IN THE HIGH COURT OF AUSTRALIA
SYDNEY REGISTRY **No S161 of 2019**

BETWEEN: **COMPTROLER-GENERAL OF CUSTOMS**
Appellant

AND: **PHARM-A-CARE LABORATORIES PTY LTD**
Respondent

APPELLANT'S OUTLINE OF ORAL ARGUMENT

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APPELLANT

CERTIFICATION

1. This document is in a form suitable for publication on the internet.

OUTLINE OF ORAL ARGUMENT

The Tariff

2. Schedules 2 (**the Interpretation Rules**) and 3 of the *Customs Tariff Act 1995* (Cth) (**the Tariff**) were enacted to give effect to Australia's obligations under the International Convention on the Harmonized Commodity Description and Coding System done at Brussels on 14 June 1983 (**the Convention**): AS[1] [31]-[34]; JBA[2] 4/1483. The Convention provides international uniformity in the classification of goods in customs tariffs: AS [29]; Explanatory Memorandum, *Customs Tariff Bill 1987* (Cth) 1. The Interpretation Rules and, with limited exceptions, the Tariff's words are taken from the Convention: AS [34].

3. Note 1(a) of Ch 30 of the Tariff is at JBA 1/46. If the goods in issue in this appeal fell within Note 1(a), then they could not be classified in Chapter 30 (as the Tribunal did): Interpretation Rule 1 ("classification shall be determined according to the terms of the headings and any relative Section or Chapter Notes"); AS [43]-[44]; JBA 1/19, 27.

4. As for Note 1(a) textually.

   (a) Every word in the Note should be given work to do: AS [68]. The words in the first set of parentheses should not be read out of the provision.

   (b) The words "foods or beverages" are of wide and imprecise connotation. Their meaning here is determined by context.

   (c) The words "such as" in the first set of parentheses indicate that, if a good is one of the kind of goods mentioned in the parentheses, then it falls within the Note: AS [66]-[67].

   (d) The words "other than nutritional preparations administered intravenously" indicate that some of the goods covered by the Note would not ordinarily be described as "foods or beverages".

   (e) The words "(Section IV)" are a guide to where some, but not necessarily all, of the goods mentioned in the Note are to be classified elsewhere in the Tariff. The Tariff says so expressly when it is intended to exclude from a Chapter only goods classified in a particular other part of the Tariff: AS [73]-[74].

5. As for Note 1(a) contextually.

   (a) The Tariff should not be construed in a narrow, legalistic way: AS [56]-[57]. The Tariff's text derives from the text of a multilateral Convention.

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1 Appellant's Amended Submissions filed 14 October 2019.
2 Joint Book of Authorities.

(b) The context in which Note 1(a) should be construed includes the Convention. The Convention has equally-authentic English and French language versions: AS [63]; ABFM 14. A translation of the French language version of Note 1(a) is at ABFM[3] 16. The translation is admissible as evidence of legislative fact: ASR [6]; *Gerhardy v Brown* (1985) 159 CLR 70, 141-2 (JBA 3/938-9); *Aytugrul v R* (1985) 247 CLR 170 at [71] (JBA 1/250-251). The French language version of the Convention does not contain the words "Foods or beverages": Vienna Convention Art 31(1) and (2); 33(1), (3) and (4) (JBA 4/1655-1656). This cuts against any construction of Note 1(a) which gives the words "Foods or beverages" dominance.

6. In ascertaining whether a good falls within Note 1(a), one does not ask how the good would ordinarily be described. One asks whether the good meets the statutory description.

7. Heading 2106 is also relevant. It appears at JBA 45. Heading 2106 is a residual, catch-all one: it applies in respect of food preparations which are "not elsewhere specified or included". Textually, there is nothing in heading 2106 which has the effect that, before a good can be classified under it, the good must (i) be a food (as distinct from a "food preparation"), or (ii) not have a cosmetic character.

The Tribunal's Decision

8. There were two kinds of goods in issue:

(a) "**VitaGummies**", being chewable pastilles containing 70-80% sucrose and gelatin, and also containing vitamins, marketed to children and adults: CAB 8 [1], 21 [60].

(b) "**Garcinia preparations**", being weight loss gummies containing hydroxycitric acid: CAB 8 [1]-[2].

9. The Tribunal held that a good did not fall within Note 1(a) unless it was a "food or beverage": CAB 19-20 [51]-[55]. This was an error. The Tribunal also held that a good could not be a "food supplement" unless it was a "food": CAB 19 [51]. This was an error. The Tribunal sought to classify the vitamin preparations by asking how "vitamin preparations" would "commonly be described": CAB 21 [57], 22 [62]. The Tribunal held that vitamin preparations would not normally be described as "food supplements": CAB 22 [62]. The Tribunal applied the wrong test.

10. The Tribunal held that "[a] weight loss preparation would not ordinarily be described as a food or as a food supplement": CAB 31 [79]. That was the wrong test. The Tribunal rejected Pharm-A-Care's submission that the garcinia preparations were medicaments because they had therapeutic or prophylactic purposes. It did so because the main purpose of the preparations was cosmetic: CAB 33 [85]. The Tribunal decided not to classify the garcinia preparations under heading 2106 (food preparations) "for reasons

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[3] Appellant's Book of Further Materials filed 5 July 2019.

[it] ha[d] already mentioned in rejecting a submission that Note 1(a) to Chapter 30 applies": CAB 33 [87]. In context, the Tribunal meant either: (i) that a good could not be a "food preparation" unless it was a "food" or "food supplement" within the meaning of Note 1(a) (which is wrong as a matter of construction), or (ii) that garcinia preparations would not ordinarily be described as a "food preparation" (which involves the wrong test).

The Full Court's decision

11. The Full Court held that a good could not fall within Note 1(a) unless it was a food or a beverage (CAB 61 [31]) which fell within Section IV of the Tariff (CAB 63 [37]). The Full Court also said that the question was not whether a good was a food or beverage, but whether it fell within a heading or sub-heading in Section IV: CAB 64 [38]. These conclusions were erroneous: they render some or all of the text in Note 1(a) redundant.

12. As for the garcinia preparations, the Full Court held that a good the main purpose of which was cosmetic could not be a "food preparation": CAB 74 [68]. The Full Court did not consider the Appellant's appeal ground that the Tribunal had erred by asking how goods would ordinarily be described: note CAB 40 [2(a)], 41 [5(a)].

The appeal

13. The Tribunal and the Full Court erred by holding that a good could only be a "food supplement" if it was also a "food": AS [59]-[68].

14. The Full Court erred by holding that a good could only fall within Note 1(a) if (i) it was a food or beverage of the kind mentioned in Section IV, or (ii) it was a good of the kind mentioned in Section IV: AS [69]-[80].

15. The Tribunal erred by classifying goods according to how they would ordinarily be described: ARS[4] [3].

16. The Full Court erred in recharacterising the Tribunal's finding that the "main purpose" of the garcinia preparations was cosmetic as a finding as to essential character. The Full Court erred in holding that a good the essential purpose of which is cosmetic cannot be a "food preparation": AS [81]-[85].

17. The Tribunal erred either by (i) asking whether the garcinia preparations would ordinarily be described as "food preparations"; or (ii) holding that a good cannot be a "food preparation" unless it is also a "food": AS [86]-[89].

N.J. Williams **D.P. Hume**

Dated: 17 October 2019

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4 Appellant's Reply Submissions dated 23 August 2019.