the vitamin preparations were incidental to the vitamins (FC [32]), the FC noted that **that "conclusion** is **supported** by what appears in the second parentheses at the end of Note 1(a), namely the term 'Section IV'" (FC [36]), emphasis added). Thus, where the FC states that the reference to "foods or beverages" is a reference to foods or beverages which are addressed in "Section IV" of the Tariff (FC [37]), it is doing so on the basis that this line of reasoning **supports** the Tribunal's reasons and conclusions, with which it has **already** expressed agreement. This reasoning should not be considered in isolation.

16. Contrary to the appellant's framing of Issue 1, the FC did not expressly find that a good could only be a "food supplement" if it was also a "food". Rather, it held that Note 1(a) is engaged by food and beverages including of the type in the brackets, without necessarily deciding whether every instance of the things in the brackets were food and beverages (see FC [31]).

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4 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).

17. The FC also considered that statutory purpose arguably supported the conclusion reached by the Tribunal (FC [43]).

18. As regards the garcinia preparations, the FC made findings that neither statutory context nor statutory purpose supported the conclusion that the garcinia preparations should be classified as food preparations (FC [69]). It held that the reasoning of the Tribunal was adequate (FC [67]).

Part V: Argument

Issue 1: can a "food supplement" fall within the scope of Note 1(a) if it is not also a "food"?

10 19. At the outset, the respondent contends that the resolution of this issue cannot affect the ultimate outcome of this proceeding. That is because the Tribunal considered for completeness whether the vitamin preparations were "food supplements" (**whether or not** they were also foods or beverages in the ordinary sense), and found that they were not (T [53], [54] [61], [62]; see above at [13]). Thus, even if the items listed in the first parentheses of Note 1(a) do expand the content of the Note, the vitamin preparations still cannot fall within the Note on the unchallenged facts as found by the Tribunal.

20. There was, in any event, no error in the Tribunal's approach to considering whether the vitamin preparations would be naturally or normally described as "food" or "food supplements" (and this is not the subject of a ground of appeal before this Court). The
20 Tribunal did so in light of its findings concerning the "essential character" of the vitamin preparations. It rejected the utility of resort to dictionary definitions (T [56]). The FC noted that the Tribunal was rightly cautious of subjecting everyday words to "intensive analysis" and endorsed the Tribunal's approach of reaching its conclusions by using its own knowledge and experience of the world and by deploying common sense (FC [35]).

Proper approach to construction of sch 3 of the Customs Tariff Act

21. The appellant relies heavily on the fact that the *Customs Tariff Act* implements the *International Convention on the Harmonized Commodity Description and Coding System* done at Brussels on 14 June 1983 (**Convention**), and hence that interpretive principles relating to the construction of treaties are applicable. This includes Article 33 of

the *Vienna Convention on the Law of Treaties* done at Vienna on 23 May 1969 (**Vienna Convention**).

22. The respondent does not dispute that the interpretive principles set out in the Vienna Convention have some relevance to the construction of sch 3. It notes, however, that the starting point is that the function of this Court is to give effect to the will of Parliament as expressed in legislation. Generally accepted principles of statutory interpretation remain relevant to the task.[5] It is by reason of those principles, including ss 15AA and 15AB(2)(d) of the *Acts Interpretation Act 1901* (Cth), that the Court may have regard to the Convention and should endeavour to adopt a construction of the *Customs Tariff Act*, if that construction is available, which conforms to the Convention.[6] Pursuant to Article 31 of the Vienna Convention, the text should be interpreted in accordance with the ordinary meaning of their words in their context (and in light of its object and purpose).

23. The problem here, however, is that there is no generally accepted construction of Note 1(a) in other countries subscribing to the Convention. The Tribunal considered the overseas authorities and noted that they "are in conflict and do not suggest that there is any uniform international approach to the issues" (T [32]ff). In addition, some countries and economic communities (such as the European Economic Community) have adopted additional explanatory notes. The result is that many international decisions are defined or guided by instruments not applicable in Australia (T 41). To the extent that the appellant presupposes that there is one agreed upon "meaning" of the multilateral documents constituting the scheme (AS [37], [61]), that assumption is not borne out by international tariff decisions. Indeed, agreement upon a single "meaning" may be impossible in light of the different rules, guidance documents and approaches applying in different countries.

24. In any event, the *Customs Tariff Act* does not simply implement the Convention. Schedule 3 diverges from the Convention through the insertion of "Additional notes" (see AS footnote 3, [34]). There are approximately 78 "Additional notes" in the *Customs Tariff Act*. These "Additional notes" are additions to the text that do not exist in the Convention.

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5 *Minister for Home Affairs v Zentai* (2012) 246 CLR 213 at [65] (Gummow, Crennan, Kiefel and Bell JJ); see also ***Air International*** *Pty Ltd v Chief Executive Officer of Customs* (2002) 121 FCR 149 at [43], [49] (Tamberlin J; O'Loughlin J agreeing).

6 *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH* (2006) 231 CLR 1 at [34] (Gummow ACJ, Callinan, Heydon and Crennan J).

Nevertheless, in Australia, they must be applied using the Interpretation Rules in sch 2 in the same way as the Notes (*Customs Tariff Act* s 7(3)).

25. If Parliament disagrees with a conclusion reached by a Court or the Tribunal applying proper methods of statutory construction, the use of Additional Notes provides a solution. For example, the Additional Note to ch 19 (discussed further below) changed the operation of heading 1902 and was added by the *Customs Tariff Amendment Act 2017* (Cth) (see cl 14 of sch 1 of that Act) after the decision of *Pacific Worldwide Pty Ltd v Chief Executive Officer of Customs* [2015] AATA 253. There are no relevant Additional Notes to chapters 17, 21 or 30.

26. The appellant seeks to draw support for its interpretation of Note 1(a) from the text of the French language version of the Convention by reason of Article 33 of the Vienna Convention. As set out above, the French text version does not begin with the French equivalent of the words "foods or beverages" but instead simply lists the items in the first parentheses (T [55], AS [65]). The respondent disagrees with the appellant's approach for four key reasons.

27. *First*, the *Customs Tariff Act* implements the English language version of the treaty, which is an "equally authentic" version of the text. There is no evidence that the French version was ever put before the Parliament as an extrinsic material. The words "foods or beverages" in the English language version cannot simply be read out or ignored. The appellant's proposed reconciliation appears to infringe the "fundamental rule of construction" the appellant outlines at AS [68] by rendering the words "foods or beverages" superfluous. In any event, it is not clear how the appellant's proposed reconciliation assists in the resolution of this case. As a practical matter on the Tribunal's findings of fact, the vitamin preparations do not fall within the enumerated examples (whether or not such items must also be foods or beverages).

28. *Secondly*, the reference to "foods or beverages" in Note 1(a) accords with the legislative history of the provision. In the *Customs Tariff Act 1982* (Cth), Note 1 to ch 30 relevantly provided (emphasis added):

> *(1) In 30.03, "medicaments" means goods (other than dietetic, diabetic or fortified foods, tonic beverages, spa water* ***or similar foods or beverages****) that are -*

This then became Note 1(a) to ch 30 in the *Customs Tariff Act 1987* (Cth), which was

identical to the current version of Note 1(a) save that it did not include the words "other than nutritional preparations for intravenous administration".[7]

29. Thus, under the 1982 Act, a range of goods were excluded from being "medicaments", including foods or beverages that were not specifically enumerated. The phrase "or similar foods or beverages" presupposes that the examples listed were foods or beverages.

30. *Thirdly*, although the Harmonized System Explanatory Notes, published by the World Customs Organisation, to ch 30 are of limited assistance and should be used as an aid to construction cautiously for the reasons set out in FC [49], [52], [58], they make repeated reference to the exclusion of "foods" and "beverages" from ch 30. This confirms that these words cannot and should not be read out of the English language version of the Convention.

31. *Fourthly*, a customs officer cannot be expected to have the knowledge, time or resources to translate every Note in the *Customs Tariff Act* in order to determine whether the French language differs from the English version, and if so, how the texts should best be reconciled. Customs officers are called upon to undertake a practical and common-sense assessment to be undertaken at least initially at the wharfside. The provisions need to be able to be understood by Customs officers and importers of products. As noted by Fox J at 321 in ***Times Consultants*** *Pty Ltd v Collector of Customs (Qld)* (1987) 76 ALR 313 (FCAFC) (in dissent but not on this point), the *Customs Tariff Act*:

> *... is very much one of practical application, and is itself required to be used in their daily duties by many Customs officers. It would be very detrimental to the operation of the Customs service if the words were to become the subject of legal refinements of meaning. A Customs officer is expected to examine the entry, and time permitting to examine the goods. He then has to apply what is his understanding of the English language to the appropriate item. There are departmental checks on the correctness of his decision and legal checks which keep decisions within proper limits.*

32. Fox J added that "the court, and the tribunal, should be careful not, by repeated findings of what is presented as law but is actually fact, to turn the application of the tariff into a legal nightmare" (at 322). That warning, particularly with reference to the interpretation of the English language of the *Customs Tariff Act* by reference to its French counterpart, is particularly apposite here.

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[7] This was inserted by the *Customs Tariff Amendment Act (No 5) 2001* (Cth), Item 134.

The meaning of "such as"

33. The Tribunal correctly rejected the appellant's preferred construction of "such as" as essentially meaning "including", instead finding that the provisions of sch 3 "mean what they say" (at [52]). If there was an intention that the words in the brackets should expand the meaning of "foods or beverages", then the legislature "has not chosen any usual way of indicating that fact" (T 53).

34. The Tribunal's construction of "such as" is to be preferred for the following reasons.

35. *First*, it accords with the ordinary meaning of "such as", which means "for example" or "for instance". There is nothing in the text or context of Note 1(a) that indicates that "such as" is being used other than in its ordinary English sense. Even accepting the appellant's contention that the principles applicable to the construction of an international instrument are relevant, as set out above, there is no reason to disregard the ordinary English meaning of words used in sch 3. The notion that a short list of items following the word "such as" does not expand the meaning of the words is quite orthodox, especially where it is clear that the integers of that list all have examples which are readily capable of falling within the stated genus. On the Tribunal's unchallenged findings, the meaning of "foods or beverages" is wide enough to include the phrase "food supplements" used as an ordinary English phrase. The Tribunal gave an example of goods that could be identified as a food supplement (and a "food or beverage"), namely protein shakes (T [57]). There was no error in this approach.

36. It is incorrect to say that the interpretation given to Note 1(a) by the Tribunal and the FC gives the words enumerated in the brackets no work to do (cf AS [65]). As the FC noted at [30]:

> *Both parties agreed that the words appearing in the first parentheses in Note 1(a) exist for the purpose of clarification, or as an example of foods or beverages which might otherwise potentially have fallen within Ch 30, and which have been identified in the parentheses for the purposes of confirming classification, perhaps, in some cases and in our view, out of abundance of caution...*

37. *Secondly*, as the Tribunal noted, the words in parentheses other than "food supplements" were illustrative and not expansive. This is confirmed by the legislative history discussed above, which presupposed that the other items were all foods or beverages.

This supports the construction of "such as" as being used in the ordinary sense, with "food supplements" also fulfilling the same illustrative purpose. The approach that one adopts in determining the meaning of the individual words of that phrase is bound up in the syntactical construction of the phrase in question (*Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389 at 396-397).[8] The Tribunal and FC's interpretation accords with both the text and context of Note 1(a), as it has regard to the nature of the other illustrative examples.

38. *Thirdly*, this interpretation accords with the context of sch 3 of the Act as a whole. Schedule 3 uses a variety of phrases to give meaning to terms in headings and notes, the primary examples being "such as", "for example", "means", "includes" / "including", "applies to" and "covers". If the words in parentheses in Note 1(a) to ch 30 were intended to be similarly expansive, language such as "includes" or "covers" could have been used to achieve this: for example, see Note 2 to ch 7 and Additional Note 1 to ch 19. The respondent is not here applying a technical principle of common law construction of the type to be disregarded when interpreting treaties (see, for example, *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 240 (Dawson J)) but rather is applying a common-sense and practical interpretation which gives effect to the terms used in the text.

39. To return to the "pasta" example of heading 1902, discussed above, heading 1902 relevantly provides (emphasis added):

> *PASTA, WHETHER OR NOT COOKED OR STUFFED (WITH MEAT OR OTHER SUBSTANCES) OR OTHERWISE PREPARED,* ***SUCH AS*** *SPAGHETTI, MACARONI, NOODLES, LASAGNE, GNOCCHI, RAVIOLI, CANNELLONI; COUSCOUS, WHETHER OR NOT PREPARED: ...*

40. The examples given would all fall within the ordinary English meaning of "pasta". This is an orthodox use of "such as" contained in the Convention and in sch 3. To expand the meaning of pasta, Parliament chose the following language in Additional Note 1 to ch 19 (emphasis added):

> *For the purposes of 1902, "pasta"* ***includes*** *kneaded noodle dough formed into sheets or other specific shapes (****for example****, rice noodles, wonton skins, Udon noodles and buckwheat noodles), whether or not cooked or stuffed or otherwise prepared.*

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[8] See similarly ***Vernon-Carus*** *Australia Pty Ltd v Collector of Customs* (1995) 21 AAR 450 at 457-458 re composite phrases (Northrop J).

In this example, the word "includes" is used to expand the ordinary meaning of pasta such that it includes any type of kneaded noodle dough. "For example" gives illustrative examples to "kneaded noodle dough" without expanding its meaning. The contrast between the expansive use of "includes", on the one hand, and the illustrative use of "such as" and "for example" on the other, is clear.

41. *Fourthly*, as to the appellant's assertion that its preferred construction was consistent with orthodox domestic law constructional principles (AS [66]), the case law examples proffered by the appellant do not assist it. The example given in ***Fortress Credit Corporation (Australia) II Pty Ltd v Fletcher*** (2015) 254 CLR 489 concerned the definition of "transaction" in the *Corporations Act*, which uses the phrase "for example (but without limitation)... and includes" and not "such as". That case is authority for the proposition that, because the definition of "transaction" is non-exhaustive, it extends **to** the ordinary meaning of "transaction". It did not concern whether each listed example must always fall within the definition in all circumstances. *Fortress Credit* thus says nothing about whether the examples **extend the ordinary meaning** of the defined term. In the context of this proceeding, *Fortress Credit* supports only the proposition that Note 1(a) extends to things that would be considered "foods or beverages" on their ordinary meaning even if they are not specifically enumerated (a proposition apparently in conflict with the appellant's position on the reconciliation of the English and French versions of Note 1(a)).

42. *Henderson v State of Queensland* (2014) 255 CLR 1 concerned a provision which specifies that property is "illegally acquired property" "**if**" certain criteria were satisfied (emphasis added). This is far removed from the phrase "such as" as used in Note 1(a). *Legal Services Board v Gillespie-Jones* (2013) 249 CLR 493 used the common formulation "means... and includes", the orthodox effect of which is to enlarge the ordinary meaning of the word. Once again, this is far removed from the phrase "such as" and does not assist the appellant. Caution must also be exercised in relying on decisions concerning definitions, as the very act of defining a term may have the effect of displacing the ordinary meaning of that term: *Office of the Premier v Herald and Weekly Times* (2013) 38 VR 684 at [61]; see also *Gibb v Federal Commissioner of Taxation* (1996) 118 CLR 628 at 635 (Barwick CJ, McTiernan and Taylor JJ).

43. Section 15AD of the *Acts Interpretation Act 1901* (Cth) also does not assist the appellant. It provides only that an example "may" extend the operation of the provision. It

does not necessarily do so. Whether or not it will do so will depend on context. Contextual matters are otherwise addressed in these submissions, and suggest that no such extension is warranted.

Issue 2: The parenthetical words at the end of Note 1(a) of ch 30

44. At the outset, the respondent notes that the FC's reasoning with respect to the second parentheses in Note 1(a) was not relied upon by the respondent before the FC.[9] That is because it was a point that leads nowhere on the findings of the Tribunal. That is, whether "food or beverages" be limited to food and beverages that are contained in Section IV of the *Customs Tariff Act* (as the FC suggested in *obiter*) or all food and beverages contained anywhere in the *Customs Tariff Act* (such as Sections I, II and III) simply makes no difference in this case. The appellant did not claim that the products fell into any classification of food or beverage outside of Section IV of sch 3. Thus, the correctness or otherwise of this point cannot affect the result of this case.

45. The respondent nonetheless offers the following observations on the second parentheses in Note 1(a).

46. *First*, the respondent disagrees with the appellant's contention that an available reading of FC [37] and [38] is that Note 1(a) excludes all goods falling within Section IV. When read fairly and in context, and in particular with regard to the reference to "those *foods or beverages* which are addressed in 'Section IV' of the Tariff" (FC [37], emphasis added), it is plain that the FC considered that Note 1(a) excluded from ch 30 only *foods or beverages* falling within the scope of Section IV, rather than *all* goods falling within the scope of Section IV. One example of an item in Section IV which would not readily be considered a food or beverage is found in heading 2106.90.20: "[p]reparations for oral consumption, such as tablets and chewing gum containing nicotine, intended to assist smokers to stop smoking". This fair and proper reading gives all the language in Note 1(a) work to do.

47. *Secondly*, the respondent also submits that the Court cannot look at FC [37] and [38] in isolation. To do so overlooks the FC's statement in [36] that the Tribunal's reasoning and conclusions – with which the FC expressly agreed (FC [31]) – "is *supported* by what

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[9] The respondent notes that it raised this argument (briefly) before the Tribunal: see Transcript, Administrative Appeals Tribunal, 6 July 2017, P-60.46-P-61.7.

appears in the second parentheses at the end of Note 1(a)" (emphasis added) (as discussed above at [15]).

48. *Thirdly,* the gist of the FC's decision is that the parenthetical provisions referred to at the end of a note can inform or constrain the content of the language that goes before it. The respondent has been unable to identify any example in sch 3 of the *Customs Tariff Act* where the approach proposed by the FC would cause any difficulties or a departure from previous practice. To the contrary, it accords with at least one prior Full Court decision. That case, *Chief Executive Officer of Customs v* ***ICB Medical*** (2008) 73 ATR 306, involved the classification of "orthotic inserts" (see [7]). The two possible headings under which they could be classified were 6406 and 9021 (see [9]). A note to ch 64 (set out at [12]) excluded orthopaedic footwear and other orthopaedic appliances from ch 64. There was then a reference to "(9021)" at the end of that note. The Full Court observed that this directed the Tribunal first to a consideration of heading 9021. The Court then set out a note in ch 90 that defined "orthopaedic appliances" *for the purpose of* 9021 (at [13]). It was defined in a way that included two categories of "special insoles" but not all such special insoles. An argument was advanced by the Chief Executive Officer of Customs that the Note to ch 64 picked up the special definition in the note to ch 90 (see [44]). The Court accepted this submission and found that the meaning of the words in the Note to ch 64 were constrained or affected by definition in the Note to ch 90. The reference to "orthopaedic appliances" in Note 1(e) to ch 64 was not freestanding but was referring to those things that were orthopaedic appliances within the special definition in heading 9021.

49. Similarly, Parliament inserted an Additional Note to ch 30 as follows:[10]

> *Additional Note.*
> *1.- 3005 does not cover:*
> *(a) incontinence pads, whether or not having an adhesive strip (9619); or*
> *(b) pants or napkins for adults (9619).*

The relevant Explanatory Memorandum provided that "[t]he new Additional Note excludes these goods from heading 3005 **and specifies that they are classified in** heading 9619".[11]

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10 See *Customs Tariff Amendment (2012 Harmonized System Changes) Act 2011* (Cth).

11 House of Representatives, *Customs Tariff Amendment (2012 Harmonized System Changes) Bill 2011, Explanatory Memorandum,* Item 136, p.61.

That is, Parliament understood that the parentheses used at the end of notes indicated where the relevant items were to be classified, and adopted this structure when making Australian-specific additions to sch 3.

50. The cross-references given in parentheses are therefore capable of having, and intended to have, operative or definitional force (cf AS [80]). This approach furthers the purpose and context of the *Customs Tariff Act* and the Convention, which is to ensure, so far as possible, that even though a particular item of goods may inherently fall under more than one classification, ultimately goods must be classified to one category.[12] The cross-references given in parentheses indicate that the goods fall either into the chapter which contains the note, or into the section, chapter or heading indicated in parentheses. If it were not so, undue confusion and complexity may arise. In the *ICB Medical* example, if the parentheses did not have this effect, then an orthopaedic appliance that did not fall within the special definition in heading 9021 could have been excluded from ch 64 whilst also not falling within 9021. Such a result does not further the purposes of the Convention and should be avoided. If, as the appellant contends, the parenthetical words at the end of Note 1(a) are "no more than a guide to the reader" and do not have "definitional or operative force" (AS [80]), as words of guidance they nonetheless support the principle and reasoning adopted by the FC.

51. *Fourthly,* the FC's approach to the second parentheses may serve to further the reconciliation of the English text to the French text, to the extent that this Court finds that Article 33 of the Vienna Convention is relevant to the construction of Note 1(a). That is because, as the appellant points out, the French text of Note 1(a) includes only the enumerated examples. By reading down the words "foods or beverages" to include only foods or beverages of Section IV, the practical effect of the FC's interpretation is to narrow the range of items outside of the enumerated examples that may be excluded by the English language version in a way that brings it closer to the French version.

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12 *Air International* at [25] (Hill J in dissent, majority silent on that point), discussing the classification rules generally.

Issue 3: the Full Court erred in holding that a good cannot be a "food supplement" if its essential character is cosmetic

52. Contrary to the assumption underlying the appellant's phrasing of issue 3, the FC did not hold that a good cannot be a "food supplement" if its essential character is cosmetic. The FC's reasoning at FC [68] concerns the phrase "food preparations" as it appears in heading 2106. This issue simply does not arise.

53. To the extent that the appellant now seeks to call into question the Tribunal's identification and characterisation of the garcinia preparations, that impermissibly goes beyond the scope of the grounds of appeal to this Court, which concern the construction of each of Note 1(a) to ch 30 and heading 2106. There is no ground of appeal concerning the identification and characterisation of the garcinia preparations.

54. In any event, the essential character of an item is a question of fact (*Times Consultants* at 321 (Fox J), 326 (Morling and Wilcox JJ)). The FC did not misdirect itself as to the test to be applied (and this does not arise on the appeal grounds). The essential character of an item is to be determined by reference to the characteristics of the goods themselves, as they would present themselves to an informed observer. The "function" or purpose of the goods considered subjectively is not part of the essential character test (*Times Consultants* at 327 (Morling and Wilcox JJ)), but the practical wharf-side test **does** encompass a consideration of the nature of the goods and the function which they were designed to serve (*Times Consultants* at 328 (Morling and Wilcox JJ)). The appellant accepted before the FC that whether a particular good is a "food supplement" necessarily involves consideration of the use or purpose of the goods.[13]

55. The Tribunal identified and characterised the garcinia preparations as weight-loss preparations (T [79]) and then held that "[a] weight-loss preparation would not ordinarily be described as a food or as a food supplement in our opinion" (T [79]). This followed on from its earlier rejection of the use of a dictionary to define the expression "food supplement" and a consideration of the ordinary English expression instead (T [61], [63]). This approach was correctly endorsed by the FC (at [35], discussed above at [20]). There is no error in this approach.

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[13] Appellant's Submissions in Reply before the FC, [17].

56. Further, the respondent does not accept the appellant's argument concerning Interpretation Rule 4 of sch 2 (AS [84]). To begin with, the appellant did not challenge the Tribunal's application of Rule 4 before the FC (FC [70]), and does not raise this as a ground of appeal before this Court. The FC's reasoning concerning the essential character of the garcinia preparations related to the Tribunal's attempt to classify the goods according to Interpretation Rules 2 and 3 of sch 2; that is, the steps that occur **prior to** turning to the fallback of Rule 4. There is no error in the Tribunal or the FC making findings concerning the essential character or characteristic of a good for the purpose of classification using Interpretation Rules 2 and 3. As Hill J noted in *Air International Pty Ltd v Chief Executive Officer of Customs* (2002) 121 FCR 149 (in dissent, although not on this point) at [20]:

> *The expression "essential character" emphasises the point that particular goods may have more than one character so that, at least in such a case, it will be necessary, when embarking on the task of characterisation to look at that character which is "essential" and disregard any other inessential character.*

57. That the FC did not fail 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 (cf AS [84]) is made plain by the classification of the garcinia preparations to heading 3004 using Rule 4. This was done notwithstanding the earlier finding that the goods were *not* for a therapeutic or prophylactic purpose. The Tribunal thus classified the garcinia preparations to heading 3004 even though its main or essential purpose did not warrant its classification under that heading. This reasoning was upheld by the FC.

58. There was also no error in the reference to the concept of "cosmetic" by either the Tribunal or the FC. It is uncontroversial that the classification of goods involves a two-step process (see ***Vernon-Carus** Australia Pty Ltd v Collector of Customs* (1995) 21 AAR 450 at 454). The first step is identifying the goods (*Vernon-Carus* at 454). The second step is the construction of the relevant heading and the application of a heading to the goods as identified. Only part of the second step is challenged by the appellant. The reference to cosmetic purpose arose, however, in the context of the Tribunal undertaking the first step of identification. The identification of the goods in this manner was open to the Tribunal. Although it may be essential to have regard to the headings when undertaking the first step (*Vernon-Carus* at 455-456),[14] there is no requirement that the identification of goods must

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[14] The principles applicable to identification of the goods are summarized in *Re Tridon and Collector of Customs* (1982) 4 ALD 615 at 620, and approved by the Full Court in *Vernon-Carus* at 455.

follow the language and terminology of the headings. Indeed, Rule 4 of the Interpretation Rules recognises that a good as identified may not be able to be identified in a way that conforms to the language of the headings.

59. The respondent urges caution before accepting the examples given by the appellant in AS [85]. It is by no means apparent that a protein powder added to food and drinks to aid muscle creation (as described by the Tribunal at [57]) has "a cosmetic purpose" (cf AS [85]), and further still no reason to accept that it should be identified as having a dominant cosmetic purpose. Absent something to the contrary, one might have thought that protein powder was designed to provide a source of protein, needed by the body to survive. It is even less clear that chia seeds would be described as food supplements, given that they are edible seeds and therefore likely to be classified under a heading that concerns seeds, such as chapters 10 or 12. Without evidence, this Court should not speculate further in this regard.

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

60. Before the FC, the appellant alleged that the Tribunal's reasoning with respect to heading 2106 was inadequate. The FC disagreed (FC [67]). For the reasons set out above at [20], it was not desirable nor necessary for the Tribunal to set out an exhaustive or detailed definition of the phrase "food preparations".

61. When considering the Tribunal's reasons as a whole, it is clear from T [40] that the Tribunal appreciated that there was a distinction between "food" and "food preparations". The Tribunal had earlier explained its approach to the construction of sch 3; that is, to have regard to the ordinary meaning of the text (T [25], [56]). In approaching the task of classification, the Tribunal expressly noted that the excipients in the garcinia preparations seemed "wholly incidental" to their proper classification (T at [88]). In this context, and in light of the facts as found, the Tribunal properly found that it did not consider the "garcinia preparations" to fall within the ordinary and common-sense understanding of the phrase "food preparations". There is no error in this approach.

62. In any event, the FC separately considered the issue in two separate ways, each of which is correct and each of which is sufficient to dispose of the issue. *First*, the FC used

the Tribunal's (unchallenged) finding of fact that the main purpose of the garcinia preparations appeared to be cosmetic and analysed this in terms of the "essential character" of the product. In doing so, it found that the garcinia preparations could not bear the essential characteristic of being a "food preparation". No error is disclosed in this approach. *Secondly*, the FC considered both statutory context and statutory purpose. The FC held that neither of these supported the conclusion that the garcinia preparations should be classified as food preparations. No error is disclosed in this approach. Even if an error is found in the first strand of reasoning, concerning essential character, this second course of reasoning is alone sufficient to uphold this finding.

10 **Issue 5: Relief**

63. Even if the FC erred in law on Issue 1, it did not materially affect the outcome of the appeal below. The Tribunal separately considered whether the vitamin preparations were "food supplements", and decided that they were not (see [13] above). This Court should not overturn this and other findings of fact. The appellant should not now be permitted to depart from its prior strategic approach on evidence and to have a second attempt to revisit these findings of fact before the Tribunal.[15] Even if this Court finds that the FC erred in law on Issue 2, this was an error made by the FC alone (and not the Tribunal) and there is accordingly no reason to set aside the Tribunal's decision regarding the vitamin preparations.

20 64. The respondent submits that, if the Tribunal and FC erred in their construction of "food preparation" (which is denied), then only that part of the decision pertaining to the garcinia preparations should be set aside and remitted to the Tribunal.[16]

Part VI: Notice of contention

65. Not applicable.

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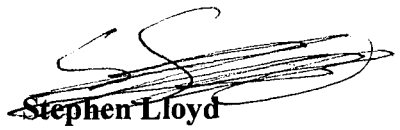
15 In other cases, for example, the parties (including the appellant) have adduced evidence on the meaning of terms used in headings in the *Customs Tariff Act* and on classification: see, for example, *BASF Australia Ltd v Chief Executive Officer of Customs* [2015] AATA 140 at [96]ff and *Re Trustee for the Kurowski Family Trust and Chief Executive Officer of Customs* (2010) 118 ALD 688 at [20].

16 The High Court has the power pursuant to s 44 of the *Administrative Appeals Tribunal Act 1975* (Cth) to set aside and remit only part of a Tribunal decision: *Commissioner of Taxation v Zoffanies* (2003) 132 FCR 523 [86] (Hely J), [94]-[95] (Gyles J) cf Hill J [79]-[80].

Part VII: Time estimate

66. The respondent estimates that it will require approximately 1.5 hours for the presentation of its oral argument.

Dated 2 August 2019



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