

***PGBR 2012/D1 - Product Stewardship (Oil) Benefit: the meaning of the expression 'goods produced from used oil' and the terms 'filtered', 'de-watered', and 'de-mineralised' for the purposes of the Product stewardship for oil benefit scheme.***

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## Draft Product Grant and Benefit Ruling

Product Stewardship (Oil) Benefit: the meaning of the expression ‘goods produced from used oil’ and the terms ‘filtered’, ‘de-watered’, and ‘de-mineralised’ for the purposes of the Product stewardship for oil benefit scheme.

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### What this Ruling is about

1. This Ruling explains the meaning of the expression ‘goods produced from used oil’ and the terms ‘filtered’, ‘de-watered’, and ‘de-mineralised’ in the *Product Stewardship (Oil) Act 2000* (PSO Act)<sup>1</sup> and the *Product Stewardship (Oil) Regulations 2000* (PSO Regulations).

2. This Ruling also explains:

- the context of the Product stewardship for oil benefit scheme (PSO scheme);<sup>2</sup>
- the meaning of ‘recycled oil’;
- the meaning of ‘oils’; and
- the meaning of ‘used oil’.

<sup>1</sup> All legislative references in this draft Ruling are to the *PSO Act* unless otherwise indicated.

<sup>2</sup> Also referred to as the Product stewardship for oil benefit programme.

3. This Ruling only applies to high grade industrial burning oils (filtered, de-watered and de-mineralised) and low grade industrial burning oils (filtered and de-watered).

## Background

4. The objects of the PSO scheme are to ensure the environmentally sustainable management, re-refining and re-use of used oil and to support economic recycling options for used oil.<sup>3</sup>

5. The PSO scheme is governed by a statutory framework encompassing:

- PSO Act and PSO Regulations;
- *Product Grants and Benefits Administration Act 2000* (PGBAA) and Product Grants and Benefits Administration Regulations 2000;
- *Excise Act 1901*;
- *Excise Tariff Act 1921*; and
- *Customs Tariff Act 1995*.

6. The PSO Act is the entitlement Act<sup>4</sup> which establishes the general framework of the PSO scheme and the entitlement to a product stewardship (oil) benefit (the benefit). Subregulation 4(1) of the PSO Regulations sets out the amount of benefit that applies to each category of recycled oil as follows:<sup>5</sup>

Item	Category	Amount (cents/l)
1	Re-refined base oil (for use as a lubricant or a hydraulic or transformer oil) that meets the criteria mentioned in Schedule 1	50
2	Other re-refined base oils	10
3	Diesel fuels that comply with the <i>Fuel Standard (Automotive Diesel) Determination 2001</i> , as in force from time to time	7
4	Diesel extenders:	5
	(a) that are filtered, de-watered and de-mineralised; and	
	(b) that, if combined with diesel fuels, would produce a combined fuel that complies with the Determination mentioned in item 3	

<sup>3</sup> Section 3.

<sup>4</sup> See item 2 of the table in section 8 of the PGBAA.

<sup>5</sup> The benefit amounts set out in the table in paragraph 6 of this Ruling are current at the date of publication of the Ruling and may be subject to change.

<b>Item</b>	<b>Category</b>	<b>Amount (cents/l)</b>
5	High grade industrial burning oils (filtered, de-watered and de-mineralised)	5
6	Low grade industrial burning oils (filtered and de-watered)	3
7	Industrial process oils and lubricants, including hydraulic and transformer oils (re-processed or filtered, but not re-refined)	0
8	Gazetted oil consumed in Australia for a gazetted use	5.449
9	Recycled oil mentioned in item 5 or 6 that has been blended with a petroleum product that meets the criteria mentioned in Schedule 2	9.557

7. The PGBAA and Product Grants and Benefits Administration Regulations 2000 set out the eligibility criteria for registration, the entitlement for the benefit and administrative mechanisms for the payment of benefits to recyclers of oil. The *Excise Act 1901* provides for the administration of excise and for the licensing of manufacturers of excisable goods.

8. The *Excise Tariff Act 1921* and *Customs Tariff Act 1995* provides for the product stewardship levy on petroleum based oils and greases (and their synthetic equivalents).<sup>6</sup> The levy is in the form of an excise duty on domestically produced oils, greases and their synthetic equivalents; and a customs duty on similar imported oils, greases and their synthetic equivalents. The benefit is an amount (expressed in cents per litre) that applies to a quantity of recycled oil. The benefit is paid to an oil recycler for the sale or consumption of recycled oil that they have recycled.

9. While there is no direct connection between the levy and the benefit,<sup>7</sup> the payment of the levy ensures that some of the costs of used oil recycling are borne by the markets that gain the benefit from the production and use of that oil.<sup>8</sup>

10. Neither the PSO Act nor the PSO Regulations provide statutory meanings for the terms 'filtered', 'de-watered' and 'de-mineralised'. These terms are a description of the outcomes of the processes in producing high grade industrial burning oils and low grade industrial burning oils as set out in the table to subregulation 4(1) of the PSO Regulations.<sup>9</sup>

<sup>6</sup> Examples of petroleum based oils are lubricants, transmission oils and hydraulic oils.

<sup>7</sup> The exception being Item 8 of the PSO benefit table - gazetted oil consumed in Australia for a gazetted use.

<sup>8</sup> Department of the Environment and Heritage December 2005, *Product Stewardship for Oil Programme Administrative Guidelines*, Department of the Environment and Heritage, Canberra.

<sup>9</sup> See paragraph 6 of this Ruling for the table.

## ***Product Stewardship (Oil) Benefit Scheme***

11. You are entitled to a benefit for the sale or consumption of recycled oil that you have recycled in Australia.<sup>10</sup>

12. You are not entitled to a benefit unless you are registered for benefits under the PGBAA.<sup>11</sup>

13. You must satisfy the general<sup>12</sup> and specific<sup>13</sup> requirements for registration under the PGBAA. The general requirements for registration are that:

- you satisfy any specific requirements for a benefit;
- you satisfy any prescribed conditions; and
- that you hold an ABN or if you are not entitled to an ABN, you provide evidence of your identity and address as determined by the Commissioner.

14. You satisfy the specific registration requirements if the Commissioner is satisfied that:

- you are licensed to manufacture excisable goods under Part IV of the Excise Act;<sup>14</sup> and
- that you comply with relevant Commonwealth, State or Territory legislation relating to oil recycling operations or enterprises.<sup>15</sup>

15. You are not entitled to a benefit unless you make a claim for the payment of a benefit in respect of a claim period during which the entitlement arose. You must lodge your claim within three years after the start of the claim period.<sup>16</sup> The Commissioner must make an assessment of the amount of benefit to which you are entitled in respect of the claim period.<sup>17</sup>

16. The benefit is claimable once only on a litre of used oil that is recycled – at the last point in the production chain when sold for use to the end user rather than further recycling production.<sup>18</sup>

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<sup>10</sup> Section 9. What it means to be 'in Australia' is not discussed in this Ruling.

<sup>11</sup> Section 8.

<sup>12</sup> Subsection 9(2) of the PGBAA.

<sup>13</sup> Subsection 9(3A) of the PGBAA.

<sup>14</sup> The exception being where you are only entitled to a benefit for the consumption in Australia of a gazetted oil for a gazetted use – see paragraph 9(3A)(a) of the PGBAA.

<sup>15</sup> Regulation 4B of the Product Grants and Benefits Administration Regulations 2000.

<sup>16</sup> Section 15 of the PGBAA.

<sup>17</sup> Section 17 of the PGBAA.

<sup>18</sup> Subsection 10(3) of the PSO Act and paragraph 4(2)(b) of the PSO Regulations.

**Definitions**

17. Unless otherwise stated, all legislative references in this Ruling are to the PSO Act.

18. In this Ruling, unless otherwise stated:

- a reference to:
  - ‘benefit’ is a reference to a product stewardship (oil) benefit under section 9;
  - ‘Commissioner’ is a reference to the Commissioner of Taxation;
  - ‘excisable goods’ is a reference to goods specified in the Schedule to the *Excise Tariff Act 1921* on which excise duty is imposed;<sup>19</sup>
  - ‘Excise Act’ is a reference to the *Excise Act 1901*;
  - ‘Excise Tariff Act’ is a reference to the *Excise Tariff Act 1921*;
  - ‘Excise Acts’ is a reference to the *Excise Act 1901* and *Excise Tariff Act 1921*;
  - ‘PSO scheme’ is a reference to the Product stewardship for oil benefit scheme or the Product stewardship for oil benefit programme;
  - ‘PSO benefit table’ is a reference to the table contained in subregulation 4(1) of the Product Stewardship (Oil) Regulations 2000;
  - ‘PSO Regulations’ is a reference to the Product Stewardship (Oil) Regulations 2000; and
  - ‘PGBAA’ is a reference to the *Product Grants and Benefits Administration Act 2000*.
- it is assumed that:
  - you are registered for entitlement to a benefit under section 9 of the PGBAA;
  - you are licensed to manufacture excisable goods under Part IV of the Excise Act;<sup>20</sup>
  - you comply with relevant Commonwealth, State or Territory legislation relating to oil recycling operations or enterprises;<sup>21</sup> and
  - if you are entitled to a benefit you meet the requirements that entitle you to the benefit under section 9 of the PSO Act.

<sup>19</sup> See the definition of ‘excisable goods’ in subsection 4(1) of the Excise Act.

<sup>20</sup> Paragraph 9(3A)(a) of the PGBAA.

<sup>21</sup> Paragraph 9(3A)(b) of the PGBAA.

This Ruling applies to partnerships and unincorporated associations as if they were a person.<sup>22</sup>

## **Class of person**

19. This Ruling applies to the class of persons or entities who produce recycled oil by ‘filtering’ and ‘de-watering’ used oil; or by ‘filtering’, ‘de-watering’ and ‘de-mineralising’ used oil.

## **Ruling**

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### **Entitlement to a benefit**

20. You are entitled to a benefit for the sale or consumption of recycled oil that you have recycled in Australia.<sup>23</sup>

### **Meaning of ‘recycled oil’**

21. The term ‘*recycled oil*’ is defined as:

- (a) goods produced from used oil; or
- (b) used oil that has been restored to its former state.<sup>24</sup>

### **Meaning of ‘oils’**

22. ‘Oils’ are defined to be petroleum based oils or their synthetic equivalents or any other goods prescribed for the purposes of the definition of oil.<sup>25</sup> Petroleum based oils include lubricant base oils; hydraulic fluids; brake fluids; transmission oils; and transformer and heat transfer oils.<sup>26</sup>

### **Meaning of ‘used oil’**

23. The term ‘used oil’<sup>27</sup> is defined as follows:

Used oil means any oil that has been used and that, as a result of such use, is contaminated by physical or chemical impurities.

24. The Commissioner considers oil that is contaminated by physical or chemical impurities through its use as oil, and any subsequent contamination of this oil through storage or handling, is ‘used oil’ for the purposes of the PSO Scheme.

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<sup>22</sup> See sections 51 and 52 of the PGBAA.

<sup>23</sup> Section 9. What it means to be ‘in Australia’ is not discussed in this Ruling.

<sup>24</sup> See subsection 6(1). This Ruling does not deal with ‘used oil that has been restored to its former state’, for example re-refined base oils.

<sup>25</sup> At the time of publication of this Ruling no other goods were prescribed for the purposes of the definition of ‘oils’.

<sup>26</sup> Subsection 6(1).

<sup>27</sup> Subsection 6(1).

**Example 1: used oil**

25. *The XYZ Trucking Company (XYZ) services its own vehicles. XYZ changes the engine oil in these vehicles every 10,000 kilometres.*

26. *As a consequence of its use, that is, as engine oil, the oil has been contaminated by physical or chemical impurities such as water and metal shavings. The oil drained out of the vehicles satisfies the description of ‘used oil’.*

**Example 2: used oil**

27. *Following on from Example 1, XYZ stores the oil drained from its vehicles in a storage tank.*

28. *During its storage, the oil becomes further contaminated with water entering the tank through the vent pipe.*

29. *As the oil has been contaminated as a consequence of its actual use and subsequent storage, the oil is ‘used oil’ for the purpose of the PSO scheme.*

**Goods produced from used oil**

30. The phrase ‘goods produced from used oil’ in the definition of ‘recycled oil’ is not defined in the PSO Act.

31. The term ‘produced’ for the purposes of the PSO Act requires that the goods in question can be said to have emerged from a process as a new or different article having a distinctive<sup>28</sup> character or use.

32. The Commissioner considers that ‘goods produced from used oil’ are goods which are new or different having a distinctive character or use from the used oil as collected.

33. Where you produce recycled oil<sup>29</sup> from used oil, the amount of benefit payable is determined by reference to the relevant description of the recycled oil in the ‘Category’ column of the PSO benefit table.<sup>30</sup> For example, ‘Low grade industrial burning oils (filtered and de-watered)’ is specified at item 6 in the PSO benefit table.

**Example 3: goods produced from used oil**

34. *Di Waste Oils Pty Ltd (Di) is a waste management company that collects various used oils, coolants (glycol and water) and other hazardous liquids.*

<sup>28</sup> See paragraph 84 of this Ruling – distinctive means different

<sup>29</sup> See paragraphs 78 to 89 of this Ruling for an explanation of ‘produce’.

<sup>30</sup> Subsection 10(1) of the PSO Act and subregulation 4(1) of the PSO Regulations.

35. *These waste liquids are collected from several sites in a single journey. During collection, the waste liquids are pumped into a tanker using a flexible spear. The liquid passes into the tanker through a metal screen. By detecting audible changes in pump speed caused by variations in the viscosity of liquid passing through it, the tanker operator switches from one segregated part of the tanker to another to separate the fluids according to the relative viscosity.*

36. *This is done in order to optimise the separation of less viscous fluids which will be directly disposed of by Di as hazardous waste, from other higher viscosity liquids.*

37. *At Di's depot, the tanker's compartments containing the less viscous liquids are disposed of as hazardous waste. The higher viscosity liquids (comprising primarily used oils and hydraulic fluids) are pumped through a filter bag into a large fixed storage tank. The filter bag removes small particles of wear metal and other solid or semi-solid contaminants and any remaining emulsified solids.*

38. *The filtered oil is then de-watered using gravity settling. The de-watering process is concluded following an inspection by Di that the water content has reduced to the extent that it satisfies customer specifications.*

39. *The oil is then tested to ensure, among other things, that the oil is compliant with local council and state environmental legislation and that it meets customer specifications. The recycled oil is sold as 'low grade burner fuel'.*

40. *The 'low grade burner fuel' produced by Di is new or different with a distinctive character from the waste liquids as collected. The recycled oil is 'goods produced from used oil'.*

#### **Example 4: goods not produced from used oil**

41. *Rose is a waste oil collector and recycler. For her larger clients, Rose provides a 1,500 litre tank for the collection and accumulation of used oil.*

42. *To prevent physical contaminants (such as nuts, bolts and rags) from entering the storage tank, the tank has a coarse metal screen filter at the inlet. The purpose of this metal screen filter is to protect pumping equipment from damage when transferring the used oil from the tank to the road tanker.*

43. *As a result of the used oil's storage, some water (free water) in the used oil settles to the bottom of the storage tank.*

44. *Rose collects the used oil on a regular basis. Rose pumps the free water from the bottom of the tank into a compartment of her road tanker by use of a flexible spear. Once the transfer of free water is complete, the used oil is then transferred to a separate compartment on the road tanker.*

45. *Rose transports the used oil directly to a customer who uses the used oil as burner oil in a brick kiln.*

46. *Rose's activities at her client's premises are part of the collection and transportation of used oils.*

47. *Rose has not produced 'recycled oil' as the coarse screening of the nuts and bolts and the de-watering does not result in something new or different with a distinctive character from the used oil as collected.*

#### **'Filtered', 'de-watered' and 'de-mineralised'**

48. Where you produce recycled oil<sup>31</sup> from used oil, the amount of benefit payable is determined by reference to the relevant description of the recycled oil in the 'Category' column of the PSO benefit table.<sup>32</sup>

49. The terms 'filtered', 'de-watered', and 'de-mineralised' are a description of the outcomes of actions or processes in the production of recycled oil, namely high grade industrial burning oils and low grade industrial burning oils as prescribed in the PSO benefit table.<sup>33</sup> These terms are not defined in the PSO Act or Regulations.

#### ***Filtered***

50. The Commissioner considers that used oil has been 'filtered' if solid contaminants (such as metal shavings or dirt) arising from the oil's use have been reduced or removed from the used oil.

#### ***De-watered***

51. The Commissioner considers that used oil has been 'de-watered' if water arising through the oil's use has been reduced or removed from the used oil.

#### ***Example 5: goods produced from used oil – low grade industrial burning oils (filtered and de-watered)***

52. *Gianni is an oil recycler. Gianni collects used oil of varying type and quality from multiple sources.*

53. *Upon arrival at his depot, Gianni drains any free water from the road tanker and then pumps the used oil through a screen into a storage tank for further settling and the further removal of water.*

54. *To accelerate the removal of water, the used oil is then heated to drive off water by evaporation.*

<sup>31</sup> See paragraphs 78 to 89 of this Ruling for an explanation of 'produce'.

<sup>32</sup> Subsection 10(1) of the *PSO Act* and subregulation 4(1) of the *PSO Regulations*.

<sup>33</sup> See the PSO benefit table provided at paragraph 6 of this Ruling. A low grade industrial burning oil (filtered and de-watered) or a high grade industrial burning oil (filtered, de-watered and de-mineralised) requires a combination of 2 or 3 processes respectively.

55. Upon completion of the de-watering process, the oil undergoes filtering to remove any fine particles suspended in the used oil.

56. Gianni then samples and tests the oil to ensure the oil meets his customers' specifications for burner oil.

57. The burner oil produced by Gianni is 'recycled oil' that is new or different with a distinctive character from the used oil as collected. The recycled oil is 'goods produced from used oil'.

58. Gianni is entitled to a category 6 benefit as the recycled oil meets the description of low grade industrial burner oil (filtered and de-watered).

### **De-mineralised**

59. The Commissioner considers that used oil has been 'de-mineralised' if soluble and insoluble metal elements; and inorganic materials (such as salts and additives) arising through the oil's use have been reduced or removed from the used oil; producing cleaner burner oil (that is, high grade industrial burning oil) or feed oil for further refining.<sup>34</sup>

### **Example 6: goods produced from used oil – high grade industrial burning oils (filtered, de-watered and de-mineralised)**

60. Further to example 5, Gianni successfully tenders for the supply of high grade industrial burning oil.

61. To meet his customer's specifications for high grade industrial burning oil, Gianni is required to further treat the previously filtered and de-watered oil. To remove certain soluble metals and inorganic materials from the used oil, the used oil needs to be de-mineralised.

62. Gianni adds a quantity of sulphuric acid and a chemical surface-active reagent, called a surfactant. This causes the oil to separate into two phases, that is, oil and water-based or aqueous. The reagent causes soluble metals and other contaminants to accumulate in the aqueous phase and settle to the bottom of the tank where they are drained off as slurry.

63. The oil then undergoes centrifugal separation to remove any remaining fine particles suspended in the oil.

64. Gianni samples and tests the oil to ensure the oil meets his customer's specifications for high grade industrial burner oil.

65. The high grade industrial burner oil produced by Gianni is 'recycled oil' that is new or different with a distinctive character from the used oil as collected. The 'recycled oil' is 'goods produced from used oil'.

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<sup>34</sup> High grade industrial burning oils or feed oils that are filtered, de-watered and de-mineralised.

66. *Gianni is entitled to a category 5 benefit as the recycled oil meets the description of high grade industrial burner oil (filtered, de-watered and de-mineralised).*

## **Date of effect**

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67. When the final Ruling is issued, it is proposed to apply both before and after its date of issue. However, the Ruling will not apply to taxpayers to the extent that it conflicts with the terms of settlement of a dispute agreed to before the date of issue of the Ruling (see paragraphs 75 to 76 of Taxation Ruling TR 2006/10).

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**Commissioner of Taxation**

23 May 2012

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## Appendix 1 – Explanation

**❶** *This Appendix is provided as information to help you understand how the Commissioner’s preliminary view has been reached. It does not form part of the proposed binding public ruling.*

68. The meaning of the phrase ‘goods produced from used oil’ and the terms ‘filtered’, ‘de-watered’ and ‘de-mineralised’ must be determined having regard to the text of the legislation, the context in which those terms appear and the policy of the law.

### Entitlement to a benefit

69. You are entitled to a benefit for the sale or consumption of recycled oil that you have recycled in Australia.<sup>35</sup>

### Meaning of ‘recycled oil’

70. The terms ‘recycled oil’ or ‘recycling of oils’ are defined in subsection 6(1) as:

**recycled oil** means:

- (a) goods produced from used oil; or
- (b) used oil that has been restored to its former state.<sup>36</sup>

**recycling of oils** means:

- (a) the production of goods from used oils; or
- (b) the restoring of used oils to their former state.<sup>37</sup>

71. The Commissioner considers the term ‘recycled oil’ describes the type of recycled oils; whereas the term ‘recycling of oils’ is a reference to processes that results in a recycled oil.

### Meaning of ‘oils’

72. The term ‘oils’ is defined in subsection 6(1) as follows:

**oils:** the following are oils:

- (a) petroleum based oils (including lubricant base oils; prepared lubricant additives containing carrier oils; lubricants for engines, gear sets, pumps and bearings; greases; hydraulic fluids; brake fluids; transmission oils; and transformer and heat transfer oils);
- (b) synthetic equivalents of goods covered by paragraph (a);
- (c) any other goods prescribed for the purposes of this definition.<sup>38</sup>

<sup>35</sup> Section 9. What it means to be ‘in Australia’ is not discussed in this Ruling.

<sup>36</sup> Subsection 6(1).

<sup>37</sup> Subsection 6(1).

73. Petroleum based oil does not include an oil derived from plant or animal matter, for example a vegetable oil.

***Meaning of ‘used oil’***

74. Subsection 6(1) defines ‘used oil’ to be:

any oil that has been used and that, as a result of such use, is contaminated by physical or chemical impurities.

75. The Commissioner considers that any oil<sup>39</sup> that is employed for a use as oil, and as a result of that use, is contaminated by physical or chemical impurities is ‘used oil’ for the purposes of the PSO Act.

76. Physical impurities may include (but not limited to) metal shavings and dirt. Chemical impurities may include (but not limited to) metal elements (for example chromium), solvents, glycol and water.

77. Used oil that subsequently becomes further contaminated through its storage or handling is ‘used oil’ for the purposes of the PSO Scheme. For instance, motor oil that has been used in a vehicle that becomes contaminated with large foreign material (such as bolts, nuts and washers) or other impurities (such as water) during its collection, handling or storage is ‘used oil’.

***Goods produced from used oil***

78. The terms ‘production’ and ‘produced’ within the meaning of ‘recycled oil’ or ‘recycling of oils’ (respectively) are not defined by the PSO Act or PSO Regulations.

***‘Production’ or ‘Produced’***

79. The *Macquarie Dictionary*<sup>40</sup> defines ‘production’ and ‘produced’ respectively as follows:

***Production***

*noun*

1. the act of producing; creation; manufacture.
2. that which is produced; a product.
3. *Economics* the creation of value; the producing of articles having an exchangeable value.
4. the total amount produced.

***Produced***

*verb (t)*

<sup>38</sup> Currently no goods are prescribed for the purposes of the definition of ‘oils’.

<sup>39</sup> See definition of ‘oils’ in subsection 6(1).

<sup>40</sup> *The Macquarie Dictionary*, [Multimedia], version 5.0.0, 1/10/01.

to bring into existence; give rise to; cause: *to produce steam.*

3. *Economics* to create (something having an exchangeable value).

4. to bring forth; bear; give birth to.

5. to yield; provide, furnish, or supply: *a mine producing silver.*

10. to bring forth or yield offspring, products, etc.

11. *Economics* to create value; bring crops, goods, etc., into a state in which they will command a price.

*noun*

12. that which is produced; yield; product.

13. agricultural or natural products collectively.

The *Australian Oxford Dictionary*<sup>41</sup> defines 'produce' as

2 manufacture (goods) from raw materials etc.

3 bear or yield (offspring, fruit, a harvest etc).

4 bring into existence.

80. Relevant to the meaning of recycled oil, the ordinary meaning of 'produce' includes 'manufacture' within its definition.

81. In *Caltex Australia Petroleum Pty Ltd v. Commissioner of Taxation*<sup>42</sup> (*Caltex*) the Federal Court was required to consider the phrase 'manufactured or produced' for the purposes of the Excise Tariff Act. Sundberg J cited with approval the judgement of Lockhart J in *Federal Commissioner of Taxation v. Jax Tyres Pty Ltd*<sup>43</sup> (*Jax Tyres*) in the context of sales tax legislation:

To manufacture an article necessarily involves producing a different article from the articles, materials or ingredients from which it was made. As Darling J. said in *McNicol v. Pinch* (1906) 2 K.B. 352 at p. 361:

'I think the essence of making or of manufacturing is that what is made shall be a different thing from that out of which it is made.'

That passage was approved and applied by Dixon J. in *Federal Commissioner of Taxation v Jack Zinader Pty Ltd* (1949) 78 CLR 336 – the leading case in this field. Whether the article which results from the process of manufacturing is a different article from the constituents or ingredients from which it was made is a question of fact: the *Jack Zinader* case.

<sup>41</sup> *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne.

<sup>42</sup> *Caltex Australia Petroleum Pty Ltd v. Commissioner of Taxation* [2008] FCA 1951.

<sup>43</sup> *Federal Commissioner of Taxation v. Jax Tyres Pty Ltd* (1984) 5 FCR 257.

**‘Production’**,...is a word of wide import; but it still involves the element of producing something different from the materials from which it was made. It is not possible to formulate precise definitions of such general terms as ‘manufacture’ and ‘production’; but they do not bear a restricted meaning. Whatever answers the description of ‘manufacture’ or ‘production’ of goods according to accepted usage of the English language is within the Act.<sup>44</sup> [Emphasis added]

82. In *Caltex*, Sundberg J, in relying on *Jax Tyres*<sup>45</sup>, held that for the purposes of section 5 of the Schedule to the Excise Tariff Act, goods are manufactured or produced if they have emerged from a process as a ‘new and different article ... having a distinctive character or use’.<sup>46</sup>

83. The Commissioner considers that based on the reasoning in the above mentioned cases, an ordinary meaning should be attributed to terms ‘produce’ or ‘production’ for the purposes of the PSO Act.

84. In this context, the term ‘produced’ requires that the goods in question can be said to have emerged from a process as a new or different article having a distinctive character or use. The ordinary meaning of ‘distinctive’ means ‘distinguishing; serving to distinguish’ and the ordinary meaning of ‘distinguish’ means ‘different’.<sup>47</sup> In particular circumstances the difference in character may be slight or it may be great.

85. In determining whether you have ‘goods produced from used oil’ it is necessary for the goods to be new or different having a distinctive character or use from the used oil as collected.

86. Some factors to be taken into consideration in determining whether a thing is different from that out of which it was made were discussed in the High Court by Windeyer J in *M.P. Metals Pty Ltd v. Federal Commissioner of Taxation*.<sup>48</sup>

...Identity and difference, as concepts, must always be related to some quality of the thing or things in respect of which identity or difference is to be determined. It may be colour, shape, chemical composition or any other quality. To speak of ‘substantial differences’, as distinct from small differences, means little or nothing, unless some quality of the thing is postulated as its essential.

<sup>44</sup> *Caltex Australia Petroleum Pty Ltd v. Commissioner of Taxation* [2008] FCA 1951 at paragraph 65.

<sup>45</sup> *Commissioner of Taxation v Jax Tyres Pty Ltd* (1984) 5 FCR 257 at 264.

<sup>46</sup> *Caltex Australia Petroleum Pty Ltd v Commissioner of Taxation* [2008] FCA 1951 at paragraph 71.

<sup>47</sup> *The Macquarie Dictionary* [Multimedia], version 5.0.0, 1/10/01.

<sup>48</sup> *M.P. Metals Pty Ltd v. Federal Commissioner of Taxation* (1967) 117 CLR 631; (1967) 14 ATD 407. This case discussed a provision of the *Income Tax and Social Services Contribution Assessment Act 1936-1965* (Cth).

87. It will be a question of fact and degree in relation to which an exercise in judgement is involved as to whether the end product constitutes a new or different thing from that out of which it was made or results. This involves a process of evaluating and weighing a range of factors for the particular circumstance. In particular circumstances the difference in character may be slight or it may be great.

88. In determining, whether the recycled oil is new or different from the used oil, the Commissioner may have regard to the following factors:

- changes in physical or chemical properties (for example ash content);
- type of used oil being processed (for example transformer oil, used engine oils or co-mingled used oils); and
- extent to which used oil has been filtered, de-watered or de-mineralised.

The relevance and weighting afforded to the above factors<sup>49</sup> will vary according to the facts of the individual case.

89. Where you produce recycled oil from used oil the amount of benefit payable is determined by reference to the relevant description of the recycled oil in the 'Category' column of the PSO benefit table.<sup>50</sup> For example, 'Low grade industrial burning oils (filtered and de-watered)' is specified at item 6 in the PSO benefit table.

### ***The PSO scheme is not intended to apply to collectors***

90. The Commissioner considers the PSO scheme is not intended to directly benefit collectors of used oil (that is, through the payment of a benefit):

#### ***Impact on Waste Oil Collectors***

Although it is not intended that collectors will be direct recipients of a levy, or directly participate in any trading of certificates, they should nevertheless benefit from the product stewardship system proposed. The increased value given to waste oil through the product stewardship system levy will flow, virtually immediately, to approved recyclers. This should have the effect of improving the operating margins of recyclers, and causing them to require greater quantities of oil. With recyclers competitively seeking more oil, the collectors in turn should be better placed commercially to achieve better margins on existing quantities, or go further afield in search of new sources of waste oil.<sup>51</sup>

<sup>49</sup> This is not an exhaustive list.

<sup>50</sup> Subsection 10(1) of the PSO Act and subregulation 4(1) of the PSO Regulations.

<sup>51</sup> See page 32 of the Explanatory Memorandum to the Product Stewardship (Oil) Bill 2000.

91. Notwithstanding the PSO scheme is a beneficial scheme designed to encourage the recycling of oils, the Commissioner considers that not all filtering and de-watering processes may result in the production of recycled oil that is new or different having a different character or use from the used oil as collected.

92. When having regard to a waste oil collector's activities<sup>52</sup> (which may similarly occur at a premise), the coarse screening to facilitate the collection and transportation of used oil, and the extent of any de-watering that may occur; the Commissioner considers a collector is not producing goods that are new or different having a distinctive character or use from the used oil as collected. However, this is a question of fact and degree with each case decided on its merits.

#### **'Filtered', 'de-watered' and 'de-mineralised'**

93. Where you produce recycled oil<sup>53</sup> from used oil, the amount of benefit payable is determined by reference to the relevant description of the recycled oil in the 'Category' column of the PSO benefit table.<sup>54</sup>

94. The terms 'filtered', 'de-watered', and 'de-mineralised' are a description of the outcomes of actions or processes in the production of recycled oil, namely high grade industrial burning oils and low grade industrial burning oils as prescribed in the PSO benefit table.<sup>55</sup> These terms are not defined in the PSO Act or PSO Regulations.

95. A low grade industrial burning oil (filtered and de-watered) or a high grade industrial burning oil (filtered, de-watered and de-mineralised) requires a combination of 2 or 3 processes respectively.

96. The higher benefit paid for 'High grade industrial burning oils' at item 5 reflects the higher level of recycling performed (that is, the requirement for the oil to also be de-mineralised) and the consequent lower level of contaminants associated with the product.

97. De-mineralisation is a further step in the processing of recycled oils. If this was not the case, there would be effectively no difference between the terms 'filtered and de-watered' for low grade industrial burning oils and 'filtered, de-watered and de-mineralised' for high grade industrial burning oils.

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<sup>52</sup> In *Caltex Australia Petroleum Pty Ltd v Commissioner of Taxation* [2008] FCA 1951, Sundberg J explained at 71 that the principle objectives of a commercial operation may be relevant to the question of characterisation as they provide context for the task of characterisation and are an important factor to take into account. However, they are not determinative in ascertaining whether a good is manufactured or produced.

<sup>53</sup> See paragraphs 78 to 89 of this Ruling for an explanation of 'produce'.

<sup>54</sup> Subsection 10(1) of the PSO Act and subregulation 4(1) of the PSO Regulations.

<sup>55</sup> See the PSO benefit table provided at paragraph 6 of this Ruling.

## **Filtered**

98. The Macquarie Dictionary<sup>56</sup> defines ‘filter’ as follows:

*noun*

1. any device in which cloth, paper, porous porcelain, or a layer of charcoal or sand, is held and through which liquid is passed to remove suspended impurities or to recover solids.

*verb (t)*

6. to remove by the action of a filter.

7. to act as a filter for.

8. to cause to pass through, or as through, a filter.

*verb (i)*

9. to percolate; pass through or as through a filter.

99. The following filters are typically used by the oil recycling industry<sup>57</sup>:

- bag filters;
- screen filters;
- filter pads;
- bentonite clay filter;
- activated clay filter; and
- centrifugal separators.

100. The reduction or removal of solid contaminants from used oil is typically achieved by passing used oil through a filter or series of filters.

101. The effectiveness of the filter depends on the size and type of filter being utilised relative to the solid contaminants present in the used oil. For example, a 400 micron<sup>58</sup> bag filter is not designed to remove (that is, filter out) solid contaminants with a particle size measuring 350 microns.

102. The meaning of filtering and de-mineralisation in the context of the PSO Scheme have been described as:

The purpose of filtering and demineralisation (sic) is to remove inorganic materials and certain additives from used oil to produce a cleaner burner fuel or feed for re-refining.<sup>59</sup>

103. The Commissioner considers that used oil has been ‘filtered’ if solid contaminants arising from the oil’s use have been removed or reduced from the used oil.

<sup>56</sup> *The Macquarie Dictionary*, [Multimedia], version 5.0.0, 1/10/01.

<sup>57</sup> This is not an exhaustive list.

<sup>58</sup> 1 micron equals 0.001 millimetres or 1000 microns equals 1 millimetre.

<sup>59</sup> Department of Sustainability, Environment, Water, Population and Communities, viewed 30 April 2012, [www.oilrecycling.gov.au/what-happens.html](http://www.oilrecycling.gov.au/what-happens.html).

104. While the coarse screening of nuts, bolts, rags and other large foreign material which have become mixed in with used oil (usually the result of handling or storage) may be seen as a form of filtering; the type and extent of this filtering will not ordinarily produce something new or different having a distinctive character or use from the used oil as collected.

### ***De-watered***

105. To understand the meaning of the term 'de-watered' in the context of used oil recycling, it is necessary to understand the states in which water co-exists with oil.

106. Water can exist in oil in three states or phases being dissolved water, emulsified water and free water.

107. Dissolved water refers to individual water molecules dispersed throughout the oil. Dissolved water in oil is a function of its environment – the relative humidity, temperature and type of oil determines the content of dissolved water in oil.

108. Emulsified water is a reference to water that has been mixed and homogenised in oil to form an emulsion. Emulsion can occur when the amount of water in the oil has exceeded the maximum level for it to remain dissolved. At this point, water is suspended in the oil in microscopic droplets. When this happens in lubricating oils, the oil is said to be cloudy or hazy.

109. Free water is water that is free to separate and settle to the base of a reservoir or storage tank.

110. The question that arises in attributing a meaning to 'de-watered' in the context of the PSO scheme is whether the process of de-watering must entail the removal of dissolved water, emulsified water, and free water or either one or more of these states of co-existence with oil.

111. It could be said the prefix 'de' in the word 'de-watered' connotes the removal of all water from the used oil as 'de-watered'. *The Macquarie Dictionary*<sup>60</sup> defines the pre-fix 'de' as follows:

a prefix meaning:

1. privation and separation, as in dehorn, dethrone, detrain.
2. negation, as in demerit, derange.
3. descent, as in degrade, deduce.
4. reversal, as in deactivate.
5. intensity, as in decompose.

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<sup>60</sup> *The Macquarie Dictionary*, [Multimedia], version 5.0.0, 1/10/01.

112. The meaning of 'de-watering' has been described as:

Water is found in used oil as free water or bound water, for example in emulsions. The term dewatering (sic) is usually taken to mean the removal of free water. Where water has been emulsified with oil, the emulsion has to be 'broken' with a de-emulsifier before the water can be separated from the oil.

Dewatering (sic) is a simple process relying on the separation of aqueous and oil phases over time under the influence of gravity. The used oil is allowed to stand in a tank (raw waste oil) and free water drops to the bottom where it can be drained, treated (waste water treatment) and discharged appropriately to sewer or stormwater depending on quality and local regulations.<sup>61</sup>

113. The extent to which used oil is de-watered is ultimately determined by the type of recycled oil being produced.

114. The following de-watering methods are typically used by the oil recycling industry:

- gravity settling;
- application of heat;
- centrifuge;
- de-emulsifiers (application of chemicals); and
- flash evaporation.<sup>62</sup>

115. Gravity settling does not remove emulsified water. The removal or reduction of emulsified water in used oil requires further processing of the oil than simply gravity settling as the emulsion must be 'broken apart' for water to separate from the oil. Common methods used by the oil recycling industry to remove emulsified water include the application of heat and the use of de-emulsifiers.

116. The Commissioner considers that used oil is de-watered if it is subjected to a process that removes or reduces the amount of any water in the used oil.

### ***De-mineralised***

117. In the context of used oil recycling, it is appropriate to have regard to the generally accepted meaning of 'de-mineralised' within the oil recycling industry.

118. Further to paragraph 102 of this Ruling, the meaning of filtering and de-mineralisation in the context of the PSO Scheme have been described as:

The purpose of filtering and demineralisation (sic) is to remove inorganic materials and certain additives from used oil to produce a cleaner burner fuel or feed for re-refining.<sup>63</sup>

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<sup>61</sup> Department of Sustainability, Environment, Water, Population and Communities, viewed 30 April 2012, [www.oilrecycling.gov.au/what-happens.html](http://www.oilrecycling.gov.au/what-happens.html).

<sup>62</sup> This is not an exhaustive list.

119. An independent review of the PSO scheme considered (after consultation with the oil recycling industry) that:

Demineralisation (sic) is a process involving removal of metals and other inorganics from the used oil, with a mild form of sulphuric acid treatment. An acidic sludge is produced as a waste stream and this must be treated and disposed of in an appropriate manner.<sup>64</sup>

120. Soluble and insoluble metal elements may be present in the used oil (depending on the type or mixture of the used oil) as a consequence of its use. Used oil may contain metals such as calcium, chromium, copper, lead, potassium, sodium, sulphur and vanadium. This is not an exhaustive list and it is recognised that used oil may contain other metals and compounds.

121. The effectiveness of de-mineralisation is dependent on the type and quality of the used oil being processed and the level of treatment applied.

122. A typical process of de-mineralisation involves the use of a chemical surface-active reagent known as a surfactant. The surfactant causes the used oil to break into two phases, being oil and water-based or aqueous. The surfactant causes the contaminants in the used oil to accumulate in the aqueous phase, which settle to the bottom of a tank as a slurry. The slurry contains metals and some of the oil additives. The slurry is then drained off, dried and disposed of appropriately.

123. The Commissioner recognises that the use of chemical surface-active reagents is only one method of de-mineralising used oils and that other methods can be used to reduce or remove soluble and insoluble metals, inorganic materials, minerals and oil additives.<sup>65</sup>

124. The Commissioner considers that de-mineralisation is a reference to a process that involves the reduction or removal of soluble and insoluble metals, inorganic materials and minerals (in whole or in part) from used oil.

125. The removal of solid metals and non-metallic contaminants solely by filtering is not de-mineralisation for the purposes of the PSO Regulations – de-mineralisation requires the removal of contaminants that cannot be filtered out. The purpose of de-mineralisation is to produce a cleaner burner fuel or feed oil for refining and as such requires used oil to be treated beyond the filtering and de-watering necessary to produce low grade industrial burning oil.

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<sup>63</sup> Department of Sustainability, Environment, Water, Population and Communities, viewed 30 April 2012, [www.oilrecycling.gov.au/what-happens.html](http://www.oilrecycling.gov.au/what-happens.html).

<sup>64</sup> See page 47 of the Australian Academy of Technological Sciences and Engineering, *Independent Review of the Transitional Assistance Element of the Product Stewardship for Oil (PSO) Programme* (March 2004).

<sup>65</sup> Oils may contain from 2 to 5% additives. Additives (for example antioxidants, wear protection additives and de-foamants) extend the life of the oil and enhance its performance.

## **Appendix 2 – Your comments**

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126. You are invited to comment on this draft Ruling, including the proposed date of effect. Please forward your comments to the contact officer by the due date.

127. A compendium of comments is prepared for the consideration of the relevant Rulings Panel or relevant tax officers. An edited version (names and identifying information removed) of the compendium of comments will also be prepared to:

- provide responses to persons providing comments; and
- be published on the ATO website at [www.ato.gov.au](http://www.ato.gov.au).

Please advise if you do not want your comments included in the edited version of the compendium.

**Due date:** 6 July 2012

**Contact officer:** John Marando

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## **Appendix 3 – Detailed contents list**

128. The following is a detailed contents list for this Ruling:

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## References

### *Previous draft:*

Not previously issued as a draft

### *Related Rulings/Determinations:*

TR 2006/10; ER 2012/D1

### *Subject references:*

- benefit
- de-mineralised
- de-watered
- filtered
- oils
- recycled waste oil
- recycling of oils
- used oil

### *Legislative references:*

- Customs Tariff Act 1995
- Excise Act 1901
- Excise Act 1901 4(1)
- Excise Act 1901 Part IV
- Excise Tariff Act 1921
- Excise Tariff Act 1921 5
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- PGBAA 2000
- PGBAA 2000 8 item 2
- PGBAA 2000 9
- PGBAA 2000 9(2)
- PGBAA 2000 9(3A)
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- PGBAA 2000 9(3A)(b)
- PGBAA 2000 15
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- PGBA Regulations 2000 4B
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- PSO Act 2000 3
- PSO Act 2000 6(1)
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- PSO Regulations 2000 4(1) item 6

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### *Case references:*

- Caltex Australia Petroleum Pty Ltd v. Commissioner of Taxation [2008] FCA 1951; (2008) 74 ATR 676
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