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

EZ Respondents' Submissions – Applicants' Discovery IA for Access to Seized Material

INTRODUCTION

- 1 The EZ Respondents make these submissions in opposition to the Applicants' Amended Interlocutory Application (**IA**), including the new Prayers 3A and 3B proposed in Annexure PAD-36 of the affidavit of Paul Alexander Dewar affirmed 19 August 2025 (**Dewar 10**). The Applicants' submissions dated 19 September 2025 will be referred to as **AS**.
- 2 The EZ Respondents rely on their verified Lists of Documents filed on 29 April 2025, their verified Supplementary Lists of Documents filed on 13 June 2025, the affidavit of Rebecca Mary Dunn sworn 9 September 2025 (**Dunn 7**), which responds to Dewar 10 insofar as it concerns the original prayers of the IA, and the affidavit of Rebecca Mary Dunn sworn 16 September 2025 (**Dunn 8**), which responds to prayers 3A which has been added to the IA. They also seek to rely on the affidavit of Rebecca Mary Dunn sworn 22 September 2025 (**Dunn 9**), which corrects factually inaccurate assertions made by Mr Dewar in his 19 September 2025 affidavit (**Dewar 11**).
- 3 The central matters to be determined in respect of prayers 1, 3 and 3A of the IA are:
(a) whether the Respondents' discovery has been inadequate; and (b) if so, whether the Applicants should be granted access to the Seized Material and further categories of discovery should be ordered. Prayer 2 is a privilege issue and by prayer 3B the Applicants seek to redact a document for relevance.

PRINCIPLES – FURTHER DISCOVERY AND ACCESS TO SEIZED MATERIAL AS PART OF IT

- 4 An applicant seeking to establish there has been inadequate discovery must prove there are 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* [2023] FCA 793 at [18]-[22] (Perram J).
- 5 Prior to service of the AS, the Applicants accepted both orally and in writing that, to be granted access to the Seized Material pursuant to prayer 1 of their IA, they *must* satisfy that test: [3] of their written submissions dated 16 September 2025 in respect to Dr Jacobsen and at T26.44-27.4 on 17 September 2025.

- 6 A mere two days later, in [6] of the AS, the Applicants suggest otherwise. They now suggest there is a “less stringent standard”, namely that they need only point to “material that cast[s] doubt on” or gives rise to “questions” as to the adequacy of discovery. They rely on obiter comments of the Full Court in *Metso Minerals (Aust) Ltd v Kalra* [2009] FCAFC 57 at [16] and Stewart J in *Rauland Australia Pty Ltd v Johnson (No 2)* [2019] FCA 1175 at [53] and [55] in support of their new position. The EZ Respondents will address the Court at the hearing as to why the Applicants’ proposition is wrong and, indeed, untenable.
- 7 As the Court noted during the case management hearing concerning leave to rely on Dr Jacobsen’s affidavit on 17 September 2025 at T20.1-21.15, the court will generally not go behind an affidavit of discovery and the power to do so will be exercised sparingly (echoing Besanko J’s observations in *Procter* at [33]-[35] and those of Lander J in *Brookfield v Yevad Products Pty Ltd* [2004] FCA 1164 at [364]-[369]). In particular, as the Court noted at T25.17-41:
- “HER HONOUR: We moved past that [the allegation that material was taken being the basis for which the Applicants obtained the search orders]. The search order was maintained, and the way in which it was to be – the access to the material was to be dealt with was by way of discovery. Mr Heerey, you weren’t involved, but we spent two long days arguing about categories for discovery, and when they were finally settled, the parties went off to review the material, including the seized material for discovery. The current allegation your client makes is that that discovery is inadequate. ... Makes that allegation over the sworn evidence that I assume will be relied on, namely, the verified discovery and the affidavits given by the solicitors.... It might have existed, it would have existed, who knows, but it doesn’t exist now because there’s sworn evidence, it seems to me, answering the criticisms in the discovery. That’s what I’ve got to resolve. How do I resolve the issues raised by Mr Dewar in his 10th affidavit with the responses given by Ms Dunn and Mr Hales.”
- 8 The Court also observed at T27.37-47 that the Applicants, by prayer 1 of their IA, “seek to interrogate the same material that has been interrogated in accordance with the – with search terms that I think were the subject – the very subject of the orders I made”.
- 9 The usual remedy for deficient discovery, where it is demonstrated, is the ordering of a further affidavit of discovery or, in limited circumstances, cross-examination of the verifying deponent; but, if those remedies prove not satisfactory, further and better discovery may be ordered: *Procter* at [29]-[41] (Besanko J), which has been followed in numerous cases e.g. *Voxson Pty Ltd v Telstra Corporation Limited (No 10)* [2018] FCA 376; 134 IPR 99 at [17] (Perram J) and *Edwards v Nine Network Australia Pty Ltd (No 2)* [2022] FCA 1332 at [45]-[49] (Wigney J).
- 10 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 *Procter* at [33]-[35]. The deficiency 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).

- 11 *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]).
- 12 There is no Australian case in which a court has both determined there to be deficient discovery and ordered access to the seized materials. That is not surprising given the above principles and the circumstances in which they are applied by courts.

PRAYER 1 – ALLEGED DEFICIENCIES IN DISCOVERY

- 13 As the Court observed on 17 September 2025 at T9.31, the legitimate issues which had been identified by the Applicants have been rectified (e.g. searching for and discovering documents referred to in previously discovered documents, such as within a family or versions). Instead of accepting the resolution of those matters, the Applicants have persisted in speculating that, because such issues were identified, the discovery issues *could* be “more widespread” and that “the EZ Respondents have failed to discover an *unknown* number of documents”: AS [7]; e.g. Dewar 10 [127]-[128] and [138].
- 14 What the Applicants’ approach reveals is that they are unable to meet the inadequate discovery test because any legitimate issues with discovery have been adequately addressed by further searches and documents being discovered. What remains is argumentative, amorphous evidence deployed to raise “questions” or potential “doubt” about the discovery.
- 15 As the Court is aware, the EZ Respondents’ discovery has been based on extensive categories painstakingly worked through by the Court over two hearing days in February 2025 (as the Court recognised at T25.19 on 17 September 2025) which resulted in the review and production of over 1,300 documents and the process of discovery being explained extensively on oath by officers of this Court. That careful process of search and review, including searches conducted over the Seized Material, and the documents produced in each of the categories of discovery, is addressed in detail in Dunn 7 [45]-[69]. The Applicants’ challenge to that evidence is unwarranted, indulgent and wasteful. The IA offends the principles of case management reflected in s 37M of the *Federal Court Act* 1997 (Cth).

16 The Applicants' case theory is that the Second and Third Respondents left their employ with the fruits of research and development that they had been working on, and thus the Respondents were able to apply for a patent four months after beginning research and development of the process in July 2022: e.g. T13.28-14.21 and 15.5-44 on 17 September 2025. The over 1,300 documents the EZ Respondents have discovered following searches across some 3 million documents has brought the Applicants little joy when it comes to their case theory coming up to proof: Dunn 7 [47] and Dunn 9. The Applicants' response has not been to acknowledge they could have got it wrong, but rather that there "must" be documents that support their case that have not been discovered. So much was laid bare by the Applicants on 17 September 2025 at T13.22ff (see also T15.46, T 25.1 and T26.19). The Applicants therefore seek to rummage through the Seized Material to see if they can find anything for their current case, or some other case, under the pretext of inadequate discovery. That is reinforced by the evidence set out in Dunn 7 [19]-[44] as to the history of the Applicants' attempts to access the Seized Material and the steps they have taken in pursuing their IA. As Flick J said in *Metso Minerals (Australia) Ltd v Kalra (No 3)* [2008] FCA 1201 at [49]:

"The power [to order a search] is expressed to be "for the purpose of securing or preserving evidence". The purpose, not surprisingly, is not confined to securing only that material which may thereafter be discoverable. But, to enable a party to obtain an order [for a search] and thereafter permit that party to "rummage through" the materials seized, in order to make an assessment as to those documents which that party considers would be or should be discoverable, would defeat the perimeters within which discovery is to be made by a party, especially the more confined and restricted extent of discovery which this Court now permits. It would also endorse a course which courts have properly shunned, namely a course of improperly permitting the relief authorised by O 25B to become an "investigatory tool" (*Microsoft Corp v Goodview Electronics Pty Ltd* [1999] FCA 754 at [26], 46 IPR 159 at 164 per Branson J; *Bugaj v Bates* [2004] FCA 1260 at [13] per Stone J) or a preliminary step that later facilitates such an investigation."

17 In furtherance of their strategy, the Applicants have amassed 486 "Issues" in respect of the EZ Respondents' discovery and 50 other issues in respect of the Third Respondents' discovery which they ask the Court to consider under 13 categories (split up into sections C2 to C14 of the contentious and argumentative affidavit from their solicitor on the record, in Dewar 10): Dunn 7 [43]. It is a grossly disproportionate approach that flagrantly ignores the requirements of both ss 37M and N of the Act. When properly considered, the alleged deficiencies amount to either complaints that no documents have been produced in certain categories supporting the Applicants' inferential case theory, where extensive searches indicate there are no documents to produce (verified by the EZ Respondents and their solicitor), or that there were minor issues (such as the provision of additional versions or documents previously not produced for technical reasons) which have been explained and resolved by the EZ Respondents.

Sections C.2 and C.3 – References to other documents in discovered documents and documents discovered by Third Respondent, which have now been discovered by EZ Respondents

- 18 Sections C.2 and C.3 concern documents which are referred to in discovered documents or were discovered by the Third Respondent but not by the EZ Respondents. As stated at Dunn 7 [72], the EZ Respondents: (a) have now produced a small number of such documents that were inadvertently not produced; and (b) conducted additional searches and produced documents which were produced by the Third Respondent, without admission as to relevance.
- 19 As noted above, however, the Applicants point to the fact that further documents have been discovered as somehow supporting a conclusion that the discovery remains inadequate. The Applicants wrongly suggest in AS [8] that *Firns v Tzovaras* [2006] NSWSC 925 at [15] supports that conclusion. In that case there had been four attempts at verification of discovery, and even then Studdart J said at [15]:
- “Of course, the circumstance that the plaintiff has acknowledged the need to provide three lists of documents, two of which have been since his appointment as administrator, evidences the insufficiencies of the first two lists, one of which was after his appointment as administrator. This is a matter to be weighed against the conclusiveness of the discovery thus far provided. Nevertheless, there exists a need for the defendant to establish why further discovery should be ordered.”
- 20 The Applicants also inaccurately suggest in Dewar 11 at [8] that the EZ Respondents have failed to identify the categories in which those additional documents fall: see Dunn 9. The EZ Respondents identified to the Applicants on 9 September 2025 (in the cover letter accompanying the additional discovered documents) that the vast majority were already in the Applicants’ possession, having been discovered by the Third Respondent in response to categories 11(d) and (f), and the items to which the remaining documents referred to were set out in the letter.¹ The EZ Respondents have now also provided a schedule detailing which item each of the 60 new documents relate to (Dunn 9 [11]).
- 21 There is no substance to the complaints persisted with in Sections C.2 and C.3; the issues raised have been resolved.

Section C.4 – Documents discovered by Third Respondent

- 22 The Applicants suggest in section C.4 that there has been inadequate disclosure by the EZ Respondents because the Third Respondent has discovered documents that have not

¹ The Applicants’ 9 September 2025 letter states that of the 565 documents: 490 documents are being produced on the basis that they were produced by the Third Respondent in relation to categories 11(d) and 11(f), and 75 documents are documents referred to in the Element Zero Respondents’ response to Items 2, 376-378, 379, 380, 381, 384, 387, 396-398, 399, 407, 408, 425, 426, 428-429, 430, 448, 493 and 494 which have not previously been produced to the Applicants.

been discovered by the EZ Respondents. As Dunn 7 [73]-[81] identifies, there are legitimate reasons why the Third Respondent has documents which are not in the possession of the EZ Respondents, including that he used a personal, non-EZ laptop and external drive (in addition to his EZ laptop), neither of which the EZ Respondents have, or have a copy of, in their possession. In particular, AS [12] last sentence ignores the evidence that the Third Respondent used his personal device for his work for a period at Element Zero (Dunn 7, [78(a)]) and that the documents produced by him in answer to category 2A were contained on a personal hard drive (**Hales 4** 12 September 2025, [31]).

- 23 The remaining complaint is in AS [13] where it is suggested that the EZ Respondents admit not conducting searches in relation to the chapeau of Category 2A. They encourage the Court to artificially dissect the chapeau to Category 2A from the items listed after it, and to ignore the extensive and wholly adequate searches undertaken by the EZ Respondents (including of the Seized Material) that are further explained at Dunn 7 [91]-[103]. As set out in Dunn 7 (at [53]-[57], [60]-[62]), the EZ Respondents conducted extensive searches for documents in categories 2A, 6, 6A and 7, including searches across the Seized Materials, and produced all relevant documents in their possession. That is the end of the matter.

Section C.5 – No documents produced in certain categories

- 24 This complaint is directed at categories 2A(a), 11(e) and 14. The EZ Respondents had no documents to produce in those categories.
- 25 *Category 2A(a)*: was appropriately complied with by the Second Respondent searching his Gmail account for correspondence in relation to the work he performed at home; he does not recall taking drafts of any documents, and therefore the only documents he could identify in answer to the category were those he received from and sent to Matthew Roper (referred to in his affidavit sworn 19 June 2024): Dunn 7 [105]-[106]. The form of category 2A(a) does not lend itself to the identification of search terms to run across the Seized Materials (Dunn 7 [53]); taking direct instructions from the Second Respondent was the reasonable and appropriate method by which to respond to the category. In any event, the EZ Respondents also searched across the Seized Material for all documents identified by Mr McKemmish as being located on those USBs (pursuant to category 2A(f), see Dunn 7 [56]) and no documents falling within category 2A(a) were identified as part of those searches: cf AS [16]. There has been no misconception about the category: cf AS [17]. Appropriate and adequate searches were undertaken. There are no further documents to produce in answer to category 2A(a).
- 26 *Category 11(e)*: concerns documents recording the “retirement project” undertaken by the Third Respondent at home in his garage. It is difficult to follow the complaints at AS [18]-[19].

The exact work undertaken by the Third Respondent is within his knowledge: Dunn 7 [66], [109]. To the extent such documents were in the EZ Respondents' possession they have been searched for and fall within category 11(f) (documents recording the research and development of the EZ Process), and they have been produced (including documents in the period January to June 2022 when the "retirement project" was being undertaken by the Third Respondent): Dunn 7 [109]-[110]. The Applicants' complaint is unfounded.

- 27 *Category 14*: the complaints in AS [20] are without basis. Adequate searches were performed in respect of categories 1, 2A, 6 and 7, and there is therefore no deficiency in category 14: Dunn 7 [111]. The Applicants incorrectly submit that the EZ Respondents did not run searches for documents falling within category 14. As set out in Dunn 7 [69], the searches run for categories 1, 2A, 3, 6, 7 and 8 would have captured the use of documents in categories 1, 2A, 6 and 7 in preparing patents or patent applications (including because those searches captured modified versions of documents or emails containing the documents which were identified as responsive to categories 1, 2A and 6). As the Second Respondent was involved in the preparation of the patents, it was appropriate to seek instructions from him that no documents produced in categories 1, 2A and 6 were used in preparation of the patents or the invention itself (in addition to the searches already conducted by Gilbert + Tobin) (Dunn 7 [69]). The submission that Gilbert + Tobin relied on the "untested assertion" by the Second Respondent is a misrepresentation of Ms Dunn's evidence.

Section C.6 – Response to category 1

- 28 The Applicants are disappointed there are not more documents in Category 1. Their response is to suggest, without basis, that some of the documents that have been discovered in Category 1 appear to them to not be relevant to their pleaded claim (as opposed to what Category 1 required to be discovered): AS [21]-[23].
- 29 As identified in Dunn 7 [112]-[125], the definition of "Ionic Liquid" in Category 1 is very broad – broader than the definition in the pleading. Appropriate, extensive searches for documents falling within Category 1 were conducted. The documents discovered fall within Category 1. They may not fall within the pleaded definition of "Ionic Liquid R&D", but the fault for that (if it be the case) lies with the Applicants for seeking such a broad definition in Category 1 (over the EZ Respondents' objection at the time).
- 30 For the purposes of responding to Category 1, the EZ Respondents conducted searches over the Seized Material using very broad search terms based on the definition of "Ionic Liquid" proposed and obtained by the Applicants. Scratching around for something to still complain about, the Applicants suggest three additional key words could have been used in the

searches (“ILs”, “NaOH” and “KOH”): AS [22]. At no point in the two-day hearing on discovery categories did the Applicants contend for the inclusion of these terms in the category. Having regard to the extensive searches undertaken, this complaint is hollow.

- 31 Finally, AS [23] reflects what the IA is truly about: disappointment by the Applicants that there are not discovered documents fitting within the part of their inferential case theory that the Second Respondent performed some work in 2020 while still an employee, that such work was recorded in documents at the time, that he took such documents with him and he destroyed the copies that would have been in the Applicants’ possession in order to cover his tracks. It need only be stated to be rejected as a basis for thinking there might have been inadequate discovery. It is pure speculation.

Section C.7 – Documents relating to personal email accounts, which have now been discovered by EZ Respondents

- 32 This complaint concerns Category 11(d). In responding to this category, the EZ Respondents’ approach included gathering all emails to or from Element Zero email addresses and the playground.global domain, reviewing the data room which was provided to Playground Global, and conducting additional searches of Mr Masterman’s personal devices for relevant documents: Dunn 7 [125].
- 33 The Applicants identified that there were some emails discovered by the Third Respondent in this category that had not been discovered by the EZ Respondents, and, upon review, the EZ Respondents identified that this was because they had been sent to or from the Second and Fourth Respondents’ personal email addresses. Those personal email addresses had been searched when responding to other categories but had inadvertently not been searched when responding to Category 11(d); when the issue was identified, a search of those personal email addresses was performed for Category 11(d) documents and 10 documents within the category were discovered: Dunn 7 [128]-[130]. This is an example of an issue which, when raised, was appropriately and adequately responded to. This was a minor issue in a large-scale discovery exercise and has now been rectified: Dunn [129]. There is no proper basis for the Applicants persisting with this complaint and it certainly does not reflect any broader deficiency with the EZ Respondent’s discovery.

Section C.8 – Documents discovered by Third Respondent and further searches for category 11(f) documents, which have now been discovered by EZ Respondents

- 34 The alleged deficiency is that the Third Respondent produced documents in answer to category 11(f) that were not also discovered by the Element Zero Respondents. The EZ Respondents undertook a thorough process in giving discovery in this category, including by

Ms Dunn personally reviewing all documents that were produced: Dunn 7 [7], [68], [133]. The EZ Respondents subsequently produced the additional documents in their control that were discovered by the Third Respondent and which he considered fell within Category 11(f), without admitting that they do: Dunn 7 [134]-[138]. The suggestion at AS [26] that this “undermines the integrity of the searches” is a professional slur without foundation. It is no more than an assertion, and provides no basis for being certain other documents exist.

Section C.9 – Five “family documents”, which have now been discovered by EZ Respondents

- 35 A further issue which has been inappropriately pressed in this IA concerns the identification and discovery of five “family documents”: AS [27]. This is the type of discovery issue, which frequently comes up in large, computer-aided discovery processes, was appropriately responded to by identifying the scope of the issue and producing the documents that formed part of a family of documents which had been discovered: Dunn [139]-[146]. The maintenance of the complaint reflects the Applicants’ approach to the IA.

Section C.10 (four documents with “technical issues”, which have now been discovered by EZ Respondents) & Section C.11 (alleged inadequate explanation for discovery performed where an adequate explanation has been provided)

- 36 Presumably these sections have not been referred to in the AS because they are embarrassing to persist with. As such, there is nothing to answer in these submissions. In any event, the “technical issues” in Section C.10 have been resolved (Dunn 7 [147]-[153]) and the “inadequate explanations” in C.11 relate to “references” in documents to other “documents” which either (1) do not exist or (2) records available and relevant to a discovery category have already been discovered (Dunn 7 [154]-[168]).

Section C.12 – Alleged inconsistent explanation in relation to USBs, where there is no inconsistency and Part 3 of the Supplementary Verified List is clear

- 37 The Court need only compare the Gilbert + Tobin letter of 14 June 2024 to Part 3 of the EZ Respondents’ List of Documents filed on 29 April 2025 to see that the suggestion that the explanation for why the USB devices are not in the Second Respondent’s control is not inconsistent: Dunn 7 [169]-[179]. Regardless, what relevance such explanations have to the IA is entirely unclear. The USBs are not in the EZ Respondents’ possession. For completeness, in answer to category 2A(f), the EZ Respondents have conducted searches for documents which were identified by Mr McKemmish as being located on those USBs and 69 documents were produced to Fortescue (Dunn 7 [50], [172]). There is no deficiency.

Section C.13 – versions of documents created by third party, New Pro, which have now been discovered by EZ Respondents

- 38 The complaint in Section C.13, in essence, is that the Third Respondent discovered a version of a document which was not discovered by the EZ Respondents. Fortescue relies on Item 487, which concerns a document titled “Process Design Criteria Rev C.pdf” (BWJ.5000.0004.7343). On 9 September 2025, the EZ Respondents produced this document (EZR.0001.0001.0084) which was originally subject to a technical issue: Dunn 7 [148], [151(c)]. Fortescue is therefore incorrect; Category C.13 has been resolved.

Section C.14 – references to experiments in documents, which have been the subject of further searches but nothing further to discover

- 39 Category 14 used to be supported by the speculation in Dr Jacobsen’s affidavit that, because there are experiments referred to in discovered documents, there could be other documents recording such experiments. Mr Dewar seeks to breathe light into that conjecture again in [13]-[16] of Dewar 11. It should be rejected as such. Further, it is not reply evidence but rather an attempt to get around inadmissible evidence by simply repeating the point in similarly objectionable form. AS [32] is reliant on Mr Dewar’s evidence and should similarly be rejected.
- 40 A further observation is necessary: Dewar 11 [29]-[30] asserts that copies and drafts of PCT Application no. WO2025118033 relating to the 979 Application (which is the patent identified in discovery category 13(c)) have not been discovered by the EZ Respondents. That is wrong. The EZ Respondents produced this patent application (EZR.0003.0002.0309) and claim patent attorney privilege over the draft patents in their control (see for example, EZR.0003.0002.0291, EZR.0003.0002.0292, EZR.0003.0002.0296, EZR.0003.0002.0298, EZR.0003.0002.0300 identified in Part 3 of the Element Zero Respondents’ Lists of Documents): Dunn 9 [18].

PRAYER 2 – PRIVILEGE CLAIMS

- 41 This prayer is appropriate to be determined by another Judge or a Registrar. The evidence supporting the privilege claims is in Dunn 7 [192]-[195].

PRAYER 3 – ANOTHER ATTEMPT AT GETTING CATEGORY 2

- 42 The Applicants have sought on three prior occasions to get the new category in Prayer 3. This most recent iteration is no better than the last. The only thing said in support of it is that the Applicants believe no documents falling within the new category have been discovered

(despite it being duplicative of Category 1) and the Applicants have sought to narrow it since its last draft iteration: AS [35]. That does not establish entitlement to further and better discovery: the Applicants have failed to identify why there is a reasonable basis to believe documents must exist falling in the new category which have not been discovered in response to Category 1. The new category is also oppressive as it could lead to over 1,500 search term combinations and a large number of irrelevant documents to review: Dunn 7 [197].

PRAYER 3A – FURTHER AND DUPLICATIVE DISCOVERY CATEGORIES

43 Prayer 3A seeks a number of new categories duplicative of what has already been discovered (particularly within Category 11); to the extent they go further, they seek production of material which is not relevant to the pleaded case and will result in an oppressive search and review process likely to take 2 months (working efficiently) and cost the EZ Respondents hundreds of thousands of dollars: Dunn 8 [11(g)]. In the circumstances, the categories should not be ordered. It demonstrates the Applicants' lack of any sense of proportionality in this long-running discovery process. In relation to each new category:

- (a) **Category 15** is not relevant to the pleaded case (see EZ Respondents' Defence at [29]). The Respondents have already discovered a large number of documents in relation to the research and development of the Element Zero process in answer to category 11(f), the Third Respondent was overseas during the relevant period (Hales 4 [30]), and it would be oppressive to order it: Dunn 7 [11], [18].
- (b) **Categories 16** (Third Respondent only) **and 17** (all Respondents): the Third Respondents' solicitor has given sworn evidence that all documents falling within category 16 have been produced (Hales 4 [31], [53]). There is no basis to go behind that evidence. As for category 17, there is no utility – the EZ Respondents have already discovered a large quantity of documents in relation to the research and development of the Element Zero process which, to the extent they were used or disclosed, would have captured the types of documents sought. The category is also oppressive.
- (c) **Categories 18 and 19** seek documents relating to NewPro (engaged by the EZ Respondents to assist with the pilot plant). To the extent such documents or communications are relevant to the pleaded case (and the categories already ordered) they have been produced: Dunn 8 [23(c)]. They are otherwise oppressive, as they would be costly and time consuming to comply with: Dunn 8 [11], [23(e)].
- (d) **Categories 20 and 21** seek communications between the respondents and two individuals. Similar to categories 18 and 19, to the extent such documents or communications are relevant they have already been produced: Dunn 8 [25(c)]. Sub-

category (c) in particular has no link to the case and constitutes fishing. The categories are also oppressive: Dunn 8 [11].

(e) **Category 22** is irrelevant, fishing, and of no utility: Dunn 8 [26]-[27].

PRAYER 3B – APPLICANTS’ REQUEST TO UNILATERALLY REDACT FOR RELEVANCE

44 By Prayer 3B the Applicants seek to unilaterally redact portions of a document, being a journal of a Fortescue employee, for relevance despite it being discoverable. They suggest in AS [46] that the document is a “register” or “minute book” as referred to in *Esso Australia Pty Ltd v Australian Workers Union (No 3)* [2020] FCA 316 at [14]. Wheelahan J in that case was not endorsing a practice of unilaterally redacting “registers” or “minute books” but merely noted a former practice existed in doing so, apparently in the UK. In any event, the Applicants’ document, based on its description, is not a formal “register” or “minute book”. What Wheelahan J did say at [15] is:

“My own disposition is that redactions of whole integrated documents should not ordinarily occur except by consent or by court order. In my view, if a document is relevant, and is therefore discoverable, then generally the whole of the document should be produced.”

45 Wheelahan J then referred to a number of cases identifying why whole documents should be produced and not redacted for relevance, including because it would otherwise leave it in the power of the producing party to unilaterally determine relevance, it would result in further disputes and therefore waste of time, and it is unnecessary where the lawyers who would get access to it are subject to the implied undertaking or, as in this case, enhanced express obligations of confidentiality: *MG Corrosion Consultants Pty Ltd v Gilmore* [2011] FCA 1514 at [12] (Barker J), *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 4)* [2010] FCA 863 at [98] (Logan J), *Rio Tinto Ltd v Commissioner of Taxation* [2005] FCA 1335 (Logan J) and *Gall v Domino’s Pizza Enterprises Ltd* at [65]-[67] (Murphy J). The EZ Respondents respectfully adopt these observations. The Applicants ought not be permitted to redact anything.

JM Hennessy and CD McMeniman

23 September 2025