

## **COMPTROLLER-GENERAL OF CUSTOMS v PHARM-A-CARE LABORATORIES PTY LTD (S161/2019)**

Court appealed from: Full Federal Court of Australia  
[2018] FCAFC 237

Date of judgment: 21 December 2018

Special leave granted: 17 May 2019

Pharm-A-Care Laboratories Pty Ltd (“Pharm-A-Care”) imported pastilles from Germany which contained manufactured vitamins. These were marketed in Australia under the “Nature’s Way” brand and are known as the “Vitamin Preparations”. Pharm-A-Care also imported two categories of weight loss gummies, which did not contain vitamins but did contain garcinia cambogia. These are known as “the Garcinia Preparations”.

On 19 October 2017 the Administrative Appeals Tribunal (“the Tribunal”) made a decision concerning the classification of both the Vitamin Preparations and the Garcinia Preparations. This was for the purposes of the Customs Tariff in Sch 3 (“the Tariff”) to the *Customs Tariff Act 1995* (Cth) (“the Customs Tariff Act”). The Tribunal found that the Vitamin Preparations were not “food supplements” for the purposes of Note 1(a) of Ch 30 of the Tariff, but were medicaments for the purposes of subheading 3004.50.00. A critical element of its reasoning was its acceptance that a “food supplement” must be either a “food” or a “beverage”.

With respect to the Garcinia Preparations, the Tribunal likewise rejected the characterisation of these preparations as food. It found that these products were designed to enable weight loss. A weight-loss preparation would not therefore ordinarily be described as a food or a food supplement.

On 21 December 2018 the Full Federal Court (Burley, Steward & Thawley JJ) rejected the Comptroller-General of Customs’ appeal. In doing so, their Honours endorsed the Tribunal’s reasoning that the Vitamin Preparations were not a “food” in the sense that that term is ordinarily used.

With respect to the Garcinia Preparations, the Full Federal Court endorsed the Tribunal’s reasoning as to why these preparations were not food. Their Honours further noted that there was also no challenge to the Tribunal’s finding that the main purpose of the Garcinia Preparations was cosmetic.

The grounds of appeal are:

- The Full Court erred in holding that the Tribunal had not erred in construing Note 1(a) to Chapter 30 of Schedule 3 of the Customs Tariff Act.
- The Full Court erred in holding that the Tribunal had not erred in construing heading 2106 of the Customs Tariff Act.

