



Australian  
**BORDER FORCE**

# Tariff Concession System

**TCO Applications an Administrators perspective**

# TCO Applications

- Some History
- The Approved Form – B443
- Sections 269F and 269FA and 269SJ
- Local Manufacturer Searches
  - Industry Capability Network
  - Other database searches
  - Applicant’s Obligations Home Affairs Notice 2091/21
  - Case Law
- Goods Description
  - Legislative perspective
  - Drafting v Interpretation
  - Case Law
- Due Process

# The Tariff Concession System

- TCO legislation – Part XVA of the Customs Act 1901
- TCOs provide concessional (Zero) rate of duty when applied
- Can be traced back to 1901 to the time of Federation
- Species of delegated legislation

## Core Criteria (section 269C)

- No substitutable goods
- Goods produced in Australia
- Goods produced in the ordinary course of business

# The Tariff Concession System cont.

- TCO legislation
  - Part XVA of the *Customs Act 1901*
  - TCOs are a concessional instrument
    - Item 50 of Schedule 4
  - TCOs do not apply to;
    - a) goods classified under subheading 3817.00.10, or heading 3819.00.00, of Schedule 3;
    - b) Excise equivalent goods
    - c) Goods on Schedule 9, *Customs Regulations 2015* (EGS)

# The Approved Form & Legislation

- Sections 269F and 269FA are to be read together
- Legislative constraints S.269SJ
- Must be a full description
- Must provide local manufacturer searches
- There is a reasonable expectation to the satisfaction of the Comptroller General to complete all questions as required.

# The Approved Form & Legislation

- TCO Application form (B443) is integral to PART XVA of the Customs Act 1901
  - S.269F Making a TCO application
    - (2) An application must:
      - (a) be in writing; and
      - (b) be in **an approved form**; (B443) and
      - (c) **contain such information as the form requires**; and
      - (d) be signed in the manner indicated in the form.
  - On signing the form you declare there is no false or misleading statements

# The Approved Form & Legislation

- **269FA The applicant's obligation**

*It is the responsibility of an applicant for a TCO to establish, to the satisfaction of the Comptroller-General of Customs, that, on the basis of:*

*(a) all information that the applicant has, or can reasonably be expected to have; and*

*(b) all inquiries that the applicant has made, or can reasonably be expected to make;*

*there are reasonable grounds for asserting that the application meets the core criteria*

# The Approved Form & Legislation

- Explanatory Memorandum Customs Bill 1996

Principle changes to the Act

- (iv) the imposition of a statutory obligation on applicants for a TCO to undertake research as to the existence of possible Australian producers of substitutable goods, **prior** to the lodgement with Customs of the TCO application [emphasis added]

***This amendment, ... is intended to place an "up-front" obligation on TCO applicants ...***


*The amendment, in combination with Customs power to reject an application where reasonable inquiries have not been made, proposed in item 8, is intended to ensure that applicants only lodge TCO applications where reasonable efforts to establish the non existence of Australian producers of substitutable goods have already been made.*



# (c) contain such information as the form requires

- **Illustrative Descriptive Material (IDM)**

- Industry standards
- Brochures
- Detailed photos
- Engineering drawings
- etc



IDM is used for the confirmation of the classification and of the goods description. Hence, when it is provided keep this in mind as different and separate articles of information may need to be provided.

- **Full Description**

SMS Autoparts Pty Limited and Chief Executive Officer of Customs [1996] AATA 158 (6 May 1996)

- *In my view, a full description for TCO purposes must offer this ease of objective identification.*
- *Such a description may be be oppressive and unnecessary. This may well be so from a commercial point of view. Nevertheless, it seems to me incumbent upon the applicant to undertake this task.*

The TCO description is to be based on the IDM which in turn should translate to a wharf-side test

# (c) contain such information as the form requires

- **Local Manufacturer Searches**

- *Prescribed Organisation S.144 Customs Regulations 1995.*
- Database searches
  - Google
  - B2B
  - Australian Made
  - Etc
- *Provide the first three pages of each search*
- *Search terms are to be broad - key search terms not specific*
- *Include Australian manufacturer in the search term*
- *Refer to Home Affairs Notice 2019/21 Applicant's Obligations*

# Local Manufacturer Search Obligations

- Home Affairs Notice 2019/21 summary
  - TCO applications should not be lodged if there are known local manufacturers
  - The Comptroller-General will require evidence of searches using reasonable search terms of at **least three types** of database
  - it is reasonable to expect that
    - » the applicant will have information or industry knowledge about Australian businesses that produce, or potentially produce, substitutable goods
    - » industry knowledge may have been obtained through trade fairs, membership of industry associations or normal business operations – it must be disclosed
    - » **searches are to be comprehensive and multiple searches using different key words would normally be expected.**
    - » **key word, or key words should not be so narrow as to preclude a result**
    - » if a potential local manufacturer is identified they must be written to and 10 days allowed for their response before submitting the application

# Local Manufacturer Obligations

## Case Law

- Ceramic Oxide Fabricators Pty Limited and Comptroller-General of Customs [2021] AATA 2770 (9 August 2021)
  - Construing Section 269F and 269FA and the explanatory memorandum it concluded
    - Perform the local manufacturer search prior to the application being lodged
    - If any local manufacturers or potential local manufacturers are identified, they must be written to before the TCO application is submitted
    - Importer knowledge of no local manufacturers **is not a defence** to not perform the local manufacturer searches.

# Legislative Constraints S.269SJ

- S.269SJ states a TCO must:
  - Not be described in terms other than in **generic terms**
    - Eg thermos (brand name) vs vacuum flask
    - Overly specified to identify a unique item (eg washing machine, 6 wash cycles, four selection buttons, two drying cycles, etc, etc)
  - Be described in terms other than **their intended end use**
    - Eg coffee cup vs ceramic cup
  - Declared by regulations to be goods to which a **TCO should not extend**
    - Schedule 9 of the *Customs Regulations 2015* often referred to as the EGS
    - Excise equivalent goods
    - Goods classified to 3817.00.10 and 3819.00.00
- Drafting a TCO should be in positive terms - describe what it is; not what it isn't.

# Goods Description Drafting.

- Drafting takes a hierarchical structure
  - Headword, or Headword Phrase [IN CAPITALS]
    - This is the noun or noun phrase having the unit meaning of the noun
    - The headword or headword phrase tries to be consistent with the headings and subheadings in the tariff
  - General format [lower case]
    - This follows the headword or headword phrase and may continue with descriptive words or phrases that further define the goods
- Back to Front
  - Often the headword or headword phrase is written in reverse
    - FILTER CARTRIDGES, **INDUSTRIAL GAS** to be read as industrial gas filter cartridges. Heading 8421
    - This anomaly is due to the choice of headword being dependant on the structure of the subject tariff heading and subheading. The red text can be considered in the adjectival sense. Ie modifies the noun - FILTER CARTRIDGES
- CAPITAL LETTERS VS non capitals
  - Capital letters are used for the headword and the headword phrase and for emphasising limitations eg OR, AND, BUT, EITHER, NOT, ANY etc. All other words should be lower case.

# Goods Description Drafting cont.

- EG

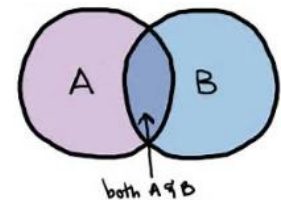
4805.93.10 PAPERBOARD, multi-ply, uncoated, having ALL the following:  
(a) weight NOT less than 300 gsm and NOT greater than 430 gsm;  
(b) outer layers having bleached chemical pulp;  
(c) internal layer having groundwood pulp;  
(d) absorbency rating NOT greater than 30 seconds/ml  
Op. 21.12.21 Dec. date 21.03.22 - TC 21535094

- CAPITAL LETTERS VS non capitals
  - Capital letters are used for the headword and the headword phrase and for emphasising limitations eg OR, AND, BUT, EITHER, NOT, ANY etc. All other words should be lower case.

# Core Criteria - Substitutable goods

## Defined as

- *Goods produced in Australia that are put or capable of being put to a use that corresponds with a use (including design use) to which the goods the subject of the TCO can be put.*
- It is broadly applied
- Are not defined by market forces ie competition, appearance, performance, quality or price.
  - Market test removed in 1996, just because you don't compete does not limit the corresponding use test
  - Performance, price, quality, appearance are irrelevant
- S.269B(3) The lack of competition is irrelevant consideration for substitutability





# Substitutable Goods cont.



Versus



Question: What is reasonable corresponding use?

Answer: Depends on the facts.

- Relevant case law

- Toyota Material Handling Australia
- Riverwood Cartons
- Vulcan Australia
- Downer EDI Rail

*Reasonable use*

*Only requires one use to correspond  
it is irrelevant how the use is achieved*

*Ultimate end use*

# Interpret a TCO

- Answer - A species of delegated legislation
  - In *Collector of Customs v Agfa-Gevaert Ltd*[33] (*Agfa-Gevaert*) the High Court described TCOs “... as a species of delegated legislation.”[34] On that basis, the High Court continued, the general principles of statutory interpretation apply to its interpretation.
- Statutory Interpretation
  - Unlike Schedule 3 of the *Customs Tariff Act 1995*, TCOs do not have statutory rules for interpretation vis a vis Schedule 2. Hence the general rules to interpreting Acts of Parliament apply.
  - S.15AA of the Acts Interpretation Act 1901
    - (1) In the interpretation of a provision of an Act, **a construction that would promote the purpose or object underlying the Act**( whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.
  - S.15AB of the Acts Interpretation Act 1901
    - Provides the ability to use external materials to ascertain the meaning of the provision. For TCOs this is usually the stated use of the goods as per TCO application.
      - To confirm the ordinary meaning as conveyed in the provision
      - When the meaning is ambiguous or obscure
      - The provision promotes a meaning that is manifestly absurd or unreasonable

# Interpret a TCO

## Trade vs Ordinary meaning

- *Collector of Customs v Agfa Gevaert Ltd* [1996] HCA 36; (1996) 186 CLR 389
  - When construing revenue statutes that utilise trade or technical terms, therefore, the law generally favours interpretation of the terms as they are understood in the trade to which the statute applies.
- *Voxson Sales Pty Ltd v Collector of Customs* No. QG70 of 1992 FED No. 984/93 Customs and Excise - Statutes (1993) 19 AAR 129,
  - **In determining the meaning of words, one gives them their ordinary meaning unless it is proved that they have acquired some generalised secondary meaning through usage in trade or commerce. If so, that meaning is to be preferred:**
  - “ In identifying goods for Customs purposes, one looks at the goods themselves and the condition in which they were imported”

# Interpret a TCO Some cases

- Meeting the terms of the TCO
- Cameron Australia Pty Ltd and Chief Executive Office of Customs [2012] AATA 865 (10 December 2012)  
UMIBIICALS, HYDRAULIC ,GAS, being EITHER of the following:
  - a) onshore;
  - b) subsea

The importer argued that: “whilst the term umbilicals may relate to a bundle of hoses or combination of hoses and cables, in the offshore oil and gas industry, the term umbilical reel includes the reeler and the umbilical, and various components”.

Customs submitted various definitions from industry dictionaries, sites and publications to show that definitions of “umbilical” referred to the hoses and cables and did not refer to the reel. Customs won the matter.

- Other references used
  - Chinese Food and Wine Supplies Pty Ltd v Collector of Customs - it involves an inspection of the goods as imported
  - Re Sheldon & Hammond Pty Ltd and Chief Executive Officer of Customs - practical wharf side test.

# Interpret a TCO Some cases

- Meeting the terms of the TCO
- Australian Plastic Products Pty Ltd and CEO of Customs [1998] AATA 433 (17 June 1998)

TCO Wording TC9508968

SHEETING, opaque polyvinyl chloride, having ALL of the following:

- (a) thickness 0.225mm;
- (b) width 330mm to 340mm (both inclusive);
- (c) hardness 35 PHR;
- (d) in rolls of 500 metres (+ or - 5% variance)
- (e) in the following colours:
  - (i) brilliant white;
  - (ii) red;
  - (iii) blue;
  - (iv) black;
  - (v) grey

The importer imported the same product , however the rolls were 400 metres in length and lost the matter.

The Tribunal referred to the Voxon matter ... ***In determining the meaning of the words, one gives them their ordinary meaning.*** This was with reference to the criteria, being roll length of 500 metres (+ or – 5% variance) and the word “All of the following”

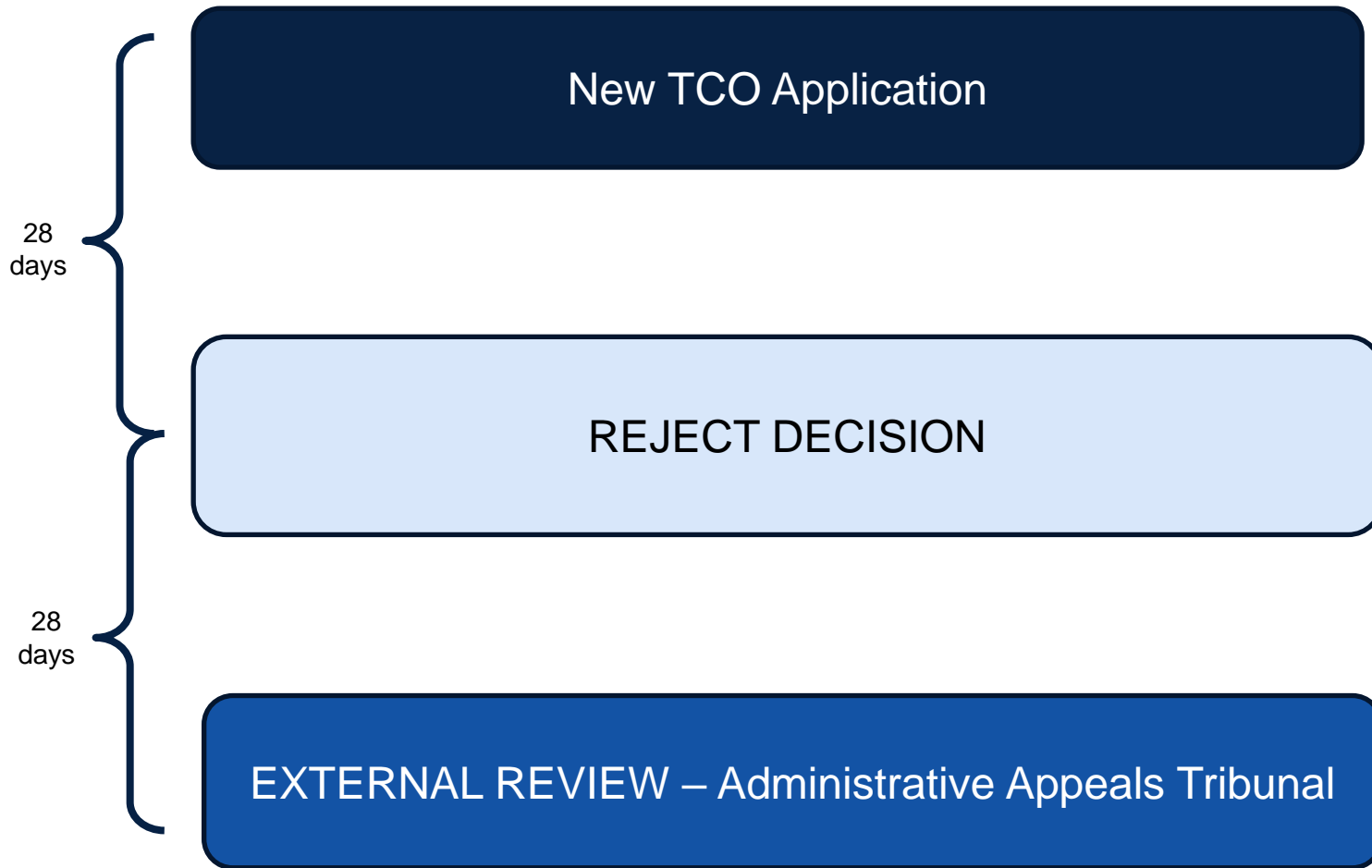
Other cases cited in support

- Television Oceania Pty Ltd and Collector of Customs (AAT 8515, 5 February 1992)
- Greig Novelties Pty Ltd and Chief Executive Officer of Customs (AAT 11286, 8 October 1996)

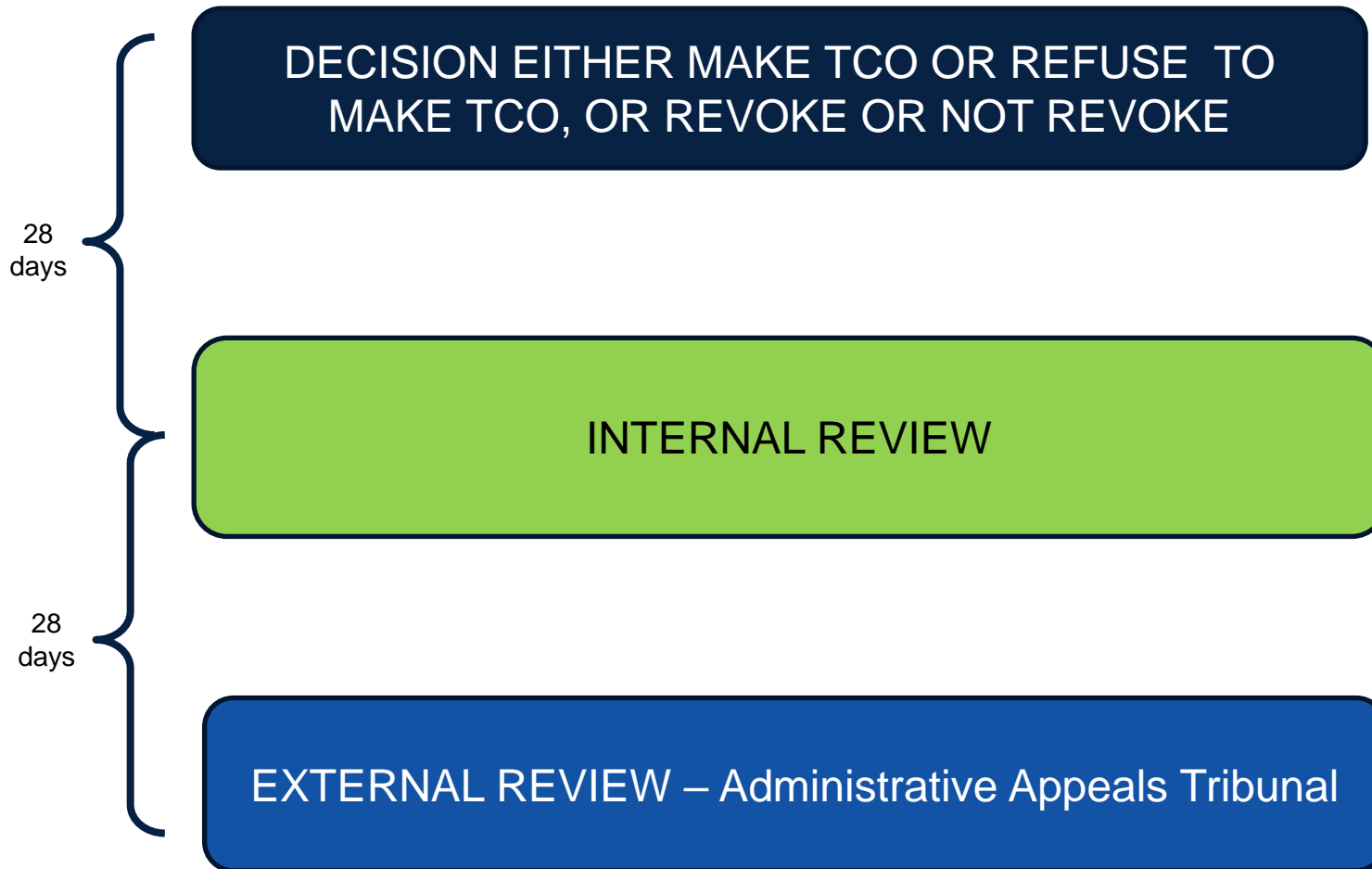
# Interpret a TCO Some cases

- Meeting the terms of the TCO
- Greig Novelties Pty Ltd and Chief Executive Officer of Customs [1996] AATA 355 (8 October 1996)
- TCO Wording
  - TOYS, representing animals or non human creatures, stuffed, but NOT including:
    - (a) stuffed toys indigenous to Australia;
    - (b) bears having a height in excess of 15 cm and below 79cm
  - The importer imported unstuffed toy animals. The stuffed goods could be keyed to the same tariff classification as the TCO, however the terms of the TCO required the goods be stuffed and lost the matter.

# Due Process



# Due Process





# Extra Reading

Find all relevant case law decisions on [www.austlii.edu.au](http://www.austlii.edu.au)

- [Home Affairs Notice 2019/21](#) – Applicant’s Obligations
- Ceramic Oxides
  - Ceramic Oxide Fabricators Pty Limited and Comptroller-General of Customs [2021] AATA 2770 (9 August 2021)
- SMS Autoparts
  - Sms Autoparts Pty Limited and Chief Executive Officer of Customs [1996] AATA 158 (6 May 1996)
- Toyota
  - Chief Executive Officer of Customs v Toyota Material Handling Australia Pty Ltd [2012] FCAFC 78



# Australia's Vape Reforms

For Customs Brokers

# Australia's new vape import laws

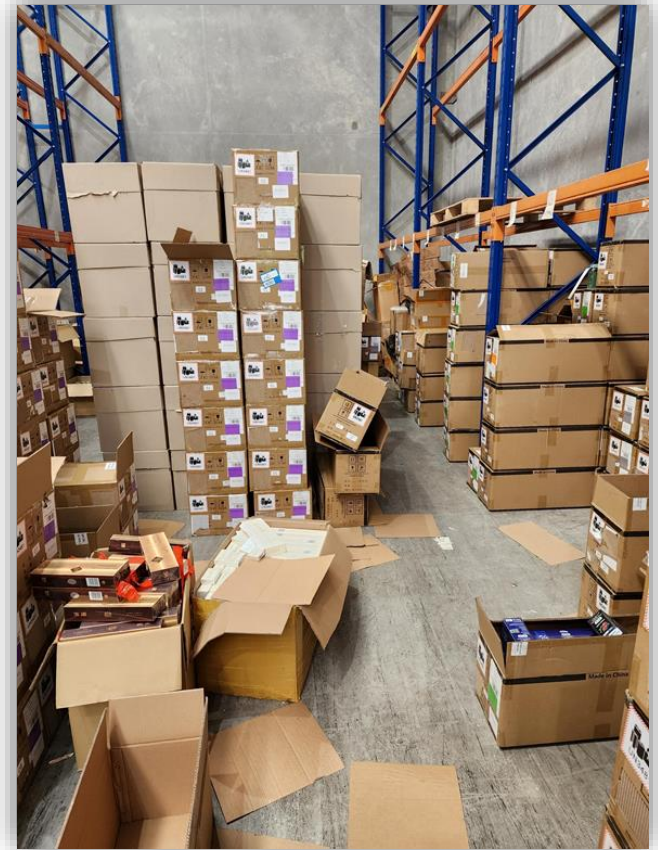
In 2024, the Australian Government implemented vape reforms in a phased approach.

- Vaping goods are a prohibited import under new regulation 5A of the *Customs (Prohibited Imports) Regulations 1956* (Prohibited Imports Regulations).
  - From 1 January 2024, all disposable vapes became a prohibited import, unless the importer holds a licence and permit.
  - Since 1 March 2024, additional vaping reforms were introduced to make all other vaping goods a prohibited item unless the importer held licence and permit.



# Current vape environment

- Since 1 January 2024, the ABF has seized more than 456,000 vape devices, accessories and substances.
- Early detection and intervention are proving effective in impacting the flow of vapes entering Australia.
- Organised crime groups are highly adaptive and can alter their activities and behaviours in an attempt to circumvent Australia's border control.



# We need your help

- As subject matter experts of the supply chain activities and behaviours, the ABF asks to keep an eye out for any unusual or suspicious cargo reporting.
  - In the instance that you find cargo reports of packages suspected of containing vapes or engaging in any other suspicious border-related behaviours, please make a report through ABF's Border Watch at <https://www.abf.gov.au/about-us/what-we-do/borderwatch> or via telephone 1800 06 1800 (if urgent).
  - Alternatively, you could report the concern via ICS utilising the CPSAC/amber line option.





# Contacts

For more assistance use the team mailbox

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