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A-TECH/AKJ SUBMISSION NO. 5

CAPRAL AND ALSPEC — AUSTRALIAN INDUSTRY STATUS, CHINESE MANUFACTURE, ROYALTIES, COMPETITION-LAW CONCERNS AND INJURY ATTRIBUTION

SUBMISSION – In response to Statement of Essential Facts No. 691

Countries Involved: Australia and China

Submitted by

A-Tech Australia Pty Ltd
Guangdong AKJ Façade and Architecture Co., Ltd

LODGEMENT DETAILS

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1. Purpose and central issue

This submission concerns the legal and economic role of Capral and Alspec in Investigation 691, their support for the measures, and their commercial relationships with Chinese manufacturers producing Australian proprietary systems.

A-Tech/AKJ states as a matter of fact that Chinese manufacturers fabricate Australian proprietary Capral and Alspec systems and make commercial payments to the Australian system owners under royalty, licence, system or related arrangements.

The Commission should establish how those relationships affect the identification of the Australian industry, the injury analysis, the reliability and weight of supporting evidence, and whether the relationships warrant separate competition-law examination.

2. The Commission must establish whether Capral and Alspec are producers of the relevant like goods

Capral and Alspec have commercial interests in the Australian aluminium window and façade market. That does not itself establish that they are manufacturers of the completed bespoke façade and window goods alleged to have suffered injury.

Section 269T of the Customs Act 1901 identifies the Australian industry by reference to persons producing like goods in Australia and requires Australian production to involve a substantial process of manufacture in Australia.

If Capral or Alspec is being treated as a producer of the relevant like goods, the Commission should identify the completed like goods produced, Australian manufacturing location, substantial manufacturing process undertaken, production volume attributed to that entity, relevant market and injury allegedly suffered in relation to that production.

> **Standing commercially adjacent to an industry is not the same as constituting the industry producing the like goods.**
>
> **An extrusion supplier does not automatically become the manufacturer of the completed window. A proprietary-system owner does not automatically become the manufacturer of the completed façade package.**

3. Chinese manufacture of Capral and Alspec proprietary systems

A-Tech/AKJ states that Chinese manufacturers fabricate Australian proprietary Capral and Alspec systems for supply into Australia and make royalty, licence, system or related commercial payments to the Australian system owners.

A-Tech further understands that some Chinese manufacturers participating in these arrangements are themselves subject to Investigation 691 and the provisional measures, including exporters falling within the residual and all-other-exporter categories.

This creates a commercial relationship that the Commission should establish directly from Capral, Alspec and the relevant Chinese manufacturers.

4. The royalty and commercial-income issue cannot be omitted from the injury analysis

A-Tech has lost more than $100 million of projects to Chinese competitors, including Chinese manufacturers using Australian proprietary systems.

The economic structure therefore cannot always be described as Chinese manufacture displacing all Australian economic participation. A Chinese manufacturer may win the project while an Australian proprietary-system owner receives commercial income arising from that same manufacture and Australian supply.

> **If Capral and Alspec receive millions of dollars in royalty, licence, system or related income from Chinese manufacture for the Australian market, where has that income been identified and reconciled in the injury analysis?**
>
> **How can the Commission assess the economic effect of Chinese imports upon those businesses without establishing the income those same businesses derive from Chinese manufacture?**

The Commission should obtain the relevant licensing agreements, royalty arrangements, quantity or tonnage-based payment mechanisms, invoices or payment records necessary to establish the nature and scale of those relationships. A-Tech does not have access to those confidential commercial records and is not required to prove their contents on behalf of the Commission.

5. Support for Ventora and Investigation 691 requires proper characterisation

Capral has made submissions supporting Investigation 691. The Commission should also establish the nature and extent of Alspec's involvement, if any.

If Capral and Alspec are not themselves manufacturers of the completed bespoke façade/window packages allegedly displaced, their support must be characterised as the position of system owners, extrusion suppliers or other commercially interested parties rather than automatically as direct evidence of injury to a producer of the completed like goods.

At the same time, if those entities derive substantial revenue from Chinese manufacturers whose Australian imports are subject to the investigation, that economic relationship is directly relevant to understanding their position and the weight to be given to their evidence.

> **Supplier interest is not manufacturer injury. System-owner revenue is not evidence that a completed-window manufacturer lost a sale. Support for another manufacturer does not itself establish injury or causation.**

6. Competition-law issues arising from the commercial relationships

A-Tech/AKJ does not ask the Australian Trade Remedies Commission to determine whether Capral, Alspec, Ventora, AGWA or any other party has contravened the Competition and Consumer Act 2010. That question falls within the jurisdiction of the ACCC and ultimately the courts.

However, A-Tech requests independent examination of whether the licensing and royalty relationships, together with any coordination among applicants and supporting industry participants, involved agreements, arrangements, understandings, information exchanges or coordinated conduct extending beyond legitimate commercial licensing and industry advocacy.

The potentially relevant provisions include section 45 of the Competition and Consumer Act 2010; section 45AD concerning the statutory definition of cartel provisions; sections 45AJ and 45AK concerning the civil prohibitions on making or giving effect to contracts, arrangements or understandings containing cartel provisions; and section 46 concerning misuse of substantial market power where the statutory substantial-lessening-of-competition test is satisfied.

> **The existence of a royalty or licensing arrangement is not, by itself, evidence of anti-competitive conduct. The issue requiring investigation is whether those commercial relationships, when considered together with any coordination concerning Investigation 691 or market conduct, contain or facilitate conduct meeting the statutory competition-law tests.**

A-Tech does not have access to confidential licensing agreements, commercial communications or internal coordination records. The appropriate regulators can obtain and examine that material.

7. Requested ACCC examination and ATRC action

A-Tech requests that the ACCC assess the relationships and conduct identified above and, where warranted, exercise its statutory investigative powers to obtain relevant licensing agreements, commercial communications and other evidence.

A-Tech further requests that the Australian Trade Remedies Commission determine whether any established relationships or conduct affect the reliability or independence of evidence, applicant standing or support, injury assessment, causation or any other statutory requirement in Investigation 691.

Where information obtained or held by the Commission raises a potential competition-law concern, A-Tech requests that the matter be referred or otherwise brought to the attention of the ACCC, as appropriate.

8. Project-level reconciliation

For projects included in the alleged approximately $350 million tender losses, the Commission should identify those won by Chinese manufacturers using Capral, Alspec or other Australian proprietary systems.

> **Project → successful Chinese manufacturer → proprietary system → Australian system owner → licensing/royalty arrangement → Australian commercial income → treatment in the injury calculation.**

The Commission should separately identify the fabrication opportunity allegedly lost and the Australian proprietary-system income associated with the successful imported transaction. A-Tech/AKJ does not contend that royalty income to one Australian entity automatically eliminates injury suffered by another Australian fabricator. The point is that the actual economic consequences must be identified rather than the entire gross project value automatically being characterised as an Australian loss.

9. Required determination

1. whether Capral and Alspec are being treated as producers of the relevant like goods and the manufacturing basis for that treatment;
2. the Chinese manufacturers producing their proprietary systems for the Australian market;
3. the nature of the licensing, royalty, system or related payment arrangements;
4. the aggregate Australian revenue derived from those arrangements relevant to the investigated market;
5. which projects within the injury analysis were won using those systems;
6. how that Australian revenue was treated in the injury calculation;
7. the nature of Capral's support for Investigation 691 and Alspec's involvement, if any;

8. whether the commercial relationships or related coordination raise matters warranting independent ACCC examination; and
9. whether any such relationships affect the reliability, independence or weight of evidence relied upon in Investigation 691.

> **The Commission has made the findings. It must establish the evidence supporting the findings.**

10. Reservation

This submission does not seek reconsideration of any individual exporter's dumping margin. A-Tech/AKJ reserves all available administrative, regulatory and judicial rights.

A-TECH

Signed:

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