

Pharma-A-Care and Goods Compliance Update

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hunt & hunt
lawyers

Topics

1. Pharm-A-Care Laboratories
 - a) Classification of vitamins
 - b) Key rule of classification
 - c) Use of HS notes
 - d) Reference to use of goods
 - e) Post importation changes to goods
 - f) Classification of weight loss gummy
2. Goods compliance update

Pharm-A-Care Laboratories

- Products considered:
 - VitgaGummies and Nature's Way – pastilles not tablets
 - Weight loss gummies – do not contain vitamins but contain garcinia cambogia
- Pastilles contain sucrose, glucose syrup, gelatin, flavours and other substances
- Vitamins are listed on the Australian Register of Therapeutic Goods – weight loss gummies were not
- Goods arrive in bulk and bottled and labeled for sale after import



Pharm-A-Care Laboratories

- The goods were identified as vitamin preparations and garcinia preparations respectively
- Classification options:
 - 3004 Medicaments
 - Notes – this chapter does not cover food or beverages (such as dietetic, diabetic or fortified foods, food supplements, tonic beverages and mineral waters)...
 - 2106 Food preparations not elsewhere specified or included
 - 1704 Sugar confectionary (including white chocolate), not containing Cocoa

Previous Australian cases

- Kurowski – effervescent vitamin tablets – heading 3004
 - food – what is eaten for nourishment
 - food supplement – something to complete a thing
 - Reasonable people would not call a vitamin food
- BASF – plant sterol to reduce cholesterol – used in margarine
 - food given a wide meaning – a substance that gives energy – the form of the substance doesn't matter
 - food supplement – something in addition to what is normally in foods or what is normally consumed by the individual
 - plant sterol was held to be a food supplement

Pharm-A-Care Laboratories - AAT

- Vitamin
 - narrow meaning to food supplement - must be a food – like a powder product sold in gyms
 - no need to look at a dictionary for the meaning of the word food
 - food is not apt to describe a vitamin
 - essential feature of the good is the vitamin content
 - HS explanatory notes ignored as the word “food” is easily understood
 - vitamins provide prophylactic and therapeutic properties – this was enough to justify classification as a medicine
 - registration of the goods on Therapeutic Goods Register was not relevant

Pharm-A-Care Laboratories - AAT

- Weight loss gummy
 - do not have prophylactic and therapeutic properties
 - would not ordinarily be described as food
 - main use was said to be cosmetic
 - goods are 70-80% sucrose and gelatin and flavours – Customs argued for classification as confectionary
 - Applied IR 4 – determination according to the classification to which the goods are most akin – heading 3004 as weight loss has medical benefits

IR 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”

Findings Full Federal Court

Vitamins

- Finding that vitamins have prophylactic and therapeutic benefits was not challenged by Customs
- The Court agreed that a “food supplement” must itself be a “food” – BASF was incorrect
- There is no need to refer to a dictionary to know what “food” is, at least when a good is a regular item of commerce

Court's approach to classification

- Words that have an ordinary meaning should not be subject to intensive analysis
- Reference should be made to local knowledge, experience and common sense
- The interpretation should be consistent with the convention
- Issue is not what is “food” generally but rather, what is the word “food” when referred to in the notes to Ch 30 and in the context of the headings argued by Customs
- What interpretation will best achieve the purpose of the Act
- “food” does not admit any absolute definition – determined by statutory purpose or function

Ultimate finding on whether a vitamin is food

A vitamin is not a food in the ordinary way in which the term would be used

The essential character of the goods is the vitamins, not the glucose type substance in which they are contained – as such, could not be classified as sugar confectionary (1704)



Was the Court's approach was too narrow

- The Court focused on the Ch 21 food preparations specifically listed
- Customs made the point that this approach ignores the breadth of “food preparations **not specified elsewhere**”
- Most goods are not specifically listed in the tariff

Reference to taxation policy

The Court consider it relevant that most of the items listed in Ch 30 were imported duty free while many items in Ch 17 and 21 attracted duty

As the vitamins were similar to medicine, this supported a view that they be taxed as medicines

- Very risky to base classification on the intended tax outcome
- Similar goods can be taxed very differently based on the existence of a local industry
- Customs duty is a protectionist tax – it is dangerous to try discern a more deliberate policy intent

Use of HSEN

- Customs argued that the Tribunal should have had regard to the HSEN
- The Court found that it may legitimately have regard to the HSEN as an aid to construction
- However, the approach should be cautious – the HSEN is not domestic law
- The HSEN must be capable of assisting the interpretation of the tariff – but assistance must be needed

“...(The Brussels Notes) are a secondary guides only and cannot displace the plain words of the statute ... or be used when there is no ambiguity in the legislation, eg a doubt cannot be created by the use of the explanatory notes and then have the doubt settled by reference to the same notes”

Type of vitamin

- Broad based vitamin vs targeted higher dose vitamin
- The Court found that such a distinction was not merited by the words of the tariff
- The question is simply whether the vitamin is section IV food, not whether it is a general or targeted vitamin
- The distinction would be relevant if a broad based vitamin did not have prophylactic or therapeutic benefits

Labels added after import

- Customs argued that the Court should have regard to labels added after export
- **It seems dangerous for Customs to focus on:**
 - post importation changes to the good
 - the description of the good by the importer
- Customs said the labels showed the goods were mere dietary supplements
- The Court held that affixing a label after import could not change what was imported
- A label may however be relevant where the heading refers to intended use – such evidence is relevant if directed to the state of the goods at the time of import
- The Tribunal found that the goods had prophylactic and therapeutic benefits – this could not be changed by the addition of labels

Findings Full Federal Court – Weight Loss

Weight loss gummy

- Customs argued that the AAT erred in considering the gummies to not be a food - The Court rejected this
- The main purpose of the preparations was cosmetic and this was not challenged on appeal
- In the context of Ch 21, a product whose essential character is cosmetic” cannot also be a food preparation
- Other Ch 21 items do not suggest that a weight loss gummies should be a Ch 21 food preparation
- Customs did not attack the application of IR 4

Was the Court correct

- There was no finding of fact that the goods cause weight loss
- **Akin to miscellaneous food preparations:**
 - Ch 21 also expressly includes protein concentrates and nicotine gum
 - If the garcinia provides the essential character, is the good most akin to a garcina extract (1302) (section II is vegetable products, not simply food)
- Should it have been identified as a mixture of garcina extract and other goods and classified by its essential character
- What does this decision mean for any edible product that is not medical but also is not taken for nourishment
 - cosmetic
 - detox
 - food extracts with a claimed non-nutrition benefit

Summary of issues

- When interpreting the tariff, the Courts prefer the ordinary meaning of a word
- The HSEN can only be used if the tariff is ambiguous, it cannot be used to create doubt about clear words
- Labels added after import cannot change the objective features of goods
- The definition of “food” is narrow
- The bar for establishing prophylactic or therapeutic goods is low
- Just because a product is not a food will not mean it is necessarily classified as a medicament – but it might be

Goods Compliance Update



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2018-19 Compliance Priorities

- Tobacco
- Trade compliance (revenue)
- Trade measures (preferential agreements)
- Supply chain integrity
- Traveler and cargo clearance
- Firearms
- Asbestos

Response to deliberate non-compliance

Case study

- ABF identified a complex and systematic process to falsify documents to conceal the nature of goods and avoid payment of duty
- Underpaid duty and GST \$1.6 million
- 49 infringement notices totaling \$352,250
- Is the INS designed for the systematic falsification of documents
- Penalty for deliberate avoidance of duty – s234 – 2 - 5 times the underpaid duty (for an individual)

Disclosure of information from the ICS

Risk – ICS users may use the ICS to track illicit goods

The risk is real – ABF officers and brokers both found to have misused the system

Section 233BABA(3) – it is an offence to:

- obtain and use restricted information to commit an offence against a law of the Commonwealth or a State or Territory
- obtain restricted information, and disclose the information to another person without authority to do so under the Customs Act or the ABF Act

Broker licensing condition:

“The holder of the Licence must not allow Department systems or information provided by the Department to be used for an unauthorised purpose or to assist, aid, facilitate in any lawful or illegal activity.

Is disclosure in the ordinary course of business?

Disclosure of information - holds

- Key issue – Containers Holds – the ABF view is that you cannot disclose to the owner of the goods:
- *“Advice that the container is subject to an examination at a Customs Cargo Examination Facility (CEF) or that the container is being examined by the ABF”*
- Can disclose what the importer would see if they themselves had access – HELD/RELEASED
- Simply state that the release of the container is being held – you do not know the reason

Disclosure of information – To freight forwarder

Disclosure of information to freight forwarders:

- have you been authorized by the importer to disclose information
- can disclosed HELD or CLEAR status
- details required for the movement of the goods

Remember – in accessing the ICS you are acting as the agent of the importer, not the freight forwarder

Compliance results – Error rate

Area	Error rate
Import declarations	21.8%
Export Declarations	37.7%
Cargo reporting	3.84%
Anti-Dumping	26.85%

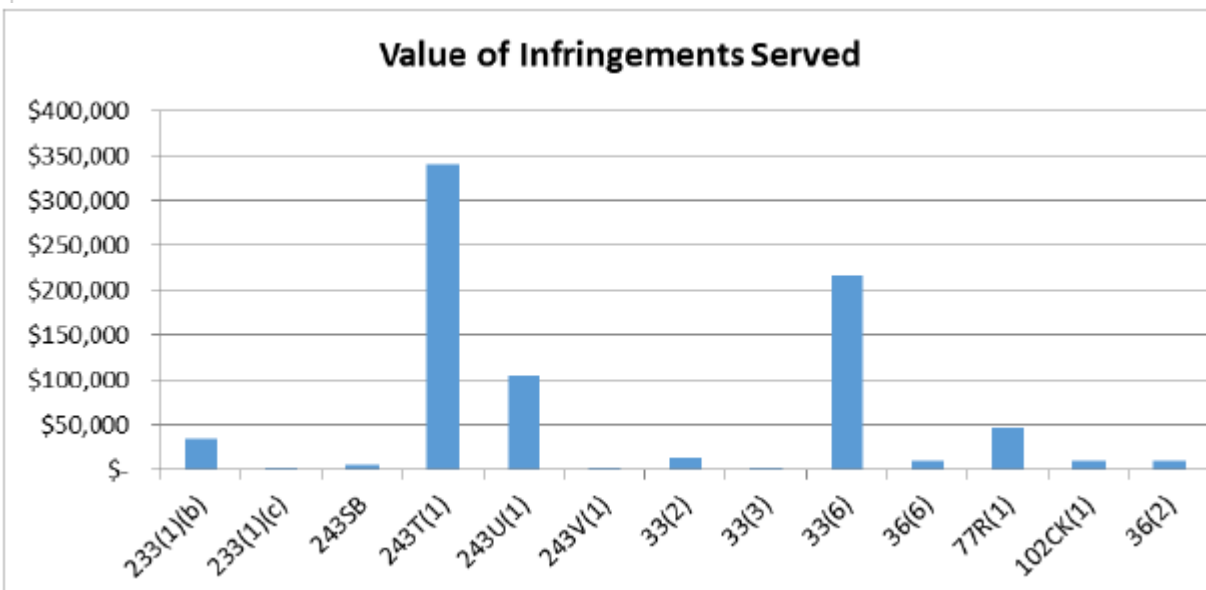
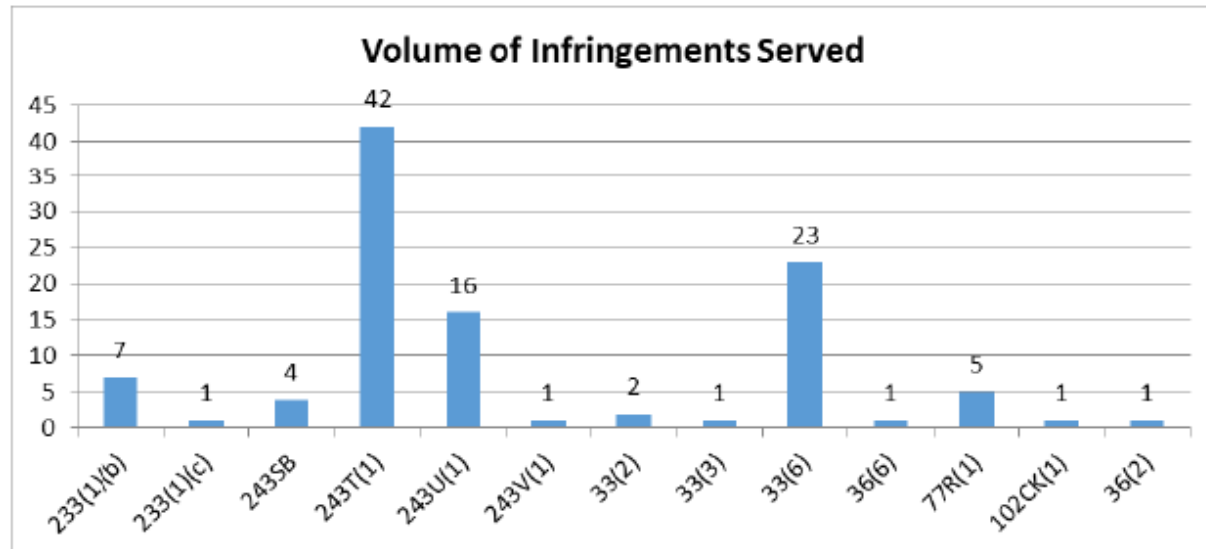
Import declarations – top errors

Description	Number
Incorrect Delivery Address	81
Val - Valuation Date	73
Tariff Classification	59
Other	41
Val - Invoice Terms	34
Val - Price (Invoice Total)	30
Val - Related Transaction	28
Gross Weight	23
Number of packages	20
Quantity	20

Export declarations – top errors

Description	Number
FOB Value	62
Gross Weight	26
Net Quantity	15
AHECC - Misclassification	12
AHECC - Multi-Lines	9
Origin	5
Other Export Data Inaccuracy	5
Consignee City	3
FOB Currency	3
Consignee Name	2

Infringement notices



Questions



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