

ABN 41 009 690 859304

**405 Newman Road
Geebung, QLD 4034
P O Box 543
Virginia Qld 4014
Phone 07 3637 6444
Fax 07 3265 2111**

11 November 2014

Ms Andrea Stone
Manager
Operations 2
Anti-Dumping Commission
Customs House
5 Constitution Ave
Canberra ACT 2600

**RE: Dumping Investigation into Stainless Steel Sinks
Exported from China – Submission by Everhard Industries
Pty Ltd in response to submission by the Australian
industry**

Dear Ms Stone

We refer to the submission made by the Australian industry on 30 September 2014 in response to our (Everhard Industries Pty Ltd (**Everhard**)) submission on 26 September 2014¹.

The Australian industry contended that

- lipped stainless steel laundry tub bowls (**lipped bowls**) exported separately or with accessories to form “laundry kits” must be treated as goods under consideration (**GUC**) in the investigation;
- the Australian industry produced goods that are “like” to “lipped bowls” and “lipped bowls sold with accessories”; and
- “the conditions warranting the making of a Ministerial Exemption under the Dumping Duty Act have not been satisfied in this case.”

¹ Being the submission made by Arthur Vlahonasios, International Trade Remedies Advisor on secondment to the Australian Industry Group on behalf of Tasman Sinkware Pty Ltd on 30 September 2014.

We disagree with these arguments and make the submissions below.

1. **Must lipped bowls or laundry kits be included in GUC?**

The Australian industry contended that its submission that the Anti-Dumping Commission (**Commission**) is bound to include both lipped bowls imported separately and lipped bowls imported with accessories (ie laundry kits) in the GUC is supported by the WTO jurisprudence.

The Australian industry's presentation and interpretation of the WTO jurisprudence is misleading.

First of all, the Australian industry's submission states

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”. (page 4)

This statement contains no reference to the Appellate Body Report on *EC – Fasteners (China)*. We note that in *EC – Fasteners (China)* the Appellate Body did not make any rulings to the effect of the statement made by the Australian industry above²; accordingly, the statement is misleading. Further, in the sentence immediately following the statement, the Australian industry's submission cites the panel's ruling in *EC – Fasteners (China)* but mistakenly states in Footnote 3 that the ruling is from the Appellate Body Report. These misleading statements are significant. A panel's decision does not necessarily stand for a settled position under the WTO jurisprudence and is not binding on panels³ and certainly not on the Appellate Body in future cases. Accordingly, the WTO jurisprudence on the issue whether an investigating authority should consider product likeness in determining GUC is, at least, unsettled.

Secondly, the existing WTO jurisprudence does not impose an obligation on the Commission in relation to the Commission's determination of what products should be included as GUC in an investigation. Rather, the Commission has wide discretion to determine GUC.⁴ This means that in the present investigation the Commission has the discretion to determine whether to include lipped bowls or laundry kits as GUC. In other words, while the Commission is under no obligation to consider whether products are “like” in determining GUC, the Commission is not prohibited from doing so under the WTO jurisprudence. Accordingly, if the Commission decides to exclude lipped bowls or laundry kits from GUC because they are not “like” the other subject goods, the Commission cannot be said to be acting inconsistently with WTO jurisprudence. In addition, the factual circumstances in the present investigation are different from those in *EC – Fasteners (China)*. While in *EC – Fasteners (China)* both the goods produced by the EC domestic industry and exports from China included standard and special fasteners⁵, in the present investigation the Australian industry does not produce lipped bowls for the assembling of laundry kits.

² Appellate Body Report, *EC – Fasteners (China)*, pp. 249 - 253.

³ Panel Report, *EC – Fasteners (China)*, para. 7.273.

⁴ Panel Report, *EC – Fasteners (China)*, para. 7.271.

⁵ Panel Report, *EC – Fasteners (China)*, para. 7.283.

Therefore, it is not unreasonable or WTO-inconsistent for the Commission to exclude lipped bowls and laundry kits from the GUC.

Thirdly, the Australian industry's submission suggests that the Commission must determine not to exclude lipped bowls and laundry kits from GUC, and that the issue of "like product" is irrelevant to that determination. However, the Australian industry has failed to point out that whether to include "un-like" products in the GUC has significant impact on the entire investigation. For example, the issue of "like product" is closely relevant to the calculation of dumping margins which must be based on a comparison between the normal value and export price of products that are "like". Including lipped bowls and laundry kits in the GUC would substantially complicate the investigation and significantly increase the possibility of an erroneous determination of dumping.⁶ Further, the Australian industry only represents manufacturers producing "like products". Apparently, this investigation concerns Australian manufacturers of sinks only and not Australian manufacturers of laundry kits. More significantly, the Commission's assessment of material injury must be based on the assessment of the impact of dumped imports on the domestic industry producing "like products".⁷ Given the fact that the Australian industry does not produce lipped bowls for the assembling of laundry kits or goods that are "like" lipped bowls (which will be discussed below), it is hard to understand how the importation of lipped bowls could possibly cause material injury to the Australian industry. The Australian industry's submission does not provide any evidence to show how it may suffer material injury caused by the importation of lipped bowls.

In light of the above, the Australian industry's submission is misleading as it has failed to disclose the relevant information correctly or completely. Such a submission would complicate the Commission's assessment of the relevant issues and unjustifiably prolong the investigation, and also would mislead interested parties and the public who may or may not wish to comment. In particular, it is not acceptable that the submission contains such misleading contents in relation to the WTO jurisprudence and provides incorrect information and guidance to the Commission, interested parties and the public. Contrary to the Australian industry's submission, we believe the existing WTO jurisprudence does not prohibit the Commission from excluding lipped bowls and laundry kits from the GUC.

2. Does the Australian industry produce "like product"?

Under Article 2.6 of the WTO Anti-Dumping Agreement (**ADA**), the term "like product" is defined as

a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

It is commonly accepted that the scope of "like product" under the ADA is substantially narrower than the scope of the term "like or directly competitive or substitutable product" used in other WTO agreements such as Article III of the GATT or Article 2.1 of the Agreement on Safeguards. In practice, the Commission

⁶ Panel Report, *EC – Fasteners (China)*, para. 7.270.

⁷ Panel Report, *Korea – Certain Paper*, para. 7.219.

considers “physical likeness”, “commercial likeness”, “functional likeness”, and “production likeness” in determining whether products are “like” in an investigation. While the Commission’s approach to determining product likeness is consistent with the WTO jurisprudence, the Commission must be cautious that the scope of “like product” must be interpreted within the meaning of Article 2.6 of the ADA and must not be unduly stretched.

In its submission, the Australian industry appears to have argued that lipped bowls, either sold separately or with accessories to form laundry kits, are “like” the goods produced by the Australian industry. There is no dispute that lipped bowls are not identical to the goods produced by the Australian industry as the Australian industry does not produce lipped bowls. The issue then is whether lipped bowls have “characteristics closely resembling those of” the goods produced by the Australian industry, which must be interpreted narrowly and not overly stretched.

In our submission published on 26 September 2014, we have provided evidence in support of the facts that lipped bowls

- have unique features, that is, its unique lipped top edge;
- are designed for specific uses, that is, “designed to lock-in and firmly secure the bowls to one of our metal or Australian-made polymer cabinets”;
- cannot be used in any other application;
- are not interchangeable with drop-in / benchtop sinks; and
- are not produced by the Australian industry.

Accordingly, we have argued in that submission that lipped bowls are not “like” the GUC or the goods produced by the Australian industry. The Australian industry’s attempt to have lipped bowls included in the GUC is unjustifiable as it will lead to the imposition of dumping duties on products that are not produced by the Australian industry and consumers paying a higher price for imported lipped bowls and laundry kits assembled in Australia.

We provide further information below in support of our arguments that lipped bowls are not “like” the goods produced by the Australian industry.

Physical likeness

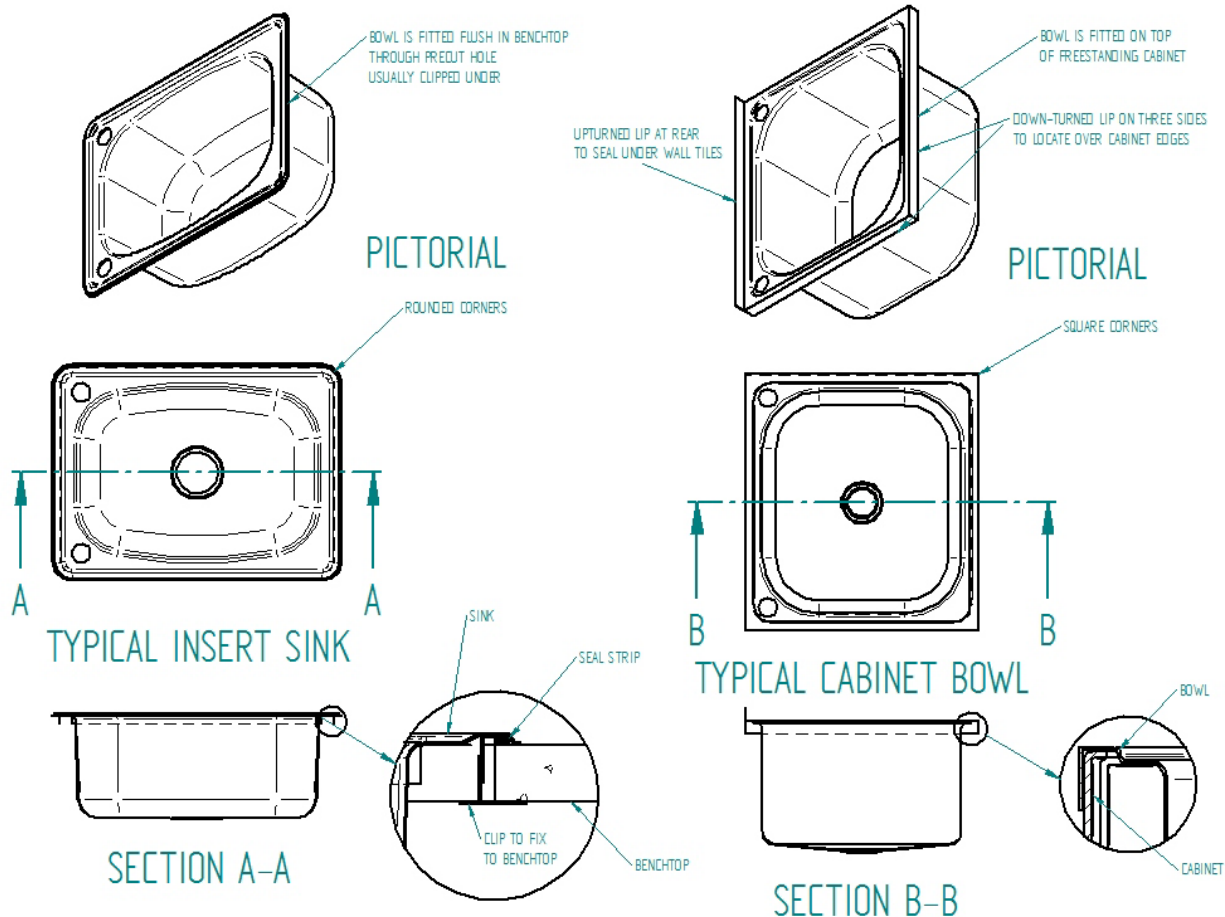
The image below shows the physical differences between lipped bowls and Drop in / Benchtop sinks.

As shown in section A-A of the image, a Drop in / Benchtop sink has a flat surface on the bottom of the lip where it sits and is secured to a benchtop. Along this edge is a stainless steel bracket where clips are fitted and used to pull the flat lip down tight on a benchtop once the foam strip has been put in place and sealant used to seal the bowl to the benchtop.

In comparison, section B-B of the image shows that a lipped bowl is generally more square in dimensions and clearly has the lipped top edge all the way around the top of the bowl where the cabinet and bowl sit and lock together, and the front and two side edges are pressed down to also ensure that the bowl is sitting and locked onto the cabinet. The other major noticeable difference is the upturned lip at the rear of

the bowl which will sit flush with the vertical wall that the free standing laundry unit is pushed against; and wall tiles will be secured to the wall and over the tile strip to ensure that water does not leak in behind the tiles and cause any type of rot to the frame and walls in a laundry.

The physical differences described above are significant and determine that Drop in / Benchtop sinks can only be fitted to a benchtop while lipped bowls can only be fitted to a free standing cabinet, either metal or poly cabinet.



Commercial likeness

Due to the significant physical differences between Drop in / Benchtop sinks and lipped bowls, the two types of sinks are obviously not directly competitive in the market. It is undisputable that Drop in / Benchtop sinks cannot be used for a free standing cabinet while lipped bowls cannot be fitted to a benchtop. Since there is no manufacturer of lipped bowls in Australia, the sinks produced by the Australian industry do not bear "commercial likeness" with lipped bowls.

Functional likeness

While lipped bowls can only be used for a free standing laundry unit, Drop in / Benchtop sinks have a much wider application and can be used in different areas of a home other than laundry area such as kitchen, bar and bathroom.

Production likeness

While the production of both of the sinks starts from pressing a flat piece of stainless steel sheet to form the bowl shape, different shaped moulds are used to form the shape of the top edge. It is generally regarded that it is harder to manufacture lipped bowls because of the tight corners and the lipped edge and the process of folding and pressing the back tile strip and the three front turn down edges of the bowls.

Accordingly, it is obvious that lipped bowls and the bowls produced by the Australian industry do not have characteristics *closely* resembling and hence cannot be treated as “like products” within the meaning of Article 2.6 of the ADA.

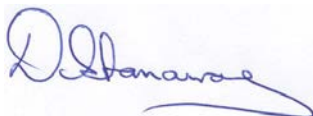
3. Are lipped bowls qualified for exemption?

As the Australian industry pointed out in its submission, whether lipped bowls imported for the assembling of laundry kits are eligible for exemption from any measures that may be applied following the completion of the investigation in according with the *Customs Tariff (Anti-Dumping) Act 1975* depends on whether “like or directly competitive goods” are offered for sale in Australia. The Australian industry’s submission argues that the term “like or directly competitive goods” “had the same meaning as the term “like goods”” under subsection 269T(1) of the *Customs Act 1901* which is equivalent to Article 2.6 of the ADA. Assuming this argument is correct, it means that the term “like or directly competitive goods” must be interpreted as narrowly as the term “like goods” which only covers goods that are identical or closely resembling in characteristics.

We have argued above that lipped bowls used for assembling of laundry kits cannot be “like” to the GUC or the goods produced by the Australian industry given the narrow scope of “like product”. That argument necessarily applies here, that is, lipped bowls used for assembling of laundry kits cannot be regarded as “like or directly competitive goods” for the purpose of determining whether they should be eligible for an exemption. The fact that there is no production of lipped bowls or goods closely resembling them that can be used for the assembling of laundry kits justifies the exemption of lipped bowls from any antidumping measures that may result from the investigation.

Should you have any queries or need further information, please do not hesitate to contact us.

Yours sincerely,



Doug Stanaway
Chief Executive Officer /
National Sales & Marketing Manager