

IN THE AUSTRALIAN ANTI-DUMPING COMMISSION
CERTAIN DEEP DRAWN STAINLESS STEEL SINKS
EXPORTED FROM THE PEOPLE'S REPUBLIC OF CHINA

TASMAN SINKWARE PTY LTD

Australian industry

AND

EVERHARD INDUSTRIES PTY LTD

Importer

RESPONSE OF THE AUSTRALIAN INDUSTRY TO THE SUBMISSION OF THE IMPORTER

Date of Document: 30 September 2014

Lodged on behalf of: The Australian industry

Tel: 03 9867 0267

Email: trade.remedies@aigroup.asn.au

Prepared by: The International Trade Remedies Advisor
The Australian Industry Group
20 Queens Road
MELBOURNE VIC 3004

This submission is made on behalf of the Australian industry producing certain deep drawn stainless steel sinks in Australia, specifically the applicant to *Dumping and Countervailing Investigation ADC 238*, Tasman Sinkware Pty Ltd.

The Australian Industry makes this submission in response to the submission of the Importer dated 26 September 2014.

Summary

The Australian Industry notes the comments of the Importer that "Lipped SS Laundry Tub Bowls are not "like goods" for the purposes of this investigation". This is an incorrect consideration of the issue. The question is one of whether or not "lipped stainless steel laundry tub bowls" (**lipped bowls**) come within the definition of the goods under consideration (**GUC**).

PUBLIC FILE VERSION

An issue implicit in the Importer's submission is whether or not the inclusion of accessories, such as metal or polymer cabinets, to form so-called "laundry kits" changes the nature of the goods, so that they cease to be the GUC, but another form of goods.

The Australian industry opposes both these contentions. The Australian industry submits that:

1. lipped bowls come within the definition of the GUC; and
2. lipped bowls exported with accessories to form "laundry kits" also come within the GUC.

The Australian industry does not contest the Importer's contention that non-stainless steel (polymer) bowls; whether or not exported with accessories; do not form the GUC and are not subject to this investigation

The definition of the GUC is contained in the initiating notice issued by the Australian Anti-Dumping Commission (**Commission**) on 18 March 2014 (refer AND 2014/20).

The Australian industry's interpretation of the definition of the GUC is supported by WTO (World Trade Organisation) practice and jurisprudence.

The exclusion of "lipped bowls" and "laundry kits" from the investigation would be an error of law and fact.

The GUC (the imported goods the subject of this investigation)

For the avoidance of doubt, the goods (or GUC) are defined as:

"... deep drawn stainless steel sinks with a single deep drawn bowl having a volume of between 7 and 70 litres (inclusive), or multiple drawn bowls having a combined volume of between 12 and 70 litres (inclusive), with or without integrated drain boards, whether finished or unfinished, regardless of type of finish, gauge, or grade of stainless steel **and whether or not including accessories.**" [emphasis added]

- Refer ADN No. 2014/20 (18 March 2014)

There is ***nothing*** within the Importer's submission that supports the view that:

- (a) lipped bowls are not the goods the subject of this investigation; and
- (b) lipped bowls exported with accessories (including cabinets) are not also goods the subject of this investigation.

What the Importer appears to be arguing is that the Australian industry does not manufacture 'like goods' to the imported lipped bowls or lipped bowls imported with accessories. That is a separate and secondary consideration to whether or not the Importer's goods must be considered the subject of this investigation.

Submission that the inclusion of accessories changes the nature of the imported goods

In essence, the Importer is arguing that the inclusion of accessories changes the nature of the goods from deep drawn stainless steel sinks to so-called "laundry kits". This view is unsupportable both as a matter of practice and WTO jurisprudence. As a matter of anti-dumping practice, such an argument would introduce rampant circumvention of the measures by exporter and importer interests. This circumvention risk was considered, and addressed, by the Australian industry in its application. For this reason the definition of the goods includes the possible "inclusion of accessories". This definition was accepted by the Commission, and formed the basis of the initiated investigation:

“... deep drawn stainless steel sinks with a single deep drawn bowl having a volume of between 7 and 70 litres (inclusive)... **and whether or not including accessories.**”
[emphasis added] - Refer ADN No. 2014/20 (18 March 2014)

Therefore, the Australian Industry submits that the Commission is bound to include "lipped bowls" "whether or not including accessories" within the scope of the investigation. "Lipped bowls" clearly come within the definition of the goods. Secondly, the Australian Industry submits that "lipped bowls" exported with accessories, including "cabinets", also come within the scope of the investigation. Having initiated the investigation on the basis of the possible inclusion of accessories, the Commission is bound to include "lipped bowls" exported with accessories in the form of so-called "laundry kits" within the scope of the current investigation. There is a consistent body of WTO practice and jurisprudence that supports this view.

In *US – Softwood Lumber V*, the WTO Disputes Settlement Panel there considered that there is “no guidance on the way in which the ‘product under consideration’ should be determined”.¹

Indeed, the WTO Disputes Settlement Panel (**the Panel**) in *EC – Salmon (Norway)*² concluded that the WTO Anti-Dumping Agreement did not have to be interpreted to require an investigating

¹ Panel Report, *United States – Final Dumping Determination on Softwood Lumber from Canada*, WT/DS264/R, adopted 31 August 2004, at [7.153]

² Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 16 November 2007 at [7.68]

authority to have defined the product under consideration (GUC) to include only products that are “like”.

This line of WTO jurisprudence was upheld by the Appellate Body in *EC — Fasteners (China)*, where it concluded that Articles 2.1 and 2.6 of the *WTO Agreement* did not require the investigating authority to define the product under consideration to include only products that are “like”. The Panel remarked that:

“The mere fact that a dumping determination is ultimately made with respect to ‘a product’ says nothing about the scope of that product. There is certainly nothing in the text of Article 2.1 that can be understood to require any consideration of ‘likeness’ in the scope of the exported product investigated...’.”³

In that case, the Panel concluded that:

“while Article 2.1 establishes that a dumping determination is to be made for a single ‘product under consideration’, there is no guidance for determining the parameters of that product, and certainly no requirement of internal homogeneity of that product, in that Article.”⁴

Therefore, given the inclusion of “accessories” in the definition of the goods, it is not open to the Commission to unilaterally, now limit the scope of the investigation or the potential application of measures (including the imposition of securities). In other words, “lipped bowls” exported with accessories (including cabinets), to form so-called “laundry kits”, must necessarily form the GUC under WTO jurisprudence and practice.

The Australian produced ‘like goods’

To the extent that a separate argument may be implied from the Importer’s submission that the Australian industry does not produce ‘like goods’ to lipped bowls or lipped bowls exported with accessories, the Australian industry again rejects that proposition.

There is, again, a body of WTO jurisprudence that supports the Australian industry’s position on this issue.

The WTO Disputes Settlement Panel in *EC — Salmon (Norway)*⁵ rejected Norway’s argument that in defining “like product”, Article 2.6 required an assessment of “likeness” in respect of the

³ Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, WT/DS397/AB/R, adopted on 15 July 2011 at [7.263]

⁴ Panel Report, *EC — Fasteners (China)*, at [7.265]

⁵ Panel Report, *European Communities – Anti-Dumping Measure on Farmed Salmon from Norway*, WT/DS337/R, adopted 16 November 2007

product under consideration “as a whole” and that this required a comparison of all product categories considered as potentially “like product”:

“In the context of Article 2.6, this logic could be understood to mean that where the product under consideration consists of different sub-categories, the investigating authority, in assessing the question of like product, must take into account each and every sub-category, and may not ignore any. **It cannot, however, be stretched to require that an investigating authority assess whether each category or group of goods within the product under consideration is ‘like’ each other category or group of goods.**” [emphasis added]⁶

Therefore, even though the Australian industry may not produce a sub-category of the GUC, namely “lipped bowls” or “lipped bowls exported with cabinets”, it does not mean that the goods produced by the Australian industry cannot, nevertheless be considered ‘like’ to these goods. If the argument of the Importer is to be followed to its conclusion, then the Commission would be asked to perform such an exercise in contradiction of the Panel’s position.

More recently the Panel upheld this position in *EC – Fasteners (China)*:

“[T]he subject of Article 2.6 is not the scope of the product that is the subject of an anti-dumping investigation at all. Rather, the purpose of Article 2.6, apparent from its plain language, is to define the term ‘like product’ for purposes of the AD Agreement... .

“China’s position would, in our view, require that any difference between categories of goods, and potentially even between individual goods, within a product under consideration would require that each such category or individual good be treated individually, as a separate product under consideration. This would be problematic, as, given that a ‘domestic industry’ for purposes of the AD Agreement is defined as producers of a like product, **such a fragmented product under consideration, and correspondingly fragmented like products, would result in the definition of, and determination of injury to, multiple, narrowly defined ‘industries’ which may bear little if any resemblance to the economic realities of the production of those goods in the importing country.**

“... While it seems self-evident to us that an investigating authority must, at the time it initiates an anti-dumping investigation, make a decision as to the scope of that investigation, and give notice of the ‘product involved’, **we are not persuaded that**

⁶ Panel Report, *EC – Salmon (Norway)*, at [7.55]

either Article 2.1 or Article 2.6 of the AD Agreement establishes a requirement for making an elaborated determination in that regard.” [emphasis added]⁷

Therefore, the approach proposed by the Importer to create sub-categories around the GUC and force an examination of a sub-industry for the domestic production of that sub-category of goods is in breach of WTO jurisprudence and would amount to bad anti-dumping practice.

The Australian produced ‘like goods’

To put beyond doubt that the Australian industry produces ‘like goods’ to the Importer’s goods, within WTO jurisprudence, the following analysis is provided.

The Australian industry produces in its South Australian facility, *inter alia*, the following models of deep drawn stainless steel sinks, generally known as laundry tub bowls:

- TI45;
- TI45S;
- TI45S/OF;
- TI70; and
- TI70S.

In summary, they cover the following size ranges, 45 and 70 litre capacities.

The Australian produced ‘like goods’ are ‘like’ to the lipped bowls imported by the importer under an interpretation of the definition of “like goods” within subsection 269T(1) of the *Customs Act 1901 (the Act)*, as interpreted within section 2 of the *Dumping and Subsidy Manual (December 2013) (the Dumping Manual)*, and the WTO Dispute Settlement Panel decisions in *EC — Salmon (Norway)* and *EC — Fasteners (China)*.

Specifically, section 2.3 of the Dumping Manual provides that where the goods under consideration (**GUC**) and the ‘like goods’ are not alike in all respects, the Commission will assess whether they have characteristics closely resembling each other against a number of considerations.


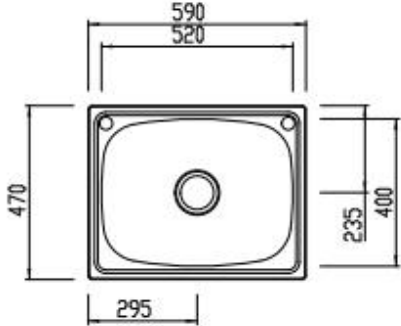



The characteristics of the lipped bowls and the Australian industry’s like goods; together with the degrees of likeness between the two; are considered below.

(a) Physical characteristics

⁷ Panel Report, *EC — Fasteners (China)*, at [7.267]–[7.268]

PUBLIC FILE VERSION

The following matrix summarises the physical characteristics of the GUC and Australian produced 'like goods':

Physical characteristics	"Lipped SS Laundry Tub Bowls"	Australian produced "like goods"
Size/capacity		
30 L	✓	✗
45 L	✓	✓
70 L	✓	✓
Shape/Dimension		
Rectangular	✓	✓
Dimensions	 <p style="text-align: center;">Product code 71190</p>	 <p style="text-align: center;">TI45 model</p>
Profile	<p>Product Code 71190 - NuGleam™ Standard Laundry Unit</p> 	<p>Tasman Sinkware TI45 model</p>  <p style="text-align: center;">(side profile)</p> 

PUBLIC FILE VERSION

		<i>(top profile)</i>
Content		
304 grade, 18/10 polished stainless steel	✓	✓
0.8 mm thickness	✓	✓
Warranty		
	25 years	Lifetime
Tariff classification		
7324.10.00 (stat code 52)	✓	✓

(b) Degrees of commercial likeness

In terms of the commercial likeness between the GUC and the ‘like goods’, although it is noted that the so-called “lipped stainless steel laundry tub bowl” is compatible with the proprietary designed cabinets sold by the Importer, the ‘like goods’ are also installed in cabinet units. Fundamentally, it is the design of the cabinet that determines the compatibility of the sink bowls to form “laundry units”. The material composition of those cabinets is irrelevant to whether or not the GUC and Australian ‘like goods’ may be installed, interchangeably.

Further, it is entirely possible for the lipped bowl to be installed within existing cabinetry.

Alternatively, the Australian ‘like goods’ may be sold with accessories (including a cabinet) and as part of a so-called “laundry kit”. Again, both goods must be installed in a cabinet of some description to enable them to fulfill their domestic or commercial end use, and as such are commercially interchangeable.

Even if the lipped bowl (when taken together with their accessories to form laundry kits) are compared to the ‘like goods’ not sold with accessories, and as part of a kit, then there is direct commercial interchangeability between the imported goods and the Australian ‘like goods’. The difference is that the market participant, must separately source the accessories, which would otherwise form the kit. It is submitted, that the issue of price between the lipped bowl when sold with accessories, must be compared to the ‘like goods’, not sold with accessories. Therefore, an end-user will need to consider the cost of purchasing the goods or ‘like goods’, and all the necessary accessories. Whether the goods or ‘like goods’ are marketed as “a kit”, only changes the value proposition for the end-user, it does not completely displace the decision to install “a sink” *per se*.

In terms of distribution channels, it is submitted that the lipped bowls are sold through the same trade wholesaler and retailer channels to market.

(c) Extent of functional 'likeness' between the GUC and 'like goods'

As noted in the Dumping Manual, the concept of functional likeness refers to end-use. Applied here, the lipped bowl (whether or not sold with accessories), has exactly the same end-use as the 'like goods', namely a plumbing fixture designed for the controlled capture and discharge of water in enclosed, habitable environments. In the case of the lipped bowl and the 'like goods', for specific use in utility room or 'laundry' environments. Both lipped bowls and the 'like goods' must be installed in a form of cabinetry (of any material composition), and plumbed to a water supply and waste water system by a qualified plumber under the applicable regulatory scheme. When identified by the capacity of the respective goods, the functionality of the goods are completely identical, in terms of either 45 or 70 litres.

As identified (above) under the consideration of the physical characteristics of the GUC and 'like goods', the quality is identical.

In terms of consumer preference for the installation of a lipped bowl and the 'like goods', we consider that to be related to a function of price.

(d) Degrees of production likeness

From the Importer's submission, we do not consider that the issue of production likeness is in dispute, and that lipped bowls and the 'like goods' are produced using similar production processes.

Ministerial Exemption request

To the extent that a Ministerial Exemption request under paragraphs 8(7)(a) and 10(8)(a) of the *Customs Tariff (Anti-Dumping Act) 1975 (the Dumping Duty Act)* may be implied from the Importer's submission, the following analysis is provided.

The Importer appears to assert, that the Australian industry does not produce "lipped bowls", and "lipped bowls with accessories" forming so-called "laundry kits". The Importer presumably relies on the provision under paragraph 8(7)(a) of the *Dumping Duty Act*, which provides *inter alia*, that:

"The Minister may, by notice in writing, exempt good from dumping duty if he is satisfied:

"(a) that like or directly competitive goods are not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade..."

The expression “like or directly competitive goods” is not defined within the *Dumping Duty Act*. Although the expression “like goods” is defined under the current anti-dumping provisions contained within Part XVB of the *Customs Act 1901 (the Customs Act)*, the term “like or directly competitive goods”, is not.

Therefore, the question arises whether the term has a broader or narrower meaning than the expression “like goods” as defined and interpreted pursuant to Customs Act.

The term “like goods” is defined by subsection 269T(1) of the Customs Act, as:

“in relation to goods under consideration, means goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration”

Specifically, the expression “like or directly competitive goods” was adopted by the *Dumping Duty Act* from the *Customs Tariff (Dumping and Subsidies) Act 1961* - being the Act that it later repealed. Reference to the antecedent Act suggests that “like or directly competitive goods” had the same meaning as the term “like goods” does under the current provisions of Part XVB of the Customs Act. Support for this interpretation may be found in the section 269TG (Customs Act) equivalent provisions found in the now repealed Act of 1961:

“7(1) If the Minister, after inquiry and report by the Tariff Board, is satisfied, as to any goods, that –

“the export price of any of those goods that have been exported to Australia is less than the normal value of the goods so exported; and

“the exportation of those goods is causing or threatening injury to an **Australian industry producing or manufacturing like or directly competitive goods...** may cause a notice to be published in the Gazette specifying the goods as to which he is so satisfied.”[emphasis added]

In other words, reference to “like or directly competitive goods” in the *Dumping Duty Act*, should not be interpreted any differently to the term “like goods” under the Part XVB of the Customs Act. Such a view would be in no way inconsistent with the purpose of the provisions of subsections 8(7) and 10(8) of the *Dumping Duty Act*, because the aim of those provisions, specifically

paragraph (a), is to create an exemption in circumstances in which “like or directly competitive goods” or “like goods” are “not offered for sale in Australia to all purchasers on equal terms under like conditions having regard to the custom and usage of trade”. Therefore, the purpose of the exemption is not to distinguish a separate class of the goods based on their properties or characteristics, but rather in terms of the condition on which they are sold into the Australian market.

Therefore, any implied request for Ministerial Exemption by the Importer on the basis that the Australian industry does not produce ‘like goods’ to “lipped bowls” and “lipped bowls with accessories” must necessarily fail under the provisions of the Dumping Duty Act, and the interpretation of ‘like goods’ under the WTO Panel decisions in *EC — Salmon (Norway)* and *EC — Fasteners (China)*.

Conclusions

In summary, the Australian Industry asserts that:

- “Lipped bowls” and “lipped bowls” exported with accessories form the GUC;
- The Australia produced goods are ‘like’ to “lipped bowls” and “lipped bowls sold with accessories”;
- The conditions warranting the making of a Ministerial Exemption under the Dumping Duty Act have not been satisfied in this case.

DATED 30 September 2014

SIGNED:

International Trade Remedies Advisor.....

for the Australian industry