ER 2012/1 - Excise: the meaning of the expression 'manufactured or produced' for the purposes of the Excise Acts

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This ruling is being reviewed as a result of a recent court/tribunal decision. Refer to Decision Impact Statement: Cooper Bros Holdings Pty Ltd trading as Triple R Waste Management v Commissioner of Taxation (2011/3815).

There is a Compendium for this document: **ER 2012/1EC** .

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Excise Ruling

Excise: the meaning of the expression 'manufactured or produced' for the purposes of the Excise Acts

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This publication (excluding appendixes) is a public ruling for the purposes of the *Taxation Administration Act 1953*.

A public ruling is an expression of the Commissioner's opinion about the way in which a relevant provision applies, or would apply, to entities generally or to a class of entities in relation to a particular scheme or a class of schemes.

If you rely on this ruling, we must apply the law to you in the way set out in the ruling (unless we are satisfied that the ruling is incorrect and disadvantages you, in which case we may apply the law in a way that is more favourable for you - provided we are not prevented from doing so by a time limit imposed by the law). You will be protected from having to pay any underpaid duty or penalty in respect of the matters covered by this ruling if it turns out that it does not correctly state how the relevant provision applies to you.

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What this Ruling is about

1. This Ruling provides the Commissioner's view regarding the meaning of the expression 'manufactured or produced' for the purposes of the excise regime.

Background

2. The Commissioner has the general administration of the excise regime[1] with its framework principally provided by the Excise Act and the Excise Tariff Act.

3. Section 2 of the Excise Tariff Act provides that the Excise Act, Excise Tariff Act and *Petroleum Excise (Prices) Act 1987*[2] are to be read as one.

[1] See sections 4 (definition of CEO) and 7 of the Excise Act, and sections 1A and 3 (definition of CEO) of the Excise Tariff Act.
[2] The *Petroleum Excise (Prices) Act 1987* relates to the determination of a Volume Weighted Average Realised Price for the calculation of excise duty on stabilised crude petroleum oil and condensate.

4. The Excise Act deals with matters such as general administration, licensing, control of excisable goods, the payment of excise duty and the remission, refund and drawback of excise duty.

5. Excisable goods are defined in section 4 of the Excise Act to mean goods in respect of which excise duty is imposed by the Parliament, and includes goods the subject of an Excise Tariff or Excise Tariff alteration proposed in the Parliament.

6. To manufacture excisable goods, you are required to be a licensed manufacturer.[3] A licensed manufacturer can only manufacture excisable goods at licensed premises in accordance with the conditions specified in the manufacturer licence.[4]

7. Licence holders are responsible for the safe custody of all excisable goods held on their premises and for the observance of the Excise Act at the premises specified in their licence.[5]

8. The Excise Tariff Act deals with the imposition of excise duty and matters relating to duties of excise.

9. Section 5 of the Excise Tariff Act imposes excise duty on goods dutiable under the Schedule that are 'manufactured or produced' in Australia. The Schedule lists the various goods that are subject to excise duty and the rate of duty applicable.

10. 'Australia' is defined in sections 4 and 4A of the Excise Act to exclude certain external territories, but include certain installations (a resources installation or sea installation) which are deemed to be part of Australia.

11. The relevant definition of Australia for excise purposes is the definition in the Acts Interpretation Act[6] as modified by the Excise Act. For the purposes of the excise regime, the term 'Australia' does not include any external Territory[7] but includes certain installations (a resources installation or sea installation – for example, an oil rig) which are treated as being part of Australia under section 4A of the Excise Act.

Interpretation

12. In this Ruling, unless otherwise stated:

- a reference to:
  - 'Acts Interpretation Act' is a reference to the *Acts Interpretation Act 1901*;

[3] Section 25 of the Excise Act.
[4] Sections 26 and 39D of the Excise Act.
[5] Section 53 of the Excise Act.
[6] Section 2B of the Acts Interpretation Act.
[7] The external territories are: Australian Antarctic Territory; Coral Seas Islands; Norfolk Island; Territory of Ashmore Reef and Cartier Island; Territory of Christmas Island; Territory of Cocos (Keeling) Islands; Territory of Heard and McDonald Islands.

- ‘Customs Act’ is a reference to the *Customs Act 1901*;
- ‘Excise Acts’ is a reference to the *Excise Act 1901* and *Excise Tariff Act 1921*;
- ‘Excise Act’ is a reference to the *Excise Act 1901*;
- ‘Excise Tariff Act’ is a reference to the *Excise Tariff Act 1921*;
- ‘Fuel Tax Act’ is a reference to the *Fuel Tax Act 2006*;
- ‘manufacture or produce’ is also a reference to ‘manufactured or produced’;
- ‘the Schedule’ is a reference to the Schedule to the Excise Tariff Act;

- ‘article’, ‘good’ or ‘thing’ are used interchangeably; and
- ‘process’ is to be read in context to cover processes.

Class of entities

13. This Ruling applies to the class of entities that have obligations under the Excise Acts for goods that are ‘manufactured or produced in Australia’.

Ruling

14. You have a liability to pay excise duty in accordance with the Excise Acts[8] if you manufacture or produce excisable goods in Australia.

Meaning of ‘manufactured or produced’

15. The phrase ‘manufactured or produced’ for the purposes of the Excise Acts, requires that something new or different, having a distinctive[9] character or use, results from a process. It is the end result that is determinative; however the complexity of the process may still be relevant.

16. It is 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.

[8] See section 54 of the Excise Act and section 5 of the Excise Tariff Act.
[9] See paragraph 95 of this Ruling – distinctive means different.

Factors that may be taken into account in determining whether something new or different has been manufactured or produced in an excise context include:

The thing did not previously exist

17. The thing did not previously exist. The parts have been combined to form a thing that is distinct (for example, commercially distinct) from that out of which it is made having a distinctive character or use.

18. Whether something is new or different does not depend upon whether the original parts remain identifiable at the end of the process. Whether the physical identity of the parts is retained or lost by fusion or some process is not determinative.

A different thing from that out of which it is made or results

19. The thing that is brought into existence has new or different qualities, properties or combinations thereof from that out of which it is made or derived. It may be any quality that indicates a difference – qualities such as colour, shape, or chemical composition. For example, a change in chemical composition by adding, removing, combining or altering the chemical characteristic of the thing being manufactured or produced.

Change in form

20. A change in form (for example, change from solid to liquid, or liquid to gas) does not automatically mean that manufacturing or production has occurred. Where a change in form has occurred you will still need to consider whether something new or different has resulted from this change – for example it has new qualities, properties or combinations thereof.

Differences in its utility

21. The existence of something new or different may depend on or result from not only a change in its chemical or physical characteristics but also upon a change in its utility, for example creating a saleable commodity if the commodity is new or different having a distinctive character or use.

Improving the goods

22. Improvements to goods in existence may result in something new or different where the improvements give the goods new or different qualities, properties, utility or combinations thereof.

Subjective intention is relevant but not determinative

23. Whether or not an entity has intended for the thing to be manufactured or produced, or whether the thing has come into existence incidentally as a consequence of some process, is relevant but not determinative of whether something has been manufactured or produced.[10]

Quality or value of incidental goods

24. A good that comes into existence incidentally from a process and is of a relatively lower quality or value from the main goods made from the process may still be considered manufactured or produced.[11]

Goods for own consumption

25. Goods that are brought into existence for the consumption of the manufacturer or producer and not a third party consumer, may still be considered manufactured or produced.

Application of skill, knowledge or labour

26. Manufacture or production may involve the application of skill, knowledge or labour to a thing that brings into existence something new or different having a distinctive character or use.

Example 1: manufacture or production of an excisable good

27. *Dandy Tobacco Company (DT) purchases duty paid cut tobacco.*[12] *DT specialises in producing middle-eastern styled tobacco that is smoked through water pipes or hookahs. DT adds molasses and other ingredients to the tobacco to produce molasses tobacco in Australia.*

28. *Item 5 of the Schedule refers to tobacco, cigars, cigarettes and snuff. The term 'tobacco' is defined in the preamble to the Schedule and means tobacco leaf subjected to any process other than curing the leaf as stripped from the plant. Where cut tobacco is subject to further processing to produce another tobacco product, that end product also meets the definition of tobacco. The process also requires the application of skill and knowledge.*

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[10] *Caltex Australia Petroleum Pty Ltd v. Commissioner of Taxation* [2008] FCA 1951 at paragraph 71.

[11] *Caltex Australia Petroleum Pty Ltd v. Commissioner of Taxation* [2008] FCA 1951 at paragraph 71.

[12] Cut tobacco is tobacco leaf that has been subject to processes other than curing, for example, cured tobacco leaf that has been cut into shreds or thin strips for use in cigarettes or pipes.

29. *The addition of molasses to cut tobacco amounts to the manufacture or production of tobacco. The process results in a product that is different and has a distinctive character from that out of which it is made.*

30. *Consequently, the molasses tobacco is an excisable good.*

Example 2: manufacture or production of an excisable good and a non-excisable good

31. *Levy Company (Levy) wants to reduce the alcoholic content of wine, a sauvignon blanc, by subjecting it to the process of evaporative perstraction.*

32. *Levy first puts the sauvignon blanc through a reverse osmosis process that separates the wine into a wine permeate and a wine retentate. The wine permeate then moves onto a membrane, which comprises very small pores and has two surfaces. Water runs along the outside surface of the membrane. Alcohol from the wine permeate evaporates at the pores of the surface of the membrane and passes through the membrane. On exit from the pores of the membrane, the alcohol condenses and dissolves, or mixes, into the water running along the outside surface of the membrane.*

33. *At the conclusion of the process, Levy has two products. One is reduced alcohol sauvignon blanc, and the other is alcoholised water with an alcoholic content of 9% alcohol by volume (a/v).*

34. *The processes undertaken by Levy to reduce the alcoholic content of wine described result in changes to the sauvignon blanc resulting in products (reduced alcohol sauvignon blanc and alcoholised water) that are different from the product out of which they were made. The reduced alcohol sauvignon blanc and alcoholised water are manufactured or produced*.

35. *The alcoholised water is classifiable to item 2 of the Schedule (other excisable beverages*[13] *not exceeding 10% by volume of alcohol). However, reduced alcohol sauvignon blanc is not classifiable to the Schedule.*[14]

Example 3: manufacture or production of an excisable good

36. *Hatton Company (Hatton) is a spirits bottler. Hatton acquires an iso-tanker of whisky at 67% a/v. Hatton pumps the whisky into its storage tank. In preparation for bottling, Hatton reduces the alcoholic strength from 67% to 40% a/v by the addition of water. The whisky is then bottled into one litre bottles.*

[13] The meaning of 'other excisable beverages' is set out in the preamble to the Schedule and does not include wine.
[14] The reduced alcohol sauvignon blanc is subject to the wine equalisation tax.

37. *The reduction of the high strength whisky results in physical and chemical changes (such as taste, strength and density) to the whisky. The whisky at 40% a/v has a different character from the whisky at 67% a/v. The process of reduction results in a product that is different from that out of which it is made.*

38. *The reduction of high strength whisky by the addition of water constitutes manufacture or production of whisky for excise purposes.*

Example 4: no manufacture or production of an excisable good

39. *Waymouth Oil Company (WO) imports mineral turpentine on which customs duty is paid. The overseas packaging is in 200 litre containers. WO repackages the mineral turpentine into smaller 1 litre containers in Australia to meet the requirements of the retail market.*

40. *Mineral turpentine is dutiable under subitem 10.26 of the Schedule. The mineral turpentine has not been subject to any other process in Australia aside from being repackaged. It is the same product both before and after its repackaging. The repackaging of the imported mineral turpentine is not manufacture or production for excise purposes.*

41. *Consequently, the repackaged mineral turpentine is not an excisable good.*

Excise provisions that modify, clarify or operate within the meaning of 'manufactured or produced' and provisions that exempt excisable goods for certain uses from excise duty

42. 'Manufactured or produced' for the purposes of the Excise Acts means the manufacture or production of goods specified in the Schedule – having regard to the specific provisions of the Excise Act that modify the meaning of 'manufacture' or 'produce'.

Tobacco curing – exemption

43. Section 68 of the Excise Act provides that no person shall be deemed to manufacture because he or she cures tobacco leaf. Although the process of curing would ordinarily be seen to be manufacture, a person is deemed not to manufacture merely because he or she cures tobacco leaf. 'Tobacco' is defined in the preamble to the Schedule to mean 'tobacco leaf subjected to any process other than curing the leaf as stripped from the plant'.

Repackaging of beer – taken to be manufacture

44. The repackaging of beer that is delivered for home consumption[15] into individual containers not exceeding 48 litres is taken to be the manufacture of beer for the purposes of the Excise Acts.[16]

Example 5: repackaging that is the manufacture of an excisable good

45. *Setzer Company purchases 50 litre kegs of beer on which excise duty has been paid and repackages it into 5 litre party kegs for retail sale.*

46. *The repackaging of beer, on which excise duty has been paid, from 50 litre kegs into 5 litre kegs, is taken to be manufacture for excise purposes.*

Compressed natural gas for certain uses – exempt from excise duty

47. The process of compressing natural gas to form compressed natural gas constitutes the manufacture or production of the compressed natural gas.[17] When natural gas is compressed, it has new qualities/properties that are different from natural gas.

48. However, compressed natural gas is exempt from excise duty if it:

- was compressed for use other than as a fuel for a motor vehicle (that is, non-transport use); or
- was compressed other than in the course of carrying on an enterprise; or
- was compressed for use as fuel in:
  - a motor vehicle that is designed:
    - merely to move goods with a forklift; and
    - for use primarily off public roads; or

[15] The expression 'home consumption' is a term of broad application, intended to capture all domestic use of excisable goods manufactured or produced in Australia (see *Caltex Australia Petroleum Pty Ltd v. Commissioner of Taxation* [2008] FCA 1951; (2008) 74 ATR 676 and *Moama Refinery Pty Ltd v. Chief Executive Officer of Customs* [2001] FCA 1287; (2001) 48 ATR 145; (2001) 49 ATR 114). The primary means by which excisable goods are delivered into home consumption is physical delivery from the licensed premises. However, excisable goods consumed on the licensed premises are also considered to have been delivered for home consumption.

[16] Section 77FC of the Excise Act.

[17] The Explanatory Memorandum to the Taxation of Alternative Fuels Legislation Amendment Bill 2011 states that compressed natural gas is manufactured when the natural gas is compressed for use in a vehicle, or when it is imported for use in a vehicle – see paragraph 1.71.

- motor vehicles of a kind prescribed by the regulations.[18]

49. Compressed natural gas is also exempt from excise duty if it:

- was compressed at residential premises; and
- the rate at which it can be compressed is not more than
  - the amount per hour prescribed by the regulations; or
  - if no amount is prescribed – 10 kilograms of compressed natural gas per hour; and
- the compressed natural gas is not sold or otherwise supplied in the course of carrying on an enterprise.[19]

Liquefied petroleum gas and liquefied natural gas for certain uses – exempt from excise duty

50. Liquefied petroleum gas is manufactured or produced when hydrocarbon gases undergo processes that compress them to a liquid state. Liquefied petroleum gas has new qualities/properties that are different from hydrocarbon gas.[20]

51. Similarly, the cooling of natural gas to form liquefied natural gas constitutes the manufacture or production of liquefied natural gas.[21] When natural gas is liquefied, it has new qualities/properties that are very different from natural gas.

52. However, liquefied petroleum gas and liquefied natural gas are exempt from excise duty if:

- the liquefied petroleum gas or liquefied natural gas is used by a licensed manufacturer on premises specified in the manufacturer licence; and
- the use is in the process of manufacturing petroleum condensate or stabilised crude petroleum oil or liquefied petroleum gas, liquefied natural gas or other hydrocarbons; and
- the petroleum condensate or stabilised crude petroleum or liquefied petroleum gas, liquefied natural gas or other hydrocarbons is manufactured in accordance with the licence.[22]

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[18] Subsection 77HA(1) of the Excise Act. 'Carrying on an enterprise' within the meaning of the *A New Tax System (Goods and Services Tax) Act 1999*.
[19] Subsection 77HA(2) of the Excise Act. 'Residential premises' within the meaning of the *A New Tax System (Goods and Services Tax) Act 1999*. No amount of compressed natural gas per hour is currently prescribed by the regulations.
[20] The Explanatory Memorandum to the Taxation of Alternative Fuels Legislation Amendment Bill 2011 – for example, see paragraphs 1.30 and 1.37.
[21] The Explanatory Memorandum to the Taxation of Alternative Fuels Legislation Amendment Bill 2011 – for example, see paragraphs 1.59 and 1.61.
[22] Section 77HB of the Excise Act.

Blending

53. Blending constitutes manufacture or production for excise purposes where same, similar or dissimilar goods are blended resulting in a new or different product having a distinctive character or use, having regard to specific provisions that deal with blending – sections 77FM, 77G and 77H of the Excise Act.

54. Subsection 77FM(1) and subsection 77G(1) of the Excise Act specifically provide that spirit and fuel blending respectively constitute manufacture. In this context, it is not necessary to consider whether a new or different product has resulted from the blending.

55. However, spirit blending is taken not to constitute manufacture if it occurred in circumstances as specified in a legislative instrument.[23]

56. In relation to fuel blending, blending exemptions under subsections 77H(1), 77H(2A) and 77H(2B) of the Excise Act apply to the blending of certain goods. Under these exemptions, the blending of 1 or more eligible goods[24] or relevant fuel[25] is taken not to result in goods covered by paragraph 10(g) of the Schedule if certain requirements are met.[26]

57. The exemption under subsection 77H(1) of the Excise Act does not apply where any of the eligible goods or other substances on which excise or customs duty has been paid, are certain goods specified under subsection 77H(2) of the Excise Act.[27] The blended goods are also taken not to be goods covered by paragraph 10(g) of the Schedule if they meet the circumstances specified in a legislative instrument.[28]

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[23] Subsections 77FM(2) and 77FM(3) of the Excise Act.

[24] 'Eligible goods' is defined in subsection 77H(5) of the Excise Act to mean goods covered by paragraph 10(a), 10(b), 10(c), 10(d), 10(da), 10(db), 10(dc), 10(e) or 10(f) of the Schedule.

[25] 'Relevant fuel' is defined in subsection 77H(5) of the Excise Act to mean (a) gasoline for use in aircraft; (b) kerosene for use in aircraft; (c) liquefied petroleum gas; (d) liquefied natural gas; or (e) compressed natural gas that is classified to subitem 10.19C of the Schedule.

[26] See paragraphs 126 to 130 of this Ruling.

[27] Subsection 77H(2) of the Excise Act lists (i) denatured ethanol for use as fuel in an internal combustion engine; or (ii) biodiesel; or (iii) taxable fuel for which any entity has been entitled to a fuel tax credit under the Fuel Tax Act.

[28] Subsections 77H(3) and 77H(4) of the Excise Act – for example, see *Excise (Blending exemptions) Determination 2012 (No. 2)*.

Example 6: blending that is the manufacture or production of an excisable good

58. *Perth Distillery Company (PD) is located in Australia and manufactures or produces spirit. This spirit is then stored at a distillery in Perth (local ethanol).The local ethanol is used as high strength spirit for human consumption. PD also imports spirit (imported spirit) for use as feedstock to make domestic high strength spirit. The local and imported spirit are blended and stored in the same tank at the distillery.*

59. *Item 3 of the Schedule refers to spirits; other excisable beverages exceeding 10% by volume of alcohol. High strength spirit for human consumption manufactured or produced in Australia falls within this item.*

60. *The blending of imported and local ethanol by PD is manufacture or production for excise purposes.*[29]

61. *The blended high strength spirit manufactured or produced by PD is an excisable good.*

Example 7: blending that is not the manufacture or production of an excisable good

62. *Carlene Company (Carlene) is a fuel distributor. Carlene produces a blend of diesel and kerosene (known as 'winter mix') formulated for use in internal combustion engines in cold weather.*

63. *Carlene uses only duty paid diesel and duty paid kerosene in the blend. The blending of the fuel is not manufacture of taxable fuel as the blend is excluded from excise manufacture by section 77H of the Excise Act as duty has been paid at the same rate on the diesel and kerosene.*

64. *The blending of duty paid diesel and duty paid kerosene is not manufacture or production of fuel for excise purposes.*

Processes in deriving a liquid hydrocarbon product

65. The processes referred to in paragraph 10(d) of the Schedule (that is, recycling, manufacturing or other process) constitute manufacture or production where the processes result in something new or different having a distinctive character or use.

Recycling

66. Recycling constitutes manufacture or production for excise purposes where the recycling process results in something new or different having a distinctive character or use, having regard to specific recycling provisions under section 77J of the Excise Act and items 10 and 15 of the Schedule.

[29] See section 77FM of the Excise Act.

67. Section 77J of the Excise Act specifically excludes certain goods that are for use as a solvent which are manufactured or produced by a recycling process from subitems 10.25, 10.26, 10.27, 10.28 or 10.30 of the Schedule. This section ensures that the recycler would not be required to pay excise duty on such recycled solvents.

68. It is a question of fact and degree in relation to which an exercise in judgement is involved whether a recycling process (for example, filtering, de-watering, de-mineralisation, screening, separation of contaminants by settlement, centrifuge or refining) results in something that is new or different having a distinctive character or use.

69. The Commissioner considers that the term 'recycling' does not include the reuse of used oil where nothing new or different having a distinctive character or use has been manufactured or produced.

Example 8: recycling that is not the manufacture or production of an excisable good

70. *Joe is a waste oil collector and recycler. He provides a 1,500 litre tank to clients for the collection and accumulation of waste oil of varying type and quality.*

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

72. *As a result of the waste oil's storage, some water (free water) in the waste oil separates and settles to the bottom of the storage tank.*

73. *The collection tank is pumped of oil on a regular basis. Joe pumps the free water from the bottom of the tank into a compartment of his road tanker by the use of a flexible spear. Once the transfer of free water is complete, the waste oil is then transferred to a separate compartment on the road tanker.*

74. *The waste oil is transported by Joe directly to a customer for use as burner oil.*

75. *Joe has not produced or manufactured a liquid hydrocarbon product derived from the recycling of oil.*[30] *The coarse filtering or the separation of water by settling is part of the collection process of the waste oil and only results in the product achieving the state it was in at the time it became waste oil. The process does not result in something new or different having a distinctive character or use from the waste oil as collected.*

[30] For a full discussion on the recycling of oil and the Product Stewardship Oil Benefit Scheme, see Product Grant and Benefit Ruling PGBR 2012/1 *Product Stewardship (Oil) Benefit: the meaning of the expression 'goods produced from used oil' and*

76. [Withdrawn.]

77. [Withdrawn.]

78. [Withdrawn.]

79. [Withdrawn.]

80. [Withdrawn.]

81. [Withdrawn.]

82. [Withdrawn.]

83. [Withdrawn.]

84. [Withdrawn.]

85. [Withdrawn.]

86. [Withdrawn.]

87. [Withdrawn.]

Date of effect

88. This Ruling applies both before and after its date of issue. However, the following paragraphs explain our view of the law as it applies as follows:

Provision application dates

- Subsection 77H(5) of the Excise Act:
  - changes to the definition of eligible goods apply on and from 1 December 2011. See *Taxation of Alternative Fuels Legislation Amendment Act 2011*. See paragraph 56 of this Ruling.
  - changes to insert the meaning of relevant fuel apply if the blending occurs on or after 1 July 2012 (whether the amounts of relevant fuel being blended were manufactured, produced, or imported before, on or after that day). See *Tax Laws Amendment (2012 Measures No. 3) Act 2012*. See paragraph 56 of this Ruling.
- Subsections 77H(2A) and 77H(2B) of the Excise Act:
  - apply if the blending occurs on or after 1 July 2012 (whether the amounts of relevant fuel being blended were manufactured, produced, or imported before, on or after that day). See paragraphs 56 and 129 of this Ruling.

the terms 'filtered', 'de-watered', and 'de-mineralised' for the purposes of the Product stewardship for oil benefit scheme.

[31] [Withdrawn.]

[32] [Withdrawn.]

[33] [Withdrawn.]

- Subsection 77HA(1) of the Excise Act:
  - applies on and from 1 July 2012. See paragraphs 48 and 117 of this Ruling.
- Subsection 77HA(2) of the Excise Act:
  - applies on and from 1 July 2012. See paragraphs 49 and 118 of this Ruling.
- Subsection 77HB of the Excise Act:
  - applies on and from 1 December 2011. For transitional and application provisions see *Taxation of Alternative Fuels Legislation Amendment Act 2011.* See paragraphs 52 and 119 to 122 of this Ruling.
- Paragraphs 10(da), 10(db) and 10(dc) of the Schedule:
  - apply on and from 1 December 2011. For transitional and application provisions see *Excise Tariff Amendment (Taxation of Alternative Fuels) Act 2011*. See paragraph 56 of this Ruling.
- Paragraphs 10(i) and 10(j) of the Schedule:
  - changes apply on and from 1 December 2011. For application provisions see *Excise Tariff Amendment (Taxation of Alternative Fuels) Act 2011.* See paragraph 126 of this Ruling.

89. 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).

Commissioner of Taxation
12 September 2012

Appendix 1 – Explanation

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.

Meaning of 'manufactured or produced'

90. The term 'manufacture' is defined in section 4 of the Excise Act as:

> ***Manufacture*** includes all processes in the manufacture of excisable goods and, in relation to beer, includes the provision to the public at particular premises of commercial facilities and equipment for use in the production of beer at those premises.

91. The excise definition of 'manufacture' includes all processes (that is, the series of stages or actions) in the manufacture of excisable goods. The reference to 'processes' indicates the provision has wide application; that is not confined to a particular operation or course of action.

92. 'Produce' is not defined in the Excise Act or the Excise Tariff Act.[34] The term should be given its ordinary meaning in the context in which the term is used.

93. In the context of the sales tax legislation, Lockhart J held in *Federal Commissioner of Taxation v. Jax Tyres Pty Ltd*[35] (*Jax Tyres*) that to manufacture an article necessarily involves producing a different article from the articles, materials or ingredients from which it was made. Further, Lockhart J referred to the case of *McNicol v. Pinch,*[36] in which Darling J held 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*[37] where it was held that whether an article which results from the process, is a different article from the constituents or ingredients from which it was made, is a question of fact.

94. The cases referred to in paragraph 93 of this Ruling were adopted by Sundberg J in *Caltex Australia Petroleum Pty Ltd v. Commissioner of Taxation*[38] (*Caltex*) in considering the meaning of manufactured or produced in an excise context.

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[34] 'Produce' is also not defined in the *Product Stewardship (Oil) Act 2000* or any other Australian Acts or Regulations that deal with 'indirect taxes' (for example, the Fuel Tax Act).

[35] *Federal Commissioner of Taxation v. Jax Tyres Pty Ltd* (1984) 5 FCR 257 at 261; (1984) 58 ALR 138 at 141.

[36] *McNicol v. Pinch* [1906] 2 KB 352 at 361.

[37] *Federal Commissioner of Taxation v. Jack Zinader Pty Ltd* (1949) 78 CLR 336; 23 ALJ 447.

[38] *Caltex Australia Petroleum Pty Ltd v. Commissioner of Taxation* [2008] FCA 1951 at paragraph 65.

95. In *Caltex*, Sundberg J, in relying on *Jax Tyres*,[39] held that for the purposes of section 5 of the Schedule, goods are manufactured or produced if they have emerged from a process as a 'new and different article … having a distinctive character or use'.[40] The ordinary meaning of 'distinctive' means 'distinguishing; serving to distinguish' and the ordinary meaning of 'distinguish' means 'different'.[41] In particular circumstances the difference in character may be slight or it may be great.

Subjective intention is relevant but not determinative

96. In *Caltex*, Sundberg J held that excise duty is imposed on goods by reference to their quality as manufactured goods and not with any reference to the relative value of the goods or the subjective intentions of the manufacturer. Further, Sundberg J explained that the principal 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.[42]

97. The Commissioner considers that, in addition to Sundberg J's observations in *Caltex*, the following cases set out factors that may be relevant in determining whether something new or different has been manufactured or produced for excise purposes.[43] Whilst it is not possible to directly adopt judicial interpretation of the words manufacture or produce as it appears in other legislation or jurisdictions, in the absence of any other direct authority these cases provide relevant guidance.

The thing did not previously exist

98. In *Commissioner of Taxation v. Softex Industries Pty Ltd*[44] *(Softex),* the Full Federal Court (Ryan and Hely JJ with Dowsett J agreeing) held in a sales tax context that:

[39] *Commissioner of Taxation v. Jax Tyres Pty Ltd* (1984) 5 FCR 257 at 264; (1984) 58 ALR 138 at 144.
[40] *Caltex Australia Petroleum Pty Ltd v. Commissioner of Taxation* [2008] FCA 1951 at paragraph 71.
[41] *The Macquarie Dictionary*, [Multimedia], version 5.0.0, 1/10/01.
[42] *Caltex Australia Petroleum Pty Ltd v. Commissioner of Taxation* [2008] FCA 1951 at paragraph 71.
[43] These include factors confirmed relevant in *Caltex Australia Petroleum Pty Ltd v. Commissioner of Taxation* [2008] FCA 1951 at paragraphs 65, 66 and 71.
[44] *Commissioner of Taxation v. Softex Industries Pty Ltd* (2001) 107 FCR 111; (2001) 191 ALR 724; (2001) 46 ATR 512; 2001 ATC 4184; [2001] FCA 397.

> We agree with the primary judge that whether a particular factual situation comes within par (b) of the definition does not depend upon whether the original parts remain identifiable at the end of the process, but on whether the parts have been combined so as to form an article that did not previously exist, which is commercially distinct from the original parts. For the purpose of determining whether there has been a 'combining' of components, it is not critical whether the physical identity of the parts or ingredients is retained, or lost by fusion or some other process. … In coming to a different conclusion in this respect [the] AAT misdirected itself as to the scope of par (b) of the definition and thereby fell into legal error.[45]

99. Whether there is a new or different thing does not depend upon whether the original parts remain identifiable at the end of the process. It is relevant if the parts have been combined to form a new or different thing that is distinct (for example, commercially distinct) from that out of which it is made (that is, having a distinctive character or use).

Differences – including change in form, utility and improvements

100. The factors to be taken into consideration in determining whether something is different from that out of which it was made were discussed in an income tax context by Windeyer J in *M.P. Metals Pty Ltd v. Federal Commissioner of Taxation*[46] *(M.P. Metals)*:

> It is no doubt true that all manufacturing involves the making of a new thing. But it is not true that every making of a new thing is, in the relevant sense, manufacturing. And what is meant by a new thing? In *Federal Commissioner of Taxation v. Jack Zinader Pty. Ltd.* (1949) 78 CLR 336, at p.343 (a case under the *Sales Tax Acts*) Dixon J. quoted a statement by Darling J. in *McNicol v. Pinch* [1906] 2 K.B. 352, at p. 361 that 'the essence of making or manufacturing is that what is made shall be a different thing from that out of which it is made'. That is indisputable. But what is a different thing? Various paraphrases were offered to me, such as 'substantially different thing', not merely an 'altered thing'; 'a new entity'; 'a distinct commodity'. But these are all pregnant with ambiguity. 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.

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[45] *Commissioner of Taxation v. Softex Industries Pty Ltd* (2001) 107 FCR 111 at 119-120; (2001) 191 ALR 724 at 731-732; (2001) 46 ATR 512 at 519; 2001 ATC 4184 at 4191; [2001] FCA 397 at paragraph 33.

[46] *M.P. Metals Pty Ltd v. Federal Commissioner of Taxation* [1967-1968] 117 CLR 631; (1968) 14 ATD 407.

101. In the Irish case *Samuel McCausland v. Ministry of Commerce* (*McCausland*)[47] regarding the manufacture of goods for eligibility of a grant under the *Re-equipment of Industry Act (Northern Ireland) 1951,* the Court considered amongst other things, the issue of utility, quality and worth of bulk product (seeds) that have been processed.[48] Lord MacDermott LCJ observed that although each seed in the bulk that had been processed did not change physically, when considered in bulk, from a physical and commercial perspective, there was clearly a significant change:

> …the production of a commodity different from the crop not only in content but in quality, and so different as to enter a marketable category which, by its usability for seeding purposes, is quite distinct from that of the crop.
>
> …The circumstance that each seed in the bulk produced by the company may have passed through all the processed without appreciable physical change does not appear to me to justify a different conclusion once it has been held that the goods in question are the seed in bulk. That accepted, the change accomplished is physically appreciable and commercially vital.... In short, the bulk with which we are now dealing is much more than an aggregation of individual seeds; it has a utility, a quality and a worth which are due to and cannot be dissociated from the processes carried out in the company's premises. One cannot, as it seems to me, decide this case merely by looking at the goods and giving them a physical description. One must also consider how they came to be what they are and what the company has done to the crop in order to obtain the finished product.

102. Porter LJ in *McCausland*[49] was of the opinion that the production of rye grass seeds from mixed seeds with other foreign matter processed into a homogeneous, marketable and repackaged commodity is a manufacture of goods within the meaning of the legislation considered in that case:

> The processing and machining have changed what was a mass of heterogeneous seeds and other foreign substances into a homogeneous, marketable commodity, smaller in bulk but cleaned, sorted, graded, bagged and adapted for sale as 'ryegrass seed' in accordance with the Ryegrass Seed (Temporary Provisions) Act (Northern Ireland), 1949, and the
>
> Ryegrass Seed (Temporary Provisions) (Extension) Act (Northern Ireland), 1950, and the Regulations made thereunder.
>
> In my opinion the production of ryegrass seed in this manner by the company is a manufacture of goods within the meaning of section 13.

103. However, these factors are not looked at in isolation when determining if something new or different has been manufactured or produced for excise purposes.

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[47] *Samuel McCausland v. Ministry of Commerce* [1956] NI 36.
[48] It should be noted the case was decided 2:1, with Black LJ dissenting.
[49] *Samuel McCausland v. Ministry of Commerce* [1956] NI 36.

104. The Commissioner considers that the mere re-use of used oil for different purposes does not constitute the manufacture or production of goods from used oil.[50] Although there may be a change in use, there is no manufacture or production of something new or different for excise purposes in those circumstances.

Complexity is not determinative but may be relevant

105. In the context of the Canadian excise system (dealing with a consumption or sales tax) Pratte, J.A. in *Minister of National Revenue v. Enseignes Imperial Signs Ltd,*[51] concluded that:

> …a thing can be produced by carrying out a very simple operation. What matters is not the complexity of the operation but its result. A thing is produced if what a person does has the result of producing something new; and a thing is new when it can perform a function that could not be performed by the things which existed previously.[52]

106. The complexity of a process, on its own, may not be a determinative factor of whether something is manufactured or produced. However, it will be relevant where it results in processes which change a good into something new or different having a distinctive character or use.

Application of skill, knowledge or labour

107. In *Re Searls Ltd*[53] (*Re Searls*) Harvey CJ discussed in the context of sales tax the notion that manufacture involves the application of skill to the component elements of a thing in order to bring a new and saleable entity into existence, stating:

> In my opinion the fact that a new saleable entity is brought into existence by means of skill applied to the component elements of that new entity goes a long way to establish that the result is a manufactured article and if to that new entity people would in every day language apply the words 'made' or 'manufactured' and that entity is purchased for its own sake by reason of the skill which has been exhibited in putting the component parts into combination, I think it is proper to call the completed article a manufactured article.

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[50] See paragraphs 137 to 146 of this Ruling for a more detailed discussion of recycling.
[51] *Minister of National Revenue v. Enseignes Imperial Signs Ltd* [1991] 1 C.T.C. 229, 3 T.C.T. 5389, Can. S.T.R. 80-074.
[52] *Minister of National Revenue v. Enseignes Imperial Signs Ltd* [1991] 1 C.T.C. 229, 3 T.C.T. 5389, Can. S.T.R. 80-074 at paragraph 8.
[53] *Re Searls Ltd* (1932) 33 SR (NSW) 7.

108. In *Jax Tyres*[54] Lockhart J conveyed that manufacture connotes labour – however, that labour does not have to be of a particular scale for a process to be considered manufacture or production:

> The primary meaning of the word 'manufacture' when used as a verb is to make something by hand; but since the industrial revolution the word has come to mean manufacture by machinery, often on a large scale and with a division of labour. This accords with the dictionary definition. As Windeyer J said in Readymixed Concrete (WA) Pty Ltd v Federal Commissioner of Taxation (1971) 71 ATC 4107 at p 4109:
>
>> All that can perhaps be said of the word manufacture is that its derivative and etymological sense no longer determines its meaning. No longer is it restricted to the handiwork of individual craftsmen.'

109. Implicit in the ordinary meaning of manufacture or produce and in the discussion of cases such as *Re Searls*[55] and *Jax Tyres*[56] is the notion that knowledge, skills and labour may be features of manufacture or production.

Excise provisions that modify, clarify or operate in relation to the meaning of 'manufactured or produced' and provisions that exempt excisable goods for certain uses from excise duty

110. The following provisions modify, clarify or operate in relation to the meaning of 'manufactured or produced', or affect the imposition of excise duty:

- Section 68 of the Excise Act – Exemption for the curing of tobacco;
- Section 77FC of the Excise Act – Repackaged beer;
- Section 77HA of the Excise Act – Compressed natural gas that is exempt from excise duty;
- Section 77HB of the Excise Act – Liquefied petroleum gas and liquefied natural gas that is exempt from excise duty;
- Section 77FM of the Excise Act – Spirit blending is to be treated as manufacture;
- Section 77G of the Excise Act – Fuel blending is to be treated as manufacture;
- Section 77H of the Excise Act – Blending exemptions;
- Section 77J of the Excise Act – Recycling of solvents;

[54] *Federal Commissioner of Taxation v. Jax Tyres Pty Ltd* (1984) 5 FCR 257 at 261; (1984) 58 ALR 138 at 144.
[55] *Re Searls Ltd* (1932) 33 SR (NSW) 7.
[56] *Federal Commissioner of Taxation v. Jax Tyres Pty Ltd* (1984) 5 FCR 257 at 261; (1984) 58 ALR 138 at 144.

- Item 10 of the Schedule – Liquid hydrocarbon products derived through a recycling, manufacturing or other process; and
- Items 10 and 15 of the Schedule – the reference to 'recycling' or 'recycled'.

Section 68 of the Excise Act – Exemption for the curing of tobacco

111. The Schedule provides that:

> ***tobacco*** means tobacco leaf subjected to any process other than curing the leaf as stripped from the plant.

112. Section 68 of the Excise Act provides that:

> No person shall be deemed to manufacture merely because he or she cures tobacco leaf as stripped from the plant so as to convert it into leaf tobacco.

113. Section 68 of the Excise Act and the meaning of tobacco in the Schedule ensure that curing of tobacco leaf[57] is excluded from the meaning of 'manufacture' for the purposes of the Excise Acts. Curing is the controlled drying (that is, through regulated conditions of temperature and humidity) of tobacco leaves to enhance the tobacco's texture, colour and aroma. The basic purpose of curing is to produce a stable product of suitable physical and chemical composition for use in cigarette manufacture.[58] As the tobacco has undergone a physical and chemical change, the process of curing would otherwise be 'manufacture' in the ordinary sense of the word.

Section 77FC of the Excise Act – Repackaging of beer taken to be manufacture

114. Section 77FC of the Excise Act states:

> If:
>
> (a) beer classified to subitem 1.2, 1.6 or 1.11 of the Schedule to the *Excise Tariff Act 1921* is delivered for home consumption (beer packaged in an individual container exceeding 48 litres); and
>
> (b) the beer is repackaged into sealed individual containers not exceeding 48 litres;
>
> then, for the purposes of this Act, that repackaging is taken to be the manufacture of beer.

[57] Local production of tobacco leaf in Australia has virtually ceased.
[58] Tobacco Growing in Victoria, The Tobacco Co-operative of Victoria Ltd and Stonesthrow Communications, viewed 30 July 2012 <http://www.alpinelink.com.au/tobaccoproduction/curing.shtml>

115. Under section 77FC of the Excise Act, the repackaging of duty paid beer that is packaged in an individual container exceeding 48 litres, is taken to be the manufacture of beer where it is repackaged into sealed individual containers not exceeding 48 litres.

Section 77HA of the Excise Act – Exemption for compressed natural gas for certain uses

116. Section 77HA of the Excise Act provides:

77HA Compressed natural gas that is exempt from excise duty

(1) Compressed natural gas is exempt from excise duty if any of the following apply:

(a) the gas was compressed for use other than as a fuel for a motor vehicle;

(b) the gas was compressed other than in the course of carrying on an enterprise (within the meaning of the *A New Tax System (Goods and Services Tax) Act 1999*);

(c) the gas was compressed for use as a fuel for a motor vehicle that:

(i) is designed merely to move goods with a forklift and is for use primarily off public roads; or

(ii) is of a kind prescribed by the regulations for the purposes of this subparagraph;

(d) the gas is exempt from excise duty under subsection (2).

(2) Compressed natural gas is exempt from excise duty if:

(a) the gas was compressed at residential premises (within the meaning of the *A New Tax System (Goods and Services Tax) Act 1999*); and

(b) the rate at which natural gas can be compressed at those premises is not more than:

(i) the amount of compressed natural gas per hour prescribed by the regulations; or

(ii) if no amount is prescribed—10 kilograms of compressed natural gas per hour; and

(c) the gas is not sold or otherwise supplied in the course of carrying on an enterprise (within the meaning of the *A New Tax System (Goods and Services Tax) Act 1999*).

117. Compressed natural gas is manufactured for the purposes of the Excise Act when natural gas is compressed.[59] However, subsection 77HA(1) of the Excise Act provides an exemption from excise duty if the compressed natural gas:

- was compressed for use other than as a fuel for a motor vehicle (that is, non-transport use); or
- was compressed other than in the course of 'carrying on an enterprise' (within the meaning of the *A New Tax System (Goods and Services Tax) Act 1999)*; or
- was compressed for use as fuel in:
  - a motor vehicle that is designed:
    - merely to move goods with a forklift; and
    - for use primarily off public roads; or
  - motor vehicles of a kind prescribed by the regulations.[60]

118. Other factors in subsection 77HA(2) of the Excise Act that exempt compressed natural gas from excise duty are related to:

- the place where the compression of the natural gas occurs (whether it was compressed at 'residential premises' (within the meaning of the *A New Tax System (Goods and Services Tax) Act 1999*)); and
- the rate at which the compression occurs (the rate at which natural gas can be compressed at those premises is not more than the rate per hour prescribed by the regulations, or where no amount is prescribed – 10 kilograms of compressed natural gas per hour); and
- whether the gas was sold or otherwise supplied in the course of 'carrying on an enterprise' (within the meaning of the *A New Tax System (Goods and Services Tax) Act 1999*).

Section 77HB of the Excise Act – Exemption for liquefied petroleum gas and liquefied natural gas for certain uses

119. Section 77HB of the Excise Act provides:

> Liquefied petroleum gas or liquefied natural gas is exempt from excise duty if:

[59] See paragraph 1.71 of the Explanatory Memorandum to the Taxation of Alternative Fuels Legislation Amendment Bill 2011 which states that fuel excise is imposed on compressed natural gas at the point of manufacture which is when natural gas is compressed for use in a vehicle.

[60] Subsection 77HA(1) of the Excise Act. 'Carrying on an enterprise' is within the meaning of the *A New Tax System (Goods and Services Tax) Act 1999*.

(a) the liquefied petroleum gas or liquefied natural gas is used by a licensed manufacturer on premises specified in the manufacturer licence; and

(b) the use is in the process of manufacturing:

(i) petroleum condensate or stabilised crude petroleum oil; or

(ii) liquefied petroleum gas, liquefied natural gas or other hydrocarbons; and

(c) the manufacturer manufactures the goods referred to in paragraph (b) in accordance with the licence.

120. Liquefied petroleum gas is manufactured or produced for excise purposes when hydrocarbon gases undergo processes that compress them to a liquid state – liquefied petroleum gas has new qualities/properties that are very different from hydrocarbon gas.[61]

121. Liquefied natural gas is manufactured or produced for excise purposes when natural gas is liquefied through cooling – liquefied natural gas has new qualities/properties that are very different from natural gas.[62]

122. However, section 77HB of the Excise Act provides an exemption from excise duty if:

- the liquefied petroleum gas or liquefied natural gas is used by a licensed manufacturer on premises specified in the manufacturer licence; and
- the use is in the process of manufacturing petroleum condensate or stabilised crude petroleum oil or liquefied petroleum gas, liquefied natural gas or other hydrocarbons; and
- the petroleum condensate or stabilised crude petroleum or liquefied petroleum gas, liquefied natural gas or other hydrocarbons is manufactured in accordance with the licence.[63]

Blending

123. Blending constitutes manufacture or production for excise purposes where same, similar or dissimilar goods are blended resulting in a new or different product having a distinctive character or use, subject to specific provisions which affect whether the blending constitutes manufacture[64] (for example, blending spirits or fuels), or whether the end product of blending is dutiable under the Schedule.[65]

[61] The Explanatory Memorandum to the Taxation of Alternative Fuels Legislation Amendment Bill 2011– for example, see paragraphs 1.30 and 1.37.
[62] The Explanatory Memorandum to the Taxation of Alternative Fuels Legislation Amendment Bill 2011– for example, see paragraphs 1.59 and 1.61.
[63] Section 77HB of the Excise Act.
[64] See sections 77FM and 77G of the Excise Act.
[65] See section 77H of the Excise Act.

Section 77FM of the Excise Act – Spirit blending is to be treated as manufacture

124. Section 77FM of the Excise Act provides that for greater certainty, spirit blending to produce spirit is taken to constitute the manufacture of those goods for the purposes of the Excise Act, and that the Commissioner may specify the circumstances in which spirit blending is taken not to constitute the manufacture of spirit for the purposes of Item 3 of the Schedule.[66] Under this section, the blending of 'like' with 'like' spirit (for example, blending whisky with whisky whether they are imported or local) to produce such goods amounts to the manufacture of those goods for excise purposes.

Section 77G of the Excise Act – Fuel blending is to be treated as manufacture

125. Section 77G of the Excise Act provides that for greater certainty, fuel blending to produce goods covered by paragraph 10(g) of the Schedule is taken to constitute the manufacture of those goods for the purposes of the Excise Act. Under this section, the blending of 'like' with 'like' fuel (for example, blending diesel with diesel whether they are imported or local) to produce such goods amounts to the manufacture of those goods for excise purposes.

Section 77H of the Excise Act – Blending exemptions

126. Paragraph 10(g) of the Schedule covers blends of one or more of the products specified in paragraphs 10(a) to 10(f) of the Schedule (with or without other substances) other than blends covered by subsections 77H(1) or 77H(3) of the Excise Act.[67]

127. Subsection 77H(1) of the Excise Act excludes a blend of one or more products in paragraphs 10(a) to 10(f) of the Schedule (with or without other substances) where either:

- excise duty or a duty of Customs has been paid at the same rate on all products and other substances (if any); or
- the goods have been covered by a determination in force under subsection 95-5(1) of the Fuel Tax Act.[68]

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[66] For example, see *Excise (Spirit blending exemptions) Determination 2010 (No.1).*

[67] Item 10 of the Schedule does not include goods classifiable to item 15 of the Schedule, waxes and bitumen, and goods covered by section 77HA and 77HB of the Excise Act. See paragraphs 10(h), 10(i) and 10(j) of the Schedule.

[68] The Commissioner may determine by legislative instrument that a fuel blend does not constitute a fuel. For example, see *Fuel Tax (Fuel Blends) Determination 2006 (No. 3)*.

128. However, subsection 77H(1) of the Excise Act does not apply if any of the eligible goods or other substances on which excise duty or a duty of Customs has been paid are:

- denatured ethanol for use as fuel in an internal combustion engine;
- biodiesel; or
- taxable fuel for which an entity has been entitled to a fuel tax credit under the Fuel Tax Act.[69]

129. Subsections 77H(2A) and 77H(2B) of the Excise Act exclude the following blends from paragraph 10(g) of the Schedule:

- goods that are the product of the blending of amounts of one kind of relevant fuel, if both of the following apply:
  - none of the amounts of the relevant fuel are subject to a remission (either in full or in part) of excise duty or a duty of Customs; and
  - the excise duty or a duty of Customs that is payable on the amounts of the relevant fuel has been paid;[70]
- goods that are the product of the blending of amounts of one kind of relevant fuel that is either liquefied petroleum gas or liquefied natural gas if, for each amount in the blend, either of the following applies to the amount:
  - the amount is subject to a remission (whether in full or in part) of excise duty or a duty of Customs on the grounds that the amount is not used, or intended for use, in an internal combustion engine in either a motor vehicle or a vessel; or
  - the amount is not subject to excise duty or a duty of Customs because the amount was manufactured, produced or imported before 1 December 2011.[71]

130. Furthermore, subsection 77H(3) of the Excise Act excludes blends otherwise covered by paragraph 10(g) of the Schedule, if circumstances specified in a legislative instrument[72] exist. An example of a blend covered by legislative instrument is where a person blends duty-paid oil with duty-paid petrol for use (as two stroke petrol) in their lawn mower.[73]

[69] Subsection 77H(2) of the Excise Act.
[70] Subsection 77H(2A) of the Excise Act.
[71] Subsection 77H(2B) of the Excise Act.
[72] Subsection 77H(4) of the Excise Act.
[73] See *Excise (Blending exemptions) Determination 2012 (No. 2)*.

Section 77J of the Excise Act – Recycling of solvents

131. Section 77J of the Excise Act excludes from subitems 10.25, 10.26, 10.27, 10.28 or 10.30 of the Schedule certain goods which are manufactured or produced by a recycling process.[74]

132. The exclusion applies where:

- the fuel was previously delivered for home consumption[75] under subitem 10.25 (liquid aromatic hydrocarbons), subitem 10.26 (mineral turpentine), subitem 10.27 (white spirit), subitem 10.28 (petroleum products, other than blends, not elsewhere included in another subitem of item 10), or subitem 10.30 (blends not elsewhere included in another subitem of item 10);
- the fuel was used as a solvent;
- the person who used the fuel as a solvent recycles it for the person's own reuse as a solvent; and
- the recycled fuel is the same type of product as originally delivered for home consumption.

Liquid hydrocarbon products derived through a recycling, manufacturing or other process

Derived

133. Paragraph 10(d) of the Schedule makes reference to liquid hydrocarbon products '... **derived** through a recycling, manufacturing or other process' [emphasis added], without defining the meaning of 'derived'.

134. Accordingly, for the purposes of paragraph 10(d) of the Schedule, the term should be given its ordinary meaning in the context in which the term is used.

135. The *Australian Oxford Dictionary*[76] relevantly defines 'derive' to mean:

> 1. (usu. foll. by from) get, obtain, or form.

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[74] The exclusion in section 77J of the Excise Act removes the need for a recycler to pay excise duty on a recycled fuel used as a solvent on which the recycler would also be entitled to a fuel tax credit if the recycled fuel was for use or used in carrying on the recycler's enterprise.

[75] Home consumption - the expression 'home consumption' is a term of broad application, intended to capture all domestic use of excisable goods manufactured or produced n Australia (see *Caltex Australia Petroleum Pty Ltd v. Commissioner of Taxation* [2008] FCA 1951 and *Moama Refinery Pty Ltd v. Chief Executive Officer of Customs* [2001] FCA 1287). The primary means by which excisable goods are delivered into home consumption is physical delivery from the licensed premises. However, excisable goods consumed on the licensed premises are also considered to have been delivered for home consumption.

[76] *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne.

136. In the context of paragraph 10(d) of the Schedule, the Commissioner considers what is required is that the liquid hydrocarbon product is obtained or formed because of or by means of any process. The expression 'other process' serves to capture any method by which you derive a liquid hydrocarbon product, such as a production process.

Items 10 and 15 of the Schedule – the reference to 'recycling' or 'recycled'

137. The Schedule makes specific reference to 'recycling' in item 10 (paragraph 10(d) makes reference to goods '... derived through a recycling, manufacturing or other process') while item 15 of the Schedule refers to petroleum based oils or greases and their synthetic equivalents that are 'recycled' for use as oils or greases.

138. The terms 'recycling' or 'recycled' are not defined in the Excise Acts.

139. The *Macquarie Dictionary*[77] defines 'recycle' as

> **recycle**
>
> *verb (t)* (**recycled**, **recycling**)
>
> **1.** to treat (waste, empty bottles, old tins, etc.) so that new products can be manufactured from them.
>
> **2.** to prepare (something) for a second use, often with some adaptation or reconstruction.

140. The *Chambers Dictionary*[78] and *Australian Oxford Dictionary*[79] provide the following definitions of recycle:

> *v.t.* to put (waste materials) through a manufacturing process by which they can be reused.
>
> *v,tr.* return (material) to a previous stage of a cyclic process, esp. convert (waster) to reusable material.

141. Given that excise duty is to be imposed on goods dutiable under the Schedule and 'manufactured or produced in Australia'[80] in accordance with section 5 of the Excise Tariff Act, in the Commissioner's view 'recycling' must be read within this framework. The goods in this case are liquid hydrocarbon products derived through a recycling process and classifiable to paragraph 10(d) of the Schedule; and recycled oils or greases and their synthetic equivalents classifiable to item 15 of the Schedule.

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[77] *The Macquarie Dictionary,* [Multimedia], version 5.0.0, 1/10/01.
[78] *Chambers Dictionary* 1998, Harrap Publishers Edinburgh.
[79] *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne.
[80] See the definitions of 'manufacture' and 'excisable goods' in section 4 of the Excise Act. The meaning of manufacture 'includes all processes in the manufacture of excisable goods…'. Excisable goods means 'goods in respect of which excise duty is imposed by the Parliament, and includes goods the subject of an Excise Tariff or Excise Tariff alteration proposed in the Parliament.'

142. Accordingly, recycling (which includes filtering, de-watering, de-mineralisation, screening, separation of contaminants by settlement, centrifuge and refining) must result in something new or different from that out of which it is made as result of some process. The recycled product must have a distinctive character or use.[81]

143. Whether a liquid hydrocarbon product is derived through a recycling process for excise purposes is a question of fact and degree.

144. For example, if a process recycles used oils by reducing the amount of contaminants or impurities, and the chemical and/or physical composition of the recycled oil is different from the used oils as collected, transforming the used oils into a new or different product having a distinctive character or use, then that recycled oil has been manufactured or produced for the purposes of the Excise Acts.[82]

145. The Commissioner considers that the mere removal of foreign objects from the collection of used oil,[83] such as nuts and bolts, is an activity that only results in the product achieving the state it was in at the time it became used oil. The process does not manufacture or produce something new or different having a distinctive character or use from the used oil as collected.[84] This product would not be considered to be derived through a process that amounts to manufacturing or producing a good for the purposes of excise.

146. The processes referred to in paragraph 10(d) of the Schedule (that is, recycling, manufacturing or other process) constitute manufacture or production where the processes result in something new or different having a distinctive character or use.

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[81] See PGBR 2012/1 for further examples and discussion of recycled oil.

[82] As stated in paragraph 16 of this Ruling whether particular goods are manufactured or produced for the purpose of the Excise Acts is often a question of fact and degree. The explanation for this example does not mean that a chemical or physical change is the only factor or the factor to be given greatest weight in all circumstances.

[83] See the definition of 'used oil' in subsection 6(1) of the *Product Stewardship (Oil) Act 2000*.

[84] As stated in paragraph 16 of this Ruling whether particular goods are manufactured or produced for the purpose of the Excise Acts is often a question of fact and degree. The explanation for this example does not mean that a chemical or physical change is the only factor or the factor to be given greatest weight in all circumstances.

Appendix 2 – Detailed contents list

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

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