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A handwritten signature in blue ink that reads "Sia Lagos".

Registrar

Important Information

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No. NSD 527 of 2024

Federal Court of Australia
District Registry: New South Wales
Division: General

**APPLICANTS' SUBMISSIONS IN SUPPORT OF THEIR
AMENDED INTERLOCUTORY APPLICATION FILED 19 SEPTEMBER 2025**

A. Inspection of Search Order Materials (AIA, para 1)

1. Pursuant to paragraph 1 of the Amended Interlocutory Application filed on 19 September 2025 (**AIA**), the Applicants (**Fortescue**) seek an order granting access and inspection of the seized material pursuant to a regime proposed in Annexure A to these submissions.

A.1 Principles

2. The Court has the power to order inspection of documents, including documents obtained under a search order: FCA Act, s 23; FCR 14.01; *Metso Minerals (Australia) v Kalra* [2009] FCAFC 57 at [17] (**Metso FC**); *Rauland Australia v Johnson (No 2)* [2019] FCA 1175 at [53].¹ The Court may order inspection of materials under a search order including for the purpose of: **(1)** ensuring the proceeding is adequately and properly prepared; and **(2)** testing the adequacy of discovery. See *Metso FC* at [17], [20]; *Rauland* at [48], [53]-[55]; *Sundarjee Bros (Aust) v Sundarjee* [2022] NSWSC 1722 at [15]-[16].
3. It is important to ensure that a party obtains the material the subject of the Court's discovery orders, both for the purposes of there being a fair trial and to protect the integrity of the Court's processes: e.g., *Australian National Airlines Commission v Commonwealth* (1975) 132 CLR 582 at 593; *Federal Treasury Enterprise v Spirits* [2021] FCAFC 77 (**FKP FC**) at [121] ("failure to give proper discovery is inimical to ... a fair trial"); *Brookfield v Yevad Products* [2004] FCA 1164 at [366]-[369].
4. Once the issue of adequacy of discovery has been raised, the party giving discovery (here, the Respondents) bears an onus of establishing the steps they took to comply with the discovery orders and satisfying the Court that the steps were adequate: *Clifton v Kerry J t/a Clenergy* [2020] FCAFC 5 at [90], [151]; *FKP FC* at [382].
5. Ordinarily (i.e. outside the context of search orders), the standard for determining insufficiency of discovery is whether there are reasonable grounds for being fairly certain that there are other documents: *Procter v Kalivis* [2009] FCA 1518 at [33]. Insufficiency might appear from the discovered documents and "any other source that constituted an admission of the existence of a discoverable document", including if it appears the party giving discovery has excluded documents "under a misconception of the case": *Procter* at [32]; *Mulley v Manifold* (1959) 103 CLR 341 at 343.

¹ The Court also has power to order electronic inspection of material in circumstances where there was no search order, but there is an issue as to the adequacy of discovery: (i) *Howden Australia v Minetek (Forensic Imaging)* [2020] FCA 1419 at [1], [52] (Perram J); (ii) *The Owners Strata Plan No 91086 v Fairview Architectural (No 2)* [2021] FCA 779 at [1]-[3], [5], [6], [14] (Wigney J); and (iii) *AEI Insurance Group v Martin (No 2)* [2023] FCA 277 at [15], point 2, [23], [32] (Thawley J).

6. While Fortescue’s position is that the discovery is insufficient in accordance with the above principles, the Court does not necessarily need to make a finding to that effect for it to make the orders Fortescue seeks. Rather, the relevant consideration is a less stringent standard, that is, whether there is “material that cast[s] doubt on the adequacy of discovery that has actually been given”: *Rauland* at [53], citing *Metso FC* at [16]. Where “questions arise” as to the adequacy of discovery, the discretion may be “more readily exercised”: *Rauland* at [55]; also *Metso FC* at [16] third sentence. For the reasons explained below, there is ample material to cast doubt on the adequacy of the Respondents’ discovery so as to justify Fortescue’s order for inspection and, in any event, such an order is necessary to ensure the proceeding is adequately and properly prepared.

A.2 Application

7. As a threshold matter, through their actions, the Respondents have cast doubt on the adequacy of their discovery by producing 565 documents (EZ Respondents) and 13 documents (Third Respondent) on 11 September and 6 August 2025, respectively, after receipt of Fortescue’s letters dated 4 and 14 July 2025 identifying deficiencies in the Respondents’ discovery. None of these documents were referred to in the Respondents’ discovery lists (EZ Respondents’ Supplementary Lists dated 12/13 June 2025 or the Third Respondent’s List dated 19 May 2025); however, they were within the scope of the discovery categories ordered. Nor have the Respondents filed discovery lists in respect of these additional documents.
8. Prior deficiencies in providing discovery tell against the sufficiency of the discovery process: e.g., *Firns v Tzovaras* [2006] NSWSC 925 at [15]. These deficiencies are enough to cast doubt on the adequacy of the Respondents’ discovery. There are, however, additional deficiencies identified below.
9. **Category C.2: First, the EZ Respondents admitted five deficiencies in their discovery that resulted in the production of an unidentified proportion of 565 documents:** *Dewar 10* [38]-[39] admitting documents “*inadvertently not discovered*”; *Dunn 7* [72] third sentence (“*inadvertently not produced*”). **Dr Winther-Jensen admitted two deficiencies that resulted in the production of 13 documents:** *Dewar 10* [42] (“*inadvertently omitted*”); *Hales 4* [21] (“*human error*”). These admitted failures constitute deficiencies in the Respondents’ discovery.
10. **Category C.3: Second, there are 12 deficiencies which the EZ Respondents dispute but they have agreed to produce, which constitute the remainder of the 565 documents:** *Dewar 10* [44]-[45]. Although the EZ Respondents produced these

documents “*without admission as to relevance*”, analysis of a sample of them shows that they fall within the categories 11(a), 11(b), 11(c), 11(d) ordered against the EZ Respondents (being relevantly the same categories ordered against Dr Winther-Jensen and in respect of which he discovered documents): Dewar 11 [12].

11. Of course, it is necessary for the EZ Respondents to satisfy their own discovery obligations because evidence of them being in control of certain documents (i.e. Fortescue confidential information and copyright works) may attract liability for the EZ Respondents in addition to or separate from Dr Winther-Jensen’s liability.
12. **Category C.4: Third, the EZ Respondents have not discovered documents that are or have been in their control by reason of Dr Winther-Jensen’s roles in Element Zero.** Dr Winther-Jensen was a co-developer of Element Zero’s process and a founder, a director and the R&D manager of Element Zero until late 2023/early 2024: Dewar 10 [46(b)]-[46(e)]. Dr Winther-Jensen discovered 1,067 unique documents in Category 2A (documents copied from Fortescue, Sep–Nov 2021); Category 6 (First Specified Documents); Category 6A (pilot plant documents copied from Fortescue in 2021); and Category 7 (Second Specified Documents): Dewar 10 [47]-[48]. 151 of these documents contain or appear to contain Fortescue’s confidential information: Dewar 10 [50] and PAD-52 pp 254-260. Save for one exception, the EZ Respondents discovered none of the documents discovered by Dr Winther-Jensen in Categories 2A, 6, 6A and 7: Dewar 10 [54]-[55]. This is despite the entirety of Dr Winther-Jensen’s EZ laptop having been copied to Element Zero’s cloud-based server: Dunn 7 [78(d)]. The comment in paragraph 10 above (last sentence) applies *mutatis mutandis*.
13. Indeed, the EZ Respondents’ own evidence admits this deficiency in relation to the chapeau of Category 2A (“*All documents... copied [etc] by the Second Respondent or the Third Respondent from Fortescue... from September 2021 to November 2021*”)—a critical category in the case. On its face, Dunn 7 shows that the EZ Respondents made no attempt to search for documents in the chapeau of Category 2A; they only searched for documents in sub-paras (a)-(g): Dunn 7 [53]-[57]; Dunn 7 [50] table; Dewar 11 [22]. This failure to search for documents in the chapeau constitutes an exclusion of documents under a misconception of Category 2A: [5] above.
14. **Category C.5: Fourth, the EZ Respondents discovered no documents in Categories 2A(a), 11(e) and 14:** Dewar 10 [72]-[94]; admitted in Dunn 7 [50] table.
15. **Category 2A(a)** seeks “*documents copied by [Dr Kolodziejczyk] while working from home in October and November 2021*”. This was the subject of Dr Kolodziejczyk’s evidence in support of the EZ Respondents’ discharge application: Dewar 10 [78]-

- [79]. Notwithstanding such evidence, Dr Kolodziejczyk discovered no documents in Category 2A(a), and irrelevant documents in Category 2A(b): Dewar 10 [80]-[82].
16. Unlike searches in other categories, the EZ Respondents' solicitors ran no searches over the seized material for Category 2A(a) and (b): *cf.* Dunn 7 [52] and [53]. Instead, *Dr Kolodziejczyk personally* ran unspecified "searches" over his Gmail account: Dunn 7 [53], [106]. The Gmail account was part of the seized materials (Klotz 29/5/24, p 29 at [20]) and should have been searched by the solicitors, which can otherwise "seriously ameliorate" concerns about discovery being undertaken personally by a search order respondent (*cf.* *A v B* [2019] EWHC 2089 (Ch) at [30]). Further, Category 2A(a) is not limited to emails, so a search of emails only is on its face inadequate and a misconception of the subcategory: [5] above.
 17. In addition, the EZ Respondents have misconceived Category 2A(a). It does not seek the "work product" *created* by Dr Kolodziejczyk while working from home in the period. It seeks documents *copied* by him while working from home in that period.
 18. **Category 11(e)** seeks "*documents recording or evidencing the 'retirement 'project', the 'work[] with nickel [and] iron', and the 'work that eventually led to the creation of Element Zero'*" referred to in Dr Winther-Jensen's affidavit. No separate search was conducted for Category 11(e) documents because Ms Dunn wrongly assumed that Category 11(e) was coterminous with Category 11(f): Dunn 7 [66]. That is another misconception; they are not coterminous: Dewar 11 [27]-[28].
 19. Further, the EZ Respondents say they do not know "*what documents Dr Winther-Jensen considers*" meets that description in Category 11(e) and their solicitors could not take instructions from him: Dewar 10 [86], [91]; Dunn 7 [66], [109]. This involves misreading Category 11(e) by adding a subjective gloss to it: Dewar 10 [88]. The asserted lack of knowledge is inconsistent with the fact that the EZ Respondents retained entire contents of Dr Winther-Jensen's EZ laptop (Dunn 7 [78](d)); as well as their pleading that Drs Kolodziejczyk and Winther-Jensen *together* researched and developed the Element Zero process (EZD [29](a)); the individual Respondents' roles as founding directors of Element Zero; and the EZ Respondents' reliance on Dr Winther-Jensen's affidavit on the discharge application: Dewar 10 [89(a)]-[89(c)].
 20. **Category 14** is dependent on Categories 1, 2A, 6 or 7: Dewar 10 [92]. Because the EZ Respondents' discovery is deficient for these categories ([15]-[17] above, [22] below), their discovery in Category 14 is also deficient: Dewar 10 [94]. This is confirmed by Dunn 7 [69], which states no separate searches were undertaken for Category 14 documents and Dr Kolodziejczyk's untested assertion that no documents in Categories 1, 2A or 6 were used to prepare/invent patents.

21. **Category C.6: Fifth, the EZ Respondents discovered no relevant documents in Category 1 (Ionic Liquid R&D).** They marked 205 documents as being responsive to Category 1, which on review were not truly responsive: Dewar 10 [97]-[98]. It is apparent from Dunn 7, [52], [118]-[119] that the EZ Respondents misapprehended what was required of the category, affecting their searches which led to discovery of documents that they admit are irrelevant to the case: *cf. Clifton* at [172] (FCR 20.14(2) direct relevance applies to FCR 20.15 non-standard discovery). Their misconception of the category raises concerns as to the adequacy of their discovery.
22. The keywords for Category 1 are deficient because they appear to search exact phrases (quotation marks in Dunn 7 [52]) and do not permit even simple permutations, abbreviations used by the Respondents (“ILs” for “ionic liquids”), or basic chemical notations such as “NaOH”, “KOH” which are terms for the ionic liquid compositions relevant to these proceedings: Dewar 11 [21]. The terms used by the EZ Respondents would fail to retrieve documents identified by Dr Winther-Jensen as responsive to Cat 1: Dewar 11 [21]. Further, the EZ Respondents’ lawyers determined the keywords for themselves (Dunn 7 [52]) and did not seek instructions as to the appropriateness of those keywords against the requirements of the category or obtain the input of chemical expert Professor Abbott, whom they had previously engaged to give evidence explaining the meaning of “ionic liquid”.
23. Category 1 documents *must* exist because: (a) Dr Kolodziejczyk’s 2020 emails and documents, already reviewed by the Court, describe the work took place: [2024] FCA 1157 at [50](8)(a)-(d), [50](10), [66](1)-(6), [67] (“*these documents... demonstrate that work had been undertaken including by laboratory testing*”: (Dewar 10 [101])); (b) Dr Winther-Jensen (who worked with and reported to Dr Kolodziejczyk at Fortescue) discovered documents in Category 1; and (c) the file path metadata in Dr Winther-Jensen’s discovery shows he copied research on ionic liquids and molten salts from Fortescue on 23 October 2021: Dewar 10 [52] page 16 (folder entitled “*ILs and molten salts*”), [53(c)(iii)], [102].
24. **Category C.7: Sixth, the EZ Respondents admit they failed to properly search Dr Kolodziejczyk’s and Mr Masterman’s non-Element Zero email addresses: Dewar 10 [105], Dunn 7 [128].** The deficiency affects production under categories other than Category 11(d) (see analysis in Dewar 10 [106]-[107]), yet the steps taken by the EZ Respondents to remedy the deficiency is limited only to Category 11(d) (Dunn 7 [128]): further searches for “*communications between those [non-Element Zero email] addresses and Playground Global*”). The deficiency arises at least because of Ms Dunn’s erroneous assumption (at Dunn 7 [129(a)]) that Element Zero

communications were only sent to/from Element Zero email addresses; Dr Winther-Jensen's discovery shows that this is incorrect: Dewar 10 [107](a)(i), [107](b)(i).

25. Moreover, Dr Kolodziejczyk's and Mr Masterman's non-Element Zero email addresses are 'Listed Things' in the search order: Dewar 10 [108]. The EZ Respondents' failure to discover emails from those email addresses engages the second aspect of *Rauland* at [55] ("*[w]here... discovery has not produced the seized material... the discretion might be more readily exercised*").
26. **Category C.8: Seventh, the EZ Respondents took an inappropriately narrow view of Category 11(f) (EZ process R&D):** Dewar 10 [110]. Ms Dunn concedes there were documents in Category 11(f) that should have been discovered but were not discovered: Dunn 7 [135]. This is an admission of deficiency. The EZ Respondents failed to discover these documents because Dr Kolodziejczyk failed to provide documents to Gilbert + Tobin for review, based on his opinion the documents were not relevant: Dunn 7 [135]. This undermines the integrity of the searches for documents in Category 11(f): *cf.* Dunn 7 [63]. Category 11(f) strikes at the heart of Fortescue's case: the research and development of Element Zero's process.
27. **Category C.9: Eighth, the EZ Respondents admit documents were not recognised as 'families' of related documents:** Dewar 10 [114]. The relevant chronology is Dewar 10 [115]-[124]. The EZ Respondents have not explained what steps they took to identify subsequently affected 'family' documents: Dewar 10 [125]; Dunn 7 [145]: rather, the explanation is a broad assertion that "documents the subject of the issue" were subject to a manual review: Dunn 7 [145(c)]. Their assertion that this is a "*confined issue*" should be rejected for the reasons in Dewar 10 [126]-[127].
28. **Category C.12: Ninth, the EZ Respondents provided inconsistent explanations in relation to the fates of the USB Listed Things.** The search order included two USB devices as 'Listed Things': Dewar 10 [156]. The devices were not found during execution of the search order in May 2024: Dewar 10 [157]. The EZ Respondents then sent a letter to Fortescue in June 2024, stating that "*Dr Kolodziejczyk has not provided the USBs or their contents to any other person*" and if he finds the devices, "*he undertakes not to access them and to promptly provide them*" to Gilbert + Tobin: Dewar 10 [158]. In their original discovery, the EZ Respondents did not list the documents in the USB devices in Part 3 (documents that have been but no longer in their control): Dewar 10 [160]. In their supplementary discovery, Dr Kolodziejczyk asserts—for the first time—that the USB devices had been lost or disposed of sometime in or after December 2021/2023: Dewar 10 [161]. These explanations about the fates of the USB devices are inconsistent and materially different: Dewar 10 [162]-[163].

29. That Ms Dunn says the supplementary list provides “*a greater degree of specificity*” than the June 2024 letter (Dunn 7 [177]) is an implicit admission of this inconsistency. The EZ Respondents do not address the inconsistency between the June 2024 letter and Part 3 of their lists of documents: *cf.* Dunn 7 [178]. The EZ Respondents claim they do not understand what follows from this inconsistency (Dunn 7 [179]): however, the inconsistency undermines any assertion as to the conclusiveness of the lists.
30. **Category C.13: Tenth**, the EZ Respondents have failed to discover revisions or versions of documents in Category 11(f) (EZ process R&D). Fortescue relies on example deficiency #386, #487 (Dewar 10 [179]-[186]) for which Dr Winther-Jensen has produced revisions, but the EZ Respondents have not. There is no explanation in Dunn 7 as to why such a discrepancy should exist, particularly given that the detailed information in the revision produced by Dr Winther-Jensen appears central to the EZ Respondents’ activities (see PAD-68).

Notified deficiencies concerning patents

31. **Further, the Respondents have failed to discover experimental records to support the examples in their patent specifications.** Fortescue relies on deficiencies #14, #15, #496-#499. The relevant patent specifications are the **2022 Provisional** patent application no. AU 2022903090 (filed 20 October 2022: Dewar 11, Confidential PAD-79); the **2023 Provisional** application no. AU 2023902103 (filed 30 June 2023: Dewar 11, PAD-81) and the **PCT** patent application no. WO 2024/082020 (filed 19 October 2023, Dewar 11, PAD-80).
32. Each patent application contains Examples. Each Example admits one or more experiments, which must have been done. Such experiments generated experimental records. Those records must have existed to instruct a patent attorney to draft the patent applications months or a year later (and those records are not listed in Part 3 of any of the Respondents’ List of Documents). The alternative inference (that one or more of the inventors remembered all the described details of their experiments including data) is unlikely. Fortescue contends that experimental records evidencing at least Examples 1–3 of the 2022 Provisional, Examples 1–3, 6, 8–10 of the PCT and Examples 2–3 of the 2023 Provisional have not been discovered: Dewar 11 [14]-[16].

B. Discovery in Revised Category 2A (AIA, para 3)

33. The discovery categories sought under para 3 relate to a discovery category, “Revised Category 2”, originally sought by Fortescue in November 2024, and then in amended forms in February 2025 and April 2025: Dewar 10 [216]-[217].

34. By Revised Category 2, Fortescue seeks discovery of documents pertaining to work described by the Second Respondent in emails sent by him in October 2020, December 2020 and January 2021. These emails were annexed to Dr Bhatt's first affidavit in support of the search orders: Bhatt 1 AIB-7, AIB-12 and AIB-15. It is important that Fortescue obtain discovery of them, because they go to the ionic liquid processes and plant (described therein) and the work done by Dr Kolodziejczyk and Dr Winther-Jensen in respect of it.
35. The Respondents have been on notice of the form of Revised Category 2 since 8 April 2025: Dewar 10 [218(a)]. At the 30 April CMH, her Honour directed Fortescue to file an application in respect of it, because the category was contested: Dewar 9 Anx PAD-35, p 21 lines 1–22. Fortescue has reviewed the EZ Respondents' discovery and no documents falling within Revised Category 2 have been discovered: Dewar 10 [215]. Revised Category 2 is narrow, and limited by search terms.
36. Fortescue submits that if para 1 of the AIA is allowed, then the seized material should be searched for documents responsive to Category 2A in accordance with regime proposed in Annexure A. If para 1 of the AIA is refused, then Fortescue submits that the Respondents should search and be ordered to give discovery responsive to Category 2A.

C. Discovery of Categories 15–22 (AIA, para 3A)

37. Para 3A of the AIA relates to discovery categories 15 to 22. They relate to matters that only became apparent after Fortescue's solicitors reviewed the Respondents' discovery: Dewar 11 [220]. Fortescue thus could not have proposed those categories at the discovery hearings in February 2025.
38. Fortescue submits that if para 1 of the AIA is allowed, then the seized material should be searched for documents responsive to categories 15 to 22 in accordance with regime proposed in Annexure A. If para 1 of the AIA is refused, then Fortescue submits that the Respondents should search and be ordered to give discovery responsive to categories 15 to 22.
39. **Category 15** (sought against all Respondents) concerns work that would otherwise fall within Categories 11(e) or (f) had the date limitation of those categories (Jan 2022 to Feb 2024) been Nov 2021 to Dec 2021. Contrary to Dunn 8 [18], the category falls within the pleaded case in FASOC [29] ("*Since date/s not known... but after November 2021...*"). The EZ Respondents' discovery in Category 11(e) is deficient ([18]–[19] above), so there is utility in granting discovery in this category. Contrary to Hales 4 [50]–[51], Dr Winther-Jensen's being overseas from Nov 2021 to Feb 2022

does not affect his ability to engage in R&D; he previously described engaging in R&D while overseas: Hales 4 [30](a)(i).

40. **Category 16** (against Dr Winther-Jensen only) concerns documents in named subfolders on a Toshiba hard disk preserved on a search of Dr Winther-Jensen's premises. The category is limited to only those subfolders that have either an "FFI" prefix (a reference to the Second Applicant, Fortescue Future Industries), or a folder name related to the plant and process the subject of this proceeding. Dr Winther-Jensen now admits he copied this material from his Fortescue laptop: Hales 4 [31]. If he has already discovered this material, as he asserts in Hales 4 [53], there would be nothing new to discover. But Fortescue should be given an opportunity to test that assertion through discovery, especially in light of the new admission of copying.
41. **Category 17** (against all Respondents) is for documents recording the use of category 16 documents. This is relevant to the misuse of the confidential information and copyright infringement in those documents, which Dr Winther-Jensen has admitted he copied (Hales 4 [31]) and at least one document (Ore composition document) found its way to Element Zero's servers (Dunn 7 [79]). Such documents are relevant to at least FASOC [31], [33], [34]. Fortescue should be given an opportunity to test Dr Winther-Jensen's assertion of nil return (Hales 4 [54]). The assertion of oppression in Dunn 8 [20](c) is speculative.
42. **Categories 18 and 19** (against all Respondents) are in respect of communications between any Respondent and 'NewPro'. 'NewPro' is an engineering firm engaged by the First Respondent for the development of its pilot plant: Dewar 10 [227], which engagement only became apparent during discovery: Dewar 10 [220]. By **cat 18**, Fortescue seeks communications, narrowly defined with respect to particular projects and contract numbers, e.g. the "Green Metals" project and "Pilot Plant" project, which appear in the discovered documents. By **cat 19**, Fortescue seeks the information communicated to NewPro relevant to those projects, in the event it is Fortescue's confidential information. It already has a basis for believing that NewPro was provided with Fortescue's Ore composition document, because Dr Winther-Jensen saved that documents in a folder named "NewPro": Dewar 10 [58]; Dunn 7 [77]. These Categories are relevant to at least FASOC [30], [31](b)(ii), [33](b).
43. **Categories 20 and 21** (against all Respondents) concern the Respondents' communications with Fortescue ex-employees, Mr Arnall (an engineer on Fortescue's Green Iron project) and Mr Kerr (a chemist under Dr Winther-Jensen's supervision): Dewar 10 [234(a)]. The discovery given by Dr Winther-Jensen reveals that he communicated with them in the development of the Element Zero venture: Dewar 10 [234(b)]. The assertion of oppression in Dunn 8 [25](c) is speculative. Fortescue

should be given an opportunity to test Dr Winther-Jensen’s assertion of nil return (Hales 4 [56]). These Categories are relevant to at least FASOC [12], [13] (“*other employees of FMGPS*”).

44. **Category 22** (against all Respondents) concerns documents “in relation to” (e.g. communications with, documents produced by, discussions concerning) ‘BWJ Materials Consulting’. It is apparent from Dr Winther-Jensen’s discovery that ‘BWJ Materials Consulting’ is the predecessor business name of what became Element Zero: Dewar 10 [236]. Discovery with respect to this business name is necessary, in the absence of the words “Element Zero” being in discoverable documents: *ibid*.

D. Fortescue discovered document (AIA, para 3B)

45. Fortescue seeks an order permitting it to produce only those parts of document ‘FRT.001.0002189’, being an employee’s work journal, which are responsive to the discovery orders made on 26 February 2025, subject to any claim for privilege. The journal comprises 311 pages of largely irrelevant material. Fortescue has already discovered the document to the Respondents, in redacted form subject to claims of privilege: Dewar 10 [241].
46. Disclosure of the balance of the journal document would be prejudicial to Fortescue, because it contains private and confidential information concerning *inter alia* human resources, business strategies and commercial decisions that are irrelevant to the proceeding: Dewar 10 [239]. In the circumstances, redacted disclosure is appropriate: *Esso Australia Pty Ltd v Australian Workers Union (No 3)* [2020] FCA 316 at [14] (“*entries in registers, or minute books, may be discovered without discovery of the entire register or book*”).

E. Conclusion

47. The Court should make the orders sought in paras 1, 3, 3A and 3B of the AIA. Fortescue seeks its costs.

JS Cooke SC, DB Larish, WH Wu & SK Yates
Counsel for Fortescue

19 September 2025

Annexure A

FORTESCUE'S PROPOSED INSPECTION REGIME

19 September 2025

1. As to access and search of the material obtained under the search order (**Search Order Material**):
 - a. The independent computer expert Mr McKemmish (**ICE**) is given access to the Search Order Material. Each Respondent provide the ICE with any usernames, passwords or other information necessary to access and search the Search Order Material.
 - b. The ICE's access will be subject to confidentiality undertakings and the *Hearne v Street* obligation. This access does not constitute a waiver of any confidentiality or privilege in any of the Search Order Material.
 - c. The Applicants' solicitors will provide the Respondents' solicitors with a list of search terms for the purpose of the ICE conducting searches over the Search Order Material for documents responsive to the categories of documents to be discovered by the Respondents as ordered by the Court (**Discovery Categories**) to locate **Responsive Documents**.
 - d. The Respondents will indicate any objection to the search terms referred to in 1(c) above. The parties will confer to seek resolve any disputed search terms, and insofar as they cannot be resolved, will be determined by a Judge or Registrar of the Court.
 - e. The ICE will conduct a search of the Search Order Material using the search terms not objected to by the Respondents or otherwise ordered by a Judge or Registrar of the Court.
2. The ICE prepares a **Report** on the results of those searches and setting out the particulars of the Responsive Documents located (e.g., file name, subject line, type, date, custodian details, sender/recipient, file path etc). The Report and the Responsive Documents are provided to the Respondents.
3. The Respondents indicate which of the Responsive Documents the Respondents object to production based on a privilege claim (**Privilege Claim Documents**). The Respondents notify the Applicants' solicitors of the basis for the privilege claim for each Privilege Claim Document. The parties confer to seek to resolve any disputed claims of privilege, and insofar as they cannot be resolved, will be determined by a Judge or Registrar of the Court.
4. The Applicants' solicitors:
 - a. review the Report and the Responsive Documents not subject to a privilege claim;

- b. identify from the documents in (a) the documents which have not been discovered and which they contend should be discovered pursuant to the Discovery Categories (**Identified Documents**);
 - c. notify the Respondents' solicitors of the Identified Documents.
- 5. The Respondents' solicitors notify the Applicants' solicitors as to which of the Identified Documents they claim are confidential to the Respondents (**Confidential Identified Documents**).
- 6. The Confidential Identified Documents are subject to the existing confidentiality regime and the Identified Documents (including the Confidential Identified Documents) are only to be used for the purpose of this proceeding.