

# ***ER 2012/D1 - Excise: the meaning of the expression 'manufactured or produced' for the purposes of the Excise Acts***

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## Draft Excise Ruling

### Excise: the meaning of the expression ‘manufactured or produced’ for the purposes of the Excise Acts

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### What this Ruling is about

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1. This Ruling explains when excisable goods are manufactured or produced for the purposes of the Excise Acts.
2. The Ruling also explains the meaning of the phrase ‘manufacture or produce’ for the purposes of the Excise Acts.

#### Legislative context

3. The *Excise Act 1901* and the *Excise Tariff Act 1921* provide the framework for the administration and imposition of excise on goods and are to be read as one.<sup>1</sup>

4. Excise duty is payable on goods ‘manufactured or produced in Australia’ and specified in the Schedule to the Excise Tariff Act.<sup>2</sup>

#### Interpretation

5. In this Ruling, unless otherwise stated:
  - a reference to:

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<sup>1</sup> See section 6 of the Excise Act and section 2 of the Excise Tariff Act.

<sup>2</sup> Section 5 of the Excise Tariff Act.

- ‘Acts Interpretation Act’ is a reference to the *Acts Interpretation Act 1901*;
- ‘CNG’ is a reference to Compressed Natural Gas;
- ‘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’; and
- ‘The Schedule’ is a reference to the Schedule to the Excise Tariff Act.

## **Class of entities**

6. 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**

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7. You have a liability to pay excise duty in accordance with the Excise Acts<sup>3</sup> if you manufacture or produce excisable goods in Australia.

### **Meaning of ‘manufactured or produced’**

8. The phrase ‘manufactured or produced’ for the purposes of the Excise Acts, requires that something new or different having a distinctive<sup>4</sup> 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.

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<sup>3</sup> See section 54 of the Excise Act and section 5 of the Excise Tariff Act.

<sup>4</sup> See paragraph 84 of this Ruling – distinctive means different.

9. 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.

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

*The thing did not previously exist*

10. The article 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.

11. 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 irrelevant whether the physical identity of the parts is retained or lost by fusion or some process.

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

12. The article 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.

*Change in form*

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

*Differences in its utility*

14. The existence of a new or different thing may depend not only upon a change in its chemical or physical characteristics but also upon a change in its utility, for example creating a saleable commodity.

*Improving the product*

15. Improvements to articles in existence may result in a new or different good where the improvements give the article new or different qualities, properties, utility or combinations thereof.

*Subjective intention is relevant but not determinative*

16. 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 a thing has been manufactured or produced.<sup>5</sup>

*Quality or value of the thing*

17. A thing that comes into existence incidentally and is of a relatively lower quality or value from the main purpose of the process is not precluded from being considered manufactured or produced.<sup>6</sup>

*Goods for own consumption*

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

*Application of skill, knowledge or labour*

19. There is an application of skill, knowledge or labour to a thing that brings into existence a new or different thing having a distinctive character or use.

**Example 1: manufacture or production of an excisable good**

20. *Dandy Tobacco Company (DT) purchases cut tobacco. The cut tobacco has been subject to excise duty. 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.*

21. *Item 5 of the Schedule refers to tobacco, cigars, cigarettes and snuff. The Schedule defines the term ‘tobacco’ as meaning tobacco leaf subjected to any process other than curing the leaf as stripped from the plant. Cut tobacco is defined as tobacco leaf that has been subject to processes other than curing. 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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<sup>5</sup> *Caltex Australia Petroleum Pty Ltd v Commissioner of Taxation* [2008] FCA 1951 at paragraph 71.

<sup>6</sup> *Caltex Australia Petroleum Pty Ltd v Commissioner of Taxation* [2008] FCA 1951 at paragraph 71.

22. *The production of molasses tobacco by adding molasses to cut tobacco would amount to the manufacture or production of tobacco. The process results in a product that is different and has a distinctive character or use from that out of which it is made.*

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

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

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

25. *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.*

26. *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% alc/vol.*

27. *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 production of reduced alcohol sauvignon blanc and alcoholised water amounts to manufacture or production.*

28. *The alcoholised water is classifiable to item 2 of the Schedule (other excisable beverages<sup>7</sup> not exceeding 10% by volume of alcohol). However, reduced alcohol sauvignon blanc is not classifiable to the Schedule.<sup>8</sup>*

**Example 3: manufacture or production of an excisable good**

29. *Hatton Company (Hatton) is a spirits bottler. Hatton acquires an iso-tanker of whisky at 67% alcohol by volume (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.*

<sup>7</sup> The meaning of 'other excisable beverages' is set out in the preamble to the Schedule and does not include wine.

<sup>8</sup> The reduced alcohol sauvignon blanc will be subject to the Wine Equalisation Tax.

30. *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.*

31. *The process of reduction of high strength whisky by the addition of water amounts to the manufacture or production of whisky for excise purposes.*

#### **Example 4: no manufacture or production of an excisable good**

32. *Waymouth Oil Company (WO) imports mineral turpentine. Customs duty has been paid on the imported mineral turpentine. 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.*

33. *Mineral turpentine is listed 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 imported mineral turpentine does not amount to the manufacture or production of mineral turpentine within the excise context.*

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

35. 'Manufacture' or 'produce' 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'.

#### **Excise provisions that modify, clarify or operate within the meaning of 'manufacture' or 'produce' and provisions that exempt goods for certain uses from excise**

##### ***Tobacco curing***

36. In the context of the Excise Acts, the curing of tobacco leaf that is stripped from a plant in order to convert it into leaf tobacco is deemed not to be 'manufacture'.<sup>9</sup>

##### ***Repackaging of beer***

37. The repackaging of beer that is delivered for home consumption<sup>10</sup> into individual containers not exceeding 48 litres is taken to be the manufacture of beer for the purposes of the Excise Acts.<sup>11</sup>

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<sup>9</sup> See section 68 of the Excise Act.

<sup>10</sup> The expression 'home consumption' is a term of broad application, intended to capture all domestic use of excisable goods manufactured or produced in Australia

***Example 5: Repackaging that is manufacturing an excisable good***

38. *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.*

39. *The repackaging of beer from 50 litre kegs into 5 litre kegs is taken to be manufacture for excise purposes.*

***Compressed natural gas for certain uses***

40. The process natural gas undergoes resulting in compressed natural gas is manufacturing.<sup>12</sup> When natural gas is compressed, it has new qualities/properties that are very different from natural gas.

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

- compressed for uses other than as a fuel for a motor vehicle, or
- the gas was compressed not in the course of carrying on an enterprise, or
- the gas was compressed for use in forklifts or motor vehicles with fork lift attachments (used primarily off public roads) or motor vehicles of a kind prescribed by the regulations.<sup>13</sup>

42. Compressed natural gas is also exempt from excise if it was compressed at residential premises and compressed at a rate not more than the amount per hour as prescribed by the regulations. If no amount is prescribed, the stipulated rate under this provision is 10 kilograms of compressed natural gas per hour. The compressed natural gas must not be sold or otherwise supplied in the course of carrying on an enterprise.<sup>14</sup>

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(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.

<sup>11</sup> Section 77FC of the Excise Act.

<sup>12</sup> The Explanatory Memorandum to the Taxation of Alternative Fuels Legislation Amendment Bill 2011 states that CNG is manufactured for the purposes of the Excise Acts – for example see paragraph 1.71.

<sup>13</sup> Subsection 77HA(1) of the Excise Act. From 1 July 2012, have regard to amendments to section 77HA of the Excise Act under the *Clean Energy (Excise Tariff Legislation Amendment) Act 2011*.

<sup>14</sup> Subsection 77HA(2) of the Excise Act. From 1 July 2012, have regard to amendments to section 77HA of the Excise Act under the *Clean Energy (Excise Tariff Legislation Amendment) Act 2011*.

*Blending*

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

44. However, spirit blending is taken not to constitute manufacture if it occurred in circumstances as specified in a legislative instrument.<sup>15</sup>

45. In relation to fuel blending, blending exemptions under subsection 77H(1) of the Excise Act apply to the blending of certain goods. Under this exemption, the blending of 1 or more eligible goods<sup>16</sup> are taken not to be goods covered by paragraph 10(g) of the Schedule if certain requirements are met.<sup>17</sup> This exemption 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.<sup>18</sup> 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.<sup>19</sup>

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

46. *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.*

47. *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.*

48. *The blending of imported and local ethanol is manufacture or production within the excise context.*<sup>20</sup>

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<sup>15</sup> Subsections 77FM(2) and (3) of the Excise Act.

<sup>16</sup> 'Eligible goods' is defined in subsection 77H(5) to mean goods covered by paragraph 10(a),(b), (c), (d), (da), (db), (dc), (e) or (f) of the Schedule.

<sup>17</sup> The requirements are listed under paragraphs 77H(1)(a) and (b) – where excise duty or customs duty has been paid at the same rate on all the eligible goods and the other substances (if any); or the goods are covered by a determination in force under subsection 95-5(1) of the *Fuel Tax Act 2006*.

<sup>18</sup> 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 2006*.

<sup>19</sup> Subsections 77H(3) and (4) of the Excise Act.

<sup>20</sup> Refer to section 77FM of the Excise Act.

49. *Consequently, blended high strength spirit manufactured or produced in Australia is an excisable good.*

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

50. *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.*

51. *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.*

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

*Processes in deriving a liquid hydrocarbon product*

53. *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*

54. *Recycling constitutes manufacture or production for the purposes of the excise system 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 and items 10 and 15 of the Schedule.*

55. *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.*

56. *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.*

57. *The Commissioner considers that the term ‘recycled’ does not include the reuse of used oil where nothing new or different has been manufactured or produced having a distinctive character or use.*

**Example 8: recycling that is not manufacturing or producing an excisable good**

58. Joe is a waste oil collector and recycler. He provides a 1,500 litre tank to clients for the collection and accumulation of used oil of varying type and quality.
59. 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 used oil from the tank to the road tanker.
60. As a result of the used oil's storage, some water (free water) in the used oil separates and settles to the bottom of the storage tank.
61. 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 used oil is then transferred to a separate compartment on the road tanker.
62. The used oil is transported by Joe directly to a customer for use as burner oil.
63. Joe has not produced or manufactured a liquid hydrocarbon product derived from the recycling of oil. The coarse filtering or the separation of water by settling is part of the collection process of the used oil and only results in the product achieving the state it was in at the time it became used oil. It is a process that does not amount to manufacture or production as nothing new or different having a distinctive character or use has been manufactured or produced from the used oil as collected.

**Example 9: recycling that is manufacturing or producing an excisable good**

64. Di Waste Oils Pty Ltd (Di) is a waste management company that collects various used oils, coolants (glycol and water) and other hazardous liquids.
65. 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.
66. 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.

67. *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.*

68. *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.*

69. *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'.*

70. *The recycled oil produced by Di is new and different with a distinctive character from the waste liquids as collected. The recycled oil is manufactured or produced for excise purposes.*

**Example 10: recycling that is manufacturing or producing an excisable good**

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

72. *Upon arrival at his depot, Eric drains any free water from the road tanker and then pumps the used oil through a screen filter into a storage tank for further settling and the further removal of water. This filter removes physical impurities in the used oil.*

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

74. *Upon completion of the de-watering process, the oil undergoes centrifugal separation to remove any remaining fine particles and chemical impurities suspended in the used oil. The processes require the application of skill and knowledge.*

75. *The processes undertaken by Eric to filter, de-water and separate centrifugally the used oil as described, amount to the manufacture or production of a good for excise purposes. The low grade industrial burning oil produced by Eric is different and has a distinctive character from the used oil as collected.*

# ER 2012/D1

## Date of effect

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76. 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

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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.*

### Meaning of ‘manufactured or produced’

#### **Meaning of ‘manufacture’**

77. 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.

78. 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.

79. As the definition is an inclusive one, we need to consider the ordinary meaning of the term and determine its appropriateness for the purposes of the Excise Act. The term should be given its ordinary meaning unless this would lead to any absurdity or inconsistency within the context in which the term is used.

#### **Meaning of ‘produce’**

80. ‘Produce’ is not defined in the Excise Act or the Excise Tariff Act.<sup>21</sup>

81. It is apparent that what constitutes ‘manufacture or produce’ is susceptible to a range of interpretations and its meaning is context-dependent. In the context of the Excise Acts, the terms ‘manufacture’ or ‘produce’ are not technical terms which are capable of a precise definition or universal application.

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<sup>21</sup> ‘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 *Fuel Tax Act 2006*) or grants relating to excisable goods (for example *Products Grants and Benefits Administration Act 2000*).

82. In the context of the sales tax legislation, Lockhart J held in *Federal Commissioner of Taxation v. Jax Tyres Pty Ltd*<sup>22</sup> (*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*<sup>23</sup>, 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*<sup>24</sup> 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.

83. The cases referred to in paragraph 82 were adopted by Sundberg J in *Caltex Australia Petroleum Pty Ltd v. Commissioner of Taxation*<sup>25</sup> (*Caltex*) in considering the meaning of manufactured or produced in an excise context.

84. In *Caltex*, Sundberg J, in relying on *Jax Tyres*,<sup>26</sup> 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'.<sup>27</sup> The ordinary meaning of 'distinctive' means 'distinguishing; serving to distinguish' and the ordinary meaning of 'distinguish' means 'different'.<sup>28</sup> In particular circumstances the difference in character may be slight or it may be great.

### ***Subjective intention is relevant but not determinative***

85. 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 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>29</sup>

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<sup>22</sup> *Federal Commissioner of Taxation v Jax Tyres Pty Ltd* (1984) 5 FCR 257 at 261.

<sup>23</sup> *McNicol v Pinch* [1906] 2 KB 352 at 361.

<sup>24</sup> *Federal Commissioner of Taxation v Jack Zinader Pty Ltd* (1949) 78 CLR 336.

<sup>25</sup> *Caltex Australia Petroleum Pty Ltd v Commissioner of Taxation* [2008] FCA 1951 at paragraph 65.

<sup>26</sup> *Commissioner of Taxation v Jax Tyres Pty Ltd* (1984) 5 FCR 257 at 264.

<sup>27</sup> *Caltex Australia Petroleum Pty Ltd v Commissioner of Taxation* [2008] FCA 1951 at paragraph 71.

<sup>28</sup> The Macquarie Dictionary [Multimedia], version 5.0.0, 1/10/01.

<sup>29</sup> *Caltex Australia Petroleum Pty Ltd v Commissioner of Taxation* [2008] FCA 1951 at paragraph 71.

86. The Commissioner accepts that, in addition to Sundberg J's observations in *Caltex*, the following cases set out factors that may be relevant in determining whether an article has been manufactured or produced for excise purposes.<sup>30</sup> Whilst it is not possible to directly adopt judicial interpretation of the words manufacture or produce as it appears in other legislation or jurisdictions, these cases do provide guidance.

***Bringing into existence a thing that did not previously exist***

87. In *Commissioner of Taxation v. Softex Industries Pty Ltd*<sup>31</sup> (*Softex*), the Full Federal Court (Ryan and Hely JJ with Dowsett J agreeing) held that:

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.<sup>32</sup>

88. 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 article that is distinct (for example, commercially distinct) from that out of which it is made.

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<sup>30</sup> These include factors confirmed relevant in *Caltex Australia Petroleum Pty Ltd v Commissioner of Taxation* [2008] FCA 1951.

<sup>31</sup> *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.

<sup>32</sup> *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.

## ***Differences – including change in form, utility and improvements***

89. The factors to be taken into consideration in determining whether a thing is different from that out of which it was made were discussed by Windeyer J in *M.P. Metals Pty Ltd v. Federal Commissioner of Taxation*<sup>33</sup> (*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.

90. In the Irish case *Samuel McCausland v. Ministry of Commerce (McCausland)*<sup>34</sup> the Court considered amongst other things, the issue of utility, quality and worth of bulk product (seeds) that have been processed.<sup>35</sup> 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.

<sup>33</sup> *M.P. Metals Pty Ltd v. Federal Commissioner of Taxation* [1967-1968] 117 CLR 631; (1968) 14 ATD 407.

<sup>34</sup> *Samuel McCausland v. Ministry of Commerce* [1956] NI 36.

<sup>35</sup> It should be noted the case was decided 2:1, with Black LJ dissenting.

91. Porter LJ in *McCausland*<sup>36</sup> 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 Acts 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.

92. However, these factors are not necessarily looked at in isolation when determining if an article has been manufactured or produced for excise purposes.

93. For example, a change in utility in the context of recycling may only result in waste disposal, for example, reuse of used oil which has not produced something new or different for excise purposes. The Commissioner considers that the term 'recycled' does not include the reuse of used oil as the use of a used oil for the same or different purpose does not constitute the manufacture or production of goods from used oil.

### ***Complexity is not determinative but may be relevant***

94. In the context of the Canadian excise system (dealing with a consumption or sales tax) the judgment by Pratte, J.A. in *Minister of National Revenue v. Enseignes Imperial Signs Ltd.*,<sup>37</sup> 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.<sup>38</sup>

95. 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 with a distinctive character or use.

<sup>36</sup> *Samuel McCausland v. Ministry of Commerce* [1956] NI 36.

<sup>37</sup> *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.

<sup>38</sup> *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.

## **Application of skill, knowledge or labour**

96. In *Re Searls Ltd*<sup>39</sup> (*Re Searls*) Harvey CJ discussed 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.

97. In *Jax Tyres*<sup>40</sup> 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.'

98. Implicit in the ordinary meaning of manufacture or produce and in the discussion of cases such as *Re Searls*<sup>41</sup> and *Jax Tyres*<sup>42</sup> is the notion that knowledge, skills and labour may be features of manufacture or production.

## **Excise provisions that modify, clarify or operate within the meaning of 'manufacture' or 'produce' and provisions that exempt goods for certain uses from excise**

99. The following provisions extend or modify the meaning of 'manufacture' or 'produce', or affect the imposition of excise:

- Section 68 of the Excise Act – Exemption for the curing of tobacco;
- Section 77FC of the Excise Act – Repackaging of beer;

<sup>39</sup> *Re Searls Ltd* (1932) 33 SR (NSW) 7.

<sup>40</sup> *Federal Commissioner of Taxation v. Jax Tyres Pty Ltd* (1984) 85 ATC 4001 at 4005.

<sup>41</sup> *Re Searls Ltd* (1932) 33 SR (NSW) 7.

<sup>42</sup> *Federal Commissioner of Taxation v. Jax Tyres Pty Ltd* (1984) 85 ATC 4001 at 4004.

- Section 77HA of the Excise Act – Exemption for compressed natural gas (CNG);
- Section 77FM of the Excise Act – Spirit blending to be treated as manufacture;
- Section 77G of the Excise Act – Fuel blending to be treated as manufacture;
- Section 77H of the Excise Act – Blending exemptions;
- Section 77J of the Excise Act – Recycling of solvents;
- Items 10 and 15 in the Schedule – the reference to recycling; and
- Item 10 – the reference to other processes.

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

100. The Schedule provides that:

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

101. 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.

102. Section 68 of the Excise Act and the meaning of tobacco in the Schedule ensure curing of tobacco leaf<sup>43</sup> is excluded from the definition 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.<sup>44</sup> 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***

103. 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

<sup>43</sup> Note local production of tobacco leaf in Australia has virtually ceased.

<sup>44</sup> Tobacco Growing in Victoria, The Tobacco Co-operative of Victoria Ltd and Stonestrow Communications, viewed 1 May 2012 <<http://www.alpinelink.com.au>>

- (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.

104. Under section 77FC of the Excise Act, the repackaging of beer<sup>45</sup> 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 (CNG)***

105. Section 77HA of the Excise Act provides that:

77HA Compressed natural gas that is exempt from excise duty

77HA(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.

77HA(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

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<sup>45</sup> Excise duty has been paid on the beer packaged in an individual container exceeding 48 litres.

meaning of the *A New Tax System (Goods and Services Tax) Act 1999*).

106. CNG is manufactured for the purposes of the Excise Act when natural gas is compressed.<sup>46</sup> However, subsection 77HA(1) of the Excise Act provides an exemption from excise for:

- CNG manufactured for uses other than in a motor vehicle;
- natural gas compressed not in the course of carrying on an enterprise; or
- CNG that was manufactured for use in forklifts or vehicles with fork lift attachments (used primarily off public roads).<sup>47</sup>

107. Other factors in subsection 77HA(2) of the Excise Act that exempt CNG from excise are related to:

- the place where the compression of the natural gas occurs (whether it was compressed at residential premises);
- the rate at which the compression occurs (compressed at a rate per hour not more than as prescribed by the regulations, if no amount is prescribed, the stipulated rate under this provision); 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*).<sup>48</sup>

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

108. 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.<sup>49</sup>

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<sup>46</sup> 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 CNG at the point of manufacture which is when natural gas is compressed for use in a vehicle.

<sup>47</sup> From 1 July 2012, have regard to amendments to section 77HA of the Excise Act under the *Clean Energy (Excise Tariff Legislation Amendment) Act 2011*.

<sup>48</sup> From 1 July 2012, have regard to amendments to section 77HA of the Excise Act under the *Clean Energy (Excise Tariff Legislation Amendment) Act 2011*.

<sup>49</sup> For example, see *Excise (Spirit blending exemptions) Determination 2010 (No. 1)*.

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

109. 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**

110. 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 subsection 77H(1) or (3) of the Excise Act.<sup>50</sup>

111. 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.<sup>51</sup>

112. However, subsection 77H(1) of the Excise Act does not apply if any of the constituents 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.<sup>52</sup>

113. 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<sup>53</sup> 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.<sup>54</sup>

<sup>50</sup> Item 10 of the Schedule does not include goods classifiable to item 15 and waxes, liquefied petroleum gas and bitumen. See paragraphs 10(h) and 10(i) of the Schedule.

<sup>51</sup> The Commissioner may determine by legislative instrument that a fuel blend does not constitute a fuel. See *Fuel Tax (Fuel Blends) Determination 2006 (No. 3)*.

<sup>52</sup> Subsection 77H(2) of the Excise Act.

<sup>53</sup> Subsection 77H(4) of the Excise Act.

<sup>54</sup> See *Excise (Blending exemptions) Determination 2006 (No. 1)*.

**Blending**

114. Blending of fuel and spirit constitutes manufacturing or producing for the purposes of the Excise Acts where similar or dissimilar goods are blended to produce a new or different product having a distinctive character or use, having regard to specific blending exemptions.

**Section 77J of the Excise Act – Recycling of solvents**

115. Section 77J of the Excise Act excludes from subitems 10.25, 10.26, 10.27, 10.28 or 10.30 in the Schedule certain goods which are manufactured or produced by a recycling process.<sup>55</sup>

116. The exclusion applies where:

- the fuel was previously delivered for home consumption<sup>56</sup> 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*

117. 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'.

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<sup>55</sup> The Commissioner's view is that 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.

<sup>56</sup> Home consumption - 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 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.

118. Accordingly, for the purposes of paragraph 10(d) of the Schedule, the term should be given its ordinary meaning, unless this would lead to any absurdity or inconsistency within the context in which the term is used.

119. The Australian Oxford Dictionary<sup>57</sup> relevantly defines ‘derive’ to mean:

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

120. In the context of paragraph 10(d) of the Schedule, it is considered 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.

### ***The reference to ‘recycling’ or ‘recycled’ in Items 10 and 15 of the Schedule***

121. 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 refers to petroleum based oils or greases and their synthetic equivalents that are ‘recycled’ for use as oils or greases.

122. The terms ‘recycling’ or ‘recycled’ are not defined in the Excise Acts.

123. The *Macquarie Dictionary*<sup>58</sup> 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.

124. The Chambers Dictionary<sup>59</sup> and *Australian Oxford Dictionary*<sup>60</sup> 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.

125. A broad application of the ordinary meaning of ‘recycle’, without reference to the context in which it appears, may result in unintended consequences.

<sup>57</sup> *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne.

<sup>58</sup> *The Macquarie Dictionary* [Multimedia], version 5.0.0, 1/10/01.

<sup>59</sup> *Chambers Dictionary* 1998, Harrap Publishers Edinburgh.

<sup>60</sup> *The Australian Oxford Dictionary*, 1999, Oxford University Press, Melbourne.

126. Given that excise is to be imposed on goods ‘manufactured or produced in Australia’<sup>61</sup> 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.

127. 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.<sup>62</sup>

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

129. For example, if a process recycles used lubricant by reducing the amount of contaminants or impurities, and the chemical and/or physical composition of the recycled lubricant is different to the used lubricant as collected, transforming the used lubricant into a new or different product having a distinctive character or use, then that recycled lubricant has been manufactured or produced for the purposes of the Excise Acts.<sup>63</sup>

130. The Commissioner considers that the mere removal of large foreign objects from the collection of used oil,<sup>64</sup> 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 produce anything new or different having a distinctive character or use from the used oil as collected.<sup>65</sup> 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.

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<sup>61</sup> 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.’

<sup>62</sup> Please refer to Draft Product Grant and Benefit Ruling PGBR 2012D/1 for further examples and discussion of recycling used oil.

<sup>63</sup> As stated in paragraph 9 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.

<sup>64</sup> See definition of ‘used oil’ in subsection 6(1) of the *Product Stewardship (Oil) Act 2000*.

<sup>65</sup> As stated in paragraph 9 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 – Background

**❶ This Appendix is provided as information to help you understand the excise system. It does not form part of the binding public ruling.**

### Excise Legislation Overview

131. The Excise Act and the Excise Tariff Act are the principal Acts that provide the framework for the excise regime.

132. Section 2 of the Excise Tariff Act provides that the Excise Act, Excise Tariff Act and *Petroleum Excise (Prices) Act 1987*<sup>66</sup> are to be read as one.

133. 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.

134. 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.

135. To manufacture excisable goods, you are required to be a licensed manufacturer.<sup>67</sup> A licensed manufacturer can only manufacture excisable goods at licensed premises in accordance with the conditions specified in the manufacturer licence.<sup>68</sup>

136. There are four types of licences:

- a Manufacturer licence which authorises the licence holder to manufacture excisable goods;<sup>69</sup>
- a Storage licence which authorises the licence holder to keep, store and deal with excisable goods at the premises specified in the licence;<sup>70</sup>
- a Producer licence<sup>71</sup> which authorises the licence holder to produce tobacco seed, plant or leaf;<sup>72</sup> and
- a Dealer licence<sup>73</sup> which authorises the licence holder to deal in tobacco seed, plant or leaf.<sup>74</sup>

<sup>66</sup> 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.

<sup>67</sup> Section 25 of the Excise Act.

<sup>68</sup> Sections 26 and 39D of the Excise Act.

<sup>69</sup> Section 25 of the Excise Act.

<sup>70</sup> Part IV of the Excise Act.

<sup>71</sup> Section 28 of the Excise Act

<sup>72</sup> Tobacco seed, tobacco plant or tobacco leaf are not excisable goods. For the meaning of 'tobacco' see the preamble to the Schedule to the Excise Tariff Act.

<sup>73</sup> Section 33 of the Excise Act.

<sup>74</sup> Tobacco seed, tobacco plant or tobacco leaf are not excisable goods. For the meaning of 'tobacco' see the preamble to the Schedule to the Excise Tariff Act.

137. As a licence holder, you are responsible for the safe custody of all excisable goods held on your premises and for the observance of the Excise Act at the premises specified in your licence.<sup>75</sup>

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

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

140. '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 as being part of Australia:

4 Australia does not include:

- (a) the Territory of Christmas Island; or
- (b) the Territory of Cocos (Keeling) Islands

4A Certain installations to be part of Australia

- (1) For the purposes of the Excise Acts:
  - (a) a resources installation that becomes attached to, or that is, at the commencement of this subsection, attached to, the Australian seabed; or
  - (b) a sea installation that becomes installed in, or that is, at the commencement of this subsection, installed in, an adjacent area or a coastal area; shall, subject to subsections (2) and (3), be deemed to be part of Australia.
- (4) In this section:
  - (a) adjacent area, Australian seabed, coastal area, resources installation and sea installation have the same respective meanings as in the Customs Act 1901;
  - (b) a resources installation shall be taken to be attached to the Australian seabed if it would be taken to be so attached for the purposes of the Customs Act 1901;
  - (c) a sea installation shall be taken to be installed in an adjacent area if it would be taken to be so installed for the purposes of the Customs Act 1901; and
  - (d) a sea installation shall be taken to be installed in a coastal area if it would be taken to be so installed for the purposes of the Customs Act 1901.

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<sup>75</sup> Section 53 of the Excise Act.

141. Having regard to the Acts Interpretation Act,<sup>76</sup> for the purposes of the excise system, the term 'Australia' does not include any external Territory<sup>77</sup> 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.

***Example 11: offshore gas platform deemed to be part of Australia***

142. *Southern Oil Explorers Company (Southern Oil) carries on an oil and gas exploration and production enterprise. Southern Oil operates an offshore gas platform, (Matey 1) off the coast of Australia. Matey 1 is attached to the Australian seabed.*

143. *Matey 1 is a resources installation that is deemed to be part of Australia for the purposes of the Excise Acts. Consequently, if any goods listed in the Schedule that are 'manufactured or produced' on Matey 1, they may be subject to the Excise Acts.*

144. The Australia Constitution (the Constitution) provides that only the Commonwealth can impose duties of excise.<sup>78</sup> The Constitution also provides that laws imposing duties of excise shall only deal with duties of excise.<sup>79</sup>

145. The Excise Tariff Act imposes duties of excise on certain goods manufactured or produced in Australia and as such this imposition of excise duty is distinguished from the imposition of customs duty on those equivalent goods that are imported into Australia.

146. You have a liability to pay excise duty in accordance with the Excise Acts<sup>80</sup> if you manufacture or produce excisable goods in Australia.

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<sup>76</sup> Section 2B of the Acts Interpretation Act.

<sup>77</sup> 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.

<sup>78</sup> Section 90.

<sup>79</sup> Section 55.

<sup>80</sup> See section 54 of the Excise Act and section 5 of the Excise Tariff Act.

## **Appendix 3 – Your comments**

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147. 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.

148. 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.

<b>Due date:</b>	<b>5 July 2012</b>
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**Appendix 4 – Detailed contents list**

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- produce

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