

## NOTICE OF FILING

### Details 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
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



*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.

The date of the filing of the document is determined pursuant to the Court's Rules.

**BY EMAIL:**

[MWilliams@qtlaw.com.au](mailto:MWilliams@qtlaw.com.au);  
[RDunn@qtlaw.com.au](mailto:RDunn@qtlaw.com.au)  
[Mike.Hales@minterellison.com](mailto:Mike.Hales@minterellison.com);  
[Edward.Fearis@minterellison.com](mailto:Edward.Fearis@minterellison.com)

**Our Ref:** PXD:2023413

**Your Refs:** MJW:RXD:1058625  
1496352

1 August 2024

Mr Michael Williams / Ms Rebecca Dunn  
Gilbert + Tobin  
L35, Tower Two, International Towers Sydney  
200 Barangaroo Avenue  
Barangaroo NSW 2000

and

Mr Mike Hales / Mr Edward Fearis  
MinterEllison  
One The Esplanade, Level 9  
1 The Esplanade  
Perth WA 6000

Dear Colleagues

**Fortescue Limited & Ors v Element Zero Pty Limited & Ors,  
Federal Court Proceeding No. NSW 527 of 2024**

In advance of the Respondents notifying their position as to whether they seek to cross-examine any of Dr Bhatt, Mr Roper or Mr Dewar (i.e. the Applicants' witnesses on the discharge application), the Applicants consider it appropriate to notify the Respondents of their position as to cross-examination of the Respondents' witnesses on the discharge application.

Based on the evidence filed on the discharge application, the Applicants' position is that there should not be any cross-examination on the discharge application. However, if the Respondents seek leave to cross-examine:

- (a) Dr Bhatt, the Applicants will seek leave to cross-examine Dr Kolodziejczyk and Dr Winther-Jensen;
- (b) Mr Roper, the Applicants will seek leave to cross-examine Dr Kolodziejczyk;
- (c) Mr Dewar, the Applicants will seek leave to cross-examine Mr Masterman and Mr Williams.

So as to enable our clients to prepare written submissions in support of any application for leave to cross-examine (should it be necessary for our clients to make any such application, given the above matters), please let us know by no later than **12pm on 5**

Level 4, Macquarie Place  
Sydney NSW 2000  
Australia

T +61 2 9293 1000  
F +61 2 9262 1080  
E [law@dcc.com](mailto:law@dcc.com)

[dcc.com](http://dcc.com)

**Attention:** Michael Williams  
Rebecca Dunn  
Mike Hales  
Edward Fearis

**Contact:** Paul Dewar  
[PDewar@dcc.com](mailto:PDewar@dcc.com)



2.

**August 2024** whether your clients seek leave to cross-examine Dr Bhatt, Mr Roper or Mr Dewar.

Yours faithfully

A handwritten signature in blue ink, consisting of several loops and a vertical stroke, positioned above the firm name.

**DAVIES COLLISON CAVE LAW**

Partner  
Contact

Michael Williams  
Rebecca Dunn  
T +61 2 9263 4625  
rdunn@gtlaw.com.au  
MJW:RXD:1058625

Our ref



L 35, Tower Two, International Towers Sydney  
200 Barangaroo Avenue,  
Barangaroo NSW 2000 AUS  
T +61 2 9263 4000 F +61 2 9263 4111  
www.gtlaw.com.au

**5 August 2024**

By email: [pdewar@dcc.com](mailto:pdewar@dcc.com)

Mr Paul Dewar  
Partner  
Davies Collison Cave  
Level 4, 7 Macquarie Place  
SYDNEY NSW 2000

Dear Colleagues

**Fortescue Limited & Ors v Element Zero Pty Ltd & Ors - Proceedings in the Federal Court of Australia (NSD527/2024)**

We refer to your letter dated 1 August 2024, received at 10:13pm.

That letter sets out a very unusual position; that there should not be any cross-examination on the discharge application, but nevertheless that your clients intend to cross-examine the Respondents' witnesses, if (and only if) the Respondents seek leave to cross-examine certain of the Applicants' witnesses.

In reality, the Applicants' position seems to be entirely focused on *avoiding* cross-examination of its witnesses, including by exerting pressure on the Respondents by holding over them a threatened consequence for their witnesses if the Respondents elect to seek to cross-examine the Applicants' witnesses. This is a highly unorthodox, internally inconsistent, and inappropriate way to approach this issue, and one which is divorced from any legitimate forensic purpose.

As for the request for early notification of witnesses for cross-examination, there was no provision for this in the orders that were made (which your clients had proposed). There was no suggestion when the matter was before her Honour on 1 August 2024, or when consent orders were circulated and provided to the Court, that there was any further notification step involved, and it is not appropriate for your clients to now seek unilaterally to impose such a step.

It is a matter for your clients, and your firm, to assess our clients' evidence and determine whether cross-examination of the Respondents' witnesses will assist the Court in resolving the issues for determination. We do not accept that an application for leave made by the Respondents has any bearing on the forensic decision to be made by your clients.

The First, Second and Fourth Respondents are currently considering their position in relation to cross-examination of the Applicants' witnesses (particularly considering the late filing of the Applicants' evidence). Our clients will notify the Court and the Applicants of their position by 10am on 6 August 2024 in accordance with the orders made 2 August 2024.

The First, Second and Fourth Respondents' rights are reserved, including to bring this letter to the Court's attention.

Yours faithfully  
**Gilbert + Tobin**

*Gilbert + Tobin*

**Michael Williams**  
Partner  
+61 2 9263 4271  
mwilliams@gtlaw.com.au

**Rebecca Dunn**  
Partner  
+61 2 9263 4625  
rdunn@gtlaw.com.au



Level 4, 7 Macquarie Place  
Sydney NSW 2000  
Australia

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F +61 2 9262 1080  
E [law@dcc.com](mailto:law@dcc.com)

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[MWilliams@qtlaw.com.au](mailto:MWilliams@qtlaw.com.au);  
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[Mike.Hales@minterellison.com](mailto:Mike.Hales@minterellison.com);  
[Edward.Fearis@minterellison.com](mailto:Edward.Fearis@minterellison.com)

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**Attention:** Michael Williams  
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5 August 2024

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Dear Colleagues

**Fortescue Limited & Ors v Element Zero Pty Limited & Ors,  
Federal Court Proceeding No. NSW 527 of 2024**

We refer to your letter dated 5 August 2024.

We reject your characterisation of our clients' position. Our letter was consistent with the parties' obligations to the Court and each other to efficiently case manage this proceeding.

Our clients' position is that consistent with the authorities it is not in the Court's or the parties' interests to allow cross-examination of any witness on a discharge application such as the present. Nevertheless, if a contrary view is taken, then our clients do not intend to be prejudiced and will adopt an equivalent position to that allowed to be taken by the Respondents in respect of cross-examination.

We reserve our clients' position to produce this correspondence to the Court.

Yours faithfully

A handwritten signature in blue ink, appearing to be 'P. Dewar', written over a light blue rectangular background.

**DAVIES COLLISON CAVE LAW**