

Submissions

Federal Court of Australia

No. NSD 527 of 2024

District Registry: New South Wales

Division: General

FORTESCUE LIMITED ACN 002 594 872 and others

Applicants

ELEMENT ZERO PTY LIMITED ACN 664 342 081 and others

Respondents

The Jacobsen affidavit

1. The Jacobsen affidavit should not be permitted to be used at the hearing of the Applicants' Interlocutory Application (**IA**) on case management principles. It contravenes sections 37M and 37N of the *Federal Court of Australia Act 1976* (Cth) and the Central Practice Note paragraphs 7.1 to 7.4 and 10.13. Dealing with it, including responding to it in evidence, would cause the Respondents to incur costs disproportionate to the dispute.
2. Further, the Respondents would need substantial time to respond to the Jacobsen affidavit. That would mean that the IA could not be heard in full on 24 September 2025. That, in turn, would jeopardise the trial date. The Third Respondent does not want the May trial dates put at risk.
3. It is inappropriate and unhelpful for the Applicants to seek to deploy expert evidence on the IA. The IA seeks inspection of the Listed Things based on the allegations made in the tenth Dewar affidavit and the Jacobsen affidavit. Both allege deficiencies in the Respondents' discovery, so the IA is, at its heart, an examination of whether the Respondents have given proper discovery. Specifically, the Applicants say the

Filed on behalf of (name & role of party)

Bjorn Winther-Jensen, Third Respondent

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Respondents have not given proper discovery because Dr Jacobsen's opinion is that other documents falling within the categories must exist.

4. The starting point is Dr Winther-Jensen's verified list of documents. If a party deposes to the accuracy of its list, that is generally the end of the matter, unless the other party establishes that there is a good reason to go behind the list¹.
5. The Jacobsen affidavit does not give a good reason. It is nothing but speculation. Dr Jacobsen addresses what documents would generally exist in a hypothetical standard (industrial) R&D project. That says nothing about what documents were in fact created in this particular project. As Dr Winther-Jensen said in his affidavit of 8 July 2024 (set out again at [51] of Mr Hales' fourth affidavit of 12 September 2025), the work he did that led to the technology ultimately used at Element Zero was a retirement project. Specifically, he says this at [38]-[40] of his affidavit:

As stated above, when I resigned I did not intend to work again...

After I ceased work for Fortescue, I travelled to Denmark to be with my sister and then to Thailand to reunite with my wife and niece, which was a key factor in my resignation from FMGPS. I returned to Perth in early February 2022.

In March 2022 (after returning to Perth in early February) I started setting up electrochemical gear in my garage. This was driven by curiosity and to have a small retirement "project" exploring the footsteps of Humphry Davy's and Michael Faraday's work from 1807 on electrodeposition from molten hydroxides. I worked with nickel initially but then branched into iron in about July 2022. It was this work that eventually led to the creation of Element Zero.

6. Dr Jacobsen's evidence is directed to the documents that he thinks would have been created in a chemical research and development program. His views are based on his experience at the global companies, The Dow Chemical Company and BP Chemicals. His evidence says nothing about what documents Dr Winther-Jensen is likely to have created in the course of his retirement project in his garage.
7. It is unsurprising that the Jacobsen affidavit does not take account of what Dr Winther-Jensen has said: Dr Jacobsen was not given that evidence. That was a forensic choice by the Applicants. If Dr Jacobsen had been given Dr Winther-Jensen's evidence, his opinion about the documents likely to have been created might have been very different.
8. The clearest example is the documents Dr Jacobsen thought were likely to have been created in what he refers to as the Pre-Provisional period prior to 6 March 2022 (at [57]). Had Dr Jacobsen been given Dr Winther-Jensen's evidence, his view that such documents must exist would surely have changed.

¹ *Mulley v Manifold* (1959) 103 CLR 341, 343

9. The discovery searches by the Respondents have been extensive. The documents Dr Jacobsen theorises about do not exist.
10. Dr Jacobsen's affidavit implicitly invites Dr Winther-Jensen to respond to the suggestion of missing documents by explaining the work that he did. That will be a crucial issue in the primary proceeding. It would be unfair for Dr Winther-Jensen to be required to go into evidence about it before seeing the Applicants' case against him, in circumstances where there is no good reason to go beyond his verified list of documents. In any event, he has already given an outline of what he did – and it was ignored.
11. The Applicants first proposed discovery categories on 6 November 2024 prior to applying for discovery on 20 November 2024. Discovery was ordered on 26 February 2025². The Applicants have made complaints about Dr Winther-Jensen's discovery since 4 July 2025 which have been answered³. Dr Winther-Jensen respectfully submits that the Court should exercise its case management powers to keep the costs and time consumed by this dispute proportionate. It can be resolved without resort to speculation by Dr Jacobsen.

The proposed amendments to the IA

12. The Applicants want to insert paragraphs 3A and 3B into the IA.
13. Dr Winther-Jensen does not object to the IA being amended as the Applicants seek but he does oppose an order being made in the terms of paragraph 3A on the basis that it is unnecessary and therefore oppressive in putting him to further cost. His response to the proposed new discovery categories numbered 15 to 22 is dealt with in [49] to [57] of Mr Hales' fourth affidavit. In summary:
 - (a) Category 15 – This is unnecessary against Dr Winther-Jensen, as he has deposed that he was not working on anything during November and December 2021 and there has been no challenge to his evidence.
 - (b) Category 16 – This has already been provided.
 - (c) Category 17 – This is unnecessary against Dr Winther-Jensen. Anything to be discovered would have been revealed by the searches to date.
 - (d) Categories 18 and 19 – These searches are unnecessary against Dr Winther-Jensen. Any relevant communications with NewPro have already been discovered.

² [See the Seventh Affidavit of Rebecca Mary Dunn of 9 September 2025 at [26] to [30]

³ [See the Fourth Affidavit of Michael Hales of 12 September 2025 at [10] to [42]

- (e) Categories 20 and 21 - This is unnecessary against Dr Winther-Jensen. Anything to be discovered would have been revealed by the searches to date.
 - (f) Category 22 – This is unnecessary against Dr Winther-Jensen. Anything to be discovered would have been revealed by the searches to date.
14. The Third Respondent does not object to the order being made at paragraph 3B.

Frances St John, 16 September 2025