



Form 59  
Rule 29.02(1)

### Affidavit

No. 527 of 2024

Federal Court of Australia  
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

Affidavit of: **Michael John Williams**  
Address: Level 35, International Tower Two, 200 Barangaroo Avenue  
Barangaroo NSW 2000  
Occupation: Solicitor  
Date: 29 November 2024

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Filed on behalf of (name & role of party) The First, Second and Fourth Respondents  
 Prepared by (name of person/lawyer) Michael John Williams, Partner  
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*[Handwritten signatures]*

I **Michael John Williams** of Level 35, International Tower Two, 200 Barangaroo Avenue Barangaroo NSW 2000, Solicitor, say on oath:

### **Introduction**

1. I am the solicitor for the First, Second and Fourth Respondents (the **Element Zero Respondents**).
2. This is my sixth affidavit. To the extent that I refer to my experience below I am intending to rely on the experience set out in my Third Affidavit dated 25 June 2024. For convenience, I have referred to parts of my Fifth Affidavit (sworn on 22 November 2024 in support of the Element Zero Respondents' interlocutory application for discovery), where relevant, without repeating them here.
3. I make this affidavit in response to the Applicants' Interlocutory Application dated 20 November 2024 seeking discovery from the Respondents in 15 categories (**Applicants' Discovery Application**).
4. For the purposes of making this affidavit, I have reviewed the affidavit of Paul Dewar affirmed on 20 November 2024 in support of the Applicants' Discovery Application (**Mr Dewar's affidavit**). Where I have not responded to parts of that affidavit I do not intend to be taken to agree with those parts.
5. Exhibited to me at the time of making this affidavit is a paginated bundle of documents marked "**Exhibit MJW-5**" to which I refer below. A reference to a page number of **Exhibit MJW-5** is a reference to a document which appears on that page of the exhibit.
6. By referring in this affidavit to any information or instructions I received or obtained, I do not waive or intend to waive – nor am I authorised to waive – any privilege attaching to those instructions or any work I performed as a result of those instructions, other than where expressly referred to in this affidavit.

### **The Applicants' Discovery Application**

7. The Applicants now seek production of documents under 15 discovery categories (**Applicants' Proposed Categories**).
8. Since the Applicants initially provided their proposed categories on 6 November 2024, they have added an additional category, Category 2A, which I discuss below.
9. As set out in my Fifth Affidavit, the Element Zero Respondents have agreed to the production of documents under three of the Applicants' Proposed Categories: Categories 6, 12 and 14 (but only to the extent it refers to Category 1 as amended and Category 6, but not insofar as it refers to other categories).




10. The Element Zero Respondents have proposed amendments to categories 1, 8 and 13 on 6 November 2024, however the Applicants have not agreed to these amendments.
11. For the reasons set out below, the Element Zero Respondents object to the Applicants' Proposed Categories as currently drafted, including on the basis that they are (1) unnecessarily broad, (2) not relevant to the pleaded issues and (3) would be oppressive to the Element Zero Respondents if they were required to comply with those categories.
12. I have set out below the Element Zero Respondents' position on the Applicants' Proposed Categories which are not consented to, including responding to Mr Dewar's affidavit where it refers to certain of the Applicants' Proposed Categories.
13. However, I note that the majority of the Applicants' Proposed Categories are not addressed in Mr Dewar's affidavit, and in the circumstances the Element Zero Respondents do not know the basis on which the Applicants contend discovery pursuant to those categories is relevant and necessary for determination of the issues in dispute. Should that basis be identified in further material relied on by the Applicant, the Element Zero Respondents reserve the right to respond to that material.

#### *Category 1*

14. The Applicants' Proposed Category 1 seeks access to documents recording or evidencing work undertaken by the Second Respondent, the Third Respondent and/or Fortescue at any time during the period from 25 March 2019 to 12 November 2021 (being the period of the Second and Third Respondents' employment with Fortescue) in relation to an electrochemical reduction process involving Ionic Liquid.
15. The Element Zero Respondents object to Proposed Category 1 in this form.
16. The basis for the objection is the Applicants' definition of "Ionic Liquid" which they rely on for the purpose of discovery under Category 1, which is as follows:

*"Ionic Liquid" means any salt or mixture of salts that is capable of acting as an electrolyte in electrowinning and/or electroplating of metals and/or ores when in its liquid form (irrespective of the temperature range at which the salt or mixture is in its liquid form) including, without limitation, electrolytes that may be described as ionic liquids, molten salts, eutectics, molten hydroxide-based electrolytes, molten carbonate-based electrolytes, "hydroxide alkali melt or eutectic melt" (referred to in paragraph 29(a)(i) of the EZ Parties defence) and/or "molten hydroxide eutectic" (referred to in paragraph 29(c) of Dr Winther-Jensen's defence).*

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17. I have concerns about the scope of that definition, given that:
- (a) It is not limited to the Applicants' pleaded case, namely the "Ionic Liquid R&D" that it is alleged the Second and Third Respondents undertook while working at Fortescue (paragraph 12 of the FASOC);
  - (b) It is extremely broad when compared to the Applicants' pleaded case, as evidenced by the fact that it includes, but is not limited to, "electrolytes that may be described as ionic liquids", which is not included in FASOC [12];
  - (c) It includes the additional terms "hydroxide alkali melt or eutectic melt" (referred to in paragraph 29(a)(i) of the Element Zero Respondents' defence) and/or "molten hydroxide eutectic" (referred to in paragraph 29(c) of Dr Winther-Jensen's defence), which are terms used in the Respondents' Defences to describe the technology developed by the Respondents *after* their employment with Fortescue (i.e., these terms are not used in relation to Ionic Liquid) which they plead in defence as being distinguishable from the Ionic Liquid R&D they are alleged to have done *while employed by Fortescue*.
18. In my view, the attempt to seek discovery based on an expansion of the definition of "Ionic Liquid" by the Applicants to include the work that the Respondents have pleaded they conducted *after* their employment with Fortescue constitutes fishing.
19. It is not directed at the case pleaded by the Applicants (that they conducted Ionic Liquid R&D as defined in FASOC [12] while employed by Fortescue), and as such seeks documents that are not relevant to the pleaded case.
20. On 13 November 2024, the Element Zero Respondents proposed an amendment to category 1, to bring this category into line with the Applicants' pleaded case, as follows:
- All documents recording or evidencing work undertaken by the Second Respondent, the Third Respondent and/or Fortescue at any time during the period from 25 March 2019 to 12 November 2021 in relation [to] Ionic Liquid R&D as defined in paragraph 12 of the FASOC. ~~to an electrochemical reduction process involving Ionic Liquid.~~*
- A copy of this letter appears at page 17 to 21 of Exhibit MJW-4 to My Fifth Affidavit.
21. The Applicants did not respond to this proposal and proceeded to file the Applicants' Discovery Application with no amendment to category 1. The justification for the wider definition of "Ionic Liquid" appears in paragraphs 11 to 18 of Mr Dewar's affidavit.
22. In those paragraphs Mr Dewar repeats evidence about the meaning of "Ionic Liquid" taken from affidavits affirmed by Dr Anand Indravadan Bhatt (**Dr Bhatt**) in support of the




original search order application and subsequently, and to evidence disputing Dr Bhatt's meaning of "Ionic Liquid" filed by the Third Respondent (Dr Winther-Jensen).

23. At paragraph 16 of his affidavit, Mr Dewar acknowledges the definitional debate, stating:

*Given the technical definitional debate between Dr Bhatt and Dr Winther-Jensen described above, based on my experience in intellectual property litigation, I consider that there is likely to be a technical definitional debate at trial about what is an "ionic liquid", and whether other terms, such as "eutectics" etc, are synonymous with, can be used interchangeably with, or overlap with, "ionic liquid".*

24. The Element Zero Respondents have not yet filed evidence on the meaning of "Ionic Liquid" in answer to the evidence of Dr Bhatt. They intend to do so, including from an expert in the relevant field of electrochemistry, if the Applicants persist in seeking discovery from the Element Zero Respondents based on that definition.

25. I am, however, informed by Dr Kolodziejczyk, and believe, that he does not consider that the definition of "Ionic Liquid" given by Dr Bhatt is accurate; it includes references to chemical compounds such as "molten hydroxide" which are not ionic liquids.

26. On 26 November 2024, Gilbert + Tobin wrote to the Applicants' lawyers proposing a further alternative to Category 1 as follows:

*All documents recording or evidencing work undertaken by the Second Respondent, the Third Respondent and/or Fortescue at any time during the period from 25 March 2019 to 12 November 2021 in relation to:*

- (a) Ionic Liquid R&D as defined in paragraph 12 of the FASOC;*
- (b) an electrochemical reduction process involving electrolytes that may be described as ionic liquids, molten salts, eutectics, molten hydroxide-based electrolytes, molten carbonate-based electrolytes, "hydroxide alkali melt or eutectic melt" (referred to in paragraph 29(a)(i) of the EZ Parties' defence) and/or "molten hydroxide eutectic" (referred to in paragraph 29(c) of Dr Winther-Jensen's defence).*

A copy of that letter appears at page 2 to 4 of **Exhibit MJW-5**.

27. In my view based on my experience and understanding of Category 1, the proposed amendment has the practical effect of providing the Applicants with the discovery sought in Category 1 by reference to the pleaded cases of the parties, without requiring the Court to determine the ambit of the meaning of "Ionic Liquid" at this stage of the case.



28. On 27 November 2024, Gilbert + Tobin received a letter from Davies Collison Cave requesting clarification of certain matters concerning the alternative proposed Category 1 above. A copy of that letter appears at page 5 to 8 of **Exhibit MJW-5**.
29. On 28 November 2024, Gilbert + Tobin sent a letter to Davies Collison Cave in response. A copy of that letter appears at page 9 to 11 of **Exhibit MJW-5**.
30. At the time of making this affidavit Gilbert + Tobin has not received a response to this letter or any indication that the Applicants are prepared to accept the amended form of Category 1 proposed by the Element Zero Respondents.

*Category 2*

31. Category 2 seeks access to documents relating to work which was undertaken by the Second Respondent, the Third Respondent and/or Fortescue, which is referred to in 24 documents exhibited to the affidavits of Anand Bhatt affirmed 1 May 2024 and Susanne Hantos affirmed 1 May 2024.
32. The Element Zero Respondents object to Category 2.
33. Category 2 would be oppressive to the Element Zero Respondents as presently drafted. I have formed this view having regard to the breadth of documentation described (there are 24 sub-categories) and the generality of the words used in the proposed category.
34. By way of example, this category seeks documents recording “work for “getting our manufacturing and R&D facilities set up”” (Category 2(f)) “the “develop[ment]” and “test[ing]” work” (Category 2(p)), and the “the work concerning “initial evaluation of various suitable electrolytes”, “laboratory desktop studies”, “R&D roadmap” and “internal electrochemical developments” (Category 2(x)). To conduct reasonable searches for the documents falling within this category, I consider that at a minimum it would be necessary to conduct searches using each of the terms referred to in the category.
35. Based on my understanding of Element Zero’s business and Dr Kolodziejczyk’s work, I am informed and believe that reasonable searches of their records using each of the terms used in Category 2 would likely return an extremely large amount of material unrelated to Fortescue or the issues in dispute in these proceedings.
36. Additionally, any documents relevant to the Applicants’ pleaded case in relation to Ionic Liquid R&D would be captured by the Applicants’ Proposed Category 1 (which the Element Zero Respondents have agreed to in the modified version identified above).

*Category 2A*

37. Category 2A is a new category which is not referable to the pleadings but instead seeks access to documents alluded to in evidence filed by the Second and Third Respondents

in the Element Zero Respondents' set aside application. Category 2A was not previously notified to the Respondents prior to service of the Applicants' Discovery Application.

38. The Element Zero Respondents object to production of documents under Proposed Category 2A. The documents sought are not adequately described and/or are documents which are already within the Applicants' possession, custody or control and on this basis, I consider it would be oppressive to the Respondents if they were required to comply with this category. In particular, I note:
- (a) The chapeau to Proposed Category 2A is exceptionally broad encompassing "*All documents, and all documents recording or evidencing information, copied, taken or otherwise obtained by the Second Respondent or the Third Respondent from Fortescue (including Fortescue's network, systems or devices)*". Proposed Category 2A is not confined to the pleaded issues (for example, by reference to the documents the Applicants allege were taken and used by the Respondents).
  - (b) Subparagraphs (c) – (e) in Proposed Category 2A refer to any (unidentified) documents which were located in folders on Dr Kolodziejczyk's Fortescue laptop. Dr Kolodziejczyk is not in possession of his Fortescue laptop and as a result is not able to identify the documents which were saved on the "*local drives*" or "*TempSD*" folder.
  - (c) Subparagraph (f) seeks documents contained on two USBs. On 14 June 2024, Gilbert + Tobin sent a letter to Davies Collison Cave confirming that Dr Kolodziejczyk has conducted a further search of his home and has been unable to locate the USBs. This letter also stated that if the USBs were located, Dr Kolodziejczyk undertakes not to access them and to promptly provide them to Gilbert + Tobin's office, pending further order of the Court. A copy of this letter is reproduced at pages 12 to 13 of Exhibit **MJW-5**.
  - (d) Subparagraph (g) seeks documents sent by the Third Respondent from his Fortescue email address to his personal email address. The Element Zero Respondents do not have access to Dr Winther-Jensen's Fortescue email address or personal email address. However, I understand that the Applicants have access to Dr Winther-Jensen's Fortescue email address and are already in possession of the documents sought.
39. For the reasons set out above, I have formed the view that the Element Zero Respondents will be unable to conduct a reasonable search for documents falling within Proposed Category 2A and it would be oppressive to require the Respondents to carry out these searches, particularly as in some cases they do not have access to the information that is in possession of the Applicants.

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*Category 3*

40. Category 3 seeks documents recording or evidencing the location and storage of *any* of the documents referred to in categories 1 and 2.
41. The Applicants have not provided any explanation for the relevance of this category in correspondence or Mr Dewar's affidavit.
42. The Element Zero Respondents object to production of documents under this category.
43. Based on my experience, I consider that this category is not a properly framed discovery category, but a request for evidence.
44. The Applicants have not identified any need for discovery of this category of documents prior to the filing of evidence in this proceeding.
45. Additionally, based on the wording of the category, responding to this category is likely to require forensic investigation and analysis of the Element Zero Respondents' computer systems. To the extent that any documents are produced under Categories 1 or 2 (if ordered), it is likely that compliance with this category will not be possible unless the Element Zero Respondents engage Mr Nigel Carson, a forensic expert from Digital Trace, to conduct an analysis of the Element Zero Respondents' devices.
46. In my experience this is not the type of discovery category typically ordered by this Court, as it would go far beyond the concept of reasonable searches. It would involve the *creation* of evidence about the issue of the location for every document, which is in the nature of an answer to an interrogatory, not discovery. I expect that this will not only involve additional significant expense beyond the expense of undertaking discovery, it will also significantly add to the time taken in discovery as Mr Carson would have to undertake in effect a forensic investigation of the Element Zero Respondents' devices.

*Category 4*

47. Category 4 seeks documents recording or evidencing any conduct or attempt by the Second Respondent and/or the Third Respondent to make any of the documents referred to in category 1 and 2 above unavailable to Fortescue.
48. This category is not address in Mr Dewar's affidavit.
49. The Element Zero Respondents object to production of documents under this category.
50. I consider that this category is not a proper discovery category, but is instead a request for evidence. The Applicants have not identified any need for discovery of this category of documents prior to the filing of evidence in the proceedings.
51. It is not clear to me how reasonable searches could be conducted by the Element Zero Respondents for documents in Category 3. There are no words in the category that

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*Mr Carson*



could be used to search for responsive documents. In addition, the category does not make sense to me as I do not understand what is meant by “make ... unavailable”. Further, if documents in Categories 1 and 2 exist, and are produced by the Element Zero Respondents, then they have not been made *unavailable* to Fortescue.

52. To the extent that the category is intended to cover the deletion of documents, production under this category would require forensic analysis of the Element Zero Respondents’ computer systems. To the extent that any documents are produced under Categories 1 or 2 (if ordered), compliance with Category 3 will not be possible unless the Mr Carson is engaged to conduct forensic analysis of the Element Zero Respondents’ devices, which raises the same concerns referred to above in relation to Category 3.

#### *Category 5*

53. Category 5 seeks documents recording or evidencing “*the Respondents’ consideration of the confidentiality of any of the documents referred to in Category 1 and 2*”.
54. The Applicants have not provided any explanation for this category or identified any need for discovery of this category of documents prior to evidence.
55. In my view, based on my experience, Category 5 is really a request for evidence.
56. The phrase “*consideration of the confidentiality of*” is vague and imprecise. Searches using terms such as “confidentiality” or “confidential” are not likely to return relevant documents (to the extent that there are any) , and instead throw up a vast array of documents which contain either of those words which have nothing to do with the documents in Category 1 or 2. I am concerned that the Element Zero Respondents will be unable to conduct reasonable searches for documents which fall under this category.
57. Further, I consider that Category 5 is unnecessary given the Element Zero Respondents consent to Category 14 insofar as it concerns Category 1 (as amended) such that there will be discovery of documents evidencing or recording the use of any of the documents in Category 1 (as amended).

#### *Category 7*

58. Category 7 seeks “*documents constituting or referring to the Second Specified Documents*” where:
- (a) The Second Specified Documents means “*(i) modified forms of First Specified Documents, including previous or subsequent drafts; (ii) documents created directly or indirectly using the First Specified Documents*”; and
  - (b) The First Specified Documents means the documents referred to in the particulars to paragraph 19 and 20 of the FASOC.




59. The Element Zero Respondents have agreed to discovery of documents constituting or referring to the First Specified Documents (the Applicants' Proposed Category 6).
60. However, the Element Zero Respondents object to proposed Category 7 on the basis it is unduly broad and oppressive.
61. The Applicants have not provided any explanation for Category 7.
62. The Second Specified Documents are defined to include "*documents created directly or indirectly using the First Specified Documents.*" The words "*directly or indirectly*" are not usual words in a discovery category. They do not involve a clear ability to determine whether a given document is discoverable or not on its face. It would be oppressive because it would require an evaluative assessment of whether a document was discoverable using the criterion of "indirectly created". The requirement for the exercise of such a judgment is not consistent with the usual discovery obligation on a party.
63. Further, in my view Category 7 is unnecessary given the Element Zero Respondents agree to produce to Category 8 insofar as it concerns the First Specified Documents, such that there will be discovery of documents recording or evidencing any use or disclosure of the First Specified Documents.

#### *Category 8*

64. Category 8 seeks documents "*recording or evidencing any use or disclosure of any one or more of the First and/or Second Specified Documents by any one or more of the Respondents or their agents*".
65. The Element Zero Respondents consent to production of documents under this category with the following amendment, to remove the reference to Second Specified Documents:
- All documents recording or evidencing any use or disclosure of any one or more of the First and/or ~~Second~~ Specified Documents by any one or more of the Respondents or their agents.*
66. I consider that the amended Category 8 is an appropriately framed category, which is relevant to the pleaded issues in dispute. The Applicants have not agreed to this amendment or provided any explanation as to the relevance of this proposed category.

#### *Category 9*

67. Category 9 seeks documents "*directly relevant to any of the matters pleaded or particularised in paragraph 31, 33 and/or 78 of the FASOC.*"
68. In my experience, this category is akin to general discovery not a category of discovery. There has been no order for general discovery in this proceeding.

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*[Signature]*

69. The category would require the Element Zero Respondents to undertake a subjective evaluation of what has been pleaded, and whether any document in their possession, custody or control is "*directly relevant to any of the matters pleaded or particularised*". The vagueness of this category makes it oppressive and inappropriate.
70. It would also be burdensome because search terms would not be able to be created for the matters pleaded in paragraphs 31, 33 or 78 as they are conclusory allegations of disclosure and use of Fortescue information (which is defined broadly without specification in the pleading) in the design and construction of the EZ technology.
71. Even if searches could be framed and documents identified, reviewers would need to evaluate whether a particular document is directly *relevant* to the use or disclosure of Fortescue information in designing and manufacturing the EZ technology. This involves a further subjective element which is inconsistent with a discovery obligation.

#### Category 10

72. Category 10 seeks documents "*documents recording or evidencing consideration by any one or more of the Second, Third and/or Fourth Respondents at any time during the period 25 March 2019 to 31 July 2022 as to their present or future involvement in an enterprise (other than Fortescue) for electrochemical reduction of iron*".
73. There has been no explanation provided by the Applicants of the relevance of the category, or the need for documents falling within this category prior to evidence.
74. Documents sought under the Category 10 do not appear to me to be relevant to any issue in the proceedings. They appear to be fishing, unrelated to the pleaded case.

#### Category 11

75. Category 11 seeks very broad-ranging production of documents regarding the First Respondent's business, including all research and development which took place between January 2022 and February 2024 (11(f)), laboratory books (either in hard or soft copy) (11(c)), documents provided to Playground Ventures (which is the venture capital firm who provided seed funding to the First Respondent) (11(d)), and documents relating to the First Respondent's pilot or trial plant (11(a) and (b)).
76. Mr Dewar's affidavit provides an explanation for the relevance of 11(a) – (c) only.
77. There has been no justification advanced for categories 11(d) – (f) by the Applicants.
78. I understand that Mr Dewar's evidence is that the Respondents should be ordered to give discovery of basis of design documents, piping and instrumentation documents on the basis that the Fortescue's witnesses have given evidence about the relevance of

Fortescue's own basis of design documents and piping and instrumentation documents. These are two documents which Fortescue alleges the Respondents have used.

79. The Element Zero Respondents object to this category.
80. In my view, the category is objectionable as it travels well beyond the pleaded issues and amounts to fishing. It is not limited to documents recording, incorporating or using the Applicants confidential information (which the Element Zero Respondents have agreed to produce). Rather, it extends to documents relating to the Element Zero technology, plant, funding and research and development over a two-year period.
81. The practical effect of the width of this category is that it would require that the Element Zero's produce documents to the Applicants relating to Element Zero's entire business, despite the fact that the Applicants are a commercial competitor. In my experience in cases involving confidential information, production of confidential documents from one business to a competitor of the kind sought by the Applicants, would not be permitted in a discovery category ordered by this Court, let alone in as broad terms. Issues of efficiency, as suggested by Mr Dewar, would not in my experience be a sufficient justification to permit such broad obligations of disclosure. The Applicants have themselves opposed the requests for production of documents by the Element Zero Respondents, despite the fact that they would have delivered efficiencies in the case.
82. The Element Zero Respondents have consented to Category 8 which covers discovery in relation to those documents (with a slight amendment described above). In the circumstances, any documents which record or evidence any use or disclosure of Fortescue's confidential information (including the basis of design documents and piping and instrumentation documents) would already be captured under Category 8 above.

### *Category 13*

83. The Category 13 seeks production of patents and patent applications (or divisional or related patents and patent applications), including draft patent applications.
84. The Element Zero Respondents have consented to production of documents under this category provided the words "*including drafts thereof*" are excluded.
85. The Applicants have not provided any explanation for the reason that drafts are required. Drafts of patent applications would be the subject of patent attorney privilege.




Category 14

- 86. The Category 14 seeks documents “*evidencing or recording the use of any of the documents in categories 1, 2, 2A, 6 and/or 7 above for or in preparing or inventing (sic) any of the patents or patent applications referred to in category 13 above*”.
- 87. Consistent with their position on the earlier categories referred to in category 14, the Element Zero Respondents consent to production of documents to the extent it refers to Category 1 as amended and Category 6 only, but not otherwise.
- 88. In relation to the balance of the category, patent attorney privilege would apply. If there was any use of documents in the preparation or “inventing” of the patents or patent applications would be presumably apparent on the face of the patent applications and would be discernible by the Applicants’ legal representatives and experts on inspection.

Sworn by the Deponent  
 at Barangaroo  
 in New South Wales  
 on 29 November 2024  
 Before me:

)  
)  
)  
)  
)



Signature of deponent



Signature of witness  
 Caitlin Aisling Meade  
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Federal Court of Australia  
District Registry: New South Wales  
Division: General

**FORTESCUE LIMITED ACN 002 594 872** and another


Applicants

**ELEMENT ZERO PTY LIMITED ACN 664 342 081** and others

Respondents

**Exhibit MJW-5**

This is a bundle of documents marked "Exhibit MJW-5" to the Affidavit of **Michael John Williams** sworn before me on 29 November 2024.

  
.....  
Signature of witness

Name: Caitlin Aisling Meade

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Filed on behalf of (name & role of party)	<u>The First, Second and Fourth Respondents</u>	
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## Daisy Cullen

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**From:** Caitlin Meade  
**Sent:** Tuesday, 26 November 2024 5:44 PM  
**To:** Paul Dewar; Ashley Cameron; Kevin Huang; Rohit Dighe  
**Cc:** Michael Williams; Rebecca Dunn; Daisy Cullen; Mike Hales; Lachlan McLean; Daniella Lambert  
**Subject:** Fortescue Limited & Ors v Element Zero Pty Ltd & Ors - Proceedings in the Federal Court of Australia (NSD527/2024)  
**Attachments:** Letter to DCC dated 26.11.24.pdf

Dear Colleagues

Please see attached.

Regards  
Rebecca Dunn / Caitlin Meade

**Caitlin Meade** (She/Her)  
**Lawyer | Gilbert + Tobin**

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Gilbert + Tobin acknowledges Australia's First Nations peoples as the Traditional Custodians of this land. We pay our respects to Elders, both past and present, and extend that respect to all First Nations peoples across these lands.

This email and any attachment is confidential between Gilbert + Tobin and the addressee. If it has been sent to you in error, please delete it and notify us. Any opinion expressed in it is not the opinion of Gilbert + Tobin unless that is stated or apparent from its terms.

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26 November 2024

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Dear Colleagues

**Fortescue Limited & Ors v Element Zero Pty Ltd & Ors - Proceedings in the Federal Court of Australia (NSD527/2024)**

We refer to your clients' Interlocutory Application dated 20 November 2024 seeking discovery (the **Fortescue Application**) and our letter dated 13 November 2024.

As set out in our letter of 13 November 2024, the definition of "Ionic Liquid" proposed in your clients' categories is significantly broader than the definition of "Ionic Liquid R&D" in the pleaded case. It introduces concepts raised in the Respondents' defences, such as "hydroxide alkali melt or eutectic melt" and "molten hydroxide eutectic", as well as additional wording about those or similar electrolytes which (based on Mr Dewar's affidavit sworn 20 November 2024) appear to be derived from a reading of Mr Bhatt's earlier affidavits affirmed on 1 May 2024 and on 8 July 2024, read in support of the application for the search orders and in relation to the application to set aside the search orders.

The Applicants have not alleged that the Respondents conducted research into the additional electrolytes during their employment at Fortescue, and our clients' primary position is that the Applicants' discovery should be confined to its pleaded case. The attempt to expand discovery beyond the pleaded case, by reference to what the Respondents have now confirmed are features of the Element Zero technology, exemplifies the Applicants ongoing inability to accurately state their case and the scope creep in its approach to what is the core allegation in the case. It is emblematic of fishing.

We are instructed that the additional matters now included in the Applicants' definition of "Ionic Liquid" (such as the "hydroxide alkali melt or eutectic melt" and "molten hydroxide eutectic") are not considered to be ionic liquids in the scientific community. Our clients reserve the right to file expert evidence in relation to the meaning of "Ionic Liquid", including, if necessary, as part of this application. At paragraph 16 of his affidavit, Mr Dewar has acknowledged that:

*Given the technical definitional debate between Dr Bhatt and Dr Winther-Jensen described above, based on my experience in intellectual property litigation, I consider that there is likely to be a technical definitional debate at trial about what is an "ionic liquid", and whether other terms, such as "eutectics" etc, are synonymous with, can be used interchangeably with, or overlap with, "ionic liquid".*

In the circumstances, while our clients maintain that the Applicants are not entitled to discovery outside of their pleaded case, and that category 1 as drafted amounts to fishing, they are prepared to provide discovery in the following amended category 1:

All documents recording or evidencing work undertaken by the Second Respondent, the Third Respondent and/or Fortescue at any time during the period from 25 March 2019 to 12 November 2021 in relation to:

- (a) Ionic Liquid R&D as defined in paragraph 12 of the FASOC;
- (b) an electrochemical reduction process involving electrolytes that may be described as ionic liquids, molten salts, eutectics, molten hydroxide-based electrolytes, molten carbonate-based electrolytes, "hydroxide alkali melt or eutectic melt" (referred to in paragraph 29(a)(i) of the EZ Parties' defence) and/or "molten hydroxide eutectic" (referred to in paragraph 29(c) of Dr Winther-Jensen's defence).

The proposed amendment has the practical effect of providing the Applicants with the discovery sought in category 1, without requiring the Court to determine the meaning of "Ionic Liquid" at this stage of the case (which would require our clients to file expert evidence in relation to this issue), and without any admission that the Applicants' definition of "Ionic Liquid" is correct.

For completeness, we note that our clients' prior agreement to category 13 (which also contains the phrase "Ionic Liquid") is subject to the same overriding objection about the definition of the term. It would be too cumbersome, given the extensive list in category 13, to redraft it to delineate between Ionic Liquid R&D as defined in the FASOC and the EZ process. But given the same vice exists, our clients will approach discovery in category 13 by identifying those documents within category 13 concerning the Ionic Liquid R&D definition in the FASOC and those concerning the EZ process (adopting the same delineation set out above in respect to Category 1(a) and (b)).

Please confirm Fortescue's position on the above proposal by **4:00pm tomorrow, 27 November 2024**. We trust that this will facilitate a narrowing of the issues currently in dispute.

All the EZ Respondents' rights are reserved, including to rely on this correspondence in respect of the determination of the objections and costs.

Yours faithfully  
**Gilbert + Tobin**

*Gilbert + Tobin*

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**Rebecca Dunn**  
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**Daisy Cullen**

**From:** Rohit Dighe <RDighe@dcc.com>  
**Sent:** Wednesday, 27 November 2024 4:50 PM  
**To:** Rebecca Dunn; Michael Williams; Caitlin Meade; Daisy Cullen  
**Cc:** Mike Hales; Lachlan McLean; Daniella Lambert; Edward Fearis; Paul Dewar; Ashley Cameron; Kevin Huang  
**Subject:** RE: Fortescue Limited & Ors v Element Zero Pty Ltd & Ors - Proceedings in the Federal Court of Australia (NSD527/2024) [ITUSEONLY-LAW.FID86345]  
**Attachments:** 2024-11-27 - Letter to G+T.pdf

**Follow Up Flag:** Follow up  
**Flag Status:** Completed

**Categories:** Filed to ND  
**FilingIndicator:** -1

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Dear Colleagues

Please see **attached** correspondence.

Regards

**Rohit Dighe**      **Paul Dewar**  
 Associate          Principal Lawyer



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**From:** Caitlin Meade <CMeade@gtlaw.com.au>  
**Sent:** Tuesday, 26 November 2024 5:44 PM  
**To:** Paul Dewar <PDewar@dcc.com>; Ashley Cameron <ACameron@dcc.com>; Kevin Huang <KHuang@dcc.com>; Rohit Dighe <RDighe@dcc.com>  
**Cc:** Michael Williams <MWilliams@gtlaw.com.au>; Rebecca Dunn <RDunn@gtlaw.com.au>; Daisy Cullen <DCullen@gtlaw.com.au>; Mike Hales <Mike.Hales@minterellison.com>; Lachlan McLean <Lachlan.McLean@minterellison.com>; Daniella Lambert <daniella.lambert@minterellison.com>  
**Subject:** Fortescue Limited & Ors v Element Zero Pty Ltd & Ors - Proceedings in the Federal Court of Australia (NSD527/2024)

Dear Colleagues

Please see attached.

Regards



Rebecca Dunn / Caitlin Meade

**Caitlin Meade** (She/Her)

Lawyer | **Gilbert + Tobin**

---

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**BY EMAIL:**

[MWilliams@gtlaw.com.au](mailto:MWilliams@gtlaw.com.au);  
[RDunn@gtlaw.com.au](mailto:RDunn@gtlaw.com.au)

**COPY TO:**

[Mike.Hales@minterellison.com](mailto:Mike.Hales@minterellison.com);  
[Edward.Fearis@minterellison.com](mailto:Edward.Fearis@minterellison.com)

**Our Ref:** PXD:2023413

**Your Ref:** MJW:RXD:1058625

**Attention:** Michael Williams  
Rebecca Dunn

**Copy:** Mike Hales  
Edward Fearis

**Contact:** Paul Dewar  
[PDewar@dcc.com](mailto:PDewar@dcc.com)

27 November 2024

Mr Michael Williams / Ms Rebecca Dunn  
Gilbert + Tobin  
L35, Tower Two, International Towers Sydney  
200 Barangaroo Avenue  
Barangaroo NSW 2000

Dear Colleagues

**Fortescue Limited & Ors v Element Zero Pty Limited & Ors,  
Federal Court Proceeding No. NSD527/2024**

We refer to your letter yesterday 26 November 2024, received at 5:44pm (AEDT), and requesting a response by today at 4pm (presumably AEDT).

As you know, our instructors are based in Western Australia, so your letter in effect requests a response from our clients within four business hours (AWST). Given that you have had our clients' discovery application since last Wednesday 20 November 2024, your request for a response within that timeframe is unreasonable, and we ask you to refrain from making such unreasonable requests.

We will take instructions on your clients' proposal to Fortescue's categories 1 and 13 and revert as soon as practicable.

To assist our taking instructions, would you please clarify the following:

1. Proposed amended category 1 appears to omit the following words from Fortescue's definition of 'Ionic Liquid': "...any salt or mixture of salts that is capable of acting as an electrolyte in electrowinning and/or electroplating of metals and/or ores when in its liquid form (irrespective of the temperature range at which the salt or mixture is in its liquid form) including, without limitation...". Do your clients also propose to include those words in proposed amended category 1? If not, please explain why.
2. In addition to Fortescue's categories 13 and 13(e) (which use the term 'Ionic Liquid'), Fortescue's categories 2, 3-5 and 14 cross-refer to documents in category 1. If the Court orders discovery in any of Fortescue's categories 2, 3-5 and 14, do your clients propose that proposed amended category 1 should apply to those cross-references?

Separately, whether your clients file "expert evidence in relation to the meaning of 'Ionic Liquid' ... as part of [Fortescue's] application" is a matter for them. If your clients choose to do so, Fortescue expects your clients will timely file any such evidence (i.e., **by**

8  
2.

**the end of today**, as required by order 8 made on 23 October 2024), because the timing of that evidence affects the remaining steps in the timetable (orders 9–10).

To be clear, your clients' proposal, Fortescue's consideration of the proposal, and the above requests for clarification, should not be considered as Fortescue's agreement to a *de facto* extension of time for your clients to comply with order 8 made on 23 October 2024.

We request your clients' response to the matters in points 1 and 2 above as soon as practicable.

Yours faithfully

A handwritten signature in blue ink, appearing to be 'Paul Dewar', with a stylized flourish.

**Paul Dewar**

Principal Lawyer

**DAVIES COLLISON CAVE LAW**

[PDewar@dcc.com](mailto:PDewar@dcc.com)

## Daisy Cullen

---


**From:** Daisy Cullen  
**Sent:** Thursday, 28 November 2024 5:23 PM  
**To:** Rohit Dighe; Paul Dewar; Ashley Cameron; Kevin Huang  
**Cc:** Mike Hales; Lachlan McLean; Daniella Lambert; Edward Fearis; Rebecca Dunn; Michael Williams; Caitlin Meade  
**Subject:** RE: Fortescue Limited & Ors v Element Zero Pty Ltd & Ors - Proceedings in the Federal Court of Australia (NSD527/2024) [ITUSEONLY-LAW.FID86345]  
**Attachments:** Letter to DCC (Discovery Categories) - 28 November 2024.pdf

Dear Colleagues

Please find **attached** correspondence.

Regards  
 Rebecca Dunn / Daisy Cullen

**From:** Rohit Dighe <RDighe@dcc.com>  
**Sent:** Wednesday, 27 November 2024 4:50 PM  
**To:** Rebecca Dunn <RDunn@gtlaw.com.au>; Michael Williams <MWilliams@gtlaw.com.au>; Caitlin Meade <CMeade@gtlaw.com.au>; Daisy Cullen <DCullen@gtlaw.com.au>  
**Cc:** Mike Hales <Mike.Hales@minterellison.com>; Lachlan McLean <Lachlan.McLean@minterellison.com>; Daniella Lambert <daniella.lambert@minterellison.com>; Edward Fearis <Edward.Fearis@minterellison.com>; Paul Dewar <PDewar@dcc.com>; Ashley Cameron <ACameron@dcc.com>; Kevin Huang <KHuang@dcc.com>  
**Subject:** RE: Fortescue Limited & Ors v Element Zero Pty Ltd & Ors - Proceedings in the Federal Court of Australia (NSD527/2024) [ITUSEONLY-LAW.FID86345]

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Dear Colleagues

Please see **attached** correspondence.

Regards

**Rohit Dighe**      **Paul Dewar**  
 Associate            Principal Lawyer



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**From:** Caitlin Meade <CMeade@gtlaw.com.au>  
**Sent:** Tuesday, 26 November 2024 5:44 PM  
**To:** Paul Dewar <PDewar@dcc.com>; Ashley Cameron <ACameron@dcc.com>; Kevin Huang <KHuang@dcc.com>; Rohit Dighe <RDighe@dcc.com>



**Cc:** Michael Williams <[MWilliams@gtlaw.com.au](mailto:MWilliams@gtlaw.com.au)>; Rebecca Dunn <[RDunn@gtlaw.com.au](mailto:RDunn@gtlaw.com.au)>; Daisy Cullen <[DCullen@gtlaw.com.au](mailto:DCullen@gtlaw.com.au)>; Mike Hales <[Mike.Hales@minterellison.com](mailto:Mike.Hales@minterellison.com)>; Lachlan McLean <[Lachlan.McLean@minterellison.com](mailto:Lachlan.McLean@minterellison.com)>; Daniella Lambert <[daniella.lambert@minterellison.com](mailto:daniella.lambert@minterellison.com)>  
**Subject:** Fortescue Limited & Ors v Element Zero Pty Ltd & Ors - Proceedings in the Federal Court of Australia (NSD527/2024)

Dear Colleagues

Please see attached.

Regards  
Rebecca Dunn / Caitlin Meade

**Caitlin Meade** (She/Her)  
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**28 November 2024**

By email: [pdewar@dcc.com](mailto:pdewar@dcc.com)

Mr Paul Dewar  
 Partner  
 Davies Collison Cave  
 Level 4, 7 Macquarie Place  
 SYDNEY NSW 2000

Dear Colleagues

**Fortescue Limited & Ors v Element Zero Pty Ltd & Ors - Proceedings in the Federal Court of Australia (NSD527/2024) – Discovery Categories**

We refer to your letter dated 27 November 2024.

As indicated in our letter of 26 November 2024, your clients' Category 1 as drafted constitutes fishing, and incorporates a definition of "Ionic Liquid" which goes beyond the pleaded issues. Nevertheless, and without admissions, our clients were prepared to agree to a modified category 1, to progress discovery efficiently without pre-empting the determination of the meaning of "Ionic Liquid".

Fortescue's definition of "Ionic Liquid" is objectionable for a number of reasons, including that it cobbles together different concepts referred to in the (untested) evidence of Dr Bhatt. Dr Bhatt is not an independent expert, has not complied with the Expert Guidelines and his evidence is controversial.

In response to your questions:

1. Our clients will not amend Category 1 further. As drafted, it captures all of the material concepts and the remainder of Fortescue's proposed definition is overbroad and irrelevant.
2. Our clients agree that the amendments to Category 1 would flow through to other categories referring to Category 1 (noting the objections to Categories 2, 3, 4 and 5 which are maintained).

In light of this, please confirm your clients' position on proposed amended Category 1 as soon as possible, and in particular whether they press for the existing definition of "Ionic Liquid".

Our clients reserve their rights to file further evidence if the controversial evidence of Dr Bhatt is to be relied on in support of Fortescue's wider definition. There can be no prejudice resulting from this in circumstances where the discovery applications are listed for hearing on 6 February 2025.

Yours faithfully  
**Gilbert + Tobin**

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**Caitlin Meade**

---

**From:** Caitlin Meade  
**Sent:** Friday, 14 June 2024 8:12 PM  
**To:** Paul Dewar; Ashley Cameron; Rohit Dighe; Kevin Huang  
**Cc:** Michael Williams; Rebecca Dunn; Amelia Cooper  
**Subject:** Element Zero Pty Ltd & Ors ats Fortescue Limited & Ors - Federal Court Proceedings  
NSD527/2024  
**Attachments:** 3439-3889-9758 Letter to DCC 14 June 2024.pdf

Dear Colleagues

Please see attached correspondence.

Regards  
Michael Williams / Caitlin Meade

Partner Michael Williams  
 Contact Rebecca Dunn  
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 rdunn@gtlaw.com.au  
 Our ref MJW:RXD:1058625



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**14 June 2024**

By email: [pdewar@dcc.com](mailto:pdewar@dcc.com)

Mr P Dewar  
 Partner  
 Davies Collison Cave  
 Level 4, 7 Macquarie Place  
 SYDNEY NSW 2000

Dear Colleagues

**Element Zero Pty Ltd & Ors ats Fortescue Limited & Ors - Proceedings in the Federal Court of Australia (NSD527/2024)**

We refer to the Listed Things which appear at Schedule A of the Search Orders made 14 May 2024.

Paragraph 1(a) and (b) of the Listed Things includes two USBs, being a:

- (a) Toshiba branded USB drive with serial no. 07080A078F1B6304; and
- (b) Kingston branded USB drive with serial no. 900042ACAE668708.

We understand from the affidavit of Stephen Klotz affirmed 29 May 2024 that the USBs were not removed from the Premises during the execution of the Search Order. During the return date before Logan J, Mr Klotz confirmed that he was "*not aware of any reason to believe that there is anything missing from the lists that have been provided...and no reason to believe that the lists that have been provided are not an accurate record of the things removed*" (T26.25-27).

Since the return date, Dr Kolodziejczyk has undertaken a thorough search at his home for the USBs but has been unable to locate them. Dr Kolodziejczyk has not provided the USBs or their contents to any other person.

In the event that Dr Kolodziejczyk locates the USBs, he undertakes not to access them and to promptly provide them to our office, pending further order of the Court.

All our clients' rights are reserved.

Yours faithfully  
**Gilbert + Tobin**

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