Fortescue and Ors v Element Zero Pty Ltd and Ors – NSD 527/2024

EZ Respondents' Submissions Regarding Affidavit of Dr Grant Jacobsen and Case Management Orders for the Applicants' IA

1 The Applicants dispute that they require leave to rely on Dr Jacobsen's written evidence dated 20 August 2025, and do not seek it.

2 Leave is required, for two inter-related case management reasons. *First*, it may be observed that the *Federal Court Rules 2011* (Cth) only contemplate, in Part 23, the calling of expert evidence at trial (which is defined so as not to include an interlocutory hearing), with such evidence to be set out in a report (not an affidavit, as here) that complies with r 23.13 and GPN-EXPT: r 23.11 and Dictionary in Schedule 1. Dr Jacobsen says at [4] that he has read and complied with GPN-EXPT, Part 5 of which requires, consistent with rr 23.11-13, the expert's evidence to be in the form of a report. His affidavit must be taken, as a matter of substance, to be an expert report (albeit one that has been shoe-horned into an affidavit to try and work around the stipulation that expert reports are for trials only).

3 Had the Applicants disclosed at the CMH on 19 June 2025 (when the IA was set down for a one-day hearing) their intention to serve an expert report, the Court would have had an opportunity to consider whether that was a proportionate approach to the controversy. Further, the EZ Respondents would have had some opportunity to retain their own expert in readiness for receipt of any such report so that they might be in a position to answer it. The Court might also have made directions as to conferral by the experts and the preparation of a joint report in order to make it at least possible for the hearing of the IA to be dealt with in the one day. Instead, the EZ Respondents will not be in a position to answer the report with their own expert report, and the Court will not be in a position to hear the matter in one day.

4 The capacity of a party to call a witness or adduce other evidence may be regulated by the Court's power to control and supervise the proceeding and the requirement upon the Court that it take into account case management considerations, including those required by s 37M, particularly where the potential witness threatens to disrupt a hearing: *Comcare v John Holland Rail Pty Ltd* (2011) 195 FCR 43; 283 ALR 111; [2011] FCA 622 at [18]-[20].

5 *Second*, the Applicants need leave because they served Dr Jacobsen's report 12 days late, in non-compliance with Order 3 dated 19 June 2025: *Comcare* at [9]. The lateness of the evidence has further prejudiced the EZ Respondents.

6 The hearing of the IA will take the full day already: the lay evidence of the parties' respective Solicitors is extensive; and oral submissions will be lengthy.

7 Should the Applicants belatedly seek the Court's leave, they will need to establish that the cost, delay and prejudice of allowing Dr Jacobsen to give evidence at this stage of the IA is outweighed by the relevance and importance of the evidence: *Comcare* at [17]-[25]. They cannot discharge that burden for the following reasons.

8 The cost, delay and prejudice considerations are significant. Aspects of them have been touched upon in earlier CMHs.

9 At the CMH on 30 April 2025, the EZ Respondents raised their concern that the Applicants are seeking to drag out the proceeding against smaller respondents (T8.13). The Court thereafter emphasised to the Applicants that the proceeding "should be dealt with or resolved in some fashion relatively expeditiously" (in the face of the Applicants seeking months to review and complete discovery before even commencing preparing their evidence in chief (T18.1)).

10 At the CMH on 19 June 2025, the Court refused to allocate two hearing days for the Applicants' IA (the Applicants' estimate being 1-2 days). The Court informed the parties they should narrow the issues in dispute (the subject of the IA), consistent with their obligations in s 37N (T11.18-12.23 and T13.30). In doing so, the Court made plain to the Applicants that: "the matter can't go on forever" (T18.41); "there is no perfection in the world" (T19.3); and "I will hear the matter [Applicants' IA] on the 24th [September 2025] and hopefully resolve it fairly quickly after" (T 17.19). As the EZ Respondents submitted to the Court at the CMH on 10 September 2025, the Applicants must have already begun to prepare Dr Jacobsen's report when before the Court on 19 June 2025 obtaining the hearing date (T9.35-45).

11 The Applicants did not heed the Court's observations above and instead significantly expanded their IA by: (a) pursuing 494 individual discovery issues; and (b) serving Dr Jacobsen's long, contentious and argumentative report two weeks late. This has put significant pressure on the Court's ability to hear the IA in one day and determine it shortly thereafter. Indeed, the report of Dr Jacobsen would make both those tasks impossible.

12 Dr Jacobsen's evidence is 931 pages long (the body is comprised of 267 paragraphs over 69 pages, with 30 annexures across 832 pages). It does not annex any instruction or engagement letter and does not list the documents provided. Despite the EZ Respondents' requests, the Applicants have refused to provide that information (doubtless such a letter would disclose the lengthy period over which the evidence was prepared).

13 Instead, the Applicants have produced a list showing 1,415 documents were given to Dr Jacobsen just for Parts C-F. For Part G, Dr Jacobsen appears to have relied on many hundreds of pages of further documents which are annexed. It is not clear which documents Dr Jacobsen relied on for which parts of his evidence (e.g. some sections appear to be based on documents within a particular date range, but he does not identify with sufficient specificity what they are so they can be identified). The volume of documents is, self-evidently, overwhelming.

14 Any potential relevance of Dr Jacobsen's report for a final hearing cannot outweigh its lack of relevance and probative value to the hearing of the IA. If leave were granted to the Applicants to rely on the report, the admissibility issues the Court would need to determine would, in turn, lead to further delay and costs.

15 As to relevance, although prayer 1 of Fortescue's IA invokes s 23 of the *Federal Court Act* to access the seized material, it invokes the discovery jurisdiction of the Court such that the rules concerning discovery must be applied (which the Applicants' accepted at the CMH on 10 September 2025: T T14.36-15.2; T15.41-43).

16 An applicant for further or better discovery needs to establish reasonable grounds for being fairly certain that there are other relevant documents which have not been discovered: *Procter v Kalivis* [2009] FCA 1518; 263 ALR 461 at [33] and [44] (Besanko J), *Basetec Services Pty Ltd v Leighton Contractors Pty Ltd (No 3)* [2015] FCA 767 [19] (Besanko J) and *Watson v Kriticos (Further Discovery and Adjournment)* [2023] FCA 793 at [18]-[22] (Perram J). Speculation, on Dr Jacobsen's part, is not sufficient or relevant.

17 Further, and in any event, the allegedly deficient discovery cannot be shown by a contentious or argumentative affidavit: *Mulley v Manifold* [1959] HCA 23; 103 CLR 341 at [3]-[5] (Menzies J) cited with approval by Besanko J in *Proctor* at [33]-[35]. The deficiency must be established from the pleadings, verification affidavit or other objective evidence: see, e.g., *Basetec* [10]-[19].

18 *Basetec* gives examples of conjecture as to the existence of documents not establishing inadequacy and therefore entitlement to further discovery (e.g. *Basetec* [10]-[14]). That is to be contrasted with instances in which a document that has not been discovered is clearly identified by reference in a document that has been discovered, in which case further discovery is likely to be ordered (such as a drawing referred to in a discovered email – see *Basetec* at [17]-[19]).

19 By contrast, Dr Jacobsen's report (a) is replete with contentious, argumentative and speculative opinions as to there being documents "he expects" would have been created by the Respondents during their R&D which have not been discovered and must be in the Respondents' possession (that being the nub of his report): see, e.g., [57(a)-(d)], and (b) reflects Dr Jacobsen's opinions in the absence of evidence in the case about the true context of the R&D about which he speculates.

20 The above demonstrates there is no legitimate forensic purpose for the calling of Dr Jacobsen's report on the hearing of the IA. And even if there were one, it could not outweigh the cost, delay and prejudice at this stage of the IA.

21 The above also demonstrates that, if leave were granted to the Applicants to rely on the report, there would be significant objections on the grounds of relevance, inadmissibility under s 79, or otherwise for exclusion under ss 135-137 of the *Evidence Act*. A schedule of the objections the EZ Respondents would make, if leave were granted, is annexed to these submissions. They are objections that would occupy a significant part of the one-day hearing.

22 For the above reasons, leave should not be granted to the Applicants to rely on Dr Jacobsen's report. Further orders should be made to ensure that the Applicants' IA is heard and determined efficiently without the need to deal with the report. Those orders are reflected in the proposed short minutes of order sent to Justice Markovic's Associate on 16 September 2025.

JM Hennessy

CD McMeniman Gilbert + Tobin

16 September 2025

SCHEDULE OF OBJECTIONS TO DR JACOBSEN AFFIDAVIT

1. The whole of Dr Jacobsen's affidavit is objected to on the grounds of relevance:
   a. Any deficiency in discovery must be established from the pleadings, verification affidavit or other objective evidence: see, e.g., *Basetec Services Pty Ltd v Leighton Contractors Pty Ltd (No 3)* [2015] FCA 767 [10]-[19] (Besanko J).
   b. His evidence is contentious and argumentative, and therefore inadmissible on a further and better discovery application: *Mulley v Manifold* [1959] HCA 23; 103 CLR 341 at [3]-[5] (Menzies J) cited with approval by Besanko J in *Procter v Kalivis* [2009] FCA 1518; 263 ALR 461 at [33]-[35].
   c. His opinions as to there being documents "he expects" would have been created by the Respondents during their R&D which have not been discovered is irrelevant to whether there are reasonable grounds for being fairly certain that there are other relevant documents which have not been discovered: *Procter* at [33] and [44].
   d. Any opinion he may have on the types of experiments that may have been undertaken by the EZ Respondents may be relevant to the issues for final determination, but only if sufficiently informed by the evidence, not just a review of discovery documents. Such opinions are not relevant to discovery.
2. Dr Jacobsen's opinions do not fall within s 79 of the *Evidence Act 1995* (Cth):
   a. His only experience with R&D startups is as a patent attorney (see [10]-[25]).
   b. He is not qualified to give an opinion about what R&D startups do in terms of keeping records of experiments.
   c. He is not qualified to give an opinion about hypothetical circumstances involving an R&D startup.
   d. He is not qualified as a non-participating onlooker, nor does he have sufficient knowledge of the facts to give an opinion on what documents in fact the EZ Respondents created when performing their research and development – that is pure speculation,

   see, e.g., *Australian Securities & Investments Commission v Vines* (2003) 48 ACSR 291; [2003] NSWSC 1095 at [13], [19]-[22] and [53]-[54] (Austin J) and *Maronis Holdings Ltd v Nippon Credit Australia Ltd* (2001) 38 ACSR 404; [2001] NSWSC 448 at [380] (Bryson J).
3. Alternatively, his evidence should be excluded under ss 135-137 of the *Evidence Act* for undue waste of time or prejudice, e.g. *R v Smith* (2000) 116 A Crim R 1; [2000] NSWCCA 388 at [69]–[70] or for failing to identify the bases of the opinion, including the instructions, documents and assumptions provided, as Palmer J did in *Williams v Public Trustee of New South Wales* [2007] NSWSC 921 at [14]) the Applicants have to date refused to produce the letter of instructions (cf their obligation to do so in GPN-EXPT [5.2(c)]) or Dr Jacobsen's retainer, either of which no doubt reveals that he was working at the report by the time the matter was before the Court for case management on 19 June 2025.

Unless stated otherwise, where the basis of objection is referred to as being “relevance” or “s 79”, it is referring to the above reasons.

Paragraph	**Part**	**Basis**
B: Document and record keeping practices in chemical research		
25-46	Whole	Relevance, s 79; or exclude under ss 135-137
C: Consideration of Respondents’ R&D – 1 January to October 2022		
C1: Electrochemistry		
50-55	Whole	Relevance; or exclude under ss 135-137
C2: Disclosure of Pre-Provisional documents		
57-58	Whole	Relevance, s 79; or exclude under ss 135-137
59-62	Whole	Relevance; or exclude under ss 135-137
63-65	Whole	Relevance, s 79; or exclude under ss 135-137
66-67	Whole	Relevance; or exclude under ss 135-137
68-70	Whole	Relevance, s 79; or exclude under ss 135-137
C.3: 6 March to 6 April 2022		
71-75	Whole	Relevance; or exclude under ss 135-137
76-78	Whole	Relevance, s 79; or exclude under ss 135-137
79-81	Whole	Relevance; or exclude under ss 135-137
82-85	Whole	Relevance, s 79; or exclude under ss 135-137
C.4: Academic Papers		
86-92	Whole	Relevance; or exclude under ss 135-137
93-94	Whole	Relevance, s 79; or exclude under ss 135-137

D: 2022 Provisional		
D1: Example 1 of the 2022 Provisional		
97-100	Whole	Relevance; or exclude under ss 135-137
101	Whole	Relevance, s 79; or exclude under ss 135-137
102	Whole	Relevance; or exclude under ss 135-137
103-104	Whole	Relevance, s 79; or exclude under ss 135-137
D2: Example 2 of the 2022 Provisional		
105-106	Whole	Relevance; or exclude under ss 135-137
107	Whole	Relevance, s 79; or exclude under ss 135-137
108	Whole	Relevance; or exclude under ss 135-137
109-111	Whole	Relevance, s 79; or exclude under ss 135-137
D.1.3: Example 3 of the 2022 Provisional		
113	Whole	Relevance; or exclude under ss 135-137
114	Whole	Relevance, s 79; or exclude under ss 135-137
116	Whole	Relevance, s 79; or exclude under ss 135-137
118-120	Whole	Relevance, s 79; or exclude under ss 135-137
D.1.4: Summary of my review of experimental documents underlying Examples 1-3 of the 2022 Provisional		
121	Whole	Relevance, s 79; or exclude under ss 135-137
E.1: *Completeness of the EZ Respondents' experimental records dated 2022*		
123	Whole	Relevance; or exclude under ss 135-137
124-125	Whole	Relevance, s 79; or exclude under ss 135-137
E.2: Completeness of Dr Winther-Jensen's experimental records dated 2022		
126-127	Whole	Relevance, s 79; or exclude under ss 135-137

E.3: Records not sufficient to draft the 2022 Provisional		
128-129	Whole	Relevance, s 79; or exclude under ss 135-137
F: Consideration of the PCT and the 2023 Provisional		
F.1: Examples of the PCT		
133, 135-137	Whole	Relevance, s 79; or exclude under ss 135-137
138-139	Whole	Relevance; or exclude under ss 135-137
141	Whole	Relevance, s 79; or exclude under ss 135-137
142	Whole	Relevance; or exclude under ss 135-137
144	Whole	Relevance, s 79; or exclude under ss 135-137
146-147	Whole	Relevance; or exclude under ss 135-137
148-149	Whole	Relevance, s 79; or exclude under ss 135-137
F.2: Examples of the 2023 Provisional		
151-154	Whole	Relevance, s 79; or exclude under ss 135-137
G: My consideration of specific documents discovered by the Respondents		
G.1: Testing of iron ores as part of the R&D of the EZ Process		
158-159	Whole	Relevance; or exclude under ss 135-137
G.2: Item 389		
162	Whole	Relevance; or exclude under ss 135-137
163-165	Whole	Relevance, s 79; or exclude under ss 135-137
G.3: Items 390-395		
168	Whole	Relevance; or exclude under ss 135-137
169-170	Whole	Relevance, s 79; or exclude under ss 135-137
G4: Items 400 and 401		

174	Whole	Relevance; or exclude under ss 135-137
175-176	Whole	Relevance, s 79; or exclude under ss 135-137
G5: Item 402		
179	Whole	Relevance; or exclude under ss 135-137
180-181	Whole	Relevance, s 79; or exclude under ss 135-137
G6: Item 403		
184	Whole	Relevance; or exclude under ss 135-137
G7: Item 405		
187	Whole	Relevance, s 79; or exclude under ss 135-137
G8: Item 406		
190	Whole	Relevance, s 79; or exclude under ss 135-137
G9: Item 413		
193	Whole	Relevance; or exclude under ss 135-137
194-195	Whole	Relevance, s 79; or exclude under ss 135-137
G10: Item 436		
198	Whole	Relevance; or exclude under ss 135-137
199-200	Whole	Relevance, s 79; or exclude under ss 135-137
G11: Items 419-424		
203-205	Whole	Relevance; or exclude under ss 135-137
206-209	Whole	Relevance, s 79; or exclude under ss 135-137
G12: Items 504-505		
212	Whole	Relevance; or exclude under ss 135-137
213-214	Whole	Relevance, s 79; or exclude under ss 135-137

G13: Items 513-514		
217-219	Whole	Relevance, s 79; or exclude under ss 135-137
G14: Item 515		
222	Whole	Relevance; or exclude under ss 135-137
223-224	Whole	Relevance, s 79; or exclude under ss 135-137
G15: Item 518		
227-229	Whole	Relevance, s 79; or exclude under ss 135-137
G16: Item 521		
232	Whole	Relevance; or exclude under ss 135-137
233-235	Whole	Relevance, s 79; or exclude under ss 135-137
G17: Item 523		
238-239	Whole	Relevance, s 79; or exclude under ss 135-137
G18: Item 526-529		
242	Whole	Relevance; or exclude under ss 135-137
243-245	Whole	Relevance, s 79; or exclude under ss 135-137
G19: Item 533		
248	Whole	Relevance; or exclude under ss 135-137
249-250	Whole	Relevance, s 79; or exclude under ss 135-137
251	Whole	Relevance; or exclude under ss 135-137
G20: Items 526, 534-536		
254-255	Whole	Relevance, s 79; or exclude under ss 135-137
G21: Item 474		
258	Whole	Relevance; or exclude under ss 135-137

259-260	Whole	Relevance, s 79; or exclude under ss 135-137
G22: Item 428-429		
265-267	Whole	Relevance, s 79; or exclude under ss 135-137