

EXC 2019/1 - Explanatory statement -



Explanatory Statement

Excise (Alcoholic Strength of Excisable Goods) Determination 2019

General Outline of Determination

1. This determination is made under section 65 of the *Excise Act 1901* (Excise Act).
2. The determination provides rules for working out the alcoholic strength of alcoholic excisable goods entered for home consumption.
3. The determination is a legislative instrument for the purposes of the *Legislation Act 2003*.
4. Under subsection 33(3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws) the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend or vary any such instrument.

Date of effect

5. The determination commences on the day after it is registered on the Federal Register of Legislation and applies to alcoholic excisable goods entered for home consumption on or after the date of commencement.

What is this determination about

6. The duty payable on an alcoholic excisable good is determined by the volume of alcohol contained in the good. The volume of alcohol in a good is calculated by multiplying the volume of the good by its alcoholic strength. To ensure manufacturers pay the correct amount of duty on the alcoholic excisable goods they manufacture, it is important that there is a set of rules for correctly measuring the alcoholic strength of those goods. The rules are sufficiently flexible to allow for small variations in alcoholic strength.
7. The purpose of this determination is to provide the rules for measuring the alcoholic strength of alcoholic excisable goods, including:
 - (a) sampling and analysis;
 - (b) measuring and equipment; and
 - (c) permitted variations between the actual and labelled strength of alcoholic excisable goods.

What is the effect of this determination

8. Manufacturers will have clear rules as to how to measure the alcoholic strength of alcoholic excisable goods, which will provide greater certainty for industry and enhance administration of the Excise laws.

Background

9. This determination replaces *Excise (Alcoholic strength of excisable goods) Determination 2009 (No. 1)* [F2009L00998] (previous determination), registered on 12 March 2009. The previous determination is repealed on commencement of this determination.
10. The new determination is largely the same as the previous determination. The changes to the new determination aim to simplify the key concepts and approaches that previously existed. Taxpayers that satisfied the requirements of the previous determination are unlikely to be affected by the changes.
11. Compliance cost impact: Minor – there will be no or minimal impact for both implementation and ongoing compliance costs. The change is minor or machinery in nature.

Explanation

The term 'excisable beverages' and 'alcoholic excisable goods'

12. For added clarity the term 'excisable beverages' has been replaced with 'alcoholic excisable goods' because it is arguable that some of the products that fall to item 3 of the Schedule to the *Excise Tariff Act 1921* are not beverages and thus would not have been covered by the determination. Section 65 of the Excise Act specifically refers to 'excisable goods' not 'beverages'.

Sampling and analysis

13. The previous determination required the strength of beer produced at BOPS to be re-established annually. Going forward, annual testing will no longer be required and the strength obtained from a test brew of a recipe only needs to be re-established where there has been a change to the recipe.
14. Sufficient samples must be taken from each manufacturing run to ensure accuracy. What is 'sufficient' is to be judged by the manufacturer taking into account such things as the circumstances and size of the run and the consistency of the product. For example, if beer in a single run was drawn from different final storage or packaging tanks, sampling would need to ensure that any difference in strength between tanks was adequately allowed for in determining the overall strength of the beer in the run. Strength is to be determined as an average of the strength of sample measurements.
15. There have been no changes to the position that the volume of alcohol in excisable goods is the volume of alcohol as measured at 20 degrees Celsius. Therefore to measure the volume of alcohol, a measurement of the temperature and the volume of the product is required. Appropriate adjustments may need to be made to be able to state the volume of alcohol at 20 degrees Celsius.

Measuring and equipment

16. The alcoholic strength of alcoholic excisable goods must be measured in accordance with legal requirements pertaining to measurements. Contact the National Measurement Institute (NMI) for further information.
17. As there are existing legal requirements relating to the accuracy of measuring equipment, there is no longer a requirement to calibrate certain measuring instruments at intervals of one year or less against a standard certified instrument.
18. The determination has retained the examples of accepted methods for the measurement of alcoholic strength that appeared in the previous determination.
19. In the previous determination, breweries producing less than 100,000 litres of beer in a financial year were permitted to use a hydrometer and a formula to determine alcoholic strength. In recognition of the fact that there are other fermented beverages for which strength must be determined, use of this method will now also become available to alcohol manufacturers producing other fermented beverages. However, an alcohol manufacturer will only be permitted to use this method where the total of beer and other fermented beverages they produce in a financial year is less than 100,000 litres.
20. Use of this method is considered to be sufficiently accurate for small alcohol producers and the maximum production criteria of 100,000 litres ensures that any revenue impacts are minimal.

Permitted variations

21. The permitted variation in the strength for beer undergoing secondary fermentation (0.3 percentage points) is greater than for beer that does not undergo secondary fermentation (0.2 percentage points). This is due to the nature of the process, as fermentation continues after the product has been packaged for retail sale and variations in strength are slightly less predictable. The permitted variations for all other excisable goods (including beer that does not undergo secondary fermentation) is 0.2 percentage points.

Other considerations

22. Users of this determination should be aware that the document only provides rules for taxpayers regarding compliance with their excise duty obligations.
23. Compliance with this instrument may not completely satisfy other legislative requirements such as those imposed under the Australia New Zealand Food Standards Code (the Foods Standards).

Consultation

24. Subsection 17(1) of the *Legislation Act 2003* requires, before the making of a determination, that the rule-maker is satisfied that appropriate and reasonably practicable consultation has been undertaken.
25. Draft versions of the determination and explanatory statement were published on the ATO Legal Database at ato.gov.au on 22 October 2018 for public consultation providing an opportunity for feedback to be provided by 2 November 2018. No feedback was received from the website publication.

26. Draft versions of the determination and explanatory statement were also forwarded directly to targeted stakeholders in the alcohol industry as part of the consultation process. Several responses were received from industry representatives.
27. One stakeholder was granted additional time to provide a response after the closing date so that they could further consult with their body of members.
28. The feedback received from stakeholders is summarised below:
 - (a) Stakeholders expressed gratitude at having been approached to participate in the consultation process and noted that the changes made are appropriate and will simplify the compliance process.
 - (b) Stakeholders requested alignment of the permitted variations allowed by the ATO to those allowed in the Food Standards.
 - (c) Stakeholders requested refinement of the determination to better reflect and align the ATO measurement requirements to those legislated in the *National Measurement Act 1960*.
29. The ATO considered all stakeholder feedback in preparing the final determination and reached a view as follows:
 - (a) No changes will be made to permitted variations. The ATO recognises that the permitted variations allowed by the ATO and the Food Standards differ, however note that alignment would not simplify the process given the Food Standards have different variation limits dependent on the type of product.
 - (b) The ATO recognises that the requirements stated in previous determinations could infer to taxpayers that satisfaction of ATO measurement requirements results in satisfaction of requirements of the NMI. Given the existence of specific legal requirements relating to measuring equipment contained in the *National Measurement Act 1960* and the regulations to that Act, it was considered sufficient for the determination to require adherence to those legal requirements. This also ensures the contemporaneity of the determination as it will require adherence to legal requirements pertaining to measurement as they exist at a particular point in time.

Legislative references:

Acts Interpretation Act 1901

Excise Act 1901

Excise Tariff Act 1921

Human Rights (Parliamentary Scrutiny) Act 2011

Legislation Act 2003

National Measurements Act 1960

Statement of compatibility with Human Rights

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

Excise (Alcoholic Strength of Excisable Goods) Determination 2019

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

The instrument provides rules for working out the alcoholic strength of alcoholic excisable goods entered for home consumption.

Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms, as it simply provides guidance to manufacturers of alcoholic excisable goods as to how to determine the alcoholic strength of their products.

Conclusion

This Legislative Instrument is compatible with human rights as it does not raise any human rights issues.