

Sub to - DR156
to - 1403



To: (R Team)
(replied to Helen Owens)

4 July 2001

Ref.176.GMB/sf

Mrs Helen Owens
Commissioner
Productivity Commission
LB2 Collins Street East
MELBOURNE VIC 8003



Dear Mrs Owens

I refer to the hearings by your inquiry on 7 June 2001, when my clients, the CTFAA, appeared.

Arising from those hearings, I now attach copy of:

- Letter dated 14 March 2001 from Deacons Lawyers to the Executive Director of CTFAA, reviewing the legal advice on NICNAS charges provided by the Australian Government Solicitor.

With kind regards,

Yours sincerely

A handwritten signature in cursive script, appearing to read 'George Brownbill'.

George Brownbill
Government Relations Consultant

Encl.

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GOVERNMENT RELATIONS

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14 March 2001

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Mr J Woods
Executive Director
Cosmetic Toiletry & Fragrance Association of Australia
Level 4 140 Arthur Street
SYDNEY NSW 2060

Dear Mr Woods

NATIONAL INDUSTRIAL CHEMICALS NOTIFICATION AND ASSESSMENT SCHEME

Thank you for your instructions in this matter.

You have asked us to advise in relation to assessments under s80QA of the *Industrial Chemicals (Notification and Assessment) Act 1989* (Cth) ("IC Act" – unless otherwise stated, all references are to that Act) by the Director of Chemicals Notification and Assessment ("Director").

SUMMARY:

Assessments should be based on the value of the relevant chemicals – either their transaction value, if that can be determined, or else their identical goods value, plus the cost of the insurance and freight and the customs duty payable on those chemicals.

I see no reasonably arguable basis to contend that packaging of any kind is to be valued for the purpose of the imposed charge.

How the NICNAS Scheme works

The IC Act imposes charges on persons who introduce "relevant industrial chemicals" to Australia above a threshold value, whether by Importation or manufacture. The IC Act requires that such persons register (s80B). Registered persons are required to lodge written statements indicating the value of relevant industrial chemicals actually introduced each year (per s80Q). On the basis of the statement, and of any other relevant information that is available to the Director, the Director must issue an assessment (80QA(1)).

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The IC Act has a complex but important set of interacting definitions, including of *chemical*, *industrial chemical*, *relevant industrial chemical*, and *industrial use*. The key definitions are set out in the attachment to this letter.

Administration of IC Act

The Director of Chemicals Notification and Assessment is given the function of managing the day to day administration of the IC Act "and must do so under the direction of the Chief Executive Officer" (s91(1)). The Director can delegate most of her functions to certain persons (s104A).

The Chief Executive Officer is the CEO of the National Occupational Health and Safety Commission.

The latest Commonwealth Government Directory shows Dr Margaret Hartley as the Director of the "Chemical Assessment Division – National Industrial Chemicals Notification and Assessment Scheme", within the National Occupational Health and Safety Commission.

The Occupational Health and Safety Commission is apparently an agency under the *Commonwealth Authorities and Companies Act 1997* (Cth) ("**CAC Act**") – see the note to s6 of the *Occupational Health and Safety Commission Act 1985* (Cth). As such it is bound by the Legal Services Directions made by the Attorney General, including the Directions on the Commonwealth's Obligation to Act as a Model Litigant ("**Model Litigant Direction**"). As such, the Occupational Health and Safety Commission and the Director are explicitly bound to endeavour to avoid litigation, and to act honestly and fairly in handling litigation.

The Occupational Health and Safety Commission and the Director are also bound by general policy directions of the Government – s28 CAC Act. A similar provision in another Commonwealth Act has been interpreted broadly to allow the responsible Minister to give binding directions to Commonwealth agencies – *NSW Farmers Association v Minister for Primary Industries and Energy* (1990) 94 ALR 207 (Full Federal Court).

The CAC Act requires inter alia that those managing CAC agencies:

- Give the responsible Minister such information as he requires (s16(1)(b))
- Exercise reasonable care and diligence (s22(1)), and make judgments in good faith and for a proper purpose (ss22 and 23)
- Not improperly to use his/her position to cause detriment to any person (ss24 and 26).

Civil and criminal penalties apply to breaches. In certain circumstances involving lack of good faith, the officer will not be indemnified (s27M).

Scope of the IC Act

The long title of the Act is "an Act to establish a national system of notification and assessment of industrial chemicals, to provide for registration of certain persons proposing to introduce industrial chemicals, and for related purposes."

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According to section 3, the IC Act's object –

"is to provide for a national system of notification and assessment of industrial chemicals for the purposes of:

- (3) aiding in the protection of the Australian people and the environment by finding out the risks to occupational health and safety, to public health and to the environment that could be associated with the importation, manufacture or use of the chemicals; and*
- (b) providing information, and making recommendations, about the chemicals to Commonwealth, State and Territory bodies with responsibilities for the regulation of industrial chemicals; and*
- (c) giving effect to Australia's obligations under international agreements relating to the regulation of chemicals; and*
- (d) collecting statistics in relation to the chemicals;*

being a system under which information about the properties and effects of the chemicals is obtained from importers and manufacturers of the chemicals."

Constitutional basis

If challenged, I expect that the Commonwealth would assert that the Act is justified by the Commonwealth Parliament's power to make laws which are appropriate to an independent, sovereign nation – the so-called implied nationhood power. Section 3, quoted above, seems intended to lay the groundwork for such a claim.

The foreign affairs power would also be called in aid to the extent that the Commonwealth can point to relevant treaty obligations concerning industrial chemicals.

In addition, s4 seeks to rely on the following heads of legislative power: corporations, interstate and overseas trade and commerce, the Territories power, and the power to make laws concerning dealings with the Commonwealth or an instrumentality of the Commonwealth (executive power and incidental power).

Outside the heads of power referred to in s4 (which are admittedly broad), the Act is of questionable validity.

The IC Act, and its companion Acts - *Industrial Chemicals (Registration Charge - Customs) Act 1997 (Cth)*, *Industrial Chemicals (Registration Charge - Excise) Act 1997 (Cth)* and *Industrial Chemicals (Registration Charge - General) Act 1997 (Cth)* – appear not to fall foul of s55 of the Constitution, which requires that taxing Acts deal only with one subject.

Cosmetics

"Cosmetic" is defined by the IC Act to mean:

"a product applied to a person's body for the purpose of its cleansing or care, colouring it, influencing its smell, or otherwise changing its appearance or smell, without affecting its structure or functions. (s5)

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The IC Act prohibits the introduction of "a new industrial chemical" without an assessment certificate. However it excepts from that prohibition "the introduction by a person of an amount of new industrial chemical not exceeding 10 kilograms in a period of 12 months (either by itself or in a mixture with one or more other chemicals):

(3) unless the person knows that the chemical poses an unreasonable risk to occupational health and safety, public health or the environment; and

(b) if the chemical is introduced in a cosmetic – if prescribed requirements relating to its introduction (including, but without being limited to, requirements relating to its use, packaging or labelling) are met." (s21(4))

Valuation

Registered persons are required to lodge written statements indicating "the value of relevant industrial chemicals actually introduced" each year (s80Q(1)). (On the basis of that statement "and of any other relevant information that is available to the Director, the Director must issue an assessment" setting out the amount of any registration charge payable. (s80QA(1)(a)))

Accordingly, the key concept is "the value of relevant industrial chemicals actually introduced". That term is defined in the IC Act, together with a series of interacting terms, as follows:

"Value of relevant industrial chemicals introduced" is defined to mean:

"the sum of:

(3) the value (if any) of the relevant industrial chemicals imported by that person during that period; and

(b) the value (if any) of the relevant industrial chemicals manufactured by that person during that period." (s5)

"Value of relevant industrial chemicals imported" is defined to mean:

"the amount worked out in accordance with subsection 7A(2)" (s5)

Section 7A(2) says "The value of relevant industrial chemicals imported by a person during a particular period ... is the amount, worked out to the nearest whole dollar, using the formula:

$$V + CIF + CD$$

Where;

'V' means the customs value (within the meaning of section 159 of the Customs Act 1901) of all of those relevant industrial chemicals.

'CIF' means the cost of the insurance and freight relating to those chemicals.

'CD' means the customs duty payable on those chemicals."

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In passing, we note that the last element involves imposition of a tax on a tax.

Section 159 of the *Customs Act* 1901 relevantly provides:

- "(1) *Unless the contrary intention appears in this Act or in another Act, the value of imported goods for the purposes of an Act imposing duty is their customs value and the Collector shall determine that customs value in accordance with this section.*
- (2) *Where a Collector can determine the transaction value of imported goods, their customs value is their transaction value.*
- (3) *Where a Collector cannot determine the transaction value of imported goods but can determine their identical goods value, their customs value is their identical goods value."*

It follows that the assessment should be based on the value of the relevant chemicals – either their transaction value, if that can be determined, or else their identical goods value, plus the cost of the insurance and freight and the customs duty payable on those chemicals.

Especially in light of the rule of statutory construction that taxing Acts are to be interpreted strictly, against the revenue, I see no reasonably arguable basis to contend that packaging of any kind is to be valued for the purpose of the imposed charge. The IC Act makes clear that there are only three elements in the valuation: the value of the relevant industrial chemicals plus the cost of the insurance and freight plus the customs duty payable on those chemicals.

That is reinforced by s80T which sets the amount of the charge by reference to "*the value of the chemicals introduced*".

In summary, the prospects of overturning assessments made on other bases are very strong.

That is consistent with the whole thrust of the IC Act, which is concerned with regulating industrial chemicals – not making a windfall gain for the Commonwealth revenue on the basis of the value added aspects of perfumes and other cosmetics represented by their packaging and get up.

I agree with the advice of the Australian Government Solicitor dated 15 February 1999 that the Act is not intended to tax the packaging in which cosmetics are presented.

In my long experience of public law, both within government and in private practice, I have not previously come across an example of a government agency setting its face against all legal advice and the plain meaning of its statute in the way that is being done here. It is a matter deserving of severe rebuke.

Judicial review?

We understand that a number of your members have commenced AAT proceedings against their assessments. The possibility of judicial review proceedings has been mooted. Any such judicial review proceedings would need to overcome s80QA(7) of the IC Act:

"The production of an assessment, or of a document purporting to be an assessment, signed by the Director or a delegate of the Director, is conclusive evidence:

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- (a) *of the due making of the assessment; and*
- (b) *except in proceedings under section 80QC [which provides for AAT review] on a review or appeal relating to the assessment – that the amounts specified in the assessment and all the particulars of the assessment are correct. “*

That provision seems intended to force persons objecting to assessments to use the AAT rather than judicial review. Similar provisions are found in seven other tax assessment Acts. None of those provisions seems to have been judicially interpreted yet. However, they might well be interpreted as disallowing judicial review under the *Administrative Decisions (Judicial Review) Act*. Nevertheless, the Constitutionally entrenched right to go to the High Court for judicial review remains (Australian Constitution, s75(v)).

WTO aspects

To the extent that charges imposed under the NICNAS scheme are applied in a manner that is discriminatory against imported products – as by including the value of packaged items – it is likely to be contrary to the rules of the World Trade Organisation, as well as domestic Australian law.

Please let me know if you require more information or further assistance.

Yours faithfully

Jan Cunliffe
Partner
Deacons

c.c. Mr G. Brownbill, Acil Consulting Pty Ltd. – By Fax: 02 6257 4170

**SOME DEFINITIONS FROM THE INDUSTRIAL CHEMICALS
(NOTIFICATION AND ASSESSMENT) ACT 1989**

Relevant industrial chemical is defined to mean "an industrial chemical:

- (a) that is not intended for an excluded use; and
- (b) that is not:
 - (i) a naturally-occurring chemical; or
 - (ii) a biological material ; or
 - (iii) an incidentally-produced chemical; or
 - (iv) a reaction intermediate"

Chemical is defined as "includes:

- (a) a chemical element, including a chemical element contained in a mixture; or
 - (b) a compound or complex of a chemical element, including such a compound or complex contained in a mixture; or
 - (c) a UVCB substance; or
 - (d) a naturally-occurring chemical;
- but does not include:
- (e) an article; or
 - (f) a radioactive chemical; or
 - (g) a mixture." (s6(1))

An **article** is defined as "an object that:

- (a) is manufactured for use for a particular purpose, being a purpose that requires that the object have a particular shape, surface or design; and
 - (b) is formed to that shape, surface or design during manufacture; and
 - (c) undergoes no change of chemical composition when used for that purpose except as an intrinsic aspect of that use;
- but does not include a particle or a fluid." (s6(2))

A **mixture** is defined as "a physical combination of chemicals resulting from deliberate mixing of those chemicals or from a chemical reaction, but does not include a UVCB substance". (s6(2))

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