

NOTICE OF FILING

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Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

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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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Form 59
Rule 29.02(1)

Affidavit

No. 527 of 2024

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

FORTESCUE LIMITED ACN 002 594 872 and others
Applicants

ELEMENT ZERO PTY LIMITED ACN 664 342 081 and others
Respondents

Affidavit of: **Rebecca Mary Dunn**
Address: Level 35, International Tower Two, 200 Barangaroo Avenue
Barangaroo NSW 2000
Occupation: Solicitor
Date: 26 July 2024

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I **Rebecca Mary Dunn** of Level 35, International Tower Two, 200 Barangaroo Avenue
Barangaroo NSW 2000, Solicitor, say on oath:

Filed on behalf of (name & role of party) The First, Second and Fourth Respondents
 Prepared by (name of person/lawyer) Michael John Williams, Partner
 Law firm (if applicable) Gilbert + Tobin
 Tel (02) 9263 4271 Fax (02) 9263 4111
 Email mwilliams@gtlaw.com.au
Address for service Level 35, International Tower Two
 (include state and postcode) 200 Barangaroo Avenue, Barangaroo NSW 2000

Introduction

1. I am a partner of Gilbert + Tobin Lawyers and I have day-to-day carriage of this matter for the First, Second and Fourth Respondents (the **Element Zero Respondents**) with Michael Williams, the solicitor for the Element Zero Respondents.
2. I make this affidavit in support of the Element Zero Respondents' Interlocutory Application dated 9 July 2024 (**the Amended Application**) for an order under s 37AF of the *Federal Court of Australia Act 1976* (Cth) in relation to Confidential Exhibit MJW-2 to the Affidavit of Michael John Williams sworn 29 May 2024 (**Confidential Exhibit MJW-2**) and pages 54 to 65 of Confidential Exhibit MJW-3 to the Second Affidavit of Michael John Williams sworn 29 May 2024 (**pages 54 to 65 of Confidential Exhibit MJW-3**).
3. This is my second affidavit in the proceedings. In my first affidavit sworn 3 July 2024, I gave evidence regarding the Element Zero Respondents' Interlocutory Application dated 3 July 2024 for an order under s 37AF of the *Federal Court of Australia Act 1976* related to confined information contained within:
 - (a) Annexure PAD-2 to the affidavit of Paul Dewar affirmed 1 May 2024;
 - (b) Annexure PAD-6 to the affidavit of Paul Dewar affirmed 9 May 2024; and
 - (c) Annexure PAD-8 to the affidavit of Paul Dewar affirmed 14 May 2024.
4. I make this affidavit from my own knowledge unless indicated to the contrary. Where I rely on information provided to me from other sources, I have identified the relevant source, and believe that information to be true and correct.
5. In making this affidavit, I do not waive or intend to waive - nor am I authorised to waive - privilege in any communication between Element Zero Respondents and their external legal representatives, including any privileged advice, work product or work undertaken by lawyers of Gilbert + Tobin in connection with these proceedings.
6. Exhibited to me at the time of swearing this affidavit is a bundle of confidential documents marked "**Confidential Exhibit RMD-1**" to which I refer below. The First Respondent claims confidentiality over these documents. A reference to a page number of **Confidential Exhibit RMD-1** is a reference to the document on the correspondence page of **Confidential Exhibit RMD-1**.


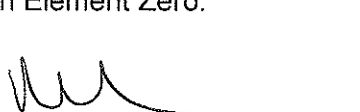
Confidential Exhibit MJW-2

7. Confidential Exhibit MJW-2 to the first affidavit of Michael John Williams sworn 29 May 2024 (**Mr Williams' first affidavit**) is a two-page document which sets out examples of third parties who have provided confidential information to the First Respondent




(**Element Zero**) or received that information from Element Zero, as referred to in paragraph 57 of Mr Williams' first affidavit.

8. I am informed by Michael Masterman and believe that:
- (a) Element Zero works with many commercial third parties, including parties which are competitors of the Applicant in these proceedings;
 - (b) Element Zero entered into Non-Disclosure Agreements (**NDAs**) with the third parties listed in Confidential Exhibit MJW-2;
 - (c) The existence of the discussions and relationships between Element Zero and the commercial third parties recorded in Confidential Exhibit MJW-2 is confidential to Element Zero and not publicly known;
 - (d) The list collates Element Zero's key third party relationships, which (in particular as a collected set of Element Zero's relationships) are confidential and commercially sensitive to Element Zero;
 - (e) It is Element Zero's practice to keep the list which appears in Confidential Exhibit MJW-2 confidential. The list was prepared by Melissa Gravina (Element Zero's Corporate & Finance Operation Manager) and until very recently was only stored on her personal computer;
 - (f) Ms Gravina has only provided this list and the agreements with the third parties in the list to certain employees or contractors of Element Zero, being Mr Masterman, Bart Kolodziejczyk, Jodie McIntosh (Administration Support at Element Zero) and Steve Nethery (Chief Renewables Officer);
 - (g) It is Element Zero's practice to keep the agreements with the parties referred to in the list which appears in Confidential Exhibit MJW-2 confidential. Only Ms Gravina has access to all of the agreements referred to on the list and certain of the agreements and their drafts are kept on Element Zero's OneDrive in a restricted folder only accessible by Element Zero's IT contractor for administrative purposes, Ms Gravina, Mr Masterman, Mr Kolodziejczyk and Julie Barker (Special Projects Support at Element Zero);
 - (h) Disclosure of the list which appears in Confidential Exhibit MJW-2 would cause significant harm to Element Zero and/or the third parties listed, who consider the relationship with Element Zero to be confidential. By way of example, this information could be used by a trade rival to Element Zero's detriment. If this information was disclosed, Element Zero's competitors could seek to gain a commercial advantage over Element Zero by approaching third parties who are in confidential negotiations with Element Zero.




- 9. Reflecting the confidentiality of the relationships between the Element Zero and the entities listed in Confidential Exhibit MJW-2, I am informed by Mr Masterman and believe that 23 of the 36 agreements with the parties listed in Confidential Exhibit MJW-2 are based on Element Zero’s standard mutual confidentiality deed terms (**Mutual Confidentiality Deed**), being the parties at item 2, 6-8, 12-13, 15-18, 20-24, 26-31, 33 and 35 of the list. A copy of the proforma Mutual Confidentiality Deed is reproduced at pages 2 to 19 of **Confidential Exhibit RMD-1**.
- 10. I have reviewed the terms of this agreement and, without waiving any of the confidentiality, observe that in addition to containing terms regarding the confidentiality of material exchanged between the parties, it also deals with the confidentiality of the parties’ relationship and the deed itself.
- 11. The majority of the remaining agreements with the parties listed in Confidential Exhibit MJW-2 have similar terms regarding the confidentiality of the existence of the agreements. I have caused to be prepared a table which lists the parties identified in Confidential Exhibit MJW-2 who have agreements with Element Zero that are not based on the Mutual Confidentiality Deed. This table appears at page 20 to 21 of **Confidential Exhibit RMD-1**. The third column of this table contains an extract of relevant provisions.


Pages of Confidential Exhibit MJW-3

- 12. Pages 54 to 65 of Confidential Exhibit MJW-3 contain the mutual confidentiality deed between North WA Iron Pty Ltd, Element Zero and Fortescue Future Industries International Pty Ltd (**Fortescue Confidentiality Deed**).
- 13. I have reviewed the Fortescue Confidentiality Deed and observe it appears to be based on Element Zero’s standard terms referred to at paragraph 9 above and includes the same obligations referred to in paragraph 10.
- 14. In the circumstances described above, the Element Zero Respondents respectfully seek the orders in the Amended Application.

Sworn by the Deponent)
 at Barangaroo)
 in New South Wales)
 on 26 July 2024)
 Before me:)



 Signature of deponent



 Signature of witness

Caitlin Aisling Meade, Solicitor
 Level 35, International Tower Two
 200 Barangaroo Avenue
 Barangaroo NSW 2000

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

FORTESCUE LIMITED ACN 002 594 872 and another

Applicants

ELEMENT ZERO PTY LIMITED ACN 664 342 081 and others

Respondents

Confidential Exhibit RMD-1

This is a confidential bundle of documents marked "**Confidential Exhibit RMD-1**" to the Affidavit of **Rebecca Mary Dunn** sworn before me on 26 July 2024.


.....
Signature of witness

Name: Carlin Aisling Meade

Level 35 Tower Two
International Towers Sydney
200 Barangaroo Avenue
Barangaroo NSW 2000
Solicitor

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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