EXC 2016/5 - Explanatory statement -

Australian Government
Australian Taxation Office

Australian Taxation Office Legislative Instrument
Instrument ID: 2016/ITX/0056

Explanatory Statement

Fuel Tax (Fuel Blends) Determination 2016 (No.1)

General outline of determination

1. This Explanatory Statement is provided in accordance with sections 15(G)4 and 15J of the *Legislation Act 2003* (**'Legislation Act'**).
2. Under section 95-5 of the *Fuel Tax Act 2006* (**'Fuel Tax Act'**) the Commissioner of Taxation may determine that a blend of a fuel and another product does not constitute a fuel for the purposes of the Fuel Tax Act.

Revoking of previous instrument

3. *Fuel Tax (Fuel blends) Determination 2006 (no. 3) (FRLI No. F2006L02798)* registered on the 24 August 2006 is revoked on the commencement of this determination.
4. The new instrument is a restatement of the previous determination which is to be repealed on 1st October 2016 under the sunsetting provisions as prescribed in part 6 of the *Legislative Instrument Act 2003.*
5. The new instrument additionally includes a new circumstance for the blending of biodiesel with substances where the final blended product is used in non-fuel applications including (but not limited to) biodegradable agricultural sprays and mould release agents.

Date of effect

6. The determination commences on the day after registration.

What is the determination about?

7. This instrument is made under section 95-5 of the Fuel Tax Act. It contains a test that, if satisfied, provides that a blend of a taxable fuel with another product does not constitute a fuel for the purposes of the fuel tax law. This means that the producer of such a blend may be entitled to claim fuel tax credits on taxable fuel used in the production of the blend. It also has implications for excise, as such blends are taken not to be excisable under subsection 77G(1) of the Excise Act 1901 (**'Excise Act'**).

What is the effect of the determination?

8. According to section 41-5 of the Fuel Tax Act, an entity that is registered for goods and services tax (GST) or required to be registered for GST, or an entity that is a non-profit body that satisfies subsection 41-5(3) of the Fuel Tax Act, is entitled to a fuel tax credit for taxable fuel acquired, manufactured in or imported into Australia for use in carrying on its enterprise.

9. Section 110-5 of the Fuel Tax Act defines an enterprise to have the same meaning as in the A New Tax System (Goods and Services) Act 1999 (GST Act).

10. The term ‘use’ in the Fuel Tax Act takes its ordinary meaning provided the fuel is used in carrying on an enterprise. Fuel is ‘used’ if it ceases to exist after an action to use it, which includes fuel used in the production of another product.

11. However in some circumstances it is not clear that a fuel is used when producing another product (a blend). To provide certainty the fuel tax law gives a further power to the Commissioner to determine whether a blend constitutes a fuel.

12. Under section 95-5 of the Fuel Tax Act the Commissioner of Taxation (the Commissioner) can make a legislative instrument that a blend of a fuel and another product (not a taxable fuel) does not constitute a fuel for the purposes of a fuel tax law.

13. Section 95-5(3) of the Fuel Tax Act requires that the Commissioner consider a number of matters when making the legislative instrument. These matters include:

    (a) the physical and chemical properties of the blend

    (b) whether the blend can be used in an internal combustion engine

    (c) whether the fuel is marketed and distributed as fuel

    (d) whether there is a risk that the blend might be used as a fuel and the risk and financial impact to the Commonwealth If the blend were used as a fuel

    (e) any other relevant matter.

    The Commissioner must give the greatest weight to the matter mentioned in paragraph (d).

14. The types of blends covered by this determination are not limited. However, it is considered that the determination will be most relevant to producers of solvents.

15. Blends often contain several components, with a large number of final products resulting from slight variations in components. Therefore, it is difficult to produce a conclusive list of all blends that would meet the test as set out in subsection 95-5(3) of the Fuel Tax Act.

16. To ease the compliance burden on clients, the Commissioner has determined that, when a specified product is added to a taxable fuel at a minimum level and the blend is not marketed or sold for use as a fuel in an internal combustion engine, the resulting blend does not constitute a fuel for the purposes of the fuel tax law. The minimum level may be determined by reference to a single specified product at a specified concentration, or to a combination of specified products at a cumulative concentration.

17. The Schedule to the legislative instrument provides a list of specified products which may be blended with fuel so that the resultant blend (provided it is not marketed or sold as fuel for use in an internal combustion engine) will not constitute a fuel for the purposes of the fuel tax law. The list sets out the following:

    - item number for identification purposes
    - the product to be blended with taxable fuel

- § the chemical abstracts service (CAS) number for the product (where applicable)
- § the minimum amount by volume of the product that must be present in the final blend if no other products specified in the list are present.

18. Where there is more than one specified product, the minimum level is determined cumulatively at 10% by volume.
19. The manufacturer must be able to demonstrate that the minimum level of a specified product or specified products is present.

Impact of the instrument

20. The instrument provides certainty to producers of blends in relation to their entitlement to claim fuel tax credits on taxable fuel included in the blend. It also has implications for fuel excise in determining whether certain blending processes constitute excise manufacture and the blends are exempt blends, due to the reference in paragraph 77H(1)(b) of the Excise Act.

Consultation

21. Subsection 17(1) of the *Legislation Act* requires that the CEO undertake an appropriate level of consultation that is reasonably practicable to undertake before making a legislative instrument.
22. Limited industry consultation was undertaken in relation to the development of the instrument as it is considered minor or machinery in nature, and does not substantially change the law.
23. The Treasury have been consulted and do not have any issue with the determination.

Related Rulings/Determinations:

Fuel Tax (Fuel blends) Determination 2006 (No. 3) (FRLI No. F2006L02798)

Subject references:

Blending determination

Excise manufacture

Excise tariff

Exempt blend

FTC determination

Fuel blending

Fuel tax

Fuel tax credits

Legislative references:

Excise Act 1901 subsection 77H(1)

Excise Tariff Act 1921, The Schedule, subitems 10.25, 10.26, 10.27 and 10.28

Fuel Tax Act 2006 section 41-5

Fuel Tax Act 2006 section 95-5

Fuel Tax Act 2006 section 110-5

Legislative Instruments Act 2003

Statement of Compatibility with Human Rights

This Statement is prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011.*

Fuel Tax (Fuel Blends) Determination 2016 (No. 1)

This Legislative Instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

Fuel Tax (Fuel Blends) Determination 2016 (No. 1) revokes *Fuel Tax (Fuel blends) Determination 2006 (no. 3).* The determination provides a test that, if satisfied, provides that a blend of a taxable fuel with another product does not constitute a fuel for the purposes of the fuel tax law and that determines the producer's entitlement to claim fuel tax credits on taxable fuel used in the production of the blend. It also has implications for excise, as such blends are taken not to be excisable under subsection 77G(1) of the *Excise Act 1901 (Excise Act)*.

Human rights implications

This legislative instrument does not engage any of the applicable rights or freedoms as it is considered to be minor or machinery in nature. It provides certainty to producers of blends in relation to their entitlement to claim fuel tax credits on taxable fuel included in the blend. It also has implications for fuel excise in determining whether certain blending processes constitute excise manufacture and the blends are exempt blends, due to the reference in paragraph 77H(1)(b) of the Excise Act.

Conclusion

This legislative instrument is compatible with human rights as it does not raise any human rights issues.