



# ***WETD 2024/D1 - Wine equalisation tax: the addition of water to cider or perry***

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Status: **draft only – for comment**

## Draft Wine Equalisation Tax Determination

### Wine equalisation tax: the addition of water to cider or perry

#### Relying on this draft Determination

This publication is a draft for public comment. It represents the Commissioner's preliminary view on how a relevant provision could apply.

If this draft Determination applies to you and you rely on it reasonably and in good faith, you will not have to pay any interest or penalties in respect of the matters covered, if this draft Determination turns out to be incorrect and you underpay your tax as a result. However, you may still have to pay the correct amount of tax.

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#### What this draft Determination is about

1. The definition of 'cider or perry' in the *A New Tax System (Wine Equalisation Tax) Act 1999* (WET Act) specifically allows for the addition of water to the beverage at any time. This draft Determination<sup>1</sup> sets out how much water can be added before a beverage will no longer meet the definition of cider or perry for the purposes of the WET Act.

#### Ruling

2. The term 'wine' is defined in section 31-1 of the WET Act to include cider or perry.<sup>2</sup> For a product to meet the definition of cider or perry, it must satisfy all the tests in section 31-5 of the WET Act, which defines 'cider or perry' as a beverage that<sup>3</sup>:

- (a) is the product of the complete or partial fermentation of the juice or must of apples or pears; and

<sup>1</sup> For readability, all further references to 'this Determination' refer to the Determination as it will read when finalised. Note that this Determination will not take effect until finalised.

<sup>2</sup> Subsection 31-1(2) of the WET Act provides that, '**wine** does not include beverages that do not contain more than 1.15% by volume of ethyl alcohol'.

<sup>3</sup> For the purposes of paragraph (d) of this definition, there are currently no specific regulations in respect of 'cider or perry'.

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- (b) has not had added to it, at any time, any ethyl alcohol from any other source, except as specified in the regulations; and
- (c) has not had added to it, at any time, any liquor or substance (other than water or the juice or must of apples or pears) that gives colour or flavour, except as specified in the regulations; and
- (d) complies with any requirements of the regulations, made for the purposes of section 31-8, relating to cider or perry.

3. The circumstances in which water is added to a product can affect whether that product satisfies the 'cider or perry' definition.<sup>4</sup>

**'Product of' the complete or partial fermentation of the juice or must of apples or pears**

4. In *Divas Beverages Holdings Ltd v Commissioner of Taxation* [2018] FCA 576 (*Divas Beverages*), the Federal Court considered whether certain beverages satisfied the 'grape wine' definition in section 31-2 of the WET Act. The Federal Court decided that the exhaustive nature of that definition did not permit considering whether a beverage had the 'essential character' of wine as ordinarily understood.<sup>5</sup>

5. The Federal Court nevertheless considered the ingredients comprising the final beverage and the connection between those ingredients and the requirement that the final beverage be the 'product of' fermentation. Notably, the Federal Court decided that (emphasis added)<sup>6</sup>:

The starting point is the statutory definition of "grape wine". To constitute "grape wine" within the statutory meaning, the beverage must be **the product of the fermentation** of fresh grapes or products derived solely from fresh grapes. **The text of the definition, in ordinary meaning, conveys that a beverage is "grape wine" if it is a fermented drink made from fresh grapes or products derived solely from fresh grapes.**

6. Both the 'grape wine' and 'cider or perry' definitions in sections 31-2 and 31-5 of the WET Act require a beverage to be the 'product of' a fermentation process. Therefore the Federal Court's reasoning in *Divas Beverages*, that to be 'grape wine' the beverage must be the product of a fermentation process, informs the consideration of the 'cider or perry' definition.

7. Paragraph (c) of the 'cider or perry' definition allows for the addition of water at any time. However, the definition still operates by reference to whether there is the necessary connection between the beverage and the process of complete or partial fermentation in paragraph (a) of the definition, with that connection being sufficiently close that the beverage can properly be described as the 'product of' that process.

8. Having regard to paragraph (a) of the 'cider or perry' definition, the addition of water must not cause the final beverage, being the product that must meet the definition of cider or perry, to no longer be regarded as the product of the complete or partial fermentation of the juice or must of apples or pears.

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<sup>4</sup> All references to water in this Determination include carbonated water.

<sup>5</sup> At [72] in *Divas Beverages*, Justice Davies found that following the amendments made to the definition of 'wine' by the *A New Tax System (Indirect Tax and Consequential Amendments) Act 1999*, '[t]he evident purpose of the 1999 amendments was to define the terms exhaustively to remove uncertainty as to whether a drink met the description of "wine" in ordinary meaning'. Accordingly, Justice Davies found that it was unnecessary to examine whether the product which was the subject of that case had the 'essential character' of wine.

<sup>6</sup> See *Divas Beverages* at [58].

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9. The necessary connection between the final beverage and the process of fermentation will be broken where water is added after fermentation in a quantity that alters the character of the final beverage as the 'product of' the fermentation process.

10. Consequently, a beverage, which because of the addition of water, has an unfermented component exceeding the fermented component, will not be regarded as the product of the complete or partial fermentation of the juice or must of apples or pears under the 'cider or perry' definition. Rather, the beverage is properly described as a mixture of a substance produced by the complete or partial fermentation of the juice or must of apples or pears and a substance not produced by such fermentation, with the latter forming the majority of the final beverage.

11. It follows, that where water or other unfermented substances are added alone or in combination to the fermented substance in a volume exceeding that of the fermented substance (that is, in a volume that is more than half the total volume of the final beverage), the beverage is not 'cider or perry' for the purposes of the WET Act.

12. Paragraph (a) of the 'cider or perry' definition does not preclude the fermentation of the juice of apples or pears when that juice has been reconstituted by mixing apple or pear concentrate with water.

13. The addition of water prior to fermentation, to the extent it is necessary to reconstitute apple or pear concentrate to the equivalent of natural undiluted juice, will not prevent a beverage from being a product of fermentation. Nor will that amount of water need to be taken into account when determining whether unfermented substances comprise more than half the total volume of the final beverage.

14. The addition of water, in an amount beyond that which is necessary to reconstitute apple or pear juice to the consistency of apple or pear juice in its natural undiluted form, could result in the beverage no longer being 'the product of the complete or partial fermentation of the juice or must of apples or pears' for the purposes of paragraph (a) of the 'cider or perry' definition.

15. A beverage that does not satisfy the definition of 'cider or perry' for the purposes of the WET Act because the proportion of water or other unfermented substances in the final beverage exceeds the proportion of the fermented substance, is an 'other excisable beverage' for the purposes of the Schedule to the *Excise Tariff Act 1921*. That beverage is subject to excise duty at the applicable rate.

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## **Example 1 – cider**

16. *The Cider Boys are manufacturers of cider and are creating a new beverage which will result from the fermentation of fresh apple juice. Following fermentation, water will be added. The added water comprises 40% of the final product.*

17. *The beverage meets the definition of 'cider or perry' for the purposes of the WET Act as the unfermented component is not greater than the fermented solution (assuming all other requirements in the definition of 'cider or perry' are satisfied).*

## **Example 2 – other excisable beverage**

18. *ABC Cider manufactures a beverage made from the fermentation of reconstituted pear juice. Pear juice concentrate is combined with water to a concentration consistent with that of natural undiluted juice and is fermented to create a 'cider base'. Following fermentation, additional water is added to the cider base, with the water added post-fermentation comprising 60% of the final product.*

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19. *The Commissioner accepts that the reconstitution of pear concentrate with water to a concentration consistent with that of natural undiluted pear juice is pear juice for the purposes of the WET Act.*

20. *Although the ‘cider base’ meets the definition of ‘cider or perry’ for the purposes of the WET Act, adding such a large quantity of water post-fermentation means the final beverage can no longer be characterised as the ‘product of the complete or partial fermentation of the juice or must of apples or pears’. Therefore the beverage does not meet the ‘cider or perry’ definition. It is classified as an ‘other excisable beverage not exceeding 10% by volume of alcohol’ under table Item 2 in the Schedule to the Tariff Act.*

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## Date of effect

21. When the final Determination is issued, it is proposed to apply from 1 July 2024.

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**Commissioner of Taxation**

12 June 2024

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## Appendix 1 – Alternative views

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❶ ***This Appendix sets out alternative views and explains why they are not supported by the Commissioner. It does not form part of the proposed binding public ruling.***

22. The definition of ‘wine’ in section 31-1 of the WET Act was introduced by the *A New Tax System (Indirect Tax and Consequential Amendments) Act 1999* and includes ‘grape wine’ in addition to ‘cider or perry’, each of which have their own definitions in sections 31-2 and 31-5 of the WET Act respectively.

23. The Explanatory Memorandum to the *A New Tax System (Indirect Tax and Consequential Amendments) Bill 1999* relevantly stated the following:

### **The definition of wine**

1.231 **Item 231** inserts a new more comprehensive definition of wine. The new definition provides certainty as to the types of products that will be covered by the WET.

**Subdivision 31-A** makes it clear that the WET extends to fruit or vegetable wines and grape wine products such as wine cocktails, flavoured wines and Irish style cream drinks. A minimum and maximum alcohol band is specified for grape wine products and fruit or vegetable wines to prevent designer drinks and pre-mixed alcoholic products, commonly referred to as ready-to-drink, containing less than 8% alcohol, and low strength spirits from accessing the WET. A separate definition for cider has been included to ensure that traditional cider is included in the WET.

...

### **Cider or perry**

1.239 Cider and perry will cover traditional cider and perry products. **[Item 231, new section 31-5]**

24. In *Divas Beverages*, the Federal Court considered whether certain beverages satisfied the ‘grape wine’ definition in section 31-2 of the WET Act, and decided that the exhaustive nature of that definition did not permit evaluating whether a beverage had the ‘essential character’ of wine.<sup>7</sup>

25. In applying this reasoning to the ‘cider or perry’ definition in section 31-5 of the WET Act, it might be considered that because this definition is also exhaustive, there is also no ‘essential character’ test. Consequently, it might be reasoned by extension, that where the ‘cider or perry’ definition expressly allows for the addition of certain unfermented substances (such as water), the fact that there are no prescribed limits on the quantity of such substances means that they may be added in unlimited quantities.

26. The Commissioner does not accept this as the better view.

27. Despite there being no ‘essential character’ test expressed by the terms of the ‘cider or perry’ definition in section 31-5 of the WET Act, a careful consideration of the product sought to be classified under the ‘cider or perry’ definition is still required by the terms of the definition, and is consistent with the description of the operation of that definition and the related ‘wine’ definition in the Explanatory Memorandum.

28. When considering in *Divas Beverages* the concept of what constitutes a ‘product’ for the purposes of the ‘grape wine’ definition in section 31-2 of the WET Act, the Federal Court cited the following passages with approval from the decision concerning petroleum

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<sup>7</sup> *Divas Beverages* at [72].

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resources rent tax in *Esso Australia Resources Pty Ltd v The Commissioner of Taxation* [2011] FCA 360 at [236–238]<sup>8</sup>:

The ordinary meaning of ‘produce’ or ‘produced’ in the PRRTA Act should not be read simply to mean ‘derived’, but should be read by reference to its context and the purpose of the petroleum project.

According to the Oxford English Dictionary “product” means something “produced by any action, operation or work; a production; the result. Now frequently that which is produced commercially for sale...”. The word “produce” means “To bring forth, bring into being or existence... To bring (a thing) into existence from its raw materials or elements, or as the result of a process”.

The chief current meaning of the word “process” is “a continuous and regular action or series of actions, taking place or carried on in a definite manner, and leading to the accomplishment of some result; a continuous operation or series of operations”.

29. These passages were cited by the Federal Court in *Divas Beverages* in deciding that the requirements of the definition for whether a beverage was ‘grape wine’ under section 31-2 of the WET Act, were to be applied with reference to the finished product, and not to the liquid as it existed during the various stages of production.

30. The ‘grape wine’ definition is materially similar to the ‘cider or perry’ definition in section 31-5 of the WET Act, in that both definitions require a beverage to be the ‘product of’ a fermentation process. Therefore, the Federal Court’s reasoning in *Divas Beverages* about the focus of the ‘grape wine’ definition being on whether the final beverage can be properly regarded as the product of a fermentation process, is considered to apply equally to the ‘cider or perry’ definition.

31. In line with this reasoning from *Divas Beverages*, it is not sufficient that a mere component of the final beverage is produced by the complete or partial fermentation of the juice or must of apples or pears, and that the remainder of the beverage consists of water or other unfermented substances added in unrestricted measure. To satisfy the definition of ‘cider or perry’ in section 31-5 of the WET Act, the final beverage must be the product of the complete or partial fermentation of the juice or must of apples or pears.

32. A beverage that does not satisfy the requirements of the ‘cider or perry’ definition in section 31-5 of the WET Act because it is not the product of the complete or partial fermentation of the juice or must of apples or pears by reason due to containing added unfermented substances exceeding the fermented substance, will be subject to excise duty as an ‘other excisable beverage’ for the purposes of the Schedule to the *Excise Tariff Act 1921*.

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<sup>8</sup> See *Divas Beverages* at [39]. References in this quote to PRRTA Act are to the *Petroleum Resources Rent Tax Assessment Act 1987*.

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## Appendix 2 – Your comments

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

34. A compendium of comments is prepared when finalising this Determination, and an edited version (names and identifying information removed) is published to the Legal database on [ato.gov.au](http://ato.gov.au)

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

**Due date:** 12 July 2024

**Contact officer details have been removed as the comments period has ended.**



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## References

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*Previous draft:*

Not previously issued as a draft

*Related Rulings/Determinations:*

TR 2006/10

*Legislative references:*

- ANTS(WET)A 1999 31-1
- ANTS(WET)A 1999 31-2
- ANTS(WET)A 1999 31-5
- Excise Tariff Act 1921 the Sch
- A New Tax System (Indirect Tax and Consequential Amendments) Act 1999

*Cases relied on:*

- Divas Beverages Holdings Ltd v Commissioner of Taxation [2018] FCA 576; 2018 ATC 20–654
- Esso Australia Resources Pty Ltd v The Commissioner of Taxation [2011] FCA 360; 194 FCR 32; 279 ALR 519; 83 ATR 47

*Other references:*

- Explanatory Memorandum to the A New Tax System (Indirect Tax and Consequential Amendments) Bill 1999

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ATO references

NO: 1-Y1G8HVN

ISSN: 2205-6211

BSL: SMB

ATOlaw topic: Wine equalisation tax ~~ Manufacture and definitions of wine

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