

NOTICE OF FILING

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File Title:	FORTESCUE LIMITED ACN 002 594 872 & ORS v ELEMENT ZERO PTY LIMITED ACN 664 342 081 & ORS
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Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

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

**First, Second and Fourth Respondents' Submissions in support of paragraph 2 of
Amended Interlocutory Application dated 9 July 2024**

- 1 These submissions are made in support of paragraph 2 of the Amended Interlocutory Application by the First, Second and Fourth Respondents dated 9 February 2024.
- 2 Paragraph 2 of the Amended Interlocutory Application seeks a suppression order pursuant to s 37AF of the *Federal Court of Australia Act 1976* (Cth), on the ground referred to in s 37AG(1)(a), over Confidential Exhibit MJW-2 to the first affidavit of Michael John Williams sworn 29 May 2024 and pages 54 to 65 of Confidential Exhibit MJW-3 to the second affidavit of Michael John Williams sworn 29 May 2024.
- 3 MJW-2 contains a list of third parties with whom the First Respondent has entered into Non-Disclosure Agreements with, to share confidential information and pursue commercial opportunities. The relevant pages of MJW-3 over which a suppression order is sought contain such a Non-Disclosure Agreement between the Second Applicant and the First Respondent.

Evidence

- 4 In support of the application, the First, Second and Fourth Respondents rely on the affidavit of Rebecca Mary Dunn sworn 26 July 2024 which is accompanied by Confidential Exhibit RMD-1.

Principles

- 5 In considering whether to make a suppression order, the question is whether that order is “necessary” to prevent prejudice to the proper administration of justice and that, if the answer to that question is yes, then the Court must make the order: *Hogan v Australian Crime Commission* (2010) 240 CLR 651 at [32]-[33].
- 6 There is a public interest, as well as a private one, in permitting contracting parties to maintain commercial confidentiality in the ongoing performance of complex contractual arrangements: *Lend Lease (Millers Point) Pty Ltd v Barangaroo Delivery Authority* [2013] NSWSC 1848 at [75]. A suppression order will likely be “necessary” where disclosure of confidential and commercially sensitive material has the “potential to be detrimental to the interests of the beneficiaries or members of the relevant trust”:

Filed on behalf of (name & role of party)	The First, Second and Fourth Respondents		
Prepared by (name of person/lawyer)	Michael John Williams, Partner		
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Re Application by LGSS Pty Ltd (aft Local Government Super) [2021] NSWSC 1613 at [188].

- 7 An example may be found in the decision of Farrell J in *Re Northern Energy Corporation Ltd (Administrators Appointed); Ex parte Jahani* [2018] FCA 1983 which suppressed access to three commercial agreements relating to the development and operation of an export terminal (being a Shareholders Agreement, a Take or Pay Agreement and a Port Services Agreement). At [47], Her Honour observed:

“These are commercially sensitive documents and I am satisfied that it is necessary to avoid prejudice to the administration of justice to make orders prohibiting access to them. Without the potential to obtain such orders, there would be a chilling effect on parties seeking relief from the Courts to which they are entitled in the normal course if the commercial arrangements reached by them with persons who may have no interest in the proceedings cannot be protected and prejudice to them avoided.”

Application of principles to the evidence

- 8 For the reasons set out at [8] of Ms Dunn’s affidavit, the existence of the Non-Disclosure Agreements with third parties is confidential and commercially sensitive to Element Zero and the parties to those agreements. They include that the information is not in the public domain, it is kept confidentially secure by Element Zero and disclosure of it would potentially cause significant harm to Element Zero because the information could be used by a trade rival to gain a commercial advantage over Element Zero, such as by approaching third parties who are in the confidential arrangements with Element Zero.
- 9 Further, 23 of the 36 third parties that have entered into Non-Disclosure Agreements with Element Zero are on Element Zero’s standard terms, which deal with the confidentiality of the information passing between the parties and the existence of the agreement: Dunn [9] - [10]. The majority of the remaining agreements with the third parties listed in MJW-2 have similar terms regarding confidentiality of the agreements: Dunn [11].
- 10 It is necessary to prevent prejudice to the proper administration of justice that MJW-2 and the relevant pages of MJW-3 be suppressed. This is in circumstances where the information, if disclosed, could cause damage to Element Zero and third parties, and in light of the terms of the Non-Disclosure Agreements themselves.

C D McMeniman

Gilbert + Tobin

26 July 2024