No. NSD 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

APPLICANTS' SUBMISSIONS IN SUPPORT OF THEIR APPLICATION FOR DISCOVERY FILED 20 NOVEMBER 2024

1. By application filed 20 November 2024 (**FIA**), **Fortescue** seeks discovery of documents in four groups: **(a)** 'Ionic Liquid documents' (cats 1 to 5), relevant to the Respondents' work on, and exfiltration of documents/information in relation to, the ionic liquid electrochemical reduction process developed while at Fortescue; **(b)** 'Specified Documents' (cats 6 to 9), being confidential Fortescue documents relating to the design, engineering etc of a Green Iron pilot plant that Fortescue alleges were exfiltrated and misused by the Respondents, and documents derived from them; **(c)** 'Element Zero-related documents' (cats 10 to 12), which include technical documents relating to the development of Element Zero's (**EZ's**) plant (**EZ Plant**) and electrochemical reduction process (**EZ Process**); and **(d)** 'Documents showing use / patent documents' (cats 13 and 14), being EZ's patents, patent applications, drafts of the same, and documents showing use of other discovered material in EZ's patents. Fortescue's categories are in **Annexure A**.

2. Fortescue relies on the seventh affidavit of Mr Dewar affirmed 20 November 2024 (**Dewar 7**); and certain evidence in support of its application for search orders: [91]-[98], [156]-[159] and AIB-22 of the affidavit of Dr Bhatt affirmed 1 May 2024 (**Bhatt 1**) and [22], [78]-[79] and AH-3 of the affidavit of Mr Huber affirmed 1 May 2024 (**Huber**). In answer to the FIA, the Respondents have filed affidavits of Mr Hales affirmed 27 November 2024 (**Hales 3**), Mr Williams sworn 29 November 2024 (**Williams 6**) and Ms Dunn sworn 5 December 2024 (**Dunn 4**).

3. The Respondents agree to discover documents responsive to categories 6 and 12: PAD-26 p 24; PAD-27; Williams 6 [9]. The Respondents would agree to categories 1, 8 and 13 subject to amendments: PAD-26 p 24; PAD-27; Williams 6 [10]. They oppose the balance (cats 2-5, 7, 9-11, 14) on relevance, 'fishing', breadth and oppression grounds: Williams 6 [11]. The relevance, breadth and oppression grounds are addressed category by category below.

4. As to 'fishing', this is a basis for objecting to discovery where it is being used to ascertain whether a case exists or to assist a case "*essentially speculative in nature*": ***Jilani** v Wilhelm* [2005] FCAFC 269 at [108], [111]. It does not apply "*where there is already some evidence that a case exists*": *Trade Practices Commission v CC (NSW) Pty Ltd* (1995) 58 FCR 426 at 438; *Jilani* at [112]. One reason the 'fishing' objection cannot be sustained is that Fortescue has established not only that a case exists, but a strong *prima facie* case exists, at least for misuse of confidential information and contraventions of s 183 of the *Corporations Act:* [2024] FCA 1157 (**J**) at [3], [104], [244(1)-(2)].

5. Discovery should be ordered for all categories as drafted in the FIA, without the Respondents' amendments, for the following reasons.

Ionic Liquid documents (cats 1 to 5)

6. The dispute regarding **Category 1** centres on Fortescue's definition of "Ionic Liquid" in the FIA, being "any salt or mixture of salts that is capable of acting as an electrolyte" in the application described. The definition includes non-limiting examples of different terms that may describe such an electrolyte.

7. ***Before the FIA was filed***, the Respondents indicated they would agree to Category 1 if Fortescue's definition of "Ionic Liquid" were not used and the words in Category 1 after "in

relation to" were replaced with "Ionic Liquid R&D as defined in paragraph 12 of the FASOC": PAD-26 pp 24-25; Williams 6 [20]. This is not appropriate.

8. The Respondents assert that the definition of "Ionic Liquid" in the FIA is "significantly broader than the Applicants' pleaded case" because the definition includes "hydroxide alkali melt or eutectic melt" and "molten hydroxide eutectic", being terms used in the Respondents' Defences, such that the category is oppressive or amounts to fishing: PAD-26 pp 24-25; Williams 6 [18]; see also MGH-5 p 10.

9. However, the definition of "Ionic Liquid" in the FIA does not extend beyond the FASOC [12(e)]. "Ionic liquid" refers to *any* liquid comprised entirely of ions; this is the "most useful practical definition" in the absence of an authoritative definition: PAD-28 (Bhatt 1) [37]-[38]. "Salt" is another term for an ionic compound, and "molten salt" refers to the liquid phase of one or more such compounds: PAD-28 (Bhatt 1) [39]-[40]. "Ionic liquid" is used interchangeably with "eutectic" and "molten salt": Dewar 7 [13], [15], [17]; PAD-28 (Bhatt 1) [42]; PAD-30 (Bhatt 2) [101]. "Ionic liquids", "eutectic" and "molten salt" can be used as electrolytes for electrochemical reduction: PAD-28 (Bhatt 1) [43]. While Dr Winther-Jensen considers the melting point to be the difference between "ionic liquid" and "molten hydroxide", Dr Bhatt does not agree and took temperature into account: Dewar 7 [15]; PAD-29 [47(b)]; PAD-30 (Bhatt 2) [101]. The same disagreement arises with Prof Abbott's opinion: Dunn 4 [15]. On the face of Dunn 4 [14] and RMD-2, Prof Abbott was asked to comment on the bare definition of "Ionic Liquid" in the FIA — without any context, the pleadings or the contemporaneous documents.

10. Given the difference between Dr Bhatt's and Dr Winther-Jensen's (and Prof Abbott's) opinions, there will likely be a technical debate at trial about what an "ionic liquid" is, and whether other terms such as "eutectics" etc are synonymous or overlap with "ionic liquid": Dewar 7 [16]; also FASOC [29(e)], EZD [29(a)(i)]; the 3RD [29(c)]. It is not appropriate to resolve that debate on the FIA; it is a matter for trial, with the benefit of expert evidence. At this stage, therefore, the non-limiting examples of electrolytes, including "molten hydroxides", "hydroxide alkali melt" and "eutectic melts", should be included in the "Ionic Liquid" definition.

11. Another reason for including non-limiting electrolyte examples is that Fortescue's case is that although it has internal documents supporting the existence of "Ionic Liquid R&D"/ "Ionic Liquid R&D Information" (FASOC [12]-[13]; J [67]), the documents recording the Ionic Liquid R&D Information is missing, from which it is inferred the Respondents took or caused the documents to be unavailable (FASOC [14]): J [53]-[55]. In the premises, Fortescue cannot narrow the definition of "Ionic Liquid" to particular electrolytes.

12. Category 1 is limited to the period of Dr Kolodziejczyk's and Dr Winther-Jensen's employment at Fortescue (25 Mar 2019 to 12 Nov 2021). This assertion in Williams 6 [18] (category 1 captures work the Respondents conducted *after* Dr Kolodziejczyk's and Dr Winther-Jensen's employment at Fortescue) should therefore be rejected.

13. Dr Winther-Jensen's objection to the start date of this period (25 Mar 2019) on the basis that his employment at Fortescue began on 15 Feb 2021 (**start date objection**) (Hales 3 [14]-[15]) should also be rejected because: **(i)** Dr Winther-Jensen may control documents recording work

undertaken by Dr Kolodziejczyk or other Fortescue staff *before* Dr Winther-Jensen's employment (see J [65] last sentence); **(ii)** Dr Kolodziejczyk was telling Dr Winther-Jensen about his research on ionic liquids before Dr Winther-Jensen's start date (J [50(10)]); and **(iii)** any pre-employment work captured would be time-limited (25 Mar 2019 to 14 Feb 2021), not "many years" (*cf.* Hales 3 [15]).

14. The Respondents' original proposed amendment to category 1 (Williams 6 [20]) is inappropriate in circumstances where the Respondents contend there is a difference between "ionic liquid" and "hydroxide alkali melt or eutectic melt" / "molten hydroxide eutectic" (FASOC [29(e)], EZD [29(a)(i)]; 3RD [29(c)]; Williams 6 [25]); on their view, the latter would be excluded from the scope of discovery. This is inappropriate.

15. ***After the FIA was filed***, the Respondents proposed a second amended form of category 1, which they say addresses their concern about the Court's determination of the meaning of "ionic liquid" at this stage: Williams 6 [27]; MJW-5 p 4. Fortescue has two responses to the second proposal: **(i)** it omits the words in the first four lines of the definition of "Ionic Liquid" (from *"any salt or mixture of salts…"* to *"…is in its liquid form)"*. The omitted words are not "overbroad and irrelevant" (MJW-5 p 11) for the detailed reasons in DCCL's letter dated 4 Dec 2024 (RMD-2 pp 3-4). **(ii)** If the Respondents' real concern is the effect of "Ionic Liquid" in the FIA on the meaning of "ionic liquid" at trial, the easiest and least violent amendment is to use a different defined term (e.g. "Solvent") and/or include a notation to the effect that the defined term does not constitute a finding or admission as to the meaning of "ionic liquid" at trial (RMD-2 p 4).

16. **Category 2** applies to documents relating to specifically identified work, to the extent not caught by category 1. Contrary to Williams 6 [33], [35], category 2 is not too broad or oppressive. It is confined in two important respects: **(i)** the sub-paragraphs adopt the Respondents' descriptions of the work undertaken by them in Fortescue's contemporaneous records, and **(ii)** it is confined to the period of their employment at Fortescue. Subject to the start date objection, Dr Winther-Jensen does not oppose this category: Hales 3 [18] (and *cf*. the EZ Respondents' position). As to the start date objection, Fortescue repeats its submissions in [13] above. The EZ Respondents' assertion that category 2 will return "an extremely large amount of material" (Williams 6 [35]) notwithstanding limitations **(i)** and **(ii)** underscores the relevance of the category.

17. **Category 2A** concerns documents obtained by Drs Kolodziejczyk and Winther-Jensen from Fortescue's systems, immediately after their resignations. It is directly relevant to, and arises from, the pleadings (FASOC [14], [19], [20]; EZD [14(b)(ii)], [19], [21]; 3RD [14(a)], [20], [22]) and evidence already filed in which they sought to justify taking documents because **(i)** Dr Kolodziejczyk was working from home (affidavit of Dr Kolodziejczyk sworn 19 June 2024 (**Kolodziejczyk**) [49]-[51]; J [138]-[151]) and **(ii)** Dr Winther-Jensen apprehended he would lose access to Fortescue's IT network in the final days of his employment (affidavit of Dr Winther-Jensen affirmed 8 July 2024 (**Winther-Jensen**) [28]).

18. Fortescue is entitled to test the Respondents' positions: FCR 20.14(2)(b)-(d); *cf.* Williams 6 [38(a)]. The category is confined to a three-month period.

19. Hales 3 [21] involves a misreading of category 2A. 2A(a)-(g) are inclusive examples of the documents in the chapeau of 2A. 2A(a)-(g) are listed in a compendious way, without distinguishing between the two individual respondents. It may be accepted that 2A(a)-(d) refer to Dr Kolodziejczyk, and 2A(g) refers to Dr Winther-Jensen. 2A(e)-(f) are objectively identified by reference to a folder and two devices.

20. Insofar as there is an assertion about an alleged lack of control of documents in the category (Williams 6 [38(b)]-[38(c)]; MJW-5 p 13), this should be verified in a List of Documents, not merely asserted. The deponent is required to provide information about the fate of the document: FCR 20.17(2)(b).

21. **Category 3** concerns the location/storage by the Respondents of documents recording Fortescue's confidential information (responsive to cats 1, 2, 2A) in the period during (cat 3(a)) and after (cat 3(b)) Drs Kolodziejczyk's and Winther-Jensen's employment. It is directly relevant to FASOC [14]; EZD [14(b)(ii)-(iii)]; 3RD [14(a)]. Dr Winther-Jensen opposes category 3 only to the extent that it cross-refers to categories 1 and 2A: Hales 3 [23]. The EZ Respondents oppose this category; however, category 3 is not a request for evidence and does not require extensive forensic investigation: *cf.* Williams 6 [43]-[46]. The EZ Respondents are only required to undertake a reasonable search.

22. **Category 4** concerns documents evidencing conduct/attempts by Dr Kolodziejczyk and Dr Winther-Jensen to make cat 1, 2, or 2A documents unavailable to Fortescue. It too is directly relevant to Fortescue's allegations at FASOC [14], and Fortescue's entitlement to additional damages case under the *Copyright Act*: FASOC [83] particular (iii). Again, the EZ Respondents are only required to undertake a reasonable search, not engage in forensic analysis: *cf.* Williams 6 [52]. **Category 5** is directly relevant to Fortescue's breach of confidence case (FASOC [12], [13]; EZD [12(g)], [13(c)]; 3RD [12(a)], [13(a)]) and its entitlement to additional damages (FASOC [83]; EZD [83]; 3RD [83]).

23. Dr Winther-Jensen opposes categories 4 and 5 only to the extent that they cross-refer to categories 1 and 2A: Hales 3 [23]. Contrary to the EZ Respondents' position, category 5 is not a request for evidence or incapable of being searched for: *cf.* Williams 6 [55]-[56]. Category 5 is not subsumed by category 14 (*cf.* Williams 6 [57]): cat 5 goes to consideration of confidentiality, whereas cat 14 goes to use in inventing or preparing patents etc.

Specified Documents (cats 6 to 9)

24. The **First Specified Documents** are the 'Fortescue Plant CI' documents particularised in FASOC [19] and [20], which the Respondents agree to discover under **Category 6.**

25. **Category 7** concerns drafts/modified forms of the Fortescue Plant CI, as well as any documents made directly/indirectly using that Fortescue Plant CI (the '**Second Specified Documents**'). It is directly relevant to **(i)** the allegations at FASOC [31], [33] that the Respondents used the Fortescue Plant CI in developing the EZ Plant and developing the inventions the subject of EZ's patent applications listed in FASOC [5]; **(ii)** its copyright infringement case (FASOC [71]-[74]), and **(iii)** its ACL case (FASOC [75]-[81]).

26. The Respondents' objection that **category 8** (and presumably **category 7**) requires them to undertake *"an evaluative assessment of whether a [Second Specified Document] was 'indirectly created' from [a First Specified Document]"* (PAD-26 p 25; Williams 6 [62]) should be rejected. The First Specified Documents is a closed set of documents: FIA, "Definitions", para (c). The extent to which the Respondents created the Second Specified Documents from the First Specified Documents is a matter within their knowledge. No 'subjective evaluation' would be required to identify the Second Specified Documents including if proper instructions are taken: *cf.* Hales 3 [29]; Williams 6 [62].

27. **Category 9** is directly relevant to FASOC [31], [33] and [78], which the Respondents deny or do not admit. It is in effect a request for standard discovery with respect to those allegations. It is not oppressive, and all responsive documents are plainly relevant. There is no evidence for the "significant number of documents" beyond the bare assertion in Hales 3 [33]. Contrary to Hales 3 [34], category 9 is not "double discovery": the allegations in FASOC [31] includes a concept wider than First Specified Documents; that is, "Fortescue CI" (FASOC [27]). Contrary to Williams 6 [69]-[71], use of FCR 20.14 direct relevance for particular allegations is not "oppressive and inappropriate"; indeed, direct relevance is an implicit requirement of FCR 20.15 non-standard discovery: *Clifton (Liquidator) v Kerry J Investment Pty Ltd t/a Clenergy* [2020] FCAFC 5 at [172]-[173].

EZ-related documents (cats 10 to 12)

28. **Category 10** concerns documents recording/evidencing Dr Kolodziejczyk, Dr Winther-Jensen and Mr Masterman's consideration, during their employment at Fortescue, of competitive enterprise for the electrochemical reduction of iron. The timing and nature of this is relevant to their motive for, and time from which, the Respondents used Fortescue CI for their benefit (a matter which concerns all causes of action, and the claim for additional damages), as well as the asserted truth of the After Fortescue Representation, the No Fortescue Input Representation and the Later Conception Representation in Fortescue's ACL case (FASOC [75], [78]; EZD [75], [78]; 3RD [75], [78]).

29. Locating those documents would not entail a subjective evaluation: whether or not the documents evidence consideration of a competitive enterprise would be plain on their face. The attempt in Hales [38] to muddy the meaning of ordinary English words ("consideration", "involvement", "enterprise") should be rejected. As to the start date objection (Hales 3 [37]), Fortescue repeats its submissions in [13] above.

30. **Category 11** concerns documents (including drafts) used in the development of the EZ Plant and EZ Process. Such documents are directly relevant to Fortescue's claim at FASOC [31]-[33] that its confidential information was misused in the development of the EZ Plant and EZ Process; its copyright case; and its ACL case. Such documents would enable Fortescue's independent expert(s) to opine on how the discovered material (particularly, technical material within it) demonstrates the misuse of confidential information. Addressing each sub-category in turn:

(a) Basis of design documents are essential for establishing the minimum functional requirements etc to undertake the engineering of a pilot plant: Dewar 7 [25(a)]. Fortescue alleges

that the Respondents obtained and misused Fortescue's basis of design documents: FASOC [19(i)(3)] and [19(ii)] (AIB-29).

(b) P&IDs, which form the "operational 'bible'" for a pilot plant, setting out the location of piping and circuitry used in it: Dewar 7 [25(b)]. Fortescue alleges that the Respondents also obtained and misused Fortescue's P&ID: FASOC [19(i)(4)].

(c) The beneficiation and leaching of ores, electroplating, electrowinning and electrolyte development are steps/features relevant to the processes in dispute in the proceeding: Dewar 7 [25(c)]; FASOC [30(b)] (leaching/beneficiation), [12(b)], [29(b)] (electrowinning/electroplating), [12(e)], [29(e)] (electrolyte). Fortescue seeks discovery of EZ's lab books, including so as to make a technical comparison with the documents emailed to Dr Winther-Jensen's personal email as particularised at FASOC [20(i)].

(d) Playground Ventures is a venture capital firm and shareholder in EZ. It provided ~$10m venture funding to EZ in August 2023, 8 months after its incorporation and ~21 months after Drs Kolodziejczyk and Winther-Jensen left Fortescue: see Huber [82], at which time the EZ Plant and the EZ Process were under development: MGM-4 [1]; EZD [29(a)-(b)]. Documents provided to Playground Ventures, containing information about process, plant and industry, are relevant including to Fortescue's case that its confidential information was misused in capital raising (FASOC [31(b)(i)], [33(a)]) and its entitlement to additional damages because the benefit of that venture funding was obtained by reason of copyright infringements: FASOC [83], particular (iv).

(e) The reference to Dr Winther-Jensen's "retirement project" etc arises from his evidence: PAD-33 [40]. Dr Winther-Jensen contends that it was this project (and not work undertaken by him at Fortescue) that led to the creation of EZ: *ibid*; also EZD [29(a)]. Fortescue is entitled to test that position.

(f) Documents recording the research and development of the "Element Zero Process" as referred to in the Respondents' Defences at EZD [29] and 3RD [29(b)-(c)] are sought to test the Respondents' position that Fortescue's confidential information was not used in the development of the EZ Process: EZD [31]; 3RD [31(a)].

31. Contrary to Williams 6 [81], confidentiality can be dealt with by an appropriate regime. Category 11 is not subsumed by category 8 (as proposed to be amended by the EZ Respondents): cat 11 would capture use of 'Fortescue *Process* CI' in designing, engineering etc the EZ Plant (FASOC [31(b)(ii)]), whereas cat 8 would not (the 'First Specified Documents' are 'Fortescue *Plant* CI' – FASOC [26]).

32. Dr Winther-Jensen agrees to category 11(e), but not 11(a)-(d), (f) on the basis that it would be "inappropriate and oppressive" because the documents are allegedly "held by the First Respondent": Hales 3 [25]-[26]. If this is correct, there will be nothing in Dr Winther-Jensen's control and as such no oppression.

Documents showing use / patent documents (cats 13 and 14)

33. The EZ Respondents agree to **Category 13** (subject to appropriate confidentiality measures) provided the phrase "including drafts thereof" is omitted: Williams 6 [84]. Dr Winther-Jensen

adopted the same position on 13 November 2024 (PAD-27 p 28), but now appears to resile from that position (Hales 3 [43]).

34. As to the EZ Respondents' position, it is not appropriate to excise "drafts" of the patents and patent applications from the category. Fortescue alleges that its confidential information was used "in inventing" the inventions and "in preparing" the patent applications: FASOC [31(b)(iii)-(iv). Drafts bear directly on those matters. Patents and patent applications falling within sub-categories 13(e)-(i) of documents are intended to capture those applications relating to the applications in sub-categories 13(a)-(d): FASOC [45(a)]. Sub-categories 13(h) and 13(i) cover patents or patent applications expressly mentioned on EZ's website: Bhatt 1, AIB-22.

35. As to Dr Winther-Jensen's position, category 13 is not limited to patent documents filed by the EZ Respondents; the category includes those filed by Dr Winther-Jensen: *cf.* Hales 3 [40]. Confidentiality can be dealt with in the usual way. Contrary to Hales 3 [42], considering the relevance of 32 documents is not oppressive. The proposed time limitation in Hales 3 [44] would fail to capture relevant documents; for example, it would exclude a document *created* while Dr Winther-Jensen was at Fortescue, but not *finalised* until after he left Fortescue. Any patent attorney privilege (Williams 6 [85]) can be claimed in discovery (FCR 20.17(2)(c)).

36. **Category 14** is agreed insofar as it refers to agreed category 6 (First Specified Documents), and category 1 as proposed to be amended by the Respondents: Williams 6 [87]; PAD-27 p 28. In other words, the Respondents do not agree to discover documents evidencing the use of cat 2, 2A and 7 documents in the preparation of its patents or patent applications. Documents in categories 2, 2A and 7 are relevant and discoverable for the above reasons and documents evidencing use of those documents are relevant to FASOC [31(b)(iii)-(iv)]. Discovery should be ordered in the form of category 14 as drafted. Any patent attorney privilege (Williams 6 [88]) can be claimed (FCR 20.17(2)(c)). Given that the Respondents have partially agreed to production under category 14, there can be no dispute that category of documents is otherwise relevant.

Timing considerations

37. Fortescue anticipates many of the technical documents sought in discovery will need to be considered by its independent expert witness(es), for the purposes of its evidence in chief: Dewar 7 [26]. The most efficient course is for discovery to occur before evidence, including to reduce the rounds of evidence: Dewar 7 [27].

J S Cooke, D B Larish, W H Wu, S K Yates 16 December 2024
Counsel for Fortescue

ANNEXURE A TO FORTESCUE'S SUBMISSIONS DATED 16 DECEMBER 2024

Applicants' Categories of Documents

to be Discovered by the Respondents

Definitions

a. "**directly relevant**" means a document that falls within any of the criteria in rule 20.14(2) of the ***Federal Court Rules*** *2011* (Cth).

b. "**document**" has the meaning given to that term in Schedule 1 of the *Federal Court Rules*.

c. "**First Specified Documents"** means the documents referred to in the particulars of paragraphs 19 and 20 of the FASOC including:

No.	Name	Ref
1	Green Iron Update (02.08.2021).pdf	see FASOC [19(i)(1)]
2	35557986AU- Specification as filed (35557986).pdf	see FASOC [19(i)(2)], see FASOC [20(i)(4)]
3	35557986AU - Drawings as filed (35557986).pdf	see FASOC [19(i)(2)], see FASOC [20(i)(4)]
4	Document titled "Basis of Design – Chameleon Pilot Plant" having document number or file name FFI0302-10000-00-EG-BOD-0001	see FASOC [19(i)(3)]
5	Bumblebee PID markups 26_10_21.pdf	see FASOC [19(i)(4)]
6	The SharePoint documents identified in paragraphs 112 to 118 of the affidavit of Dr Anand Indravadan Bhatt affirmed on 1 May 2024 and Annexure AIB-29	see FASOC [19(ii)], see FASOC [20(iv)]
7	The internal Fortescue procedures and specifications listed in paragraph 103 of the affidavit of Mr Wayne McFaull affirmed on 1 May 2024	see FASOC [19(iii)], see FASOC [20(v)]
8	211029_Iron ore leaching_Report_ASH.R1.docx	see FASOC [20(i)(1)]
9	211014_FFI Green Steel_Ore Leach_ASH_XRF results.csv	see FASOC [20(i)(2)]

No.	Name	Ref
10	211014_FFI Green Steel_Ore Leach_ASH_ICP results.csv	see FASOC [20(i)(3)]
11	Technical Evaluation.xlsx	see FASOC [20(i)(5)]
12	Email from David White sent on 4 November 2024 with Subject "Technical Evaluation of Green Iron process"	see FASOC [20(i)(5)]
13	Green Iron Update (01.11.2021).pdf	see FASOC [20(i)(6)]

d. "**Fortescue**" has the meaning given to that term in paragraph 4 of the Further Amended Statement of Claim filed 24 October 2024 (**FASOC**).

e. "**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).

f. "**Second Specified Documents**" means any:

i. modified forms of First Specified Documents, including previous or subsequent drafts;

ii. documents created directly or indirectly using the First Specified Documents.

Categories

Ionic Liquid documents

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 an electrochemical reduction process involving Ionic Liquid. *[**Note**: the Respondents agree to this category if the words after "in relation to" were replaced with "Ionic Liquid R&D as defined in paragraph 12 of the FASOC".]*

2. To the extent not covered by 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) "low temperature oxide (predominantly iron ore) reduction technology" work, being the work referred to in Annexure AIB-5 to the affidavit of Anand Bhatt affirmed 1 May 2024 (**Bhatt**);

(b) "low-temperature metal oxide reduction from mixed electrolytes" work, being the work referred to in Bhatt AIB-5 p 52, or AIB-6 p 61;

(c) the "preliminary work that we have done in ionic liquids and low temperature iron ore reduction", being the work referred to in Bhatt AIB-7;

(d) work relating to "our internal endeavours, where Fortescue develops a new type of electrolyser", being the work referred to in Bhatt AIB-8;

(e) "low-temperature processing from ionic liquids" work, being the work referred to in Bhatt AIB-9 p 81;

(f) work for "getting our manufacturing and R&D facilities set up", being the work referred to in Bhatt AIB-10 p 85;

(g) "low temperature [electrochemical reduction] using ionic liquids as iron ore solvents" work, being the work referred to in Bhatt AIB-10 p 86;

(h) the "low-temperature electrochemical ores reduction in ionic liquid electrolytes" work, being the work referred to in Bhatt AIB-12 p 93;

(i) the "work over Christmas to establish our Perth manufacturing in early 2021", being the work referred to in Bhatt AIB-12 p 94;

(j) "electrolysers and low-temperature electrochemical iron ore processing plants" work, being the further work referred to in Bhatt AIB-12 p 94;

(k) "low temperature electrochemical ores reduction" work, being the work referred to in the Patent Assessment Form and email dated 22 December 2020 in Bhatt AIB-13 pp 96 – 100;

(l) drafts of the "intended patent application" referred to in the email dated 22 December 2020 in Bhatt AIB-13 p 96;

(m) "the use of ionic solvents and electrochemical devices for the low-temperature reduction of ores and oxides" work, being the work referred to in the Patent Assessment Form in Bhatt AIB-13 p 97;

(n) the “ionic liquid or mixture of ionic liquids” work, being the work referred to in the Patent Assessment Form in Bhatt AIB-13 p 97;

(o) the “selection of ionic liquid or mixture of ionic liquids”, “application of ionic liquids in metal oxide reduction”, and “the selection of electrode materials and cell design” work, being further work referred to in the Patent Assessment Form in Bhatt AIB-13 p 97;

(p) the “develop[ment]” and “test[ing]” work as referred to Bhatt AIB-13 pp 96, 97;

(q) the work intended to be “scaled up”, as referred to Bhatt AIB-13 pp 96, 97;

(r) the “low-temperature electrochemical ore reduction in ionic liquids” work, including the “R&D roadmaps”, “write-ups” and proposed “patent applications”, being the work referred to in Bhatt AIB-14 p 104;

(s) the “R&D roadmap” and development “using solvents capable of dissolving iron ore at low temperatures <300 deg C and/or using molten carbonate electrolyte” work, being the work referred to in Bhatt AIB-15 p 106;

(t) the work concerning “alternative processes that would utilise lower temperatures and direct electrochemical reduction of iron ore into iron and further steel. The electrochemical reduction is done in a liquid phase, hence iron ore has to be dissolved in the electrolyte prior to being electrolysed”, being the work referred to in Bhatt AIB-16;

(u) the work concerning “enabling technologies for iron ore processing to produce green commodities”, “apply[ing] this green electricity to electrochemically reduce Fortescue’s iron ore dissolved in a unique electrolyte”, and/or “selection of electrolyte, electrode material and other materials used in the process”, including the proposed “patents covering this development”, being the work referred to in Bhatt AIB-17;

(v) the work concerning “water, ionic liquids, and molten carbonate”, being the work referred to in Bhatt AIB-19 p 120;

(w) the work concerning “[m]olten salts”, “[m]olten carbonates” and “[i]onic liquids”, being the work referred to in Bhatt AIB-20 pp 132-133; and

(x) the work concerning “initial evaluation of various suitable electrolytes”, “laboratory desktop studies”, “R&D roadmap” and “internal electrochemical developments” being work referred to in Annexure SMH-3 to the affidavit of Susanne Monica Hantos affirmed on 1 May 2024, pp 82, 83.

2A. 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) in the period from September 2021 to November 2021, including:

(a) the documents copied by the Second Respondent while working from home in October and November 2021;

(b) the documents taken by the Second Respondent "to finish off [his] work for Fortescue", referred to in paragraph 50 of the Second Respondent's affidavit sworn on 19 June 2024;

(c) the documents "saved on the local drives of [the Second Respondent's] Fortescue laptop", referred to in paragraph 50 of the Second Respondent's affidavit sworn on 19 June 2024;

(d) "the files on the local drives" deleted from the Second Respondent's Fortescue laptop, referred to in paragraph 51 of the Second Respondent's affidavit sworn on 19 June 2024;

(e) the documents in the TempSD folder, referred to in paragraph 52 of the Second Respondent's affidavit sworn on 19 June 2024;

(f) the documents on the Toshiba USB device (serial 07080A078F1B6304) and on the Kingston USB device (serial 900042ACAE668708); and

(g) the documents sent by the Third Respondent from his Fortescue email address "bjorn.wintherjensen@fmgl.com.au" to his personal email address "bjornwj@gmail.com".

3. All documents recording or evidencing the location and storage of any of the documents referred to in category 1, 2 and 2A above during:

(a) the period 25 March 2019 to 12 November 2021**;**

(b) after 12 November 2021.

4. All 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, 2 and 2A above unavailable to Fortescue.

5. All documents recording or evidencing any of the Respondents' consideration of the confidentiality of any of the documents referred to in category 1, 2 and 2A above.

Specified Documents

6. All documents constituting or referring to the First Specified Documents. *[**Note**: Category agreed between the parties.]*

7. All documents constituting or referring to the Second Specified Documents.

8. 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. *[**Note**: the Respondents agree to this category if the words "and/or Second" were deleted, thereby removing the "Second Specified Documents" from its scope.]*

9. All documents directly relevant to any of the matters pleaded or particularised in paragraph 31, 33 and/or 78 of the FASOC.

Element Zero-related documents

10. All 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.

11. All versions, including drafts, of the following documents (howsoever described):

    (a) basis of design documents for the First Respondent's pilot or trial plant/s, including the "**Element Zero Trial Plant**" (referred to in paragraph 30 of the EZ Parties' defence);

    (b) piping and instrumentation documents for the First Respondent's pilot or trial plant/s, including the Element Zero Trial Plant;

    (c) laboratory books (either in hard or soft copy) recording work done with respect to the development of each of beneficiation and leaching of ores and electroplating and/or electrowinning and/or electrolyte development during the period from January 2022 to February 2024;

    (d) any documents provided by or on behalf of the Respondents or any of them to Playground Ventures containing any information in relation to chemical processes, plant design, the green iron/green steel industry and/or industry participants;

    (e) 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 paragraph 40 of the affidavit of Bjorn Winther-Jensen affirmed on 8 July 2024;

(f) documents recording the research and development of:

i. the “Element Zero Process” referred to in paragraph 29 of the EZ Parties’ defence; or

ii. the “Element Zero process” referred to in paragraphs 29(b)-(c) of Dr Winther-Jensen’s defence,

during the period from January 2022 to February 2024.

12. One or more documents recording or evidencing the amount of expenditure on designing, engineering and constructing the First Respondent’s pilot or trial plant/s, including the Element Zero Trial Plant. *[**Note**: Category agreed between the parties.]*

Documents showing use / patent docs

13. Copies of all patents and patent applications (or divisional or related patents and patent applications) filed by any of the Respondents, or in which the Second, Third, and/or Fourth Respondents are named as an inventor concerning any aspect of an electrochemical reduction process involving Ionic Liquid, leaching and/or any aspect of a pilot or trial plant for the electrochemical reduction of ore (including the Element Zero Trial Plant), including drafts thereof, and including but not limited to: *[**Note**: the Respondents agree to this category if the words "including drafts thereof," were deleted.]*

(a) no. 2022903090 entitled “Method of ore processing”;

(b) no. 2023902103 entitled “Ore Processing Method for Metal Recovery”;

(c) no. 2023903979 entitled “Electrowinning from Molten Salt” (979 Application);

(d) no. PCT/AU2023/051041 entitled “Method of ore processing”;

(e) any patent application for an electrochemical reduction process involving Ionic Liquid;

(f) any patent application concerning leaching;

(g) any patent application that relates to the features of a pilot or trial plant (including the Element Zero Trial Plant) in respect of electrochemical reduction of ore;

(h) the patents or patent applications that “cover the overall process and its unique chemistry” as referred to on the Element Zero website as shown at Bhatt AIB-22 p 141;

(i) the patents or patent applications that cover “the complete circuit design for mineral processing incorporating a unique electrolyte” as referred to on the Element Zero website, as shown at Bhatt AIB-22 p 141.

14. All 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 any of the patents or patent applications referred to in category 13 above. *[**Note**: the Respondents agree to this category to the extent it refers to category 1 (as amended per the note to that category) and category 6 only.]*